IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 67

WCC No. 2003-0807

UNINSURED EMPLOYERS' FUND

Petitioner

vs.

RON HUME, d/b/a RJ's COUNTRY

Respondent/Employer

and

LINDA GIBSON

Claimant.

DECISION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Summary: This action was filed by the Uninsured Employers' Fund (UEF) in May 2003. It seeks reimbursement from an uninsured employer for benefits paid to an injured employee of the employer. Because the alleged injury occurred in 1989, the respondent/ employer argues the petition is barred by the applicable statute of limitations. The UEF opposes the motion and argues that under *Uninsured Employers' Fund v. Gould*, 2003 MTWCC 23, and *Intermountain Deaconess Home v. State of Montana*, 191 Mont. 309, 623 P.2d 1384 (1981), the statute of limitations was tolled by a November 1989 administrative order demanding payment from respondent. The employer argues that the UEF's reliance on *Gould* and *Intermountain* are misplaced because *Gould* was decided under a later version of the Worker's Compensation Act than the 1989 Act applicable to this case.

Held: Under *Gould* and *Intermountain* the limitation period was tolled from the date the UEF demanded payment from respondent, hence its present action is not barred. Contrary to the respondent's reading of the 1989 statutes, those statutes established an administrative process for initial determination of liability by the UEF. The administrative demand for payment issued in 1989 satisfied *Gould* and *Intermountain* and tolled the limitations period.

Topics:

Limitations Period: Tolling. Under *Uninsured Employers' Fund v. Gould*, 2003 MTWCC 23, and *Intermountain Deaconess Home v. State of Montana*, 191 Mont. 309, 623 P.2d 1384 (1981), the limitations period for the UEF to file a petition for reimbursement from an uninsured employer was tolled by the UEF's Order Determining Liability of Uninsured Employer which issued prior to the running of the limitations period. While the 1989 statutes in effect when the claim arose provided different procedures for seeking indemnification from an uninsured employer, those differences are immaterial under *Gould* and *Intermountain*.

Limitations Period: UEF Actions. Under *Uninsured Employers' Fund v. Gould*, 2003 MTWCC 23, and *Intermountain Deaconess Home v. State of Montana*, 191 Mont. 309, 623 P.2d 1384 (1981), the limitations period for the UEF to file a petition for reimbursement from an uninsured employer was tolled by the UEF's Order Determining Liability of Uninsured Employer which issued prior to the running of the limitations period. While the 1989 statutes in effect when the claim arose provided different procedures for seeking indemnification from an uninsured employer, those differences are immaterial under *Gould* and *Intermountain*.

Uncontroverted Facts

¶1 Claimant, Linda Gibson, filed a claim for workers' compensation benefits alleging she was injured while employed by respondent/employer, Ron Hume (Hume), on or about August 3, 1989. ([Respondent's] Statement of Uncontroverted Facts ¶ 1; Petition ¶¶ 1, 4.) Hume admits employing claimant at the time of her claimed injury. (Affidavit of Ron Hume; Petition ¶ 1.)

¶2 On November 30, 1989, the UEF issued an administrative Order Determining Liability of Uninsured Employer and mailed it to respondent. ([Respondent's] Statement of Uncontroverted Facts ¶ 2; Petition ¶ 5.) The Order included the following:

> A thorough review of the Division's files failed to locate any workers' compensation coverage in effect for RJ's Country at the time of the claimant's injury.
>
> IT IS THEREFORE HEREBY ORDERED the employer pay any benefits the claimant is entitled to under the Montana Workers' Compensation Act. The total owed for medical services to the claimant as a result of her industrial injury is $164.38. The total amount of $164.38 must be submitted within thirty (30) days from the date of this order.
>
> The Division will bill the employer for any future medical services or loss of wages suffered by the claimant that are directly related to her industrial injury. There is a $50,000 maximum payable.

> This Order Determining Liability of Uninsured Employer is signed by the Uninsured Employers' Fund Supervisor in the Insurance Compliance Bureau under delegated authority of the Administrator of the Division of Workers' Compensation. If you have any questions or objections about this, please FIRST contact us at (406) 444-6530. If your question or objection is still not resolved, you may seek relief by following procedures in the Administrative Rules of Montana, Title 24, Chapter 29, Part 2. If you want information about the procedures, you may contact the Administrator's office at the above address or phone (406) 444-6518.

(Exhibit A to UEF's Response to Employer's Motion for Summary Judgment.)

¶3 On that same date, the UEF mailed the first invoice claiming the right to reimbursement for medical expenses paid on behalf of Gibson. ([Respondent's] Statement of Uncontroverted Facts ¶ 2; Petition ¶ 5; Exhibit B to UEF's Response to Employer's Motion for Summary Judgment.) Like the Order, the invoice was mailed to "Ron Hume RJ's Country Box 1935 Colstrip, MT 59623." (*Id.*)

¶4 Nowhere in his moving papers or in his affidavit supporting this motion does respondent deny receiving notice of the UEF's order and demand.

¶5 Respondent closed his business and moved to Helena, Montana, in January of 1991. (Affidavit of Ron Hume ¶ 2; UEF Background Facts in Response to Employer's Motion ¶ 11.)

¶6 The present petition was filed in this Court on May 27, 2003.[(1)]

Discussion

¶7 A two-year statute of limitations applies to actions by the UEF for indemnification from an uninsured employer. *Uninsured Employers' Fund v. Gould*, 2003 MTWCC 23 (applying *Intermountain Deaconess Home v. State of Montana*, 191 Mont. 309, 623 P.2d 1384 (1981)).

¶8 Respondent contends the UEF's petition is barred because it was not brought within two years. Indeed, the petition herein was filed more than fourteen years after the injury and the UEF's acceptance of the claim. In *Gould*, however, this Court held that the two- year limitations period was tolled by an administrative demand for payment made upon the uninsured employer by the UEF if that demand was made within the two-year limitations period. The decision was based on the Supreme Court decision in *Intermountain Deaconess*.

¶9 Respondent counters that *Gould* and *Intermountain Deaconess* are inapplicable because this case arises under the 1989 version of the Workers' Compensation Act, which has different statutory provisions governing collection of benefits from an uninsured employer of benefits paid by the UEF. In particular, respondent relies on the 1989 version of section 39-71-506, MCA, which provides as follows:

> **Collection of payments from uninsured employer by suit.** If, upon demand of the department, an uninsured employer refuses to make the payments to the fund that are provided for in subsections (1) and (2) of 39-71-504, the sums may be collected by the department through suit. The department may settle through compromise with an uninsured employer the amount due the fund under 39-71-504.

¶10 Respondent argues that the pending petition, the "suit" to enforce repayment, was commenced by the petition filed this year in this case and therefore comes twelve years too late. *Intermountain*, as well as *Gould,* however, hold that an administrative agency's statutory demand for payment constitutes the commencement of an action for purposes of the statute of limitations even though the agency may ultimately have to seek enforcement of its demand in the courts. I summarized and quoted pertinent portions of the *Intermountain* decision in *Employment Relations Division v. Total Mechanical Heating & Air Conditioning, et al.,* 2000 MTWCC 39, aff'd, 2002 MT 55, as follows:

> In *Intermountain Deaconess Home* the Department of Labor and Industry sought overtime wages on behalf of several employees. In 1977, it audited the employer and sent "a letter to plaintiff demanding over $40,000, for back wages." *Id.*, 191 Mont. at 311, 623 P.2d at 1386. However, no action was filed in district court to enforce the demand for more than five years after the date the wages had accrued. Five years was the applicable limitations period. The district court held that the action was barred because the Department failed to commence an action within the limitations period which could result in a judgment by a court. 191 Mont. at 313, 623 P.2d at 1386. Agreeing the appropriate limitations period was five years, the Supreme Court nonetheless reversed, holding:
>
> > The statute of limitations was tolled in this case when plaintiff received the Department's demand letter notifying plaintiff of each claimant's minimum wage claims. The court erred by concluding that only court action tolls the running of this statute of limitations. The statute of limitations for wage claims may be tolled by an active, timely administrative pursuit of the unpaid wages that gives notice to the employer. We recently decided this issue in *State, Dep. of Labor v. Wilson* (1980), Mont., 614 P.2d 1066, 37 St.Rep. 1393:
> >
> > > "The question remains: (in wage claim enforcement cases) Is the statute of limitations tolled by the commencement of formal administrative proceedings, or must an action be commenced by the Department's filing a complaint with the District Court?
> > >
> > > "...
> > >
> > > "In an administrative setting, where the agency acts to enforce the (Minimum Wage) law on its own initiative this action is the equivalent

> of the filing of a civil complaint. The Department's ... (demand letter to the employer) fulfilled the purposes of a complaint by giving ... notice of the claim being made against them."
>
> 191 Mont. at 314, 623 P.2d at 1387. *Accord State v. Wilson*, 189 Mont. 52, 58-59, 614 P.2d 1066, 1070 (1980) (Department letter notifying appellants of overtime claim against them was the administrative equivalent to filing a civil complaint).

As I read *Intermountain,* where an agency has statutory authority to make an initial determination of liability on a statutory debt, and to demand and collect payment of that debt, the agency's demand is the equivalent of a court action for purposes of tolling the statute of limitations.

¶11 In arguing against the applicability of *Gould* and *Intermountain,* respondent contends that those cases depend on the existence of an administrative procedure for collection from uninsured employers, arguing that no such procedure existed in 1989. My reading of both the statutes and *Intermountain Deaconess* differs from that proffered by respondent.

¶12 The 1989 version of section 39-71-504 (2)(a), MCA, provided that the UEF "shall receive from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer." This entitlement contemplated administrative action by the UEF to notify an uninsured employer of monies due it and demand payment of those monies. Only when that administrative process fails, through refusal of the uninsured employer to pay, is the department authorized to collect through suit, as described in section 39-71-506, MCA (1989). As in *Gould* and *Intermountain*, court action is required only if the employer refuses to comply with the agency order for repayment.

¶13 Though not spelled out in detail in the statute itself, the statutory authority to demand and collect payment requires agency action. In this case that action was accomplished through the UEF's November 30, 1989 Order Determining Liability of Uninsured Employer. As noted in that Order, administrative procedures were available under Title 24, chapter 29, part 2, of the Administrative Rules of Montana, had the employer wished to challenge the Order. I find these administrative procedures analogous to those noted in *Intermountain Deaconess* for purposes of that decision's holding regrading tolling.

¶14 Accordingly, I find *Gould* and *Intermountain Deaconess* apply to the present situation. Since undisputed evidence shows that demand was made at least as early as November 30, 1989, the statute was tolled at that point.

ORDER

¶15 The motion for summary judgment is **denied.**

Dated in Helena, Montana, this 18th day of November, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Julia W. Swingley
Mr. Thomas A. Budewitz
Submitted: November 10, 2003

1. The delay in filing a petition may have been due to the UEF's inability to locate the employer after January 1991. Beginning with the November 30, 1989 invoice, the UEF mailed respondent bills for compensation and medical benefits, addressed to Ron Hume, RJ's Country, P.O. Box 1935, Colstrip, MT 59323. (UEF's Response to Employer's Motion for Summary Judgment ¶ 6, Ex. B.) Bills mailed between November 30, 1989 and January 11, 1991, were not returned by the U.S. Post Office. (UEF's Response to Employer's Motion for Summary Judgment ¶ 6.) However, starting with the February 15, 1991 invoices, the U.S. Post Office returned mail addressed to respondent in Colstrip, marked "Return to Sender, Moved Left no Address." (UEF's Response to Employer's Motion for Summary Judgment ¶ 7.)

On January 27, 1997, the UEF referred the case to Collection Bureau Services (CBS) for collection. (UEF's Response to Employer's Motion For Summary Judgment ¶ 8, Ex. C.) In July 2002, CBS returned the case to the UEF and indicated that it was unable to locate Ron Hume. (UEF's Response to Employer's Motion for Summary Judgment ¶ 9.)

On or around July 30, 2003, the UEF located a new address for Ron Hume in Helena and began mailing periodic bills to that address. (UEF's Response to Employer's Motion for Summary Judgment ¶ 10.) Bills sent to the Helena address were not returned. (*Id*. ¶ 13.)