IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 1

WCC No. 2003-0807

UNINSURED EMPLOYERS' FUND

Petitioner

vs.

RON HUME

d/b/a RJ'S COUNTRY

Respondent/Employer

LINDA GIBSON

Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEALED - SETTLED and DISMISSED 5/19/04

Summary: RJ's Country, whose sole proprietor was Ron Hume, was uninsured when an employee suffered a work-related injury on August 3, 1989. The claim was submitted to the Uninsured Employers' Fund (UEF), which thereafter paid benefits. In 1989 the UEF made an administrative determination of Hume's liability and directed him to reimburse it for payments to Linda Gibson. The determination contained a notice that he could pursue any objections to the determination by invoking Department of Labor rules and procedures. He did not do so and ignored the dunning notices sent him in 1989 and 1990. In December 1990, he moved and left no forwarding address. In 2002, a compliance specialist for the UEF located him in Helena and this proceeding for indemnification was commenced by the UEF.

Held: The Court previously held that the statute of limitations does not bar at present the UEF from seeking indemnification. *Uninsured Employers' Fund v. RJ's Country,* 2003 MTWCC 67. Additional defenses raised in the Pretrial Order are unsupported by evidence and without merit.

Topics:

Defenses: Laches. A defense of laches requires proof of an unexplained delay in the assertion of a right such that enforcement of the right would be inequitable. A mere passage of time is insufficient in itself; there must be prejudice to the party due to the delay. *Cole v. State ex rel. Brown,* 2002 MT 32, 308 MT 265, 42 P.3rd 760 at paragraphs 24 and 25. In this case, the passage of time is explained by respondent's ignoring notices and moving without leaving any forwarding address. Moreover, respondent demonstrated no prejudice on account of the delay.

Estoppel and Waiver: Waiver. A defense of waiver requires proof of the intentional relinquishment of a known right. In this case the UEF is seeking indemnification for amounts paid to a claimant whose employer was uninsured. The UEF asserted its right to reimbursement immediately upon paying compensation and there is no evidence that it ever abandoned its right to reimbursement.

Estoppel and Waiver: Equitable Estoppel. For equitable estoppel to apply, six elements must apply. Initially, there must be a misrepresentation or concealment of a material fact. Where the UEF sought indemnification at the time it began paying benefits to the employee of an uninsured employer and then lost track of the employer's whereabouts due to the employer moving without leaving a forwarding address, there is no misrepresentation or concealment, and the defense fails.

Proof: Burden of Proof: UEF Claims for Indemnification. Where an uninsured employer alleges that a claim accepted by the UEF was not compensable, at minimum it bears the burden of producing some evidence which would support its defense.

Proof: Burden of Proof: Affirmative Defenses. A party asserting affirmative defenses of laches, estoppel, waiver, and mitigation of damages bears the burden of proof. In this case the party asserting these defenses failed to satisfy a burden of production, much less a burden of persuasion, as to those defenses.

¶1 The trial in this matter was held on November 24, 2003, in Helena, Montana Petitioner, Uninsured Employers' Fund, was represented by Ms. Julia W. Swingley. Respondent, Ron Hume, was represented by Mr. Thomas A. Budewitz.

¶2 Exhibits: Exhibits 1 through 12 were admitted without objection.

¶3 Witnesses and Depositions: Bernadette Rice, Diana Emmons, Ron Hume, and Jeannette Hume testified. No depositions were taken or submitted.

¶4 Issues Presented: The issues, as restated by the Court but reflecting all those set out in the Pretrial Order, are as follows:

4a. Whether the UEF is barred from seeking reimbursement from the respondent on account or under any of the following theories:

the statute of limitations;
waiver;
estoppel; or
laches.

4b. Whether respondent is liable to the UEF for reimbursement.

4c. Assuming none of respondent's affirmative defenses bar the present claim, whether respondent must reimburse the UEF for amounts it paid to Linda Gibson; and if so

a. whether those benefits were properly calculated; or
b. whether the UEF failed to mitigate its damages.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Except where a source is specifically cited, the following findings of fact are based on trial testimony. Cited sources may also be supported by trial testimony.

¶7 From 1985 to December 1990, Ron Hume (Hume) operated RJ's Country in Colstrip, Montana. RJ's Country, apparently also known as RJ's Pantry, was a combination restaurant, delicatessen, convenience store, and gas station. Hume operated the business as a sole proprietor.

¶8 On October 10, 1989, Linda Lou Gibson (Gibson), one of RJ's Country's employees, filed a claim for workers' compensation stating that she fell and tore a ligament in her knee while working for RJ' s Country. The date of the injury was August 3, 1989.

¶9 At the time of the Gibson's injury, Hume and RJ's Country did not have workers' compensation insurance coverage, thus the claim was directed to the Uninsured Employers' Fund (UEF).

¶10 On October 24, 1989, the UEF notified Hume of the claim and requested that he file an Employers' First Report. (Ex. 1 at 6.) Hume replied on November 1, 1989, writing that he had no notice of the alleged August 3, 1989 injury until August 21, 1989. (Ex. 1 at 8.) He also questioned the claim, writing that claimant had been seen after August 3rd and had been to Yellowstone Park before indicating any injury. (*Id*.)

¶11 Based on the information furnished by Hume, the UEF initially denied the claim. (Ex. 2.) However, after receiving additional information in the form of written statements corroborating Gibson's claim that she was injured at work (Ex. 3), the UEF issued an Order Determining Liability of Uninsured Employer. (Ex. 4.) The Order was sent to Hume and he

concedes he received it. The Order directed RJ's Country to reimburse the UEF for medical benefits it had began paying claimant and to pay future benefits.

¶12 The Order further stated that if Hume had questions about or objections to the Order he should first contact the UEF, then if still dissatisfied he could "seek relief by following procedures in the Administrative Rules of Montana, Title 24, Chapter 29, Part 2." (*Id*.) Hume took no action to object to or challenge the Order Determining Liability.

¶13 Beginning on November 30, 1989, the UEF sent Hume invoices requesting payment for compensation and medical benefits it paid Gibson. The invoices were addressed to Ron Hume, RJ's Country at P.O. Box 1935, Colstrip, MT 59323. (Uncontested Fact 3; Ex. 5.)

¶14 The first invoice was sent on November 30, 1989. (Ex. 5 at 1.) An additional seven notices were sent to the Colstrip address in 1990. (*See* Ex. 5.)

¶15 Hume resided in Colstrip until December 1990, at which time he moved to Anaconda to live for a brief time with his parents. He moved to Helena in March or April 1991, where he has continued to reside and work until present.

¶16 Hume admitted seeing at least one of the invoices and said that things were in turmoil during 1990 and he was getting lots of "correspondence" which his secretary handled.

¶17 RJ's Country ceased operation and Hume filed a chapter 7 petition for bankruptcy on January 2, 1991. (Uncontested Fact 9.) He received a discharge in bankruptcy on June 20, 1991. (*Id*.) While that discharge was initially asserted as a defense in this case, the defense was withdrawn.

¶18 Starting February 15, 1991, invoices sent to Hume at his Colstrip address were returned to the UEF marked "Return to Sender, Moved Left no Address." (Uncontested Fact 4.)

¶19 Hume did not leave a forwarding address and never notified the UEF of his change of address.

¶20 The UEF forwarded its claim for reimbursement to the Montana Department of Revenue (DOR) in May 1990. (Ex. 5 at 4.) There is no record of the DOR's collection efforts if any.

¶21 on January 27, 1997, the UEF referred its claim against Hume to a commercial collection agency. (*See* Ex. 7.) The efforts of the collection agency to locate Hume are unknown. In any event, the collection agency returned the matter to the UEF in January 2000, without any payment or indication of the whereabouts of Hume.

¶22 In the summer of 2002, a compliance specialist for the UEF located Hume. After locating him, the Department of Labor and Industry (Department) dunned him and then commenced the present action to determine his liability for benefits paid to Gibson.

¶23 There is no question in my mind, and I find, that given the sources available to the State, including information from the DOR, the UEF could have located Hume long, long ago had it had the resources to do so.

¶24 However, I also find that Hume ignored the notices sent to him in 1990, and failed to provide a forwarding address. It is his failures that put the UEF in the position of looking for him.

¶25 The UEF has paid claimant $43,044.76 in medical and compensation benefits, most of which was paid prior to 1996. (Exs. 11 and 12.)

CONCLUSIONS OF LAW

¶26 This matter involves a dispute concerning benefits payable to a claimant. The Court has jurisdiction over the matter. *See State ex re. Uninsured Employer's Fund v. Hunt,* 191 Mont. 514, 625 P.2d 539 (1981).

¶27 The law applicable to the claim and the UEF's entitlement to reimbursement is the 1989 version of the Workers' Compensation Act since that is the law in effect at the time of injury. *See Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶28 The statute of limitations defense has previously been rejected by this Court in its Decision and Order Denying Motion for Summary Judgment filed November 18, 2003. That determination is reaffirmed here.

¶29 Hume has abandoned his defense based on his discharge in bankruptcy. At trial he urged only his already rejected statute-of-limitations defense. Nonetheless, the Court considers all of the issues set out in the Pretrial Order.

¶30 Respondent's Liability in General: Initially, Hume generally contends he is not liable to the UEF for benefits it paid to Gibson. He presents no evidence disputing the fact of Gibson's industrial accident and has not presented argument supporting his contention. His liability is governed by section 39-71-503, MCA (1989), which provides:

> **39-71-503. Administration of fund.** (1) The department shall administer the fund and shall pay all proper benefits to injured employees of uninsured employers. (2) Surpluses and reserves shall not be kept for the fund. The department shall make such payments as it considers appropriate as funds become available from time to time. The payment of weekly disability benefits takes preference over the payment of medical benefits. No lump-sum payments of future projected benefits, including impairment awards, may be made from the fund. The board of investments shall invest the moneys of the fund. The cost of administration of the fund shall be paid out of the money in the fund.

The section plainly provides the UEF a right to reimbursement from an uninsured employer.

¶31 Waiver: "Waiver is an equitable doctrine, applicable when there is an intentional or voluntary relinquishment of a known right, claim or privilege, or such conduct as warrants an inference of the relinquishment of such right." *Sperry v. Montana State University*, 239 Mont. 25, 30, 778 P.2d 895, 898 (1989). There was not a scintilla of evidence presented in this case indicating that the UEF voluntarily relinquished its claim for reimbursement from Hume. To the contrary, though not as diligent as it could have been, over the years since Gibson's industrial accident it has continued to seek reimbursement. The defense is without merit.

¶32 Estoppel: The essential elements which must be proved to establish estoppel were recently reiterated in *City of Whitefish v. Troy Town Pump, Inc.,* 2001 MT 58, ¶ 15, 304 Mont. 346, 21 P.2d 1026, as follows:

> The elements of equitable estoppel are: (1) conduct, acts, language or silence amounting to a representation or a concealment of a material fact; (2) the facts must be known to the party to be estopped at the time of that party's conduct, or at least the circumstances must be such that knowledge of the facts is necessarily imputed to that party; (3) the truth must be unknown to the other party at the time the representation was acted upon; (4) the representation must be made [304 Mont. 351] with the intent or expectation that it will be acted on by the other party; (5) the representation must be relied upon by the other party, leading that party to act upon it; and (6) the other party must in fact rely on the representation so as to change its position for the worse.

The first and third elements are not met in this case as there was no misrepresentation or concealment of material fact.

¶33 Laches: The nature and essential elements of the doctrine laches is set out in *Cole v. State ex rel. Brown,* 2002 MT 32, 308 MT 265, 42 P.3rd 760 at paragraphs 24 and 25, as follows:

> ¶ 24 Laches is a concept of equity that can apply when a person is negligent in asserting a right. Laches exists "where there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable, and is appropriate when a party is actually or presumptively aware of his rights but fails to act." "A party is held to be presumptively aware of his or her rights 'where the circumstances of which he [or she] is cognizant are such as to put a [person] of ordinary prudence on inquiry.' "
>
> ¶ 25 We have repeatedly stated that in order to apply the doctrine of laches, a showing must be made that the passage of time has prejudiced the party asserting laches or has rendered the enforcement of a right inequitable. Laches is not a mere

> matter of elapsed time, but rather, it is principally a question of the inequity of permitting a claim to be enforced. Hence, the doctrine of laches is the practical application of the maxim, "Equity aids only the vigilant."

(Citations omitted.) The UEF asserted its right to reimbursement in a timely fashion. While it could have been more diligent in pursuing its right once it was asserted, the primary reason for delay was Hume's ignoring the UEF's notices and his leaving Colstrip without leaving a forwarding address. Moreover, he has not shown how he was prejudiced by the delay. Therefore, he has failed to show it is inequitable to now enforce the UEF's right to reimbursement.

¶34 Proper Calculation of Benefits: Hume has failed to offer any evidence that the UEF miscalculated Gibson's benefits. He at least has the burden of going forward on that issue. He has not done so, therefore the defense must be rejected.

¶35 Failure to Mitigate Damages: As with the previous issues, Hume has failed to offer any evidence concerning his contention that the UEF failed to mitigate damages. The defense therefore fails.

JUDGMENT

¶36 The UEF is entitled to reimbursement for benefits it has paid to Linda Lou Gibson on account of an injury she suffered on August 3, 1989, while working for RJ's Country in Colstrip, Montana. At the time of her injury, Hume was the sole proprietor of RJ's Country. He was uninsured and is therefore liable for all benefits paid Gibson by the UEF. To date that amount is $43,044.76 and judgment is entered for that amount. He is also liable for future benefits due Gibson pursuant to the Montana Workers' Compensation Act.

¶37 This JUDGMENT is certified as final for purposes of appeal.

¶38 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 5th day of January, 2004.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Ms. Julia W. Swingley
Mr. Thomas A. Budewitz
Submitted: November 24, 2003