

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 53

WCC No. 2001-0294

MARK MATHEWS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER DISMISSING AFFIRMATIVE DEFENSE

Summary: Despite the Supreme Court holding in this case, 2003 MT 116, and *Wild v. Montana State Fund*, 2003 MT 115, on remand from the Supreme Court the insurer asserts that the claimant is nonetheless barred from pursuing benefits because he misrepresented his employment status to both his employer and its insurer.

Held: The contention is utterly without merit. The claimant was in fact an employee and therefore misrepresented nothing when filing a claim with the insurer. As to his representation to his employer that he was an independent contractor, the Supreme Court held that the employer controlled the relationship and had a duty to ascertain his true status, thus the representation was not material and the employer was not entitled to rely on it.

Topics:

Independent Contractor: Independent Contractor Exemption. Defense alleging fraudulent inducement by claimant on account of his use of an Independent Contractor Exemption is incompatible with and contrary to Supreme Court decisions in *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, and *Wild v. Montana State Fund*, 2003 MT 115, and is therefore dismissed and stricken.

Estoppel and Waiver: Equitable Estoppel: Independent Contractor

Representation. Use of an independent contractor certificate by claimant who says he or she is an independent contractor does not estop the claimant from seeking workers' compensation benefits where in fact the worker is an employee. The representation is immaterial and the employer and insurer have no right to rely on it since the employer controls the relationship and has a duty to inquire into the claimant's true status.

¶1 This case is on remand from the Supreme Court, which held that an Independent Contractor (IC) Exemption is not conclusive as to a claimant's employment status. The decision reversed this Court's summary judgment holding that it was.

¶2 On remand the respondent insurer, Liberty Northwest Insurance Corporation (Liberty), renews affirmative defenses raised in its Response to Petition for Hearing and Respondent's First Notice of Additional Contentions, Witnesses and Exhibits ("First Notice"). The defenses were not considered by this Court in issuing summary judgment or by the Supreme Court on appeal.

¶3 The defenses allege that claimant is estopped from seeking benefits because he fraudulently misrepresented his employment status to both the insurer and the employer. In the Response to Petition for Hearing the insurer alleges misrepresentation:

The claimant did not notify Liberty when he applied for compensation that he was an independent contractor and therefore misrepresented his true employment status and he is now estopped from claiming Liberty accepted his plan.

(Response to Petition for Hearing at 1.) The subsequently filed First Notice essentially sets out the same defense, again naming Liberty as the victim of the representations.

The claimant negligently and/or intentionally misrepresented his employment status to Liberty Northwest.

(First Notice at 1.) However, in a Notice of Affirmative Defense filed even later, Liberty characterizes its defense as encompassing misrepresentations to both the employer and insurer:

As previously set forth in Respondent's First Notice of Additional Contentions, Witnesses & Exhibits, dated March 20, 2001, Respondent asserts that the claimant negligently and/or intentionally misrepresented his employment status to his employer and/or Liberty Northwest. Claimant's misrepresentation supports Respondent's affirmative defense of fraudulent inducement.

(Notice of Affirmative Defense at 1.)

Discussion

¶4 "Fraudulent inducement" is the basis for Liberty's estoppel argument. (Supplemental Brief in Support of Affirmative Defense.) Liberty relies on section 27-1-712, MCA, which provides that "[o]ne who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers." Assuming the statute gives rise to an estoppel defense, nine elements must be met to prove fraud. Those elements are:

1. a representation;
2. the falsity of the representation;
3. the materiality of the representation;
4. the speaker's knowledge of the falsity of the representation or the speaker's ignorance of its truth;
5. the speaker's intent that the false representation should be relied upon;
6. the hearer's ignorance of the falsity of the representation;
7. the hearer's reliance on the false representation;
8. the hearer's right to rely on the false representation; and
9. the consequent and proximate injury caused by the reliance on the false representation.

Pare v. Morrison, 241 Mont. 218, 221, 786 P.2d 655, 657 (1990). The elements are not met in the present case.

¶15 Initially, it is clear from the decision of the Supreme Court, *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116, that claimant was in fact an employee, **not** an independent contractor. Thus, when he filed his claim with Liberty he did not misrepresent his employment status. Element two is not satisfied.

¶16 Second, *Mathews* holds that the employer cannot rely on an IC Exemption and is responsible for ascertaining the claimant's employment status. Its determination is based in large part on the reality that the employer controls that status:

When an employer hires a worker, it is the employer that dictates whether the worker will be paid by the hour, how the worker will be controlled, whose tools are going to be used and whether the worker can be fired. Thus, the employer should be required to determine whether the person is an IC based on what the employer knows and what the parties agree to during the working relationship. If the facts change during the course of employment, then the employer should be required to reassess the situation. To do otherwise would lead to an absurd result and we have repeatedly stated that statutory construction should not lead to absurd results if a reasonable construction will avoid it.

Mathews ¶ 20, quoting from *Wild v. Montana State Fund*, 2003 MT 115, ¶ 28. *Mathews* precludes an employer from relying on the IC Exemption. Implicitly, the employer also cannot rely on claimant's tender of the IC exemption or his representation that he is an independent contractor. Thus, element 3 - materiality, and element 8 - the right to rely on the representation - are not met.

¶17 Finally, the Supreme Court expressly held that it is against public policy for an employer to offer workers a higher wage if they present an exemption at the time of hire and forego employee benefits the employer is paying its other workers. *Mathews* at ¶32. The statement is responsive to the specific facts of this case. The dual employment track in this case - some workers being paid lower wages as employees while others with IC

exemptions were paid higher wages sans benefits - was condemned by the Supreme Court. That condemnation trumps any claim of fraudulent inducement.

ORDER

¶18 Liberty's affirmative defenses are utterly without merit and are **dismissed** and **stricken**.

DATED in Helena, Montana, this 29th day of July, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Geoffrey C. Angel

Mr. Larry W. Jones

Submitted: July 3, 2003