IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 8

WCC No. 2000-0215

STEVE ROLAND

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

RP TWITE CONSTRUCTION, INC.

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant was one of several employees of a construction company crew working on building a house for the company's owner. The company owner gave permission to an adjacent property owner to use his crew, including claimant, to build a garage during times their services were not needed on his own house. The garage work was supervised, directed, and controlled by one of the construction company's supervisors. Claimant was injured while working on preparing the garage site for construction.

Held: Claimant was a loaned employee and his entitlement to compensation is governed by section 39-71-117(3), MCA (1999). Since the construction company controlled his work on the garage and had workers' compensation coverage for its crew, its insurer is liable for claimant's injury.

Topics:

Employers: Identifying. Where an insured employer loans its employees to another but retains control over its employees work while working for the other, its insurer is liable for work-related injuries occurring during the work. § 39-71-117(3), MCA (1999).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-117(3), MCA (1999). Under section 39-71-117(3), MCA (1999), where an insured employer loans its employees to another but retains control over its

employees work while working for the other, its insurer is liable for work-related injuries occurring during the work

¶1 The trial in this matter was held on June 20, 2001, in Missoula, Montana. Petitioner, Steve Roland (claimant), was present and represented by Mr. Dustin L. Gahagan. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones. At the end of trial, the Court granted the parties leave to take the post-trial deposition of Darrell Twite. That deposition was taken on July 3, 2001. A transcript of the deposition was received by the Court on July 5, 2001, and the case was deemed submitted on that date.

¶2 Exhibits: Exhibits 1 and 2 were admitted without objection. Exhibit 3 was admitted for demonstrative purposes only.

¶3 Witnesses and Depositions: Claimant, Ray Twite, Donald Davidson, and Dorothy Davidson were sworn and testified. The depositions of claimant and Darrell Twite were received by the Court and have been considered.

¶4 Issue Presented: The issue as set forth in the Final Pretrial Order is:

- Is Petitioner entitled to acceptance of liability for his claim.

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

FINDINGS OF FACT

¶6 Ray Twite (Ray) is the principal owner of RP Twite Construction, a Missoula based construction company. At the time of the accident at issue in this case, RP Twite was insured by Liberty. Liberty has denied liability for claimant's industrial accident on the ground that he was not injured during the course and scope of his employment for RP Twite Construction.

¶7 Darrell Twite (Darrell) is Ray's brother.

¶8 Don and Dottie Davidson (Don and Dottie or "the Davidsons") live on the West Fork of the Bitterroot River across the road from property owned by Ray Twite. On July 12, 1999, a tree on their property fell. After talking to Darrell, they hired Steve Roland (Steve) to cut up and remove the tree. In addition, they employed Steve and Darrell to patch up damaged siding and roofing on their house. The Davidsons paid Steve directly by personal check for his work.

¶9 At the time he was hired by the Davidsons, and continuing into the fall of 1999, Steve was living in a trailer on property owned by Darrell and located on the West Fork. Darrell also had a house on the property in which he lived.

¶10 In August of 1999, Ray began construction of a house on the land he owned across the road from the Davidsons. He hired a crew of workers to help in the construction. The crew consisted of seven employees including Darrell and Steve. The crew also included DJ Twite (DJ), Ray's son.

¶11 While working on Ray's house, the workers' time was reported to RP Twite Construction's bookkeeper biweekly. The workers were paid by the construction company for their work on the house.

¶12 Ray was often absent from the site and in his absence either Darrell or DJ supervised the crew.

¶13 In the late summer of 1999, the Davidson's were planning to build a garage on their property. They were aware of the construction work on Ray's house and talked to Darrell about helping them with their garage.

¶14 Ray, Darrell, and Don discussed hiring Ray's crew to work on the Davidson garage. Ray agreed that Darrell and other crew members could work on the Davidson garage when not needed to work on his house.

¶15 It was common knowledge among Ray's crew that the Davidsons were going to build a garage. While the Davidsons discussed hiring members of the crew with Darrell, they did not discuss the hiring or wages with crew members individually. They did understand that the crew would be available to work on their garage only when not needed to work on Ray's house.

¶16 The Davidsons also arranged with Ray to use Ray's bobcat in building the garage. They agreed on $25 or $35 an hour for its use.

¶17 On September 15, 1999, the forklift being used in building Ray's house broke down and needed a new water pump. A mechanic for Ray was working on it on September 16th and Darrell determined that it would be a good day to grade gravel being used as fill for the garage. As other members of the crew were not needed to work on Ray's house, they went over to do the grading.

¶18 Don testified that he expected Darrell to act as the "project lead." Steve, who up to that time on that day had been helping on the repair of the forklift, was asked by Darrell to come help with the grading.

¶19 In the course of work at the Davidson's that day, a bobcat was used to remove a shrub on the Davidson property. Steve was standing on the back of the machine to act as a counter balance when his leg and foot were pinned by the machine. He injured his foot.

¶20 Steve testified that at the time of the accident he assumed that building the garage was "Darrell's project." He did not know what he was to be paid for his help or who was paying him.

¶21 I find as a matter of fact that the Davidsons did not hire or contract with individual crew members, rather their agreement was with Darrell, who was to bring the crew with him to work. Darrell was in charge of the construction of the Davidsons garage. I further find that Steve was unaware that he was to be directly employed by the Davidsons and reasonably assumed that he was working for Darrell and RP Twite at the time of his accident. Ray contributed to his assumption by allowing Darrell to use the crew and allowing the crew to use his bobcat.

¶22 The fact that claimant had worked for the Davidsons removing a tree and doing roofing and siding repairs several months previous does not alter my ultimate findings in this case. At that time he was not working for RP Twite Construction and was not part of the RP Twite Construction crew. In July the Davidsons hired him individually. On September 15th Steve was part of the entire crew the Davidsons borrowed from RP Twite Construction.

¶23 Conflicting testimony and credibility issues are resolved in accordance with the foregoing findings of fact.

CONCLUSIONS OF LAW

¶24 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶25 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶26 At the time of his industrial accident, the claimant was an employee of RP Twite Construction, which was insured by Liberty. Whether Liberty is liable for the accident hinges on whether claimant was working in the course and scope of his employment with RP Twite Construction when injured. Section 39-71-407(1), MCA (1999), provides: "Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of employment . . . ." Liberty contends that claimant was working for the Davidsons at the time, therefore he was not in the course and scope of his employment with RP Twite Construction.

¶27 As a factual matter, claimant was an employee of RP Twite Construction and was never made aware that when working on the Davidsons' garage he would be an employee of the

Davidsons. Although he and the other crew members were aware that they were going to be working on the Davidsons' garage, the Davidsons did not directly hire him or agree to pay him wages. The Davidsons' arrangement was with Darrell Twite, whom they expected to act as foreman or supervisor of the other workers he brought with him. The arrangement was approved by Ray Twite on behalf of RP Twite Construction.

¶28 The situation presented here is governed by section 39-71-117(3), MCA, which provides:

> 3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses the services of a worker furnished by another person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. The presumption may be rebutted by substantial credible evidence of the following:
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> (a) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another retains control over all aspects of the work performed by the worker, both at the inception of employment and during all phases of the work; and
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> (b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another has obtained workers' compensation insurance for the worker in Montana both at the inception of employment and during all phases of the work performed.

Initially, Steve and the other workers were "furnished" by RP Twite Construction: Ray's approval for the use of the crew was sought and obtained but the work performed was for another - the Davidsons - and not for RP Twite Construction.

¶29 As set forth in section 39-71-117(3), MCA, an employer which borrows another's employees is deemed the employer for workers' compensation purposes unless the conditions in subsections (a) and (b) are met. In this case those conditions are in fact met. There is no evidence presented which indicates that the Davidsons exercised any control whatsoever over Steve's work or the work of other individual crew members. To the contrary, they expected Darrell, who was a supervisor and agent of RP Twite Construction, to run the project. In fact he did so, directing the crew to the work on the day of Steve's accident. Subsection (3)(a) is met. Subsection (3)(b) is similarly met. RP Twite in fact had a workers' compensation insurance policy covering the crew, including Steve. The crew was

working under the control and direction of one of RP Twite's supervisors and therefore within the course and scope of their work for RP Twite, albeit as loaned employees.

JUDGMENT

¶30 Liberty Northwest Insurance Corporation is liable for claimant's industrial accident of September 16, 1999.

¶31 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

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

¶33 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this day of 8th February, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Dustin L. Gahagan
Mr. Larry W. Jones
Submitted: July 5, 2001