

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 76

WCC No. 9609-7612

JOSEPH I. SANDOVAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer for

DONALD W. JACKLIN

Employer.

ORDER DENYING SUMMARY JUDGMENT

Summary: Cross motions for summary judgment filed raising the question whether claimant, a mule and horse trainer, was covered by the Montana Workers' Compensation Act when injured at a mule race in Nevada. UEF and the employer argue Montana lacks jurisdiction over the accident because the employer is not a Montana resident, he does not operate a business in Montana, and claimant's work was performed primarily outside of Montana. Claimant argues his primary place of employment was Montana.

Held: To determine whether Montana law applied to claimant's work, the Court looks to sections 39-71-118(1) and (7), MCA (1993). Where it is undisputed claimant was a resident of Montana, the Court looks to subsection (7)(a), which provides that an "employee or worker in this state" means "a resident of Montana...whose employment duties are primarily carried out or controlled within this state." The Court interprets "primarily" to mean "first in importance" or "leading," not 50% or more. In order to determine whether claimant's duties were primarily carried out in Montana, the Court must decide whether to consider all the employments claimant had with this employer, or to consider the employment under the parties' written agreement for training and racing mules for the 1995 season. Because subsection (7) contemplates present employment, and where the parties had entered into a series of written and oral agreements for specific terms of work, the Court will look only to the time period covered by the most recent written agreement. Although it appears uncontroverted that races did not occur in Montana during that season, summary judgment denied where the Court does not have sufficient evidence to

rule out the possibility that claimant would have done substantial work in Montana that season had he not been injured. [Note: summary judgment was granted to the UEF and employer in [*Joseph L. Sandoval v. Uninsured Employers' Fund and Donald W. Jacklin*](#) [5/6/99] 1999 MTWCC 33.]

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code: section 39-71-118(7), MCA (1993). Where it is undisputed claimant was a resident of Montana when injured, section 39-71-118(7)(a), MCA (1993) sets forth the standard for determining whether Montana workers' compensation law is applicable. That section provides that an "employee or worker in this state" means "a resident of Montana...whose employment duties are primarily carried out or controlled within this state." The Court interprets "primarily" to mean "first in importance" or "leading," not 50% or more. Thus, subsection 7(a) covers traveling employees whose employment duties carried out in Montana exceed the duties they carry out in any other individual jurisdiction. If only two states are involved, then the Montana duties must equal or exceed 50%. If there are three or more states, then the percentage of time worked in Montana must be greater than the percentage of time worked in each of the other states individually.

Constitutions, Statutes, Regulations, and Rules: Montana Code: section 39-71-118(7), MCA (1993). In order to determine whether claimant's duties were primarily carried out in Montana, the Court must decide whether to consider all the employments claimant had with this employer, or to consider the employment under the parties' written agreement for training and racing mules for the 1995 season, the season in which claimant was injured. Because subsection (7) contemplates present employment, and where the parties had entered into a series of written and oral agreements for specific terms of work, the Court will look only to the time period covered by the most recent written agreement.

Constitutions, Statutes, Regulations, and Rules: Montana Code: section 39-71-118(7), MCA (1993). Cross motions for summary judgment filed raising the question whether claimant, a mule and horse trainer, was covered by the Montana Workers' Compensation Act when injured at a mule race in Nevada. UEF and the employer argue Montana lacks jurisdiction over the accident because the employer is not a Montana resident, he does not operate a business in Montana, and claimant's work was performed primarily outside of Montana. Where it is undisputed claimant was a resident of Montana, the Court looks to section 39-71-118(7)(a), MCA (1993), which provides that an "employee or worker in this state" means "a resident of Montana...whose employment duties are primarily carried out or controlled within this state." Although it appears uncontroverted that races did not occur in Montana

during the applicable term of employment, summary judgment denied where the Court does not have sufficient evidence to rule out the possibility that claimant would have done substantial work in Montana that season had he not been injured. [Note: summary judgment was granted to the UEF and employer in [*Joseph L. Sandoval v. Uninsured Employers' Fund and Donald W. Jacklin*](#) [5/6/99] 1999 MTWCC 33.]

Employment: Montana Employment. Where it is undisputed claimant was a resident of Montana when injured, section 39-71-118(7)(a), MCA (1993) sets forth the standard for determining whether Montana workers' compensation law is applicable. That section provides that an "employee or worker in this state" means "a resident of Montana...whose employment duties are primarily carried out or controlled within this state." The Court interprets "primarily" to mean "first in importance" or "leading," not 50% or more. Thus, subsection 7(a) covers traveling employees whose employment duties carried out in Montana exceed the duties they carry out in any other individual jurisdiction. If only two states are involved, then the Montana duties must equal or exceed 50%. If there are three or more states, then the percentage of time worked in Montana must be greater than the percentage of time worked in each of the other states individually.

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had he not been injured. [Note: summary judgment was granted to the UEF and employer in Joseph L. Sandoval v. Uninsured Employers' Fund and Donald W. Jacklin [5/6/99] 1999 MTWCC 33.]

¶1 The claimant in this action, Joseph I. Sandoval (Sandoval), is a mule and horse trainer. He was injured at a mule race in Winnemucca, Nevada, on June 3, 1995, when kicked by a mule owned by Donald W. Jacklin (Jacklin). He alleges that he was employed by Jacklin and acting in the course and scope of employment at the time of his injury. He also alleges that Jacklin was uninsured and has named the Uninsured Employers' Fund (UEF) as a co-respondent.

¶2 Presently before the Court are cross-motions for summary judgment filed by each of the parties. Both Jacklin and the UEF urge that Montana lacks jurisdiction over the accident because Jacklin is not a Montana resident, he does not operate a business in Montana, and Sandoval's work was performed primarily outside of Montana. Sandoval argues that his primary place of employment was Montana and that his injury is therefore subject to the Montana Workers' Compensation Act. He further argues that, as a matter of law, he was Jacklin's employee.

Uncontroverted Facts

¶3 The parties base their motions on depositions of Sandoval and Jacklin, affidavits of Patte Widdifield, Gary McGraw and Jacklin, and numerous exhibits attached to Sandoval's and Jacklin's opening briefs. The depositions are attached to Sandoval's Motion for Summary Judgment (Sandoval's Motion) filed July 21, 1997.⁽¹⁾ The affidavits are attached to Donald W. Jacklin's Brief in Support of Cross-motion for Summary Judgment and in Opposition to Petitioner's Motion for Summary Judgment (Jacklin's Opening Brief). The exhibits are attached to Sandoval's Motion and Jacklin's Opening Brief filed August 25, 1997. Sandoval's exhibits are labeled A through D, L and M. Jacklin's exhibits are labeled 1 through 7.

¶4 Based on the parties statements of uncontroverted facts and the evidence they have presented to support them, I find the following facts are not genuinely disputed. These facts are limited to the jurisdictional issue since it is unnecessary to presently consider Sandoval's employment status.

1. Since the late 1980's Sandoval has been a Montana resident. He was a Montana resident while performing work for Jacklin.
2. Jacklin is an Idaho resident and operates a seed business in Idaho.
3. Sandoval is an experienced horse trainer and jockey.
4. Jacklin owns and races mules.

5. In 1992, Jacklin hired Sandoval to race his mules. He and Sandoval entered into a written agreement wherein Jacklin "subcontract[ed]" with Sandoval to race his mules "during the year 1992." (Ex. A at 40.⁽²⁾)
6. Jacklin and Sandoval entered into similar, although not identical, agreements in 1993, 1994 and 1995.⁽³⁾ (Ex. B, C and M.)
7. Each racing season began in May and ended in September.
8. In 1992, 1993 and 1994, Jacklin's mules were entered in races in several western states, including Montana. (Ex. A.) In 1995, there was no mule racing in Montana (Jacklin Dep. at 23-24; Jacklin's undisputed fact 7⁽⁴⁾). In 1995 Jacklin's mules raced only in California and Nevada. (Jacklin's undisputed fact 10; Jacklin Affidavit, ¶ 7.)
9. During 1992, 1993, 1994 and 1995 until his accident, Sandoval transported, trained and raced Jacklin's mules during the racing season.
10. Jacklin also hired Sandoval to condition and train his mules between January and May of each year. Some of Jacklin's mules were sent from Idaho to Hamilton, Montana, in January, and the remaining mules were sent in February. Sandoval then boarded them in Hamilton and conditioned and trained them to prepare for the racing season. The winter conditioning and training in Montana was not governed by written agreements.
11. When the racing season commenced in May 1995, Sandoval loaded up the mules he was training for Jacklin and transported them by horse trailer from Montana to Bishop, California to race. The next stop on the racing circuit was Winnemucca, Nevada, where Sandoval was injured.
12. The written agreements covering the 1992 through 1995 racing seasons all called for Sandoval to provide Montana workers' compensation insurance coverage.
13. Sandoval was injured at a mule race in Winnemucca, Nevada on June 3, 1995, when kicked by Jack Hammer, a mule owned by Jacklin and trained by Sandoval.
14. At the time of Sandoval's accident, neither he nor Jacklin had Montana workers' compensation insurance coverage.

Discussion

¶15 The first matter the Court must resolve is whether, assuming Sandoval was Jacklin's employee, the Montana Workers' Compensation Act (WCA) applies to his employment. If it does not, then the Court lacks jurisdiction over the matter and the petition must be dismissed. If it does, the Court must then determine whether in fact Sandoval was an employee rather than an independent contractor.

¶6 Sandoval was injured in June 1995, thus the 1993 version of the WCA applies to his claim. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

I.

¶7 Section 39-71-118, MCA (1993), governs the employments to which the WCA applies. Subsection (1)(a) provides generally:

The term "employee" or "worker" means:

(a) each **person in this state**, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. . . .

Subsection (7) then defines "employee or worker in this state," thus delineating which employees or workers are covered by the WCA. The subsection provides:

(7) For purposes of this section, an "employee or worker in this state" means:

(a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;

(b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer;

(c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state; or

(d) a nonresident of Montana who does not meet the requirements of subsection (7)(b) and whose employer elects coverage with an insurer that allows an election for an employer whose:

(i) nonresident employees are hired in Montana;

(ii) nonresident employees' wages are paid in Montana;

(iii) nonresident employees are supervised in Montana; and

(iv) business records are maintained in Montana.

Subsections (7)(b) through (7)(c) all pertain to nonresidents. Sandoval was and is a Montana resident, therefore the applicable subsection is (7)(a).

¶8 Under subsection (7)(a), Jacklin must have either primarily controlled Sandoval's duties from Montana or Sandoval's duties must have been primarily carried out within Montana. There is no dispute that Jacklin lived and worked in Idaho and was only occasionally in Montana. Sandoval does not argue that Jacklin primarily controlled his work from Montana.

¶9 The critical question is therefore whether Sandoval's work was "primarily carried out" in Montana. Answering the question is a three step process under the facts presented. First, the Court must determine the meaning of primarily. Second, it must determine what constitutes the alleged employment, i.e., whether the employment to be considered is solely that contemplated under the 1995 racing season contract or whether the Court must consider all work performed in either 1995 or for the entire 1992 to 1995 period. Third, and finally, the Court must determine whether there are sufficient uncontroverted facts to establish that Sandoval's duties were either primarily performed or not primarily performed in Montana.

¶10 At the Court's request, both parties submitted briefs addressing the meaning of "primarily." Jacklin argues that it means 50% or more. (Donald W. Jacklin's Additional Brief in Support of Motion for Summary Judgment at 2-4) filed February 27, 1998. Sandoval argues that it means "first in importance" or "leading." (Petitioner's Supplemental Brief Requested by Court at 3) filed March 3, 1998. The Court agrees with Sandoval.

¶11 Jacklin cites the Random House College Dictionary (1973) definition of primarily. That definition, however, does not support Jacklin's 50% interpretation. The definition, as quoted by Jacklin is "essentially; mostly; chiefly." Those terms, as well as the word primarily, may well mean 50% or more when only two things are involved. But where there are three things, "mostly", "chiefly" and "primarily" refer to the thing that outweighs each of the other two. Otherwise, the terms would have no meaning whatsoever in the context of three or more things, none of which constitute 50%. That would lead to the anomalous result of no coverage in any of three or more states which have an identical statute but where no state constitutes 50% of a claimant's duties. Statutes, and the words used in them, should be construed in their ordinary sense unless the context requires otherwise. *In re Woodburn's Estate*, 128 Mont. 145, 153, 273 P.2d 391, 394-95 (1954). They should be construed reasonably and to avoid absurd results. *Montana Power Co. v. Cremer*, 182 Mont. 277, 280, 596 P.2d 483, 485 (1979).

¶12 Jacklin's citation of a Connecticut statute as supporting his position actually undermines his argument. The Connecticut statute provides that for Connecticut workers' compensation laws to apply to a non-resident the non-resident must work "at least 50% of his employment time" in Connecticut. See *Klutz v. Howard*, 636 A.2d 818 (Conn. 1994). If the Montana legislature had intended a 50% requirement, it could have adopted unequivocal language as did Connecticut. Indeed, as Jacklin points out, the Montana legislature specifically defined "primary cause" in section 39-71-119(5), as "more than 50%." It has **not** done so in subsection (7)(a).

¶13 Finally, Jacklin's reliance on *Exhibit Aids, Inc. v. Kline*, 820 F.2d 650 (4th Cir. 1987) is misplaced. That case did not involve application of a statute basing coverage on where the duties are primarily carried out. Moreover, the employer had no regular place of business in

the jurisdiction (District of Columbia) and its employee only "intermittently" entered the jurisdiction.

¶14 I therefore interpret subsection (7)(a) as covering traveling employees whose employment duties carried out in Montana exceed the duties they carry out in any other individual jurisdiction. If only two states are involved, then the Montana duties must equal or exceed 50%. If there are three or more states, then the percentage of time worked in Montana must be greater than the percentage of time worked in each of the other states individually.

II.

¶15 During the racing seasons of 1992, 1993 and 1994, Sandoval's work took him to California, Nevada, Idaho, Oregon, as well as Montana. (Sandoval Dep. at 124-26.) During the 1995 racing season, racing took place in only Nevada and California. Sandoval also boarded and trained Jacklin's mules in Montana for approximately four months each year prior to the commencement of the racing season.

¶16 Sandoval urges the Court to look at the entire period Sandoval worked for Jacklin as the employment. If the entire period of work from 1992 to 1995, is the "employment" under subsection (7)(a), then Montana law applies to Sandoval's injury since Jacklin agrees that between 1992 and 1995, on an overall basis including both the winter and early spring stabling and training and the racing season, Sandoval spent more than 50% of his time with Jacklin's mules in Montana. (Sandoval Dep. at 22.)

¶17 Jacklin argues that the written agreement for the 1995 racing season is severable and separate from the prior work Sandoval did for him. Accordingly, he insists that the Court must apply subsection (7)(a) to that agreement alone, that it must ignore the prior agreements and work, and that it must consider only the percentage of time spent in California, Nevada and Montana once the 1995 racing season began. On that basis, he argues that the Montana WCA does not apply to Sandoval's injury and that the Court lacks jurisdiction over the injury.

¶18 Resolution of this part of the dispute turns on what is meant by "employment." Subsection (7)(a) refers to a Montana resident "who **is** employed." Thus, it plainly contemplates **current** employment, not past employments.

¶19 Employees and employers are free to enter into contracts for a specific term. *Farris v. Hutchinson*, 254 Mont. 334, 341, 838 P.2d 374, 378 (1992). The 1995 racing season agreement constituted a separate contract, as did each of the agreements for the prior seasons. Thus, the 1995 racing season agreement is separate and severable from any prior agreements. *Perry v. Hillman*, 280 P. 346, 349 (Wa. 1927) (an employment contract which can be separately performed and compensated is severable). I therefore conclude

that claimant's duties of employment at the time of his injury were determined by the 1995 racing season contract.

¶20 Sandoval's performance of the 1995 agreement commenced in Montana, when Sandoval loaded the mules up at his stables and began the trek to Bishop, California, for the first 1995 mule races. Except to load up and get out of Montana, all of Sandoval's work under the 1995 agreement was performed outside of Montana. That may not have been the case had he not been injured, thus the Montana component of the agreement must be measured by the time Sandoval would have spent in Montana with the mules had he not been injured.

¶21 In 1992, 1993 and 1994, races were held in Montana as well as in California, Nevada and Idaho. Jacklin testified that races were held in Nevada, California and Idaho in May and July, in Montana in August and the first part of September, and in Nevada for two weeks later in September. (Jacklin Dep. at 21.) However, in his affidavit at page 2, he stated, "No mule racing was scheduled nor occurred in Montana in 1995." Sandoval has not provided any evidence contradicting this statement so it is deemed uncontroverted by the Court.

¶22 If, as a result of no Montana racing, Sandoval would have spent no time with the mules in Montana, then the Court's inquiry is at an end and the petition must be dismissed. However, neither party has provided sufficient facts for the Court to determine that none of the 1995 contract would have been performed in Montana. Sandoval's home and stables were in Montana. The Montana circuit had taken up the month of August and part of September during the 1992, 1993 and 1994 seasons and there is no indication that those six or so weeks were filled in with races in other jurisdictions or what Sandoval was to do with the mules during that time. Jacklin agreed that in those prior years Sandoval "was operating out of Montana" after races in Bishop, California; Winnemucca, Nevada and Idaho. (Jacklin Dep. at 16.) Possibly in 1995, he would have returned the mules to Hamilton, Montana, and cared for them there during the time usually devoted to racing in Montana. Since the Court has no good evidence as to what time, if any, would have been spent in Montana but for Sandoval's injury, it cannot determine whether Montana was or was not the primary state under the 1995 racing agreement. Therefore, summary judgment regarding jurisdiction must be **denied** and the matter scheduled for hearing.

¶23 Since the Court may ultimately determine that Montana law does not apply to Sandoval's injury, it is unnecessary and premature to determine whether Sandoval was an employee or independent contractor under the 1995 racing season agreement. However, since determinations as to employment status typically require the Court to consider all of the facts concerning the relationship, I will hear any evidence the parties wish to present concerning employment status. If I find that Montana law applies to the injury, I will then determine whether claimant was Jacklin's employee.

ORDER

¶24 1. The motions for summary judgment are all **denied**.

¶25 2. This matter shall be placed on the next Helena trial term. A new Scheduling Order will issue separately.

DATED in Helena, Montana, this 21st day of October, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Hunt

Mr. Robert J. Campbell

Mr. Leo S. Ward

Date Submitted: March 31, 1998

1. The motion also serves as Sandoval's opening brief.
2. Sandoval provided the Court with only selected pages of Exhibit A. Thus, the first page provided to the Court is denominated Exhibit A page 40 of 172.
3. There is a dispute as to where the 1995 agreement was executed. Sandoval testified it was executed in Victor, Montana. (Sandoval Dep. at 170.) Jacklin testified that it was signed in Idaho, (Jacklin Dep. at 84) and his testimony was corroborated by an Affidavit of Gary McGraw. The Court makes no determination resolving the conflict and treats this matter as disputed. However, the place the agreement was executed is not material to the jurisdictional issue.
4. (Jacklin's Opening Brief at 2.) Sandoval did not take issue with this fact (see Petitioner's Response to Donald Jacklin's Brief in Support of Cross Motion for Summary Judgment and in Opposition to Petitioner's Motion), filed September 23, 1997 and it is therefore deemed uncontroverted, ARM 24.5.329(3).