

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 64

WCC No. 9612-7677

STEPHEN G. SMITH

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

THE MISSOULIAN

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant was injured while delivering newspapers for the Missoulian. Respondent alleged claimant was exempt from coverage of the Workers' Compensation Act because he met the criteria under section 39-71-401(3)(k), MCA (1995) or because he was an independent contractor.

Held: Pursuant to section 39-71-401(3)(k), MCA (1995), the Workers' Compensation Act does not apply to the employment of a person performing services as a newspaper carrier if the person "has acknowledged in writing" that he is not covered. The individual must also in fact be a "newspaper carrier" as defined by statute, which requires that he "provides a newspaper with the service of delivering newspapers singly or in bundles" and is not "an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers." While claimant's work at the time of the injury met the "newspaper carrier" definition, there was no written acknowledgment in place governing the work at that time. Claimant had executed written acknowledgments during earlier periods of employment, but his contract for employment had expired and he continued working under an oral agreement that did not satisfy the statutory requirement and did not, in any event, address non-coverage. Although claimant was not exempt under section 39-71-401 (3)(k), MCA (1995), he could still fall outside the coverage of the Workers' Compensation Act if he had been working as an independent contractor. However, under the 1995 version of section 39-71-120, MCA, which defines independent contractor, a worker is not an independent contractor unless he has received an independent contractor exemption from the

Department of Labor. Claimant had not received an exemption. Thus, his injury was covered and the insurer is responsible.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-120, MCA (1995). Pursuant to section 39-71-401(3)(k), MCA (1995), the Workers' Compensation Act does not apply to the employment of a person performing services as a newspaper carrier if the person "has acknowledged in writing" that he is not covered. Although claimant was not exempt under section 39-71-401(3)(k), MCA (1995), because there was no written acknowledgment governing the employment, he could still fall outside the coverage of the Workers' Compensation Act if he had been working as an independent contractor. However, under the 1995 version of section 39-71-120, MCA, which defines independent contractor, a worker is not an independent contractor unless he has received an independent contractor exemption from the Department of Labor. Claimant had not received an exemption. Thus, his injury was covered and the insurer is responsible.

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Employment: Exempt Employments: Newspaper Carriers. Pursuant to section 39-71-401(3)(k), MCA (1995), the Workers' Compensation Act does not apply to the

employment of a person performing services as a newspaper carrier if the person "has acknowledged in writing" that he is not covered. The individual must also in fact be a "newspaper carrier" as defined by the statute, which requires that he "provides a newspaper with the service of delivering newspapers singly or in bundles" and is not "an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers." While claimant's work at the time of injury met the "newspaper carrier" definition, there was no written acknowledgment in place governing the work at that time. Claimant had executed written acknowledgments during earlier periods of employment, but his contract for employment had expired and he continued working under an oral agreement that did not satisfy the statutory requirement and did not, in any event, address non-coverage. Although claimant was not exempt under 39-71-401(3)(k), MCA (1995), he could still fall outside the coverage of the Workers' Compensation Act if he had been working as an independent contractor. However, under the 1995 version of section 39-71-120, MCA, which defines independent contractor, a worker is not an independent contractor unless he has received and independent contractor exemption from the Department of Labor. Claimant had not received an exemption. Thus, his injury was covered and the insurer is responsible.

Independent Contractor: Independent Contractor Exemption. Pursuant to section 39-71-401(3)(k), MCA (1995), the Workers' Compensation Act does not apply to the employment of a person performing services as a newspaper carrier if the person "has acknowledged in writing" that he is not covered. The individual must also in fact be a "newspaper carrier" as defined by the statute, which requires that he "provides a newspaper with the service of delivering newspapers singly or in bundles" and is not "an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers." While claimant's work at the time of injury met the "newspaper carrier" definition, there was no written acknowledgment in place governing the work at that time. Claimant had executed written acknowledgments during earlier periods of employment, but his contract for employment had expired and he continued working under an oral agreement that did not satisfy the statutory requirement and did not, in any event, address non-coverage. Although claimant was not exempt under 39-71-401(3)(k), MCA (1995), he could still fall outside the coverage of the Workers' Compensation Act if he had been working as an independent contractor. However, under the 1995 version of section 39-71-120, MCA, which defines independent contractor, a worker is not an independent contractor unless he has received and independent contractor exemption from the Department of Labor. Claimant had not received an exemption. Thus, his injury was covered and the insurer is responsible.

The trial in this matter was held on July 22, 1997, in Helena, Montana. Petitioner, Stephen G. Smith (claimant), was present and represented by Mr. Edward K. Duckworth. Respondent, Liberty Mutual Fire Insurance Company (Liberty), was represented by Mr. Larry W. Jones. At the close of trial, counsel were provided an opportunity to file supplemental briefs. Upon receipt of the briefs, the case was deemed submitted for decision.

Exhibits: Exhibits 1 through 17 were admitted without objection.

Witnesses and Depositions: The claimant, Lois A. Smith, Rachel Pulis, Sarah Zerwin, Jim Rickman and Brian Mellstead testified at trial. In addition, the depositions of claimant, Jim Rickman and Rachel Pulis were submitted to the Court for its consideration.

Issues Presented: The claimant was injured on April 21, 1996, while delivering newspapers for the Missoulian. The following issues, as phrased by the parties, are presented to the Court for decision:

1. Whether the claimant was covered by the Workers' Compensation Act as an employee when he was hurt on April 21, 1996, and therefore entitled to benefits under the Montana Workers' Compensation Act.
2. If the written acknowledgment in the Missoulian carrier contracts, Exhibits "B" and "C" to the claimant's deposition, expired, whether the written acknowledgment attached as Exhibit "A" to the claimant's deposition bars his claim.
3. In the alternative, if the written acknowledgments signed by the claimant did not bar his claim, whether he was an independent contractor when injured and not entitled to benefits.
4. Whether the claimant is entitled to costs and attorney fees pursuant to either Section 39-71-611 or 39-71-612, MCA.

* * * * *

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

FINDINGS OF FACT

1. Claimant is 50 years old and lives in Charlo, Montana. He has a sixth grade education.
2. Claimant began delivering newspapers for the Missoulian in 1987. Except for a one-year period between March 1993 and March 1994, he continued delivering papers for the Missoulian until he was injured on April 21, 1996.

3. At different times, claimant worked three different delivery routes. Those routes were Kicking Horse (abbreviated KICKM1), Ronan (abbreviated RounM1) and Pablo (abbreviated PablM1). The routes included both home delivery and newspaper vending machines.

4. As of November 1, 1990, claimant was assigned the KICKM1 route. (Ex. 11; Mellstead Test.) On that date, claimant signed a "NEWSPAPER CARRIER'S ACKNOWLEDGMENT OF NON-COVERAGE UNDER THE MONTANA WORKERS' COMPENSATION ACT." (Ex. 11.) The acknowledgment stated:

I acknowledge that I am a "newspaper carrier" and that my job consists of providing a newspaper, the Missoulian, with the services of delivering newspapers singly or in bundles. I acknowledge that the Missoulian has not elected to have "newspaper carriers" be covered under the Montana Workers' Compensation Act. I acknowledge that I and the services I perform, and the services which are performed by substitute "newspaper" carriers or by any sub-contractor whatsoever, are not covered by the Montana Workers' Compensation Act.

\s\ Stephen Smith 11/1/90

(*Id.*) His continued employment to deliver the Missoulian was conditioned on his signing the acknowledgment. (Mellstead Test.)

5. After 1990, the claimant's newspaper routes were governed by written agreements. Each of the agreements was entitled "CARRIER CONTRACT." (Exs. 4 through 7 and 12 and 13.)

6. It is not clear whether all of the written contracts are before the Court. There are lapses in the time between the contracts and there is no contract for RounM1 in 1993 even though it appears that claimant was delivering that route in early 1993.

7. The first two contracts submitted to the Court are dated 1991 and 1992. Exhibit 7 is an agreement signed and dated November 1, 1991, for the PablM1 route. The agreement was for a period of 12 months and contained the following language regarding claimant's status as an independent contractor:

The responsibility for delivery of papers to subscribers shall be the sole responsibility of the Contractor. In this regard, it is understood that the Contractor is an independent contractor and as such is responsible for his/her own sub-contractors, agents and representatives. In the event that the Contractor shall be unable to deliver papers to subscribers, the responsibility of obtaining assistants or substitutes shall be that of the Contractor.

(Ex. 7.) Exhibit 6 is an agreement signed and dated January 7, 1992, for the RounM1 route. It was for a period of six months and contained the same independent contractor language as Exhibit 7. Neither agreement contains a specific statement acknowledging that claimant was not covered under the Workers' Compensation Act and the Court is unable to

determine if there were separate acknowledgments executed in conjunction with the contracts.

8. Exhibit 5 is an agreement signed and dated January 19, 1993, covering the PablM1 route. It was for 13 billing periods. Billing periods were every four weeks (see Exhibit 17), thus, 13 billing periods amounted to one year. The contract contains language nearly identical to that of the acknowledgment claimant signed in 1990, as follows:

The Contractor acknowledges that he/she is a "newspaper carrier" whose job consists of providing a newspaper, the Missoulian, with the services of delivering newspapers singly or in bundles. The Contractor acknowledges that the Missoulian has not elected to have "newspaper carriers" be covered under the Montana Workers' Compensation Act. The Contractor acknowledges that he/she and the services he/she performs, and the services that are performed by substitute "newspaper" carriers or by any sub-contractor whatsoever, are not covered by the Montana Workers' Compensation Act.

(Exhibit 5.)

9. In February or early March of 1993, claimant decided to start another business. His wife, Lois Smith, took over his routes. On March 2, 1993, she signed two separate contracts, one for the PablM1 route, the other for the RounM1 route. (Exs. 12 and 13.) The contracts were for 13 billing periods, or one year. They were identical to the one signed by the claimant on January 19, 1993, except as to the substitution of Mrs. Smith as carrier and the term of the contract. The contracts superseded claimant's 1993 contracts with the Missoulian.

10. Claimant did not deliver any Missoulian routes between March 2, 1993, and March 14, 1994.

11. On March 15, 1994, claimant renewed his relationship with the Missoulian, entering into a written contract for the PablM1 route for 13 billing periods. (Ex. 4.) The agreement is the same as the 1993 agreements. If there was an agreement between the claimant and the Missoulian for the RounM1 Route for 1994, it was not presented to the Court.

12. On March 15, 1995, the claimant again entered into contracts for the RounM1 and PablM1 routes for the next 13 billing periods. (Exs. 2 and 3.) The contracts were identical to the 1993 and 1994 contracts, containing paragraph 10 as set out earlier in Finding 7.

13. By their own terms, the 1995 contracts expired on March 14 or 15, 1996.

14. On March 15, 1996, Rachel Pulis (Pulis), the Missoulian's district manager for the area encompassing claimant's routes, met with claimant at a restaurant in Ronan. She was accompanied by Sarah Zerwin (Zerwin), who was training as a circulation manager for the Missoulian.

15. The purpose of the meeting was to present claimant with new written contracts for the RounM1 and PablM1 routes. The new contracts were identical to the 1995 contracts except they were for the period March 15, 1996 to April 28, 1996. Claimant appeared ready to sign the new contracts. However, when Pulis brought the shortened duration of the agreements to claimant's attention he became angry. He declined to sign them, threatened to sue the Missoulian, and then left, taking the contracts with him and telling Pulis and Zerwin that he would have his attorney review them.

16. Later on the day of March 15, 1996, claimant telephoned Jim Rickman (Rickman), the circulation manager for the Missoulian. He told Rickman that he refused to sign the new contracts. Rickman asked if he would nonetheless continue to deliver papers until the Missoulian found a replacement for him. Claimant agreed.

17. Rickman testified that during his March 15, 1996 conversation with claimant, he asked claimant to continue to adhere to the terms of the written agreements and claimant agreed. He conceded he did not talk about any specific provisions of the contract. Claimant denied ever discussing the prior contract and denied telling Rickman that he would abide by the terms of the prior contract. Claimant's testimony was the more credible. I find that there was no discussion concerning the written contract or any of its terms and that claimant did not expressly agree to abide by the terms of the 1995 contracts.

18. Claimant continued to deliver newspapers for the Missoulian until April 25, 1996.

19. Under the parties' various agreements, the Missoulian charged claimant a predetermined amount for each of the newspapers provided to him for delivery. Claimant provided his own transportation in delivering the papers and was not reimbursed for mileage or other costs of his deliveries. His profit was the difference between what he was charged for the papers and his expenses and what he collected from the subscribers to whom he delivered papers and from the vending machines.

20. Claimant testified that after Pulis become his district manager in early 1996, she began directing some of the details of his work. For example, according to claimant, she told customers they could put their delivery tubes where they liked and instructed claimant to put the papers in the tubes. Previously, the location of the tubes and delivery details were matters left to claimant. Pulis denied directing claimant concerning his deliveries and testified that she merely relayed customer complaints on to claimant for him to address. On this point, I found Pulis the more credible witness.

21. Claimant slipped and fell on April 21, 1996. At the time of his fall, Liberty provided workers' compensation insurance for the Missoulian. However, Liberty denied liability for claimant's fall in the belief that claimant was exempt from coverage under section 39-71-401(2)(k), MCA (1995).

22. Liberty's denial of coverage was not unreasonable. Even though I have resolved critical legal issues against it, its contentions concerning the application of the law to the facts of this case are within the bounds of reasonable advocacy.

23. There is no evidence that claimant had a contractor's exemption at the time of his accident.

CONCLUSIONS OF LAW

1. The claimant's accident occurred in April of 1996, hence the 1995 version of the Workers' Compensation Act applies to his claim for compensation. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. Section 39-71-401, MCA (1995), sets out the employers and employments who are subject to workers' compensation coverage requirements. Initially, it provides:

(1) **Except as provided in subsection (2)**, the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to all employees, as defined in 39-71-118. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer. [Emphasis added.]

Subsection (2) lists a number of employments which are exempt from the Act. As relevant to this case, it provides:

(2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following employments:

....

(k) employment of a person performing services as a newspaper carrier or free-lance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection, "free-lance correspondent" is a person who submits articles or photographs for publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":

(i) is a person who provides a newspaper with the service of delivering newspapers singly or in bundles; but

(ii) does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.

For the exemption to apply, two conditions must be met: first, claimant must meet the definition of a "newspaper carrier" and, second, he must have acknowledged in writing that he was exempt from the Act.

3. Claimant meets the definition of a newspaper carrier. At the time of his slip and fall he was engaged in the delivery of newspapers. He delivered them singly to subscribers and either singly or in bundles to vending machines.

4. Liberty argues that claimant also meets the second condition. Initially, it contended that claimant's 1990 acknowledgment (ex. 11) satisfies the requirement of a written acknowledgment. I ruled against that contention at the trial and repeat my ruling here.

There are three reasons for rejecting the contention. First, the acknowledgment applied to a different route than the routes claimant worked in 1995. Second, claimant ceased working for the Missoulian in 1993; the acknowledgment lapsed with that cessation. Third, the acknowledgment was superseded by written acknowledgments in subsequent contracts executed between the claimant and the Missoulian. Whatever life of its own the original acknowledgment may have had, the contracts of 1993, 1994 and 1995, put specific time limits on it.

Liberty also argues that the acknowledgment set out in the 1995 contract satisfies the requirement for a written acknowledgment. While the parties provided legislative history respecting the requirement that an acknowledgment be in writing, that history sheds no light on whether the acknowledgment at issue in this case is effective. Moreover, the statute is clear on its face in requiring a written acknowledgment. Here, there was a written acknowledgment but by its own terms it had expired on March 15, 1996. Thus, it was ineffective after March 15, 1996.

Liberty argues that the agreement, including the acknowledgment, were extended by the claimant's agreement to continue delivering papers until his replacement could be found. The statute, however, requires that the acknowledgment be in writing and there is no written acknowledgment covering any period after March 15, 1996. Moreover, claimant did not orally agree generally to extend the terms of the prior contract, nor did he orally agree to specifically extend his prior acknowledgment. He refused to sign a new written contract and agreed only to continue delivering the papers.

I therefore conclude that there was no written acknowledgment. Accordingly, the exemption permitted under section 39-71-401(2)(k), MCA (1995), is inapplicable to this case and does not relieve Liberty from liability for claimant's April 21, 1996 accident.

5. Liberty further contends that even if claimant was not an exempt employee under section 39-71-401(2)(k), MCA, he was nonetheless an independent contractor and therefore not covered by the Missoulian's policy of insurance. (Final Pretrial Order, Statement of the Issues Number 3 and Insurer's Contentions Number G.) Other than the

presentation of brief testimony concerning the alleged control of details of claimant's work by Pulis, neither party has further addressed the contention.

From the fact that there was no written acknowledgment applicable, it does not automatically follow that claimant's accident is covered. The exemption is with respect to newspaper carriers who otherwise satisfy the definition of an employee. Subsection (2) specifically provides that the Act "does not apply to any of the following **employments**." The section does **not** provide that every newspaper carrier is an employee. Thus, I must consider Liberty's contention that claimant was an independent contractor.

The criteria for determining whether claimant was an independent contractor are set out in section 39-71-120, MCA (1995), which provides:

39-71-120. Independent contractor defined. (1) An "independent contractor" is one who renders service in the course of an occupation and:

- (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact;
- (b) is engaged in an independently established trade, occupation, profession, or business; and
- (c) **has received an exemption granted under 39-71-401(3).**

(2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met.
[Emphasis added.]

As set forth in subsection (2), **all** of the requirements set forth in subsection (1) must be met for claimant to be deemed an independent contractor. There is no evidence showing that claimant had a contractor's exemption under section 39-71-401(3), MCA. The requirement for an exemption was deleted by the 1997 legislature. Nonetheless, it was in effect at the time of the claimant's accident and must be applied in this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Lacking evidence establishing that claimant had the requisite contractor's exemption, claimant must be considered an employee of the Missoulian. § 39-71-120(2), MCA (1995). I therefore conclude that claimant was an employee of the Missoulian and that Liberty is liable for his claim.

6. Claimant is not entitled to attorney fees since an award of attorney fees requires a finding that the insurer unreasonably denied his claim. § 39-71-611(1)(c), MCA. The insurer's actions were not unreasonable.

JUDGMENT

1. The Court has jurisdiction over the parties dispute. § 39-71-2905, MCA.

2. At the time of his April 21, 1996 accident, claimant was an employee of the Missoulain and was not exempt from the Workers' Compensation Act. He is therefore a covered employee under the Missoulain's policy of insurance issued by Liberty Mutual Fire Insurance Company.

3. The claimant is not entitled to attorney fees but is entitled to his costs. In accordance with ARM 24.25.342, he shall file and serve his memorandum of costs within 10 days. Liberty shall have 10 days thereafter in which to file and serve any objections it has to particular costs submitted by claimant.

4. The Court makes no determinations and enters no judgment concerning what benefits, if any, the claimant is due as the issue is not presented in this case.

5. This JUDGMENT is certified as final for purposes of appeal.

6. 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 19th day of November, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Edward K. Duckworth

Mr. Larry W. Jones

Submitted: August 13, 1997