

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 40A-2

WCC No. 9911-8359

LEONARD L. THORESON

Petitioner/Employer

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

RODNEY HINKLE

Claimant/Respondent.

SECOND ORDER AMENDING FINDINGS OF FACT

Affirmed in nonciteable decision [2002 MT 6](#)

Summary: Petitioner moved to amend Court's Findings of Fact, Conclusions of Law and Judgment, arguing the record did not support some factual findings. Prior Order Amending Findings of Fact neglected to respond to one of petitioner's contentions.

Held: One paragraph is corrected; other requests denied.

¶1 On September 18, 2000, the Court issued its Order Amending Findings of Fact. Subsequently, it came to my attention that I had inadvertently omitted a response to petitioner's 5th contention and misidentified the 6th contention as the 5th one. The present Order repeats the original Order, adding the response to contention 5, and correctly identifying the 6th contention.

¶2 Petitioner has moved to amend the Court's Findings of Fact, Conclusions of Law and Judgment which were filed June 28, 2000. 2000 MTWCC 40. I have reviewed a rough electronic transcript of the trial and respond to each of the contentions made in the motion.

¶3 The following are the petitioner's contentions and the Court's responses.

¶4 Contention 1: Petitioner contends as follows:

1. Regarding ¶31, Leonard Thoreson states that this is not supported by the record and is an inaccurate summary of the evidence presented in the following respects:

a. Leonard was not located on the porch of his house at the time Pat Malatare and Hinkle were smoking, but rather went out some time later.

b. Leonard did not smell marijuana smoke at that time Malatare and Hinkle were on the porch, but rather some time later after they had left. Consequently, he did not know who *had smoked* (rather than "was smoking") marijuana, if either of them. This is significant as the court faults Leonard for failing to inquire, but by the time he would have had a basis to inquire, discourage or stop the activity, Malatare and Hinkle were gone. (The next time Thoreson saw Hinkle, it was at the job site *after* the accident had occurred.) It is further significant in light of the court's finding in ¶32, that Leonard did not observe Hinkle stumbling or slurring words at this time, which was more than an hour prior to Hinkle's injury. The knowledge required under Section 39-71-407(4), M.C.A. 1995, would have to be of impairment sufficient to be a major contributing cause of the accident, which is lacking on this record.

c. The court has held that Leonard Thoreson was Rodney Hinkle's employer at the time of this accident. ¶52. Without conceding this issue, and for the purpose of the current argument, this Court must then further consider that, at the time of this injury, employers were under particular restrictions against requiring blood or urine tests for detection of drugs or alcohol as a condition for employment under M.C.A. [sic] 39-2-304(1)(b), M.C.A. 1995, and for continued employment after an initial hire, to have sufficient information to believe that a particular employee's faculties are impaired on the job (- 304(c)(i)). Any violation by an employer of that section in any regard was a criminal misdemeanor. Section 39-2-304(5), M.C.A. 1995. Therefore, the amount of action an employer could take at that time even with sufficient actual knowledge was very limited.

d. The evidence in this record does not establish sufficient particularized knowledge by the employer (as held) of the particular person impaired, the level of impairment *at the time of the accident*, and the possible effect of the level of impairment on ability to perform the work expected [n. The court has found that Hinkle acted recklessly at the time of his injury in ¶46.] to relieve Rodney Hinkle of responsibility for his own injuries and shift it to his employer. The term "knowledge" is generally considered to be of a higher order than mere notice; knowledge is considered sufficient to satisfy a requirement of notice. See *Sundheim v. Reef Oil Corporation*, 247 Mont 244, 252, 806 P.2d 503, ____ (1991); *Philadelphia & R.R.Co. V. Smith*, 64 Fed. 679,

682 (3rd Cir. 1894); *Moore v. Kenockee Tp.*, Mich., 42 N.W. 944,947 (1889). Knowledge is defined as the act, fact or state of knowing, which is in turn defined as having a clear perception or understanding of; being sure or well informed about. *Webster's New Word College Dictionary*, 1997. The definitions lead to the conclusion that knowledge is the possession of actual, specific and particularized information, and is not satisfied by speculation, notice or further inquiry, which terms are not contained in Section 39-91-407(4), M.C.A. 1995. Just as Hinkle has been given the benefit of a literal interpretation of the requirements of the independent contractor law, Section 39-71-120 M.C.A. !995 [sic], so should Leonard Thoreson be given the benefit of a literal application of the standard knowledge on the part of the employer in terms of employee use of intoxicants under Section 39-71-407(4).

(Petition to Amend Findings of Fact, Conclusions of Law and Judgment or for New Trial at 1-3.)

¶15 Response to (a) and (b): Leonard Thoreson (Thoreson) testified that he was in the house when he observed claimant and Pat Malatare (Malatare), through a window, smoking on the porch. He further testified that when he later walked out onto the porch, while the claimant and Malatare were getting "ready to go in the pickup," he could smell marijuana. Thoreson also testified that he arrived at the house before the accident and saw claimant go up the ladder to the roof. Malatare, who was the most credible witness at trial, testified that Thoreson had the ladders in his truck and they had to wait for him to arrive at the job site before they could carry the shingles to the roof; after Thoreson arrived they got the ladders and carried the shingles to the roof. Whether or not Thoreson was able to catch claimant and Malatare at the house to talk to them about the marijuana, he could have done so at the job site prior to the accident. Paragraph 31 is amended as follows:

¶31 Leonard acknowledged that on the morning of the accident he observed Pat and claimant, through the window, smoking on his porch. He acknowledged going out onto the porch and smelling marijuana as Pat and claimant "got ready to go in the pick up." He acknowledged that he arrived at the job site prior to the accident and observed claimant going up a ladder. Moreover, Pat testified, and I find, that Leonard had the ladders in his truck and his workers had to wait for him to arrive at the job site so they could get the ladders and carry the shingles to the roof. While Leonard testified that he could not tell whether Pat or claimant was smoking the marijuana on his porch that morning, he plainly knew one of them was and that both of them would be on the roof working that day. Leonard did nothing about it; however, he could have inquired who was smoking the marijuana, ascertained that it was claimant, prohibited further smoking, and barred claimant from working that day.

¶16 Response to (c): Irrespective of drug testing laws, Thoreson was aware that either Malatare or claimant were smoking marijuana and could have inquired and determined it was claimant. Drug testing was not a prerequisite for inquiring of Malatare and claimant or to preclude claimant from working that day.

¶17 Response to (d): The knowledge requirement was satisfied. Thoreson **knew** that either claimant or Malatare was using marijuana. He knew both of them would be on the roof doing a job which required good balance and good judgment. Irrespective of which worker was using the marijuana, he had a duty to act. As to the "level impairment," the nature of the job made it evident that any level of drug impairment was dangerous. Thoreson cannot hide behind his failure to inquire into the extent of the use and impairment.

¶18 Contention 2: Petitioner contends as follows:

The court has concluded at ¶147 that Hinkle's "smoking the equivalent of three joints within a couple of hours of going on the roof, his bizarre, reckless conduct of walking along the very edge of the roof like a tightrope walker" and impairment of his balance was a sufficient state to preclude Hinkle from recovery. Knowledge of these same particular factors *by Leonard Thoreson prior to the injury*, should be the only basis for imposing liability on Thoreson; however, this same level of knowledge of the extent of drug use and impairment on *Thoreson's* part is not shown by this record. As noted above, and regarding conclusion ¶148, from the time Hinkle left for the job site until he fell from the roof of the house at the job site, Thoreson did not see Hinkle or observe the particulars of his drug use or the extent of his impairment sufficiently to attempt to stop Hinkle's use of alcohol or drugs to prevent the injury. The statutory standard is whether "the employer had knowledge and failed to attempt to stop *the employee's use of alcohol or drugs*, . . .", not whether he barred him from the work area. This record shows that Hinkle's use of drugs was outside of Thoreson's presence; no other person provided this information directly to Thoreson before Hinkle was injured; and Hinkle left Thoreson's presence *before* the scant information of possible drug use came into Thoreson's knowledge. This conclusion by the court based on the record in this case is consequently contrary to the literal construction policy under Section 39-71-105(4), as it burdens the employer (and consequently benefits the employee and the insurer) with obtaining additional knowledge of facts and taking action in excess of the requirements of Section 39-71-407(4), M.C.A. 1995, while protecting an employee from clearly and admittedly reckless conduct while chemically impaired.

(Petition to Amend Findings of Fact, Conclusions of Law and Judgment or for New Trial at 3.)

¶19 Response to Contention 2: Section 39-71-407(4), MCA (1995), does not require the employer to be aware of the extent of drug use, only that drugs are being used. Petitioner's

argument might be characterized as, "I knew he was smoking dope but I didn't know how much, and I didn't bother to inquire even though I knew he was heading for a dangerous job on the roof."

¶10 Contention 3: Petitioner contends as follows:

As a consequence of the argument in paragraph 2 hereof, Leonard Thoreson should not be required to reimburse the UEF as concluded in ¶49 and ordered in ¶¶55 and 56.

(Petition to Amend Findings of Fact, Conclusions of Law and Judgment or for New Trial at 3.)

¶11 Response to Contention 3: The response to contention 2 disposes of this contention.

¶12 Contention 4: Petitioner contends as follows:

Regarding ¶21, Leonard Thoreson states that the finding that Hinkle told him that "I'm an independent contractor" is not supported by substantial evidence. His recollection is that he testified that Rodney Hinkle told him that he was an independent *roofer*.

(Petition to Amend Findings of Fact, Conclusions of Law and Judgment or for New Trial at 3.)

¶13 Response to Contention 4: This is a distinction without a difference. "Independent contractor" or "independent *roofer*", the import was the same. I simply do not believe claimant said he was an independent anything.

¶14 Contention 5: Petitioner contends as follows:

Regarding ¶26, there is no substantial evidence either from testimony or from the demeanor of the witness to find that Cindy St. Marks was angry at the denial of Rodney Hinkle of paternity of their child as would motivate her to alter facts in her testimony of Hinkle's admission that he injured himself deliberately. This is of further importance in this case in view of evidence that Hinkle hit the ground at some distance back from the edge of the roof indicating a deliberate leap or step off of the roof rather than a vertical fall after accidentally losing footing.

(Petition to Amend Findings of Fact, Conclusions of Law and Judgment or for New Trial at 3.)

¶15 Response to Contention 5: It was apparent to me that Cindy St. Marks was upset at claimant's denial of paternity. I did not find her credible and find no reason to alter my findings in ¶26.

¶16 Contention 6: Petitioner contends as follows:

Regarding ¶¶ 37-45, in view of the court's interpretation in ¶36 that the three requirements under the 1995 Workers' Compensation Act defining independent contractors are conjunctive, and that Rodney Hinkle failed to obtain an exemption under Section 39-71-120(1)(c) and consequently has been held not to be an independent contractor, ¶¶37-45 are dicta and may be deleted.

(Petition to Amend Findings of Fact, Conclusions of Law and Judgment or for New Trial at 3.)

¶17 Response to Contention 6: Paragraphs 37 through 45 are not dicta. They represent *alternative grounds* for the independent contractor determination. I decline the invitation to omit them.

ORDER

¶18 For the reasons set forth in the foregoing discussion, paragraph 31 is amended as set forth in the discussion. The motion is **otherwise denied** and with the amendment to paragraph 31 the Findings of Fact, Conclusions of Law and Judgment is **affirmed**.

DATED in Helena, Montana, this 20th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Robert M. Kampfer
Mr. Daniel B. McGregor
Mr. Richard J. Martin
Submitted: July 31, 2000