

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 40

WCC No. 9911-8359

LEONARD L. THORESON

Petitioner/Employer

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

RODNEY HINKLE

Claimant/Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

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

Summary: Roofing laborer hired to work for contractor on residential job who had smoked marijuana before starting work walked along edge of roof "like tightrope walker" and fell, suffering injuries. Contractor argued laborer was an independent contractor, deliberately jumped, and was not entitled to benefits in any event due to intoxication.

Held: Independent contractor defense rejected where claimant had not obtained IC exemption and employer retained right to control work. Claimant did not deliberately jump, but his fall did result from his marijuana intoxication. While claimant would ordinarily lose his entitlement to benefits due to his voluntary intoxication (§39-71-407, MCA (1995)), the employer had knowledge of claimant's drug use and failed to attempt to stop same, making claimant entitled to benefits.

Topics:

Constitutions, Statutes, Regulations and Rules: 39-71-120, MCA (1995). Under 39-71-120, MCA (1995), worker is employee for purposes of the Workers' Compensation Act unless all three statutory criteria are met, including existence of exemption granted under 39-71-401(3). Where worker had not obtained exemption, one criteria is absent and employee status proven for purposes of the workers'

compensation act. Court also finds AB test not met where evidence indicates employer retained right to control work of roofer/claimant.

Constitutions, Statutes, Regulations and Rules: 39-71-407, MCA (1995). Based on claimant's smoking the equivalent of three marijuana joints within a couple of hours of going on a roof to work, and his bizarre, reckless conduct of walking along the very edge of the roof like a tightrope walker, claimant was in fact intoxicated and the intoxication was a leading cause of his accident and injury. However, employer did have knowledge of claimant's drug use and failed to attempt to stop same, making claimant entitled to benefits.

Defenses: Intoxication. Based on claimant's smoking the equivalent of three marijuana joints within a couple of hours of going on a roof to work, and his bizarre, reckless conduct of walking along the very edge of the roof like a tightrope walker, claimant was in fact intoxicated and the intoxication was a leading cause of his accident and injury within 39-71-407, MCA (1995). However, employer did have knowledge of claimant's drug use and failed to attempt to stop same, making claimant entitled to benefits.

Independent Contractor: Independent Contractor Exemption. Under 39-71-120, MCA (1995), worker is employee for purposes of the Workers' Compensation Act unless all three statutory criteria are met, including existence of exemption granted under 39-71-401(3). Where worker had not obtained exemption, one criteria is absent and employee status proven for purposes of the workers' compensation act. Court also finds AB test not met where evidence indicates employer retained right to control work of roofer/claimant.

Independent Contractor: Elements. Under 39-71-120, MCA (1995), worker is employee for purposes of the Workers' Compensation Act unless all three statutory criteria are met, including existence of exemption granted under 39-71-401(3). Where worker had not obtained exemption, one criteria is absent and employee status proven for purposes of the workers' compensation act. Court also finds AB test not met where evidence indicates employer retained right to control work of roofer/claimant.

Injury: Causation. Based on claimant's smoking the equivalent of three marijuana joints within a couple of hours of going on a roof to work, and his bizarre, reckless conduct of walking along the very edge of the roof like a tightrope walker, claimant was in fact intoxicated and the intoxication was a leading cause of his accident and injury within section 39-71-407, MCA (1995). However, employer did have knowledge of claimant's drug use and failed to attempt to stop same, making claimant entitled to benefits.

¶1 The trial in this matter was held on March 27, 2000, in Great Falls, Montana. Petitioner, Leonard L. Thoreson, is the putative employer of respondent, Rodney Hinkle, and will be referred to as "petitioner" or "Leonard." He was present and represented by Mr. Robert M. Kampfer. Respondent, Uninsured Employers' Fund (UEF), was represented by Mr. Daniel B. McGregor. Respondent, Rodney Hinkle (claimant), was present and represented by Mr. Richard J. Martin. Post-trial briefs were submitted on April 10, 2000, at which time the case was deemed submitted for decision. A trial transcript has not been prepared. ¶2 Exhibits: Exhibits 2 through 5, 7 through 21, 27 through 35, and 37 through 40 were admitted without objection. Exhibits 1, 6, and 36 were not offered. Exhibit 24 was withdrawn. Exhibits 22, 23, 25, and 26 were refused.

¶3 Witnesses: Leonard L. Thoreson, Rodney Hinkle, Dale Thompson, Patrick Malatare, Cindy St. Marks, and Bernadette Rice testified at trial. No depositions were submitted.

¶4 Issues Presented: The issues, as restated by the Court, are as follows:

1. Whether claimant was petitioner's employee or an independent contractor.
2. If claimant was an employee, whether his claim for benefits and/or the UEF's claim for indemnification are barred on account of his failure to obtain an independent contractor (IC) exemption.
3. If not barred, whether the requirement for an IC exemption violated petitioner's right to due process of law in light of his lack of knowledge of the requirement.
4. Whether claimant deliberately injured himself on December 9, 1996.
5. Whether claimant's use of drugs was a major contributing cause to his December 9, 1996 industrial accident, and if so whether petitioner had knowledge of claimant's use of drugs and failed to attempt to stop that use.
6. Whether petitioner must indemnify the UEF for benefits paid to claimant.
7. If claimant is not entitled to compensation, whether he must reimburse the UEF for benefits.

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

FINDINGS OF FACT

¶6 The claimant has worked off and on for approximately nine years as a laborer on roofing jobs, primarily tearing off old shingles. Approximately a year prior to the injury which gives rise to this case, he began working as a roofer, installing shingles.

¶17 Leonard is a contractor who has been in business for 20 years. He mostly does residential remodeling jobs.

¶18 In December of 1996 Leonard contracted with a home owner near Denton, Montana, to build a deck or porch and paint. While the job was in progress, the homeowner decided to reshingle the roof of the house.

¶19 At the time reshingling was added to the contract, two workers were already on the job. The workers were Dale Thompson (Dale) and Pat Malatare (Pat).

¶10 Of all the witnesses testifying at trial, Pat was the most credible. I credited his version of events where there was conflicting testimony.

¶11 When reshingling was added to the Denton job, Leonard knew that he "was up against the weather." (Trial Test.) He determined he needed additional help. He knew claimant from a prior job he had done in Geraldine and knew that claimant did roofing. He called claimant and hired him.

¶12 On Sunday, December 8, 1996, the day before claimant's accident, Leonard picked up claimant and Pat and drove them to his home in Geraldine, Montana. Both claimant and Pat spent the night at Leonard's house.

¶13 On December 9, 1996, Pat and claimant drove together in Leonard's pickup to Square Butte to pick up shingles. They then drove to the job site in Denton, where they unloaded the shingles and carried them up to the roof.

¶14 Claimant began laying out shingles but within a matter of 10 minutes fell or jumped from the roof, falling approximately 12 feet and severely injuring himself. His injuries are not at issue, therefore nothing more need be said about them.

¶15 At the time of the accident, Leonard did not have workers' compensation insurance coverage.

¶16 Claimant's claim for compensation, dated December 27, 1996, was submitted to the UEF, which accepted liability for the claim.

¶17 Leonard disputes the claim on several grounds. He alleges that claimant was an independent contractor; the accident occurred because claimant was high on marijuana and illegal drugs; and, in the alternative, claimant intentionally injured himself in order to obtain compensation.

Employment Status

¶18 Claimant did not have an independent contractor exemption at the time of his accident.

¶19 Leonard testified that he and claimant agreed claimant would be paid by the square (100 square feet of shingles). Claimant disputed that arrangement, testifying that he assumed he would be paid by the hour. His testimony, however, was contradicted by his written claim for compensation. The claim provides a number of check boxes to designate the manner of payment, including hourly, daily, weekly, bi-weekly, monthly, and annually. It also contains a box for "other," and that is the box claimant checked. Next to it, he wrote, "PIECE WORK." (Ex. 3.) At trial he testified that he doesn't know what "piece work" means. Perhaps he was only testing my credulity. In any event, this testimony, as with other portions of his testimony, was not believable. I find that the agreement was for him to be paid by the square.

¶20 Immediately after the accident, claimant told healthcare workers that he was self-employed. At trial he claimed he didn't know what "self-employed" means. I am unconvinced by that testimony.

¶21 On the other hand, Leonard's testimony that claimant told him that "I'm an independent contractor" was not believable. After listening to claimant, I am persuaded those are not words he would have used. Nor am I persuaded that claimant ever indicated he had applied for an independent contractor exemption or that the exemption was ever mentioned.

¶22 Whether or not Leonard and claimant contemplated that claimant would work as an independent contractor, other facts are inconsistent with that arrangement. Specifically:

- Leonard purchased and provided the shingles.
- Pat and Dale helped carry the shingles up to the roof. Both were supposed to help claimant with the roofing, at least in the early stages, and Dale in fact did the roofing after claimant was injured. Both Dale and Pat were on the roof when the accident occurred. Pat testified that he was supposed to help that day until the rest of the deck materials were delivered. Leonard testified that he told Pat and Dale to help on the roof for awhile and then work on the deck and painting while claimant finished the roof. Leonard's directions to Pat and Dale to help with the roofing shows that he exercised control over that job.
- Leonard provided claimant with all tools necessary for the roofing. Claimant owned his own roofing tools, but those tools were limited, consisting of tape measure, tool belt, roofing hammer, a claw hammer and two utility knives. The only reason he did not use his own tools on the Denton job was because he had pawned the tools. Claimant did not own a chalk line or tear off forks. In addition, the ladder to reach the roof was furnished by Leonard and there is no evidence claimant owned a ladder.

- Leonard also provided claimant with transportation to the job site.

¶23 There was no evidence concerning the right to fire.

¶24 Evidence as to whether claimant was or was not in an independent business was lacking. There is no indication that claimant had steady employment for any roofer or contractor. There is evidence that he worked on another roofing job in Geraldine. According to Leonard, he was paid by the owner. That arrangement - working for the owner rather than a roofing contractor - is indicative he was self-employed, at least on that job.

Testimony that the Accident was Deliberate

¶25 Leonard called Cindy St. Marks (Cindy) to support his claim that claimant's accident was deliberate. Cindy testified that after the accident she saw claimant in a bar and he told her he jumped off the roof so he could obtain money Leonard was going to receive from the sale of real property. She testified that claimant had previously shot himself in the arm, although she was unable to say what gain he could have obtained from that act.

¶26 I have disregarded Cindy's testimony. She asserts that claimant fathered her child about seven years ago. He denies it and she is angry at his denial. She admitted that both of them were drinking at the bar during happy hour, when drinks were half price. I did not find her testimony trustworthy or credible.

¶27 The most credible description of the accident was provided by Pat. Pat testified that claimant had laid down some starter shingles along the edge of the roof and was walking along the very edge "like on a tightrope", one foot in front of the other. Claimant turned to face the peak of the roof and was balancing on the balls of his feet, his heels hanging over the edge. He began flailing his arms and fell backwards off the roof. That description, while indicating that claimant was *flying high* on drugs and reckless, is inconsistent with his deliberately leaping off the roof, especially when the distance to the ground (12 feet) is considered.

Illicit Drug Use

¶28 Pat testified that on the morning of the accident, before leaving Leonard's, he observed claimant smoking a "joint" (marijuana cigarette) outside on the porch. Later, during the drive from Square Butte to Denton, claimant fashioned a pipe of sorts out of a soda can, bending in the side to create a depression and then making a hole in that depression. He put marijuana in the depression, over the hole, and smoked through the opening usually utilized for drinking. After arriving in Denton, claimant smoked another joint. Pat has prior law enforcement experience and has training in the detection of alcohol and drug use. I credit his testimony.

¶29 Claimant testified but invoked his Fifth Amendment right against self-incrimination when asked about his drug use on the day of the accident. While, unlike a criminal proceeding, the Court may infer from his silence that he smoked marijuana that day, the inference is unnecessary since the Court was and is persuaded by other testimony as to his drug use.

¶30 Claimant's actions on the roof in walking along the very edge like a tight rope walker is strong evidence of his marijuana intoxication. I find that intoxication was a major contributing cause of his fall.

Leonard's Knowledge of Drug Use

¶31 Leonard acknowledged that on the morning of the accident he went out on his porch, observed Pat and claimant smoking, and smelled marijuana. He testified that he could not tell which one - Pat or claimant - was smoking the marijuana, but he plainly knew one of them was and that both of them would be on the roof working that day. Leonard did nothing to discourage or stop continued pot smoking. He testified that he felt that he could do nothing about it, however, he could have inquired who was smoking, prohibited further drug use, and prevented claimant from working that day.

¶32 Leonard testified he did not observe claimant stumbling or slurring his words, however, that was more than an hour prior to the accident.

CONCLUSIONS OF LAW

¶33 This Court has jurisdiction over this matter pursuant to section 39-71-2905(1), MCA (1997), which provides in relevant part:

After parties have satisfied dispute resolution requirements provided elsewhere in this chapter, the workers' compensation judge has exclusive jurisdiction to make determinations concerning disputes under chapter 71, except as provided in 39-71-317 and 39-71-516.

¶34 The law in effect on the date of the claimant's industrial accident applies to the issues in this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Therefore, the 1995 version of the Workers' Compensation Act applies.

¶35 The first issue is whether claimant was Leonard's employee or an independent contractor. Section 39-71-120, MCA (1995), sets out the criteria that must be satisfied to establish independent contractor status, providing:

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.

As set forth in subsection (2), unless those criteria are met, claimant must be deemed an employee.

¶36 As an initial matter, claimant does not meet the third, subsection (1)(c) criteria because he did not have an independent contractors exemption. The three criteria are in the conjunctive and all three, including the requirement for an exemption must be met. *Stephen G. Smith v. Liberty Mutual Fire Ins. Co.*, WCC No. 9612-7677, Findings of Fact, Conclusions of Law and Judgment at p. 8 (November 19, 1997); *Z Works, Incorporated v. Gwyn Barnaby and Uninsured Employers' Fund*, 1998 MTWCC 19, ¶ 6. For this reason alone, claimant is deemed Leonard's employee.

¶37 In light of the other issues raised in this case, I consider whether claimant meets the other criteria for independent contractor status. Those criteria (subsections (1)(a) and (1)(b)) are commonly referred to as the AB test, *American Agrijusters Co. v. Dept. of Labor & Industry*, 1999 MT 241, ¶ 19, 988 P.2d 782, 78. They require that claimant be free from the contractor's control and be engaged in an independent business or trade. The evidence concerning an independent business or trade was insufficient to draw a conclusion either way, however, the evidence concerning control requires a finding that claimant was an employee.

¶38 In determining whether the "free from control" test has been met, four factors are considered. *Sharp v. Hoerner Waldorf Corporation*, 178 Mont. 419, 425, 584 P.2d 1298 (1978). The four factors are: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire." *Id.* (citations omitted); *Loos v. Waldo*, 257 Mont. 266, 273, 849 P.2d 166 (1992). Consideration of the four factors "is not a balancing process. Direct employment status can be established upon satisfaction of one of the four factors." *Schrock*, 225 Mont. 352, 348, 732 P.2d 848 (1987). An independent contractor relationship can be established only by a convincing accumulation of factors favoring independent contractor status. *Sharp*, 178 Mont. at 425.

¶39 In this case there is no direct evidence regarding the right to fire and the evidence concerning the method of payment - by the square - is consistent with independent contractor status. Evidence regarding the furnishing of equipment is more difficult. Claimant owned his own roofing tools, but those tools were limited, consisting of tape measure, tool belt, roofing hammer, a claw hammer, and two utility knives. The only reason he did not use his own tools on the Denton job was because he had pawned the tools.

However, claimant did not own a chalk line or tear off forks. In addition, the ladder to reach the roof was furnished by Leonard and there is no evidence claimant owned a ladder. The tools claimant owned were insufficient to perform the job, thus the equipment factor cuts in favor of employee status.

¶40 That leaves the final factor - evidence of the right of control. The right of control has been held determinative in previous cases. *E.g., Loos v. Waldo*, 257 Mont. 266, 273, 849 P.2d 166 (1993) (bar owner's retention of liquor license and his co-signatory status on the bars checking account established the owner's right of control over lessee of the bar, thus the lessee was an employee). The control test "is based on the right, not just the exercise, of control." *Sharp*, 178 Mont. at 424.

¶41 As a general rule, one hiring an independent contractor may control the end "result" of the contractor's work, while control of the "means" by which the work is accomplished indicates that the worker is an employee. *Johnson v. Department of Labor & Industry*, 240 Mont. 288, 292-93, 783 P.2d 1355, 1358 (1989). Where the right of control is limited to those few matters required to ensure a satisfactory end result, that right is not inconsistent with independent contractor status. *Solheim v. Davis Ranch*, 208 Mont. 265, 677 P.2d 1034 (1984). Without destroying independent contractor status, the owner or general contractor is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result he bargained for. *Walling v. Hardy Construction*, 247 Mont. 441, 447-48, 807 P.2d 1335 (1991) (citation omitted).

¶42 In this case, the actual exercise of control is inconsistent with a finding of independent contractor status. Claimant was not in charge of the roofing job, Leonard was. Leonard assigned other workers to the roofing job to work alongside claimant, at least initially. His actions went beyond dictating the results or necessary details of the work to be performed. I therefore conclude that claimant was in fact Leonard's employee.

¶43 Leonard argues that the IC exemption requirement should not be applied to him because he was not a party to the exemption and cannot answer for claimant's failure to obtain the exemption. The argument is without merit. The statute provides, in clear terms, that anyone lacking an exemption who was hired by Leonard would be deemed his employee. It provided him fair warning that he was required to provide workers' compensation coverage for those employees. Moreover, as found in the previous paragraph, claimant was in fact his employee irrespective of the lack of an exemption.

¶44 Leonard's argument that claimant is estopped from claiming he was an employee because he failed to obtain an exemption similarly lacks merit. I have found as a matter of fact that there were no representations or even discussions regarding the exemption. Lacking a representation, there can be no estoppel since the first element for estoppel is "the existence of conduct, acts, language, or silence amounting to a representation or a concealment of a material fact," *Billings Post No. 1634 v. Montana Dept. of Revenue*, 284

Mont. 84, 90, 943 P.2d 517, 520 (1997). There was neither representation nor concealment; there was simply no discussion.

¶45 Leonard also argues that the requirement for an exemption, § 39-71-120(1)(c), MCA (1995), violates his right to due process of law. He says:

7. Section 39-71-120(1)(c), M.C.A. 1995, violates due process of the laws in that no notice by either Rodney Hinkle or the Department of Labor and Industry to contracting parties of the requirement of an exemption under 39-71-401(3) is required to be provided to parties seeking subcontractors.

(Petitioner's Proposed Findings of Fact Conclusions of Law and Judgment at 4.) The simple answer to that contention is that the statute itself provides the notice. Montana follows the common law maxim that "ignorance of the law is no excuse." *Donovan v. Graff*, 248 Mont. 21, 25, 808 P.2d 491, 494 (1991); *Rieckhoff v. Woodhull*, 106 Mont. 22, 30, 75 P.2d 56, 58 (1937). Moreover, Leonard has not provided a single case citation to support his argument.

¶46 Leonard's next argument, that claimant deliberately injured himself, need not be addressed since I have found that while claimant was acting recklessly he did not deliberately injure himself.

¶47 The next argument concerns claimant's drug intoxication. Section 39-71-407(4), MCA (1995), provides:

(4) An employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident. However, if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs, this subsection does not apply.

"Major contributing cause" is defined in subsection (7) of section 39-71-407, MCA (1995), as follows:

(7) As used in this section, "major contributing cause" means a cause that is the leading cause contributing to the result when compared to all other contributing causes.

Based on the claimant's smoking the equivalent of three joints within a couple of hours of going on the roof, and his bizarre, reckless conduct of walking along the very edge of the roof like a tightrope walker, I have found that the claimant was in fact intoxicated and that his intoxication was a leading cause of his accident. It is difficult for me to believe that in a non-intoxicated state the claimant would have put himself in danger as he did. Moreover, it is likely that his intoxicated state impaired his balance, leading to his fall. His claim is barred unless the "employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs."

¶48 Unfortunately, Leonard did have knowledge of claimant's drug use. While he claims he was not able to determine whether claimant or Pat was smoking marijuana on the porch, he knew it was one or the other and that both of them would be on the roof. The clear intent of the exception is to require employers to take steps to prevent accidents which are bound to happen when employees are intoxicated. Leonard could have inquired as to whom was smoking the dope and barred him from the roof or from further smoking, but he did nothing. Because of his failure, claimant is eligible for benefits.

¶49 Since claimant is entitled to benefits, the UEF is entitled to reimbursement for the benefits it has paid claimant and for all reasonable future benefits it may pay the claimant. Section 39-71-504, MCA (1995), provides in relevant part:

39-71-504. Funding of fund -- option for agreement between department and injured employee. The fund is funded in the following manner:

...

(2) The fund shall receive from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.

¶50 Since claimant is entitled to benefits, I need not address the seventh issue.

¶51 Claimant is entitled to his costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.

JUDGMENT

¶52 1. At the time of his December 9, 1996 industrial accident, claimant was an employee of Leonard L. Thoreson.

¶53 2. Section 39-71-120(1)(c), MCA (1995), does not violate Leonard L. Thoreson's right to due process of law.

¶54 3. Claimant is entitled to workers' compensation benefits with respect to his December 9, 1996 injury.

¶55 4. Leonard L. Thoreson shall reimburse the Uninsured Employers' Fund for all compensation and medical benefits it has paid to or for claimant. The parties have not presently asked the Court to determine the amount due. The Court retains jurisdiction to determine the amount in the event they are unable to agree on the amount.

¶56 5. Leonard L. Thoreson shall reimburse the Uninsured Employers' Fund for all reasonable future compensation and medical benefits it pays to or for claimant.

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

¶58 7. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶59 8. 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 28th day of June, 2000.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Robert M. Kampfer
Mr. Richard J. Martin
Mr. Daniel B. McGregor
Submitted: April 10, 2000