

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 19

WCC No. 9710-7840

Z WORKS, INCORPORATED

Petitioner

vs.

GWYN BARNABY/UNINSURED EMPLOYERS' FUND

Respondents.

ORDER GRANTING SUMMARY JUDGMENT

Summary: UEF filed motion for summary judgment arguing that, as a matter of law, painter was an employee and not an independent contractor where she had not been granted an independent contractor exemption under section 39-71-120, MCA (1995.) The alleged employer responded that the painter had also been hired to provide bookkeeping services and represented workers' compensation insurance was not necessary for her.

Held: Summary judgment granted to UEF where undisputed affidavit proves claimant had not been granted an independent contractor exemption under section 39-71-120, MCA (1995). While the requirement of an exemption may be a trap for employers unschooled in the technicalities of the 1995 legislation, which added the exemption requirement, the Court must apply the law as written. Even assuming claimant told the employer not to purchase workers' compensation insurance, the advice of a bookkeeper or accountant, or even an attorney, cannot relieve the employer from its statutory obligation.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-120, MCA (1995). Summary judgment granted to UEF establishing liability of uninsured employer where undisputed affidavit proves painter/bookkeeper had not been granted an independent contractor exemption under section 39-71-120, MCA (1995). While the requirement of an exemption may be a trap for employers unschooled in the technicalities of the 1995 legislation, which added the exemption requirement, the Court must apply the law as written. Even assuming claimant told the employer not to purchase workers' compensation insurance, the advice of a bookkeeper or accountant, or even an attorney, cannot relieve the employer from its statutory obligation.

Employers: Insurance. Summary judgment granted to UEF establishing liability of uninsured employer where undisputed affidavit proves painter/bookkeeper had not been granted an independent contractor exemption under section 39-71-120, MCA (1995). While the requirement of an exemption may be a trap for employers unschooled in the technicalities of the 1995 legislation, which added the exemption requirement, the Court must apply the law as written. Even assuming claimant told the employer not to purchase workers' compensation insurance, the advice of a bookkeeper or accountant, or even an attorney, cannot relieve the employer from its statutory obligation.

Employment: Employee. Summary judgment granted to UEF establishing liability of uninsured employer where undisputed affidavit proves painter/bookkeeper had not been granted an independent contractor exemption under section 39-71-120, MCA (1995). While the requirement of an exemption may be a trap for employers unschooled in the technicalities of the 1995 legislation, which added the exemption requirement, the Court must apply the law as written. Even assuming claimant told the employer not to purchase workers' compensation insurance, the advice of a bookkeeper or accountant, or even an attorney, cannot relieve the employer from its statutory obligation.

Independent Contractor: Generally. Summary judgment granted to UEF establishing liability of uninsured employer where undisputed affidavit proves painter/bookkeeper had not been granted an independent contractor exemption under section 39-71-120, MCA (1995). While the requirement of an exemption may be a trap for employers unschooled in the technicalities of the 1995 legislation, which added the exemption requirement, the Court must apply the law as written. Even assuming claimant told the employer not to purchase workers' compensation insurance, the advice of a bookkeeper or accountant, or even an attorney, cannot relieve the employer from its statutory obligation.

Independent Contractor: Independent Contractor Exemption. Summary judgment granted to UEF establishing liability of uninsured employer where undisputed affidavit proves painter/bookkeeper had not been granted an independent contractor exemption under section 39-71-120, MCA (1995). While the requirement of an exemption may be a trap for employers unschooled in the technicalities of the 1995 legislation, which added the exemption requirement, the Court must apply the law as written. Even assuming claimant told the employer not to purchase workers' compensation insurance, the advice of a bookkeeper or accountant, or even an attorney, cannot relieve the employer from its statutory obligation.

¶1 This case involves the interpretation and application of 1995 statutes concerning independent contractors. The petition is brought by a putative employer, Z Works, Incorporated (Z Works). Z Works alleges that claimant, Gwyn Barnaby (Barnaby), was injured on October 4, 1996, while painting for it, however, it urges that it is not liable for workers' compensation benefits because (1) Barnaby was an independent contractor and

(2) she expressly advised Z Works not to provide workers' compensation coverage. In its response, the Uninsured Employers' Fund (UEF) asserts that Barnaby was an employee and that UEF is entitled to reimbursement from Z Works for the benefits it has paid on account of Barnaby's October 1996 injury.

¶2 Based on the pleadings and a single affidavit, the UEF moves for summary judgment. It urges that, as a matter of law, Barnaby was not an independent contractor and that her advice to Z Works does not relieve the company of liability for her injury. The UEF's motion is meritorious and is **granted**.

Undisputed facts

¶3 The undisputed facts as derived from the pleadings and an uncontradicted Affidavit of Mary Buswell, who is an employee with the Independent Contractor Central Unit of the Montana Department of Labor and Industry, follow:

1. Gwyn Barnaby was injured on October 4, 1996, while painting for Z Works. (Petition for Hearing, ¶ 1; Barnaby Response to Petition for Hearing, ¶1; UEF Response to Petition at 1.)
2. At the time of the injury, Z Works was not insured. (Petition for Hearing, ¶ 2; Barnaby Response to Petition for Hearing, ¶2; UEF Response to Petition at 2.)
3. At the time of the injury, Barnaby did not have an independent contractor exemption. (Buswell Affidavit at 2.)

Discussion

¶4 The industrial accident at issue in this case occurred on October 4, 1996; hence, the 1995 version of the Montana Workers' Compensation Act applies to the claim. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶5 Under the 1995 Act, as well as under the present and prior acts, employers are required to provide their employees with workers' compensation insurance coverage. Section 39-71-401(1), MCA (1995), provides:

39-71-401. Employments covered and employments exempted. (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.

As apparent from the language of the section, the insurance requirements of the Workers' Compensation Act applies only to employers of employees. There are also specific employments excepted from the Act, § 39-71-401(2)-(5), MCA (1995), but none of the

enumerated exceptions are at issue in this case. The sole dispute is over whether Barnaby was an employee or an independent contractor.

¶6 Section 39-71-118(1), MCA (1995), defines "employee." The definition excludes independent contractors:

39-71-118. Employee, worker, volunteer, and volunteer firefighter defined. (1) 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.

The 1995 Act also defines independent contractor, as follows:

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.

This Court recently construed this provision in *Smith v. Liberty Mutual Fire Ins. Co.*, WCC No. 9612-7677 (November 19, 1997.) In that case, I pointed out that subsection (2) of section 39-71-120, MCA (1995), requires a finding that a worker is an employee unless **all** of the criteria of subsection (1) are met. As in *Smith*, in this case Barnaby did not have "an exemption granted under 39-71-401(3)." Lacking such exemption, she must be deemed an employee.

¶7 In its reply brief, Z Works does not dispute the Affidavit which shows that Barnaby lacked a contractor's exemption, and it has not offered or identified any evidence disputing the fact. Thus, the undisputed facts require that I find that Barnaby was an employee of Z Works at the time of her injury.

¶8 I acknowledge that the requirement of an exemption may be a trap for employers unschooled in the technicalities of the 1995 legislative amendments, which added the exemption requirement. The requirement was repealed in 1997, so it applies only to employments between July 1, 1995 and June 30, 1997. However, irrespective of any surprise or hardship the law may visit upon employers, courts must apply the law as

written by the legislature; they cannot alter it or insert exceptions. *§ 1-2-101, MCA; Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994).

¶19 Z Works also disputes liability based upon its assertion that it hired Barnaby to provide bookkeeping services and relied on her representations that it need not carry workers' compensation insurance. (Petition for Hearing, ¶ 3.) It has provided no evidentiary support for its contention. On the other hand, the UEF has provided no evidence contradicting the assertion. The contention is therefore assumed to be true for purposes of the present motion.

¶10 Assuming Barnaby advised Z Works that it need not carry workers' compensation insurance, Z Works was not entitled to rely on the advice and the advice did not relieve it from its statutory obligation to provide insurance. The advice of a bookkeeper or accountant, or even an attorney, cannot relieve the employer from its statutory obligation.

¶11 The undisputed facts presented to the Court require me to find that the claimant was an employee of Z Works and that Z Works was an uninsured employer at the time of claimant's injury. The UEF properly accepted liability for the claim. Accordingly, UEF's Motion for Summary judgment is **granted**.

JUDGMENT

¶12 1. The Court has jurisdiction of this controversy pursuant to section 39-71-2905, 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." The enumerated exceptions do not apply.

¶13 2. The UEF is entitled to reimbursement from Z Works with respect to the workers' compensation benefits it has properly paid to Barnaby. The Court has not been requested to determine the amount due. However, it retains continuing jurisdiction to do so in the event Z Works and the UEF are unable to agree as to the amount.

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

¶15 4. Any party to this dispute may have 20 days in which to request a rehearing from this Order Granting Summary Judgment.

DATED in Helena, Montana, this 3rd day of March, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. John A. Lence

Mr. Kevin Braun

Ms. Gwyn Barnaby - Certified Mail

Date Submitted: February 23, 1998