

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 4

WCC No. 2000-0110

AMERICAN SEAMLESS RAINGUTTERS

Petitioner

vs.

INDEPENDENT CONTRACTOR CENTRAL UNIT/
UNINSURED EMPLOYERS' FUND

Respondent.

DECISION AND JUDGMENT

Summary: The Department of Labor and Industry issued Steven J. Winscot (Winscot) an independent contractor exemption in 1996 and in January 1998 renewed the exemption for three years. In 1999, following a UEF audit, the Department cancelled his exemption effective December 21, 1999, then the Independent Contractor Unit determined he was in fact an employee of American Seamless Raingutters. Winscot claims he is a partner. This appeal follows.

Held: Section 39-71-401(3)(c), MCA, means exactly what it says - an independent contractor (IC) exemption is **conclusive** as to employment status. There is no statutory authority for either the Workers' Compensation Court or the Department to retroactively review employment status in the face of an exemption or cancel an exemption prior to the 3-year term of exemption provided in section 39-71-401(3)(d), MCA. Moreover, once the Department issues the exemption, there is no statutory authority for it to challenge the exemption. 39-71-401(3)(f), MCA. Since fraud was not pled the Court makes no determination as to whether that might be a basis for revoking an exemption, however, provision for a civil penalty for misstatements and the lack of a provision for revocation at least raises an issue as to whether even fraud may constitute a basis for redetermining employment status. (**See [Wild v. Montana State Compensation Fund, 2003 MT 115](#) ; [Mathews v. Liberty Northwest Ins. Corp., 2003 MT 116](#). Section 39-71-401(3), MCA (1999), in which Supreme Court held that the workers' compensation statutes, when read together, do not preclude factual inquiry into whether an employee/employer relationship exists even though the worker has been issued an independent contractor exemption.)**)

Topics:

Independent Contractor: Independent Contractor Exemption. Section 39-71-401(3)(c) means exactly what it says - an IC exemption is **conclusive** as to employment status. There is no statutory authority for either the Workers' Compensation Court or the Department to retroactively review employment status in the face of an exemption.

Independent Contractor: Independent Contractor Exemption. There is no statutory authority for the Department or the Workers' Compensation Court to cancel an IC exemption prior to expiration of the 3-year period for the exemption which is specified in 39-71-401(3)(d).

Independent Contractor: Independent Contractor Exemption. The Department of Labor and Industry does not have standing to challenge an IC exemption once the exemption is issued. 39-71-401(3)(f).

Montana Code: 39-71-401(3)(f). The Department of Labor and Industry does not have standing to challenge an IC exemption once the exemption is issued. 39-71-401(3)(f).

Montana Code: 39-71-401(3)(c). Section 39-71-401(3)(c) means exactly what it says - an IC exemption is **conclusive** as to employment status. There is no statutory authority for either the Workers' Compensation Court or the Department to retroactively review employment status in the face of an exemption.

Montana Code: 39-71-401(3)(d). There is no statutory authority for the Department or the Workers' Compensation Court to cancel an IC exemption prior to expiration of the 3-year period for the exemption which is specified in section 39-71-401(3)(d), MCA.

Jurisdiction: Original Jurisdiction. The Court lacks jurisdiction, at least where fraud is not pled, to inquire retroactively into employment status where the Department had previously issued an IC exemption covering the time in question.

1 This matter is an appeal from a determination by the Independent Contractor Central Unit (ICCU) of the Department of Labor and Industry (Department). The ICCU found that Steven J. Winscot (Winscot) was an employee of American Seamless Raingutters (American Raingutters) between November 1, 1998 and January 14, 2000 (ex. 2), a period for which American Raingutters had no workers' compensation insurance (exs. 3 and 15 at 1; Trial Test.).

2 The determination below came about as the result of an audit conducted of American Raingutters by the Uninsured Employers' Fund (UEF). (Ex. 2.) The UEF auditor concluded that Winscot was an employee of American Raingutters, not an independent contractor. (*Id.*) Lester C. Sichelstiel (Sichelstiel), one of the owners of American Raingutters, then

requested a determination by the ICCU. (*Id.*) When the ICCU affirmed the UEF's position, this appeal followed.

3 The ICCU is an administratively created unit within the Department authorized to make initial determinations regarding employment status. It has the first word as to whether a worker is an employee or an independent contractor. The regulations authorizing the ICCU are discussed in this Court's prior decision in *Art v. Independent Contractor Central Unit*, 2000 MTWCC 37.

4 Under section 39-71-415, MCA, as amended in 1999, the Workers' Compensation Court has the final word regarding employment status under workers' compensation laws. Section 39-71-415, MCA (1999), provides in relevant part:

39-71-415. Procedure for resolving disputes regarding independent contractor status. (1) If an individual, employer, or insurer has a dispute as to whether an individual is an independent contractor or an employee as defined in this chapter, any party may, after mediation pursuant to department rules, petition the workers' compensation court for resolution of the dispute.

See also section 39-71-401(3)(f), MCA (1999), (quoted in paragraph 17).

5 A trial was held in Helena on November 13, 2000. Exhibits 1 through 24 and 27 were admitted after all objections were withdrawn. Exhibit 25 was not offered. Exhibit 26 was duplicative of Exhibit 24. Steven Winscot, Lester Sichelstiel, Lacey Culver, and Neil Brunett were sworn and testified.

6 The facts essential to the Court's determination on appeal are not in dispute. Therefore, this decision will be in narrative form.

Discussion

7 Initially, it is apparent that the UEF intends to pursue a penalty against American Raingutters with respect to its lack of insurance coverage for Winscot. The penalty is authorized by section 39-71-504(1)(a), MCA, which provides:

39-71-504. Funding of fund -- option for agreement between department and injured employee. The fund is funded in the following manner: (1) (a) The department may require that the uninsured employer pay to the fund a penalty of either up to double the premium amount the employer would have paid on the payroll of the employer's workers in this state if the employer had been enrolled with compensation plan No. 3 or \$200, whichever is greater. In determining the premium amount for the calculation of the penalty under this subsection, the department shall make an assessment based on how much premium would have been paid on the employer's past 3-year payroll for periods within the 3 years when the employer was uninsured.

8 Imposition of the penalty is dependent upon a finding that Winscot was American Raingutters' employee from November 1, 1998, to January 14, 2000. Standing in the way of such finding is an independent contractor exemption issued Winscot on December 13, 1996 (ex. 11-3; Tr. Test.), and renewed in January 1998. The renewed exemption was for the three years ending January 15, 2001. (Ex. 11-3).

9 On December 9, 1999, an IC questionnaire was sent out to Winscot for him to complete and return, but he apparently failed to do so. (Ex. 11-3.) On December 21, 1999, the Department cancelled Winscot's IC exemption. (*Id.*)

10 The Department's actions in this case raise two questions which are determinative of the dispute. The first issue is whether the Department can ignore an exemption it issued and retroactively redetermine Winscot's employment status. The second is whether it can cancel an exemption prior to its expiration based on the failure of a worker to promptly reply to a questionnaire. While these issues were not expressly raised by the parties, they must be determined because they are jurisdictional: If the Department and the Court lack statutory authority to rescind or cancel Winscot's exemption, then neither has jurisdiction to do so.

11 The IC exemption at issue herein was issued in January 1998 under the 1997 version of section 39-71-401, MCA. The statute provides in relevant part:

(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.

(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:

....

(d) employment of . . . **working members of a partnership** . . . except as provided in subsection (3).

....

(3)(a) A sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company who represents to the public that the person is an independent contractor shall elect to be

bound personally and individually by the provisions of compensation plan No. 1, 2, or 3 **but may apply to the department for an exemption from the Workers' Compensation Act.**

. . . .

(c) **When an application is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.**

(d) The exemption, if approved, remains in effect for 3 years following the date of the department's approval. . . .

39-71-401, MCA (1999), (emphasis added). The 1999 amendments to the section involve jurisdiction of this Court and mediation - they are procedural changes not affecting the IC exemption itself.

12 Under subsection (3) of section 39-71-401, MCA, anyone who asserts s/he is a sole proprietor or a partner may seek an IC exemption and thereby opt-out of the Workers' Compensation Act. The procedure prescribed by statute requires that a worker seeking the exemption apply to the Department for the exemption. The subsection goes on to provide that as to workers who obtain the exemption, the exemption is "**conclusive.**" In *Bouldin v. Uninsured Employers' Fund*, WCC No. 9704-7742, decision and judgment (October 22, 1997), I determined that the "conclusive" language of the section means exactly what it says - a worker who secures an exemption is conclusively deemed an independent contractor.

13 The UEF's position that it can issue the exemption, later investigate whether the worker is in fact an employee, and then retroactively cancel the exemption is contrary to statute. There is no provision for reopening, rescinding, or terminating an exemption once granted. Inserting such provision would make the exemption **non**-conclusive, contradicting the plain terms of the statute and the certainty the statute provides to persons hiring workers with IC exemptions.

14 Further support for this conclusion is found in the appeal procedures set forth in section 39-71-401(3)(f), MCA. The applicable procedure in 1998 (under the 1997 version of the law), provided:

(f) If the department denies the application for exemption, the applicant may contest the denial by petitioning for review of the decision by an appeals referee in the manner provided for in 39-51-1109. An applicant dissatisfied with the decision of the appeals referee may appeal the decision in accordance with the procedure established in 39-51-2403 and 39-51-2404.

As amended in 1999, the subsection now provides:

(f) If the department denies the application for exemption, the applicant may, after mediation pursuant to department rules, contest the denial by petitioning the workers' compensation court.

Both versions provide immediate review of the Department determination concerning an application for exemption. The application was acted on in 1998 triggering the right of review at that time. Significantly, neither the 1997 nor 1998 version of subsection (3)(f) authorizes an appeal of a determination granting an exemption. Moreover, the only one who can seek review is the applicant. The Department and the UEF lack standing to challenge the exemption issued in 1998.

15 Finally, the Department's cancellation of the exemption on December 21, 1999, is plainly contrary to statute, section 39-71-401(3)(d), MCA (1997-1999), which expressly provides that the exemption shall be effective for three years.

16 I do not determine whether an exemption may be rescinded on account of fraud since fraud has not been pled. The fact that a worker may not have satisfied independent contractor criteria when he or she applied for an exemption does not mean that the application is fraudulent, thus the UEF must plead and prove more than just the fact that the worker did not in fact qualify for the exemption. Further, section 39-71-401(3)(e), MCA, expressly provides for a civil penalty for misstatements made in an application for an exemption, providing:

(e) A person who makes a false statement or misrepresentation concerning that person's status as an exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose the penalty for each false statement or misrepresentation. The penalty must be paid to the uninsured employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

Such express provision for civil penalties, and the lack of any provision for rescinding an exemption or redetermining employment status, at least raises an issue as to whether an exemption may ever be retroactively cancelled.

ORDER AND JUDGMENT

17 Based on the forgoing discussion,

18 IT IS HEREBY ORDERED AND ADJUDGED that the Department's determination of January 4, 2000 (ex.2), as well as its December 21, 1999 action cancelling Winscot's IC exemption are **reversed and deemed null and void**.

19 IT IS FURTHER ORDERED AND ADJUDGED that Winscot and Sichelstiel shall recover their costs.

DATED in Helena, Montana, this 25th day of January, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. John C. Doubek
Mr. Charles K. Hail
Submitted: December 12, 2000