

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 67

WCC No. 9802-7919

JOHN GRYWUSIEWICZ

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

CAR WORLD, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant worked as car salesman and carpenter for owner of used car lot who was remodeling a building on a new lot. In a vehicle from the lot, claimant was injured in an automobile accident on his way to work following a medical appointment. The insurer argued claimant was outside the course and scope of employment and was also an independence contractor not covered by the workers' compensation policy due to his carpentry work.

Held: Claimant was not an independent contractor. He did not meet the requirement of section 39-71-120, MCA (1997) that he be engaged in an independent trade, occupation or business. Moreover, at the time of the accident, his remodeling carpentry work was interlaced with his work as a salesman and was subject to the employer's direction and control. The accident occurred in the course and scope of employment, entitling claimant to benefits, where the credible evidence suggested the employer requested claimant to drive company vehicles to and from work, and paid for maintenance and repairs, in order to familiarize claimant, a salesman, with the vehicles and in order to detect problems with the cars being sold.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-120, MCA (1997). Car salesman who was also performing carpentry work to remodel a new building for the employer was not an independent contractor. He did

not meet the requirement of section 39-71-120, MCA (1997) that he be engaged in an independent trade, occupation or business. Moreover, at the time of the accident, his remodeling carpentry work was interlaced with his work as a salesman and was subject to the employer's direction and control.

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-407(3), MCA (1997). Car salesman who was also performing carpentry work to remodel a new building for the employer was injured while driving a vehicle from the lot. The accident occurred in the course and scope of employment, entitling claimant to benefits, where the credible evidence suggested the employer requested claimant to drive company vehicles to and from work, and paid for maintenance and repairs, in order to familiarize claimant with the vehicles and in order to detect problems with the cars being sold.

Employment: Course and Scope: Coming and Going. Car salesman who was also performing carpentry work to remodel a new building for the employer was injured while driving a vehicle from the lot. The accident occurred in the course and scope of employment, entitling claimant to benefits, where the credible evidence suggested the employer requested claimant to drive company vehicles to and from work, and paid for maintenance and repairs, in order to familiarize claimant with the vehicles and in order to detect problems with the cars being sold.

Employment: Course and Scope: Travel. Car salesman who was also performing carpentry work to remodel a new building for the employer was injured while driving a vehicle from the lot. The accident occurred in the course and scope of employment, entitling claimant to benefits, where the credible evidence suggested the employer requested claimant to drive company vehicles to and from work, and paid for maintenance and repairs, in order to familiarize claimant with the vehicles and in order to detect problems with the cars being sold.

Independent Contractor: Generally. Car salesman who was also performing carpentry work to remodel a new building for the employer was not an independent contractor. He did not meet the requirement of section 39-71-120, MCA (1997) that he be engaged in an independent trade, occupation or business. Moreover, at the time of the accident, his remodeling carpentry work was interlaced with his work as a salesman and was subject to the employer's direction and control.

Independent Contractor: Right of Control. Car salesman who was also performing carpentry work to remodel a new building for the employer was not an independent contractor. He did not meet the requirement of section 39-71-120, MCA (1997) that he be engaged in an independent trade, occupation or business. Moreover, at the time of the accident, his remodeling carpentry work was interlaced with his work as a salesman and was subject to the employer's direction and control.

¶1 The trial in this matter was held on April 28, 1998, in Billings, Montana. Petitioner, John Grywusiewicz (claimant), was present and represented by Mr. R. Russell Plath. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. David A. Hawkins. By agreement of the parties, and with the approval the Court, on April 29, 1998, the claimant provided additional testimony outside the Court's presence. Also by agreement and with the Court's approval, on May 19, 1998, additional telephonic testimony of Thomas E. Snellman was taken.

¶2 Exhibits: Exhibits 1 through 3 were admitted without objection.

¶3 Witnesses and Depositions: John Grywusiewicz, Kim M. Hurley and Thomas E. Snellman were sworn and testified. In addition the parties agreed that the Court may consider the depositions of the claimant, Kim M. Hurley and Thomas E. Snellman.

¶4 Issues Presented: As set forth in the Pretrial Order, the following issues are presented for decision:

- Whether Petitioner/Claimant is an independent contractor or an employee.
- Whether Petitioner/Claimant's injury, which was sustained while driving a

vehicle owned and provided by his employer, occurred within the course and scope of his employment.

* * * * *

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

FINDINGS OF FACT

¶6 Claimant is 49 years old. He resides with his significant other, Kim M. Hurley (Hurley), in Billings, Montana.

¶7 Claimant has worked as a logger, construction worker, carpenter and car salesman. He worked as a staff carpenter at Western Montana College (WMC) from 1979 to 1985. While working at WMC, he suffered a back injury which disabled him from full-time carpentry work.

¶8 Claimant thereafter pursued a career as a car salesman. He was employed by Homestead Honda and Subaru from approximately 1990 to 1995. In 1995 he was unemployed for several months. During those months he did some general carpentry work for his landlord in return for a reduction in his rent.

¶9 In 1996 claimant went to work for Thomas E. Snellman (Snellman) at Car World, Incorporated (Car World) in Billings, Montana. He was employed as a car salesman and

worked on a commission basis. Initially, claimant was the only salesman employed by Car World, which on average had between eight and sixteen cars for sale. Snellman also sold cars.

¶10 In October of 1996 Snellman purchased new property for his car lot. Before he could move Car World to the new location, he had to renovate the existing building on the new lot. He closed his old car lot while he proceeded with the renovation.

¶11 During the renovation, Snellman employed claimant to do general carpentry work on the building. Snellman paid claimant \$8 an hour for his work.

¶12 Claimant performed work which did not require a licensed craftsman. Although Snellman did not give claimant specific directions concerning the manner in which he completed his work, he determined the work claimant did and in what order and generally oversaw claimant's work. While claimant provided some of his own tools, Snellman provided others. Snellman also paid for materials, either through cash he gave to claimant or by check made out directly to material suppliers.

¶13 At claimant's suggestion, Snellman paid claimant "under the table" by making out checks for claimant's work to Kim M. Hurley or Kim Hurley Construction. Hurley is a registered nurse and has never operated a construction business.

¶14 While working as a car salesman for Snellman, claimant was paid on the 1st and 15th of each month. He was paid on the same schedule while working as a carpenter.

¶15 While working as a car salesman, claimant worked Monday through Saturday. He maintained the same work week while working as a carpenter.

¶16 In January 1997 Snellman reopened Car World at its new location. The new car lot accommodated 30 to 40 used cars. Claimant returned to his salesman duties. Snellman also hired an additional salesman, increasing the sales force (including Snellman) to three.

¶17 Despite opening for business at the new car lot, the remodel of the building at the new location was incomplete in January 1997. Snellman therefore had claimant continue work on the remodel while selling cars. When Snellman and the other salesman were able to wait on customers, claimant worked on the building.

¶18 One of claimant's remodeling projects was to build a cabinet and install a new sink in a small kitchen area. Claimant built the cabinet and on Saturday, August 2, 1997, he installed the sink. However, the sink leaked.

¶19 After work on Saturday, August 2, 1997, claimant drove a pickup truck provided by Snellman home. On Sunday, August 3, 1997, he drove to a hardware store either in the truck or in Hurley's car and purchased materials he needed to stop the leak in the sink.

Snellman did not direct claimant to pick up the materials on his day off nor prevent him from doing so during a regular workday.

¶20 On Monday morning the claimant drove Snellman's pickup to the Billings Veterans' Administration Center (VA) for a personal appointment. The appointment was at 9:00 a.m. and claimant notified Snellman that he would be late to work.

¶21 Following his VA appointment, claimant returned to the pickup and began driving to work. On his way to work, his pickup collided with another car at an intersection. Claimant hit his head and was injured.

¶22 Claimant testified that while working as a salesman Snellman provided him with a vehicle to drive to and from work. Snellman testified, and the Court finds, that the vehicles he furnished to his salesmen were to enable them to familiarize themselves with the vehicles, and thereby assist their sales efforts, and to determine whether repairs were needed. Snellman rotated the vehicles so his salesmen could check them out. He testified: "I'd like to have them switch now and then so that they can drive a different car and check and see if there was anything wrong with it. And things to be repaired on them you know look at them." (Trial Test.) Snellman also stated he rotated the vehicles so the salesmen would have exposure to a greater number of cars and so that no vehicle accumulated too many miles. The salesmen purchased gas for the vehicles but Car World did all maintenance and repair work on them.

¶23 Claimant testified that after he left the VA for work he intended to drive by an auto shop that repaired and maintained vehicles for Car World. He wanted to see if any Car World vehicles were ready to return to the lot. Snellman testified that the drive by was not a part of claimant's duties and claimant confirmed that Snellman had not requested him to check on cars at the shop.

¶24 At the time of the accident, Snellman and Car World were insured by the State Fund.

¶25 Claimant filed a claim for compensation, however, the State Fund denied the claim. In this proceeding the State Fund stands on its denial and argues that when claimant was injured he was either acting as an independent contractor or was not within the course and scope of his employment with Snellman and Car World.

¶26 During the period beginning in 1996, up until his accident, claimant was employed exclusively by Car World.

¶27 The insurer's denial of liability was not unreasonable.

CONCLUSIONS OF LAW

I.

¶128 The injury in this case occurred on August 4, 1997, therefore this claim is governed by the 1997 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶129 Claimant must prove by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

III.

¶130 The State Fund does not dispute claimant's employment status insofar as his services as a car salesman, however, it claims that he was an independent contractor when doing remodeling work.

¶131 The 1997 Workers' Compensation Act 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; and
- (b) is engaged in an independently established trade, occupation, profession, or business.

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

¶132 The claimant does not meet the statutory criteria. At the time of his accident, he was not engaged in any independent trade, occupation or business. *Lundberg v. Liberty Northwest Ins. Co., Inc.*, 268 Mont. 499, 504, 887 P.2d 156, 159 (1994). Moreover, at the time of the auto accident, his remodeling work was interlaced with his work as a salesman and was subject to Snellman's direction and control.

V.

¶133 The Court must still determine whether the claimant was working in the course and scope of his employment at the time of the accident.

¶134 At the time of the accident the claimant was traveling to work. It has long been the rule that unless travel to and from work is paid for by the employer or is of special benefit to the employer such travel is not within the course and scope of employment duties and is not covered under the Workers' Compensation Act. *Hagerman v. Galen State Hospital*, 174 Mont. 249, 251, 570 P.2d 893, 894 (1977).

¶135 In 1987 the legislature adopted an express provision governing employee travel. Section 39-71-407(3), MCA, as amended through 1997, provides:

(3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

- (a) (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and
- (ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
- (b) the travel is required by the employer as part of the employee's job duties.

At the time of his August 4, 1997 accident, claimant was driving to work in a vehicle furnished by Car World. Thus he meets the first requirement of subsection (a)(i), which requires that the transportation be furnished by the employer. The more difficult question is whether he meets the second part (a)(ii).

¶136 *State Compensation Ins. Fund v. James*, 257 Mont. 348, 849 P.2d 187 (1993), considered the meaning of subsection (3)(b) of section 39-71-407, MCA. The operative language of the section is that the "travel is required [by the employer] as a part of the employee's job duties." Focusing on the phrase "as a part of", the Supreme Court construed the subsection 'as equivalent to the phrase "in the course and scope of" employment from the previous common law.' 257 Mont. at 352, 849 P.2d at 190.

¶137 The language of subsection (3)(a)(ii), which refers to "an *integral* part or condition of employment," adds the word "integral" to the mix. If that language requires more than the "course and scope" requirement of subsection (3)(b), then the requirement is meaningless since the claimant can avoid the heavier burden by satisfying subsection (3)(b).

Subsections (3)(a) and (3)(b) are in the alternative -- only one of them need be satisfied. Thus, whether or not the employer furnishes or pays for the travel, the claimant is entitled to compensation under subsection (3)(b) if the travel was in the course and scope of employment.

¶138 A second alternative construction of subsection (3)(a)(ii) is that it also requires proof that the claimant was acting in the course and scope of his employment while driving to work. If that interpretation is adopted, then the subsection is legally equivalent to that of subsection (3)(b) and is redundant since a determination that the claimant was acting within the course and scope of his employment satisfies subsection (3)(b) irrespective of whether the employer furnishes or pays for the transportation.

¶139 The third possible interpretation of subsection (3)(a)(ii) is one requiring some lesser connection with employment than the traditional course and scope analysis. That alternative seems repugnant to the use of the word "integral."

¶140 Rules of statutory interpretation cut against each of the above interpretations. Statutes should be construed so as to give them meaning. *Albright v. State By and Through State*,

281 Mont. 196, 206, 933 P.2d 815, 821 (1997). All three of the possible interpretations of subsection (3)(a)(ii) are at odds with this fundamental precept. The first renders the subsection meaningless. The second renders it redundant, thus meaningless. The third renders the word "integral" meaningless.

¶41 However, parsing the statute is critical only if the claimant cannot satisfy the course and scope requirement of subsection (3)(b). If he satisfies that requirement, the Court need not determine whether subsection (3)(a)(ii) imposes some greater or lesser standard.

¶42 The general test for determining whether an injury is work related is set out in *Courser v. Darby School Dist. No. 1.*, 214 Mont. 13, 692 P.2d 417 (1984). That test is:

(1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted from the activity.

214 Mont. at 16-17; 692 P.2d at 419. In *Courser* the Supreme Court determined that injuries suffered by a claimant in an automobile accident while commuting between his home in Darby and Western Montana College in Dillon were compensable where the claimant, a teacher, was attending the summer courses at the specific recommendation of his school district employer. The claimant enrolled in the summer courses at the specific request of his employer to make him eligible for a principal position in the Darby schools. The employer promised an increase in salary upon completion of the courses and the employer received a benefit because claimant increased his qualifications and became eligible for promotion to a school principal. The Court held that not every one of the cited factors need be satisfied and did not state specifically which of the factors were satisfied. On the whole, however, it found that the test was satisfied.

¶43 In a later case, the Supreme Court reiterated an earlier, simpler test for determining whether travel is work related:

In cases where some reasonably immediate service to the employer can be discerned the claim has been sustained. Where there has been no reasonably immediate service, the claim has been denied.

Ogren v. Bitterroot Motors, Inc., 222 Mont. 515, 519, 723 P.2d 944, 946 (1986).

¶44 Applying the foregoing principles to the facts of this case, I find and conclude that the claimant was acting in the course and scope of his employment at the time of his August 4, 1997 auto accident and is entitled to workers' compensation benefits. The employer requested claimant to drive company vehicles to and from work and paid for maintenance and repairs. Claimant's driving of the vehicle had a direct and immediate benefit to the employer: By driving the vehicle, the claimant was able to identify problems with the used

vehicles sold by his employer, thus facilitating vehicle repair and thereby helping his employer's used car business. No prospective used car driver wants to buy a car in need of immediate repairs. Driving company vehicles provided an additional benefit by familiarizing claimant with the vehicles he was selling. That familiarity presumably permitted him to match cars with prospective customers, thereby facilitating sales.

¶45 Whether or not claimant's trip to the VA was a deviation, he was on his way to work when the accident occurred. Whether or not Snellman contemplated claimant's obtaining plumbing materials on claimant's day off, claimant was on his way to work when the accident happened. Whatever other personal use the claimant made of the truck, Snellman clearly contemplated his use of the truck in driving to and from work as a part of claimant's employment.

VI.

¶46 Claimant is not entitled to attorney fees since this case presents legitimate issues of fact and law.

VII.

¶47 Since claimant has proven his claim for benefits, he is entitled to his costs.

JUDGMENT

¶48 1. The Court has jurisdiction in this case. §§ 39-71-2401, -2905, MCA.

¶49 2. On August 4, 1997, the claimant suffered an industrial injury while in the course and scope of his employment with Car World, Incorporated. His employer's insurer, State Fund, is liable for his injury. Neither party has asked the Court to determine the amount of benefits due claimant, thus this JUDGMENT does not provide for specific benefits.

¶50 3. Claimant is entitled to his costs in an amount to be determined pursuant to the Court's Rule 24.5.342.

¶51 4. The claimant is not entitled to attorney fees.

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

¶53 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 24th day of September, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. R. Russell Plath

Mr. David A. Hawkins

Date Submitted: May 22, 1998