IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 6

WCC No. 2001-0294

MARK MATHEWS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BJS CONSTRUCTION, INCORPORATED

a Montana Corporation

Employer.

SUMMARY JUDGMENT

REVERSED & REMANDED 4/29/03

Summary: Insurer seeks summary judgment where at the time of his industrial injury the claimant had an independent contractor exemption covering the type of work he was doing.

Held: The claim is barred by section 39-71-401(3)(c), MCA (1999), which provides that a worker with an independent contractor exemption is precluded from receiving workers' compensation benefits.

Topics:

Independent Contractor: Independent Contractor Exemption. Where claimant had a valid independent contractor exemption, provided a copy of the exemption to the contractor for whom he was working, and understood he was working as an independent contractor, he is barred from claiming worker's compensation benefits from the employing contractor's insurer. [Note: This decision was reversed in *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116.]

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-401(3)(c), MCA (1997). Where claimant had a valid independent contractor exemption, provided a copy of the exemption to the contractor for whom he was working, and

understood he was working as an independent contractor, he is barred from claiming worker's compensation benefits from the employing contractor's insurer. [Note: This decision was reversed in *Mathews v. Liberty Northwest Ins. Corp.*, 2003 MT 116.]

¶1 The petitioner, Mark Mathews (Mathews), filed a petition seeking workers' compensation benefits with respect to an accident occurring on June 8, 2000, while working for BJS Construction, Incorporated (BJS). Liberty Northwest Insurance Corporation (Liberty), which insured BJS at the time of the accident, moves for summary judgment on the ground that at the time the claimant was injured he had a valid independent contractor certificate which is conclusive as to his employment status and precludes his now claiming that he was a covered employee. § 39-71-401(3)(c), MCA 1999; *Bouldin v. Uninsured Employers' Fund,* WCC No. 9704-7742, Decision and Judgment (October 22, 1997)*; American Seamless Raingutters v. Independent Contractors Central,* 2001 MTWCC 4.

Uncontroverted Facts

¶2 The following facts appear from the pleadings, depositions and deposition exhibits, and affidavits. The facts as set forth below are uncontroverted:

¶2a On June 8, 2000, claimant was working as a carpenter helping frame a building on a construction project of BSJ. (Mathews Dep. Ex. 12.)

¶2b BJS is a general contractor which primarily contracts for the framing of buildings. (Shroeder Dep. at 5.)

¶2c On June 8, 2000, claimant was applying plywood sheeting to the roof when he fell off the roof and broke his left leg. (Mathews Dep. at 22-23; Mathews Dep. Ex. 12.)

¶2d BJS was insured by Liberty at the time of the claimant's accident. (Petition for Hearing and Response to Petition for Hearing.)

¶2e On July 14, 2000, Mathews filed a claim for compensation. (Mathews Dep. Ex. 12.)

¶2f On August 4, 2000, Liberty wrote claimant a letter stating it was accepting liability for the claim. (Mathews Dep. Ex. 14.)

¶2g On August 11, 2000, Liberty again wrote to claimant, this time advising him that it had "completed our investigation of your claim" and was denying the claim because he was an independent contractor. (Mathews Dep. Ex. 15.)

¶2h In fact, claimant had an Independent Contractor (IC) Exemption on the date of his accident. He applied for the exemption on December 31, 1997. (Mathews Dep. Ex. 1; Connor Dep. Ex. 1.) In conjunction with his application, he filed an affidavit, made under oath, certifying that his occupation was "carpentry" and that he worked as an independent contractor. (*Id.*) His affidavit specifically acknowledged, "**I am**

not eligilble for workers' compensation benefits or unemployment insurance benefits from the hiring agent related to my work as an independent contractor." (*Id.*, emphasis in original.) The affidavit further acknowledged that any exemption granted to him "will remain in effect for **three years** for the occupations listed on the certificate, **unless I notify the Department in writing** that I want to have the exemption revoked." (*Id.*, emphasis in original.) In compliance with his request, the Department issued him a Certificate of Independent Contractor Exemption certifying that claimant was engaged in an independent trade as a "CARPENTRY CONTRACTOR." (Mathews Dep. Ex. 2.) The IC Exemption was for the period December 31, 1997 to December 31, 2000.

¶2i Records of the Department show that the IC Exemption was in fact in effect on June 8, 2000. (Connor Dep. Ex. 1 - printout of computer screen of information concerning the Exemption.)

¶2j At the time claimant went to work for BJS he was holding himself out as an independent contractor. While BJS had employees working for it and performing similar tasks as claimant, claimant and BJS agreed that claimant would work as an independent contractor. (Matthews Dep. at 45-47; Schroeder Dep. at 39-40.) Claimant provided BJS with a copy of his IC Exemption. (Matthews Dep. at 10; Shroeder Dep. at 39-40.) In his deposition claimant admitted that while working for BJS he was "claiming to be" an independent contractor and not an employee. (Matthews Dep. at 26-27.) He submitted invoices for his work and no taxes were withheld from his earnings. (*Id*. at 45; Mathews Dep. Exs. 4 through 11.)

Discussion

I.

¶3 This case is governed by section 39-71-401(3)(c), MCA (1999), which provides in relevant part:

> (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.
>
> (b) The application must be made in accordance with the rules adopted by the department. There is a $25 fee for the initial application. Any subsequent application renewal must be accompanied by a $25 application fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset the costs of administering the program.

(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. To maintain the independent contractor status, an independent contractor shall every 3 years submit a renewal application. A renewal application must be submitted for all independent contractor exemptions approved on or after July 1, 1995. The renewal application and the $25 renewal application fee must be received by the department at least 30 days before the anniversary date of the previously approved exemption.

. . .

As I held in *Dwight Bouldin v. Uninsured Employers' Fund,* WCC No. 9704-7742, Decision and Judgment (October 22, 1997), subsection (c) "expressly and unequivocally states that where a person obtains an independent contractor exemption from the Department, he or she is precluded from obtaining benefits under the Workers' Compensation Act." *Accord American Seamless Raingutters v. Independent Contractor Central Unit,* 2001 MTWCC 4, ¶ 12. Indeed, the obvious purpose of the provision is to provide certainty as to the employment status of those who have an IC Exemption and eliminate the post-injury factual inquiry which claimant asks the Court to embark upon. At the time of his injury, the claimant in this case had an effective IC Exemption, he had presented it to BJS, and he was working under it. Section 39-71-401(3)(c), MCA, applies, and bars his claim for workers' compensation benefits.

II.

¶4 The only remaining possible question is whether Liberty is precluded from raising the defense afforded it under section 39-71-401(3)(c), MCA, on account of its initial acceptance of the written claim submitted to it by the claimant. Claimant has not, however, raised or argued the issue. Even if he had, the initial acceptance does not bar Liberty from contesting the claim.

¶5 While Liberty initially accepted the claim, it learned of claimant's exemption and then denied the claim within the 30 days permitted by section 39-71-606(1), MCA (1999). Indeed, the denial followed within one week. Under these circumstances, the denial was timely and the insurer is not precluded from contesting the claim.

¶6 Moreover, even if the denial is deemed void because of the initial acceptance, Liberty has alleged that claimant is estopped from asserting that it accepted the claim. (Response to Petition for Hearing, ¶ 3.) "As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse." *Selley v. Liberty Northwest Ins. Corp.,* 2000 MT 76, ¶ 9, 299 Mont.

127, 998 P.2d 156. The following six elements are required for the doctrine of estoppel to apply:

> (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse.

Id. at ¶ 10. Since the claimant has not raised the acceptance of the claim as barring Liberty's defense, neither party has addressed the six elements. The facts, however, on their face indicate that Liberty accepted the claim based on claimant's representation that he was an employee of BJS, and his concealment of his independent contractor status, and only later learned of his IC status. Claimant was aware of his IC status and that his exemption precluded benefits, thus he knew that his representation and concealment were false and misleading. All six elements are met.

SUMMARY JUDGMENT

¶7 The claimant is barred by section 39-71-401(3)(c), MCA (1999), from seeking workers' compensation benefits with respect to his June 8, 2000 industrial injury since he had an independent contractor exemption applicable to the carpentry work he was doing. His petition is therefore **dismissed with prejudice**.

¶8 This JUDGMENT is certified as final for purposes of appeal.

¶9 Any party to this dispute may have 20 days in which to request a rehearing from this Summary Judgment.

DATED in Helena, Montana, this 1st day of February, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Submitted: August 1, 2001