IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 9

WCC No. 2001-0286

KELLY WILD

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

FREGIEN ROOFING

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

REVERSED & REMANDED 4/29/03

Summary: Claimant, who had worked for many years as an independent roofing contractor, went to work for another roofing company but arranged with the company to work as an independent contractor under his Independent Contractor (IC) Exemption. He fell off a roof while working for the contractor and thereafter brought this action seeking workers' compensation benefits from the contractor's insurer.

Held: Since claimant had a valid outstanding IC Exemption, his claim is barred by section 39-71-401(3)(c), MCA, (1999).

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 workers' compensation benefits from the employing contractor's insurer. § 39-71-401(3)(c), MCA (1999). [Note: This decision was reversed in *Wild v. Montana State Compensation Fund*, 2003 MT 115.]
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> **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 *Wild v. Montana State Compensation Fund*, 2003 MT 115.]

¶1 Like *Matthews v. Liberty Northwest Ins. Co.,* 2002 MTWCC 6, this is a case in which a claimant with an Independent Contractor (IC) Exemption and who was paid as an independent contractor now urges he was in reality an employee and is therefore entitled to workers' compensation benefits under his employer's insurance policy. For the same reasons I set forth in *Matthews*, the claimant's contention in this case is without merit and his petition for benefits must be dismissed.

FINDING OF FACTS

¶2 The parties have submitted the case for decision without trial and based on depositions of claimant and Russ Fregien, as well as the exhibits attached to those depositions. (June 4, 2001 Minute Entry.) The salient facts material to the disposition of the case are as follows.

¶3 Petitioner, Kelly Wild (claimant), is a roofer by trade. He began roofing in the early 1980s, probably 1983. (Wild Dep. 19, 23.) Between that time and the year 2000, and except for a few short stints of employment, he worked as an independent roofing contractor.

¶4 While working as an independent contracting roofer, claimant worked by himself. He did not employ others in his business.

¶5 In 1993 claimant applied to the Montana Department of Labor and Industry (Department) for an IC Exemption as a roofing contractor. (Wild Dep. Ex. 1.) In an April 1, 1993 letter, the Department approved his application and notified claimant that "[a]s an independent contractor you also will not be able to file a claim in the event you sustain an industrial injury or an occupational disease." (*Id*.)

¶6 Claimant reapplied for the Exemption on July 22, 1996, February 25, 1997, and March 4, 1998.[1] In each application for renewal, including the last one, claimant signed an affidavit stating that he was in fact an independent contractor and acknowledging he was ineligible for workers' compensation benefits from anyone hiring him. (*Id*., Exs. 3-5.) The 1998 application further acknowledged, "I also understand that if this affidavit is granted, the *Certificate of Independent Contractor Exemption* will remain in effect for **three years** for those occupations listed in the certificate, **unless I notify the Department in writing** that I want to have the exemption revoked." (*Id*., Ex. 5; italics and bolding in the original.) As a result of the 1998 application and affidavit, made March 4, 1998 (*id*.), the claimant was issued an IC Exemption for the period of April 1, 1998 through April 1, 2001. (*Id*., Ex. 6.) Claimant's exemptions collectively covered the period of April 1, 1993 to April 1,

2001. At the time of the accident at issue in this case, he had not cancelled his IC registration. (Wild Dep. at 42.)

¶7 Russ Fregien (Fregien) is also a roofer and has his own roofing business. He employs workers on his jobs, doing business as Fregien Construction.

¶8 Fregien Construction was insured by the State Compensation Insurance Fund on the date of the accident which is at issue in this case.

¶9 In July 2000 claimant needed work in addition to what he had been able to contract directly. He approached Fregien and asked about working for him. (Wild Dep. at 43; Fregien Dep. at 19.) Fregien agreed to hire claimant.

¶10 The testimony of claimant and Fregien concerning the hiring arrangement is conflicting. Since the Court was not provided the opportunity to personally hear their testimony, it must resolve the conflict based on objective clues found in their testimony and the exhibits.

¶11 Initially, both agreed that claimant was hired on an hourly basis and paid $20 an hour for his work. Claimant, however, testified that he assumed he was hired as an employee. (Wild Dep. at 45.) He denied giving Fregien a copy of his IC Exemption or that Fregien even asked for it, however, he simply did not recall when asked if he had given a copy of the IC Exemption to Susan Krueger, who was Fregien's bookkeeper. (Fregien Dep. at 51-52.) Fregien, on the other hand, testified that while he was willing to hire claimant as an employee, and in fact had other employees, claimant wanted to work as an independent contractor so he could receive a higher hourly wage and would not be subject to withholding taxes. (*Id.* at 47.) According to Fregien, he would have paid claimant $15 an hour if an employee rather than the $20. (*Id*. at 47.) He testified that claimant provided him with a copy of his IC Exemption within a week or two of being hired, and that he relied upon it in agreeing to pay $20 an hour without withholding. (*Id*. at 21-22, 123, 125.)

¶12 On the face of the facts presented, Fregien's recollection of what occurred is more probably correct. Claimant testified that in his accident he suffered a head injury which has impaired his memory. (Wild Dep. at 13.) Fregien had in his possession a copy of claimant's exemption for the period April 1, 1998 to April 1, 2001. (Fregien Dep. at 21-22.) His testimony in that regard was not rebutted. No deductions were taken from the payments made to claimant. (*Id*. at 125 and attached Ex. 8; Wild Dep. at 69-70 and attached Ex. 7.) In the memorandum portion of the checks written to claimant the words "sub.", "sub cont." and "sub wages" appeared, indicating that claimant was being paid as a subcontractor. (Wild Dep. Ex. 7.) Both claimant and Fregien agreed that claimant while claimant was working for Fregien he was also still working on other jobs for which he had directly contracted. By mutual agreement claimant was free to work on those other jobs as he saw fit, thus coming and going from Fregien jobs as he chose. (Wild Dep. at 48-51; Fregien Dep.

at 49, 71.) All of these facts lend support to the conclusion that claimant and Fregien agreed that claimant would work for Fregien under claimant's IC Exemption and that claimant would therefore receive a higher hourly rate and not be subject to withholding taxes, and I so find.

¶13 On October 17, 2000, while roofing on a project for Fregien Construction, claimant fell off the roof and suffered head, shoulder, and rib injuries.

¶14 I make no findings of fact with respect to whether claimant was an employee under the A-B test of section 39-71-120(1), MCA, since I determine as a matter of law that the claimant's IC Exemption precludes him from obtaining workers' compensation benefits.

CONCLUSIONS OF LAW

¶15 The 1999 version of the Workers' Compensation Act governs this case since that was the law in effect at the time of the claimant's industrial accident on October 17, 2000. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶16 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *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).

¶17 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.
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> (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.
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> **(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. [Emphasis added.]

As I held in *Dwight Bouldin v. Uninsured Employers' Fund,* WCC No. 9704-7742, Decision and Judgment (October 22, 1997), and more recently in *Matthews v. Liberty Northwest Insurance Corporation,* 2002 MTWCC 6, ¶ 3, "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 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 Fregien Construction and he was working under it. Section 39-71-401(3)(c), MCA, therefore applies and bars his claim for workers' compensation benefits.

¶18 Since benefits are expressly barred by section 39-71-401(3)(c), MCA, a post-injury factual inquiry into whether claimant was in fact an independent contractor or an employee is precluded. Claimant's IC Exemption, as noted, is conclusive.

¶19 Finally, in his brief the claimant contends that if section 39-71-401(3)(c), MCA, is determinative, then the section is unconstitutional. The contention is not made in either the petition or in the Pretrial Order, which was signed by both parties. It is therefore outside the scope of issues presented to the Court for decision.

<u>JUDGMENT</u>

¶20 The claimant's claim for workers' compensation benefits is barred by section 39-71-401(3)(c), MCA (1999). His petition is **dismissed with prejudice**.

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

¶22 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 12th day of February, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Hunt
Mr. Greg E. Overturf
Submitted: July 9, 2001

1. When claimant first applied for an IC Exemption in 1993, the statute governing the exemption provided that "the election [exemption] remains effective and the independent contractor retains his status as an independent contractor until he notifies the department of any change in his status and provides a description of his present work status." § 39-71-403(3)(d), MCA (1991). The section was amended in 1995 to provide for annual registration, thus exemptions were good only for one year. § 39-71-403(3)(d), MCA (1995). In 1997 the section was again amended to provide that the IC Exemption is good for three years and to also require re-registration of contractors obtaining an exemption prior on and after July 1, 1995. § 39-71-403(3)(d), MCA (1997).