

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 41

WCC No. 2008-2046

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**KATHY BENTON**  
as Personal Representative  
of the Estate of Mickey Benton

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**and**

**ROBERT AND SUSAN HARRYMAN of Oregon,  
and/or ALAN MEYER and ERICA RODRIGUEZ,  
d/b/a ROGUE TRANSPORTATION of Oregon**

**Respondents/Uninsured Employers.**

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ORDER GRANTING RESPONDENT ALAN MEYER AND ERICA RODRIGUEZ,  
d/b/a ROGUE TRANSPORTATION'S MOTION FOR SUMMARY JUDGMENT

**Summary:** Rogue Transportation, an Oregon business, moves the Court for summary judgment arguing, *inter alia*, that pursuant to § 39-71-117(4), MCA, it was not an employer of Mickey Benton at the time of his accident and death because it did not maintain a place of business in Montana. Petitioner contends that Rogue did maintain a place of business in Montana because Rogue maintained a place of business wherever its vehicle was located.

**Held:** Rogue did not maintain a place of business in Montana pursuant to § 39-71-117(4), MCA. Rogue's motion for summary judgment is granted.

## Topics:

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329.** ARM 24.5.329(3) is designed to facilitate the Court's resolution of a motion for summary judgment by clearly identifying the issues in dispute and setting forth the material facts which would preclude summary judgment. Although Petitioner has not complied with this rule, she has submitted her own affidavit accompanying her response to Rogue's motion to dismiss and/or for summary judgment. Much of Petitioner's affidavit is a series of conclusory statements. Nevertheless, as this motion pertains to the first issue (whether Meyer d/b/a Rogue Transportation or Rodriguez were Petitioner's "employer" within the meaning of § 39-71-117(4)), it is clear from Petitioner's brief and accompanying affidavit that the basis for Petitioner's opposition to this motion is her contention that Rogue maintained a "place of business" wherever Rogue's truck was located.

**Summary Judgment: Disputed Facts.** ARM 24.5.329(3) is designed to facilitate the Court's resolution of a motion for summary judgment by clearly identifying the issues in dispute and setting forth the material facts which would preclude summary judgment. Although Petitioner has not complied with this rule, she has submitted her own affidavit accompanying her response to Rogue's motion to dismiss and/or for summary judgment. Much of Petitioner's affidavit is a series of conclusory statements. Nevertheless, as this motion pertains to the first issue (whether Meyer d/b/a Rogue Transportation or Rodriguez were Petitioner's "employer" within the meaning of § 39-71-117(4)), it is clear from Petitioner's brief and accompanying affidavit that the basis for Petitioner's opposition to this motion is her contention that Rogue maintained a "place of business" wherever Rogue's truck was located.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-117.** Where Petitioner argues that a motor carrier's use of an employee truck driver in this state effectively constitutes maintaining a place of business because the truck driver uses a truck, cell phone, computer, and log book to carry out his duties in this state, the Court concludes that the motor carrier business does not maintain a place a business and, therefore, was not an employer pursuant to § 39-71-117(4), MCA.

**Employers: Motor Carriers.** Where Petitioner argues that a motor carrier's use of an employee truck driver in this state effectively constitutes

maintaining a place of business because the truck driver uses a truck, cell phone, computer, and log book to carry out his duties in this state, the Court concludes that the motor carrier business does not maintain a place a business and, therefore, was not an employer pursuant to § 39-71-117(4), MCA.

**Discovery.** The Court has wide discretion to order discovery in certain circumstances pursuant to ARM 24.5.329. Where a party has made a blanket request of this Court to stay its ruling on a motion for summary judgment without proposing the discovery she seeks and establishing how the proposed discovery could preclude summary judgment, a request for a stay of the summary judgment ruling is not well-taken.

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329.** The Court has wide discretion to order discovery in certain circumstances pursuant to ARM 24.5.329. Where a party has made a blanket request of this Court to stay its ruling on a motion for summary judgment without proposing the discovery she seeks and establishing how the proposed discovery could preclude summary judgment, a request for a stay of the summary judgment ruling is not well-taken.

¶ 1 Alan Meyer and Erica Rodriguez, d/b/a Rogue Transportation (“Rogue”) move the Court for summary judgment on Petitioner’s claims.<sup>1</sup> Rogue raises three issues which it contends warrant summary judgment in its favor. They are as follows:

- I. Neither Alan Meyer, d/b/a Rogue Transportation, nor Erica Rodriguez is an “employer” pursuant to Montana law.
- II. Kathy Benton, in her capacity as the Personal Representative of the Estate of Mickey Benton, lacks standing to bring this case.
- III. Kathy Benton’s petition was untimely pursuant to Montana Code Annotated § 39-71-520, MCA.<sup>2</sup>

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<sup>1</sup> Rogue’s motion sought “to dismiss Petitioner’s claims and/or grant summary judgment in favor of Respondents.” (Rogue’s Motion to Dismiss/Motion for Summary Judgment and Brief in Support, at 1.) However, both Petitioner and Rogue have submitted affidavits and exhibits in support of their respective positions regarding this motion. Therefore, I consider Rogue’s motion as one for summary judgment only.

<sup>2</sup> Rogue’s Motion to Dismiss/Motion for Summary Judgment and Brief in Support at 3-5.

¶ 2 I find the first issue to be dispositive of this matter. Therefore, I will not address issues two or three.

### Standard of Review

¶ 3 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.<sup>3</sup>

### Uncontroverted Material Facts

¶ 4 Pursuant to ARM 24.5.329(3), Rogue has filed a statement of uncontroverted facts in support of its motion for summary judgment.<sup>4</sup> The rule also requires that “[a]ny party opposing a motion filed under this rule shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party.”<sup>5</sup> The rule is designed to facilitate the Court’s resolution of a motion for summary judgment by clearly identifying the issues in dispute and setting forth the material facts which would preclude summary judgment. Although Petitioner has not complied with this rule, she has submitted her own affidavit accompanying her response to Rogue’s motion to dismiss and/or for summary judgment. Much of Petitioner’s affidavit is a series of conclusory statements. Nevertheless, as this motion pertains to the first issue (whether Meyer d/b/a Rogue Transportation or Rodriguez were Petitioner’s “employer” within the meaning of § 39-71-117(4)), it is clear from Petitioner’s brief and accompanying affidavit that the basis for Petitioner’s opposition to this motion is her contention that Rogue maintained a “place of business” wherever Rogue’s truck was located.

¶ 5 For purposes of this motion, the Court accepts as true, the facts set forth below:

1. Mickey Benton died as a result of a single motor vehicle accident that occurred on July 3, 2006, near Superior, Mineral County, Montana.<sup>6</sup>

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<sup>3</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

<sup>4</sup> Motion to Dismiss/Motion for Summary Judgment and Brief in Support at 2.

<sup>5</sup> ARM 24.5.329(3).

<sup>6</sup> Petition for Hearing, ¶¶ 1 and 3.

2. At the time of the accident, Mickey Benton was driving a tractor and semi-trailer combination vehicle.<sup>7</sup>
3. The vehicle was owned by Respondents Robert and Susan Harryman (“Harrymans”) and leased to Rogue.<sup>8</sup>
4. Rogue is an Oregon business.<sup>9</sup> Rogue is a motor carrier authorized to engage in interstate commerce pursuant to a Federal Department of Transportation authority.<sup>10</sup>
5. At the time of the accident, neither Meyer, Rodriguez, nor Rogue were enrolled under Montana Compensation Plan No. I, II, or III.<sup>11</sup>
6. At the time of Mickey’s death, he was a resident of the State of Montana.<sup>12</sup>
7. Mickey had been delegated possession of the vehicle.<sup>13</sup> He also possessed a computer, cell phone, dispatch log, and trip log that he used to receive and record dispatches. Dispatches were sent from Oregon and were received anywhere Mickey was located.<sup>14</sup>

### Discussion

¶ 6 Petitioner argues that the vehicle Mickey was driving at the time of his accident was personal tangible property “*which by its nature is in constant motion so that business is conducted wherever the property is located.*”<sup>15</sup> Petitioner contends that it follows that

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<sup>7</sup> Petition for Hearing, ¶ 1.

<sup>8</sup> Petition for Hearing, ¶ 3.

<sup>9</sup> Affidavit of Alan Meyer, ¶ 2.

<sup>10</sup> Petition for Hearing, ¶ 3; Affidavit of Alan Meyer, ¶ 2, and Exhibit A to Affidavit of Alan Meyer.

<sup>11</sup> Affidavit of Alan Meyer, ¶ 4.

<sup>12</sup> Affidavit of Katherine Benton, ¶ 5. (Ex. A to Petitioner’s Response to Respondent Rogue[’s] Motion to Dismiss.

<sup>13</sup> *Id.*, ¶ 18.

<sup>14</sup> *Id.*, ¶ 17.

<sup>15</sup> Petitioner’s Response to Respondent Rogue[’s] Motion to Dismiss at 3, emphasis in original.

Rogue maintained a “place of business” wherever the vehicle was located.<sup>16</sup> Moreover, Petitioner notes that Mickey used a computer, cell phone, dispatch log, and trip log to receive and record his dispatches from Rogue. Although Petitioner acknowledges that the dispatches were sent from Oregon, she contends they were received wherever Mickey was located. All of these facts, Petitioner argues, support a finding that Rogue maintained a place of business in Montana and preclude summary judgment.

¶ 7 Section 39-71-117, MCA reads, in pertinent part, as follows:

(4) An interstate or intrastate common or contract motor carrier that maintains a place of business in this state and uses an employee or worker in this state is considered the employer of that employee, is liable for workers’ compensation premiums . . . .

¶ 8 The Court must construe a statute so as to avoid an absurd result.<sup>17</sup> Section 39-71-117(4), MCA, specifically applies to interstate and intrastate common and contract motor carriers. It is axiomatic that a “motor carrier” is engaged in a mobile transport business. If I were to accept Petitioner’s argument that a motor carrier was maintaining a place of business wherever one of its trucks was located, this would mean that all motor carriers who travel through Montana would be considered Montana employers while their trucks are traveling within the borders of the state. Such a statutory construction would lead to an absurd result which this Court is mandated to avoid.

¶ 9 Moreover, when the Court interprets a statute, it is to read all parts of a statute as a whole and strive to give effect to all of its provisions.<sup>18</sup> Section 39-71-117(4), MCA, is written in the conjunctive in that it requires **both** that the motor carrier maintain a place of business in this state **and** use an employee or worker in this state to be considered an employer. Boiled down, Petitioner’s argument is that a motor carrier’s use of an employee in this state effectively constitutes maintaining a place of business in this state. I am not persuaded by this argument. The fact that a truck driver uses a truck, cell phone, computer, and log book to carry out his duties does not constitute maintaining a “place of business” since these are merely the tools used to perform those duties. If I were to accept Petitioner’s argument that an employee performing his duties in this state constituted maintaining a “place of business,” I would be effectively abrogating the first criteria of § 39-71-117(4), MCA, and not giving effect to all parts of the statute.

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<sup>16</sup> *Id.*

<sup>17</sup> *S.L.H. v. State Compensation Mut. Ins. Fund*, 2000 MT 362, ¶ 17, 303 Mont. 364, 15 P.3d 948.

<sup>18</sup> *Barnard v. Liberty Northwest Ins. Corp.*, 2008 MT 254, ¶ 17.

¶ 10 I conclude that Rogue did not maintain a place of business in Montana, and therefore, was not an employer pursuant to § 39-71-117(4), MCA.

¶ 11 In Petitioner's Response to Respondent Rogue[s] Motion to Dismiss she requests that, to the extent this Court considers Respondent's motion to dismiss/motion for summary judgment as a motion for summary judgment, the Court's ruling be stayed to permit discovery to continue. The Court has wide discretion to order discovery in certain circumstances pursuant to ARM 24.5.329(8), which is identical to Rule 56(f), Mont. R. Civ. P. The rule reads:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.<sup>19</sup>

¶ 12 Regarding a court's discretion under Rule 56(f), Mont. R. Civ. P., the Montana Supreme Court has stated:

District courts have inherent discretionary power to control discovery. *J.L. v. Kienenberger* (1993), 257 Mont. 113, 119, 848 P.2d 472, 476. This discretionary power extends to deciding whether to deny or to continue a motion for summary judgment pursuant to Rule 56(f), M.R.Civ.P. *Howell v. Glacier General Assur. Co.* (1989), 240 Mont. 383, 386, 785 P.2d 1018, 1019. A district court does not abuse its discretion in denying a Rule 56(f), M.R.Civ.P., motion where the party opposing a motion for summary judgment does not establish how the proposed discovery could preclude summary judgment. *Howell*, 240 Mont. at 386, 785 P.2d at 1020.<sup>20</sup>

¶ 13 Petitioner has made a blanket request of this Court to stay its ruling on Rogue's motion for summary judgment. She has failed, however, to both propose the discovery she seeks, and establish how the proposed discovery could preclude summary judgment in this matter. Therefore, Petitioner's request for a stay of the summary judgment ruling is not well-taken.

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<sup>19</sup> Mont. R. Civ. P. 56(f).

<sup>20</sup> *Environmental Contractors, LLC v. Moon*, 1999 MT 178, ¶ 19, 295 Mont. 268, 983 P.2d 390.

JUDGMENT

¶ 14 Respondents Alan Meyer and Erica Rodriguez, d/b/a Rogue Transportation's motion for summary judgment is **GRANTED** and they are dismissed from the case with prejudice.

¶ 15 Petitioner's request for a stay of this Court's summary judgment ruling in the present matter is **DENIED**.

DATED in Helena, Montana, this 14th day of August, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: James P. O'Brien  
Mark Cadwallader  
Kelly M. Wills  
Charles G. Adams  
Submitted: May 23, 2008