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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT FOR THE STATE OF MONTANA

MARK MATHEWS,)	WCC Number 2001-0294
)	
Petitioner,)	BRIEF IN OPPOSITION TO MOTION
)	RE: AFFIRMATIVE DEFENSE
vs.)	
)	
LIBERTY NORTHWEST INSURANCE)	
CORPORATION,)	
)	
Respondent/Insurer)	

Liberty Northwest's motion regarding the affirmative defense of fraudulent inducement must be denied because BJS Construction had no right to rely on the Independent Contractor Exemption Certificate. On the contrary, BJS Construction had an affirmative duty to inquire into the elements which define a worker as an employee versus an independent contractor. BJS Construction is in control, and actively engages in conduct, which establishes most of the elements of the AB test. BJS Construction must inquire into the remaining facts to determine if it is, in fact, employing a worker like Mark Mathews as a employee or an independent contractor. The affirmative defense of fraudulent inducement is a factual impossibility in this context and the motion regarding the affirmative defense should therefore be denied.

Even assuming, *arguendo*, an employer could raise fraudulent inducement it would have to be raised as an affirmative defense *affirmatively* pled in the responsive pleading. Mark Mathews moved to strike Liberty Northwest's belated attempt to assert an *affirmative* defense and renews that motion here. Mark Mathews was deprived of every opportunity throughout discovery to inquire into and prepare to rebut the affirmative defense of fraud. Liberty Northwest failed to plead fraud in its answer, at any time throughout discovery, and at any time before the close of Brian Schroeder's deposition. In fact, Liberty Northwest waited until after the completion of Brian Schroeder's deposition to first notify Mark Mathews that it would assert an affirmative defense of fraud.

BJS Construction waited until after the close of Brian Schroeder's deposition, President of BJS Construction, after the closure of formal discovery, to place Mark Mathews on notice that it would later raise the affirmative defense of fraudulent inducement. *Deposition of Brian Schroeder*, pp. 46-47. BJS Construction's timing prevented Mark Mathews from inquiring of Brian Schroeder into the facts which may support its contention that fraudulent inducement exists. BJS Construction compounded this 'trial by ambush' strategy by failing to affirmatively plead the facts which it contends support fraudulent inducement once it raised this affirmative defense. BJS Construction failed to plead any facts with specificity which it may prove to establish the nine elements of fraud.

Liberty Northwest now files a Supplemental Brief in Support of Affirmative Defense. Liberty Northwest's failure to plead the affirmative defense of fraudulent inducement until after the close of its client's deposition and after the close of discovery defeated the notice provisions of pleading an affirmative defense *affirmatively*. All of the facts recited in the supplemental brief were known to BJS Construction *before* this claim for workers' compensation benefits was filed. Liberty Northwest timed the notice to Mark Mathews to prevent him from inquiring into these matters at Brian Schroeder's deposition. Liberty Northwest waited until after Brian Schroeder's deposition was complete to announce that BJS Construction would claim fraudulent inducement as an affirmative defense. Notably, the facts supporting the affirmative defense were not shared with Mark Mathews until the following week when BJS first filed supplemental contentions asserting fraudulent inducement.

The affirmative defense of fraud must be plead with specificity and affirmatively in the answer or other responsive pleading. *Rule 8(c), Montana Rules of Civil Procedure; Nimmick v. Hart*, 248 Mont. 1, 8, 808 P.2d 481, 486 (1991); *Pracht v. Rollins*, 239 Mont. 62, 68, 779 P.2d 57, 61(1989); *Chandler v. Madsen*, 197 Mont. 234, 241, 642 P.2d 1028, 1032 (1982); *Ekestrand v. Wunder*, 94 Mont. 57, 20 P.2d 622 (1933). This general rule includes an exception where the facts and circumstances which comprise the fraud are not known or could not be discovered prior to the commencement of discovery. No such exception exists in this case.

Wherefore, Mark Mathews respectfully requests that the Court deny BJS Construction's motion regarding the affirmative defense of fraudulent inducement. Alternately, Mark Mathews requests the Court to strike BJS Construction's Supplemental Brief in Support of Affirmative Defense for failure to provide notice and affirmatively plead fraud in its answer.

DATED this 30th day of June 2003.

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