

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 6

WCC No. 2015-3511

SCOTT EMANUEL

Petitioner

vs.

MONTANA STATE FUND

Respondent and Third Party Petitioner

vs.

**UNINSURED EMPLOYERS' FUND and
PETE LITTLE d/b/a LITTLE ROOFING AND CONSTRUCTION**

Third Party Respondents.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Summary: Respondent moves to dismiss the Petition on the grounds that this matter is time-barred under § 39-71-520(1), MCA, which provides that “[a] dispute concerning uninsured employers’ fund benefits must be appealed to mediation within 90 days from the date of the determination.” Petitioner opposes Respondent’s motion, arguing that § 39-71-520, MCA, is inapplicable to his case because he is not seeking benefits from the UEF.

Held: Respondent’s motion is denied because Petitioner is not seeking “uninsured employers’ fund benefits.” Rather, Petitioner seeks benefits under § 39-71-405(1), MCA, which provides, in relevant part:

An employer who contracts with an independent contractor to have work performed of a kind which is a regular or a recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment of benefits under this chapter to the employees of the contractor

if the contractor has not properly complied with the coverage requirements of the Worker's Compensation Act.

The time limitation in § 39-71-520(1), MCA, is inapplicable to this case. Moreover, § 39-71-415(1), MCA, specifically provides that disputes over benefits between an insurer and a claimant involving an issue of whether the claimant was an employee or an independent contractor are governed by § 39-71-2905, MCA, which contains a two-year statute of limitation. Petitioner brought this case well within two years of the date of Respondent's denial of liability. Therefore, this Court has jurisdiction to decide the merits of Petitioner's claim.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. State Fund's reliance on the 90-day statute of limitations in § 39-71-520(1), MCA, is misplaced, as that statute applies only to disputes concerning uninsured employers' fund benefits. Here, Petitioner chose to pursue benefits from State Fund under § 39-71-405, MCA, and the two year statute of limitations in § 39-71-2905(2), MCA, applies.

Limitations Periods: Workers Compensation Court Petitions. State Fund's reliance on the 90-day statute of limitations in § 39-71-520(1), MCA, is misplaced, as that statute applies only to disputes concerning uninsured employers' fund benefits. Here, Petitioner chose to pursue benefits from State Fund under § 39-71-405, MCA, and the two year statute of limitations in § 39-71-2905(2), MCA, applies.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.35.101. While the UEF can rely upon an ICEC as a reason to deny UEF benefits, it has no authority to make a decision whether a person is an employee or an independent contractor that is binding beyond a claim for UEF benefits; that authority lies with the ICCU under ARM 24.35.101(6).

Independent Contractor: Independent Contractor Exemption. While the UEF can rely upon an ICEC as a reason to deny UEF benefits, it has no authority to make a decision whether a person is an employee or an independent contractor that is binding beyond a claim for UEF benefits; that authority lies with the ICCU under ARM 24.35.101(6).

Independent Contractor: Independent Contractor Central Unit. While the UEF can rely upon an ICEC as a reason to deny UEF benefits, it has no authority to make a decision whether a person is an employee or an independent contractor that is binding beyond a claim for UEF benefits; that authority lies with the ICCU under ARM 24.35.101(6).

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-415. The Workers Compensation Court has jurisdiction to resolve disputes between claimants and insurers to determine whether a claimant is an independent contractor or an employee, so long as the petition is filed within two years after benefits are denied.

¶ 1 Respondent and Third Party Petitioner Montana State Fund (State Fund) moves to dismiss the Petition for Hearing (Industrial Injury),¹ arguing the matter is time-barred under § 39-71-520(1), MCA, and therefore this Court lacks subject matter jurisdiction. Petitioner Scott Emanuel opposes State Fund's motion, arguing he is not seeking benefits from the Uninsured Employers' Fund (UEF) and therefore § 39-71-520(1), MCA, is inapplicable.

Procedural Matter

¶ 2 Although State Fund moves to dismiss this matter, it has submitted exhibits outside the pleadings.² Emanuel has also submitted evidence from outside the pleadings.³ This Court would normally convert State Fund's motion to a summary judgment motion and require the parties to authenticate their exhibits.⁴ However, Emanuel has agreed that State Fund has accurately set forth the procedural facts and tacitly admits that State Fund's exhibits are authentic.⁵ Likewise, State Fund tacitly

¹ Petition for Hearing (Industrial Injury) (Petition), Docket Item No. 1.

² [Respondent's] Motion to Dismiss Petition for Hearing and Brief in Support (Respondent's Motion), Exs. A-F, Docket Item No. 14.

³ Petitioner's Brief in Opposition to Respondent's Motion to Dismiss (Petitioner's Brief), Ex. 1, Docket Item No. 22.

⁴ See *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶ 9, 340 Mont. 56, 172 P.3d 1232 (citation omitted) (stating that when deciding a motion to dismiss for lack of subject matter jurisdiction, "The inquiry is whether the complaint states facts that, if true, would grant the district court subject matter jurisdiction."). See also *Steck v. Liberty Mut. Northwest*, 2003 MTWCC 17, ¶ 2; *Alfson v. Allstate Prop. & Cas. Ins. Co.*, 2013 MT 326, ¶ 13, 372 Mont. 363, 313 P.3d 107 (citations omitted) (stating, "It is well established that unauthenticated documents cannot be considered on a motion for summary judgment. . . . A document which lacks a proper foundation to authenticate it cannot be used to support a motion for summary judgment.").

⁵ Petitioner's Brief at 2.

admits that Emanuel's exhibits are authentic.⁶ Since the parties do not dispute the facts relevant to the issue of whether Emanuel's claim is time-barred, this Court will rule on State Fund's Motion to Dismiss Petition for Hearing based upon the exhibits submitted without requiring the parties to authenticate them.

Facts

¶ 3 On August 13, 2013, the Department of Labor & Industry issued Emanuel an Independent Contractor Exemption Certificate (ICEC) for the occupations of roofing and general construction. The ICEC was effective from August 13, 2013, through August 12, 2015.⁷

¶ 4 Emanuel contends that documents submitted to the Department of Labor & Industry in support of his application for his ICEC were fraudulent.⁸

¶ 5 Emanuel was injured on December 10, 2013, while performing work for Pete Little d/b/a Little Roofing and Construction (Little), which had contracted with Nistler Homes, LLC (Nistler Homes).⁹

¶ 6 Little did not have workers' compensation coverage.¹⁰ State Fund insured Nistler Homes at the time of Emanuel's injury.¹¹

¶ 7 On July 30, 2014, the UEF denied liability for Emanuel's claim and submitted Emanuel's claim to State Fund pursuant to § 39-71-405, MCA.¹² The UEF explained:

It appears James "Pete" Little d/b/a Little Roofing & Construction, did not have a workers' compensation policy in effect at the time of Emanuel's December 10, 2013, injury. Furthermore, the Department has determined to exercise its discretion pursuant to Section 39-71-418 and 39-71-419, MCA, to revoke the Independent Contractor Exemption Certificate of Mr. Emanuel retroactively to the date of application as a result of the

⁶ See Respondent Montana State Fund's Reply to Petitioner's Brief in Opposition to Respondent's Motion to Dismiss, Docket Item No. 24.

⁷ Respondent's Motion, Ex. A.

⁸ Petitioner's Brief at 4.

⁹ Petition at 1.

¹⁰ Respondent's Motion, Ex. B.

¹¹ Respondent's Motion at 2.

¹² *Id.*

misrepresentations made at the direction of his employer. Additionally, pursuant to its authority under 24.33.142, ARM, and 39-9-201, MCA, the Department has determined to exercise its discretion to suspend the Contractor Registration of Mr. Little retroactively to the date of application as a result of misrepresentations made in his application. Both of these revocations result from information obtained from the depositions of Little and Emanuel in a separate suiting [sic] in District Court.¹³

¶ 8 On August 29, 2014, State Fund advised Emanuel and the UEF that it was denying liability for Emanuel's claim. State Fund explained the reason for its denial as follows:

As you are aware, Mr. Emanuel had a current independent contractor exemption certificate on the date of injury. He was working within the scope of the exemption at the time of injury. While the Department's ability to revoke Mr. Emanuel's exemption is not disputed, it is equally clear that, pursuant to 39-71-418(3), the revocation "takes effect on the issuance of the decision." In this case the decision to revoke Mr. Emanuel's independent contractor exemption certificate appears, based on correspondence from [the] Department's Independent Contractor Central Unit to Mr. Emanuel, to have occurred on July 30, 2014. As such, on the date of Injury, Mr. Emanuel was working under an independent contractor exemption certificate and not eligible for coverage under any other employer's policy. Section 39-71-405 is inapplicable in this instance.¹⁴

¶ 9 The UEF then paid Emanuel temporary total disability (TTD) benefits under § 39-71-608, MCA.¹⁵

¶ 10 In the fall of 2014, Emanuel, State Fund, and the UEF completed the mandatory mediation process over the dispute concerning State Fund's and the UEF's denials of liability for his claim. Emanuel's position was that either the UEF was liable for his claim because Little was an uninsured employer or State Fund was liable under § 39-71-405, MCA.¹⁶

¶ 11 On December 2, 2014, the UEF sent Emanuel a letter informing him that it was "amending its determination of July 30, 2014." The UEF explained, "The UEF finds that

¹³ Respondent's Motion, Ex. B.

¹⁴ Respondent's Motion, Ex. C.

¹⁵ *Id.*

¹⁶ See Respondent's Motion at 2, Exs. D and E.

you held an Independent Contractor Exemption Certificate (ICEC), effective August 13, 2013, for the occupation of roofing. As an ICEC holder, you waived your rights to workers compensation benefits pursuant to Mont. Code Ann. § 39-71-417, and authorized by Mont. Code Ann. § 39-71-409(2).” The UEF also notified Emanuel that it was terminating his TTD benefits. The UEF notified Emanuel of his appeal rights, specifically stating, “**Under section 39-71-520 of the Workers’ Compensation Act all appeals must be filed within 90 days from the date of this letter, on or before March 2, 2015.**”¹⁷

¶ 12 This Court has not received any information as to whether the Independent Contractor Central Unit’s (ICCU) revocation was appealed, or whether it *sua sponte* amended or rescinded its revocation of Emanuel’s ICEC.

¶ 13 Emanuel did not appeal the UEF’s denial of liability of his claim.

¶ 14 On January 26, 2015, Emanuel commenced this case against State Fund; he did not name the UEF as a Respondent. Emanuel contends: “That at the time of injury, Petitioner was an employee of Little and that Little was a subcontractor employed by Nistler Homes, LLC . . . to perform work which was a recurrent part of the work of Nistler’s business.”¹⁸ Emanuel contends he is entitled to benefits from State Fund under § 39-71-405, MCA.¹⁹

Law and Analysis

¶ 15 This case is governed by the 2013 version of the Workers’ Compensation Act because that was the law in effect on Emanuel’s date of injury.²⁰

¶ 16 State Fund contends that Emanuel’s claim is time-barred under § 39-71-520(1), MCA, which is a 90-day statute of limitations for appealing a determination of the UEF, and argues that this Court does not have subject matter jurisdiction to hear the claim.²¹ Emanuel argues that § 39-71-520(1), MCA is inapplicable because this case is not a dispute concerning UEF benefits and because this case is governed by the jurisdictional requirements of § 39-71-2905(1), MCA.²² Emanuel also argues that since he settled his

¹⁷ Respondent’s Motion, Ex. F (emphasis in original).

¹⁸ Petition at 1.

¹⁹ *Id.* at 2.

²⁰ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687; § 1-2-201, MCA.

²¹ Respondent’s Motion at 3-4.

²² Petitioner’s Brief at 3-4.

tort claims against Nistler Homes for more than \$100,000, he could not obtain any additional benefits from the UEF under §§ 39-71-503(3)(c) and -511, MCA, and therefore, had no reason to continue his claim against the UEF.²³ This Court agrees with Emanuel that he timely filed his claim against State Fund.²⁴

¶ 17 By its plain language, § 39-71-520(1), MCA, applies only to “dispute[s] concerning uninsured employers’ fund benefits.” It states:

A **dispute concerning uninsured employers’ fund benefits** must be appealed to mediation within 90 days from the date of the determination by the department or the determination is considered final.²⁵

¶ 18 The current dispute between State Fund and Emanuel is **not** a dispute over UEF benefits. If Emanuel prevails on his claim against State Fund, he will not receive benefits from the UEF; rather, he will receive benefits from State Fund under § 39-71-405(1), MCA, which states in relevant part:

An employer who contracts with an independent contractor to have work performed of a kind which is a regular or a recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment of benefits under this chapter to the employees of the contractor if the contractor has not properly complied with the coverage requirements of the Worker’s Compensation Act.

¶ 19 Moreover, if Emanuel prevails, State Fund cannot seek reimbursement from the UEF, as § 39-71-405(1), MCA, also states: “Any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses from the contractor primarily liable therein.” Irrespective of whether Emanuel could have pursued an appeal of the UEF’s denial of liability and obtained additional wage-loss benefits had he prevailed, Emanuel has chosen not to pursue any additional benefits from the UEF. Thus, the UEF no longer has any potential liability for Emanuel’s injury and therefore, § 39-71-520(1), MCA, does not apply.

¶ 20 Since Emanuel is not seeking benefits from the UEF, the cases on which State Fund relies are not on point. In *Flynn v. Uninsured Employer’s Fund*,²⁶ the Montana

²³ *Id.* at 2.

²⁴ *Id.* at 5.

²⁵ § 39-71-520(1), MCA (emphasis added).

²⁶ *Flynn*, 2005 MT 269, 329 Mont. 122, 122 P.3d 1216 (overruling on other grounds recognized in *Weidow v. Uninsured Employers’ Fund*, 2010 MT 292, ¶ 23, 359 Mont. 77, 246 P.3d 704).

Supreme Court affirmed a decision of this Court dismissing a claimant's Petition for Hearing against the UEF because the claimant did not appeal the UEF's denial of liability for his claim within 90 days, as required by § 39-71-520(1), MCA. In *Florence v. Morales*,²⁷ an uninsured employer filed a Petition for Hearing contending that the claimant did not suffer an industrial injury and, therefore, that the UEF was not liable for the claim and that the employer was not liable for reimbursing the UEF for the benefits it paid. However, this Court dismissed the case because the uninsured employer missed the 90-day deadline to appeal the UEF's acceptance of liability.

¶ 21 The 90-day statute of limitation in § 39-71-520(1), MCA, applied in *Flynn* and *Florence*, is inapplicable here because, unlike this case, *Flynn* and *Florence* involved disputes over whether a claimant was entitled to benefits from the UEF. Neither *Flynn* nor *Florence* support State Fund's argument that the statute of limitations in § 39-71-520(1), MCA, applies to claims brought under § 39-71-405, MCA, as neither involved the issue of an insurer potentially liable under § 39-71-405, MCA. Emanuel may pursue a claim against State Fund under § 39-71-405, MCA, regardless of the UEF's denial of liability because Emanuel's claim against State Fund is distinct from his claim against the UEF.

¶ 22 Furthermore, the UEF's "finding" that Emanuel had a valid ICEC at the time of his injury is not binding upon him in his claim against State Fund. While the UEF can rely upon an ICEC as a reason to deny a claim for UEF benefits, the UEF has no authority to make a decision as to whether a person is an employee or an independent contractor that is binding beyond a claim for UEF benefits. Within the Department of Labor & Industry, this authority lies with the ICCU. As set forth in the Department of Labor & Industry's rules, the ICCU is "the unit located within the department which is responsible for making employment status decisions for the entire department and other agencies that elect to participate in the ICCU."²⁸

¶ 23 Finally, when a claimant and an insurer have a dispute involving an issue of whether a claimant seeking workers' compensation benefits is an independent contractor or an employee, this Court has jurisdiction. Section 39-71-415(1), MCA, states:

Procedure for resolving disputes regarding independent contractor status. (1) If a claimant and insurer have a dispute over benefits and the dispute involves an issue of whether the claimant is an independent

²⁷ *Florence*, 2011 MTWCC 5.

²⁸ ARM 24.35.101(6).

contractor or employee, either party may, after mediation pursuant to department rules, petition the workers' compensation judge for resolution of the dispute in accordance with 39-71-2905.

Section 39-71-2905(2), MCA, in turn, provides that the statute of limitations for filing a petition in this Court is "within 2 years after benefits are denied." This statute of limitations governs this case, as it is well-established that when a specific statute governs a particular type of claim, it governs over other statutes to the extent of any inconsistency.²⁹

¶ 24 This case falls directly under § 39-71-415(1), MCA. State Fund denied liability for Emanuel's claim on August 29, 2014, on the grounds that Emanuel was working under a valid ICEC for roofing and therefore, that Emanuel had "waived all rights and benefits under the Workers' Compensation Act" under § 39-71-417(7)(b), MCA, and that § 39-71-405, MCA, was "inapplicable." It appears from State Fund's August 29, 2014, letter that its position is that the ICCU did not have authority to revoke Emanuel's ICEC retroactive to the date of his application. Emanuel, however, maintains that his ICEC was void *ab initio* because it was obtained through fraud on the part of Little and that he was therefore an employee.³⁰ Emanuel also claims that even if his ICEC was valid, he was an employee under § 39-71-417(7)(c), MCA.³¹ After Emanuel and State Fund mediated their dispute over whether Emanuel was an independent contractor or an employee of Little at the time of his injury, Emanuel filed his Petition on January 26, 2015 — well inside the two-year statute of limitations set forth in § 39-71-2905(2), MCA — alleging that he was an employee and that State Fund is liable for benefits under § 39-71-405, MCA. Therefore, the Court concludes that Emanuel's Petition was timely and this Court has jurisdiction to decide this dispute.

²⁹ *Boyd v. Zurich Am. Ins. Co.*, 2010 MT 52, ¶ 21, 355 Mont. 336, 227 P.3d 1026 (citations omitted) (*overruled in part on other grounds by Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 49, 365 Mont. 405, 282 P.3d 687). See also *Brookins v. Mote*, 2012 MT 283, ¶ 28, 367 Mont. 193, 292 P.3d 347 (internal quotation marks and citation omitted) (a specific statute controls over a general provision to the extent of any inconsistency). Accord § 1-2-102, MCA.

³⁰ Petitioner's Brief at 4.

³¹ See § 39-71-417(7)(c), MCA ("For the purposes of the Workers' Compensation Act, a person is working under an independent contractor exemption certificate if: (i) the person is performing work in the trade, business, occupation, or profession listed on the person's independent contractor exemption certificate; and (ii) the hiring agent and the person holding the independent contractor exemption certificate do not have a written or an oral agreement that the independent contractor exemption certificate holder's status with respect to that hiring agent is that of an employee.").

ORDER

¶ 25 For the foregoing reasons, Respondent's Motion to Dismiss is **denied**.

DATED this 27th day of April, 2015.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: William P. Joyce and Michael W. Haynes
Greg E. Overturf
Quinlan L. O'Connor
Pete Little d/b/a Little Roofing and Construction

Submitted: April 6, 2015