

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 26

WCC No. 2011-2780

JOHN ERHARD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner broke his leg while moving into housing provided by his employer prior to beginning his first work shift. Respondent denied Petitioner's claim for workers' compensation benefits, alleging that Petitioner was not within the course and scope of his employment at the time of his accident and injury.

Held: Petitioner was not an employee of Respondent's insured at the time his accident and injury occurred. He was not within the course and scope of employment because no employment existed. Therefore, Respondent is not liable for Petitioner's claim.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-118. An employment relationship is a contract between an employer and an employee, and whether an employment relationship exists is a question of contract law. An agreement may contain conditions precedent which the parties must meet before the employment relationship begins. Here, Petitioner was required to complete all necessary paperwork, sign a job application, and have the physical ability to perform the duties of the job. Because Petitioner had not satisfied the conditions precedent at the time of his accident and injury, no employment agreement existed and he was therefore not injured in the course and scope of his employment.

Employment: Employee. An employment relationship is a contract between an employer and an employee, and whether an employment relationship exists is a question of contract law. An agreement may contain conditions precedent which the parties must meet before the employment relationship begins. Here, Petitioner was required to complete all necessary paperwork, sign a job application, and have the physical ability to perform the duties of the job. Because Petitioner had not satisfied the conditions precedent at the time of his accident and injury, no employment agreement existed and he was therefore not injured in the course and scope of his employment.

Employment: Course and Scope: Generally. An employment relationship is a contract between an employer and an employee, and whether an employment relationship exists is a question of contract law. An agreement may contain conditions precedent which the parties must meet before the employment relationship begins. Here, Petitioner was required to complete all necessary paperwork, sign a job application, and have the physical ability to perform the duties of the job. Because Petitioner had not satisfied the conditions precedent at the time of his accident and injury, no employment agreement existed and he was therefore not injured in the course and scope of his employment.

¶ 1 The trial in this matter occurred on December 21, 2011, at the Workers' Compensation Court. Petitioner John Erhard attended and was represented by Thomas J. Murphy. Larry W. Jones represented Respondent Liberty Northwest Insurance Corp. (Liberty). Liberty's claims representative Gary Schild also attended.

¶ 2 Exhibits: I admitted Exhibits 1 through 9 without objection.

¶ 3 Witnesses and Depositions: The depositions of Erhard and Kal Anderson were submitted to the Court and are considered part of the record. Erhard, David D. Freeman, Jr., Kyle Kelly, and Schild were sworn and testified.

¶ 4 Issues Presented: The Final Pretrial Order sets forth the following issues:¹

Issue One: Is Erhard entitled to acceptance of liability?

Issue Two: Is Liberty liable for the payment of the medical bills and indemnity benefits?

¹ Final Pretrial Order at 2.

Issue Three: Is Erhard entitled to costs, attorney fees, and penalty in this action?

FINDINGS OF FACT

¶ 5 Petitioner John Erhard, Broken O Ranch's general manager David D. "Dan" Freeman, Jr., Broken O Ranch's assistant manager Kyle Kelly, and Liberty's senior claims case manager Gary Schild all testified at trial and I found each of them to be a credible witness. I further found the videotaped deposition testimony of Kal Anderson, a former calving facility manager for Broken O Ranch, credible.

¶ 6 The basic facts of this case are largely undisputed.² In December 2010, Erhard applied for a job with Broken O Ranch, a cattle ranch and farm which is approximately 135,000 acres in size. Erhard initially spoke to Freeman about an advertisement the ranch had placed for a feedlot operator. He later traveled to the ranch and met with Kelly, who ultimately offered him a job working in a facility the ranch referred to as the "new barn," which they used as part of their calving operation.

¶ 7 The parties agree that both Kelly and Freeman typically offered employees housing on the ranch property, and that it was "the norm" for most large ranching operations to offer its employees on-site housing. The parties also agree that Kelly would have informed Erhard that the ranch "preferred" that its employees live on the ranch. Kelly and Freeman both testified that the vast majority of the ranch's employees lived on the property although at any given time, a few employees did not reside on the ranch but lived in nearby communities. Erhard testified that when Kelly told him the ranch "preferred" that employees live on the ranch property, he understood this to be a polite way of saying that the ranch expected its employees to do so.

¶ 8 Erhard accepted a position as a ranch hand assigned to the "new barn" calving facility. Kelly testified that he set a start date of January 17, 2011, for Erhard because that was the beginning of a pay period and would also allow Erhard to give adequate notice to his current employer. Erhard expressed a desire to move into the ranch housing prior to beginning work and it was ultimately agreed that he would move into an available house on the ranch on January 8, 2011.

¶ 9 On January 8, 2011, Erhard arrived on the ranch with a few friends who were helping him relocate his household possessions from a home he rented in Belgrade to the house on the ranch. Freeman met Erhard and gave him the key to the house.

² All findings herein are taken from trial testimony except where otherwise noted.

¶ 10 Erhard received some employment paperwork for his new job and he filled out the paperwork and delivered it to the ranch employee who handled personnel matters. Among the paperwork Erhard signed was a “General Job Description for all Employees” which stated:

All jobs offered on the Broken O Ranch will require the physical ability to walk up to 2 miles per day over unlevel and unstable surfaces and be able to lift objects weighing up to 100 lbs. . . . Will be required to complete all necessary paper work and sign a job application work before any job starts. . . .³

¶ 11 Erhard also completed and signed the employee portion of an “I-9” form but did not present the necessary documentation for employer review and verification.⁴ Erhard partially filled out the ranch’s “Application for Employment” form, but did not complete all portions of the form and did not sign it.⁵

¶ 12 Erhard spent the next several days getting settled into the house. On one day, Erhard returned to Belgrade to retrieve more possessions and his son also followed Erhard back to the ranch with some of Erhard’s belongings. On another day, Erhard acquired firewood for the house’s wood-burning stove. Erhard made a few trips into town for groceries. He traveled to Great Falls to visit his daughter on another day.

¶ 13 Erhard testified that he and his wife were having marital difficulties and were living apart at the time that he accepted the ranch hand position. On January 14, 2011, he went to visit his wife and the two of them attended a rodeo in Great Falls. They then returned to the house on the ranch and both stayed overnight on the property. On the morning of January 15, 2011, Erhard continued unpacking his belongings. While he was taking some empty cardboard boxes out of the house, he fell on the outdoor front stairs on the home’s porch. He sought medical treatment and learned that he had broken a bone in his right leg.

¶ 14 Erhard contacted Freeman and told him that he had fallen and suffered an injury. Erhard reported for his first work shift on January 17, 2011, attending a general meeting for all ranch employees at 7 a.m. He was dressed in work clothes and had a medical “boot” on his leg. After the meeting, he was told that he needed to get a doctor’s note stating that he was able to work in his current condition before he would be allowed to work on the ranch. Erhard attempted to obtain a doctor’s release, but instead he

³ Ex. 2 at 21.

⁴ Ex. 2 at 13.

⁵ Ex. 2 at 16-17.

learned that his injury was more serious than the treating doctor had initially believed. He was referred to an orthopedic surgeon who recommended surgery.

¶ 15 Erhard was not released to work and he ultimately had surgery on his leg. During this time, he continued to live in the house on the ranch property. Erhard further testified that he never received any monetary compensation for any work performed on the ranch. He stated that the only work he performed for the ranch during the time he lived there was to shovel snow off the sidewalk in front of his house.

¶ 16 In February 2011, Anderson became Erhard's roommate. Anderson testified that when the ranch hired him, he was asked if he would be willing to temporarily live with a roommate until other housing became available and he agreed to do so.⁶

¶ 17 The ranch's housing policy included a provision which allowed people who were injured, ill, or otherwise unable to work to remain in ranch housing for up to 45 days.⁷ Kelly testified that he spoke with Erhard about the housing policy approximately 30 days after Erhard's accident. Kelly informed Erhard that he would need to vacate the ranch housing if he was unable to return to work without restrictions by March 1, 2011. Erhard explained to Kelly that he had a doctor's appointment scheduled for March 15, 2011, and that he expected to be cleared to return to work at that time. He asked Kelly to allow him to remain in ranch housing until his doctor could make a determination about his work release on March 15, 2011, and Kelly agreed.

¶ 18 However, Erhard had a change of heart about wanting to remain on the ranch pending his work release determination. Erhard testified that he decided that he did not want to work for Broken O Ranch. He informed Anderson that he had decided to leave the ranch and he moved out. Kelly testified that on March 13, 2011, he learned that Erhard had vacated the house and left the ranch.

¶ 19 On March 15, 2011, Erhard filed a First Report of Injury regarding his January 15, 2011, fall.⁸ Schild denied liability for Erhard's claim because he did not believe Erhard was in the course and scope of his employment at the time of his accident and injury.

CONCLUSIONS OF LAW

¶ 20 This case is governed by the 2009 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Erhard's

⁶ Anderson Dep. 23:11 – 24:20.

⁷ Ex. 3 at 3.

⁸ Ex. 1.

industrial accident.⁹ Erhard bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.¹⁰

ISSUE ONE: Is Erhard entitled to acceptance of liability?

¶ 21 Before the Court can determine whether or not Erhard was in the course and scope of his employment at the time of his accident and injury, I first must determine whether he was, in fact, an employee at the time the incident occurred. Section 39-71-118, MCA, defines “employee” in pertinent part as a person in this state who is in the service of an employer, as defined by § 39-71-117, MCA, under any appointment or contract of hire, expressed or implied, oral or written.

¶ 22 Under the WCA, an employment relationship is a contract between the employer and employee. Whether or not the employment relationship exists is a question of contract law.¹¹ In *Bustell v. AIG Claims Service, Inc.*, this Court held that a claimant was an employee when she suffered severe injuries in a motor vehicle accident prior to the start of her first work shift while she was traveling to complete a drug screening test at her new employer’s request. The Court rejected the insurer’s contention that no agreement for employment existed since, it alleged, the claimant had to qualify as a driver. This Court explained:

Certainly, an agreement may contain a condition precedent which must be met before the [employment] agreement springs to life. “A condition precedent is a condition which must be met before the agreement becomes effective.” *Depee v. First Citizen’s Bank of Butte*, 258 Mont. 217, 220, 852 P.2d 592, 593 (1993). In *Depee*, unlike the present case, there was a specific, express provision in a contract for the sale of a mobile home which stated that the sale was conditioned upon bank approval.¹²

¶ 23 In the present case, Erhard, like Bustell, suffered an accident and injury prior to the start of his first work shift. However, in Erhard’s case, his job as a ranch hand required certain conditions to be met prior to the start of his employment. Pertinent to the issue at hand, these conditions precedent included the completion of all necessary paperwork, a signed job application, and the physical ability to walk up to two miles per

⁹ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¹⁰ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¹¹ *Bustell v. AIG Claims Service, Inc.*, 2002 MTWCC 26, ¶ 57 (citing *Gentry v. Douglas Hereford Ranch, Inc.*, 1998 MT 182, ¶ 38, 290 Mont. 126, 962 P.2d 1205), *aff’d on other grounds*, 2004 MT 362.

¹² *Bustell*, 2002 MTWCC 26, ¶¶ 59-60.

day over unlevel and unstable surfaces and the ability to lift objects weighing up to 100 pounds. Erhard had not satisfied any of these conditions precedent at the time of his injury; therefore, no agreement for employment existed at the time of Erhard's accident and injury.

¶ 24 Since Erhard was not an "employee" within the meaning of § 39-71-118, MCA, he was not within the course and scope of employment at the time of his accident and injury. Therefore Liberty is not liable for Erhard's claim.

ISSUE TWO: Is Liberty liable for the payment of the medical bills and indemnity benefits?

¶ 25 Since I have concluded that Erhard is not entitled to acceptance of liability, Liberty is not liable for the payment of medical bills and indemnity benefits.

ISSUE THREE: Is Erhard entitled to costs, attorney fees, and penalty in this action?

¶ 26 Since Erhard is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.¹³

JUDGMENT

¶ 27 Erhard is not entitled to acceptance of liability.

¶ 28 Liberty is not liable for the payment of the medical bills and indemnity benefits.

¶ 29 Erhard is not entitled to costs, attorney fees, or a penalty in this action.

¶ 30 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 1st day of August, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Thomas J. Murphy
Larry W. Jones
Submitted: December 21, 2011

¹³ §§ 39-71-611 and -2907, MCA.