

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 41

WCC No. 9911-8346

ARTHUR SCHIMMEL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

JASPER EXPRESS, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

REVERSED AND REMANDED

Schimmel v. Uninsured Employers' Fund, 2001 MT 280

Summary: Claimant, a long haul truck driver working in several states, but living in Montana, claimed entitlement to Montana Workers' Compensation Benefits following an injury in Missoula County while allegedly "employed" by a company not carrying Montana workers' compensation insurance for claimant. The Uninsured Employers' Fund (UEF) and the employer argued claimant was not an employee within the Montana WCA.

Held: Under 39-71-118, MCA (1997), a worker is an employee for whom an employer must carry WC insurance only if he is a resident of Montana whose employment duties are primarily carried out or controlled within this state. Where the alleged employer had offices in and controlled its business from Washington, and most of claimant's long-haul truck driving occurred outside Montana, claimant was not a "worker in this state" and Montana WC coverage was not required.

Topics:

Constitutions, Statutes, Regulations and Rules: 39-71-118, MCA (1997).

Under 39-71-118, MCA (1997), a worker is an employee for whom an employer must carry WC insurance only if he is a resident of Montana whose employment duties are primarily carried out or controlled within this state. Where the alleged employer had offices in and controlled its business from Washington, and most of claimant's long-haul truck driving occurred outside Montana, claimant was not a "worker in this state" and Montana WC coverage was not required.

Employment: Employee. Under 39-71-118, MCA (1997), a worker is an employee for whom an employer must carry WC insurance only if he is a resident of Montana whose employment duties are primarily carried out or controlled within this state. Where the alleged employer had offices in and controlled its business from Washington, and most of claimant's long-haul truck driving occurred outside Montana, claimant was not a "worker in this state" and Montana WC coverage was not required.

Montana Employment. Under 39-71-118, MCA (1997), a worker is an employee for whom an employer must carry WC insurance only if he is a resident of Montana whose employment duties are primarily carried out or controlled within this state. Where the alleged employer had offices in and controlled its business from Washington, and most of claimant's long-haul truck driving occurred outside Montana, claimant was not a "worker in this state" and Montana WC coverage was not required.

¶1 The trial in this matter was held on April 10, 2000, in Missoula Montana. Petitioner, Arthur Schimmel (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent, Uninsured Employers' Fund (UEF), was represented by Mr. Kevin Braun. Respondent, Jasper Express, Incorporated (Jasper Express), was represented by Mr. Dean K. Knapton.

¶2 Witnesses: The claimant, Lon Jasper, and Thomas Cauley testified.

¶3 Exhibits and Deposition: Exhibits 1 through 3, 6 through 15, 19, 20, 22 through 26 and 28 through 32 were admitted without objection. Exhibits 4, 5, 16, and 21 were admitted over objection. Exhibit 17 was refused. Objections to Exhibits 18 and 27 were withdrawn and those exhibits were admitted. Exhibit 27 duplicates Exhibit 18. The deposition of claimant was also submitted to the Court for its consideration.

¶4 Issues: The issues, as stated by the parties, are as follows:

1. Whether Petitioner would be considered an employee covered by workers' compensation insurance or an independent contractor under the Montana Workers' Compensation Act in relation to the accident of November 18, 1998.

2. If the Court finds Petitioner's claim compensable and finds the Uninsured Employer Fund liable for payments, is the Fund entitled to recover from Respondent/Employer benefits paid to Petitioner and the penalty specified in §39-71-504, MCA.

3. If the Court finds Petitioner is an independent contractor, is Petitioner nonetheless entitled to benefits under §39-71-117(4), MCA.

(Pretrial Order at 3.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, the deposition, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is a long-haul truck driver. He has a seventh grade education but acknowledges that he is able to read and comprehend what he reads.

¶7 At the times material to this proceeding, claimant was a resident of Montana.

¶8 Jasper Express is incorporated and maintains its place of business in the State of Washington. It has no place of business in Montana. Jasper began business in March 1998. It operates a long-haul trucking business. Until recently it exclusively used flatbed trailers in its operations.

¶9 Jasper Express has Interstate Commerce Commission (ICC) authority to operate interstate. Its trucks operate in seven western states, including Montana.

¶10 Jasper Express does not own its own fleet of trucks. Rather, with one exception, it has leased trucks (tractor and flatbed units) from drivers who own their own trucks and then contracted with the driver/owners (hereafter "owner/operators") to haul loads for Jasper Express. It has entered into written agreements with each of its owner/operators similar to one it used with claimant. (Ex. 1). The agreement is entitled "Lease of Motor Vehicle Equipment With Driver" (hereinafter "Owner/Operator Lease").

¶11 The one exception involves the claimant. At the time Jasper Express began business the claimant was driving a truck for B&K trucking. He did not own his own tractor or trailer and B&K had leased its trucks to Jasper Express under the arrangement described in the previous paragraph. Claimant was unhappy with the condition of B&K's trucks. He contacted Jasper Express about getting his own truck and driving for the company, but he had no funds to purchase or make a down payment on a truck. He asked Jasper Express to assist him in purchasing a truck.

¶12 At the time of claimant's initial contact, Jasper Express did not own a flatbed trailer. Around that time one of its other drivers quit and Jasper Express bought that driver's 1973 Peterbilt tractor. Claimant located a used 1988 flatbed trailer and Jasper Express purchased it in contemplation of leasing it to claimant. Jasper Express then leased both the tractor and trailer to claimant. The written agreement, dated September 16, 1998, is found at Exhibit 2 and provides for claimant to pay Jasper Express weekly payments of \$278.17 for a term of 104 payments. The agreement further provides that upon making the last lease payment claimant could purchase the tractor and trailer for a nominal, additional payment of \$1.32. (Ex. 2 at 4.) The lease was unconditional: Payments were due whether or not claimant drove for Jasper Express. Both claimant and Jasper Express were listed as co-owners on the truck's certificate of title.

¶13 Simultaneous to the execution of the truck lease, claimant entered into a separate agreement wherein the claimant agreed to use the tractor and trailer exclusively to haul for Jasper Express. That agreement, as noted earlier, is found at Exhibit 1 and is the same type of agreement Jasper Express used with its other drivers.

¶14 Owner/operators, including claimant, operated their trucks under Jasper Express' ICC operating authority. They were subject to ICC rules and regulations.

¶15 The Owner/Operator Lease between claimant and Jasper Express contained the following provisions, among others:

- Claimant was to use his truck exclusively for hauling loads for Jasper Express. (¶¶ 1, 5, and 16.)
- The agreement was for a year, however, it was terminable by either party upon 30-days written notice to the other. (¶ 4.)
- Claimant was required to provide drivers for his truck and was responsible for hiring, firing, and paying the drivers, as well as for their taxes, unemployment insurance taxes, and workers' compensation insurance. (¶¶ 2, 11, 12, and 20.) When employing other drivers, he was required to furnish

proof that the drivers met all state and federal requirements applicable to the drivers. (¶ 20.)

- Claimant was required to pay for tires, gas, and maintenance on the truck. (¶¶ 1 and 17.) He was also required to insure the truck and pay all license fees and taxes. (¶ 14.)
- Jasper Express agreed to use reasonable efforts to furnish claimant with loads to transport. (¶ 3.)
- Payment to claimant was to be either by the mile or a fixed percentage of the total revenue for the load. (¶ 6.)
- Claimant was required to promptly notify Jasper Express of any accident. (¶ 12.)
- Claimant was required to comply with a list of rules set out in the contract. Among other things, he was prohibited from carrying unauthorized passengers, operating the truck under the influence of alcohol or drugs, stealing, taking unauthorized routes or routes other than the shortest ones, operating the truck unsafely, failing to comply with safety laws, and failing to follow dispatch instructions or make timely delivery. He was required to contact the dispatcher daily, notify the shipper and consignee of his location and estimated arrival time, be courteous to customers, and maintain a reasonable personal appearance. (¶33.)
- The agreement was non-assignable unless Jasper Express consented. (¶ 24.)
- Jasper Express arranged for insurance coverage but claimant was responsible for premiums. (¶ 9.)

¶16 ICC regulations required trucks operating under Jasper Express' ICC authority to be plainly marked with the Jasper Express name, and, in fact, claimant's truck was. The same regulations permitted claimant to put his name on the door of the tractor.

¶17 Claimant was not required to accept all assignments from Jasper Express. In fact, he declined some loads. He also conceded that but for financial considerations on his own part, he was free to take off whatever time he wished.

¶18 As set out in the contract, claimant was not required to personally drive the truck. In fact, immediately following his accident he had his son deliver his load and he thereafter

asked Jasper Express to find another driver for him since he was severely injured. He testified that he supposed the driver was his employee. Jasper Express obtained Montana workers' compensation insurance for claimant to cover the driver.

¶19 All loads claimant picked up and delivered were paid for on a percentage of revenues basis. Jasper Express did not specify the routes he took and there was no financial incentive for it to do so since claimant was not being paid by the mile. However, claimant testified that he generally took the shortest routes since that was the sensible thing to do.

¶20 Many of the requirements of the contract, such as insurance, truck maintenance, prohibitions against drug and alcohol use, and the prohibition against passengers, were mandated by ICC regulations, state laws, or by the insurance industry. Other provisions, such as reporting of moving violations and accidents, arose from safety concerns. Still others, such as those relating to personal appearance, telephoning customers in advance of arrival, and courtesy, arose out of basic business concerns.

¶21 Both Jasper Express and claimant agreed that the contract permitted him to obtain his own loads so long as the hauling agreement was arranged with Jasper Express. (The contract neither authorized nor prohibited his doing so.) In fact claimant obtained at least one customer who thereafter used Jasper Express, through claimant, to haul ore to the East Helena Asarco Smelter.

¶22 As noted in the list of contract provisions, claimant was required to purchase and maintain his own workers' compensation insurance coverage and provide proof of coverage to Jasper Express. Jasper Express never asked for proof of coverage and claimant never secured workers' compensation insurance.

¶23 The Owner/Operator Lease expressly designated claimant an independent contractor. Claimant held himself out to the public as an "owner/operator" of his truck.

¶24 The only employment-related document which Jasper Express had claimant fill out was an I-9 form which was required to show that claimant was a citizen or legal resident of the United States. Jasper Express' manager testified that the document was required out of ignorance and an abundance of caution during company start-up and is no longer required.

¶25 During the short time he drove for Jasper Express, claimant drove a total of 17,628 miles. Of those miles, 3,238 were in Montana. He drove more miles in both Nevada and Idaho, 6,749 and 4,311 respectively. His last few trips were to or from Montana.

¶26 Claimant never picked up a load and delivered that same load within the state of Montana. However, he picked up loads in Montana for delivery in other states and picked up loads in other states for delivery in Montana. He told Jasper Express' manager that he preferred hauling loads that either originated or were destined for Montana, and his desires were considered in offering loads to him.

¶27 Jasper Express did not have either Montana or Washington workers' compensation insurance covering the claimant.

¶28 On November 18, 1998, claimant was injured in Missoula County, Montana, while loading posts onto his truck. A bundle of posts fell on him, severely injuring his left arm and leg.

¶29 After claimant's injury his truck was wrecked (apparently by his successor driver). The insurance proceeds were less than the remaining payments due under the lease agreement with Jasper Express. Claimant therefore signed over his interest in the title and Jasper Express collected the insurance.

CONCLUSIONS OF LAW

¶30 Based on the date of the claimant's industrial accident, the 1997 version of the Montana Workers' Compensation Act applies to this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶31 The threshold question the Court must answer is whether the Montana Workers' Compensation Act applies at all in this case. Section 39-71-117, MCA (1997), defines who is an employer subject to the Act. Subsection (4) specifically addresses both intrastate and interstate motor carriers, providing:

39-71-117. Employer defined. . . .

(4) An interstate or intrastate common or contract motor carrier doing business in this state who uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is subject to loss experience rating in this state unless:

(a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3); or

(b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation furnishing drivers in this state to a motor carrier has obtained workers' compensation insurance on the drivers in Montana both at the inception of employment and during all phases of the work performed. [Emphasis added.]

¶32 Section 39-71-117, MCA, however, cannot be read in isolation of other provisions of the Act. “[S]tatutes must be read and considered in their entirety and legislative intent may not be gained from the wording of one particular section or sentence, but only from consideration of the whole.” *State v. Meader*, 184 Mont. 32, 36-37-601 P.2d 386, 389 (1979). The section ties in with section 39-71-401, MCA (1997), which is the primal section establishing requirements for Montana workers’ compensation coverage. The section provides in relevant part:

39-71-401. Employments covered and employments exempted.

(1) Except as provided in subsection (2), the Workers' Compensation Act **applies to all employers, as defined in 39-71-117, and to all employees, as defined in 39-71-118.** An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer. [Emphasis added.]

The section not only specifies which employers are subject to the Act but also what employees they must cover. Irrespective of whether Jasper Express may be considered “doing business within this state,”¹ the claimant must be an employee whom it was required to cover.

¶33 As set forth in section 39-71-401(1), MCA (1997), whether claimant was an employee for whom coverage was required is governed by section 39-71-118, MCA (1997), which provides in relevant part:

39-71-118. Employee, worker, volunteer, and volunteer firefighter defined. (1) The term "employee" or "worker" means:

¹By necessary implication, interstate carriers not doing business in this state are not required to carry workers’ compensation even if they do not meet the criteria of paragraph (a) or (b) or section 39-71-117(4), MCA (1997). Whether Jasper Express was “doing business within the state” depends on what is meant by that phrase. The phrase is not self-defining and may have a different meaning in different contexts. An isolated transaction within Montana, for example, may not be considered doing business within the state. *E.g. State ex rel. American Laundry Machinery Co. v. Second Judicial Dist. Court in and for Silver Bow County*, 98 Mont. 278,41 P.2d 26, 29 (1934). In another example, section 39-1-1026, MCA, which governs registration of foreign corporations doing business in Montana, specifically provides that transacting business in interstate commerce does not constitute transacting business in Montana.

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. . . .

. . . .

(10) For purposes of this section, an "employee or worker in this state" means:

(a) **a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;**

(b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer;

(c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state; or

(d) a nonresident of Montana who does not meet the requirements of subsection (10)(b) and whose employer elects coverage with an insurer that allows an election for an employer whose:

(i) nonresident employees are hired in Montana;

(ii) nonresident employees' wages are paid in Montana;

(iii) nonresident employees are supervised in Montana; and

(iv) business records are maintained in Montana. [Emphasis added.]

Claimant was a resident of Montana, therefore, subsection (10)(a) governs his status. That subsection requires that he not only be a resident but that his "employment duties are primarily carried out or controlled within this state." His duties were not controlled within the State: Jasper Express' offices and business operations were in Washington. His duties were not primarily carried out in Montana: Most of his driving occurred in other states, indeed his Montana mileage ranked third among the states in which he drove. *Sandoval v. Uninsured Employers' Fund and Jacklin*, 1998 MTWCC 76, ¶ 14 ("primarily carried out" means that the work in Montana must be more than the work in any other individual state). Under this section, claimant was not a "worker in this state," therefore he was not an "employee" as defined by the section and not an employee for whom Jasper Express was required to cover.

¶34 The UEF is liable to claimant only if Jasper Express was an uninsured employer. §39-71-503, MCA (1997).² An uninsured employer is defined in section 39-71-501, MCA (1997), as follows:

39-71-501. Definition of uninsured employer. For the purposes of 39-71-501 through 39-71-511 and 39-71-515 through 39-71-520, "uninsured employer" means an **employer who has not properly complied with the provisions of 39-71-401.**

As discussed above, Jasper Express was not required by section 39-71-401, MCA, to insure the claimant. It therefore was not an uninsured employer and the UEF is not liable for the claimant's November 18, 1998 injuries.

JUDGMENT

¶35 1. Jasper Express was not required to maintain workers' compensation insurance coverage for claimant and was not an uninsured employer.

¶36 2. The Uninsured Employers' Fund is not liable for claimant's November 18, 1998 accident and injuries.

¶37 3. The petition is **dismissed with prejudice.**

¶38 4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶39 5. 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.

² Section 39-71-503 (1), MCA (1997), provides in relevant part:

(1) There is created an uninsured employers' fund. The purpose of the fund is to pay:

(a) to an injured employee of an uninsured employer the same benefits the employee would have received if the employer had been properly enrolled under compensation plan No. 1, 2, or 3, except as provided in 39-71-503(2);

