

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 2

WCC No. 2016-3719

RICHARD A. KUNZ

Petitioner

vs.

ELECTRIC INSURANCE COMPANY

Respondent/Insurer.

**APPEALED TO MONTANA SUPREME COURT – MARCH 12, 2018
SETTLED (DISMISSED WITH PREJUDICE) – JANUARY 14, 2019**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner, a Montana resident, was hired in Montana, but traveled to work at power plants throughout the United States, and one in Europe, for four to six months out of each year. Petitioner's employer had not assigned him to any of its Montana jobs. After Petitioner was injured on a job in Texas, the person who handled claims for his employer reported his claim to its insurer as a Montana claim, filled out a Montana First Report of Injury and Occupational Disease and put it in his claims file, and told Petitioner he did not need to file a claim in Texas. Notwithstanding, Respondent denied liability on the grounds that Petitioner's employment was not covered by the Montana Workers' Compensation Act's extraterritorial statute, § 39-71-402(1)(a), MCA, and on the grounds that it was not estopped from denying Petitioner's claim because it is a Plan No. 2 insurer and the employer's employees could not bind it.

Held: Petitioner's claim falls under the Montana Workers' Compensation Act's extraterritorial statute, § 39-71-402(1)(a), MCA. Petitioner was a Montana employee who temporarily left Montana incidental to his employment and was injured in the course of his employment. Respondent is therefore liable for his claim.

¶ 1 The trial in this matter was held on May 23, 2017, in Kalispell. Kenneth S. Thomas represented Petitioner Richard A. Kunz. Charles G. Adams represented Respondent Electric Insurance Company (Electric).

¶ 2 Exhibits: This Court admitted Exhibits 1 through 20 without objection.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Kunz, Lisa Block, and Shannon Calderwood into evidence. Kunz was sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues in the Pretrial Order as follows:

Issue One: Whether Kunz has a compensable Montana workers' compensation claim.

Issue Two: Whether Electric is estopped from denying that Kunz has a compensable Montana workers' compensation claim.

Issue Three: Whether Kunz is entitled to acceptance of liability for his claim by Electric and payment of appropriate past, ongoing, and future indemnity and medical benefits.

Issue Four: Whether Kunz is entitled to recover his costs.

Issue Five: Whether Electric has unreasonably refused to accept liability for Kunz's industrial injuries, thereby entitling Kunz to his attorney fees and a penalty.

¶ 5 This Court's resolution of Issue One renders Issue Two moot.

FINDINGS OF FACT

¶ 6 The following facts are established by a preponderance of the evidence.

¶ 7 Kunz's permanent residence is in the Kalispell area.

¶ 8 In 2000, Kunz suffered an industrial injury to his neck while working for a sign company in Kalispell. Montana State Fund (State Fund) accepted liability. Kunz underwent a fusion at C6-7. Kunz settled this claim, leaving medicals open. Eventually, Kunz began seeing Greg Vanichkachorn, MD, at Occupational Health Services in Kalispell for treatment of his ongoing neck pain, which was an arthritic ache and pain.

¶ 9 In early 2008, Kunz learned of an opportunity to work as a turbine mechanic for General Electric d/b/a Granite Manpower (Granite).¹ Kunz was qualified for this job as a result of his prior experience as a millwright.

¶ 10 Granite is enrolled under Compensation Plan No. 2 of the Montana Workers' Compensation Act (WCA) and is insured by Electric, another subsidiary of General Electric. Sedgwick Claims Management Services, Inc. (Sedgwick) serves as Third-Party Administrator for Electric's Montana claims.

¶ 11 Kunz contacted Mick Tucker, one of Granite's supervisors, who lives south of Kalispell. At the time, Granite had at least ten employees who lived in Montana, including several supervisors. They traveled throughout the United States for their work. Tucker had Kunz fill out an application, which Kunz completed in Montana and gave to Tucker, who forwarded it on to Granite's human resources department. Kunz had a phone interview with one of Granite's managers who worked in its office in Vancouver, Washington. On February 24, 2008, Granite hired Kunz as a turbine mechanic. Kunz's job was to disassemble and reassemble turbines and generators at power plants at locations throughout the United States.

¶ 12 From 2008 to 2015, Kunz worked jobs in Arkansas, Louisiana, New Mexico, Oregon, Nevada, Idaho, and Texas. Kunz also worked in Romania four times. Kunz worked for and with other employees from Montana, including Tucker. Although Granite has had jobs in Montana, it never assigned Kunz to a Montana job. At the job locations, Kunz stayed in motels.

¶ 13 Kunz did not travel to jobs for Granite year-round; he worked only the spring outage, which is one of the times each year that power plants are taken offline for maintenance and repairs. Kunz worked between four and six months each year. Sometimes, Kunz returned to his home in Montana for a few days between jobs. He always returned to Montana when his work for the year was done. Kunz then collected unemployment insurance benefits.

¶ 14 When Granite called Kunz out to jobs, one of Granite's resource managers would call him at his home in Montana. The calls originated from Texas, Florida, North Carolina, and Washington. Oftentimes, before Kunz received his official calls notifying him of his job assignments, Tucker or another supervisor who lived south of Kalispell would give Kunz a "heads-up" that he was about to be called.

¹ In the statement of uncontested facts in the Pretrial Order, the parties state that Kunz's employer was "General Electric d/b/a Granite Manpower." However, the evidence shows that Kunz's employer was actually Qualified Contractor, Inc., which is a division of Granite Services International, Inc., which is a subsidiary of General Electric. The companies themselves, and the employees, colloquially call these entities "Granite" and "Granite Manpower." This Court follows this practice and refers to Kunz's employer as "Granite."

¶ 15 Kunz either drove his personal vehicle to the job locations or flew. When Kunz flew, Granite made the arrangements for his flights, paid for his airline tickets, and provided him with a rental car. After calling him out to jobs, Granite sent Kunz emails with his airline tickets, rental car reservations, motel reservations, and itinerary. Granite paid Kunz to travel, and also provided him with per diem pay.

¶ 16 When Kunz started at Granite, the company withheld state income taxes in every state in which he worked. However, starting in 2014, Granite changed the way it handled state tax withholdings, and withheld only Montana income tax.

¶ 17 On March 8, 2014, Kunz sustained an accident, in which he injured his neck and back, while working in Texas. His direct supervisor witnessed the accident. Kunz kept working but, within a few hours of the accident, he was “locked up” and unable to move. He was transported to the ER at the local hospital via ambulance.

¶ 18 Granite’s supervisors and its safety manager investigated the accident by taking statements, having Kunz fill out a written report, and giving Kunz a drug test. They determined that Kunz did not do anything wrong.

¶ 19 Despite his injuries, Kunz worked into June 2014. At that time, as he had done every year he worked for Granite, Kunz returned to Montana. Over the summer, he suffered from acute neck and left-arm pain, with pain radiating to the back of his hand, right-arm pain, and low-back pain. His symptoms worsened over the summer and into the fall.

¶ 20 In the fall of 2014, Kunz collected unemployment benefits from the Montana Unemployment Insurance program.

¶ 21 On November 11, 2014, Kunz saw Joshua Krass, DO, who works at the Department of Neurological Surgery at Kalispell Regional Medical Center. An MRI showed nerve compression at C5-6. Dr. Krass recommended a fusion at C5-6, on the condition that Kunz quit smoking.

¶ 22 On November 24, 2014, Dr. Vanichkachorn reviewed Dr. Krass’s record and, in reply to a letter from State Fund, opined that the March 8, 2014, accident in Texas substantially and materially worsened Kunz’s preexisting cervical condition.

¶ 23 Shortly thereafter, State Fund denied further liability for Kunz’s cervical condition. Kunz and State Fund settled the dispute over State Fund’s liability for medical benefits under his 2000 claim.

¶ 24 In January 2015, Kunz contacted Granite’s human resource department regarding his injuries. The first person with whom Kunz spoke told him he needed to speak with Lisa Block because she was the person at Granite who handled its workers’ compensation claims. At the time, Block’s office was in Florida. Her job title was

“Environmental, Health, and Safety global analyst.” Block’s job duties included reporting injury claims for Granite’s employees and working as a “liaison” between Granite and Electric. However, Block did not participate in the decision-making process as to whether to accept or deny claims.

¶ 25 Kunz called Block on January 22, 2015. Kunz told her that his pain had worsened, that an MRI showed he had a “crushed” disk, and that Dr. Krass recommended surgery. Kunz told her he could not work and that he could no longer afford to pay for his own treatment. Block told Kunz that she would “take care of it.” Block did not ask Kunz where he wanted to file his claim. She decided that Kunz had a Montana claim and indicated she would report his claim to Montana. Block told Kunz that he did not need to file a claim in Texas.

¶ 26 Block reported Kunz’s claim to Sedgwick through an online system called “ClaimCapture.” She knew that Kunz was injured in Texas. But she reported his injuries as a Montana claim because Kunz resided in Montana and had been treating with Montana physicians. Block filled out a First Report of Injury or Occupational Disease, on the form published by the Montana Department of Labor & Industry, and added it to his claim file at Sedgwick.

¶ 27 In January 2015, Granite had Kunz undergo a physical at a clinic in Kalispell. The physician determined that Kunz was physically unable to work as a turbine mechanic.

¶ 28 Block called Kunz back in the first part of February 2015 and told him that she had reported his claim. Block told him that Shannon Calderwood of Sedgwick would contact him because Calderwood handled Electric’s claims in Montana. Block also told Kunz that Calderwood had an office in Montana and gave Kunz her telephone number.

¶ 29 On March 5, 2015, Kunz filed a First Report of Injury and Occupational Disease with the Montana Department of Labor & Industry.

¶ 30 Calderwood adjusted Kunz’s claim. However, because she was an inexperienced adjuster, she ran her decisions by her supervisor. Sedgwick’s adjustment of Kunz’s claim was less than exemplary; e.g., Sedgwick sent a form letter under Calderwood’s name to Kunz confusingly stating that Virginia has a 7-day waiting period for temporary total disability (TTD) benefits and, more confusingly, that Texas’s maximum TTD rate is \$1,143 per week. And, it did not pay Kunz some of the TTD it agreed to pay under § 39-71-608, MCA, in a timely manner.

¶ 31 Block told Calderwood that she reported Kunz’s claim as a Montana claim because he was a Montana resident and was receiving treatment in Montana. However, because Kunz’s injury occurred in Texas, Calderwood concluded that it was most likely not a Montana claim. Although Calderwood could have transferred Kunz’s claim to Texas, she did not do so.

¶ 32 Electric retained counsel to advise it on Kunz's claim. On June 1, 2015, Electric's attorney notified Kunz's attorney that Electric was denying liability. The letter states: "It appears that this is not a Montana Workers' Compensation claim as the work was not controlled within Montana, it was performed in Texas, and the payroll is made out of Connecticut. As a consequence, this is not an injury that arose out of Montana employment."

¶ 33 On April 14, 2016, Granite terminated Kunz's employment on the grounds that he had not provided any medical documentation stating that he could work as a turbine mechanic.

CONCLUSIONS OF LAW

¶ 34 This case is governed by the 2013 version of the WCA since that was the law in effect at the time of Kunz's industrial injuries.²

Issue One: Whether Kunz has a compensable Montana workers' compensation claim.

¶ 35 Because Kunz's injury occurred in Texas, and because Montana does not have a reciprocal agreement with Texas under which Montana employees can work in Texas and be covered by their employer's Montana policy,³ Kunz's only avenue for Montana workers' compensation benefits is Montana's extraterritorial statute, § 39-71-402(1)(a), MCA. It states:

In the absence of [a reciprocal agreement with the state in which the worker was working], if a worker employed in this state who is subject to the provisions of this chapter temporarily leaves this state incidental to that employment and receives an injury arising out of and in the course of employment, the provisions of this chapter apply to the worker as though the worker were injured within this state.

¶ 36 The Montana Supreme Court interpreted this statute in *Application of McGaha*.⁴ Greyhound employed McGaha, who resided in Clinton, as an extra board driver for more than four years.⁵ He regularly drove the route between Missoula and Butte.⁶ However, pursuant to a labor agreement, Greyhound temporarily "bumped" him to drive a route

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

³ See <http://erd.dli.mt.gov/work-comp-regulations/insurance-compliance/extra-territorial> (noting that Montana has reciprocal agreements with Washington, Oregon, Utah, Wyoming, South Dakota, North Dakota, and Idaho).

⁴ 226 Mont. 345, 735 P.2d 521 (1987).

⁵ 226 Mont. at 346, 735 P.2d at 522.

⁶ *Id.*

between Idaho and Utah, which was a route in his “region,” as defined in the labor agreement.⁷ On his first day driving this route, McGaha injured his back in Idaho.⁸ McGaha filed a claim for Montana workers’ compensation benefits, asserting that he had a right to benefits under § 39-71-402(1)(a), MCA, as a Montana employee who temporarily left Montana to work.⁹ Greyhound maintained that that the labor agreement was “a multi-state employment contract and argued that Mr. McGaha was a regional employee rather than a Montana employee.”¹⁰ The Supreme Court held that McGaha was a Montana employee who temporarily left Montana to work, reasoning as follows:

The Workers’ Compensation Court concluded that Montana had a sufficient interest in Mr. McGaha’s case to justify application of the extraterritorial statute. The record supports this conclusion. Mr. McGaha had been employed in Montana for four years immediately prior to the date of his injury, and had established his residence in this state. He testified that he had once before had a similar absence from Montana, when he was “bumped” from his position in Missoula, and that his absence from the state at that time was of a short and temporary duration. In this instance, he was injured within his first 24 hours of working outside of Montana. He testified that he had intended to return to Montana as soon as possible, and that he did in fact regain his Missoula position, but was unable to work it due to his injuries.¹¹

Thus, the Supreme Court held that McGaha had the right to Montana workers’ compensation benefits under § 39-71-402(1)(a), MCA.¹²

¶ 37 This Court applied § 39-71-402(1)(a), MCA, in *McCoy v. Travelers Casualty & Surety Co.*¹³ McCoy lived in Great Falls and worked for Financial Health Resources, Inc. (FHR) , a Florida company which provided accounts receivable services for Benefis Hospital.¹⁴ When FHR’s contract with Benefis terminated, FHR had no business left in Montana.¹⁵ Thus, FHR gave McCoy two choices: be terminated or move to North Dakota and work for it there.¹⁶ Because McCoy was an exceptional employee, FHR sought to

⁷ *Id.*

⁸ *Id.*

⁹ 226 Mont. at 347, 735 P.2d at 523.

¹⁰ 226 Mont. at 347, 735 P.2d at 522.

¹¹ 226 Mont. at 348-49, 735 P.2d at 523-24.

¹² 226 Mont. at 349, 735 P.2d at 524.

¹³ 2014 MTWCC 3.

¹⁴ *McCoy*, ¶¶ 2, 4, 5.

¹⁵ *McCoy*, ¶¶ 8, 12.

¹⁶ *McCoy*, ¶¶ 12, 20.

induce her to try working in North Dakota for six to eight months by offering her a raise, paying her moving expenses, and indicating that, if she did not like North Dakota, it would relocate her to either its corporate office in Florida, or another state she deemed desirable in which it did business.¹⁷ As a result, McCoy moved out of her apartment in Great Falls to North Dakota and began working.¹⁸ McCoy applied for North Dakota's Healthy Steps medical coverage for her son, stating she was a North Dakota resident.¹⁹ Three months after moving, McCoy suffered an industrial injury.²⁰

¶ 38 Although McCoy's injury occurred in North Dakota, she filed a Montana workers' compensation claim, asserting that she was entitled to benefits under § 39-71-402(1)(a), MCA, because she was actually a Montana resident, hired in Montana, and intended to return to Montana at some point.²¹ Relying upon this Court's decision in *McGaha*, this Court concluded that McCoy did not have a compensable Montana claim.²² This Court concluded that at the time of McCoy's injury, no Montana employment existed because FHR was not doing any business in Montana.²³ Moreover, this Court concluded that McCoy did not temporarily leave Montana incidental to her employment, explaining: "McCoy left Montana to take a job in North Dakota because her Montana job had ceased to exist. Therefore, irrespective of McCoy's subjective intent to return to Montana at some point in the future, she obviously did not leave Montana incidental to a Montana job that no longer existed."²⁴ Thus, this Court concluded that McCoy did not have a compensable Montana claim under § 39-71-402(1)(a), MCA.²⁵

¶ 39 Kunz maintains that Granite employed him in Montana. He relies on the facts that he was a Montana resident, that in 2014 Granite withheld only Montana income tax from his pay, and that he received unemployment insurance benefits from Montana in 2014. Kunz also argues that since he did not permanently move to where he was working, and always returned to Montana, his injuries occurred when he had temporarily left Montana incidental to his employment. Relying upon *McGaha*, Kunz maintains he has a compensable Montana workers' compensation claim.

¹⁷ *McCoy*, ¶¶ 14, 16, 17-19.

¹⁸ *McCoy*, ¶ 22, 24, 26.

¹⁹ *McCoy*, ¶ 30.

²⁰ *McCoy*, ¶ 32.

²¹ *McCoy*, ¶ 50.

²² *McCoy*, ¶¶ 51-56 (citing *McGaha v. Greyhound Lines, Inc.*, WCC No. 8502-2890 (July 1, 1986), *aff'd* 226 Mont. 345, 735 P.2d 521 (1987) (setting forth that "§ 39-71-402(1), MCA has three requirements: (1) there must be Montana employment; (2) leaving Montana must be temporary; and (3) leaving Montana must be incidental to the Montana employment.")).

²³ *McCoy*, ¶ 52.

²⁴ *McCoy*, ¶ 53 (emphasis removed).

²⁵ *McCoy*, ¶¶ 52-56.

¶ 40 Electric relies on *Sandoval v. Uninsured Employers' Fund*,²⁶ and argues that Kunz did not have Montana employment. In *Sandoval*, this Court ruled that to be covered in Montana, a person must be an “employee” or “worker” **and** an “employee or worker in this state,” all of which are defined in § 39-71-118, MCA.²⁷ Subsection (1)(a) states in pertinent part:

The terms “employee” or “worker” means:

(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.

Subsection (7)(a)²⁸ defines “employee or worker in this state” in relevant part as:

a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state[.]

This Court ruled that “primarily” means “first in importance” or “leading.”²⁹ Thus, this Court explained that under this definition, Montana residents who travel to other states are covered only if their “employment duties carried out in Montana exceed the duties they carry out in any other individual jurisdiction. If only two states are involved, then the Montana duties must equal or exceed 50%. If there are three or more states, then the percentage of time worked in Montana must be greater than the percentage of time worked in each of the other states individually.”³⁰

¶ 41 Electric asserts that the majority of Kunz’s work for Granite was in the states in which he worked on turbines and generators. Thus, it argues that Kunz does not meet the definition of “employee or worker in this state,” codified in the 2013 WCA at § 39-71-118(8)(a), MCA. Therefore, Electric argues, pursuant to *Sandoval*, Kunz did not have Montana employment, and, pursuant to *McCoy*, he does not have a compensable Montana claim.

¶ 42 Notwithstanding, Electric’s argument is without merit because *Sandoval* is no longer good law. Although *Sandoval* was never appealed, the Montana Supreme Court’s holding in *Schimmel v. Montana Uninsured Employers’ Fund*³¹ effectively overruled it.

²⁶ 1998 MTWCC 76.

²⁷ *Sandoval*, ¶ 7.

²⁸ Due to amendments to § 39-71-118, MCA, this definition has appeared in different subsections. In the 1993 version of the WCA, which applied in *Sandoval*, this definition is codified at subsection (7)(a).

²⁹ *Sandoval*, ¶ 10.

³⁰ *Sandoval*, ¶ 14.

³¹ 2001 MT 280, 307 Mont. 344, 38 P.3d 788.

¶ 43 When *Schimmel* was initially before this Court, this Court relied upon *Sandoval* and ruled that Schimmel — a Montana resident who worked as a long-haul truck driver for a Washington company — was not entitled to benefits for an injury occurring in Missoula County because he did not meet the definition of “employee or worker in this state,” then codified at § 39-71-118(10)(a), MCA.³² This Court stated:

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.³³

¶ 44 The Montana Supreme Court reversed, holding that this Court erred in relying on the definition of “employee or worker in this state” and that a worker need only satisfy the definition of “employee” in § 39-71-118(1)(a), MCA, to be a Montana employee and covered by the WCA.³⁴ The Supreme Court explained:

We conclude the Workers’ Compensation Court erred when it relied on § 39-71-118(10)(a), MCA, to exclude Schimmel from the statutory definition of “employee.” Section 39-71-401(1), MCA, provides that “the Workers’ Compensation Act applies . . . to all *employees*, as defined in 39-71-118.” (Emphasis added.) Section 39-71-118(1)(a), MCA, provides in relevant part that the term “employee” means “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, express or implied, oral or written.” The court needed [to] go no further; Schimmel’s status should have been determined with regard to this provision.³⁵

The Supreme Court explained that the definition of “employee or worker in this state” applied only to loaned employees and “is not relevant to a determination of whether

³² *Schimmel v. Uninsured Employers’ Fund*, 2000 MTWCC 41, ¶ 33

³³ *Id.*

³⁴ *Schimmel*, 2001 MT 280, 307 Mont. 344, 38 P.3d 788.

³⁵ *Schimmel*, 2001 MT 280, ¶ 8.

Schimmel was an ‘employee.’ ”³⁶ On remand, this Court ruled that Schimmel was a Montana employee and entitled to benefits under the WCA.³⁷

¶ 45 This Court followed the Supreme Court’s decision in *Schimmel in RAM Montana, Inc. v. Independent Contractor Central Unit/Uninsured Employers’ Fund*.³⁸ RAM remodeled Payless Shoe Stores throughout the United States.³⁹ RAM was a Nevada corporation, though its principals were native Montanans and it had offices in Montana until 1996.⁴⁰ RAM hired more than 25 Montana residents, who traveled from Montana to job sites throughout the United States.⁴¹ RAM provided the transportation and paid these workers to travel.⁴² For most of 1995, 1996, and 1997, RAM did not have workers’ compensation coverage for its Montana-based workers.⁴³ The Independent Contractor Central Unit determined that the workers were Montana employees, and not independent contractors; therefore, the Uninsured Employers’ Fund imposed a penalty against RAM under § 39-71-504, MCA.⁴⁴

¶ 46 On appeal to this Court, RAM argued that that since it controlled its operations from Nevada, and since the vast majority of its remodeling jobs were outside of Montana, its Montana-based workers were not Montana employees subject to Montana’s workers’ compensation laws.⁴⁵ This Court rejected RAM’s position for two reasons. First, following *Schimmel*, this Court concluded that the Montana workers were Montana employees because they met the definition of “employee” and “worker” in § 39-71-118(1)(a), MCA:

But the work in this case, at least for the Montana workers, began in Montana, where the workers were mustered and then traveled together in RAM company trucks to various jobs throughout the United States. The workers were paid for their travel and in many cases were provided with company transportation originating in Montana. Ultimately, they returned to Montana. I therefore conclude that the Montana residents who worked for RAM were “person[s] in this state . . . in the service of an employer.”⁴⁶

³⁶ *Schimmel*, 2001 MT 280, ¶ 9.

³⁷ *Schimmel v. Uninsured Employers’ Fund*, 2000 MTWCC 41A, ¶¶ 2, 4.

³⁸ 2004 MTWCC 13.

³⁹ *RAM*, ¶ 8.

⁴⁰ *RAM*, ¶¶ 17, 21, 35, 39.

⁴¹ *RAM*, ¶¶ 26, 31, 32.

⁴² *RAM*, ¶ 63.

⁴³ *RAM*, ¶ 66.

⁴⁴ *RAM*, ¶¶ 10-12, 114.

⁴⁵ *RAM*, ¶ 84.

⁴⁶ *RAM*, ¶ 92. This Court recognizes, as it did in *RAM*, ¶¶ 85-91, that the Supreme Court did not follow *Schimmel* in *Fleehler v. Uninsured Employers’ Fund*, 2002 MT 125, 310 Mont. 99, 48 P.3d 746. In *Fleehler*, the court relied exclusively on the definition of “employee or worker in this state” to hold that a Montana resident who worked for

Second, this Court concluded that RAM's Montana employees were covered when working out-of-state under § 39-71-402(1)(a), MCA, and *McGaha* because they temporarily left Montana to work. this Court explained:

[The] fact of the matter is that all of RAM's jobs, in-state and out-of-state, were temporary. There was no permanent base for its workers *other than Montana*. I therefore find no inconsistency between *McGaha* and section 39-71-402(1), MCA, on the one hand, and my conclusion, on the other, that the Montana-based workers for RAM were workers within Montana who RAM was required to insure.⁴⁷

Because RAM did not insure its Montana employees, this Court ruled that RAM was an uninsured employer and liable for the penalty.⁴⁸

¶ 47 Under the framework from *RAM*, Granite employed Kunz in Montana. Kunz satisfies the definition of "employee" in § 39-71-118(1)(a), MCA. As in *McGaha*, *Schimmel*, *RAM*, and *Bustell*, Kunz is a Montana resident. And, he applied for his job with Granite, which did business in Montana, while he was in Montana, after discussing the job with Tucker, a Granite supervisor who also lived in Montana. He gave his application to Tucker while they were in Montana. When Granite interviewed and hired Kunz, he was in Montana. As in *RAM* and *Bustell*, Kunz's work began in Montana when Granite's supervisors called and told him he was about to be called out, and when Granite "officially" called him to a job, and when he received Granite's emails with his airline tickets, rental car reservations, motel information, and itinerary. Also, as in *Schimmel*, *RAM*, and *Bustell*, Kunz traveled out of Montana and was paid for his travel. In 2014, the year he was injured, Granite withheld only Montana income tax from his wages. Indeed, as in *McGaha*, *Schimmel*, *RAM*, and *Bustell*, it could not be said that Kunz was a permanent employee in any of the other states in which he worked, or in Romania. He was a person in Montana in the service of an employer, therefore, an "employee" under § 39-71-118(1)(a), MCA. Accordingly, his employment with Granite was Montana employment, thereby satisfying the first requirement of § 39-71-402(1)(a), MCA.

¶ 48 Kunz also satisfies the other requirements of § 39-71-402(1)(a), MCA. Kunz temporarily left Montana when he worked for Granite. As in *McGaha*, *Schimmel*, *RAM*,

a company that installed kitchens at chain restaurants exclusively in other states was entitled to Montana workers' compensation benefits for an injury suffered in Oklahoma. However, for the reasons set forth in *RAM*, ¶¶ 90-91, this Court remains convinced it is to follow *Schimmel*. Moreover, *Schimmel* is better reasoned and comports with established rules of statutory construction.

⁴⁷ *RAM*, ¶ 93 (emphasis in original). See also *Bustell v. AIG Claims Service, Inc.*, 2002 MTWCC 26, ¶¶ 56-62, 68-69 (citing *Schimmel* and holding that claimant, an interstate truck driver injured in Indiana, satisfied the definition of "employee" in § 39-71-118(1)(a), MCA, and therefore had Montana employment and was entitled to Montana workers' compensation benefits, because she was a Montana resident, her employer knew that she lived in Montana, her employer hired her out of Montana, and her employer knew that "while [her] driving would take her throughout the United States, claimant's home base was Montana where she would return upon completion of a driving cycle and from where she would be redispached.").

⁴⁸ *RAM*, ¶ 114.

and *Bustell*, Kunz's permanent "base" was in Montana. Unlike the situation in *McCoy*, Kunz did not move to any of the states in which he worked and establish residency, nor to Romania when he worked there. Rather, Kunz travelled from Montana to Granite's jobs and stayed in motels in these locations. If he flew to a location, Granite provided him with a rental car. Depending on what Granite's job schedule allowed, he returned to Montana for a short stay between jobs and then travelled to the next job on which Granite scheduled him to work. He worked only four to six months each spring. As in *Schimmel*, *RAM*, and *Bustell*, Kunz returned to Montana when the jobs to which Granite assigned him were completed, where he resided until Granite called him again the next year. Moreover, at the time Kunz was injured, he had left Montana incidental to his employment. The evidence conclusively shows that Kunz travelled to Texas for the sole purpose of working for Granite, where he suffered injuries in the course of his employment.

¶ 49 Having satisfied the requirements of Montana's extraterritorial statute, § 39-71-402(1)(a), MCA, Kunz has a compensable Montana claim.

Issue Two: Whether Electric is estopped from denying that Kunz has a compensable Montana workers' compensation claim.

¶ 50 Because this Court has ruled that Kunz has a compensable Montana claim under § 39-71-402(1)(a), MCA, this issue is moot.

Issue Three: Whether Kunz is entitled to acceptance of liability for his claim by Electric and payment of appropriate past, ongoing and future indemnity and medical benefits.

¶ 51 As set forth in Issue One, Kunz satisfied the requirements of Montana's extraterritorial statute, § 39-71-402(1)(a), MCA, and he therefore has a compensable Montana claim. Thus, he is entitled to acceptance of liability for his claim and benefits from Electric under the WCA.

Issue Four: Whether Kunz is entitled to recover his costs.

¶ 52 As a prevailing claimant, Kunz is entitled to his costs under § 39-71-611(1), MCA.

Issue Five: Whether Electric has unreasonably refused to accept liability for Kunz's industrial injuries, thereby entitling Kunz to his attorney fees and a penalty.

¶ 53 If this Court adjudges a claim as compensable and finds that an insurer's denial of liability is unreasonable, it is to award the claimant his attorney fees.⁴⁹ If this Court finds

⁴⁹ § 39-71-611(1)(c), MCA.

that the insurer unreasonably delayed or refused to make payments, it may assess a 20% penalty against the insurer on the amount of the delayed or refused benefits.⁵⁰

¶ 54 Although Kunz has prevailed, he did not carry his burden of proving that Electric's denial of his claim was unreasonable. Kunz limited his attorney fee and penalty claim to his argument that Electric was unreasonable by refusing to concede it was equitably estopped from denying his claim because of Block's statements and actions. However, this Court did not reach the merits of Kunz's equitable estoppel argument. Thus, it cannot make a determination as to whether Electric's denial of liability on the grounds that it was not equitably estopped was unreasonable.

¶ 55 This Court does not address Kunz's claim he is entitled to a penalty for Electric's alleged delay in paying him TTD benefits pursuant to § 39-71-608, MCA, because he did not set forth those grounds in Petitioner's List of Witnesses and Exhibits and Written Particulars of Claim for Attorney Fees, Costs and Penalty.⁵¹

¶ 56 Kunz is not entitled to his attorney fees or a penalty.

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¶ 57 Kunz satisfied the requirements of Montana's extraterritorial statute, § 39-71-402(1)(a), MCA, and, therefore, has a compensable Montana workers' compensation claim.

¶ 58 Kunz is entitled to acceptance of liability for his claim and Electric is liable for benefits under the WCA.

¶ 59 Kunz is entitled to his costs.

¶ 60 Kunz is not entitled to his attorney fees.

¶ 61 Kunz is not entitled to a penalty.

¶ 62 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 this 9th day of February, 2018.

/s/ DAVID M. SANDLER
JUDGE

⁵⁰ § 39-71-2907(1)(b), MCA.

⁵¹ Docket Item No. 17.

c: Kenneth S. Thomas
Charles G. Adams
Submitted: May 23, 2017