

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 25

WCC No. 2004-0986

UNINSURED EMPLOYERS' FUND

Petitioner

and

ROBERT COUSINS

Claimant

vs.

GALEN POYNOR, d/b/a
First Choice Construction & Year-Round Roofing

Employer/Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant, a roofer, was injured in a fall. His putative employer was uninsured and his claim was therefore submitted to the Uninsured Employers' Fund, which accepted liability for his claim and paid \$44,359.89 in medical and indemnity benefits. The UEF then brought suit to recover its payments from the putative employer. The employer argued that the claimant was an independent contractor.

Held: The claimant did not advertise, bid, or contract for roofing jobs. Rather, he worked exclusively for wages. He was therefore not engaged in an independent business and does not meet the part B test for independent contractor status, § 39-71-120(1)(b), MCA (1997-1999). Accordingly, he was an employee. The UEF is entitled to indemnification.

Topics:

Independent Contractor: Independent Business. A worker is not an independent contractor unless engaged in an independent business. § 39-71-120(1)(b), MCA (1997-1999); *Lundberg v. Liberty Northwest Ins. Co., Inc.*, 268 Mont. 499, 887 P.2d 156 (1994).

Independent Contractor: Independent Business. A roofer who does not advertise his services, does not bid on roofing jobs, and does not enter into roofing contracts, but rather works exclusively for a contractor for wages is an employee not an independent contractor.

Uninsured Employers' Fund: Indemnification. An uninsured employer must indemnify the Uninsured Employers' Fund for workers' compensation benefits it pays to an injured employee of the employer. § 39-71-504(1)(b), MCA (1999).

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-504(1)(b), MCA (1999) . An uninsured employer must indemnify the Uninsured Employers' Fund for workers' compensation benefits it pays to an injured employee of the employer.

¶1 The trial in this matter was held in Helena, Montana, on December 22, 2004. The Uninsured Employers' Fund (UEF) was represented by Mr. Charles K. Hail. The claimant, Robert Cousins, was present without personal counsel. Respondent, Galen Poynor, represented himself.

¶2 At trial the UEF offered exhibits that were not exchanged until the day before trial. The respondent did not object to the introduction of the exhibits; however, I provided him an opportunity to review them after trial and based on that review to raise any issue concerning the benefits paid to the claimant. The evidence was left open pending that review.

¶3 Subsequently, the Court received a letter from the respondent stating he wished to contest the indemnity benefits paid to the claimant. I then entered an order allowing further discovery and setting a further evidentiary hearing for April 11, 2005. (Order Allowing Further Discovery; Order Setting Hearing, February 8, 2005.) Additional exhibits and a list of additional witnesses were to be exchanged on March 4, 2005.

¶4 On March 3, 2005, an extension of time to April 4, 2005, was granted to the respondent in which to exchange his list of additional witnesses and exhibits. No exchange ever took place and the respondent failed to appear on April 11, 2005. He did not contact the Court prior to the hearing to indicate that he would be unable to attend and has not contacted the Court since the hearing. The UEF appeared on April 11, 2005, through its counsel, Mr. Arthur M. Gorov, and I deemed the evidence closed and the matter submitted for decision at that time.

¶5 Exhibits: Exhibits 1 through 5 were admitted without objection.

¶6 Witnesses and Depositions: Robert Cousins, Bernadette Rice, Galen Poynor, Edith Borchert, and Dave White testified at trial. No depositions were submitted.

¶7 Issues Presented: The Court restates the issues as follows:

¶7a Whether Robert Cousins was an employee of Galen Poynor when injured.

¶7b Whether the UEF is entitled to indemnification from Galen Poynor for medical and indemnity benefits paid to Robert Cousins.

¶8 Bench Ruling: At the close of trial, I bench ruled as to the employment issue, ruling that Robert Cousins was an employee, not an independent contractor, when working for Galen Poynor.

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

FINDINGS OF FACT

¶10 The claimant, Robert Cousins (Cousins), is a roofer. He has known and has been friends with the respondent, Galen Poynor (Poynor), since they were children.

¶11 In 1999 Poynor hired Cousins to help on roofing jobs in Nebraska. Cousins worked on a half dozen Nebraska jobs. Then Poynor asked him if he would be willing to move to Montana to work there. Cousins agreed.

¶12 Cousins and Poynor then moved to the Bozeman, Montana, area. Poynor advertised for and obtained roofing jobs, primarily residential roofing. (See Ex. 4 at 128 for a Yellow Pages' advertisement by Poynor.)

¶13 Cousins worked for Poynor on approximately ten jobs in Montana. He was paid by the hour. He received his pay weekly in cash. Poynor kept track of his hours.

¶14 Poynor designated which jobs Cousins worked on and directed Cousins' work once on the job.

¶15 Cousins worked exclusively for Poynor. He did not seek work on his own, did not have business cards, did not advertise, and never bid any jobs. He did not have an independent contractor exemption.

¶16 On September 24, 1999, Cousins fell off a roof while working. He injured his ankle.

¶17 Since the accident, Cousins has been treated for his ankle injury. He has attempted on a couple of occasions to return to construction work but was able to work only briefly. He is unable to work on any roof with a pitch equal to or greater than 4/12. Poynor urged that Cousins was working when receiving benefits but that was based on suspicion only and unsupported by any evidence.

¶18 Cousins filed a workers' compensation claim on March 30, 2000.

¶19 At the time of Cousins' accident, Poynor was uninsured. Cousins' claim was therefore routed to the UEF, which accepted liability for his claim.

¶20 The UEF has paid medical benefits totaling \$13,887.55 and indemnity benefits totaling \$30,472.34. Total benefits equal \$44,359.89

CONCLUSIONS OF LAW

¶21 This is another in a series of recent cases regarding employment status disputes. Here, as in two other recent cases – *TYAD, Inc. v. ICCU*, 2005 MTWCC 16; *Korman Marketing Group v. ICCU*, 2005 MTWCC 24 – the hiring party (Poynor) claims that the worker (Cousins) was an independent contractor.

¶22 The criteria which must be met to classify a worker as an independent contractor are long standing and well established. Section 39-71-120, MCA (1997-1999), governs. In its current iteration it is the same as in 1999 when Cousins worked for Poynor.¹ It provides in relevant part:

- 39-71-120. Independent contractor defined.** (1) An "independent contractor" is one who renders service in the course of an occupation and:
- (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact; and
 - (b) is engaged in an independently established trade, occupation, profession, or business.
- (2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met.

Both of the requirements of subsection (1) must be met, otherwise the worker is deemed an employee. *Wild v. Fregein Constr.*, 2003 MT 115, ¶ 34, 315 Mont. 425, 68 P.3d 855.

¹Section 39-71-120, MCA, was last amended in 1997.

¶23 The evidence in this case establishes as a matter of fact that Cousins was not engaged in an independently established business. He did not bid jobs, did not advertise, and did not contract directly with customers. He simply worked on jobs bid by Poynor and was paid wages for his work. Since the independent business requirement of part B, of section 39-71-120(1), MCA (1997-1999), is not met, Cousins was an employee, not an independent contractor. *Lundberg v. Liberty Northwest Ins. Co., Inc.*, 268 Mont. 499, 887 P.2d 156 (1994). That being the case, it is unnecessary to undertake any analysis under part A. *Id.*

¶24 Since Cousins was an employee and Poynor was uninsured, Poynor must reimburse the UEF for all reasonable benefits it has paid to Cousins. Section 39-71-504(1)(b), MCA (1999), provides, “[t]he [uninsured employers’] fund shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.”

¶25 The benefits paid by the UEF are supported by the evidence and are reasonable. Poynor did not contest the medical benefits and his challenge to indemnity benefits was based on suspicion, not evidence. Cousins testified that his efforts to return to work were short lived and that he did not receive total disability benefits at any time he was working. His testimony was unrebutted and credible. Therefore, the UEF is entitled to fully recover all medical and indemnity benefits it paid to him.

JUDGMENT

¶26 Judgment is hereby entered in favor of the Uninsured Employers’ Fund and against Galen Poynor finding that the Uninsured Employers’ Fund is entitled to recover from Galen Poynor, and that Galen Poynor shall pay to the Uninsured Employers’ Fund, the sum \$44,359.89.

¶27 This JUDGMENT is certified as final for purposes of appeal.

¶28 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 3rd day of May, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Arthur M. Gorov
Mr. Robert Cousins
Mr. Galen Poynor
Submitted: April 11, 2005