IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 15

WCC No. 2018-4306

EMMA STEVENS

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner fell in the parking lot of the strip mall in which her employer leased a space. Respondent initially denied liability for Petitioner's severe concussion on the grounds that she was not in the course of her employment under the going and coming rule. Respondent relied upon evidence indicating that Petitioner fell before she started working and maintained that the premises rule – which provides that an employee is in the course of her employment when she is on her employer's premises a reasonable time before her shift – did not apply because the parking lot in which Petitioner fell was not part of the employer's premises because the employer leased its space, shared the parking lot with other businesses, and did not maintain it. Petitioner argued that she was in the course of her employment under the premises rule because the parking lot was part of her employer's premises under established Montana law. Alternatively, Petitioner argued that she was within the course of her employment because she had already started working when she fell. After the parties deposed witnesses, Respondent accepted liability on the grounds that the weight of the evidence showed that Petitioner had already started working when she fell. Petitioner now asserts that Respondent's initial denial was unreasonable and that she is therefore entitled to a penalty under § 39-71-2907, MCA.

Held: Respondent's initial denial was reasonable because the law of Montana was not clearly established at the time Respondent denied liability. While the established law of Montana provides that an employer-owned parking lot is part of the employer's premises, there is no case law addressing whether an employer's premises includes a parking lot

that it leases, shares with other businesses, and does not maintain. Moreover, at the time Respondent denied liability, there were legitimate issues of material fact as to whether Petitioner fell immediately before or after she began working.

¶ 1 The trial in this matter was held on September 12, 2018, in Missoula. Petitioner Emma Stevens was present and represented by Thomas C. Bulman. Respondent Montana State Fund (State Fund) was represented by Melissa Quale.

¶ 2 Exhibits: This Court admitted Exhibits 1 through10.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Emma Stevens, Darrell Haugland, and Thomas Langeslag into evidence. Emma Stevens, and State Fund claims examiner Lila Martinez were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order set forth the following issue:

> Issue One: Whether Petitioner is entitled to an increased award of 20% on all delayed benefits pursuant to § 39-71-2907, MCA.

FINDINGS OF FACT

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

¶ 6 Darrell Haugland and his wife own Yellowstone Tractor Company, a tractor dealership in Belgrade.

¶ 7 In December 2017, the Hauglands opened a second dealership in Stevensville. Haugland leased the space in which Yellowstone Tractor conducted business in a strip mall. At the time, there were at least two other businesses in the strip mall. The businesses shared the parking lot. On the side of the parking lot, Yellowstone Tractor parked its inventory of tractors. Yellowstone Tractor's customers test drove the tractors in the parking lot in front of the store.

¶ 8 Yellowstone Tractor maintained the sidewalk in front of the store, but not the parking lot. When it snowed, the landlord's company plowed the parking lot.

¶ 9 Haugland hired Thomas Langeslag to be the salesman at Yellowstone Tractor's Stevensville dealership.

¶ 10 Haugland and Langeslag discussed that they needed another employee to answer the phones, work on the computer, and take care of customers when Langeslag was not at the dealership. Langeslag was close friends with Stevens' family and recommended that Haugland hire Stevens, as she grew up on a farm, knew how to operate tractors, and was a hard worker. Haugland hired Stevens.

¶ 11 Starting in late December 2017, Langeslag was forced to take a 5-week leave of absence, leaving Stevens as Yellowstone Tractor's sole employee in Stevensville.

¶ 12 On January 11, 2018, Stevens arrived for work at approximately 9:00 a.m. Thereafter, she fell in the parking lot, suffering a severe concussion.

¶ 13 On January 30, 2018, Stevens filed a First Report of Occupational Injury or Occupational Disease with State Fund. In the box labeled, "Time Employee Began Work," Stevens wrote, "9:00 am." In the box labeled, "Time of Injury," Stevens wrote, "9:30 am." In the box labeled "Description of Accident" Stevens wrote, "Fell on ice, hit head."

¶ 14 On February 1, 2018, State Fund assigned Bethany Sundquist to adjust Stevens' claim. That afternoon, Sundquist spoke with Haugland. Haugland told Sundquist that Langeslag had spoken to Stevens' parents, who told Langeslag that Stevens fell while walking from her truck to the store. Sundquist's claim note from that day states, in relevant part:

> Date of Injury:* 1/11/2018
>
> When and how were you notified?* I tried to get a hold of her and couldn't so I called Tom her co-worker and he called her parents and the [sic] told them what happened.
>
> Was the employee performing their regular job duties when the accident/exposure occurred?* She was going from her truck to the store to work when she fell. She is honest and I trust what she says[.]
>
> Do you have any concerns about this injury happening at work?* No[.]
>
> Please describe how the injury occurred: * She was walking from her pick up into the store and she slipped on ice and hit her head on the small curb in the front there. . . .

¶ 15 On February 2, 2018, Sundquist took Stevens' recorded statement. Stevens explained, "I was just walking across the parking lot after checking the equipment, and was walking into the building and hit a sheet of ice and fell straight forwards — or straight backwards and hit my head." Sundquist's claim note states:

> IE states[:] I was walking across [the] parking the [sic] lot after checking the equipment into the building I was two feet from the side walk , slipped on the ice and fell back and landed on my back and head. I had stuff in hands so I couldn't brace myself. I got right up just because I was in the middle of the parking lot. When I got back inside I [i]nstantly had a headache, dizzy,

> sensitive to the light. Very sore. My neck has been extremely sore, my shoulders for the most part ha[ve] been mild, tender.[1]

¶ 16 On March 5, 2018, Lila Martinez took over the adjusting of Stevens' claim. Martinez listened to Stevens' recorded statement, noting that Stevens stated she fell while walking across the parking lot after "checking the equipment." Martinez asked one of State Fund's attorneys if it would make any difference in the analysis of whether Stevens was in the course of her employment if Stevens had fallen while walking back to the store after checking the tractors. Martinez testified that State Fund's attorney advised her that "it did not make any difference."[2]

¶ 17 On March 6, 2018, State Fund denied liability. In her claim note, Martinez wrote that she spoke to Haugland and explained, "the claim will be denied due to the coming and going rule and confirmed that this [was] indeed a public lot and they do not maintain it. She has no specific designated parking spot or was not designated to park in that specific spot."

¶ 18 That same day, Martinez sent Stevens a letter, explaining that State Fund was denying liability on the grounds that Stevens was outside the course of her employment when she fell. State Fund explained: "the injury occurred in a public, no [sic] designated parking lot and in a non-designated parking spot while you [were] walking into work."[3]

¶ 19 On March 21, 2018, Martinez again spoke to Haugland. Her claims note states:

> [C]alled Darrel[l] and advised that the claim liab may be changed. I asked him if he was positive on the time of the injury. He states he was not there but IE told him that she fell on her way into work and the store opens at 9 so that makes sense that it occurred at 9[.] I asked him about checking the tractors as part of her job. He adamantly states that is not part of any bodies [sic] job and they may glance at them while walking into the store but they don't "check["] the tractors.

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[1] Alterations added.

[2] If this was actually what the attorney said, it was bad legal advice. There is no merit to State Fund's position that an employee is outside the course of her employment while, during her shift, she performs a "general job duty" — i.e., an employment task that the employer did not specifically direct the employee to do — as opposed to a "specific job duty" — i.e., a task that the employer specifically directed the employee to do. An employee is in the course of her employment while doing an employment task, even if her supervisor did not specifically direct her to do the task. *See, e.g.*, *Hopkins v. Uninsured Employers' Fund*, 2011 MT 49, ¶ 12, 359 Mont. 381, 251 P.3d 118 (holding that the dispute over whether the employer specifically told the employee to do a specific employment activity was irrelevant because "an employee's injuries are compensable unless the employee is not 'attending to employment-related matters' and has abandoned the course and scope of his employment." (citation omitted)).

[3] Alteration added.

> He states also that Tom the f/t emp[loyee] can confirm that. Tom also advised Darrel[l] that the IE story keeps changing about what happened. Tom was not in state the day of the injury and there were no witnesses[.]
>
> I thanked Darrell for his time.[4]

¶ 20 On May 21, 2018, Stevens filed a Petition for Trial with this Court, asserting that: (1) her claim was compensable; (2) she was entitled to benefits; (3) her attorney was entitled to fees under *Lockhart v. New Hampshire Ins. Co.*;[5] (4) she was entitled to attorney fees and costs under §§ 39-71-611 or -612, MCA; and (5) she was entitled to a penalty under § 39-71-2907, MCA.

¶ 21 On June 15, 2018, State Fund sent a letter to Haugland with several questions regarding Stevens' claim. In his June 19, 2018, response letter, in relevant part, Haugland wrote:

> 4) Tom Langeslag did NOT have any authority to modify Ms. Stevens' job duties to included [sic] checking on the tractors on display. The duty of checking on tractors was not included in Ms. Stevens' job duties, nor was it stated for her to do so in the office/clerical position when hired.
>
> 5) Our employee's [sic] do NOT have designated parking spots at the Stevensville location.
>
> 6) Ms. Stevens' [sic] was NOT considered the store manager when Tom was gone, her position was clerical only. Tom Langeslag is the only store manager at the Stevensville location.

¶ 22 On August 2, 2018, the parties deposed Stevens, Haugland, and Langeslag.

¶ 23 Haugland testified that when he spoke to Stevens, she stated that she slipped while getting out of her truck. Haugland was at Yellowstone Tractor's Stevensville location a few days before Stevens fell, but he could not remember whether he asked Stevens to check the lock on a tractor.

¶ 24 Langeslag, who remained close friends with Stevens' family, testified that he called Stevens the day after the accident and asked what happened. Langeslag testified that Stevens responded, "It was horrible slippery, and I came and I — and I fell out of my truck and hit by the curb, by the front door." Langeslag also testified that a woman from State Fund contacted him "and that's exactly what I told her what happened. That's exactly what — what I heard happened."

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[4] Alterations added.

[5] 1999 MT 205, 295 Mont. 467, 984 P.2d 744 (holding that medical benefits recovered due to the efforts of an attorney in a workers' compensation case are benefits to which an attorney fee lien can attach).

¶ 25 Stevens, however, denied telling Haugland or Langeslag, or anyone else, that she fell while getting out of her truck or while walking into the store directly after getting out of her truck. She explained that she had already gone into the store and that she was in the parking lot at the time she fell because Haugland had asked her to check the lock on a tractor. She testified:

> I got out of my truck. I went in the store, turned on the computer, turned on the lights, started some coffee. . . . I kind of hung out in the office for a couple of minutes. Looked out across the lot, saw that it was starting to snow.
>
> I knew that there was somebody coming to look at a specific tractor that afternoon. And Darrell had been in two days prior and had noticed that one of the locks had been freezing over and had asked me to check those locks again before that customer came in. So, I went out across the lot to make sure that those locks were not freezing over again.
>
> And on my way back across the lot there was an icy spot right in front of the curb where I slipped and fell and hit my head.

¶ 26 Following the depositions, State Fund reversed its previous decision and accepted liability for Stevens' claim. Martinez decided to accept liability for two reasons. First, Martinez did not find Haugland to be a reliable witness because "he was resistant to answering questions, and he did not have a lot of recollection of what had occurred." Second, Martinez found that Haugland had instructed Stevens to de-ice locks on the tractors, which she thought was a "specific job duty" that brought her into the course of her employment as opposed to a general job duty, which Martinez thought placed Stevens outside the course of her employment. At trial, Martinez testified: "that was the first time that it was made clear to me that she had a specific duty to perform. In other words, she said during her deposition that she was told to de-ice — to put de-icer on the starter of the tractor, if I'm recalling that correctly. Where before she had stated she checked the tractors. That was not a specific job duty or request."

Resolution

¶ 27 The issue of whether an insurer's denial of liability was reasonable is an issue of fact.[6]

¶ 28 In *Marcott v. Louisiana Pacific Corp.*, the Montana Supreme Court recognized three ways that an insurer's denial is unreasonable. First, an insurer is unreasonable if it denies liability on the facts but there are no legitimate factual disputes.[7] Second, an

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[6] *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 203, 911 P.2d 1129, 1133 (1996) (citing *Stordalen v. Ricci's Food Farm*, 261 Mont. 256, 258, 862 P.2d 393, 394 (1993)).

[7] *Marcott*, 275 Mont. at 203-04, 911 P.2d at 1133-34.

insurer is unreasonable if it denies liability on the law notwithstanding that "a court of competent jurisdiction has clearly decided [the] issue regarding compensability in advance of [the] insurer's decision to contest compensability."[8] Third, an insurer is unreasonable if it denies liability without conducting an adequate investigation.[9]

¶ 29 Stevens argues that State Fund's denial of liability, which was based on the "going and coming rule," was unreasonable because the Montana Supreme Court and this Court have long recognized the applicability of the "premises rule." The "going and coming rule," which is a general rule in Montana, provides, "employees are not covered under the Workers' Compensation Act while going to and from work."[10] However, the "premises rule" provides, "Compensable injuries include those sustained by employees having fixed hours and place of work who are injured while on the premises."[11] In sum, under the premises rule, once an employee has arrived at her employer's premises before her shift, she is no longer going to work and is in the course of her employment.[12]

¶ 30 Relying on *Popenoe v. Liberty Northwest Ins. Corp*., Stevens argues that it is established Montana law that an employer's parking lot is considered part of its premises.[13] Stevens asserts that while *Popenoe* involved an employer-owned parking lot, it should not make a difference if the employer leased the parking lot, shared it with other businesses, and was not responsible for maintaining it. Thus, Stevens argues that irrespective of whether she fell directly before or directly after she began working, she was in the course of her employment under established law. She maintains that State Fund's refusal to apply the premises rule was unreasonable.

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[8] *Marcott*, 275 Mont. at 205, 911 P.2d at 1134 (alterations added) (citing *Hunter v. Gibson Prods. of Billings Heights, Inc.*, 224 Mont. 481, 485, 730 P.2d 1139, 1142 (1986)).

[9] *Marcott*, 275 Mont. at 209-10, 911 P.2d at 1137.

[10] *See, e.g.*, *Heath v. Mont. Mun. Ins. Auth.*, 1998 MT 111, ¶ 11, 288 Mont. 463, 959 P.2d 480 (citations omitted).

[11] *Massey v. Selensky*, 225 Mont. 101, 103, 731 P.2d 906, 907 (1987) (citations omitted). *See also Griffin v. Indus. Accident Fund*, 111 Mont. 110, 115, 106 P.2d 346, 348 (1940) (holding that a municipal employee's injury on a city sidewalk was not in the course of his employment because, "unless the instrumentality causing the injury, or the premises on which the injury occurred were used in connection with the actual place of work where the employer carried on the business in which the employee was engaged, there can be no recovery."); *Heath*, ¶ 20 (holding that a city employee was not in the course of her employment when she fell on a public sidewalk while walking toward the building in which she worked because she "was not required to drive to work, was not assigned a parking space or provided with any special parking area, and was traversing a public sidewalk when injured. She had not reached the sidewalk leading into her workplace and was, therefore, not on a sidewalk used only by employees or persons conducting City business.").

[12] *See, e.g.*, *Massey*, 225 Mont. at 103-04, 731 P.2d at 907-08 (in a case in which an employee was injured on his employer's premises before his shift started, "We find it is error to apply the going and coming rule in this case. The parties already had travelled to and arrived at their place of work.").

[13] 2006 MTWCC 37.

¶ 31 State Fund argues that its denial of liability was reasonable. State Fund correctly points out that this Court withdrew its decision in *Popenoe.*[14] Therefore, State Fund asserts that *Popenoe* has no precedential value. To the extent *Popenoe* is precedent, State Fund asserts that it is arguably distinguishable from this case because Yellowstone Tractor leased the parking lot, shared it with other businesses, and did not maintain it. State Fund points out that in *Popenoe*, this Court stated, "Not only does case law in Montana support Petitioner's claim, but a leading workers' compensation treatise also explains the universality of the premises rule exception and the determination that ***employer-owned*** parking lots are part of a business's premises."[15] State Fund points out that neither this Court nor the Montana Supreme Court has addressed the issue of whether an employer's premises includes a parking lot the employer leased, shared with other businesses, and did not maintain. State Fund also asserts that there were legitimate issues of fact as to whether Stevens fell before or after she started working.

¶ 32 This Court finds that State Fund's denial of liability on the grounds that Stevens was not yet in the course of her employment was reasonable. This Court makes this finding for three reasons.

¶ 33 First, *Popenoe* is not "clearly applicable" as precedent because, pursuant to a settlement agreement, this Court withdrew its decision.[16]

¶ 34 Second, the legal issue in this case has not been decided in Montana. State Fund is correct that there is arguably a distinction between this case and the other Montana cases applying the premises rule. This case involves an employer which leased the parking lot, shared it with other businesses, and did not maintain it, while the other Montana cases applying the premises rule, including *Popenoe*, involve employer-owned property.[17] This Court recognized, in a case decided after the trial in this case, that a minority of jurisdictions hold that a leased, shared parking lot is not part of the employer's premises, and that "neither this Court nor the Montana Supreme Court has addressed a case involving a shared parking lot or other common area and that while 'Montana law is settled with regard to employer-owned, unshared parking lots, it is not settled for leased parking lots that are shared with many other businesses.' "[18] Indeed, in Stevens' closing argument, her attorney acknowledged that the law in this area is not settled in Montana, as he argued that "guidance is needed" on whether the employer's premises includes

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[14] See the Workers' Compensation Court website, http://wcc.dli.mt.gov, for the subsequent history of the *Popenoe* decision noted on the decision itself.

[15] *Popenoe*, ¶ 21 (emphasis added).

[16] *Amundsen v. Albertsons Cos., LLC*, 2019 MTWCC 3, ¶ 28.

[17] *See, e.g.*, *Massey*, 225 Mont. at 102, 731 P.2d at 906 (explaining that the employee, who worked for the Anaconda Smelter, "entered the employer's premises by the main gate and travelled some distance to the change house or clock house, a small building where the company time clock was located. The building was at an intersection from which various roads led to employee parking lots."); *Popenoe*, ¶ 21 (noting that the employer owned the parking lot).

[18] *Amundsen*, ¶ 28 (citations omitted).

a leased parking lot. Although Stevens argues that this Court should adopt the majority rule in this case and rule that a leased parking lot is part of the employer's premises,[19] this Court does not give advisory opinions.[20] The Montana Supreme Court has explained, "the existence of a genuine doubt, from a legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments."[21] Here, there was and is a genuine doubt as to the extent of the premises rule, which will be decided when the issue is actually before this Court.

¶ 35 Third, State Fund conducted an adequate investigation by taking statements from Stevens, Haugland, and Langeslag, whom were the people with the most knowledge of Yellowstone Tractor's business in Stevensville, and discovered a material factual dispute. Haugland told State Fund that it was his understanding from speaking to Langeslag that Stevens fell while walking from her truck to the store before she started her shift. Langeslag's testimony confirmed that it was his understanding that Stevens fell before she started working, as he testified that Stevens told him that she fell while getting out of her truck. If the law of Montana is that an employer's premises does not include a leased, shared parking lot that the employer does not maintain, then Stevens would not have been in the course of her employment if she fell before she entered Yellowstone Tractor's store. Given the factual dispute that existed when State Fund investigated Stevens' claim, State Fund reasonably denied liability based on the evidence that Stevens fell before she started working.[22]

CONCLUSIONS OF LAW

¶ 36 This case is governed by the 2017 version of the Montana Workers' Compensation Act (WCA) because that was the law in effect at the time of Stevens' injury.[23]

¶ 37 Section 39-71-2907, MCA, provides that this Court "may increase by 20% the full amount of benefits due a claimant" if the insurer has unreasonably delayed furnishing benefits.

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[19] 1 Lex K. Larson, Larson's Workers' Compensation § 13.01[1] (Matthew Bender, Rev. Ed.) (explaining that throughout the country, courts have held "with a surprising degree of unanimity" that "for an employee having fixed hours and place of work, going to and from work is covered only *on the employer's premises*" and that in the vast majority of jurisdictions which have considered the issue, courts have concluded that an employer's parking lot is part of its premises (emphasis in original)).

[20] *Robinson v. Mont. State Fund*, 2005 MTWCC 33, ¶ 21 (citation omitted) (explaining that this Court does not resolve hypothetical questions, give advisory opinions, nor "provide for contingencies which may hereafter arise.").

[21] *Marcott*, 275 Mont. at 205, 911 P.2d at 1134 (citing *Hunter*, 224 Mont. at 485, 730 P.2d at 1142).

[22] *See Marcott*, 275 Mont. at 203-04, 211-12, 911 P.2d at 1133-34, 1138 (holding that there is a legitimate factual dispute when there are legitimate issues over the credibility of the witnesses).

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

¶ 38 This Court has found that State Fund's denial was reasonable. Accordingly, Stevens is not entitled to a penalty under § 39-71-2907, MCA.

JUDGMENT

¶ 39 Stevens is not entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 40 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 23rd day of October, 2019.

/s/ DAVID M. SANDLER
JUDGE

c: Thomas C. Bulman
Melissa Quale

Submitted: September 12, 2018