IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 3

WCC No. 2018-4312

JAN ERIK AMUNDSEN

Petitioner

vs.

ALBERTSONS COMPANIES, LLC

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner worked at a grocery store that is located in a strip mall with a large parking lot shared by the mall's tenants. On his 15-minute break, Petitioner went to his car, which he had parked near one of the grocery store's cart corrals. While walking back to the store toward the end of his break, he fell and suffered an injury. Respondent denied liability on the grounds that Petitioner's injury did not arise out of and in the course of his employment, asserting that the parking lot was not part of the employer's worksite.

Held: The area of the parking lot where Petitioner sustained his injury was part of his employer's worksite, as the grocery store's employees regularly work in that part of the parking lot. Therefore, Petitioner's injury arose out of and within the course of his employment.

¶ 1 Respondent Albertsons Companies, LLC (Albertsons) moves for summary judgment, asserting that Petitioner Jan Erik Amundsen was outside the course of his employment when he was injured. At the hearing on Albertsons' summary judgment motion, Amundsen moved for summary judgment, and asked this Court to consider his brief opposing Albertsons' summary judgment motion as his brief supporting his summary judgment motion. The parties agreed that there are no issues of material fact and that

this Court could decide this case on the evidence they submitted with their summary judgment briefs.

FACTS

¶ 2 Amundsen worked as a baker for Albertsons at its grocery store in the Northgate Plaza strip mall in Missoula.

¶ 3 Albertsons leases its space from Gateway Limited Partnership, which owns Northgate Plaza. Gateway Limited Partnership has several other tenants in Northgate Plaza, including retail stores, a medical center, and restaurants. These businesses share a large parking lot. Under the Lease, Gateway Limited Partnership is responsible for maintaining the common areas, including the parking lot. However, the Lease is a net lease under which Albertsons pays, *inter alia*, its pro rata share of the common area maintenance cost.

¶ 4 Albertsons' employees may park in the shared parking lot while working. Albertsons does not require its employees to park in specific spaces. However, Albertsons asks its employees to park toward the middle and back of the lot, so its customers can park close to the store. Albertsons' employees routinely park in the parking lot and walk through it as they go in and out of the store.

¶ 5 Albertsons has corrals in the parking lot for its shopping carts, with the hope that its customers will put their carts in the corrals after unloading their groceries. Steve Kalin, Albertsons' store manager, testified at his deposition that the corrals make it easier for Albertsons' employees to gather the carts before walking them back into the store and reduces the chance that a cart will roll into and damage a customer's vehicle. However, many customers do not put their carts in the corrals.

¶ 6 As part of their daily job duties, Albertsons' courtesy clerks collect trash from the part of the parking lot that is generally in front of the store, carry groceries to customers' vehicles parked in the parking lot, and continuously retrieve shopping carts from the parking lot, returning them to the cart bay inside the front of the store. The carts are usually left in the area of the parking lot generally in front of the store. When it snows, Albertsons' courtesy clerks shovel snow away from the corrals and put ice melt around them. Kalin testified that keeping the parking lot clean and helping customers take groceries to their vehicles is part of Albertsons' customer service.[1]

¶ 7 Albertsons allowed Amundson to take a 15-minute break during the first half of his shift, a 30-minute lunch break, and a 15-minute break during the second half of his shift.

[1] In Kalin's Affidavit, he avers that "Albertsons does not carry out any business in the parking lot . . . ." However, when asked about the courtesy clerks at his deposition, he admitted that the statement in his Affidavit is "probably . . . not true."

¶ 8 For his shift on February 9, 2018, Amundsen parked in the Northgate Plaza parking lot, "right near" one of Albertsons' cart corrals. This was in the part of the parking lot in which Amundsen was instructed to park. Amundsen went to his car during his first 15-minute break. While Amundsen was walking back to the store, he slipped and fell in the parking lot, injuring his right ankle.

¶ 9 Albertsons denied Amundsen's claim, maintaining that Amundsen was not in the course of his employment under § 39-71-407(2)(a), MCA.

LAW AND ANALYSIS

¶ 10 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 Amundsen's injury.[2]

¶ 11 This Court grants summary judgment when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[3]

Issue One: Did Amundsen's injury arise out of and in the course of his employment?

¶ 12 For an injury to be compensable under the WCA, it must arise out of and in the course of employment.[4]

¶ 13 Section 39-71-407(2)(a), MCA, governs when an employee is injured on a break. It states:

> An injury does not arise out of and in the course of employment when the employee is:
>
> (a) on a paid or unpaid break, is not at a worksite of the employer, and is not performing any specific tasks for the employer during the break . . . .

This statute is conjunctive; thus, all three elements must be satisfied for this Court to rule that an injury suffered on a break did not arise out of and in the course of employment.[5]

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

[3] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted).

[4] § 39-71-407(1), MCA.

[5] *See Victory Ins. Co. v. Mont. State Fund*, 2015 MT 82, ¶ 14, 378 Mont. 388, 344 P.3d 977 (stating that because the four elements of intentional interference with prospective economic advantage are "framed in the conjunctive," the plaintiff must prove all four elements).

¶ 14 The parties agree that when Amundsen fell, he was on his first 15-minute break and not performing a specific task for Albertsons. They dispute whether the area where Amundsen fell was part of Albertsons' worksite.

¶ 15 Amundsen argues that the entire Northgate Plaza parking lot is part of Albertsons' worksite under § 39-71-407(2)(a), MCA, because Albertsons' courtesy clerks work in the parking lot on a daily basis. Amundsen also points out that the Montana Supreme Court has adopted the premises rule, which provides that injuries occurring on the employer's premises while the employee is going to and from work before or after working hours are compensable.[6] Amundsen cites *Popenoe v. Liberty Northwest Ins. Corp.*, where this Court ruled that under the premises rule, Popenoe's injury arose out of and within the course of his employment because it occurred in his employer's parking lot a reasonable time before his shift.[7] Amundsen argues that the premises rule applies, that an employer's premises is equivalent to its worksite, that an employee is within the course of his employment from the moment he arrives at his employer's premises before work until he leaves his employer's premises after work, including during breaks in which he stays on his employer's premises, and that under *Popenoe*, a parking lot used in connection with the employer's business is its premises and its worksite.

¶ 16 Albertsons argues that the premises rule does not apply to cases in which an employee is on a break, as § 39-71-407(2)(a), MCA, specifically sets forth the law for breaks. Albertsons argues that Northgate Plaza's parking lot is not its worksite because the work its courtesy clerks perform there is insignificant. Albertsons also argues that because the parking lot is large and shared by the other tenants, it would be impossible to determine where its worksite ends and another business's worksite begins. Albertsons maintains that its worksite is limited to its store, as that is where it sells groceries and personal items, which it argues is its only business. Albertsons also argues that while the parking lot might be its courtesy clerks' worksite, it was not Amundsen's worksite, as he was a baker and only worked inside the store. Albertsons argues that even if the premises rule applies, Northgate Plaza's parking lot is not its premises because it leases its space and shares the parking lot with the other tenants and is not responsible for maintaining the parking lot.

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[6] *Nicholson v. Roundup Coal Mining Co.*, 79 Mont. 358, 257 P. 270, 276 (1927), *superseded by statute on other grounds as stated in Greger v. United Prestress, Inc*., 180 Mont. 348, 590 P.2d 1121 (1979) (citations omitted) (holding, "where an industrial accident occurs while an employee is going to or from work while on the premises of the employer and while passing over ways of egress and ingress furnished by the employer, without deviation for purposes of his own, an injury suffered by reason of the accident arose out of and in the course of his employment, as he was under the protection of, and using the things furnished him by, his employer."); *See also Massey v. Selensky*, 225 Mont. 101, 103, 731 P.2d 906, 907 (1987) ("*Massey II*") (holding, "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. Rather, the premises rule should be used. Compensable injuries include those sustained by employees having fixed hours and place of work who are injured while on the premises.").

[7] 2006 MTWCC 37, ¶¶ 17, 19 (Order Vacated and Withdrawn Pursuant to Stipulation of Counsel and Order and Judgment of Court (February 8, 2007)).

¶ 17 This Court applied the three elements of § 39-71-407(2)(a), MCA, in *Holtz v. Indemnity Ins. Co. of North America.*[8] Holtz, a Delta airlines flight attendant, sustained an injury in a motorcycle accident during a paid, one-day layover in Cincinnati, Ohio.[9] The accident took place on a rural highway, approximately 40 miles from her hotel.[10] This Court ruled that Holtz's injuries did not arise out of and in the course of her employment under § 39-71-407(2)(a), MCA, because she was on a break, not performing any specific task for Delta, and was not at one of Delta's worksites, such as the airport.[11] Although the premises rule does not apply to cases involving breaks,[12] this Court looked to premises rule cases indicating the meaning of "premises" and defined "worksite of the employer" as "a place where an employer carries on its business and at which its employees perform their job duties."[13]

¶ 18 Although Amundsen seeks a ruling that Northgate Plaza's entire parking lot is part of Albertsons' worksite, it is unnecessary for this Court to make such a broad ruling because, under the definition established in *Holtz*, Albertsons' worksite includes the portion of the parking lot at Northgate Plaza where Amundsen parked, which was "right near" one of Albertsons' cart corrals, and where he fell, which was between his car and the store. There is no merit to Albertsons' argument that its courtesy clerks do insufficient work in the parking lot to make it Albertsons' worksite as it is undisputed that they engage in a variety of activities there every day, including carrying groceries out to customers' vehicles, retrieving carts from the parking lot, and removing trash from the parking lot. The courtesy clerks also shovel snow from the cart corrals and place ice melt around them when necessary. In short, Albertsons carries on its business in the parking lot and its employees actually work in the area of the parking lot in which Amundsen fell. His injury therefore arose out of and in the course of his employment under § 39-71-407(2)(a), MCA.

¶ 19 Albertsons' three remaining arguments are also without merit.

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[8] 2016 MTWCC 4.

[9] *Holtz*, ¶¶ 4, 6, 11, 22.

[10] *Holtz*, ¶¶ 10, 11.

[11] *Holtz*, ¶ 23.

[12] *Holtz*, ¶ 27 (citing § 1-2-103, MCA, which states, in relevant part, "[S]tatutes establish the law of this state respecting the subjects to which they relate.") (ruling that this Court only uses the elements in § 39-71-407(2)(a), MCA, to determine if an employee injured during his break suffered an injury that arose out of and in the course of employment). *See also Carrillo v. Liberty Northwest Ins.*, 278 Mont. 1, 7-8, 922 P.2d 1189, 1193-94 (1996), *abrogated on other grounds by the enactment of § 39-71-407(2)(a), MCA* (holding that the going and coming rule and its exceptions, such as the premises rule, do not apply 15-minute breaks).

[13] *Holtz*, ¶ 23 (citing *Griffin v. Indus. Accident Fund*, 111 Mont. 110, 115, 106 P.2d 346, 348 (1940), and *Heath v. Mont. Mun. Ins. Auth*., 1998 MT 111, ¶ 19, 20, 288 Mont. 463, 959 P.2d 480, where the Supreme Court indicated that an employer's "premises" is the property "used in connection with the actual place of work where the employer carried on the business in which the employee was engaged").

¶ 20 First, there is no merit to Albertsons' position that Amundsen's injury did not arise out of and in the course of his employment because he never worked in the parking lot. The plain language of § 39-71-407(2)(a), MCA, is, "worksite of the employer," ***not*** "workstation of the injured employee." Thus, the issue is whether the area in which the injury occurred is an area where any of the employer's employees work, not whether the area is a place in which the injured employee worked.

¶ 21 Second, there is no merit to Albertsons' argument that the parking lot is not its worksite because it neither owned the property nor maintained the parking lot. Again, the plain language of § 39-71-407(2)(a), MCA, is, "worksite of the employer," ***not*** "property owned by the employer in fee simple or maintained by the employer." Moreover, Albertsons' argument that it did not maintain the parking lot is unsupported by the evidence. On a daily basis, Albertsons' employees helped maintain the parking lot, as they picked up garbage, retrieved shopping carts, and, when necessary, shoveled snow from Albertsons' cart corrals.

¶ 22 Finally, there is no merit to Albertsons' claim that it is impossible to determine the boundaries of its worksite because it shares the large parking lot. Albertsons' worksite is simply the area in which Albertsons' employees work, which, in the Northgate Plaza parking lot, may overlap with the worksites of the other businesses. Albertsons' courtesy clerks testified to where they work in the parking lot. The evidence in this case shows that Amundsen fell well within the boundaries of where Albertsons' employees work in the parking lot.

¶ 23 In sum, although Amundsen was on a break and not performing any specific task for Albertsons at the time he fell, the location where Amundsen fell was part of Albertsons' worksite; therefore, Amundsen's injury arose out of and in the course of his employment under § 39-71-407(2)(a), MCA. Albertsons is therefore liable for benefits under the WCA. On this issue, this Court **grants** Amundsen's summary judgment motion and **denies** Albertsons' summary judgment motion.

Issue Two: Was Albertsons' denial of liability reasonable?

¶ 24 Section 39-71-611, MCA, provides that an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable.

¶ 25 Section 39-71-2907(1)(b), MCA, provides that if an insurer unreasonably denies liability for a claim, this Court may increase by 20% the benefits due to a claimant.

¶ 26 The Montana Supreme Court has explained:

> [A]s a general rule, where a court of competent jurisdiction has clearly decided an issue regarding compensability in advance of an insurer's

> decision to contest compensability, the clear applicability of the earlier decision constitutes substantial evidence supporting a finding by the Workers' Compensation Court that the contest over compensability is unreasonable. Conversely, where the issue upon which an insurer bases its legal interpretation has not been clearly decided, the lack of clear decision may constitute substantial evidence supporting a finding by the Workers' Compensation Court that the insurer's legal interpretation is not unreasonable.[14]

¶ 27 Relying on *Popenoe*,[15] Amundsen asserts that the issue in this case has been clearly decided. Thus, Amundsen maintains that Albertsons' denial of liability was unreasonable and that he is therefore entitled to a penalty and his attorney fees.

¶ 28 This Court, however, concludes that Albertsons' denial was reasonable. At the outset, pursuant to a settlement agreement, this Court withdrew its decision in *Popenoe*.[16] Thus, while it remains on this Court's website and is available on Westlaw, it is not "clearly applicable" as precedent. To the extent it is applicable, Albertsons is correct 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." Albertsons also cited a case from another jurisdiction holding that a mall's parking lot is not a store's premises under the premises rule.[17] In short, whether, and to what degree, a shared parking lot constitutes an employee's worksite under Section 39-71-407(2)(a), MCA, was unsettled at the onset of this case. Thus, Albertsons' denial of liability was reasonable. On this issue, this Court **denies** Amundsen's summary judgment motion.

JUDGMENT

¶ 29 Albertsons' Motion for Summary Judgment is **denied**.

¶ 30 Amundsen's Motion for Summary Judgment is **granted in part** and **denied in part.**

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[14] *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996) (citation omitted).

[15] 2006 MTWCC 37 (Order Vacated and Withdrawn Pursuant to Stipulation of Counsel and Order and Judgment of Court (February 8, 2007)).

[16] http://wcc.dli.mt.gov/p/Popenoe_2006MTWCC37.pdf

[17] *Deseth v. LensCrafters, Inc.*, 585 S.E.2d 264 (N.C. App. 2003) (holding that because LensCrafters leased its space in a 200-store mall and because the landlord was responsible for maintaining the parking lot, the parking lot was not part of LensCrafters' premises and, thus, Deseth's death, which occurred after he was hit by a car in the mall's parking lot while he was walking into work, did not arise out of and within the course of his employment). *But see Fournier v. Aetna, Inc.*, 899 A.2d 787, 788, 790-91 (Maine 2006) (rejecting *Deseth* and holding that a common staircase leading to the building in which the employer leased office space was part of the employer's premises even though the landlord was solely responsible for maintaining the staircase).

¶ 31 Because he prevailed, Amundsen is entitled to his costs under § 39-71-611, MCA. After awarding Amundsen his costs, this Court will certify this Judgment as final.

DATED this 28th day of January, 2019.

/s/ DAVID M. Sandler
JUDGE

c: Thomas Bulman/R. Spencer Bradford
Joe C. Maynard/Adrianna Potts

Submitted: October 3, 2018