IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 17

WCC No. 2019-4710

DONALD T. MCKINLEY

Petitioner

vs.

PRESSURE WASHING SYSTEMS, LLC., and UNINSURED EMPLOYERS' FUND

Respondents.

ORDER GRANTING RESPONDENT UNINSURED EMPLOYERS' FUND'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner, a resident of West Virginia, asserts that he is entitled to Montana workers' compensation benefits from Respondent Uninsured Employers' Fund (UEF) for injuries he suffered in a motor vehicle accident near Billings. Petitioner was driving a pickup truck he rented from a West Virginia company to haul an RV from a transport company located in Indiana. Petitioner asserts that the agreement under which he rented the truck created an employment relationship with the West Virginia company. The UEF asserts that Petitioner is not entitled to Montana workers' compensation benefits because the West Virginia company was not his employer under Montana law.

Held: This Court grants summary judgment to Respondents. Petitioner did not have an employment relationship with the West Virginia company under Montana law. The only agreement Petitioner had with the West Virginia company was an agreement with its co-owner under which Petitioner rented one of the company's pickup trucks which, as a matter of Montana law, does not constitute a contract of hire. Because the West Virginia company was not Petitioner's employer, it was not required to furnish workers' compensation coverage under Montana law and Petitioner is not entitled to benefits. Because the UEF is not liable for benefits, the putative employer is not obligated to

indemnify the UEF and, therefore, the putative employer is also entitled to summary judgment.

¶ 1 Respondent Uninsured Employers' Fund (UEF) moves for summary judgment, asserting that Petitioner Donald T. McKinley is not entitled to Montana workers' compensation benefits for injuries he sustained in a motor vehicle accident near Billings. The UEF argues that McKinley did not have an employment relationship with a West Virginia company, Pressure Washing Systems, LLC (Pressure Washing Systems), from which McKinley rented a pickup truck.

¶ 2 McKinley moves for summary judgment, asserting that he had an employment relationship with Pressure Washing Systems pursuant to the agreement under which he rented the truck. Because Pressure Washing Systems did not have Montana workers' compensation insurance, McKinley asserts that the UEF is liable for his benefits. McKinley also claims that the UEF's denial of liability was unreasonable and that he is therefore entitled to a penalty and attorney fees.

¶ 3 Neither the UEF nor McKinley requested a hearing.

¶ 4 For the reasons discussed below, this Court grants the UEF's summary judgment motion, grants summary judgment to Pressure Washing Systems, and denies McKinley's summary judgment motion.

FACTS

¶ 5 At all times relevant to this case, McKinley was a resident of West Virginia.

¶ 6 Pressure Washing Systems was a West Virginia limited liability company. Its business was washing concrete structures and parking lots.

¶ 7 Pressure Washing Systems did not have an office nor any facilities in Montana. It never engaged in the pressure washing business in Montana.

¶ 8 Terri Brown owned half of Pressure Washing Systems. Jason Flynn owned the other half. Brown is a resident of West Virginia and has not lived nor worked in Montana. Brown managed the company and was responsible for its day-to-day operations, including hiring and firing employees. Flynn did not participate in Pressure Washing Systems' day-to-day operations.

¶ 9 Brown's romantic partner and the father of her children, Collin Cehrs, worked as an employee of Pressure Washing Systems as its "Chief Engineer." Cehrs had no ownership interest in Pressure Washing Systems. Although Cehrs was oftentimes present when Brown hired Pressure Washing Systems' employees, he had no authority to hire or fire its employees.

¶ 10 In early 2018, Brown and Flynn decided to close Pressure Washing Systems and sell its assets.

¶ 11 On May 15, 2018, Pressure Washing Systems issued the last paychecks to its employees.

¶ 12 Pressure Washing Systems owned four, 2017 Dodge Ram 2500 pickup trucks. After Brown and Flynn decided to close Pressure Washing Systems, they sold two of these trucks.

¶ 13 In August 2018, Brown, Cehrs, and McKinley entered into agreements under which Cehrs and McKinley could use Pressure Washing Systems' remaining trucks to haul RVs for Pinnacle Fleet, an RV transport company with a location in Indiana. McKinley acknowledges that he "was hired by Col[l]in Cehrs as a driver." Pinnacle Fleet pays its drivers with prepaid credit cards, but Cehrs agreed to pay McKinley for his driving services. On August 13, 2018, Brown drafted a statement, which was notarized, stating:

> I Terri Brown give permission to Collin Cehrs & Donald McKinley to drive my trucks to haul campers for Pinnacle Fleet.
>
> I'm the owner of Pressure Washing Systems LLC.
>
> /s/ Terri L. Brown

In exchange for permission to use the truck, McKinley agreed to pay Brown and Cehrs the amount of Pressure Washing Systems' truck's monthly loan payments.

¶ 14 Shortly thereafter, Cehrs and McKinley began transporting RVs from Pinnacle Fleet's location in Indiana to locations in other states. They used Pressure Washing Systems' trucks.

¶ 15 In mid-January 2019, Brown asked Cehrs to tell McKinley that he needed to return the truck he had rented to West Virginia, so it could be sold.

¶ 16 On January 22, 2019, McKinley suffered injuries in a motor vehicle accident while driving Pressure Washing Systems' truck near Billings. He was hauling an RV.

¶ 17 In an answer to an interrogatory asking McKinley to identify who paid him for his driving services on January 22, 2019, McKinley stated, in relevant part: "Collin Cehrs paid [me] through Pinnacle Fleet for driving services that were performed on January 22, 2019."

¶ 18 On April 17, 2019, McKinley filed a First Report of Injury or Occupational Disease, asserting that he was an employee of Pressure Washing Systems at the time of the accident.

¶ 19 Pressure Washing Systems did not have Montana workers' compensation insurance. Thus, the claim was submitted to the UEF.

¶ 20 On April 25, 2019, the UEF denied liability for McKinley's claim, asserting that Pressure Washing Systems was not a Montana employer under § 39-71-117(4), MCA, and that McKinley was not a Montana employee under § 39-71-118(8), MCA.

¶ 21 In his Petition for Hearing, McKinley alleges he "was injured while truck driving/working for Pressure Washing Systems, LLC."

LAW AND ANALYSIS

¶ 22 This case is governed by the 2017 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of McKinley's injury.[1]

¶ 23 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the "absence of a genuine issue of material fact and entitlement to judgment as a matter of law."[2] "[If] the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment."[3]

Issue 1: Is there a material issue of fact?

¶ 24 McKinley argues that there is an issue of fact as to whether he was hired to work for Pressure Washing Systems under the agreements he reached with Brown and Cehrs. However, the terms of the agreements are undisputed. McKinley actually disputes whether the terms of the agreements create an employment relationship between himself and Pressure Washing Systems. This dispute does not create an issue of fact because, "[a] mere disagreement about the interpretation of a fact or facts does not amount to genuine issues of material fact."[4] Thus, there are no issues of material fact for this Court to resolve at trial.

Issue 2: Did McKinley have an employment relationship with Pressure Washing Systems?

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

[2] *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

[3] *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 24 (alteration added) (citation omitted).

[4] *Holtz v. Indem. Ins. Co. of N. Am.*, 2016 MTWCC 4, ¶ 17 (citation omitted). *See also Big Sky Civil & Envtl., Inc. v. Dunlavy*, 2018 MT 236, ¶ 22, 393 Mont. 30, 429 P.3d 258 (citations omitted) ("Mere disagreement over the correct interpretation or conclusion to be drawn from facts not otherwise subject to genuine material dispute is similarly insufficient to create a genuine issue of material fact.").

¶ 25 Section 39-71-401(1), MCA, states, in relevant part:

> Except as provided in subsection (2), the Workers' Compensation Act applies to all employers and to all employees. 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.

The Montana Supreme Court has explained that under this statute, the WCA does not apply unless there is both an "employer," as defined in § 39-71-117, MCA, and an "employee," as defined in § 39-71-118, MCA.[5]

¶ 26 The UEF makes two arguments in support of its position that the WCA does not apply to the relationship between McKinley and Power Washing Systems. First, the UEF argues that because McKinley was working for a motor carrier and because neither Pressure Washing Systems, Pinnacle Fleet, nor Cehrs had a place of business in Montana, McKinley did not have a Montana employer under § 39-71-117(4), MCA. That statute states, in relevant part:

> An interstate or intrastate common or contract motor carrier that maintains a place of business in this state and uses an employee or worker in this state is considered the employer of that employee, is liable for workers' compensation premiums, and is subject to loss experience rating in this state . . . .

The UEF relies on *Benton v. Uninsured Employers' Fund*, where this Court ruled that an Oregon motor carrier was not an employer under § 39-71-117(4), MCA, even though it had a truck drive through Montana, because it did not maintain a place of business in Montana.[6]

¶ 27 Second, the UEF argues that McKinley's agreements with Brown and Cehrs do not establish that McKinley had an employment relationship with Pressure Washing Systems. The UEF notes that Pressure Washing Systems neither hired nor paid McKinley for his driving work and that the only agreement between Pressure Washing Systems and McKinley was the agreement under which McKinley rented the truck in exchange for monthly payments equal to Pressure Washing Systems' loan payments. The UEF asserts that if McKinley had an employment relationship, it was with either Cehrs or Pinnacle Fleet.

¶ 28 In response to the UEF's first argument, McKinley argues that Pressure Washing Systems was not a motor carrier. He asserts that Pressure Washing Systems was not

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[5] *Schimmel v. Mont. Uninsured Employers' Fund*, 2001 MT 280, ¶ 10, 307 Mont. 344, 38 P.3d 788; *Geiger v. Uninsured Employers' Fund*, 2002 MT 332, ¶ 16, 313 Mont. 242, 62 P.3d 259.

[6] 2008 MTWCC 41, ¶¶ 7-10.

itself in the business of transporting property and that it did not become a motor carrier when he rented its truck to do "contract motor carrier work." Thus, McKinley asserts that this case does not fall under § 39-71-117(4), MCA.

¶ 29 In response to the UEF's second argument, and in support of his summary judgment motion, McKinley asserts that he had an employment relationship with Power Washing Systems under the terms of his agreements with Brown and Cehrs. McKinley argues that Power Washing Systems was an employer under § 39-71-117(1)(a), MCA, which states, in relevant part, that a "employer" includes a "limited liability company . . . who has a person in service under an appointment or contract of hire, expressed or implied, oral or written . . . ." McKinley also argues that he was a Montana employee under § 39-71-118(1)(a), MCA, which states, in relevant part, that an " 'employee' or 'worker' means: . . . each person in this state . . . 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." McKinley also points to § 39-71-118(8)(b), MCA, which states that the definition of employee includes, "a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer."

¶ 30 McKinley explains his argument as follows:

> Petitioner disputes that he was never hired to work for Pressure Washing Systems, LLC. Pursuant to the agreement struck between Petitioner and owner Terri [Brown], Petitioner was hired to work for Pressure Washing Systems, LLC.
>
> . . . .
>
> Petitioner was in Pressure Washing Systems, LLC's service under verbal contract to deliver the trailers and remit a share of his earnings back to the company to pay for the company's truck loans. As Petitioner was in service under an oral contract of hire, he was thus an employee of Pressure Washing System, LLC, his employer.[7]

¶ 31 Although neither the UEF nor McKinley cited the Montana Supreme Court's decision in *Geiger v. Uninsured Employers' Fund*,[8] it is directly on point. Geiger started working for David Deckert Trucking (Deckert), an interstate trucking company, as an employee.[9] Thereafter, Geiger and Deckert entered into an installment sales contract under which Geiger was to purchase one of Deckert's trucks, making monthly payments equal to the amount of Deckert's monthly loan payments on the truck.[10] Deckert agreed

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[7] (Internal citations to the record omitted).

[8] 2002 MT 332, 313 Mont. 242, 62 P.3d 259.

[9] *Geiger*, ¶ 6.

[10] *Geiger*, ¶ 7.

to forward Geiger's monthly loan payments to its lender.[11] They also entered into a lease agreement under which Geiger leased a trailer.[12] After the agreements, Deckert no longer took payroll withholdings and cancelled Geiger's workers' compensation coverage.[13] And, Geiger arranged his own loads, although he continued to operate under Deckert's authority from the Interstate Commerce Commission (ICC) when such authority was required.[14] The Supreme Court emphasized that, after the agreements, "Deckert did not take a percentage or fee for loads and made no profit with respect to Geiger's trucking operations."[15]

¶ 32 Geiger was injured in Illinois while hauling a load under Deckert's ICC authority.[16] Geiger asserted that he was entitled to benefits from the UEF because Deckert was his employer under § 39-71-117(4), MCA, arguing that Deckert "used" him in its interstate trucking business for the purpose of making payments to Deckert's lender which, in turn, increased Deckert's equity in the truck.[17] Geiger also asserted that Deckert was his employer under § 39-71-117(1)(a), MCA, arguing that he was in the service of Deckert under a contract of hire.[18]

¶ 33 The Montana Supreme Court rejected Geiger's arguments. The Court held that as used in § 39-71-117(4), MCA, the word "use" means that the motor carrier puts the driver "in service" or "employs" the driver.[19] The court explained that Deckert did not put Geiger in service nor employ him under the sales contract nor the lease agreement; i.e., neither the sales contract nor the lease agreement was a contract of hire:

> [T]he fact that Geiger made a number of monthly payments under the contract and lease does not mean that Deckert used him to serve Deckert's trucking business. This "benefit" received by Deckert was contemplated in their sales contract and lease agreement — not in a contract for hire. In fact, as of April 1, 1999, Geiger and Deckert's relationship more closely resembles that of debtor and creditor. We cannot hold that Deckert "used" Geiger under this definition of employer simply because Deckert received monthly installments according to a contract. If we were to make such a ruling, then any party facilitating the payment on a contract for the sale of

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[11] *Geiger*, ¶ 7.

[12] *Geiger*, ¶ 7.

[13] *Geiger*, ¶ 8.

[14] *Geiger*, ¶ 7.

[15] *Geiger*, ¶ 8.

[16] *Geiger*, ¶ 9.

[17] *Geiger*, ¶ 22.

[18] *Geiger*, ¶ 22.

[19] *Geiger*, ¶ 22 (citation omitted).

> equipment could be required to pay workers' compensation premiums for the debtor. Obviously, this is not the intent of the Act.[20]

Applying this same reasoning, the court also explained that Deckert was not Geiger's employer under § 39-71-117(1)(a), MCA, because Geiger was not "in service" to Deckert "under an appointment or contract of hire."[21] The court affirmed this Court's ruling that since Deckert was not Geiger's employer, Deckert was not required to furnish workers' compensation coverage and that Geiger was not entitled to benefits from the UEF.[22]

¶ 34 Under *Geiger*, Pressure Washing Systems was not McKinley's employer under § 39-71-117(1)(a), MCA, because Pressure Washing Systems did not have McKinley in service under a contract of hire.[23] The only agreement McKinley had regarding Pressure Washing Systems was the agreement with Brown under which McKinley rented one of its trucks for the amount of its monthly loan payment. As the court recognized in *Geiger*, a business does not become an employer of a person merely by selling equipment to that person via an installment sales contract nor by leasing equipment to that person. As in *Geiger*, Pressure Washing Systems did not arrange for McKinley to haul RVs, take a percentage or fee for his hauls, pay him, nor make a profit from his hauls. Instead, Brown charged McKinley a fixed monthly fee for McKinley to rent the truck. Although McKinley asserts that Pressure Washing Systems was his employer because it "hired [him] to haul loads and receive truck loan payments in return," the agreement between Brown and McKinley does not constitute a contract of hire because the payments were moving in the opposite direction of those made under a contract of hire. Under a contract of hire, the putative employee does **not** pay the putative employer for rental of equipment that the putative employee uses to work for himself or for another person. Rather, the payments move the other direction; i.e., under a contract of hire, the employer pays the employee for the employee's work.[24] In short, the agreement between McKinley and Pressure Washing Systems was not a contract of hire; rather, it was a contract for a truck rental. Therefore, Pressure Washing Systems was not McKinley's employer under § 39-71-117(1)(a), MCA.

¶ 35 Moreover, based on McKinley's assertions, his contract of hire was with Cehrs. McKinley acknowledged that it is undisputed that, "Petitioner was hired by Col[l]in Cehrs as a driver," and that "Collin Cehrs paid [him] for driving services." In a sworn answer,

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[20] *Geiger*, ¶ 22.

[21] *Geiger*, ¶¶ 19, 23.

[22] *Geiger*, ¶¶ 12, 22, 23.

[23] Because § 39-71-117(1)(a), MCA, is the only statute McKinley cites in support of his claim that Pressure Washing Systems was his employer, this Court need not address the parties' dispute over whether Pressure Washing Systems was a "motor carrier" under § 39-71-117(4), MCA.

[24] *See Hopkins v. Uninsured Employers' Fund*, 2011 MT 49, ¶ 9, 359 Mont. 381, 251 P.3d 118 (rejecting employer's argument that claimant, who worked for employer for many years in exchange for regular payments from employer, was a volunteer because, "[t]here is a term of art used to describe the regular exchange of money for favors — it is called 'employment.' ").

McKinley stated that "Cehrs paid Petitioner through Pinnacle Fleet for driving services that were performed on January 22, 2019," the date of his motor vehicle accident. Although McKinley emphasizes that Cehrs was at one time the "Chief Engineer" of Pressure Washing Systems, McKinley has not met his burden to show a triable issue of fact because he did not introduce any evidence from which this Court could find Cehrs was acting in his capacity as an employee of Pressure Washing Systems when he hired McKinley to drive and paid McKinley for driving services.

¶ 36 As a final point, because McKinley was not in the service of Pressure Washing Systems under a contract of hire, he was not an "employee" under the definition in § 39-71-118(1)(a), MCA, which, as set forth above, states that an employee is a "person in this state . . . who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire."

¶ 37 In sum, because Pressure Washing Systems and McKinley did not have an employment relationship under Montana law, Pressure Washing Systems had no legal duty to provide Montana workers' compensation coverage; thus, it is not an "uninsured employer" under Montana law.[25] Therefore, the UEF is not liable to McKinley for any benefits[26] and is entitled to summary judgment on McKinley's claim for benefits.

Issue 3: Is McKinley entitled to a penalty and attorney fees?

¶ 38 In his Petition for Hearing, McKinley asserts that the UEF's denial of liability was unreasonable and that he is therefore entitled to a penalty under § 39-71-2907, MCA, and attorney fees under § 39-71-611, MCA. However, the UEF is entitled to summary judgment on these claims because McKinley has not prevailed and the UEF's denial of liability was reasonable. Moreover, this Court has previously held that the UEF is not subject to a penalty or attorney fees because the UEF is not an insurer, and pursuant to §§ 39-71-611, -612, and -2907, MCA, this Court may award a penalty and attorney fees only when it finds unreasonableness on the part of an insurer.[27]

Issue 4: Is Pressure Washing Systems entitled to summary judgment?

¶ 39 In his Petition for Hearing, McKinley named Pressure Washing Systems as a party under § 39-71-541(1), MCA. However, because the UEF is not liable for benefits,

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[25] *See* § 39-71-501, MCA (defining "uninsured employer" as "an employer who has not properly complied with the provisions of 39-71-401," which states, "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.").

[26] *See* § 39-71-503(1), MCA (providing that the UEF is liable to pay "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 . . . .").

[27] *Pekus v. Uninsured Employers' Fund*, 2003 MTWCC 33, ¶ 4.

Pressure Washing Systems is not liable to indemnify the UEF under § 39-71-504(1)(b), MCA. Therefore, Pressure Washing Systems is also entitled to summary judgment.

¶ 40 Accordingly, this Court enters the following:

ORDER

¶ 41 The UEF's Motion for Summary Judgment is **granted**.

¶ 42 McKinley's Motion for Summary Judgment is **denied**.

¶ 43 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 5th day of November, 2019.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Alex K. Evans
Haley A. Nelson

Submitted: October 31, 2019