

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF CASE NO. 728-2013:

BLACK HAWK CRANE & RIGGING, INC.,)
)
 Petitioner,)
)
 vs.)
)
 DEPARTMENT OF LABOR & INDUSTRY,)
 EMPLOYMENT RELATIONS DIVISION,)
)
 Respondent.)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER**

* * * * *

I. INTRODUCTION

Petitioner Black Hawk Crane and Rigging (hereinafter Black Hawk) appeals from the Respondent Montana Department of Labor and Industry’s (DLI) decision to rescind recognition of extra-territorial coverage for Black Hawk’s Wyoming workers working in Montana. That decision was based on DLI’s determination that Black Hawk’s work in Montana was “construction industry” work as contemplated within the definition of Mont. Code Ann. §39-71-116(9), thus requiring Black Hawk to obtain Montana provided workers’ compensation coverage under Mont. Code Ann. §39-71-402(5).

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this matter on February 15, 2013. Amanda Long, attorney at law, represented Black Hawk. Mark Cadwallader, agency legal counsel, represented DLI. The parties provided a set of stipulated facts and stipulated to the admission of Petitioner’s Exhibits I through 19 and respondent’s Exhibits A through E. In addition, Mike Perry, DLI employee, and Matt Turner, Black Hawk employee, testified under oath. Peery’s deposition was also admitted. Based upon the evidence and arguments presented by the parties, the following findings of fact, conclusions of law and final agency decision are made.

II. ISSUE

Is Black Hawk's primary business activity properly classified as being within the construction industry such that its Wyoming workers' compensation coverage cannot be given extra-territorial effect in Montana?

III. FINDINGS OF FACT

1. Black Hawk, using its Wyoming workers, has engaged in business in Montana since 1993. Until September 2012, DLI gave extra-territorial effect to Black Hawk's Wyoming workers while Black Hawk was engaged in work in Montana.

2. Black Hawk Crane is a Wyoming corporation, and is registered to do business in Wyoming and Montana.

3. Black Hawk Crane was established in 1978.

4. Black Hawk Crane works primarily in Wyoming, and provides support services in the oil and methane gas fields of the Powder River Basin, and in other oil and gas fields around Wyoming.

5. Black Hawk Crane also provides support services for seventeen surface coal mines surrounding Gillette, Wyoming, in addition to the Spring Creek Coal Mine and the Decker Coal Mine, both located in Montana.

6. The crane operators for Black Hawk Crane are licensed in Montana and certified by the Crane Institute of America. Black Hawk Crane also maintains a commercial trucking license.

7. The work of Black Hawk Crane primarily consists of lifting and transporting large pieces of equipment, machinery, facilities, or other objects of considerable size used in the oil and gas and mining industry. This is accomplished, as demonstrated through Exhibit 14, by using large cranes which hoist the objects and place them as requested by the customer.

8. Specific to its work for the coal mines, including the two mines located in Montana, Black Hawk Crane primarily assists with the repair of large pieces of equipment by lifting the equipment in question so that it can be removed, and then lifting it again so that it can be replaced following repair. The following two examples of work done within the past year by Black Hawk Crane at the

Spring Creek Coal Mine and the Decker Coal Mine are illustrative of the work historically and currently done by Black Hawk Crane in Montana:

a. Spring Creek Coal Mine: In September of 2012, Black Hawk Crane assisted in the removal of a spud from a drag line. The spud is the huge arm on the drag line, and it had several cracks that needed to be welded, which meant the spud had to be removed from the drag line and laid down with the use of a crane. Black Hawk Crane did not do any of the welding or other repair work, nor was it directly involved in the detachment and reassembly of the spud to the drag line.

b. Decker Coal Mine: In March of 2012, Black Hawk Crane provided similar support services by assisting in the lifting necessary to remove a generator, hydraulic tank, and valve body from an excavator, so that they could be repaired.

9. For almost thirty years, this type of work has constituted the primary activity of Black Hawk Crane in Montana.

10. When performing work in Montana, Black Hawk Crane uses Wyoming employees. The Wyoming Workers' Safety and Compensation Division (the "Wyoming Division") has historically extended Extra-Territorial coverage to these employees while working in Montana.

11. On August 6, 2012, the Wyoming Division sent a letter to the Montana DOL, proposing to again extend Extra-Territorial coverage to Black Hawk Crane employees working in Montana.

12. Since 2006, Wyoming has assigned Black Hawk Crane the North American Industrial Classification System (NAICS) classification of 213112 (Support Activities for Oil and Gas). In its August 6, 2012 letter to the Montana DOL proposing to extend Extra-Territorial coverage, the Wyoming Division noted this NAICS classification.

13. DLI approved such coverage on August 7, 2012, for Black Hawk Crane, but then reversed its position and denied the coverage on September 5, 2012.

14. DLI asserts that the Wyoming NAICS classification of Black Hawk Crane is incorrect.

15. DLI also asserts that the proper NAICS classification is either 238290 (Other Building Equipment Contractors) or 238990 (All Other Specialty Trade Contractors), classifications that disqualify Black Hawk Crane from receiving extra-territorial workers' compensation coverage in Montana pursuant to Mont. Code Ann. §§39-71-402(5) and 39-71-116(9).

16. Wyoming has never classified Black Hawk Crane in Group 23 of the NAICS.

17. Black Hawk Crane timely appealed DLI's decision to deny Extra-Territorial workers' compensation coverage.

18. Black Hawk has paid premiums to receive Montana workers' compensation coverage for its Wyoming workers working in Montana.

19. Michael Peery testified on behalf of the DLI regarding the proper methodology of classifying a business entity under the NAICS system. Boiled to its essence, Peery testified that the method of classification requires a determination of the primary business activity of the business being classified in order to properly classify a business. He further testified that if the classifier finds an exact match with the key word assignment, the classifier is "relatively done" with the NAICS coding assignment.

20. Peery's testimony regarding appropriate NAICS classification is supported by the NAICS manual itself which states that NAICS "groups establishments into industries according to similarity in the processes used to produce goods or services" (emphasis added). NAICS classification manual, Exhibit E.

21. Peery's work as an NAICS classifier is done in the context of determining certain unemployment insurance requirements. He does not undertake NAICS coding for determination of workers' compensation issues. However, NAICS classification is conducted in the same manner across a broad range of areas, including workers' compensation areas and unemployment insurance areas. Therefore, the fact that Peery uses his NAICS classification training in the context of classifying business for Unemployment Insurance does nothing to lessen the credibility of his testimony. Because Peery's testimony regarding classification methodology under NAICS is consistent with both the NAICS manual's statement on the purpose of classifying (i.e., to group businesses based upon their processes used to produce the goods or services), Peery's testimony about the methodology is

found to be true and to reflect the proper methodology of applying NAICS classifications.

22. Applying NAICS classification methodology to Black Hawk demonstrates that Black Hawk, a crane rental operation with operator, is properly classified under NAICS code 238990, specialty trade contractor, a Group 23 industry under NAICS. As such, it falls within the “construction industry” under the meaning of Mont. Code Ann. §39-71-116(9). Because it is properly classified under NAICS code 238990, Black Hawk does not under Montana law qualify for reciprocal coverage under Mont. Code Ann. §39-71-402(5). It, therefore, must obtain workers’ compensation coverage through Montana.

IV. DISCUSSION¹:

Black Hawk contends that DLI’s decision to classify it as a business whose primary activity is related to the construction industry, and the concomitant decision that Black Hawk’s Wyoming coverage is not entitled to extra-territorial effect in Montana, is in error. Black Hawk contends that it is properly classified as a business whose primary activity is support for oil and gas industry. DLI, on the other hand, contends that Black Hawk is properly classified as an entity whose primary activity is either in the construction industry or as a specialty trade for the construction industry. The key to the resolution of this case lies in first following the directives of the applicable workers’ compensation statutes and then properly applying the NAICS classification.

Montana’s workers’ compensation statutes provide for reciprocity for out-of-state employers and their employees who are temporarily engaged in work in Montana unless the employer is engaged in the construction industry. In that circumstance, reciprocity is not accorded to the employer and the employer must obtain coverage for its workers under the Montana Act. Mont. Code Ann. §39-71-402(5); *Williams Insulation Co. v. Dept. of Labor*, 2003 MT 72, ¶15, 314 Mont. 523, 67 P.3d 262.

The determination of whether an employer is engaged in the construction industry is made by referring to the definition of “construction industry” as defined in Mont. Code Ann. §39-71-116(9). Mont. Code Ann. §39-71-116(9) defines the term “construction industry” to mean “the major group of general contractors and

¹Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

operative builders, heavy construction (other than building construction) contractors, and specialty trade contractors listed in major group 23 in the [NAICS] manual.” “Construction Industry” does not include “office workers, design professionals, salespersons, estimators, or any other related employment that is not directly involved on a regular basis in the provision of physical labor at a construction or renovation site.” Mont. Code Ann. §39-71-116(9)(b).

The NAICS classification manual notes that NAICS is “based on a production-oriented concept, meaning that it groups establishments into industries according to similarity in the *processes used* to produce goods or services” (emphasis added) www.census.gov/eos/www/naics/faqs/faqs. According to the Census Bureau, The NAICS coding system is a “2-through6-digit hierarchical classification system, offering five levels of detail. Each digit in the code is part of a series of progressively narrower categories, and the more digits in the code signify greater classification detail. The first two digits designate the economic sector, the third digit designates the subsection, the fourth digit designates the industry group, the fifth digit designates the NAICS Industry, and the sixth digit designates the national industry.” A complete and valid NAICS code contains six digits. Under NAICS, an establishment is classified to an industry when its principal activity meets the definition for that industry.

This tribunal’s actions are constrained by the directives of the applicable statute. This tribunal has no authority to act in any contested case hearing except as specifically provided by statute or rule. *Auto Parts of Bozeman v. Emp. Rel. Div. U.E.F.*, ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193.

The rules of statutory construction require that the language of a statute be construed according to its plain meaning. *Lovell v. St. Comp. Mut. Ins. Fund*, (1993), 260 Mont. 279, 860 P.2d 95. Statutes must be read in their entirety and legislative intent may not be gained from the wording of one particular section or sentence but only from consideration of the whole. A court’s duty is to interpret individual sections of the act in such a manner as to insure coordination with the other sections of the act. *State v. Meador*, (1979), 185 Mont. 32, 601 P.2d 386.

Mont. Code Ann. §39-71-402(5) leaves no doubt about the touchstone of determining reciprocity. Any business falling within the definition of “construction industry” must obtain workers’ compensation insurance though Montana. Similarly, Mont. Code Ann. §39-71-116(9) leaves no doubt that the sole method of determining whether a business falls within the “construction industry” is to determine its classification by reference to NAICS coding. Because the statutory

command is clear that a business' NAICS coding will determine whether or not it has extra territorial coverage, the only thing left for the hearing examiner to consider is what NAICS coding Black Hawk falls under.

The parties are at odds over the methodology of NAICS coding. NAICS itself, however, states explicitly that the classification system is designed to classify a business by the processes it uses to produce its goods or services. This statement immediately dispenses with the petitioner's argument that because Black Hawk engages solely in performing crane and rigging operations for mines it cannot be properly classified under the construction industry. The processes used to produce the goods and services drive the rationale behind the NAICS classification system, not the customer for whom the service is performed.

Here, it is clear from all the evidence presented that Black Hawk is engaged in renting its cranes and personnel, to lift heavy objects by crane, to clients seeking that service. The processes by which Black Hawk renders its services falls under classification number 238990, specialty trade contractor as it provides the service of crane rental with operator. Black Hawk, therefore, falls under major group 23 in NAICS.

Black Hawk also contends that its argument is bolstered by reference to the exclusion set out in Mont. Code Ann. §39-71-116(9)(b). The hearing officer does not agree. As stated above, the hearing officer is charged with reading and considering the statute in its entirety. The exclusion states that it "does not include office workers, design professionals, salespersons, estimators, or any other related employment that is not directly involved on a regular basis in the provision of physical labor at a construction or renovation site." Black Hawk's argument seems to focus on the "construction or renovation site" language but does not attach appropriate significance to the "provision of physical labor" language. Reading subsection 9 in its entirety, it appears to the hearing officer that the aim of the exception was to limit the requirement to secure Montana workers' compensation to those positions that were at higher risk of job injury, i.e., persons working in the field, not to limit in any way the scope of the NAICS classification used to determine the definition of "construction industry." This conclusion is bolstered by the legislative history behind. Code Ann. §39-71-402(5) and Mont. Code Ann. §39-71-116(9). Both provisions were inserted into Title 39, Chapter 71 in 1992 to level the playing field for Montana contractors who were paying higher wages to unionized labor and, therefore, were not competitive in construction bidding processes with out-of-state contractors using non-union labor under the then extant method of calculating workers' compensation insurance premiums. *See generally*, legislative history for

Section 4, Chapter 480, Laws 1991. *See also*, testimony of Johnny Monahan, director of Montana Iron Workers Joint Apprenticeship and Training Program, to Senate Labor and Employment relations sub committee, March 14, 1991.

The exception contained in Mont. Code Ann. §39-71-116(9)(b) does nothing to limit the statutory directive that the methodology of classification to be used for determining whether or not a business falls within the construction industry in the business' NAICS coding. Black Hawk, being a business that engages in crane rental with operator, falls within NAICS code 238990, Specialty Trade Contractor, a major group 23 industry. It is, therefore, properly classified in the construction industry under Mont. Code Ann. §39-71-119(9) and concomitantly excluded from recognition of extra-territorial coverage otherwise provided by Mont. Code Ann. §39-71-402(5).

V. ORDER

Based upon the foregoing, the hearing officer finds that Black Hawk Crane and Rigging is properly classified under Code Number 238990, crane rental with operator. As such, it is required to purchase workers' compensation for its out-of-state employees working on projects in Montana as it is properly classified within the construction industry under Mont. Code Ann. §39-71-402(5).

DATED this 22nd day of March, 2013.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer

NOTICE OF APPEAL RIGHTS: This Order is signed by the Hearing Officer of the Department of Labor and Industry under authority delegated by the Commissioner. A party may appeal this Order by filing a petition with the Montana Workers' Compensation Court within thirty (30) days after notice of this Order as provided in ARM 24.5.215(3). The Court's address is:

Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537
(406) 444-7794.