IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 22

WCC No. 2001-0404

IN THE MATTER OF: CYRIL GLOVER

Claimant

DUANE H. GABEL

Petitioner

vs.

DALLAS CRANFORD

Respondent/Alleged Employer

and

ST. PAUL GUARDIAN INSURANCE COMPANY

Respondent/Insurer for

EMPIRE SAND & GRAVEL COMPANY

Respondent/Alleged Employer

and

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

SAFETECH, INCORPORATED

Respondent/Alleged Employer

and

UNINSURED EMPLOYERS' FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Dallas Cranford contracted with Empire Sand & Gravel to take down a building so that he could resell and re-erect it elsewhere. Empire requested that he provide proof of

insurance as a prerequisite to doing the work, however, it allowed him to proceed with the work without that proof. Dallas Cranford told Empire that his brother would be providing a certificate of insurance and convinced his brother, Leonard, who operated a company which had removed asbestos from the building, to do so. However, the certificate was provided after-the-fact and did not encompass workers' compensation insurance coverage. Dallas secured a buyer for the salvaged building and then pressured the buyer - Duane Gabel - into helping with the salvage work. Under pressure to complete the salvage in a weekend, Dallas directed Gabel to obtain workmen from a local Rescue Mission. One of those workers, who was performing a task directed by Dallas, fell from the roof of the building. Dallas was uninsured and the parties disagree as to who is responsible for claimant's injuries.

Held: Dallas Cranford was claimant's employer. Since Dallas was an uninsured subcontractor, Empire is liable for the claim under section 39-71-405, MCA (1999).

Topics:

Employers: Identifying. Where a subcontractor directs the hiring of workers and their work on the subcontracted project, the subcontractor is the responsible employer.

Employers: Joint Ventures. There is no joint venture and no joint employment where the purported joint venturer/employer does not have an equal right of control over workers and is acting under the direction and control of the other.

Independent Contractor: Subcontractor. A subcontractor who has previously been engaged in construction, who contracts to remove a building in exchange for ownership of the building, and who has the right of control over the actual removal, subject only to providing proof of insurance and complying with governmental safety regulations, is an independent contractor/subcontractor.

Agency: Ostensible. Where the purported principal makes no representation and takes no action which would lead a reasonable person to believe that it is in a joint venture with an individual who is attempting to subcontract for the salvage of a building, and the subcontract is extended without the belief that the subcontractor is acting on behalf of the alleged principal, the subcontractor is not an ostensible agent of the one alleged to be a principal.

Agency: Ostensible. Under Montana law, an "ostensible agency is created when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him." *Youderian Const., Inc. v. Hall*, 285 Mont. 1, 7, 945 P.2d 909, 912 (1997), citing §28-10-103, MCA. "Ostensible authority is that which a principal, intentionally or by want of ordinary

care, causes or allows a third person to believe the agent to possess." *Youderian*, 285 Mont. at 8, 945 P.2d at 913.

Employer: Statutory Employer. Under section 39-71-405(1) , MCA (1999), the insurer for a prime contractor which engages an uninsured independent subcontractor is liable for the work-related injury suffered by an employee of the subcontractor.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-405(1), MCA (1999). Under section 39-71-405(1), MCA (1999), the insurer for a prime contractor which engages an uninsured independent subcontractor is liable for the work-related injury suffered by an employee of the subcontractor.

¶1 This matter is before the Court on two petitions which were consolidated for trial. Trial was held on January 28 and 29, 2002, in Billings, Montana. Cyril Glover, the claimant in this matter, was present and represented by Mr. Victor R. Halverson and Mr. Jeffrey A. Simkovic. Duane H. Gabel was present and represented by Mr. Robert C. Smith. St. Paul Guardian Fire Insurance Company and Empire Sand & Gravel Company were represented by Ms. Lucy T. France and Mr. Kelly M. Wills. Safetech, Incorporated and State Compensation Insurance Fund were represented by Mr. Greg E. Overturf and Mr. Thomas E. Martello. Mr. Charles K. Hail represented the Uninsured Employers' Fund.

¶2 Exhibits: Exhibits 1 through 36, 38 through 47, 49, and 50 were admitted without objection. Exhibits 37 and 48 were withdrawn. Exhibit 51 was not offered. Exhibit 52 was admitted over objection for use in cross-examination.

¶3 Witnesses and Depositions: Cyril Glover, Tracy Marsh, Duane Gabel, Dallas Cranford, and Leonard Cranford testified at trial. Additionally, the Court has received and considered the depositions of Dallas Cranford, Leonard Cranford, Duane Gabel, Cyril Glover, Gregory Neil Hardy, Patrick Hayden, Debbie Johnson, Rene LeVeaux, Tracy Marsh, Otis Nelson, Daniel Schneider, and Fred Schneider.

¶4 Issues Presented: The ultimate issue presented in the present case is whether, for purposes of workers' compensation insurance liability, the claimant was employed by Duane Gabel, Dallas Cranford, Empire Sand & Gravel Company, and/or Safetech, Incorporated. Other issues, as set forth in the Pretrial Order, are subsumed in that issue.

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

FINDINGS OF FACT

¶6 On Sunday, August 1, 1999, claimant, Cyril Glover (Glover), was hired as a temporary worker to assist in the demolition of a building. While working he fell from the roof of the building. (Uncontested Fact 1.) The factual dispute in this matter centers upon which individual or entity was Glover's employer.

¶7 Hardy Construction Company (Hardy) is a general contractor located in Billings, Montana. During 1999, Hardy contracted to build a new bank building on property located in Billings Heights. The project included demolition of a building existing on the site. (Ex. 13). That building had been used by the Bureau of Land Management and is therefore referred to as the "BLM building."

¶8 Hardy subcontracted with Empire Sand & Gravel Company (Empire) for demolition of the BLM building, site clearing, excavation and backfill. (*Id*. at 2.) Hardy also subcontracted with Safetech, Incorporated (Safetech) for removal of asbestos from the building prior to demolition. (Leonard Cranford Dep. at 10-13.) Safetech is owned by Leonard Cranford.

¶9 At the time of Glover's accident, Empire was insured by St. Paul Guardian Insurance Company (St. Paul), while Safetech was insured by the State Fund. (Uncontested Facts 5 and 7.)

¶10 Otis Nelson (Nelson) was the Hardy foreman responsible for the project. (Nelson Dep. at 4-5.) On Wednesday, July 28, 1999, while at the BLM building, Nelson was approached by Dallas Cranford (Dallas), who asked him about salvaging the building. (*Id*. at 7, 9.) The salvage was to involve dismantling the building such that it could be re-erected elsewhere. Nelson could not recall if he knew Dallas' name at that time but **assumed** that Dallas was a foreman with Safetech because "there was people working, and he was watching." (*Id*. at 8, 17, 38; Ex. 19.)

¶11 While Dallas is the brother of Safetech's owner (Leonard), in fact he was not working for Safetech at the time, although he had worked for Safetech in the past. Dallas learned of the demolition from Randy Warnke, who was Safetech's foreman and also a friend of Dallas. (Leonard Dep. at 17.) Dallas sought the salvage on his own, personal account, believing he could sell and re-erect the building.

¶12 Nelson referred Dallas to Tracy Marsh (Marsh), the estimator/project manager for Empire. Marsh was responsible for the demolition subcontract with Hardy. (Marsh Dep. at 12-13.)

¶13 Dallas contacted Marsh and asked about salvaging the BLM building. (*Id*. at 8-9.) Marsh, who was unaware that Nelson and Dallas had talked, met Dallas at the building site. Dallas told Marsh he was interested in salvaging the building. (*Id*. at 11.) They did not discuss how Dallas would salvage the building, who would work with him, or what would be done with the building. (*Id*. at 12, 20; Trial Test.) Dallas' remuneration for removing the building was the building itself, which he could then sell.

¶14 During the initial conversation, Marsh told Dallas she would need to obtain the approval of her boss. She also told him he would need to provide proof of insurance but did not specify the type of the insurance needed.

¶15 Marsh thereafter received authority from her boss to allow Dallas to conduct salvage work over the upcoming weekend, July 31 and August 1, 1999. She contacted Dallas to inform him that he could do the salvage over the weekend and that the work had to be completed by the next Monday morning, August 2nd. Dallas told her that "his brother would be providing insurance and his brother would probably end up with the building." (Marsh Trial Test.) Marsh had the impression there was a business connection between Dallas and his brother because his brother "was willing to give insurance." (*Id*.) In fact, Leonard did not want the building. Moreover, Marsh had not met Leonard and did not even know that Safetech was the subcontractor for asbestos removal. During her deposition she testified:

> Q. So was it your understanding, then, on Friday that Dallas was working together with his brother Leonard or his company, Safetech?
>
> A. I didn't know anything about Safetech at that point, and the representation that Dallas had made to me was that his brother was going to be giving him the insurance and that most likely his brother would end up with the building.
>
> Q. And the fact that that was the case, did that make you believe that Leonard was involved in this project with Dallas?
>
> A. Well, yeah, if he was going to get the building, he was definitely involved. But Dallas never made any representation that Leonard would be working out there or anything like that. He just said people, you know, but that Leonard was - or that his brother was probably going to end up with the building.
>
> . . . .
>
> Q. From that did you believe that Dallas was acting on behalf of his brother Leonard?
>
> A. I don't - I can't say that I believed that.

(Marsh Dep. at 134-35.) At trial, Marsh repeated: "I can't say that I believed Dallas acted on behalf of Safetech." It is thus clear that Empire, through Marsh, was subcontracting with Dallas for removal of the building.

¶16 That afternoon, Marsh met with Dallas and Hardy's foreman, Nelson, to discuss safety. (*Id*. at 18.) Nelson testified he "told her and Dallas both that they had to be properly insured and he would make sure they abided by all the OSHA regulations and rules and when they were on the roof they'd need to be tied off, which is an OSHA regulation." (Nelson Dep. at 11.)

¶17 On Friday, July 30th, Dallas asked Leonard to provide a certificate of insurance to cover the salvage work. Dallas did not say what type of insurance he was seeking: "He just said a certificate of insurance." (Leonard Dep. at 20.) Leonard testified:

> And he wanted to know if I would give him an insurance certificate, because he said they weren't going to let him start till he had an insurance certificate. And I told him that I wouldn't do that. And he kept saying, "Well," he says, "I've only got 3 days to tear this building down." He says - It was Friday. He had to have it down Monday. And otherwise Empire was going to come in and just demo it down themselves. And I said, "No, I don't want to have anything to do with it," I mean, several times. And there was a lot of people there with me that could witness to that. And he kept coming to me there on the job, and, you know, finally I said, "All right," I said, "I'll get you an insurance certificate."

(*Id*. at 19-20.) Leonard agreed to provide the certificate "as a favor" to his brother; no remuneration was involved. (*Id*. at 25.)

¶18 At the time of Leonard's and Dallas' conversation, Safetech had both liability and workers' compensation insurance. (*Id*. at 21.) Its workers' compensation insurer was the State Fund.

¶19 Following his conversation with Dallas, Leonard faxed a request for confirmation of general liability insurance to InsureTech, a firm which handled Safetech's liability insurance coverages. (*Id*. at 21-23.) He did not request confirmation of workers' compensation insurance (*id*. at 22-23) and, in any event, at the time of the request InsureTech was not Safetech's agent for workers' compensation insurance. (LeVeaux Dep. at 11-13.)

¶20 Dallas told Marsh that a certificate of insurance would be faxed to her office on Friday, July 29th. (Marsh Dep. at 19.) However, she did not return to her office that afternoon. (*Id*. at 38; Trial Test.) In fact InsureTech did not issue a certificate of insurance until August 2, 1999, the day after claimant's injury. The certificate which it did issue on August 2nd listed Safetech and Leonard Cranford as insureds, with Empire and the BLM building as additional insureds. The certification extended only to general liability and asbestos and lead coverages. (Ex. 3.) There was no certificate of insurance for either liability or workers' compensation insurance in effect on the day of claimant's injury.

¶21 Duane Gabel (Gabel) is a farmer in Huntley, Montana. As of July 30, 1999, he had never been involved in the construction business and had never been involved in the demolition or salvage of a building. Gabel also had never had business dealings with Dallas, however, he knew Dallas because their sons were in the same football program.

¶22 Both Gabel and Dallas testified at trial. Dallas was not a credible witness.[(1)] **Gabel's version of events and facts are adopted where his and Dallas' testimony conflicts.**

Citations to his testimony are to deposition since a trial transcript has not been prepared. His trial testimony was consistent with his deposition.

¶23 On Friday, July 30th, Dallas left a message on Gabel's answering machine asking if he might be interested in having the BLM building on his farm. Gabel went to the BLM building late that afternoon. Dallas was at the site, showed him around, and gave him "a sales pitch." (Gabel Dep. at 18.) The salvage operation appeared to be already underway. Gabel recognized someone he knew slightly and Dallas told Gabel, "[He] works for me." (*Id*. at 18.) There were other workers on the site who appeared to also be working for Dallas. Scaffolding, air compressors, and other tools were in use. (Trial Test.)

¶24 Dallas offered Gabel the building for $15,000, telling Gabel "that they would tear the building down." (Gabel Dep. at 19-20.) "He also suggested that if I [Gabel] wanted to help I was welcome." (*Id*. at 21.) Gabel asked Dallas how many days he had to tear down the building. Dallas said four to five days. (*Id*. at 21.) Gabel thought it was impossible to tear down the whole building in four or five days because it "was too big." (*Id*. at 21.)

> That's when I offered $10,000 for - - and he guaranteed me half the building delivered to my farm and re-erected with - - He did ask me if he could borrow a truck or if I had any products - - or any trucks or anything that would haul the material. And I said I owned a semi and that if he wanted to use my semi and loader he could. That was why I got the deduction on the building.

(*Id*. at 21.) An agreement was struck on those terms. Gabel was to pay Dallas after the building was reassembled on his farm. (*Id*. at 28.)

¶25 On Saturday morning, Gabel and his son brought the semi and loader to the job site. (*Id*. at 24.) Dallas and two men - Dan Henricks and Rick Dvorak, one of whom had been on the job site the previous afternoon - were already at work. Gabel had planned to drop off the vehicles and had arranged for a friend to pick up him and his son. (*Id*. at 24-25.) However, before he left, he had a further conversation with Dallas:

> . . . Dallas come up and smooth-talked me and said, "Can't you come and help us?" And, "Boy, the more hands we can get in here and the sooner we can get this done. . ." and just did his sales pitch. And I was weak. I . . . He kept saying that, "If you come and help, bring anybody you can, we can get this whole building down. Man, wouldn't this be beautiful on your farm?" And I stood there and looked, and at that time, at that moment, which would have been about 8:00, 8:15 in the morning, is when I decided I would help.

(*Id*. at 25-26.)

¶26 Gabel and his son went back to his farm and from there Gabel telephoned a friend, Fred Schneider (Fred), to ask him to help at the job site. Fred understood that Gabel "was

going to buy this building or buy part of it or something, and he wanted to get all he could get, you know. . . . And he wanted me to come and help him get some of this stuff out." (Fred Schneider Dep. at 9.) "[H]e [Gabel] was just there to help get that building down, 'cause they only had a week or something to get it down, or how ever many days. And he was going to buy this building, but they had to have it down, so he went in and helped these guys tear it down . . . ." (*Id*. at 39.) Fred said his work on the project "was more of a favor than anything, you know, just to go help him." (*Id*. at 14.) Fred helped at the demolition site on both Saturday and Sunday, mostly removing fixtures such as door knobs and doors. (*Id*. at 39-40.) His son Dan came to the site on Sunday to help. Fred was not paid for his help.[(2)] Gabel offered to pay Dan but Dan declined, telling Gabel he could just buy him "lunch or whatever." (Dan Schneider Dep. at 8.)

¶27 Gabel also requested Debbie Johnson (Debbie), who had done some work on his farm, to videotape the demolition of the building. The video was to provide a record of the demolition which could then be used as a reference when re-erecting the building on his farm. (Johnson Dep. at 9-10; Gabel Dep. at 13, 29.) Gabel did pay Debbie for her time. (Gabel Dep. at 27.)

¶28 At approximately 10:00 a.m., Gabel went back to the BLM site with his son and Debbie. (*Id*. at 30.) Dallas directed Gabel to "[g]et on the roof and get to work" pulling screws from the roof panels. (*Id*. at 31-32.) Gabel continued working, doing what Dallas or his "two hands" asked, until 7:30 or 8:30 that evening. (*Id*. at 32; Trial Test.)

¶29 Gabel did direct some of the work by Fred and Dan, pointing out fixtures that he wished them to remove and take to the farm. However, Dallas at times also directed their work. (Dan Schneider Dep. at 9, 12.) Dan testified that Dallas "was ordering, bossing everybody around . . . taking control of the situation. " (*Id*. at 25.)

¶30 Gabel had a farm-size toolbox in his pickup, with wrenches, sockets, and screwdrivers. He allowed these to be used at the demolition site. (Gabel Dep. at 34.) On Sunday, at Dallas' request, he brought an air compressor to the site. (*Id*.) At Dallas' request he also sent Debbie to pick up some additional scaffolding.

¶31 On Sunday morning, Gabel arrived at the BLM building around 8:30 a.m. Dallas and his two helpers were there and already working (*Id*. at 39-40.) Gabel testified:

> . . . when I walked in, Dallas said, "Good morning," and started hounding me. And I mean hounding me. "Where's all the help? You going to bring any guys today? Where's all the people?"
>
> And I said, "Dallas, that ain't part of the deal. I don't know what you're talking about. I'm here." And I said, "I shouldn't even be here." I said, "I'm tired, Dallas."

> And he's very persistent, very persistent person. You can walk off, be working. Dallas will come and agitate on you. He will push you. I just started doing where I left off the day before. I was picking - - taking the roof off. That was my main thing.

(*Id*. at 40.) Dallas continued to pressure Gabel to find more workers to help with the disassembly of the building:

> And he put the pressure on me again. He said, "If you want all this building and you want to get all this done, you better get some help here."
>
> I then referred back to him, "I did not say I would bring or" - - I said, "Dallas, I'm not - - I don't know who to call." I was just flustered, very upset, 'cause he was putting lots of pressure on me to bring help. I didn't know where to get it.

(Gabel Dep. at 43-44.)

¶32 Dan Schneider overheard the conversation and said, "Why don't you call the Montana Rescue Mission?" (*Id*. at 44.) Gabel testified:

> I looked at Dallas, and I said, "Well, do you want me to call down there, or what do you want to do, Dallas? It's your call."
>
> He said, "Well," he says, "yeah, if you want to get this building done" - -
>
> I says, "No, it's what you want." I said, "It's your job here. What do you want?"
>
> He says, "You got a phone on your hip. Call down there and get a pickup load of people."
>
> I actually laughed. I'm sorry. I laughed because . . . I said, "Dallas, I'm not going to bring a pickup load of people down here."
>
> And he says, "You better get lots of people."
>
> And I said, "Dallas, I'm not going to bring a pickup load of people here." And that's all - - I just kept saying it.
>
> He says, "Give them a call, see how many guys you can get."

(*Id*. at 44-45.) Gabel then called the Montana Rescue Mission (Mission) and was told that workers were available for day jobs. Dallas instructed him to go "get them now." (*Id*.)

¶33 Gabel picked up four men at the Mission and took them back to the BLM building. Claimant was one of the workers from the Mission. He testified that when Gabel picked them up he said they would be paid "$6 an hour, but if we went - - did a good job and went fast, it'd be $7 an hour." (Glover Dep. at 32.)

¶34 When the workers from the Mission arrived at the BLM building, Gabel told them Dallas was in charge but put them to work loading sheets of metal onto his trailer. (Gabel Dep. at 47.) Dallas then took charge and ordered the workers to go up on the roof and work there. (*Id*. at 48-49, 52; Glover Dep. at 10-11.) Glover testified Dallas "yelled down to get us up on the roof for the hard work" and "just started telling me what to do, so we did it." (Glover Dep. at 10, 31-32.) On the roof, the Mission workers were given pry bars, then Dallas showed them how to pry off the metal sheeting. (*Id*. at 12-13.)

¶35 Glover had been on the roof less than an hour when Dallas asked him to bring over a sander. (*Id*. at 14.) While taking the sander to Dallas, Glover tripped over a ridge on a metal sheet and fell off the roof, injuring himself.

¶36 Gabel then took the three other Mission workers back to the Mission. When he was dropping them off, they asked if they would be paid for their time. He gave them each twenty dollars and gave one of them twenty dollars for Glover. Gabel returned to the job site and continued working for the rest of the day.

¶37 On Sunday evening Dallas asked Gabel to pay him for the building even though the work was incomplete. Gabel initially said "no," but Dallas kept pleading, saying he was behind on his house payment and needed cash. Feeling sorry for Dallas, Gabel wrote a check to him for $5,000.

¶38 When Gabel returned to the job site Monday morning, Dallas was not present, however, Marsh was. Marsh approached him and asked where Dallas was. This was the first time Gabel and Marsh had spoken. Marsh told him no one could go on the premises. He told her he had already paid $5,000 for the building, yet the main beams had not yet been taken down; without those beams, the building was worthless. As Dallas was not there, he realized that to obtain the rest of the materials he would have to do the remainder of the work himself. (Gabel Dep. at 71-73.)

¶39 Marsh told Gabel that if he could provide evidence of workers' compensation insurance, he could take the beams. Gabel had his accountant contact the State Fund and thereafter provided Marsh with a State Fund policy number covering future work at the site by Gabel. Gabel then called his hired farm hands, Cole Swanke and Steve Thompson to assist him in dismantling the beams.

¶40 Eventually, feeling sorry for Gabel, Marsh directed Empire employees to use Empire equipment to take down the beams and to lay them out so Gabel could salvage them. Gabel and his workers then unbolted the beams and put them onto Gabel's truck. Gabel and his men worked through the day, obtaining what they could from the building. (Gabel Dep. at 74.)

¶41 Meanwhile, Gabel stopped payment on the $5,000 check to Dallas. Dallas went to Gabel's bank on Monday to cash it but the stop payment was in effect and he was unable to

cash it. Dallas called Gabel on Tuesday morning and asked him to come by his house. Gabel did so. Dallas apologized and pleaded with Gabel to release the check so he could cash it, saying he was behind on his house payments and was worried about feeding his wife and children. Dallas also asked Gabel to pay the two men who had worked for him on the job site, stating he would deduct that amount from what Gabel owed on the building. (Gabel Dep. at 77.) Gabel agreed. He wrote checks to the two men and gave them to Dallas, then called his bank to release the stop payment. Later, having second thoughts about the checks to the two workers, Gabel called his bank and stopped payment on the two checks to the workers.

¶42 Dallas was uninsured at the time of Glover's accident. For purposes of this proceeding the parties agree Gabel was also uninsured, however, he reserves the right to assert coverage in a separate district court proceeding should he be found to be Glover's employer. The insurers for Safetech and Empire have denied liability for the accident.

Resolution

¶43 At the close of the evidence, I ruled from the bench that Dallas was totally incredible in his testimony concerning his relationship with Gabel and his involvement in the project. Gabel on the other hand was convincing and his testimony was supported by that of other witnesses. I reaffirm that finding.

¶44 I also ruled from the bench that Dallas was the employer of Glover at the time of the August 1, 1999 accident. I reaffirm that finding. In support of it, I note the following salient points:

> ¶44a Dallas obtained the right to salvage the building and undertook to provide proof of insurance. He began work on the project with men he brought to the project - Dan Henrick and Rick Dvorak. At least some of Dallas' tools were used on the project, including a pneumatic pump.
>
> ¶44b Dallas solicited help from Gabel in the form of equipment and workers **after** the agreement. While Gabel complied with Dallas' requests and provided equipment and workers, he was acting at Dallas' direction. In complying with Dallas' direction he was protecting his interest in the building which Dallas had agreed to sell him.
>
> ¶44c While Gabel asked his friends and some others to do some particular work - the removing of specific fixtures and videotaping, he requested their assistance in compliance with Dallas' directions. Moreover, Dallas controlled the job site and exercised ultimate authority over the workers and their work, even the work by Gabel, his friends, and family.

¶44d While Gabel's acquiescence to Dallas' requests and demands may seem odd, and in isolation may raise issues about his version of the events, after listening to Dallas and Gabel, and also hearing from Marsh and Leonard about their dealings with Dallas, I am convinced that Dallas is a smooth, manipulative operator and that Gabel told the truth.

¶44e I credit Gabel's version of how the hiring of the Mission workers came about, specifically that Dallas told Gabel to telephone for those workers and to pick them up. In bringing the workers to the site and initially assigning their work, Gabel was acting at the direction and on behalf of Dallas, not on his own account. Shortly after the workers arrived, Dallas ordered them to work on the roof. He showed them what work to perform on the roof. It is undisputed that Glover was injured while obeying Dallas' direction to bring him a tool.

¶44f Given the record as a whole, and particularly the contrasting credibility of Dallas and Gabel, I am **not** troubled by Gabel's $20 payments to the Mission workers. I am persuaded that Gabel was acting based on his own feelings of human decency and sympathy, qualities that Dallas played upon and twisted to his own ends.

¶44g Given the record as a whole, I am also **not** troubled by evidence that Gabel at one point gave Dallas checks for Dan Henrick and Rick Dvorak. I credited both Gabel's and Leonard's testimony that Dallas is persistent, plays upon sentiments, and is able to wear down men who know better in most circumstances. I find that Gabel gave the checks not as wages for his employees but to help out Dallas and in the expectation that the amounts would be deducted from the price of the building.

¶45 I find that Dallas was **not** an employee of Empire at the time of the accident. In addition to the various facts emphasized above, and the conclusions of law set forth below, I note the following:

¶45a If Dallas had been an employee of Empire, Marsh would have directed his work on the project, which she did not. In addition, she would not have been concerned about proof that Dallas had insurance. Moreover, the evidence affirmatively shows that Dallas was not controlled in his carrying out the building salvage with the exception of the requirement that he comply with governmental safety regulations (which he did not).

¶45b Dallas received value from Empire in exchange for his agreement to disassemble the building. That value was in the form of the building itself, which he intended to resell. There is no evidence Dallas was paid wages or was considered an employee of Empire by any party associated with this case.

¶45c Dallas had experience in operating his own construction business, albeit a log home business.

¶46 The questions as to whether Safetech was Glover's employer on theories of agency or joint venture, and whether Empire was the statutory employer of Glover, will be discussed in the conclusions of law.

CONCLUSIONS OF LAW

¶47 The 1999 version of the Workers' Compensation Act applies because the claimant's injury occurred on August 1, 1999 and followed the July 1, 1999 effective date of 1999 amendments to the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶48 There is no question that Glover was an employee when injured. The question presented is, "Who was Glover's employer." The answer to that question determines the liability as among the insurers and the UEF.

¶49 An employer is a person or entity who "has a person in service under an appointment or contract of hire, express or implied, oral or written." § 39-71-117(1)(a), MCA (1999). In *State ex rel. Ferguson v. District Court*, 164 Mont. 84, 88, 519 P.2d 151, 154 (1974), the Supreme Court stated:

> [A]n individual is in the service of another when that other has the right to control the details of the individual's work. *Nelson v. Stukey*, 89 Mont. 277, 300 P.2d 287; *Grief v. Industrial Acc. Fund*, 108 Mont. 519, 93 P.2d 961. While this test has most often been used to determine whether or not an individual was an independent contractor or an employee, it may also be used to determine who the employer is, in a given situation. *Biggart v. Texas Eastern Transmission Corp.* (Miss. 1970), 235 So.2d 443. Under this test an employee will have been transferred from one employer to another when the right to control the details of his work has passed from one to another.

Ferguson, 164 Mont. at 88, 519 P.2d at 154.

Dallas Cranford was Cyril Glover's Employer

¶50 For the reasons previously noted, I am persuaded that Dallas was Glover's employer at the time of Glover's August 1, 1999 accident. Dallas had entered into a subcontract with Empire to remove the BLM building in a manner allowing it to be re-erected elsewhere. Dallas in turn arranged to resell the building to Gabel and erect it on his farm. While he persuaded Gabel to help with the salvage, a request that Gabel heeded in order to protect his prospective interest in the building, Dallas maintained the right of control of the salvage operation and in fact exercised control. When Gabel brought Glover to work on the salvage, he did so at the behest and direction of Dallas, not on his own account. Neither Leonard

nor Safetech had anything to do with the actual work; their sole role in the project was the agreement to lend Safetech's liability insurance to Dallas.

¶51 Citing decisions from other jurisdictions, the UEF has argued that Dallas and Gabel were joint employers of Glover and are therefore jointly liable for his workers' compensation claim. See *Holdren v. Lease Management, Inc.*, 233 No.W.2d 59 (1975 Mich.App.); *Riverboat Hotel Casino v. Harold's Club*, 944 P.2d 819 (1997 Nev). Even if this doctrine were adopted in Montana, I am not persuaded Gabel was a joint employer of Glover. While Gabel personally worked on the project and obtained help from friends and a farm employee, he did so at the behest and direction of Dallas. Any "control" exercised by Gabel was limited to his friends and son and even then was pre-empted in several instances by Dallas' directions. As to Glover, Gabel acted at the direction and control of Dallas. "One of the elements necessary to show joint venture is an equal right to a voice in the direction of the enterprise, giving an equal right of control." *Hammerquist v. Employment Sec. Div. of Montana Dept. of Labor and Industry,* 230 Mont. 347, 350, 749 P.2d 535, 537 (1988). Gabel did not have an equal right of control and was not a joint venturer.

Dallas was not an Employee of Empire Sand & Gravel

¶52 An "independent contractor" is defined in section 39-71-120, MCA (1999), as follows:

> (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.

Empire did not retain or exercise control over Dallas' salvage work. Its only concern was that Dallas provide proof of insurance and complete the salvage by Monday morning. Dallas held himself out as a contractor in the construction industry and in fact had been engaged in an independent construction business, albeit the construction of log homes. The criteria of subsection (1) were met, therefore he was not Empire's employee and his employment of others in the salvage operation was not attributable to Empire.

Safetech was not Glover's Employer Based on a Theory of Ostensible Agency

¶53 Empire argues that "Dallas Cranford was permitted to work on the salvage project only because he was acting as the ostensible agent of Safetech and because he had the

ostensible authority to represent that Safetech's insurance would cover the project." (Trial Brief of Empire Sand & Gravel/St. Paul Guardian at 11.)

¶54 Under Montana law, an "ostensible agency is created when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him." *Youderian Const., Inc. v. Hall*, 285 Mont. 1, 7, 945 P.2d 909, 912 (1997), citing §28-10-103, MCA. "Ostensible authority is that which a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." *Youderian*, 285 Mont. at 7, 945 P.2d at 913. An agency relationship may be "implied from the conduct and from all the facts and circumstances in the case and it may be shown by circumstantial evidence." *Id*.

¶55 The evidence in this matter does not support a finding of ostensible agency. While Marsh believed there was some business connection between Dallas and "his brother", she testified that she did not believe that Dallas was working together with Leonard or Safetech. When she agreed to allow Dallas to perform salvage work, she knew nothing about Safetech or Leonard. Indeed, Marsh **denied** believing that Dallas was acting on behalf of Leonard or Safetech. (Marsh Dep. at 134-35; Trial Test.) Rather, Marsh believed she was making an agreement with Dallas.

¶56 Moreover, prior to Glover's injury, neither Leonard nor Safetech had any communication with Marsh or Empire. They did nothing which could have caused Marsh or Safetech to believe that Dallas was their agent with respect to the salvage arrangement or that he was authorized to provide any sort of insurance on their behalf. While Leonard requested his insurance broker to provide Empire with a certificate of insurance for general liability insurance, even that fact was never communicated to Marsh prior to Glover's injury.

<u>At the Time of Glover's Accident, Empire was His Statutory Employer under Section 39-71-405, MCA, thus its Insurer is Liable for His Claim</u>

¶57 Section 39-71-405, MCA (1999), provides in relevant part:

> **Liability of employer who contracts work out.** (1) An employer who contracts with an independent contractor to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment of benefits under this chapter to the employees of the contractor if the contractor has not properly complied with the coverage requirements of the Workers' Compensation Act. . . .
>
> As I have previously concluded, Dallas was an independent contractor, therefore, the cited section applies. The section makes the prime contractor responsible for assuring that subcontractors, such as Dallas, are insured. Where the subcontractor lacks insurance, the section expressly provides that the prime contractor and its

insurer are liable for the claim. Pursuant to the section, Empire's insurer - St. Paul Guardian Insurance Company - is liable for Glover's industrial accident.

JUDGMENT

¶58 At the time of his industrial accident on August 1, 1999, Glover was an employee of Dallas for purposes of workers' compensation benefits.

¶59 At the time of the accident, Dallas was an independent contractor working under a contract with Empire Sand and Gravel. Dallas was uninsured, therefore, pursuant to section 39-71-405, MCA (1999), Empire Sand & Gravel and its insurer, St. Paul Guardian Insurance Company, are liable for Glover's industrial accident. Accordingly, St. Paul Guardian Insurance Company shall pay Glover those benefits to which he is entitled under the Montana Workers' Compensation Act.

¶60 Glover is entitled to costs in an amount to be determined by the Court. He shall file his memorandum of costs in accordance with Court rules.

¶61 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

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

DATED in Helena, Montana, this 12th day of April, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Victor R. Halverson
Mr. Robert C. Smith
Mr. Greg E. Overturf
Mr. Charles K. Hail
Ms. Lucy T. France
Mr. Kelly M. Wills
Mr. Gerald D. Christensen
Attachment
Submitted: January 29, 2002

Dallas Cranford notes:

- Dallas said that he never agreed to take down and re-erect the building for Gabel and that it was Gabel's responsibility to do both. Dallas said that the only thing he was to do after Gabel agreed to buy the building was to act as a laborer on the

project, and this seemed like it was out of the goodness of his heart. His testimony was unbelievable.

- On the other hand, Dallas said part of the deal with Gabel was that Gabel would hire and pay Dallas' friends, Dan Henricks and Rick Dvorak. His testimony struck me as pure fabrication. According to Dallas he was just being a good buddy to his friends. Then Dallas said he paid Rick and Henricks $500 and $1000 respectively out of the $5000 paid by Gabel in effect out of the goodness of his heart. Who is he kidding?
- Dallas said that on Friday when they reached the agreement, Gabel said he had plenty of equipment and workers to get the building down in two days. If that is true, why did not Gabel provide workers up front?
- Dallas said that Marsh was at the job site on Sunday but never said a word about a call made to Hardy about extending the deadline beyond Sunday. He characterized her as just passing by. His testimony is in stark contrast to her testimony and she is the more believable.
- Dallas said that July 31st (Saturday) was his wife's birthday and that he took her to dinner that night. He claimed that the 31st was a Monday and he did not work on the project that evening. Of course, July 31st, 1999, was in fact a Saturday.
- Dallas said he merely suggested that the Rescue workers be put on the roof. This contrasts with both Glover's and Gabel's testimony that he ordered the workers onto the roof. Glover and Gabel were more credible.
- Dallas testified that he initially took the $5000 Gabel gave him on Sunday night to Gabel's bank to cash it but was told that there was a stop payment. After talking to Gabel and getting Gabel to agree to rescind the stop payment, he claims to have merely deposited the check to his account. This does not make sense. If it were true that he went to Gabel's bank Monday morning, that would indicate that he wanted to make sure the check would clear. You would expect he would try that again after talking to Gabel rather than merely depositing the check and waiting for it to clear. I do not think he ever went to Gabel's bank on Monday as he claimed because, as Gabel testified, Gabel told him he had stopped payment.
- Dallas contradicted his deposition where he said that he had initially contemplated using Safetech employees to take the building down. (Dallas Dep. at 15-16.) At trial he said he never contemplated using them and that he was mistaken in his deposition.

1. The testimony of all witnesses other than Dallas is reconcilable and gives rise to the narrative below. The testimony of Dallas was another story entirely. Dallas testified at deposition and again at trial, at points contradicting himself. His testimony was not

credible and far-fetched in many respects. At the end of this decision I have attached some of the notes I made at the conclusion of trial concerning Dallas' testimony. They reflect my thoughts, at that time, concerning some of his testimony.

2. Fred did receive a payment from Gabel after the project but testified that the payment was for a generator he had sold Gabel and for a couple of days' wages owed him for work prior to the demolition project. (Fred Schneider Dep. at 14-15.)