

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 47

WCC No. 9607-7578

**C. LONEY CONCRETE CONSTRUCTION,
INCORPORATED (CLAY LONEY)**

Appellant

vs.

**EMPLOYMENT RELATIONS DIVISION/
UNINSURED EMPLOYERS' FUND**

Respondent.

ORDER ON APPEAL

Summary: In this second appeal of this case, a concrete contractor challenges the second determination of the Department of Labor that none of the contractor's workers meet the definition of "temporary worker" in section 39-71-116(24), MCA (1991). Among other things, the putative employer argues that the DOL hearing officer again applied an erroneous standard of proof and that substantial evidence does not support the hearing officer's determination that no employees were temporary.

Held: Careful reading of the hearing officer's decision indicates that he found the evidence as to some employees inconclusive and resolved the status of those workers based on the contractor's failure to prove they were temporary workers. This analysis improperly shifted the burden of proof to the contractor. As to other workers, the record supports the hearing officer's conclusion they were baseline and not temporary workers. As held in the prior appeal, the phrase "emergency or short-term" within section 39-71-116(24), MCA (1991) means as follows: emergency contemplates something unforeseen and unexpected, requiring immediate action; short-term contemplates a workload which is greater than a normal workload and exists for a matter of weeks or at most a few months. The hearing officer erroneously concluded that the contractor must include an expected need for short-term employees in his overall volume of business and insure an average number of such employees. As held previously, workers furnished for short-term overloads, either for a specific time, or to work on a specific short-term project until completion, may be considered temporary employees so long as they are not furnished on an indefinite basis.

The hearing officer's affirmation of the DOL cease and desist order was proper because the contractor was operating with some non-temporary employees, but the DOL findings are reversed with regard to specific employees.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-116(24), MCA (1991). In this second appeal of this case, a concrete contractor challenges the second determination of the Department of Labor that none of the contractor's workers meet the definition of "temporary worker" in section 39-71-116(24), MCA (1991). Careful reading of the hearing officer's decision indicates that he found the evidence as to some employees inconclusive and resolved the status of those workers based on the contractor's failure to prove they were temporary workers. This analysis improperly shifted the burden of proof to the contractor. As to other workers, the record supports the hearing officer's conclusion they were baseline and not temporary workers. As held in the prior appeal, the phrase "emergency or short-term" within section 39-71-116(24), MCA (1991) means as follows: emergency contemplates something unforeseen and unexpected, requiring immediate action; short-term contemplates a workload which is greater than a normal workload and exists for a matter of weeks or at most a few months. The hearing officer erroneously concluded that the contractor must include an expected need for short-term employees in his overall volume of business and insure an average number of such employees. As held previously, workers furnished for short-term overloads, either for a specific time, or to work on a specific short-term project until completion, may be considered temporary employees so long as they are not furnished on an indefinite basis. The hearing officer's affirmation of the DOL cease and desist order was proper because the contractor was operating with some non-temporary employees, but the DOL findings are reversed with regard to specific employees.

Employment: Temporary Employees. In this second appeal of this case, a concrete contractor challenges the second determination of the Department of Labor that none of the contractor's workers meet the definition of "temporary worker" in section 39-71-116(24), MCA (1991). Careful reading of the hearing officer's decision indicates that he found the evidence as to some employees inconclusive and resolved the status of those workers based on the contractor's failure to prove they were temporary workers. This analysis improperly shifted the burden of proof to the contractor. As to other workers, the record supports the hearing officer's conclusion they were baseline and not temporary workers. As held in the prior appeal, the phrase "emergency or short-term" within section 39-71-116(24), MCA (1991) means as follows: emergency contemplates something unforeseen and unexpected, requiring immediate action; short-term contemplates a

workload which is greater than a normal workload and exists for a matter of weeks or at most a few months. The hearing officer erroneously concluded that the contractor must include an expected need for short-term employees in his overall volume of business and insure an average number of such employees. As held previously, workers furnished for short-term overloads, either for a specific time, or to work on a specific short-term project until completion, may be considered temporary employees so long as they are not furnished on an indefinite basis. The hearing officer's affirmation of the DOL cease and desist order was proper because the contractor was operating with some non-temporary employees, but the DOL findings are reversed with regard to specific employees.

This is the second time this case has been before this Court on judicial review. The crux of the controversy is whether workers used by appellant in its concrete business, but supplied by a temporary services agency, were in fact temporary employees as defined by section 39-71-116(24), MCA (1991).⁽¹⁾ Appellant (hereinafter referred to as "Loney") was not required to provide workers' compensation insurance coverage for temporary employees. *Id.* and section 39-71-117(2), MCA (1991). The Department Of Labor and Industry (Department), however, determined that the workers were not temporary employees and issued an order under section 39-71-507, MCA (1991), directing Loney to cease and desist from operating an uninsured business. Loney requested a hearing and after hearing the Department upheld the Order.

In the first appeal (*Loney I*)⁽²⁾, this Court affirmed the Department's cease and desist Order, finding that there was substantial evidence to support the conclusion that some workers were employees of Loney and not temporary employees. However, based on the hearing officer's use of an erroneous legal standard in determining which employees were allocable to Loney, I reversed the Department's finding that none of the workers were temporary employees and remanded the case to the Department with directions that, using the correct standard, it make specific findings concerning which workers should have been insured by Loney. In the alternative, I directed the Department to excise its finding that none of the employees were temporary workers. Neither party appealed my determination to the Supreme Court, thus my decision became final.

Thereafter, the Department chose to hold another hearing and make additional findings. It issued a new decision on June 27, 1996, entitled, as its first decision, "Findings of Fact; Conclusions of Law; and Final Order." The new decision again determined that none of the workers furnished to Loney by Olsten Temporary Services (Olsten) met the statutory definition of a "temporary worker."

This second appeal followed on July 29, 1996. Briefing was completed on February 12, 1997, at which time the matter was deemed submitted for decision.

Record on Appeal

The record on appeal consists of the transcripts of the original hearing conducted on February 4, 1993 (tr. I) and the hearing held after remand on September 28, 1995 (tr. II). The Court also has the Department's file, including the exhibits submitted at the two hearings.

Factual Background

The facts pertaining to this matter are found in this Court's prior decision of December 28, 1993, and the record developed following remand.

Appellant is a close corporation. Its sole shareholders are Clay Loney and his wife. (Tr. II at 33.) The Court shall hereinafter refer to both the corporation and its shareholders as "Loney."

Loney is a concrete contractor. It began business in 1983 and incorporated in 1988. (Tr. II at 33.) Its business is affected by weather and by fluctuations in construction demand. Over the years, the number of Loney's construction jobs at any given time have varied, as have the number of workers it employed. Loney's jobs also varied in size. Some jobs required as few as two workers, others as many as seventeen.

During 1991, Loney employed a total of 33 individuals. In 1992, it employed 26 individuals. Some employees were full-time, others worked only a few hours.

In June of 1992, Loney determined that it could no longer afford a permanent work force and entered into an arrangement with Olsten to provide temporary workers for the business. Olsten paid the temporary employees and provided workers' compensation coverage for them; however, Loney fixed the hourly wages of the workers. He reimbursed Olsten for those wages and paid an additional percentage fee to cover Olsten's overhead costs and, presumably, to provide it with a profit.

In July 1992, Loney began obtaining workers exclusively through Olsten. He notified employees who had been working for him that they should sign up with Olsten. Those workers submitted employment applications to Olsten and were interviewed by Darlene Schulke (Schulke), who was the Great Falls manager for Olsten. They were put on Olsten's list of available workers.

Thereafter, when Loney needed concrete workers, including supervisors, he called Schulke. He told her the type of workers he needed and in some cases asked that specific individuals be sent. In most cases, the workers sent by Olsten were the same individuals Loney had previously employed. Some of the workers sent to Loney were also referred to jobs with other employers. After referral, Olsten's only follow-up was telephone contact with Loney to determine if a referred worker was working out.

Beginning in 1990, Veronica Hall (Hall) performed bookkeeping services for Loney on an as needed, part-time basis. She had registered with Olsten in 1988 and, in addition to her work for Loney, she worked part time for other employers. After Loney entered into the

arrangement with Olsten, Hall continued to do Loney's bookkeeping. The amount of her work, however, diminished because she no longer did payroll. With regard to Hall, there was a continuity in her services. There was no testimony indicating that Loney called Olsten every time he had bookkeeping needs. Other than her workload, the working relationship and arrangement was unaffected by the Olsten arrangement.

Additional Facts from September 1995 Hearing

At the hearing in September of 1995, the Uninsured Employers' Fund (UEF) presented additional testimony and exhibits.

Exhibits 11 and 14 consisted of Loney's quarterly reports and established the number of Loney's employees and the size of his payroll prior to its contract with Olsten in July 1992. The Quarterly Reports show the number of employees working during each month from July 1990 through December 1991. Beginning in January of 1992, Loney was no longer required to report the number of workers employed; thus he did not report the number of employees for the first half of 1992. However, payroll and unemployment insurance reports collected by James Watts (Watts), a field investigator for the Department, provides similar information for 1992. Exhibit 22 at page 4 summarizes wage information by named employee for the January 1 to June 30, 1992 period. (See Tr. II at 72-75.) Comparative information for workers supplied by Olsten's subsequent to June 30, 1992, was supplied to the hearing officer in Exhibit 20.

The following chart shows the total number of workers for each of the months beginning in July 1990 and ending December 1992.

First Quarter			Second Quarter				Third Quarter			Fourth Quarter		
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sep	Oct	Nov	Dec
1990							15	14	16	13	12	10
1991	4	9	12	9	13	12	15	13	13	12	11	11
1992	*11	*10	*13	*12	*15	*14	**14	**17	**15	**14	**13	**14

(Exhibits 11, 14, and 23. *Exhibit 22-4. **Exhibits 20 and 21.) On a quarterly basis, the total wages paid by Loney were:

WAGES PAID PER QUARTER - JULY 1990 - JUNE 1992

First Quarter	Second Quarter	Third Quarter	Fourth Quarter
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1990		\$48,410	\$46,555
1991	\$17,343	\$43,234	\$47,911
1992	\$25,243	\$50,509	\$44,480

his information is derived from Exhibits 8-2, 11, and 14.

In its earlier decision, this Court discussed the nature of the work done by the bookkeeper, Hall, and found that she was not a temporary employee. The evidence of the second hearing did not alter the facts regarding Hall or the conclusions flowing from those facts.

Issues on Appeal

The appellant raises the following issues:

1. Whether the Department hearing officer lacked jurisdiction to determine whether the cease and desist Order was valid.
2. Whether the hearing officer improperly placed the burden of proof on Loney.
3. Whether the hearing officer's findings of fact were supported by substantial evidence.
4. Whether the hearing officer misinterpreted section 39-71-116, MCA.

Standard Of Review

The present controversy arises out of the Department's enforcement of section 39-71-507, MCA (1995), which provides in part:

39-71-507. Department to order uninsured employer to cease operations -- noncompliance with order a misdemeanor -- coordination of remedies. (1)

When the department discovers an uninsured employer, it shall order the employer to cease operations until the employer has elected to be bound by a compensation plan.

The Uninsured Employers' Fund (UEF) is statutorily created by section 39-71-502, MCA, as a part of the Department and has been delegated the Department's enforcement powers under section 39-71-507, MCA.

The standards of review are set forth in section 2-4-704, MCA. Although the section, which is part of the Montana Administrative Procedures Act, generally applies to district court review of agency decisions, the standards have been utilized in judicial review cases under the jurisdiction of the Workers' Compensation Court. *E.g., State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827

P.2d 85 (1992) (applying the "clearly erroneous" standard of 2-4-704 (2)(a)(v)). The section provides in relevant part:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

Discussion

1. Jurisdiction.

Citing section 39-71-507, MCA, Loney argues that the hearing officer lacked jurisdiction to determine the validity of the Cease and Desist Order and that jurisdiction over the Order lies with the district court. This Court addressed jurisdiction in the first judicial review and determined that the Department had jurisdiction to review the Cease and Desist Order. (Decision and Order on Appeal (December 28, 1993).) That determination was not appealed.

Moreover, following the first remand by this Court, Loney applied to the Eighth Judicial District Court for an Order quashing the Cease and Desist Order. The action was dismissed for lack of jurisdiction. Judge Marc G. Buyske, who considered the application, reasoned:

An administrative review procedure does exist to make a determination of the status of Plaintiff's work force, albeit not as clearly a delineated procedure as might be desired. The factual issues to be determined by this procedure are clearly within the purview and expertise of DLI, and any reviewing court would benefit from those determinations.

(Respondent's Brief on Appeal, Appendix B - Order Granting Motion to Dismiss for Lack of Jurisdiction at 2.) That Order was not appealed.

Finally, nothing in section 39-71-507, MCA, precludes the Department or this Court from reviewing the validity of the Cease and Desist Order. The section merely provides that a violation of the Cease and Desist Order may be prosecuted as a criminal offense and that the Department may also seek an injunction enjoining violations.

The jurisdictional argument is without merit.

2. Burden of Proof (Persuasion) and Substantial Evidence.

This Court's prior, December 28, 1993 decision, held that the burden of persuasion in this proceeding lies with the UEF and that the hearing officer had erroneously required Loney to prove that workers furnished by Olsten were in fact temporary workers. Upon remand, the hearing officer was required to place the burden upon the Department to prove which workers were *not* temporary workers. In this second appeal, Loney urges that the hearing officer once again improperly placed the burden of persuasion on it.

The burden of persuasion in an administrative setting is by a preponderance of the evidence. *Woods v. Latta*, 35 Mont. 9, 16, 88 P.402 (1907); *Kramer v. EBI Companies*, 265 Mont. 525, 533, 878 P.2d. 266, 270 (1994); *Moralli v. Lake County*, 255 Mont. 23, 30, 839 P.2d 1287, 1291 (1992). A preponderance of the evidence means evidence which persuades a court or administrative agency that a particular fact of consequence is more likely than not. Thus, where the evidence preponderates in favor of the opposing party or is evenly balanced, judgment must be entered for the opposing party.

After the hearing on remand, the hearing officer concluded that none of the workers supplied by Olsten were temporary employees. However, a careful review of his findings of fact and conclusions of law in this second proceeding shows that he viewed the evidence concerning some of the workers as inconclusive and that he resolved the status of those workers based on Loney's failure to prove that they **were** temporary workers. His analysis improperly shifted the burden of proof to Loney.

This Court's prior decision discussed the criteria to be used in determining which workers are temporary employees. The criteria are statutory, as section 39-71-116(24), MCA (1991), defines temporary worker as follows:

"Temporary worker" means a worker whose services are furnished to another on a part-time or temporary basis to substitute for a permanent employee on leave **or** to meet an emergency or short-term workload. [Emphasis added.]

Whether or not the workers furnished by Olsten are deemed part time or temporary, they were not filling in for permanent employees since Loney eliminated all employees. Thus, they did not meet the first alternative test under section 39-71-116(24), MCA. Therefore, the statutory inquiry in this case is focused on whether the workers referred by Olsten were used to "meet an emergency or short-term workload."

Loney I addresses the nature of "emergency or short-term" workloads:

"Emergency" contemplates something unforeseen and unexpected, requiring immediate action. In the context of the statute, "short term" contemplates a workload which is greater than the normal workload and exists for a matter of weeks or at most a few months.

(*Loney I* at 11.) In his findings on remand, the hearing officer found that Loney had a baseline number of workers which could be foreseen and expected, therefore no emergency existed. (Finding 34.) In this regard, the hearing officer made a positive finding and did not rely on the failure of proof on the part of Loney. His finding was supported by substantial evidence showing that Loney averaged a number of 13 employees prior to contracting with Olsten. (Ex. 23.) Over a two-year period prior to contracting with Olsten, the total payrolls for the comparable quarters were also very similar, although in each year the winter quarters were significantly less than the other three. (*Id.*) The evidence was more than sufficient to show that, despite seasonal variables, the number of workers needed by Loney was predictable and static.

The hearing officer determined that Loney had a number of core employees both before and after contracting with Olsten. Those employees were Clay Loney (the principal shareholder), sons Cody and Colt Loney, John Hall, William Hoover, Dwight Dahl, Steve Ekness, Dennis Nebel and Veronica Hall. That finding was unequivocal and positive, and did not rely on any failure of proof on the part of Loney.

The finding as to the listed individuals is supported by substantial evidence. In *Loney I*, I determined that Veronica Hall was Loney's employee, not a temporary employee, and that determination is *res judicata* as to her. No one can reasonably dispute that Loney, who is the sole shareholder of the company, is **not** a temporary employee. As to the remaining listed employees, the hearing officer found that these workers "appeared repeatedly throughout the reporting and payroll documents made available" (finding 34 at 17), a finding that is supported by the testimony at hearing and in the exhibits. (Tr. II at 26, 66-68, Exs. 10 and 11.) He also found with respect to these employees that they were experienced concrete finishers and supervisors and they were essential in managing the common laborers and mud muckers. Dwight Dahl had worked for Loney for four years prior to the Olsten contract. (Finding 14.) William Hoover worked regularly and exclusively for Loney before the Olsten contract. Steve Ekness, John Hall, Dennis Nebel and Colt Loney worked exclusively for Loney after the Olsten contract.

As to the rest of the workers, the hearing officer employed too narrow a definition of short-term workload. In Finding 21 he noted, "At neither hearing did Mr. Loney present specific testimony or other evidence to indicate which, if any, projects constituted an emergency or short term workload." In Finding 26, he said:

Other named workers either did not last long, left to attend school, were fired, or did not work exclusively for the Appellant. Some of these workers included Bob Lingafelter, Jamin Hasner, Jeff Knutson, Carey Mounts, Rich Fraker, Doug Coster and Brendan Gee. Even these workers were not hired for a specified or finite period of time, but to meet the routine need for crews on jobs the Appellant successfully acquired (Testimony of D. Schulke and C. Loney; Exhibits 20 and 21).

Then, and most importantly, in Findings 34 through 36, he stated in relevant part:

The undersigned Hearing Officer specifically concludes that on the basis of the evidence presented no precise or constant number of employees can be attributed to the Appellant's operation.

35. During the time frame in question, changes in UI reporting requirements and changes in the Appellant's method of bookkeeping further limited anyone's ability to now review and reconstruct exact days, hours, crews, and jobs and weeks worked for certain periods by the workers. Mr. Loney's and Olsten's records made available simply do not contain project information by starting date, workers involved, anticipated type and number of crews needed, or estimated or actual project ending dates (Testimony of C. Loney and J. Watts, tapes 3 and 4; Exhibits 10-16; 19-21).

36. While the documentary evidence presented by the Respondent shows that some employees provided by Olsten's ceased working for the Appellant, none of the entries reflected that any individual was terminated for lack of work. Rather, the record reflects that the Appellant's workers voluntarily quit or were fired for either their failure to show up for work or their inability to do the job (Exhibit 19). No finite ending dates for any projects or ending dates for any workers were set out at the outset in any of the Appellant's records submitted by the Respondent.

(Finding of Fact; Conclusion of Law; and Final Order at 18.)

The hearing officer's findings reflect two things: first, an expectation on his part that Loney should prove which of his workers were temporary employees and, second, a requirement that the need for short-term employees be reflected in Loney's overall volume of business and average number of employees per quarter rather than the short-term requirements of particular jobs. Both approaches were erroneous.

Initially, an employee hired for a specific short-term job may be considered a temporary employee. In *Loney I*, I said:

Insofar as Loney experienced a recurrent baseline requirement for workers, the workers needed to fill that baseline cannot be considered as meeting a "short term workload." **On the other hand, workers furnished for short-term overloads, either for a specific time, or to work on a specific short-term project until**

completion, may be considered temporary employees so long as they are not furnished on an indefinite basis.

(*Loney I* at 13, emphasis added.) There was ample evidence supporting the hearing officer's finding that supervisory concrete finishers were long-term, baseline workers employed on an indefinite basis, but the evidence as to the remaining workers was lacking. As the hearing officer acknowledged, many of the other workers did not work consistently for Loney. (Finding 36.) Most of the common laborers furnished to Loney by Olsten's had not been previously employed by Loney and worked for only a few weeks. (See Ex. 20.) The lack of any written record establishing the end date of Loney's projects or the end dates of employment did not prove they were not temporary employees. The fact that average numbers of workers used by Loney by quarter was relatively consistent also did not prove that a specific employee was not a temporary employee. To be characterized as a temporary employee, it was sufficient that the construction job for which the worker was hired was a short-term project, whether or not a specific completion date was specified, and that the worker was hired for the particular job without any assurance that he or she would be hired for other jobs. The burden was not on Loney to prove that the worker was hired under those conditions, it was on the UEF to prove that the worker was not. Affirmative evidence proving that these other employees did not meet the temporary worker criteria was lacking and the hearing officer relied on Loney's failure of proof in concluding that the workers were not temporary employees. In doing so, he erred.

3. Seasonal workers.

Loney urges that the interpretation adopted by this Court in *Loney I* with respect to "seasonal" work was erroneous. It is too late to make that argument. *Loney I* was not appealed and is *res judicata*.

ORDER AND JUDGMENT

1. The Court has jurisdiction over this matter pursuant to section 39-72-612, MCA.
2. For the reasons set forth in the foregoing discussion, the hearing officer's determination that the Cease and Desist Order is valid and proper is **affirmed**. His determination that Clay Loney, Cody Loney, Colt Loney, John Hall, William Hoover, Dwight Dahl, Steve Ekness, Dennis Nebel and Veronica Hall were not temporary employees is also **affirmed**. His finding that the remaining individuals were not temporary employees is **reversed**. This matter is remanded for entry of an Order finding that Clay Loney, Cody Loney, Colt Loney, John Hall, William Hoover, Dwight Dahl, Steve Ekness, Dennis Nebel and Veronica Hall were not temporary employees and that the UEF failed to sustain its burden of proof with respect to the other individuals.
3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 15th day of August, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Antonia P. Marra

Mr. Daniel B. McGregor

Ms. Christine L. Noland

Ms. Anne L. MacIntyre -- E-mail

Submitted Date: February 12, 1997

1. The "temporary worker" definition was subsequently renumbered as section 39-71-116(34), MCA (1995).

2. C. Loney Concrete Construction, Inc. v. UEF, WCC No. 9305-6788, Decision and Order on Appeal (12/28/93).