

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 48

WCC No. 9312-6965

JERROLD LUNDBERG

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE COMPANY

Respondent/Insurer for

PYRAMID MOUNTAIN LUMBER COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 15, 1994, in Helena, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Jerrold Lundberg (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent, Liberty Northwest Insurance Co. (Liberty), was represented by Mr. Michael C. Prezeau. Claimant, Gerald Parker, Todd Johnson and Burt Lillis testified at trial. The depositions of Jerrold Lundberg and Gerald Parker were accepted for consideration by the Court. Claimant's objection to the depositions was overruled. ARM 24.5.322. Exhibits 1 through 6 were admitted into evidence by stipulation.

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

1. Claimant is 60 years old and married. He has lived in Lincoln, Montana for many years.
2. Claimant worked for the United States Forest Service (Forest Service) from April 1968 until he retired in December of 1985, which is approximately 18 years. He worked in a number of positions, including tree planter, timber cruiser, log scaler, and, finally, sales administrator for the Lincoln District of the Helena National Forest.

3. As district sales administrator, claimant was responsible for laying out timber sales, mapping out roads and timber sale boundaries, and enforcing timber sale contracts for the Forest Service. As a result of his Forest Service experience, claimant is familiar with nearly every aspect of the logging business.
4. Within a year of his 1985 retirement, claimant and his son formed a logging business called "Lundberg Logging." Lundberg Logging contracted with private landowners to cut timber, skid it out, and haul it to a mill. Most of its work was for two ranches. Claimant also had a few small contracts with Pyramid Mountain Lumber Co. (Pyramid), and on one occasion he made a small timber purchase from the Forest Service. Lundberg Logging also performed jobs piling slash and constructing a road. It owned logging equipment including a backhoe, logging truck, cat, and grader. It was a dues paying member of the Montana Logging Association. It maintained its own checking account, employer identification number, and liability insurance. Finally, it maintained workers' compensation insurance on its employees but claimant elected not to cover himself.
5. In 1991 claimant bought out his son's interest in Lundberg Logging.⁽¹⁾ Thus, the business became a sole proprietorship at that time.
6. Pyramid is in the business of buying and logging timber. Pyramid contracts with others for the actual logging of the timber it purchases.
7. Prior to July 1992 Lundberg Logging contracted with Pyramid on several small slash piling and logging jobs.
8. On July 6, 1992, Gerald Parker, Pyramid's timber resource manager, contacted claimant and asked him if he was interested in purchasing timber for Pyramid in the Lewistown area. Parker knew claimant from claimant's work as sales administrator in the Forest Service.
9. Pyramid utilizes both employees and contractual consultants in locating and purchasing timber.
10. Parker gave claimant the option of working for Pyramid as a company employee, but claimant said, "[N]o, I would rather work by the day." Claimant denied that he was given the option but the Court finds Parker more credible regarding this conversation.
11. Claimant suggested, and Parker agreed, on a rate of \$100.00 per day for claimant's work.
12. Claimant and Pyramid thereafter entered into a "CONSULTATION AGREEMENT" (Ex. 3) on July 27, 1992. Mr. Parker prepared the consultation agreement, which is set forth as follows:

CONSULTATION AGREEMENT

This Agreement is made and entered into this 27th day of July, 1992, by and between Jerrold Lundberg (hereafter referred to as consultant), whose address is P.O. Box 354, Lincoln, Montana 59639, and Pyramid Mountain Lumber, Inc., whose address is P.O. Box 549, Seeley Lake, Montana 59868.

1. Pyramid Mountain Lumber, Inc. hereby employs consultant on an independent basis to perform consultation services as follows: Procurement of timber stumpage and purchase logs for Pyramid. Also some timber sale layout and administration. Most work is expected to be in the Lewistown area and other parts of Eastern Montana.

2. The term of this agreement shall commence on July 27, 1992 and shall terminate at any time, without cause, after first giving two months written notice to the other party.

3. The agreed upon price for these consultation services shall be as follows: Pyramid agrees to pay consultant at the rate of \$100.00 per day with a mileage allowance of \$.30/mile. Pyramid will furnish living quarters and phone in Lewistown, Montana. Consultant will furnish all other personal expenses. Business expenses such as motels, food and phone calls will be paid by Pyramid when consultant is working in areas over 100 miles from Lewistown. Itemized expense records will be submitted to Pyramid at the end of each month for these special expenses.

4. It is hereby understood that Consultant is an independent consultant and not an agent or employee of Pyramid Mountain Lumber, Inc.

5. Consultant shall conduct these consultation services hereunder in an expedient, economical and workmanlike manner. The special written products involved in this consultation service shall remain the exclusive ownership of Pyramid Mountain Lumber, Inc., and specific products involving verbal consultation which are unique to this firm and not standard in most of the local industry shall remain in confidentiality between the parties.

6. In the event of any suit, action or proceedings leading to any rights, duties or liabilities arising hereunder, the prevailing party shall be entitled to recover reasonable attorney's fees and costs, including fees and costs resulting from an appeal decision of a lower court.

7. The goal of this agreement is to purchase 5 MMBF of stumpage a year for Pyramid. Consultant will report to Pyramid's Resource Forester in Great Falls, Montana, who will furnish him with maps, leads and other back-up information necessary to meet the goal. Consultant will work full time for the first 4 months out of Lewistown to get established and then spend whatever time is necessary to achieve or exceed the goal.

8. The provisions one (1) through eight (8) constitute the entire agreement of the parties hereto, any modifications to this agreement shall be in writing and signed by both parties.

IN WITNESS WHEREOF, the parties hereto have executed this consultation agreement as of the date first written above.

PYRAMID MOUNTAIN LUMBER, INC.

By: /s/ Gerald V. Parker

Title: Timber Manager

JERROLD LUNDBERG

/s/ Jerrold Lundberg

(Ex. 3 at 4-5.)

13. Pyramid interpreted the contract as permitting it to designate and change the area of claimant's work. Mr. Parker testified:

Q. [by Mr. Grosfield] Do you admit that you could have changed that area or Pyramid could have changed the area where it wanted Mr. Parker [sic] to work if it had wished to do so?

A. [by Mr. Parker] Well, we would have asked him if he would go somewhere else if we wished him to go and we had another need in another area.

Q. You would have expected him to go there if he wanted to continue with Pyramid?

A. If we no longer needed him at Lewistown; that's right.

(Tr. at 19-20.) Parker's testimony was consistent with the parties' agreement, which does not limit claimant's services to the Lewistown area and broadly encompasses "other parts of Eastern Montana."

14. Pyramid provided claimant with business cards. The business cards were the same as those provided to employees of Pyramid who purchased timber for Pyramid, and apparently were used by claimant to identify himself when contacting potential timber sellers.

15. Pyramid furnished claimant with living quarters in a trailer house. Claimant used the trailer house when in Lewistown. Pyramid paid the telephone and utilities for the trailer.

16. The equipment necessary for claimant to perform his work consisted of a pencil, a tape measure and an increment board, small items with relatively small value, and a pickup truck. Claimant provided this equipment, including his own pickup truck, although Pyramid reimbursed him for his mileage at the rate of \$.30 per mile.

17. Claimant understood that he was expected to work a full, eight-hour day in return for the \$100.00 daily remuneration provided by the contract.

18. Claimant had no fixed hours or days of work and could take days off without seeking permission from Pyramid. However, he understood that he was generally expected to work an average of 40 hours a week. Parker testified that Pyramid expected him to work full-time for the first four months and thereafter work as much time as necessary to meet his purchasing goal. That expectation was consistent with the express terms of the contract. (Ex. 3, ¶ 7.) Pyramid did not issue any directive or guidelines concerning claimant's hours or days of work. Claimant "assumed it was Monday through Friday and an eight-hour day. A lot of times I worked evenings, but I just figured as long as we averaged out at 40 or so" (Tr. at 48.)

19. Claimant was not required to maintain records of his time. He kept only a record of the days he worked and was paid on that basis.

20. Pyramid did not control the details of claimant's work. Claimant contacted prospective sellers at times that he fixed and solicited their business without any direction, guidelines, or interference by Pyramid. While he was initially given some leads by Pyramid, he was expected to develop and follow-up on his own leads.

21. Claimant was not covered by Pyramid's vacation, sick leave or health care policy. He was not subject to Pyramid's personnel policies. Income taxes were not withheld from claimant's earnings and his earnings were reported to the IRS on a form 1099, rather than a W-2.

22. Pyramid expected claimant to purchase timber solely on its account in the area assigned to him. When asked whether claimant would have been allowed to find timber in the Lewistown area and sell it to entities other than Pyramid, Mr. Parker stated:

Well, I couldn't say that I wouldn't allow it. I wouldn't like that very much. If that happened we'd certainly look at terminating the contract.

(Tr. at 81-82.) Later on Parker said, "In other words I would have felt that he shouldn't be selling it to another entity." (Tr. at 87.) But Parker also noted that it did not object to Burt Lillis purchasing timber for others since those purchases were in areas other than the ones in which Lillis was buying for Pyramid. There was no contractual provision precluding claimant from purchasing timber on behalf of others, and claimant failed to establish that Pyramid could or would terminate him without giving 60-days-written-notice. Purchasing for others could also have interfered with claimant's ability to meet his goal under the Pyramid contract.

23. Claimant was required to use a standard Pyramid log purchase agreement in purchasing timber for Pyramid. He did not have check writing authority to purchase timber

for Pyramid; purchases were paid directly by Pyramid. Claimant checked with Burt Lillis to discuss price. (Tr. at 31.) Lillis was also purchasing timber for Pyramid under a contractual arrangement similar to claimant and considered himself an independent contractor. Pyramid set a price range for its buyers and passed that information on to Lillis, who then gave the information to claimant. (Lillis Dep. at 33.) Thus, it appears that claimant had discretion to determine price within a range set by Pyramid.

24. Both Pyramid and the claimant genuinely believed that claimant was an independent contractor.

25. There is no substantial evidence to indicate that the contract between Pyramid and the claimant was a subterfuge to avoid workers' compensation premiums or payment of employee benefits. Pyramid had employees who performed similar functions as did claimant and there was no evidence indicating that it had any preference between hiring claimant as an independent contractor or an employee.

26. Claimant commenced work on behalf of Pyramid on July 27, 1992. Claimant maintained his residence in Lincoln, Montana, where his wife continued to reside. He typically traveled to Lewistown on Monday and returned to Lincoln on Friday. At the end of each month, claimant submitted a list of the days he had worked, the number of miles he had driven each day, and where he had travelled, along with an itemization of his reimbursable expenses.

27. Claimant determined which days he worked. He took off a number of days without notifying or getting permission from Pyramid. He stayed in Lincoln and did not work on September 28, 29 and 30, 1992 on account of bad weather. From October 5 to 9, 1992 he stayed home because his pickup was broken down and he did a short job for a post cutter. He also took off September 8, 24 and 25, 1992 because of personal business or because of his mother's surgery. The person (Ed Stoots) now working as a Pyramid timber buyer in the Lewistown area is a salaried employee of Pyramid. Stoots can determine his own daily work schedule but must obtain approval for days off.

28. On one occasion claimant refused to participate with a Pyramid employee in a snowmobile trip to inspect timber because he thought it was unsafe due to the cold weather.

29. Burt Lillis purchases timber for Pyramid under an agreement similar to the one between claimant and Pyramid. Lillis also purchases for other companies and has an office in both Great Falls and Coeur d'Alene, Idaho. He charges a daily rate for his timber buying and considers himself an independent contractor.

30. On February 26, 1993, claimant was seriously injured in a traffic accident while travelling to Martinsdale to check on potential timber sales.

31. At the time of claimant's accident, Pyramid was enrolled under Compensation Plan No. 2 of the Workers' Compensation Act and was insured by Liberty.

32. Liberty denied liability for the claim on the ground that claimant was an independent contractor rather than an employee.

33. The Court finds that claimant was an independent contractor and not an employee of Pyramid. The rationale for this finding is set forth in the following Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. The sole controversy in this case is whether claimant was an employee of Pyramid, thus entitled to workers' compensation benefits on account of his automobile accident, or an independent contractor.

Both parties in this case believed that claimant was an independent contractor. There was no subterfuge nor any intent to evade workers' compensation requirements. Claimant was familiar with workers' compensation and consciously decided to forgo coverage for himself, as he was entitled to do under Montana statutes which permit sole proprietors, partners and corporate officers to waive coverage. *See section 39-71-401 (3) and (4), MCA.* Had he elected coverage, this dispute would never have arisen. Having suffered severe injuries in an automobile accident, claimant now seeks compensation from Pyramid's insurer, consigning to this Court the task of applying a technical set of legal criteria to determine whether claimant was "in fact" an independent contractor. The criteria are sometimes difficult to apply, but there is no middle ground: claimant must be classified as either an employee or an independent contractor.

The criteria which must be met for independent contractor status are set forth in section 39-71-120, MCA, which defines "independent contractor" as follows:

39-71-120. Independent contractor defined. (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 his 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.

The requirements of subsections (a) and (b) are written in the conjunctive; thus, the criteria of both subsections must be satisfied. If both sections are not satisfied, the claimant is deemed an employee and is entitled to compensation.

The fact that claimant was expressly designated an independent contractor "is not dispositive. . . . [Claimant] must have been independent in fact." **Schrock v. Evans Transfer & Storage**, 225 Mont. 348, 351, 732 P.2d 848 (1987). For the same reason, the parties' belief that claimant was an independent contractor is also not conclusive in determining claimant's status. Thus, the Court must examine all of the facts of the relationship to determine if it satisfies the criteria of the statute.

The first of the two tests -- control -- has four elements or subparts. Those elements are:

- (1) Direct evidence of right or exercise of control;
- (2) Method of payment;
- (3) Furnishing of equipment; and
- (4) Right to fire.

Sharp v. Hoerner Waldorf Corp., 178 Mont. 419, 425, 584 P.2d 1298, 1301-02 (1978); **accord, Loos v. Waldo**, 257 Mont. 266, 273, 849 P.2d 166 (1992).

Right or exercise of control

The control test "is based on the right, not just the exercise, of control." **Sharp**, 178 Mont. at 424. As a general rule, an employer of an independent contractor controls the "end result" of the contractor's work, while control of the "means" by which the work is accomplished indicates that the worker is an employee. **Johnson v. Department of Labor & Industry**, 240 Mont. 288, 292-93, 783 P.2d 1355, 1358 (1989). Where the right of control is limited to those few matters required to ensure a satisfactory end result, that right is not inconsistent with independent contractor status. **Solheim v. Davis Ranch**, 208 Mont. 265, 677 P.2d 1034 (1984). Without destroying independent contractor status, the owner or general contractor is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. **Walling v. Hardy Construction**, 247 Mont. 441, 447-48, 807 P.2d 1335 (1991) (citation omitted).

The evidence in this case shows that Pyramid's right to control did not extend to details of claimant's work and that the freedom claimant exercised in going about his work was more consistent with an independent contractor status than employee status:

- a) Claimant determined his own hours and days of work; he determined his own appointments and work schedule. He took days off as he alone determined, some to do other contract work. He was free to decline to inspect timber stands with Pyramid employees.

b) There is no evidence indicating that Pyramid fixed any guidelines or rules, or even gave advice, concerning the manner and method of securing timber sellers.

c) Pyramid could reassign claimant to an area other than Lewistown if it no longer needed him in Lewistown, but that authority appears consistent with the contract designation of claimant's area as "Eastern Montana," and does not involve any day-to-day work detail. The authority is more like that of a general contractor designating the flow of work by a subcontractor on a large project to ensure that the end result is achieved. **See *Walling v. Hardy Construction*, 247 Mont. 441, 448, 807 P.2d 1335 (1991)** (*holding that a contractor's control of the subcontractor's sequence of work, and even ordering the subcontractor to pour concrete despite the subcontractor's objections, were necessary to control the end result and did not create an employment relationship*). The possibility that Pyramid might cancel the contract should claimant purchase timber for others in the Lewistown area could well have involved its legitimate concern that claimant reach his 5 MMBF annual goal, and did not in any event preclude claimant from continuing his logging business or buying for third parties in other areas, time permitting. Claimant failed to establish that Pyramid had the right or the intention to cancel on any earlier basis than 60-days-written-notice in the event claimant sold to competitors, so Pyramid may have incurred liability in the event of such a cancellation.

d) The four month full-time requirement was clearly directed to assuring that claimant would become familiar with the Lewistown area and devote enough time to his buying to achieve the contract goal.

e) Pyramid provided claimant with some initial leads and expected him to follow-up on them, however, that expectation was aimed more at the end result than work details since Pyramid did not control when and how he did so.

f) Pyramid did provide claimant with business cards of the same type it provided to its employees, certainly a detail of claimant's engagement. In the entire context of claimant's work, however, and considering claimant's need to identify himself as acting on behalf of Pyramid during his contacts, that detail is an insignificant one in determining control.

g) Claimant's use of a Pyramid purchase agreement form when negotiating contracts to purchase timber was necessary and incidental to the fact that Pyramid was the actual purchaser. Claimant's job was to secure buyers on Pyramid's terms.

h) Claimant was not given any check writing authority to purchase timber, nor a bank account from which timber purchases could be made. Those matters, however, are more consistent with claimant acting as an independent contractor

than as an employee. Check writing authority, especially, is much more indicative of an employee relationship than of independent contractor status.

i) In negotiating purchases, claimant checked with Burt Lillis to discuss price. Lillis was also purchasing timber for Pyramid under a contractual arrangement similar to claimant and considered himself an independent contractor. Pyramid set a "range" of prices, which it then communicated to Lillis, who in turn provided the information to claimant. Claimant thus had discretion in fixing timber prices, albeit within the range set by Pyramid.

On balance, the right of control supports a finding of an independent contractor status.

Method of payment

The second element of the control test is the method by which the worker is paid for services. It is undisputed that claimant was paid \$100.00 per day of work, and reimbursed for mileage and business expenses. Claimant submitted a monthly statement of his days of work and his mileage to Pyramid.

Payment on a time basis is strongly indicative of an employment relationship rather than independent contractor status. **Sharp**, 178 Mont. at 425; accord, **Morris v. Montana Forward**, 245 Mont. 153, 156, 799 P.2d 1063 (1990). However, this generalization is not always applicable. Payment on a time basis, even hourly pay, may be one of the customary payment methods in some independent trades and occupations. **Johnson v. Montana Department of Labor & Industry**, 240 Mont. 288, 293-294, 783 P.2d 1355 (1989) (*While hourly pay usually evidences employment, custom in the industry often finds carpenters working on a per hour basis, and is not conclusive of either an independent contractor or employment status.*).

In the present case the claimant suggested the \$100.00 a day remuneration and rejected the option of becoming an employee of Pyramid. Burt Lillis, who operates a forestry consultant company in Montana and Idaho, testified that he purchases timber for several companies as an independent contractor and does consulting for Pyramid under a contract similar to that of the claimant. He testified that it is customary to be paid by the day plus reimbursable expenses. The method of payment in this case is inconclusive and does not bolster either status.

Furnishing of equipment

The third factor of the control test is the furnishing of equipment by the employer. Claimant testified that the equipment he needed to perform his job was a pencil, a tape measure and an increment board, along with a pickup truck for transportation, all of which he provided. Although Pyramid reimbursed him at a 30 cents a mile rate for his use of the pickup, the

equipment did not belong to Pyramid and did not constitute equipment furnished by Pyramid.

Pyramid provided claimant with a trailer house in Lewistown to live in while working in the area. The Montana Supreme Court has treated "an office, place of worship, [and] hymnals" supplied by a church to a pastor as equipment furnished by an employer. **St. John's Lutheran Church v. State Comp. Mut. Ins. Fund**, 252 Mont. 516, 522, 830 P.2d 1271 (1992). Those items, however, were used directly in the pastor's work. The equipment furnished must be in the nature of "tools of the trade." **Doig v. Graveley**, 248 Mont. 59, 63, 809 P.2d 12 (1991). In this case housing was not used in claimant's work and was not one of the "tools of the trade." The availability of the trailer merely permitted claimant to keep his permanent residence in Lincoln, Montana, which is approximately 180 miles from Lewistown. Since the trailer house was not equipment used by claimant in performing his work, it did not constitute equipment furnished by Pyramid.

Based on claimant supplying a pickup truck and all other equipment, the equipment factor supports an independent contractor finding.

Right to fire

The fourth factor is the right to fire. The right to fire is strong evidence of an employer-employee status since the right to terminate the relationship without liability is not consistent with the concept of independent contractorship. **Solheim** at 276. "Termination at will or for failure to perform certain details unrelated to the end result strongly indicates employee status." **Walling v. Hardy Construction**, 247 Mont. 441, 449, 807 P.2d 1335 (1991)(*citations omitted*). The contractual provision governing termination other than for breach of contract, provided: "The term of this agreement shall commence on July 27, 1992 and shall terminate at any time, without cause, after first giving two months written notice to the other party." (Ex. 3.) Thus, Pyramid's right to fire was not absolute. However, the Supreme Court's opinion in **Carlson**, indicates a notice provision such as this is not particularly significant either way. Discussing a contractual provision which required thirty days notice in writing as a prerequisite to termination of a contract between a newspaper deliverer and the Billings Gazette, the Court stated:

This is not particularly significant, since the employer of an independent contractor may require satisfaction in the end result, and may terminate for breach of contract when that requirement is not met. Termination at will or for failure to perform certain details unrelated to the end result would strongly support employee status, *Larson*, Vol 1C, § 44.35, p. 8-116 et seq.

Id. at 324. The evidence in this case does not show that the contract could be terminated at will or for any failure to perform details unrelated to the end result. While there was testimony that Pyramid might consider terminating the contract if claimant sold timber to

other companies, there was no evidence indicating that such conduct would be considered cause to terminate the contract, leaving the Court to infer that any termination would have been pursuant to two months notice. Under these circumstances, this factor is neutral.

Conclusion based on four factors

The control test favors the finding of an independent contractor relationship. Consideration of the four factors is not a balancing test. **Sharp**, 178 Mont. at 425; **accord Schrock**, 225 Mont. at 348. An independent contractor relationship is established "only by a convincing accumulation of these and other tests," **Sharp**, 178 Mont. at 425; while an employment relationship can be established upon satisfaction of one of the four factors. **Id.** There is a convincing accumulation of factors supporting a finding of an independent contractor relationship. Pyramid did not have a right to control significant details of claimant's work. The equipment factor also supports a finding that claimant was an independent contractor. The remaining two factors -- method of payment and right to fire were neutral.

Independently established trade or business

The second statutory criteria for independent contractor status requires that the individual be engaged in an independently established trade, occupation, profession, or business. It is undisputed that at the time he contracted with Pyramid, claimant operated an independent logging business. Lundberg Logging initially consisted of claimant and his son, doing business as partners, but was claimant's sole enterprise at the time of the Pyramid contract. The company engaged in cutting timber for private landowners, transporting logs to the mill, and other related work, such as slash piling and road building. At times the company employed other persons on whom it carried workers' compensation insurance. It made at least one timber purchase on its own account. It did not at any time engage in timber buying or consulting for third parties, but claimant's background qualified him to expand into that field.

Even after claimant began working for Pyramid, he continued to operate Lundberg Logging, albeit on a diminished scale. He had at least one job which he did during the week of October 5, 1992. He took the time off from his Pyramid duties to do the job.

Liberty argues that the independent trade requirement is met whether or not claimant was engaged "in precisely the same enterprise as the entity which retains the services of the business." (Respondent's Reply Brief at 4.) Claimant maintains that the requirement is not met because Lundberg Logging was not engaged in the business of buying timber for third parties. The conflicting positions create a critical issue, specifically, whether the "independently established trade, occupation, profession, or business" specified by section 39-71-120 (1) (b), MCA, must involve the identical services as those which give rise to the independent contractor/employee controversy? **St. John's Lutheran Church v. State**

Compensation Ins. Fund, 252 Mont. 516, 521, 830 P.2d 1271 (1992), strongly suggests that independent business or trade need not involve identical services. That case, involving the pastor of a church, held:

It is agreed that the pastor may receive remuneration for work from third parties, even if time is taken away from his parish work. Therefore, the pastor satisfies the second part of the statute which requires that an independent contractor must be engaged in an independent[ly] . . . business.

The Court did not consider the nature of the services furnished to other parties, only the fact that the pastor did work for others. Claimant in this case was free to contract with others and to take time off from his work for Pyramid so that he could perform other contracts. Buying timber was clearly related to claimant's logging business and within claimant's skills. The second statutory criteria is met.

Thus, the claimant satisfies both statutory criteria for an independent contractor. He was not an employee of Pyramid and Liberty is not liable for his injuries.

3. Claimant is not entitled to costs or attorney fees since he has not prevailed in this action.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Claimant was an independent contractor. He was not an employee of Pyramid Mountain Lumber Co. at the time of his accident and is therefore not entitled to workers' compensation and medical benefits.

3. Claimant is not entitled to attorney fees, costs or a penalty.

4. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

DATED in Helena, Montana, this 25th day of May, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman H. Grosfield

Mr. Michael C. Prezeau

1. He testified that he built his son a shop in Canyon Creek, Montana in return for his son's equity in the business.