IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 13

WCC No. 2002-0546

RAM MONTANA, INCORPORATED

Appellant

vs.

INDEPENDENT CONTRACTOR CENTRAL UNIT/
UNINSURED EMPLOYERS' FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEALED 3/12/04
DISMISSED WITH PREJUDICE 9/21/04

Summary: RAM Montana, Incorporated, a Nevada corporation with offices in Montana and extensive contacts with Montana, was in the business of doing contract remodeling jobs for Payless Shoe stores throughout the United States. The Independent Contractor Central Unit determined that its workers, including crew leaders, were employees subject to the Montana Workers' Compensation Act. Since RAM was uninsured in Montana (and elsewhere) from March 18, 1995 through December 31, 1997, the Uninsured Employers' Fund imposed penalties on RAM pursuant to section 39-71-504, MCA. RAM appeals, alleging that its workers were not subject to Montana workers' compensation requirements because their work was performed outside of Montana and that, in any event, its workers were independent contractors or employed by independent contractors.

Held: RAM's crew leaders and workers were never independent contractors. Workers based in Montana, who mustered out of Montana and traveled to and from Montana for temporary jobs in other states, were subject to Montana workers' compensation requirements. However, crew leaders and workers who did not reside or work on jobs in Montana were not subject to Montana workers' compensation requirements and should have been excluded from any penalty determination.

Topics:

> **Jurisdiction: Montana Employment.** Contractor with Montana offices and other Montana contacts who used Montana workers on temporary jobs throughout the

United States, and who mustered those workers in Montana and transported them to and from Montana to their temporary jobs, was required to provide its Montana workers with workers' compensation insurance coverage. Failure to do so subjects it to penalties under section 39-71-504, MCA.

Independent Contractor: Independent Business. Where only work performed by alleged independent contractors was performed for a single employer and the alleged independent contractors were not engaged in business ventures independent of their work for the employer, the workers failed the "B" part of the independent contractor test and were not in fact independent contractors.

Independent Contractor: Elements. A worker who regularly works for a contractor, who does not bid jobs, who is paid by the day, who is furnished with transportation to and from jobs in vehicles owned by his employer, who is furnished with equipment other than small hand-tools, and whose activities are ultimately directed by the contractor who makes it clear that the worker will be terminated unless its instructions are followed, is an employee and not an independent contractor.

Independent Contractor: Corporation. Workers who were directed by the employer to set up corporations, and who were not previously engaged in business independent of the employer with all the necessary business forms and bookkeeping services did not become independent contractors by incorporating. The corporations were shams.

¶1 The trial in this matter was held on October 7 and 8, 2002, in Missoula, Montana. Petitioner, RAM Montana, Incorporated (RAM), was represented by Mr. Julio K. Morales. The Independent Contractor Central Unit (ICCU) and Uninsured Employers' Fund (UEF) were represented by Ms. Julia W. Swingley.

¶2 Exhibits: Petitioner's Exhibits 1 through 63, 65, 66, 68 through 74, 76 through 81, UEF-1, UEF-2, 143 and 144 were admitted without objection. Petitioners Exhibits 64 and 67 were withdrawn. Petitioner's Exhibit 75 was admitted over objection. There are no Petitioner's Exhibits 82 through 142. Respondent's Exhibits 1 through 62 were admitted without objection.

¶3 Witnesses and Depositions: Donald Revell, Amanda Monroe, Michelle Monroe, and Randy Monroe testified at trial. The parties also submitted depositions of Virginia Lewis and James Lewis for the Court's consideration, along with transcribed testimony of Michael Scott Finnegan in another proceeding (WCC No. 2000-0062) and his deposition in that proceeding. The Court also granted petitioner leave to take Mr. Finnegan's deposition post-trial. The deposition was taken on November 14, 2002, and filed with the Court on February 19, 2003, on which date this matter was deemed submitted for decision.

¶4 Pending Motions: The Pretrial Order lists three pending motions, as follows:

¶4a RAM's Motion to Dismiss for Lack of Jurisdiction.

¶4b RAM's Motion to Dismiss for Lack of Joinder and Alternative Motion to Join Parties.

¶4c ICCU/UEF'S Motion to File Deposition & Trial Transcript of Michael Scott Finnegan in Lieu of Live Testimony.

(Pretrial Order at 1.) The Court denied the second motion concerning joinder in an Order on Motion to Join Parties filed September 30, 2002. The third motion was granted but with leave of Court for petitioner to take a further deposition of Mr. Finnegan. That deposition was taken on November 14, 2002. The first motion challenging jurisdiction was deferred and is now denied based on the following findings of facts and conclusions of law.

¶5 Issues Presented: The issues set forth in the Pretrial Order are in two parts. The first part consists of the issues both parties agree are presented for decision. Those issues are as follows:

¶5a Whether RAM Montana, Inc., a Nevada corporation, was an employer subject to the jurisdiction of the Montana Workers [sic] Compensation Act during calendar 1995, 1996 and 1997.

¶5b If so, whether the "crew leaders," specifically Joe McNamara, Don Coffman, Brent Cobb, Michael Scott Finnegan, Scott Johnson, Carl Siruchek, Steve McCullough, and any other similarly situated crewleaders [sic], were employees of RAM whose wages were subject to the penalty, or to the contrary, were independent contractors under Section 39-71-120, M.C.A., for purposes of the audit.

¶5c Whether during the audit period, January 1, 1995, through December 31, 1997, the workers who were supervised by the crewleaders [sic], were employees of RAM, rather than of the crew leaders, for purposes of the audit.

(Id. at 7.) In addition, RAM presents the following issues:

¶5d If so, for which employees and which employments:

A. Concerning Payless store projects in Montana:

(1) Montana resident crew leaders.
(2) Non-Montana crew leaders.
(3) Montana resident crew workers.
(4) Non-resident crew members

B. Concerning Payless store projects outside Montana:

(1) Montana resident crew leaders.
(2) Non-Montana crew leaders.

(3) Montana resident crew workers.
(4) Non-resident crew members

¶5e Whether premium and penalty, if any, should be calculated based on actual payroll rather than summaries.

¶5f Whether premium and penalty, if any, should be calculated based on actual payroll throughout the audit period rather than projections.

¶5g Whether premium and penalty, if any, may be imposed based on payroll for which AdvanStaff, the Las Vegas employee leasing company failed to obtain coverage.

¶5h Whether premium and penalty, if any, may be imposed based on payroll for which the various crew leaders had applied for coverage but for which coverage was retroactively canceled.

(Id. at 7-8.)

¶6 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

I. Introduction

¶7 This is an "appeal" by RAM from a determination of the ICCU of the Montana Department of Labor and Industry (Department.) Although characterized as an "appeal," appellant/petitioner is entitled to a de novo hearing before this Court. § 39-71-415(3), MCA (2001).

¶8 At the time of this proceeding, the petitioner, RAM, was in the business of remodeling Payless Shoe Stores throughout the United States. (Uncontested Fact 5.) RAM incorporated and began business in 1994. It employed several "crews," consisting of three or more workers and each headed by a "crew leader," to do the remodels. (Uncontested Fact 11, 12.) In 1995 RAM contracted with Strategic Partnering, a Nevada company which did business as AdvanStaff, to provide "leased" employees to RAM other than the crew leaders. (Uncontested Fact 21.) The arrangement lasted from August 1, 1995 through December 31, 1995. (Id. But see Pet'r Exs. 1-A-1 and 1-B-1.) In May 1996, Virginia Lewis (Virginia), who had been hired by RAM as a bookkeeper and consultant, called a meeting of crew leaders and demanded that they organize themselves as independent contractors, preferably by setting up business corporations. (Uncontested Fact 34.) The crew leaders complied. Crew leaders who failed to comply "never worked for RAM again." (Id.)

¶9 The overriding issue in this case is whether, in spite of (1) RAM's designation of crew leaders as subcontractors, (2) the employee leasing agreement with AdvanStaff, and (3) the subsequent organizing of crew leaders into putative independent corporations, the crew leaders and other crew members were in fact employees of RAM and subject to Montana workers' compensation insurance requirements.

¶10 The ICCU determined that crew leaders and crew members were in fact employees during 1995, 1996, and 1997. Its determination is attached to RAM's Notice of Appeal. While the factual findings and legal conclusions set out in the determination are not binding, or even entitled to deference, the Determination does help frame the issues in this case.

¶11 The Determination is entitled: "CONCERNING THE EMPLOYMENT STATUS OF: Don Coffman, Joe McNamara, Brent Cobb, Michael Scott Finnegan, Scott Johnson, Carl Siruchek, Steve McCullough, and any other similarly situated workers [hereafter "Determination"]. There were two categories of workers involved in the Determination:

> The first category, in which Don Coffman and Michael Finnegan belong to, is the "crew leaders," and the second category is the "helpers." The second category is workers that were hired to help ease the workload when the need occurred. There is no dispute regarding the employment status of this second group of "helpers." These workers were regarded as employees. If the ICCU determines that the "crew leaders" were independent contractors, the "helpers" they hired would be their employees. If it is determined that the "crew leaders" were employees of RAM, the "helpers" would be the employees of RAM as well. . . .

(Notice of Appeal, Determination at 2 (February 19, 2002).) The ICCU determined that Don Coffman (Coffman), Michael Scott Finnegan (Finnegan), Joe McNamara (McNamara), Brent Cobb (Cobb), Scott Johnson (Johnson), Carl Siruchek (Siruchek), Steve McCullough (McCullough), and any other similarly situated workers working for RAM between January 1, 1995 and December 31, 1997, were RAM employees and that their wages should be included in the uninsured audit and penalty.

¶12 The uninsured audit found the premium for employees during the audit period totaled $109,490.58. Pursuant to section 39-71-504, MCA, it doubled that amount and assessed a $218,981.16 penalty. (See Uncontested Fact 1.) Since the penalty assessed against RAM was predicated on the workers found to be employees, the present appeal also involves the validity and amount of the penalty.

II. Payless Remodeling and Construction Jobs

¶13 Payless ShoeSource, Incorporated (Payless), a corporation headquartered in Topeka, Kansas, owns and operates shoe stores throughout the United States. During the early and mid-1990s, it remodeled both existing stores and stores acquired from competitors. The

parties agree it is likely that Payless was engaged in construction or remodeling of stores virtually on a continuous basis. (Uncontested Fact 6.)

¶14 Payless hired contractors to do its construction and remodeling. Typically several stores in a given geographical area were done in succession by a single contractor. (Uncontested Facts 6 and 10.)

¶15 Payless contractors generally did all their work between the time a store closed and reopened the next day, thus allowing the store to continue its retail operations. (Uncontested Fact 9.)

¶16 The work in each store typically involved demolition work, sheet rocking, painting, replacing carpet, and replacing shelves and shoe racks. At times some electrical work was required. The stores which Payless had acquired from competitors typically required three or four nights of work; remodels of existing Payless stores typically involved less work and fewer nights. (Uncontested Fact 10; Trial Test.)

III. The Principal Players and the Rise of RAM

¶17 Randy J. Monroe (Randy) is a Montana native. He resided in Montana through 1994. In 1989 he married Michelle Monroe (Michelle), also a Montana native. In 1991 Randy purchased a house in Anaconda, Montana, in which he and Michelle resided until they moved to Las Vegas, Nevada, in December 1994. (Uncontested Fact 8; Trial Test.) The Anaconda house was located at 412 Fifth Street.

¶18 In the late 1980s and early 1990s, Randy was involved with remodeling Payless stores. In 1986 he and Virginia Lewis formed Summit Rock Corporation (Summit), which contracted to do remodeling work for Payless. (V. Lewis Dep. Vol. I at 24-27.) Virginia held a general contractor's license and has been involved in assorted contracting and business ventures.

¶19 In 1992 Virginia and Randy's wife, Michelle, formed Richco, Incorporated (Richco), to do work for Payless. (Id. at 37.) The company was incorporated in Wyoming. Virginia and Michelle were equal shareholders. (Id. at 37-38.) Shortly after its establishment, Virginia became the sole shareholder. (Id. at 39.) Richco did business with Payless until 1994; during that time, Randy managed the work at four Payless stores. (Id. at 40.)

¶20 Through his experience with Summit and Richco, Randy acquired significant experience in remodeling Payless stores. (Uncontested Fact 7.)

¶21 On January 11, 1994, Randy and Michelle incorporated RAM Montana, Incorporated in Nevada for the purpose of doing contract work for Payless. (Pet'r Ex. 14-A; Trial Test.) Initially, Michelle was the sole shareholder. (Pet'r Ex. 14-D; Trial Test.) Michelle was also the initial president, secretary, and director of RAM. (Pet'r Exs. 14-D and 14-G.) However, Randy

managed the actual day-to-day operations of the company. He prepared bids for Payless projects, assigned crews, and generally oversaw the remodels.

¶22 On April 1, 1996, all shares of stock in RAM were transferred from Michelle to Randy. On that date Randy became the sole officer and director of RAM. (Pet'r Exs. 14-I, 14-K1, 14-K2, 14-K3.)

IV. RAM Contracts with Payless

¶23 RAM began doing work for Payless in early 1994, receiving its first check from Payless on March 2, 1994. (Pet'r Ex. 3-A and 3-B.) Between March 2, 1994 and April 21, 1999, payments from Payless to RAM totaled $6,770,023.48. (Pet'r Ex. 3-A.) All of RAM's work was on Payless stores.

¶24 Randy bid and negotiated all contracts with Payless. (Uncontested Fact 15.) All Payless contracts were with RAM, never with any of the crew leaders or workers involved in the audit.

¶25 Between 1994 and 1997, RAM did work for Payless in 27 states – Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, New York, North Dakota, Ohio, Oregon, Nevada, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming. (See Pet'r Ex. 3-1.) A breakout for 1996 jobs shows that during that year RAM derived 26.53% of it revenues from California projects, and 20.83% from New York projects, while Montana projects contributed only 2.09%. (Pet'r Ex. 11-A.) However, in 1997, Montana contributed 9.11% while California contributed only 9.28% and New York 13.58%. (Pet'r Ex. 11-B.)

V. RAM Workers

¶26 At its inception, RAM utilized workers who had previously worked with Randy on Payless projects. One of the workers was Finnegan, who started working with Randy in 1993. (Finnegan Dep. at 8.) Finnegan lived in Anaconda at that time and during all of the time he worked for RAM. (Excerpt of Testimony in Uninsured Employers' Fund v. American International Group, WCC No. 2000-0062, October 22, 2001 [hereinafter "Finnegan Excerpt"] at 5.)

¶27 Both Finnegan and Randy testified that during most of 1994 there was one crew working under Randy. The crew included McNamara, who was apparently an Arizona resident. (Finnegan Dep. at 15.) However, in the early days of RAM McNamara met the rest of the RAM crew in Anaconda and traveled with them to the various Payless job sites. (Id.) The crew, including Randy, was on the road most of the time in 1994. (Id.)

¶28 In the fall of 1994, Payless purchased one of its competitors. (Id. and Uncontested Fact

11.) The competitor's stores all required remodeling. (Id.) As a result, Randy expanded RAM's crews. (Id.) He stopped working on individual projects and began managing overall operations, setting up his base in Las Vegas, Nevada in December 1994. (Uncontested Facts 17 and 19.) From December 1994 through 1997, Randy resided in Las Vegas and oversaw RAM operations from there, traveling throughout the United States as necessary to bid projects and oversee work.

¶29 To facilitate RAM's expanded business, Randy organized several crews, each headed by a crew leader. Randy had worked with and/or had trained the crew leaders and they were expected to exercise control over the crews locally. (Uncontested Fact 16.) During RAM's existence, up to seven crews were engaged by RAM on Payless remodels.

¶30 Each crew consisted of at least three individuals. (Uncontested Fact 12.) When needed, RAM locally hired temporary workers to supplement its regular crews. The temporary workers were usually unskilled workers. (V. Lewis Dep. Vol. I at 109-10.) They are not included in the audit at issue in this case.

¶31 RAM found workers through word of mouth, mainly through workers already working for it. (Trial Test.) Most of those workers were Montana residents. Reports of RAM workers in August, September, and October 1995, shows four crews led by Cobb, Coffman, Johnson, and MacNamara. (Pet'r Ex. 1-F; and see V. Lewis Dep. Vol. I at 95-111.) Three of the four crew leaders were Montana residents; the fourth – MacNamara – apparently was a resident of Arizona. (Trial Test.; and see Pet'r Ex. 40-D.) MacNamara obtained a Montana driver's license and listed his address at Randy's Anaconda house for a time. Nonetheless, it is clear that his Montana contacts were transient and related to his work for RAM.

¶32 Of the thirty crew members listed in the reports, three (Anthony, Pat, and Jonathon MacNamara) listed Arizona residences; I could not determine the residence of Jeremy Michalosky; and the remaining twenty-seven were listed as having Montana addresses or determined by me through other testimony as being Montana residents. (Id. and Pet'r Ex. 71.) It is thus clear that as of the fall of 1995, RAM's crews consisted mostly of Montanans who were mustered out of Montana and returned to Montana upon completion of Payless jobs. (See Addendum of Montana workers.)

¶33 It is also clear that MacNamara's crew, while it included some Montanans at various times (see V. Lewis Dep. Vol. I at 235 and Trial Test.), primarily consisted of himself, his brothers and his father. At least the brothers and father were Arizona residents; there is no evidence that they were ever in Montana.

¶34 In late 1995 or early 1996, Virginia and her husband, Jim Lewis (Jim), also began doing work for RAM through Lewis Construction. By that time, Virginia and Jim resided in California and had their own company in California. They held a general contractor's license. (V. Lewis Dep. Vol. I at 52; J. Lewis Dep. at 11.) None of Lewis Construction's

employees were Montana residents and there is no evidence that they ever worked in Montana. A list of 1996 Payless projects done by Lewis Construction shows that seven were in California, one in Colorado, one in South Dakota, and two in Washington. (Pet'r Ex. 39-G.)

¶35 In addition to on-site construction/remodeling crews, RAM had a Montana bookkeeper until the end of 1995 and maintained a Montana office until at least April 1996. (See Uncontested Fact 13; V. Lewis Dep. Vol. I at 79 and Trial Test.)

¶36 Victoria Cobb (Victoria) was RAM's initial bookkeeper. She did business as "Abacus" and was married to Brent Cobb one of RAM's workers. Victoria resided in Montana and operated her bookkeeping service in Arlee, Montana. (V. Lewis Dep. Vol. I at 76.) Her bookkeeping services lasted from November 1994 to November 1995. (Id. at 77.)

¶37 In November 1995, Virginia took over bookkeeping. After she was hired by RAM to take over its bookkeeping and accounting, Virginia continued to reside in California but did spend considerable time in Montana. Among her first assignments was to work with Michelle and Victoria in Montana, but the situation had deteriorated to the point that Victoria, rather than turn over her records in proper order, simply placed them into large plastic garbage bags, and had her husband deliver them. Virginia then spent the first two or three months of 1996 sorting through these bags and reconstructing all records, then matching them with what the several workers and "crew leaders" claimed. She also took care of year-end records including W-2s and 1099s. (Uncontested Fact 29.)

¶38 Sometime in 1996 or 1997, Virginia employed Rosie Erickson (Rosie) to do RAM bookkeeping. (V. Lewis Dep. Vol. I at 124-27.) Rosie resided in Charlo, Montana. (Id. at 124-25.)

¶39 Michelle maintained a Missoula office for RAM until at least the time she transferred her shares of stock to Randy in April 1996. She was paid by RAM, as was Heather Skillicorn (Heather), who also served as a Nanny to Randy's daughter (Michelle's stepdaughter). The amount of actual work performed by Michelle and by Heather is not clear. The office served at least as a mail drop and point of contact. (Trial Test.)

VI. Payment of RAM Workers

A. 1994 to July 31, 1995

¶40 From RAM's inception until June 30, 1995, RAM directly paid both its crew leaders and the crew members. (Trial Test.) Initially, they were paid in cash.

¶41 Crews were paid a fixed amount per night of work rather than by the hour. According to Randy, there was a trial run of paying crew leaders a percentage in early 1995 but the only crew leader involved was Brent Cobb and the trial was abandoned, according to Randy,

when RAM contracted with AdvanStaff, and was not resumed until the crew leaders incorporated in May 1996. (Trial Test.)

B. August 1, 1995 to December 31, 1995 – Employee Leasing Phase

¶42 From August 1, 1995 through December 31, 1995, RAM utilized a so-called employee leasing company to pay crew members other than the crew leaders. (Uncontested Fact 21 but see Pet'r Exs. 1-B-1 and 1-A-1; V. Lewis Dep.; Pet'r Ex. 1-F; and Footnote 3.) The company was employed at the suggestion of Victoria. She suggested the use of a leasing company to keep track of employee withholding and other employment reporting. (Trial Test.)

¶43 The so-called employee leasing company was Strategic Partnering Corporation, which did business as "AdvanStaff." (Trial Test. and Pet'r Ex. 1-B-1.) AdvanStaff is a Nevada corporation with offices in Las Vegas. (Pet'r Ex. 1-B-2.)

¶44 RAM's application with AdvanStaff was prepared and submitted by Michelle as president of RAM. (Id.) It listed RAM's address as 2401 Brooks, #158, in Missoula, MT 59801 and Victoria Cobb, a Montana resident, as comptroller. (Id.) The Employee Leasing Contract between RAM and AdvanStaff also listed RAM's principal office as 2401 Brooks, #158, Missoula, MT 59801. (Id.) It was signed on behalf of RAM by Michelle as president and Randy as general manager. (Id.)

¶45 Under the agreement with AdvanStaff, RAM's crew members were required to apply for employment with AdvanStaff, which then leased the crews back to RAM. (Pet'r Ex. 1-B-1, ¶ 7; V. Lewis Dep. Vol. I at 92.)

¶46 The agreement contained a specific provision as to workers' compensation insurance, providing in paragraph 10:

10. Workers' Compensation. Workers' [sic] employed by AdvanStaff and assigned to Client shall be covered by workers' compensation insurance in compliance with applicable law. Client will cooperate with AdvanStaff to open, pursuant to state regulation, a joint workers' compensation account under which (1) AdvanStaff employees assigned to the Client's location(s) will be covered, and (2) Client's current workers' compensation deposits related to those Client employees which become AdvanStaff employees will be deposited. Client also agrees to continue its existing workers' compensation account and submit minimum payments there under as required by state regulation. Upon termination of this Agreement any deposits remaining in the joint account will be distributed pursuant to state regulation.

(Pet'r Ex. 1-B-1, italics added for emphasis.)

¶47 In 1995 or 1996, AdvanStaff registered in Montana as a foreign corporation doing business in Montana. (Pet'r Exs. 25-A, 25-B.) While the original registration has not been furnished to the Court, some documents from the Montana Secretary of State's office were

furnished. (Id.) Those documents indicate that the corporation registered as "AdvanStaff, Inc.", rather than Strategic Partnering Corporation. (Id.) However, it is clear that the corporation which registered in Montana was the same corporation which contracted with RAM. AdvanStaff listed itself as a Nevada corporation and the name of its president was the same as on the leasing agreement with RAM. (Compare Pet'r Exs. 25A and 25B with Pet'r Ex. 1-B-1.) The Montana agent listed for AdvanStaff with the Secretary of State's office was Andre Graa, 400 East Park, Anaconda, MT 59711. (Pet'r Exs. 25A and 25B.)

¶48 AdvanStaff never qualified as a Professional Employer Organization (PEO) with the Montana Department of Labor and Industry. (Uncontested Fact 22.) It applied for workers' compensation insurance with the Montana State Fund but was denied coverage because it did not qualify as a PEO under Montana law. (Id.) There is no evidence it ever insured its employees during the RAM contract period.

¶49 AdvanStaff paid RAM crew members from August 1, 1995 to December 31, 1995. A review of AdvanStaff records (Pet'r Ex. 1-F) indicates that the crew workers were paid by the hour, however, Don Revell (Revell) testified, and I find, that crew workers were paid a fixed amount per night of work but that AdvanStaff then converted their pay to an hourly rate, rectifying the hours to correspond with their nightly pay. (Trial Test.)

¶50 AdvanStaff did not employ or pay crew leaders. The crew leaders continued to be paid directly by RAM. (V. Lewis Dep. Vol. I at 105.)

C. May 1996 – Crew Leaders Incorporate

¶51 Following the termination of the contract with AdvanStaff, RAM continued to pay its crew leaders and resumed paying crew members for their work. (Id. at 130.) When sent out to jobs, Virginia advanced crew members mustering money for expenses, and then deducted the advances from their ultimate pay. (Finnegan Dep. at 27.)

¶52 On May 2, 1996, Virginia met with RAM crew leaders and employees in Missoula, Montana. The meeting took place in the basement of a duplex owned by Randy and at which his daughter lived.

¶53 At the time of the meeting it was Virginia's view that RAM's crew leaders were operating as "rogue contractors," in other words as independent contractors but without complying with laws pertaining to contractors. (V. Lewis Dep. Vol. I at 203.) At the meeting, Virginia, on behalf of RAM, demanded that the crew leaders become "legitimate" contractors by incorporating and complying with bonding, obtaining workers' compensation and liability insurance, and other requirements. (Id. et. seq.; Finnegan Excerpt, passim.) The crew leaders in attendance were MacNamara, Coffman, Cobb, and Johnson. (V. Lewis Dep. Vol. I at 204.) Jim Lewis was already incorporated in California and did not attend the meeting. According to Virginia, Tim Loafing and Finnegan also "stepped up to the table that day and

said they wanted to become a subs." (Id. at 205.) Finnegan's testimony taken as a whole contradicts that characterization.

¶54 The coercive nature of the meeting is described in Uncontested Fact 34 of the Pretrial Order, as follows:

> Virginia Lewis called a meeting of the individual "crew leaders" who were Montana residents in the basement of Amanda Monroe's apartment in Missoula. Virginia Lewis presented the demand that they formalize themselves as independent contractors, preferably as corporations. She presented each with proposed forms, including: articles of incorporation for incorporating in Montana; for obtaining a taxpayer ID number; for contractor registration; for unemployment; and for workers [sic] compensation insurance through the State Fund. All forms that were filled out were duly filed with the respective agencies, including the State Fund. Those who failed to comply never worked with RAM again. (*See also* Finnegan Excerpt at 17.)

¶55 Virginia told the crew leaders to come up with corporation names. She helped them fill out the paper work and at least in some cases simply had them sign blank forms which she then completed. (V. Lewis Dep. Vol. I at 206 et seq.)

¶56 The corporations formed as a result of the May 2, 1996 meeting were as follows:

> Joe McNamara McNamara, Inc.
> Tim Lofing Noah's Rule, Inc.
> Scott Finnegan Unifigz, Inc.
> Don Coffman Icefloe Construction Corp.
> Scott Johnson Johnson Homes, Inc.

(V. Lewis Dep.; Trial Test.; Finnegan Excerpt and Deposition; Uncontested Fact 36; Resp't Ex. 15; Pet'r Exs. 28-J, 39-C, 59.) All five corporations were incorporated in Montana. All who incorporated except McNamara were Montana residents. McNamara's residence was more probably than not in Arizona, however, he listed himself as the registered agent for McNamara, Inc., and listed his address as 412 W. 5th Street, Anaconda, Montana. (Pet'r Ex. 28-J.) W-2s issued by McNamara, Inc. for 1996 also list the Anaconda address as the corporate address. (Pet'r Ex. 28-P.) The Anaconda address of McNamara, Inc. was the Anaconda house owned by Randy.

¶57 California "crew leaders" Jim (Virginia's husband) and Pat Michaud were California residents and did not participate in the Missoula meeting. (Uncontested Fact 35.)

¶58 Virginia did the actual filing of the incorporation documents with the Montana Secretary of State's office. (V. Lewis Dep. Vol. I at 208.) Of some significance to the ultimate findings in this case, none of the incorporators except for Coffman had sufficient funds to even pay for the filings. Virginia advanced the funds on behalf of the remaining three and

"back-charged" them for the expense. (Id. at 209.) Similarly, Virginia paid for corporate minute books and "back-charged" that expense to the "new companies."

¶59 Virginia also designated herself to provide financial services to the five corporations, including payroll, bookkeeping, and payment of expenses. (Id. at 215.) RAM wrote checks to Excelstaff, Virginia's bookkeeping service, and in turn she wrote payroll and expense checks for the five corporations and prepared their tax forms and reports. (Id. at 217, 234.) RAM also advanced monies directly to the crew leaders for prospective expenses but those advances were then deducted from payments made to Excelstaff on their account. (Id. at 218; Finnegan Dep. at 41.)

¶60 Virginia forwarded applications for workers' compensation insurance for each of the five new corporations to the Montana State Fund, which initially issued policies. However, the policies were cancelled retroactively when the premium checks she sent bounced. (Uncontested Fact 36; V. Lewis Dep. Vol. I at 221-22; and see Pet'r Ex. 144-E.)

¶61 In addition to crew leaders attending the May 2, 1996 Missoula meeting, RAM crew members were required to attend. (See V. Lewis Dep. Vol. I at 205.) Approximately twenty crew members attended. (See id. at 207.) After the incorporation meeting, these workers were required to submit employment applications for the newly formed corporations. (Finnegan Excerpt at 34.) The workers continued to work for their crew leaders but were paid by Virginia through accounts set up for the new corporations.

¶62 Finnegan, who was incorporated under one of the new companies, thereafter worked on at least two jobs as an employee rather than crew leader or subcontractor. (Finnegan Dep. at 50-53). In his trial testimony, Randy admitted that Finnegan did not work as a crew leader until after Don Revell's injury. (Trial Test.) Revell was injured on a Salt Lake City job on June 20, 1996. (Trial Test.; Resp't Ex. 60.)

VII. Travel – Transportation and Pay

¶63 During 1995, 1996, and 1997, Montana workers traveled to and from Montana to jobs sites around the United States. Most of the time, they traveled in trucks furnished by RAM. (Trial Test.) Workers were paid for their travel.

¶64 After crew leaders were converted to percentage reimbursement, RAM varied the percentages to adjust for the distance they traveled. (Trial Test.; Finnegan Dep. at 55-56.) The percentage increased with the distance from Montana. (Id.)

VIII. Workers' Compensation Coverage

¶65 The Montana State Fund insured RAM from February 10, 1994 through March 17, 1995. The coverage encompassed both crew members and crew leaders. (Uncontested Fact. 23.). It also insured RAM office staff from February 5, 1996 through June 14, 1996. (Uncontested Fact 3.)

¶66 The periods during which RAM was uninsured were from March 18, 1995 through December 31, 1997, except with respect for Randy and Michelle, office staff employed between February 5, 1996 through June 14, 1996, temporary workers hired on site, and independent bookkeepers. (Uncontested Fact 14.)

IX. RAM's Montana Connections

¶67 It is clear that prior to December 1994, RAM's operations were based in Montana. Both Randy, who controlled RAM's day-to-day operations, and Michelle, his wife and the sole shareholder in RAM, were residents of Montana at least until December 1994. Though on the road most of 1994, their home was Montana. Moreover, most of its employees were residents of Montana.

¶68 In December 1994, Randy and Michelle moved to Las Vegas, Nevada. (Uncontested Fact 8; Trial Test.) However, the list of officers and directors filed by RAM in Nevada on January 22, 1995, and signed by Michelle, listed Michelle's address as Anaconda, Montana (Pet'r Ex. 14-G), thus indicating her intention to remain a Montana resident even though physical control of RAM's operations was transferred to Las Vegas. Significantly, RAM also continued to insure its employees through the Montana State Fund until March 17, 1995, thus indicating it continued to consider Montana its home state.

¶69 In late 1995 Randy and Michelle separated and Michelle returned to live in Montana. She set up an office upstairs over her parents' business, 1776 Antiques, in Missoula. (Uncontested Fact 24.) Michelle and another office worker, Heather Skillicorn, did some RAM office work from there.

¶70 Randy's daughter by a prior marriage, Amanda Monroe, who had been living with Randy and Michelle in Las Vegas, moved back to Missoula with Michelle. Eventually she obtained an apartment at 405 Amber Court in Missoula, where she lived with Heather as her caretaker. That apartment had a basement room which was used by RAM at times, including the May 1996 meeting discussed earlier. Heather was on RAM's payroll during early 1995. (Uncontested Fact 25.)

¶71 Despite the transfer of stock to Randy, Michelle continued to be involved in RAM's business and was in charge of an office in Missoula throughout 1995. After RAM contracted with AdvanStaff, she and Heather were paid by AdvanStaff. (Pet'r Exs. 1-F-3, 1-F-4, 1-F-5.)

¶72 RAM purchased and registered trucks in Montana throughout 1995, 1996, and 1997. (Uncontested Fact 39; Trial Test.; Finnegan Excerpt at 41.)

¶73 At least through 1998, RAM maintained a Montana yellow pages listing with a Montana phone number. (Trial Test.; Resp't Ex. 9.)

¶74 Crew leaders usually worked with the same crew, but at times crew members changed. A crew would usually do a group of Payless stores together, then move together to another group, and after several days or weeks on the road, would return home to await the next contract group. (Uncontested Fact 43.)

¶75 Prior to setting off on a group of stores, the crew leaders would gather their crew members, and together they would drive to the location. (Uncontested Fact 38.) Most of those crews originated in Montana. (See previous findings of fact.)

X. Independent Contractor Analysis – Additional Information

¶76 One of the elements for determining independent contractor status is the furnishing of tools. In this case, the testimony shows that the crew members furnished small tools but that RAM furnished scaffolding and ladders, as well as trucks for transporting materials and workers. (Trial Test.; V. Lewis Dep. Vol. I at 65-67; Finnegan Excerpt at 10-12.) This was true throughout all of the audit periods.

¶77 None of the "crew leaders" ever registered as independent contractors with the Department. This did not change during the audit periods at issue. (Uncontested Fact 18.)
¶78 Randy had almost daily contact with each crew leader, via telephone, from Las Vegas, or from wherever else he was at the time. (Uncontested Fact 42.)

XI. Resolution – Ultimate Factual Determinations with Conclusions of Law

¶79 This case is governed by the law in effect for the period of time covered by the UEF audit. See Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). During the initial audit period, the 1993 version of the Montana Workers' Compensation Act applied. However, during the audit period the Act was amended two times – in 1995 and 1997. Except as specifically noted, the amendments to the Act did not affect workers' compensation coverage requirements.

¶80 The workers whose wages are at issue in the present case consist of the "crew leaders" and workers who did the actual remodeling work for Payless. Excluded are temporary workers hired on the site. Also excluded are the owners, Randy and Michelle, as well as bookkeepers. (Uncontested Fact 14.) Heather is also excluded during the period she was covered by the Montana State Fund policy.

¶81 The audit periods at issue in the present case are as follows:

- March 18, 1995 through June 30, 1995. (RAM uninsured.)
- July 1, 1995 through December 31, 1995. (AdvanStaff involved.)
- January 1, 1995 to May 2, 1996.
- May 3, 1996 to December 31, 1997.

¶82 RAM challenges the jurisdiction of Montana over the employment of its workers. The jurisdictional issue does not involve in personam jurisdiction in the constitutional sense, nor could it. To exercise jurisdiction over RAM, Montana need only establish that RAM engaged in sufficient activities in Montana to make it reasonable to require it to defend itself within the State. International Shoe Co. v. Washington, 66 S.CT. 154, 158 (1945.) "'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given." Id. at 159.

¶83 RAM had ample contacts with Montana to satisfy constitutional criteria for hailing it before Montana courts. It maintained offices in Montana. It mustered its crews in Montana and furnished them with transportation from Montana to job sites. It maintained workers' compensation for a time in Montana. It compelled its crew leaders to incorporate in Montana.

¶84 In light of extensive Montana contacts, the jurisdictional issue raised by RAM is simply whether Montana statutes apply to RAM and its employees. RAM argues, in essence, that since its operations were controlled from Nevada and the vast majority of its remodel jobs were outside of Montana, its workers were not subject to Montana workers' compensation laws.

¶85 The scope of Montana jurisdiction over workers was most recently addressed in Schimmel v. Montana Uninsured Employers' Fund, 2001 MT 280, 307 Mont. 344, 38 P.3d 788 and Fliehler v. Uninsured Employers' Fund, 2002 MT 125, 310 Mont. 99, 48 P.3d 746. In Schimmel the Supreme Court held that all employees specified in section 39-71-118(1)(a), MCA, are subject to Montana workers' compensation requirements. The section provides in relevant part:

39-71-118. Employee, worker, volunteer, and volunteer firefighter defined. (1) The term "employee" or "worker" means:
(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. [Emphasis added.]

(Id. at ¶ 3.) The Supreme Court specifically rejected this Court's holding below that the criteria of section 39-71-118(10), MCA, must also be met. In Schimmel the Supreme Court held that section 39-71-118(10), MCA, applied only to loaned employees.

¶86 In Fliehler the Supreme Court held that workers who lived in Montana and were controlled by the employer from Montana were subject to Montana workers' compensation laws even though all their jobs were out-of-state. The work in Fliehler involved kitchen

remodels and was thus similar to that done by the workers in this case. In holding that the workers were subject to Montana workers' compensation laws, the Court applied subsection (10) of section 39-71-118, MCA (1997), the very section which it had held in Schimmel is applicable only to loaned employees. As aptly noted by the UEF in its post-trial brief in this case:

Despite the fact that Schimmel was decided on December 19, 2001, and specifically held that section 39-71-118(10)(a), only applied to loaned employees, on June 11, 2002, the Supreme Court decided Fliehler v. UEF, 2002 MT 125, applying section 39-71-118(10)(a), to a case not limited to loaned employees. Oddly, in Fliehler the Supreme Court did not reverse, distinguish, or reference Schimmel in any way.

(UEF's Post-Trial Brief at 13-14.)

¶87 Application of section 39-71-118(10), MCA, in this case could lead to a different result than required under section 39-71-118(1), MCA, considered alone. Subsection (10) provides in relevant part:

(1) For purposes of this section, an "employee or worker in this state" means:
(a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;
. . . .

In Fliehler the employees were residents of Montana and though they worked out-of-state, their work was controlled by the employer from Montana. In this case, the primary control over RAM workers from December 1994 onward was exercised by Randy from Las Vegas. While RAM maintained mail-drops and offices in Montana, the assignment and direction of actual work was done by Randy. Thus, it is doubtful that the criteria of section 39-71-118(10)(a), MCA, is met.

¶88 As I discuss shortly, a different result is compelled by section 39-71-118(1)(a), MCA, when considered alone. I must therefore reconcile the Supreme Court's decisions in Schimmel and Fliehler.

¶89 One explanation for the discrepancy in decisions is that the Court in Fliehler may have intended to implicitly reverse its decision in Schimmel. While that is possible, I consider it unlikely. Had the Court intended to reverse Schimmel it is more likely it would have cited the case and expressly overruled it.

¶90 There is a second, more likely explanation for the inconsistent decisions. The explanation involves timing. Schimmel was decided on December 19, 2001. I decided Fliehler on June 1, 2001, 2001 MTWCC 29, and issued an Order Amending Findings of Fact on July 6, 2001, 2001 MTWCC 29A. At the time of my decision in Fliehler, I did not have the benefit of the Supreme Court's decision in Schimmel. Thus, I applied the identical analysis

– based on section 39-71-118(10), MCA, as I had in my Schimmel decision, which the Supreme Court later reversed. I have reviewed the appellate briefs in Fliehler and determined that both briefs assumed section 39-71-118(10), MCA, applied. At the time the briefs were filed, the Supreme Court Schimmel had not issued. While it is troubling that the Supreme Court may have overlooked its Schimmel decision, I can only assume it similarly relied on the Fliehler briefs.

¶91 I am therefore convinced that I must follow Schimmel and apply section 39-71-118(1), MCA, without regard to section 39-71-118(10), MCA.

¶92 When I apply section 39-71-118(1)(a), MCA, I conclude and find that RAM workers residing in Montana were "workers" in this state within the meaning of the subsection. To some extent my conclusion involves a further interpretation of section 39-71-118(1), MCA, and specifically what is meant by "a person in this state . . . in the service of an employer." In Schimmel the claimant was injured in Montana. Arguably "a person in this state" means a person actually performing work in the state, at least Schimmel does not rule out that possibility. But the work in this case, at least for the Montana workers, began in Montana, where the workers were mustered and then traveled together in RAM company trucks to various jobs throughout the United States. The workers were paid for their travel and in many cases were provided with company transportation originating in Montana. Ultimately they returned to Montana. I therefore conclude that the Montana residents who worked for RAM were "person[s] in this state . . . in the service of an employer."

¶93 My conclusion also involves the application of section 39-71-402(1), MCA. Section 39-71-402(1), MCA (1993-1997), provides as follows:

(1) If a worker employed in this state who is subject to the provisions of this chapter temporarily leaves the state incidental to that employment and receives an injury arising out of and in the course of employment, the provisions of this chapter apply to the worker as though the worker were injured within this state.

In McGaha v. Greyhound Lines, Inc., 226 Mont. 345, 735 P.2d 521 (1987), the Supreme Court applied the quoted section to a Greyhound bus driver who had been driving a route in Montana and who was then temporarily reassigned to a route in Idaho and Utah. The Court held he was covered by Montana Law even though working and injured in Idaho. RAM argues that the case is inapplicable here because its jobs were mostly out-of-state, thus the temporary designation should not apply. However, that fact of the matter is that all of RAM's jobs, in-state and out-of-state, were temporary. There was no permanent base for its workers other than Montana. I therefore find no inconsistency between McGaha and section 39-71-402(1), MCA, on the one hand, and my conclusion, on the other, that the Montana-based workers for RAM were workers within Montana who RAM was required to insure.

¶94 While I conclude that RAM was subject to workers' compensation coverage requirements with respect to its Montana-based crews and crew leaders, I do not reach the same conclusion with respect to Lewis and his California crew, with respect to McNamara's non-Montana workers, and with respect to other workers who resided in other states and who did not work in Montana or muster out of Montana. Workers who did not reside in, work in, or muster out of Montana are not "person[s] in this state" under any common sense interpretation of that phrase. Thus, Lewis, who was a resident of California, who did no work in Montana, who had a California contractor's license, and who was insured in California was not a "person in this state," nor were the non-Montanans he employed on his jobs. McNamara had significant contact with Montana, as evidenced by the fact that he obtained a Montana driver's license, met up with crews in Montana, and came to Montana for the incorporation party on May 2, 1996. He must be considered a "person in this state." However, many of his crew members were from Arizona or other states and there is no evidence they were ever in Montana. Those workers were not "person[s] in this state." Insofar as the UEF audit includes non-Montana residents who did not perform work in Montana and who did not muster out of Montana, the audit findings are in error and must be revised to exclude those persons.

¶95 I turn next to RAM's independent contractor arguments. Under Montana law independent contractors meeting the statutory requirements for that status need not be covered by the firm or business which hires them. Section 39-71-118(1), MCA (1993-1999), specifically excluded independent contractors from the definition of an employee for whom coverage is required, providing:

39-71-118. Employee, worker, volunteer, and volunteer firefighter defined. (1) The term "employee" or "worker" means:
(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. [Emphasis added.]

¶96 The term "independent contractor," however, is specifically defined in section 39-71-120, MCA (1993-1999). From 1993 to June 30, 1997, the term was limited to workers who had obtained an independent contractor exemption from the Montana Department of Labor and Industry. Section 39-71-120, MCA (1993-1995), provided:

> 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 the contract and in fact;
> (b) is engaged in an independently established trade, occupation, profession, or business; and
> (c) has received an exemption granted under 39-71-401(3).

> (2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met.
>
> Subsection (1)(c) was repealed effective July 1, 1997. Mont. Laws 1997, ch. 548, § 11.

¶97 None of the crew leaders hired by RAM had independent contractor exemptions prior to the end of the audit period, i.e., prior to December 31, 1997. Thus, at least until they incorporated on May 2, 1996, the crew leaders did not qualify as independent contractors because they lacked the exemption. Similarly, since they never worked under the auspices of AdvanStaff, I need not consider whether the AdvanStaff arrangement shielded RAM from liability for their workers' compensation coverage.

¶98 Moreover, irrespective of their failure to obtain independent contractor exemptions, the crew leaders, with the possible exception of Lewis, were not in fact independent contractors prior to May 2, 1996, because they did not meet the requirements of subsections (1)(a) and (1)(b) of section 39-71-120, MCA (1993-1997), the so called "A-B" test.

¶99 Initially, they were not "engaged in an independently established trade, occupation, profession, or business" as required under subsection (1)(b) – the B part of the test. Wild v. Fregein Const. Co., 2003 MT 115, ¶ 37, 315 Mont. 435, 68 P.3d 862, held the fact that the worker in that case "did not perform work for other individuals after August 2000, is decisive of the fact that he was not engaged in an independently established trade, occupation, profession or business as a roofer at the time of his injury." The identical situation exists in this case. The crew leaders did not bid their projects and initially were paid a flat nightly rate. There is no evidence they offered their store remodeling services to others. They did not pay crew members until after incorporating and had no independent business listings. There is no evidence that they filed tax returns reporting their income as business income.

¶100 They also did not qualify as independent contractors under Part A of the test. Under Part A, the right of control must be determined by analyzing four factors: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire." Wild ¶ 33. These factors do not constitute a balancing test. Employee status may be established on the strength of the evidence under one of the four factors standing alone.

> [F]or the most part, any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all.

American Agrijusters, 1999 MT 241 , Par. 21 (citing 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, Sec. 61.04, at 61-67 (1999)).

¶101 The right or exercise of control must be analyzed under the particular facts of the case. In this case Randy did not exercise day-to-day control at each project. However, his on-site supervision was unnecessary because of the routine nature of the jobs. The control which was important was the mustering and assignment of crews to the projects and dealing with the particular requirements and complaints of Payless. This is where Randy in fact exercised ultimate control. The final and conclusive evidence of both the right and actual exercise of control is the May 2, 1996 meeting in Missoula, where crew leaders were directed by Virginia to incorporate as the price of their continuing to work for RAM, and crew members were then required to submit applications for employment to the new corporations. This meeting shows that RAM retained the ultimate right to hire and fire individual crew leaders and crew members who were unwilling to go along. Thus, both factors (1) and (4) indicate an employment relationship existed between RAM and its crew leaders and crew members even after its crew leaders were incorporated.

¶102 As to the method of payment, the crew leaders were initially paid by the night. According to Randy, there was a trial run of paying crew leaders a percentage in early 1995 but the only crew leader he indicated was involved was Cobb, and the trial was abandoned, according to Randy when RAM contracted with AdvanStaff and not resumed until the crew leaders incorporated in May 1996. (Trial Test.) Payment by the night is more in line with employment status, especially since crew members, who were unquestionably employees, were paid on that basis. Thus, factor (2) favors a finding of employment.

¶103 Finally, while crew leaders and crew members furnished their own small tools, RAM furnished the trucks needed in the remodeling jobs, as well as ladders and scaffolding. This factor, too, favors a finding of employment.

¶104 As noted in paragraph 100, a single factor may be sufficient to show an employment relationship. In this case, all factors point in that direction. I therefore conclude that crew leaders were employees of RAM at least until May 2, 1996, and that during that period they acted as supervisors over other crew members.

¶105 As to the crew members themselves, there is no evidence or contention that they were engaged in any independent business at any time. They were initially paid by RAM. Then they were listed and paid as employees by AdvanStaff, then again by RAM. After the incorporations on May 2, 1996, they were required to submit "employment applications" to the newly formed companies as a condition to their continued work. Clearly, they were employees during the entire audit period.

¶106 Based on the foregoing analysis, I find and conclude that RAM was required to insure all Montana-based crew leaders and workers during the initial audit period of March 18,

1995 through June 30, 1995. During that period it was an uninsured employer with respect to its Montana-based crew leaders and workers.

¶107 The next period involved was from July 1, 1995 through December 14, 1995, during which RAM utilized AdvanStaff to pay workers other than crew members. Since I have already found that crew leaders were employees until at least May 2, 1996, and since those crew leaders were employed by and paid directly by RAM, the AdvanStaff arrangement does not insulate RAM from liability for their coverage. The only remaining question is whether the arrangement insulated RAM from liability for non-crew members.

¶108 The leasing arrangement with AdvanStaff insulates RAM from those requirement only if section 39-71-117(3), MCA (1995), is satisfied. The section provides:

> (3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses the services of a worker furnished by another person, association, contractor, firm, limited liability company, or corporation, other than a temporary service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. The presumption may be rebutted by substantial credible evidence of the following:
>
> (a) the person, association, contractor, firm, limited liability company, or corporation, other than a temporary service contractor, furnishing the services of a worker to another retains control over all aspects of the work performed by the worker, both at the inception of employment and during all phases of the work; and
>
> (b) the person, association, contractor, firm, limited liability company, or corporation, other than a temporary service contractor, furnishing the services of a worker to another has obtained workers' compensation insurance for the worker in Montana both at the inception of employment and during all phases of the work performed. [Emphasis added.]

AdvanStaff in fact did not provide workers' compensation insurance coverage and did not in fact control all aspects of work. Moreover, it did not qualify under chapter 8 of Title 71. Chapter 8 governs Professional Employer Organizations, commonly referred to as employee leasing companies. The chapter requires that such organization be licensed. § 39-8-201, MCA (1995). The parties agree it was not licensed. Therefore, RAM was not exempted by the arrangement with AdvanStaff and was uninsured during the second audit period – July 1, 1995 through December 31, 1995, with respect to its Montana crew members.

¶109 The next audit period is from January 1, 1995 to June 39, 1995 [sic]. (Uncontested Fact 4.) I am unsure why June 39, 1995 was used since the next significant event for purposes of the audit was May 2, 1996, when the crew leaders incorporated. (See Footnote

10.) It appears that actual incorporation papers were filed with the Montana Secretary of State's office on May 3, 1996.

¶110 In any event, RAM was uninsured during all of 1995 and I have already found that the crew leaders and crew members were RAM employees at least until May 2, 1996. Therefore, it was an uninsured employer from January 1, 1995 to May 2, 1996, with respect to its Montana crew leaders and workers.

¶111 The final audit period is therefore May 3, 1996 through December 31, 1997, i.e., the period in which RAM was using incorporated crew leaders. (See footnote 9.) The facts as found in this decision show that the corporations set up on May 2, 1996, were sham corporations. The incorporations were orchestrated by Virginia, acting on behalf of RAM, for the specific purpose of evading Montana law governing workers' compensation and employment laws. None of the Montana crew leaders were independent businessmen: their only business was their work for RAM. None of the crew leaders independently decided to incorporate: they were told to incorporate. None of the crew leaders were required to advance capital to fund the new corporations, or even advance filing fees. None of the crew leaders independently prepared incorporation documents or any other business documents: Virginia provided each of them with packages of blank documents, obtained their signatures and information, and filled in the necessary blanks. None of the crew leaders filed incorporation papers or other business documents: Virginia took care of all of that. None of the crew leaders applied for workers' compensation insurance: Virginia did it on their behalf. None of the crew leaders sought or set up their own bookkeeping and payroll services: Virginia automatically provided them with these services. None of the crew leaders independently sought out employees: their so-called employees were told to come to the May 2, 1996 meeting in Missoula and were brought in to fill out employment applications for the new corporations, which Virginia then filed in folders she set up for the sham corporations. The new corporations were funded by payments from RAM, which were sent to Virginia. RAM through Virginia advanced funds to crew leaders so they could travel to jobs, and those funds where then deducted from the amounts owed the crew leaders. Checks written on behalf of the new corporations bounced when the funds deposited for them by RAM were insufficient.

¶112 When incorporating on May 2, 1996, and while working thereafter, the crew leaders were acting at the direction and under the control of RAM. Thus, the employment status of both crew leaders and other workers was not changed by the incorporation of the crew leaders. I therefore conclude that with respect to the Montana crew leaders and workers, RAM was an uninsured employer for the period of May 2, 1996 through December 31, 1997, and was thus an uninsured employer with respect to its Montana crew leaders and workers during the entire audit period of March 18, 1995 through December 31, 1997.

JUDGMENT

¶113 The Court has jurisdiction in this matter and jurisdiction over RAM.

¶114 The ICCU's determination concerning employment status of RAM workers between March 18, 1995 and December 31, 1997, and the resulting penalty imposed by the UEF, are affirmed except as to the crew leaders and workers who did not reside in Montana and did not work in Montana. The matter is remanded to the ICCU and UEF for a redetermination of the penalty in accordance with this decision.

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

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

DATED in Helena, Montana, this 20th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Julio K. Morales
Ms. Julia W. Swingley
Submitted: February 19, 2003
APPENDIX A

APPENDIX A

The Court's review of residency of the various crew leaders and crew members who worked for RAM, other than Jim Lewis and his crew members, shows the following:

Mark Andrews MT
Michael Armstrong MT
Dan Cheff Charlo, MT
Brent Cobb MT
Harris Cobb MT
Warren Cobb MT
Marvin Courville St. Ignatious, MT
Scott Finnegan Anaconda, MT
Wayne Forrest Stevensville, MT
John Gallagher Ronan, MT
David Gustafson Anaconda, MT
Mark Hurlbert Anaconda, MT

James Jensen Charlo, MT
Timothy Lofing Anaconda, MT
Raymond Mavity Missoula, MT
Jody McCauley Missoula, MT
Jerry McCulloch MT
Steve McCulloch MT
John McElroy Butte, MT
Anthony McNamara AZ
Joe McNamara Probably Arizona but with substantial contacts with Montana and a Montana driver's license.
Jonathan McNamara Tucson, AZ
Pat McNamara AZ
Jeremy Michalosky Unknown
Michelle Monroe MT
James Raymond MT
Don Revell MT
Heather Skillicorn Missoula, MT
Jason Skinner Montana
Ronald Skinner Ronan, MT
Billie Sparr MT
Brian Stewart Unknown