

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 27

WCC No. 2001-0315

DONALD E. FOSTER

Petitioner

vs.

OLD REPUBLIC INSURANCE COMPANY

and/or

STATE COMPENSATION INSURANCE FUND

and/or

UNINSURED EMPLOYERS' FUND

Respondents/Insurers for

**TIM CRITELLI and MARK SARGENT
d/b/a SOUTH EASTERN COURIERS**

Employer

and

QUALEX, INCORPORATED

Alleged Employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON EMPLOYER ISSUE

Summary: Claimant was injured in an automobile accident while working for South Eastern Couriers. At the time of the accident, the business was in the process of being transferred by the original sole proprietor to a new sole proprietor. While documents and the proprietors indicated their intent that the sale take effect ten days prior to the accident, their actions demonstrated that the transfer of the business was more gradual and that the original proprietor continued to be involved in the business and to exercise joint control over the business as of the date of the accident.

Held: For workers' compensation purposes, both the original and new proprietors of the business were the claimant's employers.

Topics:

Jurisdiction: Original Jurisdiction. The Workers' Compensation Court has jurisdiction to determine who is the employer for purposes of workers' compensation.

Employers: Identifying. Where two individuals are in the process of consummating the sale of a business and during a transition period both are involved in managing the business, including the hiring and firing of employees, both individuals are employers for purposes of workers' compensation.

¶1 The trial in this matter was held on January 29th and January 30th, 2002, in Billings, Montana. Petitioner, Donald E. Foster (claimant), was present for portions of the trial and excused from further attendance due to his medical condition. However, he was represented throughout by Mr. R. Russell Plath. Respondent Old Republic Insurance Company (Old Republic) and Qualex, Incorporated (Qualex) were represented by Mr. Michael P. Heringer and Ms. Lisa A. Speare. Respondent State Compensation Insurance Fund was represented by Mr. Greg E. Overturf. Respondent Uninsured Employers' Fund was represented by Mr. Daniel B. McGregor. The alleged employers Tim Critelli and Mark Sargent were present and represented, respectively, by Mr. H. Elwood English and Mr. Jeffrey A. Simkovic.

¶2 At the close of trial, the Court asked the parties to submit briefs focusing upon case law relevant to characterization of the agreement between Tim Critelli and Mark Sargent. Briefs were received and the matter was deemed submitted on March 4, 2002.

¶3 Exhibits: Exhibits 1 through 98 were admitted without objection with the proviso that Qualex, Incorporated was not the employer.

¶4 Witnesses and Depositions: The Court received and considered the depositions of Donald Foster, Tim Critelli, Mark Sargent, and Albert Martens. Donald Foster, Mark Sargent, Tim Critelli, Tom Nelson, and Jesse Olson testified at trial.

¶5 Issue Presented: The parties agreed this case presents the following preliminary issue:

Who was Petitioner's employer at the time of his accident?

¶6 Old Republic/Qualex phrased the issue as: "On December 10, 2000, was Southeastern Couriers owned by both Sargent and Critelli in a joint venture, joint enterprise partnership or some other joint ownership arrangement?" (Pretrial Order at 3.)

¶7 Pending Motions to Dismiss: In addition to the trial issue, pending before the Court are motions to dismiss filed by Old Republic/Qualex and State Fund arguing the Workers' Compensation Court does not have jurisdiction to resolve issues of insurance coverage in light of *Auto Parts of Bozeman v. Employment Relations Division*, 2001 MT 72, 305 Mont. 40.

The Court does have jurisdiction, however, to determine the identity of the claimant's employer and the trial was limited solely to that issue. To that extent, the motions to dismiss are denied. However, I do not address any dispute concerning the existence or non-existence of insurance coverage. **If any party believes that resolution of that issue is necessary and that the Court has jurisdiction to resolve it despite *Auto Parts of Bozeman*, the party shall file a Notice of Issue within 20 days of this decision. Otherwise, I will deem that matter withdrawn and/or moot.**

¶18 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

¶19 On December 10, 2000, claimant was seriously injured in an automobile accident while working for South Eastern Couriers (SEC), a courier service. (Ex. 1 at 1.)

¶110 SEC was started by Mark Sargent (Sargent) during 1999. Sargent lived in Forsyth, where he also owned and operated a fitness center and a towing company.

¶111 SEC was never incorporated. Sargent operated the company as a sole proprietorship.

¶112 SEC was engaged in a courier business serving southeastern Montana. Its primary customer on December 10, 2000, was Qualex, a nation-wide company which develops film and photographs.

¶113 Customers drop off exposed film at retail businesses. Qualex arranges to pick-up the film, which is then transported to Qualex laboratories where it is developed and photographs printed. The developed film and photos are then delivered back to the retailers, and thence to their customers.

¶114 Drivers employed by SEC picked up undeveloped film from various locations in southeastern Montana and parts of Wyoming, transported the film to Qualex's plant in Billings, then returned the developed film and pictures to the retail businesses. There was no formal written contract between Qualex and SEC, although a letter from Tom Nelson (Nelson), who was the regional district manager for Qualex, to Sargent outlined the terms of the agreement. (Ex. 10.)

¶115 During 2000, Tim Critelli (Critelli) was exercising at Sargent's fitness center. Sargent and Critelli talked about Critelli buying SEC, at first jokingly. The discussions, however, became serious. At the time of the discussions, Critelli had no business experience. He was recovering from an automobile accident and awaiting a settlement from the accident.

¶116 In October of 2000, Sargent told Nelson that SEC was struggling somewhat and that he was looking for new capital and revenue.

¶17 The discussions between Sargent and Critelli became serious and in late November they reached an agreement for Critelli to buy the business with a down payment of \$30,000. Using a software program with form agreements, Sargent prepared three documents, all dated November 24, 2000. The documents are entitled "Loan Agreement," "Waiver and Assumption of Risk," and "Grant of Right to use Name." (Exs. 62, 63, and 72, respectively.)

¶18 The "Loan Agreement" (Ex. 62) states that Sargent agreed to sell SEC to Critelli "for the sum of \$400,000.00," of which \$30,000 was to be paid in cash with the remaining \$370,000 to be paid in monthly installments over eight years with 7% interest. The total payments under the Agreement are \$484,269.49.

¶19 The "Waiver and Assumption of Risk" document states that Critelli "voluntarily makes and grants this Waiver and Assumption of risk" in favor of Sargent "for the opportunity to use the facilities, equipment, materials and/or other assets of Seller; and/or to receive assistance, training, guidance, tutelage and/or instruction from the personnel of Seller; and to engage in the activities, events, sports, festivities and/or gatherings sponsored by seller" (Ex. 63 at 1.) The document goes on to state that Critelli "waive[s] and release[s] any and all claims whether in contract or of personal injury, bodily injury . . . that may arise from my aforementioned use and/or receipt" The apparent purpose of the document is to hold Sargent harmless from Critelli's use of the vehicles and other equipment being sold to him by Sargent as a part of the business and for assistance provided by Sargent in the business. The full agreement is set out at the end of this decision.

¶20 The final document was titled "Grant of Right to Use Name" and simply gave Critelli the exclusive use of the name "South Eastern Couriers" for an eight-year period.⁽¹⁾ (Ex. 72 at 1.)

¶21 All of the documents are dated November 24, 2000. The first monthly payment was scheduled for December 15, 2000. (Ex. 62.) The Waiver and Assumption stated that it was effective November 24, 2000. (Ex. 63.) The Grant of Right to Use Name stated it was effective November 24, 2000. (Ex. 72.) Thus, on the face of things it would appear that the sale of the business was effected on November 24, 2000. However, the conduct and testimony of both Critelli and Sargent indicate that was not the case. Moreover, the agreement was incomplete in that it did not specify what was encompassed in the sale of SEC, other than the right to use the name.

¶22 Critelli testified the papers were signed sometime between November 24th and December 1st. Both Critelli and Sargent testified they understood the "sale" to be effective December 1, 2000. Both parties understood that the sale included vehicles SEC had been using in its business, however, the vehicles were security for loans obtained to finance the vehicles. The loans were personally owed by Sargent. The agreement did not require Critelli to assume the loans or the banks to exonerate Sargent from liability for them.⁽²⁾ The parties also contemplated that SEC would continue to provide transport services to Qualex.

¶23 In fact, control over the business known as South Eastern Couriers did not abruptly change hands on either November 24 or December 1, 2000. After December 1, 2000, and as of December 10, 2000, Sargent and Critelli shared control over SEC operations, as evidenced by the findings which follow.

The Qualex Agreement

¶24 The agreement between Qualex and SEC was an agreement between Qualex and Sargent personally since SEC was being operated by Sargent as a sole proprietorship. No new agreement was made between Critelli and Qualex. In late November or December 2000, Sargent and Critelli met with Jesse Olson (Olson), the Qualex operations manager in Billings, to discuss the sale to Critelli. The recollections of Sargent, Critelli, and Olson agree as to the general time period but vary as to the exact date of the meeting. Olson testified that the meeting was around December 1st and I find it more likely that the meeting occurred about that date.

¶25 Sargent testified he told Olson that Critelli was the new owner of the company. Olson, however, testified Sargent introduced Critelli as a "potential" new owner and stated Critelli would be taking over the operations side of the business, but, that he (Sargent) would continue to be involved for a period of time. According to Olson, Sargent said to call him if problems occurred. Olson had the impression the arrangement was a long term situation, more a partnership than a sale. He understood that over a period of time, Critelli would be buying the business. While no date was given for a change of ownership, he thought the process could take as long as eight years, which accords with the actual time specified by the agreement between Critelli and Sargent for payment for the business.

¶26 Having heard the testimony of Sargent, Critelli, and Olson, I find Olson's recollection of the meeting the most convincing and adopt his version of events. I take particular note that Sargent had previously indicated to Nelson, who was responsible for negotiating the agreement on behalf of Qualex, that he was looking for new capital and revenue, rather than a buyer for his business. (¶ 16.) I also note that there is no testimony indicating that there was discussion with Olson of any transfer of the existing Qualex agreement to Critelli or of a new agreement between Critelli and Qualex. Moreover, Olson was not in charge of the contract; he was a local Qualex employee in charge of the Billings processing facility.

¶27 Further evidence that Sargent continued to be jointly involved in SEC's business after December 1st is found in communications following the claimant's accident. On the day of claimant's accident, Olson (the Billings operations manager) sent an email to Nelson (the Qualex supervisor for Montana). The subject line of the message reads, "Southeastern Courier." The text reads:

Tom,

Don't know if you are aware of this or not, but just an fyi.. Mark has sold or is in the process of selling... At the [sic] point all I know is what I have been told. It is supposedly an eight year deal.. However, it appears that the assets have already been turned over to the new guy.. His name is Tim Critelli.. So far, service has been ok, but either Mark has impeccable [sic] timing, or this new guy is on a run of bad luck.. He has had more than his share of breakdowns so far.. If that wasn't enough, there were two wrecks over the weekend also.. The highline driver totaled his vehicle, but is ok.. The Great Falls driver was in a head on last night and will be in the hospital for at least a month.. Unless this new guy has some good insurance or "deep pockets", or both, we may be headed for trouble.. Just wanted to make sure you are aware.. Maybe Mark has already informed you.. Calll [sic] me when you get a chance.. Regards

(Ex. 46 at 1.) Nelson testified this was the first he heard that a sale of the business was in the works. Concerned about what was going on, Nelson telephoned Sargent. Sargent told him he had taken on a partner, but that he, Sargent, would still be the contact person for Qualex. Sargent said there would be no change in invoicing or method of payment. Nelson testified he was left with the impression of "business as usual." At that point, Nelson had neither met nor spoken to Critelli.

Sargent's Continued Involvement in SEC Operations

¶28 After December 1, 2000, Sargent continued to be involved in and exercise control over parts of SEC operations.

¶29 Until March 2001, Sargent continued to invoice Qualex for SEC deliveries. Qualex in turn remitted payment to him. Sargent turned the checks over to Critelli, who in turn paid Sargent amounts due under the Loan Agreement. (Ex. 92 at 8-9.) Critelli acknowledged he did not obtain a new contract with Qualex and that the business continued to operate under the agreement Sargent had made with Qualex.⁽³⁾

¶30 After December 1, 2001, and including December 10, 2000, SEC's place of business in Billings continued to be the premises leased by Sargent. The lessor was told the business had changed ownership, but no new lease was written until the old lease term expired. After December 2000, Critelli paid the rent.

¶31 After December 1, 2000, Sargent acted as a driver for SEC on several occasions, just as he had done prior to the agreement with Critelli. He received no compensation other than that provided in the Loan Agreement.

¶32 Sargent continued to provide SEC with the use of an 800 number which was used by drivers and customers. The 800 number continued to be answered by Sargent, his wife, and employees working at Sargent's other businesses in Forsyth. If Qualex needed to contact SEC, it called the 800 number. Olson testified that after December 1st, he saw Critelli

around more but there was no appreciable change in the way business was conducted. If a problem arose, Qualex continued to call the same phone number, which was answered by Sargent's people. This arrangement continued for two or three months after December 1st.

¶133 After December 1, 2000, Critelli and SEC employees continued to use Sargent's phone and fuel cards. (Ex. 77.) Critelli reimbursed Sargent for SEC charges on the cards. (Ex. 92 at 9.) He did not start using his own charge accounts until May 2001.

¶134 Sargent and his wife continued helping with or doing payroll for three to four weeks after December 1, 2000.

¶135 For several weeks after December 1st, Critelli followed the same employee schedules as set up by Sargent prior to that date. He acknowledged that Sargent helped him in deciding where to put people and how to schedule them. Sargent actually printed the employee schedules during the first three weeks of December.

¶136 For some time after December 1st, Sargent continued to be involved in SEC personnel decisions. While employees were asked to fill out new employment applications on or shortly after December 1st, re-employment interviews were thereafter held with both Critelli and Sargent present. Sargent acknowledged that he "sat in on" interviews with employees after December 1st and made recommendations on hiring. At deposition, he testified: "It was joint. There was - we talked - we discussed about some people and come to a consensus on whether the person should be hired or not." (Sargent Dep. at 67.) Critelli testified Sargent was involved in hiring employees after December 1st, making suggestions as to which employees to "rehire."

¶137 Sargent also acknowledged that he fired John Foster, claimant's brother, shortly after December 1st. Critelli testified he was in the room when John Foster was fired. He thought it was a "fifty-fifty thing" and did not remember who actually said the words, "you're fired." Critelli testified he would have fired Foster based on the circumstances regardless of Sargent's wishes.

¶138 Critelli did not obtain a federal identification number for taxation purposes until at least March of 2001. (Ex. 67 at 1.) And it was not until March 2001, that he notified Qualex that payments for SEC services should be sent to him rather than Sargent. (See footnote 3.)

Factual Resolution

¶139 After considering all of the evidence, I find that both Sargent and Critelli jointly exercised control over SEC's business on December 10, 2000, the date on which the claimant was injured, and that the actual transfer of ownership and control of SEC from Sargent to Critelli was incomplete at that time. SEC's relationship with Qualex, its principal customer, was premised upon an agreement between Qualex and Sargent. Sargent continued to control the invoicing to and payment by Qualex and was involved, jointly with

Critelli, in personnel decisions. While Critelli took over many of the day-to-day operations, Sargent continued to provide essential services to the business in the form of telephone communications between SEC and drivers and SEC and Qualex. Sargent also continued to provide basic financial services, such as credit card accounts, for the business.

CONCLUSIONS OF LAW

¶40 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶41 The sole question considered at present is, "Who employed the claimant at the time of his industrial injury." That issue is within the Court's jurisdiction. § 39-71-2905, MCA.

¶42 Sargent and Critelli both maintain they intended the sale of SEC to take effect on December 1, 2000. The facts in this case, however, demonstrate that after December 1st, and including December 10th, 2000, they were operating SEC jointly. As set forth in the findings above, Sargent's involvement in the business did not end December 1st. He continued to be involved in company operations and phased out his involvement over a period of several months. Especially important is the fact that after December 1st, Sargent continued to be involved in personnel matters and actually fired an individual. The company also continued to operate under his agreement with Qualex and he continued to handle the company's contact with SEC, which was not even notified of a change in ownership. Critelli was likewise involved in managing and controlling the business, handling many of the day-to-day operations. In early December he was jointly involved in personnel matters. In essence, the transfer of control of the company was gradual. During that transfer period, which ended in March, 2001, Critelli and Sargent exercised joint control over the company's affairs.

¶43 At the close of trial, I asked counsel for the six parties whom they deemed the employer of claimant at the time of his injury. With the exception of counsel for the State Fund, all counsel, including counsel for both Critelli and Sargent, agreed that both Sargent and Critelli were claimant's employer. The judicial process is not a democratic one. But while this case cannot, and will not, be decided by a vote of the attorneys for the parties, their responses do verify my own assessment of the facts. I conclude that Sargent and Critelli jointly employed claimant on the date of his accident.

JUDGMENT

¶44 At the time of claimant's industrial accident on December 10, 2000, Tim Critelli and Mark Sargent were joint employers of claimant.

¶45 Within 20 days the parties shall notify the Court whether there is any other issue within the Court's jurisdiction which should be resolved. If there is no other matter, then this judgment will be certified as final.

¶46 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law on Employer Issue.

DATED in Helena, Montana, this 20th day of May, 2002.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. R. Russell Plath

Mr. Greg E. Overturf

Mr. Michael P. Heringer/Ms. Lisa A. Speare Mr. Daniel B. McGregor

Mr. Jeffrey A. Simkovic

Mr. H. Elwood English

Attached: [Waiver and Assumption of Risk](#)

Submitted: March 4, 2002

1. The eight-year period corresponded to the eight years of payments set out in the Loan Agreement.

2. Sometime during December 2000, Sargent transferred title of SEC vehicles from his own name to that of South Eastern Couriers. (Ex. 73.) However, the address on the titles remained Sargent's address in Forsyth. (*Id.*) Sargent testified that the bank holding the lien on the vehicles would not release the vehicles for transfer to Critelli, but agreed the cars could be transferred to the name of South Eastern Couriers. This allowed Critelli to begin insuring the cars under his own policy. The bank remained a lien holder with the power to repossess the cars if Sargent's loans were not paid.

3. Olson testified that during March 2001, Critelli came to him, said he had completely taken over SEC, and that he wanted to be paid directly. Olson asked for supporting documentation, to be certain a transfer of ownership had taken place. Critelli provided copies of the agreements with Sargent, as well as a letter stating he had taken over the business. Olson asked Critelli to complete a new vendor form and to provide a taxpayer identification number. On March 22, 2001, Critelli signed a "Request for Taxpayer Identification Number and Certification." (Ex. 67 at 1.) A "Vendor Maintenance Form" for vendor "TC Enterprises dba Southeastern Couriers" is dated March 23, 2001. (Ex. 68 at 1.) Critelli testified that "TC Enterprises" is a business name he uses.