IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 24

WCC No. 9305-6788

C. LONEY CONCRETE CONSTRUCTION,

INCORPORATED (CLAY LONEY)

Appellant

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer.

DECISION AND ORDER ON APPEAL

The matter before the Court is an appeal from an April 13, 1993 decision of the Montana Department of Labor and Industry (hereinafter DLI). The DLI decision found that appellant was operating an uninsured business within the meaning of section 39-71-507, MCA, and upheld a Cease and Desist Order issued pursuant to the cited section. In this proceeding for judicial review, the appellant raises numerous challenges, both procedural and substantive, to the proceedings and Order below. Because of fundamental errors in the DLI's interpretation of the applicable statutes and in its hearing procedures, the Court reverses the DLI decision and remands the matter for a new hearing.

Background

The appellant is C. Loney Concrete Construction, Inc. Clay Loney is the company's sole shareholder and business manager. (This decision will refer to the company and Mr. Loney interchangeably, and sometimes just as "Loney.")

Loney is a concrete contractor, whose business has been operating for approximately ten years. As one would expect, the concrete business is seasonal, and is affected by weather variations, as well as by fluctuations in the construction industry. Mr. Loney testified at hearing that the number of workers and jobs each year is highly variable and there is no "typical" job. (Tr. at 15-16.) A concrete project can require two workers or thirteen workers depending on the nature of the job. (Tr. at 19.) Sometimes Loney has several jobs going at one time and at other times it has one or even none. (*Id.*) In 1991 a total of 33 individuals worked for Loney, and in 1992 the total was 26. (Tr. at 17.) Apparently, these totals are all of the individuals who worked for the company, including those who may have worked only for a few hours. (See Tr. at 17, 25, 29, 30.) Mr. Loney testified that during his ten years in business he had employed "traditional full-time

employees"; however, there is no indication in the record as to how many full-timers he actually employed at any given time. Mr. Loney also testified that at times there was insufficient work for the full-time employees and "sometimes I would take them to my place and let them fix things and do stuff around there just to get them enough hours so they could -- so you could keep them around." (Tr. at 16.)

In June of 1992, Mr. Loney determined that he could no longer afford a permanent work force, primarily because of the expense of workers' compensation insurance. (Tr. at 24-5.) He therefore entered into an arrangement with Olsten's Temporary Services, which provides temporary workers to businesses. (Tr. at 34.) Olsten's pays the temporary employees and provides workers' compensation coverage for them. (Tr. at 34-5.) If a temporary employee works 1,400 to 1,500 hours in a year, Olsten's even provides a paid vacation to the employee. (Tr. at 51.)

Commencing July 1992, Loney began obtaining workers exclusively through Olsten's. He notified the employees who were then working for him of the arrangement so they could sign up with Olsten's. (Tr. at 44.) The workers submitted employment applications to Olsten's, were interviewed by Darlene Schulke, the Great Falls manager of Olsten's, and put on Olsten's list of available workers. (Tr. at 43-45.) Thereafter, when workers, including supervisors, were needed he called Darlene Schulke. (Tr. at 23, 42.) He specified the type of workers he needed and in at least some cases asked her to send specific individuals. (Tr. at 22-24.) It appears that in most cases the workers sent out by Olsten's were the same individuals Loney had previously employed. (Tr. at 26, 28.) Mr. Loney could recall only one worker sent to him by Olsten's who had not worked for him prior to his arrangement with Olsten's. (Tr. at 18.) According to Darlene Schulke, some of the workers sent to Loney were also referred to jobs for other employers. (Tr. at 39.)

Loney specified the wages of workers sent to him by Olsten's (Tr. at 30, 39.) Olsten's, however, paid the workers directly and handled all payroll functions. (Tr. at 38.) Loney paid Olsten's a fee based on the wages of the workers plus a fixed percentage. (Tr. at 39.) Presumably, the fee covered Olsten's overhead, the payroll and associated costs for the workers sent to Loney, and some margin of profit.

Olsten's did not actively supervise the workers sent to Loney. After referral, its only follow-up was telephone contact with Clay Loney to determine if a referred worker was "working out." (Tr. at 41.)

At the hearing conducted by the DLI, Darlene Schulke gave some examples of the varied hours worked by its temporary workers. In the examples given, one worker worked as few as eight hours in one week of a four-week period and as many as twenty-two in another. Another worker worked as few as three hours and as many as nineteen. (Tr. at 37.) The examples given, however, were not specifically for individuals working for Loney. (Tr. at 50-51.) Based on the testimony admitted at trial it is impossible to obtain an accurate picture of the hours worked by the workers referred to Loney by Olsten's or of the fluctuations in Loney's business, either before or after the Olsten's arrangement. It is also impossible to determine if workers were sent to Loney for a specific job, and returned to Olsten's availability list at the end of the job, or whether once sent to Loney they worked on different projects until there was not enough work for them to continue working.

In addition to concrete workers, Loney employed a bookkeeper over the years. Since 1990 Veronica Hall has been doing the company bookkeeping on an as needed, part-time basis. (Tr. at 52-53.) She registered with Olsten's in 1988. Thus, she was already on Olsten's list of available temporary employees. (Tr. at 42, 52.) In addition to her work for Loney, she has worked part-time for other employers over the past few years. (Tr. at 52-54.) After Loney entered into the arrangement with Olsten's, she continued to do Loney's bookkeeping. The amount of her work, however, diminished because she no longer did payroll. (Tr. at 55-57.) With regard to Ms. Hall, there appears to be a continuity in her services. There was no testimony indicating that Loney called Olsten's every time he had bookkeeping needs. Other than the work load, the working relationship and arrangement with Ms. Hall appears to have been unaffected by the Olsten's arrangement.

The foregoing factual recitation is taken exclusively from the testimony of appellant's witnesses. It disregards other evidence and presumptions used by the hearing examiner in reaching his decision.

"Roughly" in July 1992, a field representative for the Uninsured Employer's Fund (hereinafter UEF) received a list of cancellations of workers' compensation insurance indicating that Loney's coverage had been cancelled June 22, 1992. (Tr. at 7, 10.) He thereafter investigated Loney, speaking both with Mr. Loney and Ms. Schulke, and observing workers at apparent Loney job sites. On September 15, 1992, as a result of his investigation, the field representative issued a Cease and Desist Order that directed Loney to "CEASE OPERATIONS in Montana . . . until you have obtained proper coverage for all employees for whom Montana law requires you to provide workers' compensation insurance coverage." (DLI Ex. No. 2b.) The Order warned Loney, "Failure to comply with this Order constitutes a criminal misdemeanor . . . ." The Order was thereafter served on Loney, who then requested a contested case hearing.

A hearing was held before a DLI hearing examiner on February 4, 1993. The hearing examiner issued his FINDINGS OF FACT; CONCLUSIONS OF LAW; ORDER on April 13, 1993. In his findings the examiner found that nine identified workers were not "temporary workers" within the meaning of section 39-71-116 (24), MCA (1991), and were in fact employees of Loney. Based on that determination, and Loney's undisputed lack of workers' compensation insurance coverage after June 22, 1992, the examiner determined that the Cease and Desist Order was properly issued.

Record On Appeal

On May 11, 1993 the appellant (Loney) filed a NOTICE OF APPEAL with this Court. The record on appeal consists of the DLI file, including a transcript of the hearing, the exhibits and the hearing examiner's decision.

On May 14, 1993 Loney moved to supplement the record by presenting additional evidence. No response was filed to the motion and it was granted. The additional evidence, consisting of additional testimony of Clay Loney, Darlene Schulke and Val Stekly, was presented at a hearing held in Great Falls on September 8, 1993. A newspaper article was also offered into evidence but was excluded on hearsay grounds.

Loney was represented at the hearing by Antonia P. Marra. The DLI was represented by Daniel B. McGregor.

Val Stekly gave testimony, based on her meetings with representatives of the State Fund, concerning her understanding of workers' compensation provisions on temporary employees. Interpretation of workers' compensation statutes, however, is a matter for the Court. Moreover, the State Fund is not the agency charged with applying laws concerning uninsured employers. Its interpretations are therefore not entitled to deference. ***Cf. Montana Dept. of Revenue v. Kaiser Cement Corp.,*** *245 Mont. 502, 507, 803 P.2d 1061 (1990) (deference may be shown to the interpretation given a statute by the agency charged with its administration).*

Ms. Schulke also testified about bid requests she received from various agencies of the State of Montana for temporary employees. The requests were not from the DLI and were for employees to be hired for specific, short periods of time.

Loney's additional testimony was offered to show why Ms. Stekly's testimony had not been offered at the time of the DLI hearing.

Appellant's Grounds For Appeal

Loney's NOTICE OF APPEAL listed eleven separate grounds of alleged error. However, in subsequent briefs submitted in support of his appeal, the issues presented have been consolidated to the following ones:

1) Whether the late filing of its list of exhibits and witnesses should have precluded the Uninsured Employers' Fund from presenting evidence at the DLI hearing.

2) Whether the burden of proof was improperly placed on Loney.

3) Whether Loney was denied due process of law by the hearing examiner's consideration of evidence outside the record, or by permitting the UEF to present evidence in light of its untimely filing of its list of exhibits and witnesses.

4) Whether DLI misinterpreted applicable statutes.

5) Whether the applicable statutes are unconstitutionally vague or over-broad.

6) Whether the DLI decision is supported by substantial evidence.

7) Whether the errors committed in the proceeding were harmless.

Standard Of Review

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

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

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

Additional subsections permit criminal prosection for noncompliance with a DLI Cease and Desist Order. They also authorize a civil action to enjoin continued business operations.

The UEF is statutorily created by section 39-71-502, MCA, as a part of the DLI, section 39-71-503, MCA. It has apparently been delegated the DLI's enforcement powers under section 39-71-507, MCA. In any event, it initiated the Cease and Desist Order in this case and has defended the Order both before the DLI's hearing examiner and in this Court.

Although there is no specific statutory provision for a contested case hearing following the issuance of a Cease and Desist Order, the DLI and the parties herein have proceeded on the assumption that an order triggers the right to a hearing. Apparently, they also agree that this Court has the power to judicially review the decision below. The DLI is "vested with full power, authority, and jurisdiction to do and perform any and all things that are necessary or convenient in the exercise of any power, authority or jurisdiction conferred upon it under this chapter [Title 39, chapter 71]." Section 39-71-203 (1), MCA. In the exercise of that power, it is further empowered to make "orders, decisions and awards," section 39-71-204 (1), MCA, from which any aggrieved party "may appeal the dispute to the workers' compensation judge," section 39-71-204 (3), MCA. Thus, the present appeal appears to be one the Court may properly consider.

The standards of review are set forth in section 2-4-704, MCA. Although the section, which is part of the Montana Administrative Procedures Act, generally applies to district court review of agency decisions, the standards set forth in the section have been utilized in judicial review cases under the jurisdiction of the Workers' Compensation Court. ***E.g., State Compensation Mutual Insurance Fund v. Lee Rost Logging,*** *252 Mont. 97, 102, 827 P.2d 85 (1992) (applying the "clearly erroneous" standard of 2-4-704 (2)(a)(v)).* The section provides in relevant part:

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

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

(i) in violation of constitutional or statutory provisions;

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

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

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

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

Review of the Procedures and Decision

1. UEF's Failure To Timely Provide Its List Of Witnesses And Exhibits

The hearing examiner issued a scheduling order requiring the parties to exchange proposed exhibits and witness lists by January 15, 1993. Despite the deadline, UEF did not mail its exhibits and list of witnesses to Loney's counsel until January 20, 1993. The exact date Loney's counsel received the materials is not clear. However, allowing three days for mailing (see Rule 6(e), Mont. R. Civ. P.), Loney's counsel should have received the materials by January 23, 1993. (January 23rd, however, was a Saturday.) The hearing was held on February 4, 1993.

In ***Torchia v. Burlington Northern, Inc.****, 174 Mont. 83, 568 P.2d 558 (1977)*, the defendant failed to disclose the name of a witness until after the close of the plaintiff's case-in-chief. The plaintiff did not know the witness and never had a chance to speak with him. The trial judge disallowed the witness' testimony and the Supreme Court affirmed.

The exclusion of testimony or evidence is within the sound discretion of the presiding judge or hearing examiner. As stated by the Montana Supreme Court in ***Melotz v. Scheckla,*** *245 Mont. 327, 331, 801 P.2d 593, (1990).*

"The exclusion of evidence for noncompliance with discovery rules is a harsh remedy [and] . . . we will reverse the trial judge only when his judgment may materially affect the substantial rights of the appellant and allow a possible miscarriage of justice."

The appellant in this case has not demonstrated substantial prejudice and ***Torchia*** is inapposite. The only witness called by UEF at hearing was Jim Watts, the DLI representative who issued the Cease and Desist Order. His testimony was brief, and Loney had at least a week and a half prior to hearing to prepare cross-examination. Loney argues that because of the lateness of the exhibits, he was unable to make specific objections, such as irrelevancy, to the exhibits. However, he had a week and a half to review the exhibits, and nothing in the record indicates that the hearing examiner refused Loney an opportunity to make specific objections to any exhibits. Loney's counsel even used one of the exhibits (Ex. No. 4) in examining one of Loney's own witnesses. Moreover, Loney filed a post-hearing brief a week after the hearing and did not raise any objections therein. Objections such as relevancy should have been raised in the proceeding below and cannot be raised for the first time on appeal.[(1)] ***In re B.L.O.,*** *213 Mont. 164, 169, 689 P.2d 1246 (1984).*

The hearing examiner's order denying Loney's motion to exclude UEF's witnesses and exhibits also indicates that the individual representing UEF was on medical leave during the week of the exchange date. Lacking any evidence of prejudice to Loney, and a

reasonable excuse appearing for the delay, the hearing examiner did not abuse his discretion in allowing UEF to present its witness and exhibits.

2. Burden of Proof

The hearing examiner allocated the burden of proof to Loney. In his decision he stated that it was Loney's "burden of proof in this de novo hearing to show by substantial credible evidence" that UEF's cease and desist order was erroneous. Findings of Fact; Conclusions of Law; Order at 18.

The hearing examiner apparently derived this burden from the rebuttable presumption in section 39-71-117 (3), MCA (1991) which reads:

(3) An employer defined in subsection (1) who utilizes the services of a worker furnished by another person, association, contractor, firm, 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, 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, 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.]

The hearing examiner misread the section. Specifically, he failed to give effect to the language, "other than a temporary service contractor." When that language is given effect, the section plainly states that an employer utilizing the services of a worker furnished by a temporary service contractor is ***not*** presumed to be the employer of such employee. In his second conclusion of law, the hearing examiner acknowledged that Olsten's is a temporary service contractor. The presumption therefore did not apply.

It is a fundamental principle of administrative procedure that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue. 73A C.J.S. Administrative Law § 128. The UEF was the proponent for the Order finding that Loney was an employer subject to insurance requirements and directing that it cease business. The burden of proof "is on the one making the charges in disciplinary proceedings or where the issue is whether the party charged has committed an illegal or improper act, and this rule applies where the charge is made by the administrative body." *Id*. ***See also Peabody Coal Co. v. Ralston,*** *578 N.E.2d 751 (Ind. Ct. App. 1991) (burden of persuasion remains on the agency in a proceeding against a coal company for alleged violations of regulations of the Indiana Department of Natural Resources)*.

Since the UEF was the administrative body which was charging appellant with the violation, it had the burden of persuasion in this case. Accordingly, the DLI decision must be reversed unless the error was harmless.

3. Due Process Arguments

Loney renews its contentions concerning the untimely exchange of exhibits and witness lists in arguing it was denied due process. The Court has determined that there is no evidence of prejudice. While the exchange was late, there was still time for Loney to prepare its case. It was not denied a fair hearing.

Loney also argues that the hearing examiner relied on information which was not presented at hearing. Loney is correct in its contention. In finding that several individual workers were not "temporary workers" within the meaning of section 39-71-116 (24), MCA, the hearing examiner relied in part on representations made by UEF in its post-hearing brief. Specifically, the examiner relied on representations that six of the workers had worked for the full twelve weeks of the quarter ending September 30, 1992. The right of "due process entails the right to cross-examination." ***In re Sonsteng,*** *175 Mont. 307, 313, 573 P.2d 1149 (1977).* Evidence must be gathered during a hearing at which all parties are afforded a fair opportunity to cross-examine adverse witnesses and evidence. Evidence may not be admitted through post-hearing representations of a party. The examiner's reliance on information furnished by UEF after hearing, was error.

4. Statutory Interpretation

The DLI is required to order uninsured employers to cease operations. Section 39-71-507 (1), MCA. It was undisputed that Loney was not covered by workers' compensation insurance after June 1992. Thus, if Loney was an employer after that date, the Cease and Desist Order was properly issued.

In reviewing the hearing examiner's conclusions of law, the standard of review is whether the examiner's interpretation of the law is correct. ***Medicine Horse v. Big Horn County School District,*** *251 Mont. 65, 68, 823 P.2d 230 (1991).* The review is de novo. ***Conn v. Quality Inn,*** *242 Mont. 190, 192, 789 P.2d 1213 (1990).*

Several statutory provisions are involved in determining whether Loney was an employer. Those statutes must be correlated and reconciled. Consideration must be given to the provisions as a whole, and individual sections must be interpreted "in such a manner as to insure coordination with other sections of the act." ***State v. Meader,*** *184 Mont. 32, 37, 601 P.2d 386 (1979).*

Section 39-71-117(3), MCA, establishes a presumption concerning the employer of a worker who is furnished by one company to another. This section has its most obvious application to a "loaned employee."[(2)] As discussed earlier, the presumption does not apply to workers furnished by a temporary service contractor. On the other hand, the section does not classify all workers who are furnished by a temporary service contractor as employees of that contractor. The section deals only with presumptions.

Section 39-71-117(2), MCA, specifically applies to temporary service contractors. It provides:

(2) A temporary service contractor is the employer of a ***temporary worker*** for premium and loss experience purposes. [Emphasis added.]

Since the presumption of section 39-71-117(3) does not apply, by implication a worker who is attributed to a temporary service contractor for insuring purposes is not considered an employee of the company utilizing the services of that worker. This follows from the general rule of statutory interpretation that the express mention of one matter is generally construed as excluding other similar matters which are not mentioned. ***Helena Valley Irrigation Dist. v. State Highway Commission,*** *150 Mont. 192, 198, 433 P.2d 791 (1967).*

The inquiry, however, is not at an end. Section 39-71-117(2), MCA, applies only to a worker who is a ***"temporary worker"***, a term that is specifically defined in section 39-71-116(24), MCA (1991) (now codified at 39-71-116(29)). Since "temporary worker" is specifically defined, only those workers meeting that definition are encompassed by section 39-71-117(2). Workers who do not fit the definition are therefore subject to general rules for determining employment.

"Temporary worker" is defined as follows:

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

In construing a statute, the primary tool for ascertaining the legislature's intent is the plain meaning of the words used. ***Dorn v. Bd. of Trust. of Billings Sch. Dist.****, 203 Mont. 136, 144, 661 P.2d 426, 430 (1983).* When the language of the statute is plain, unambiguous, direct and certain, the statute speaks for itself and no further interpretation is required. ***Blake v. State****, 226 Mont. 193, 198, 735 P.2d 262, 265 (1987).* On its face, the definition of temporary worker requires that two conditions be met. First, the worker must be furnished on a "part-time or temporary basis." Second, the worker must be a "substitute for a permanent employee on leave" or filling in "to meet an emergency or short-term workload." The conditions are conjunctive.

The first condition is satisfied by either services furnished on a "part-time basis" or on a "temporary basis." The condition is worded disjunctively, so either will satisfy the first condition.

"Full-time" work is commonly understood to be work which is performed full-time (typically 40 hours) on a regular basis. "Part-time" work is thus work which is not full-time work. Regular work for less than 40 hours, for example for 20 hours a week, or irregular work which only infrequently reaches 40 hours in any week, may be considered part-time.

If the worker is not working part-time, the worker's services must be furnished on a "temporary basis." While "temporary" is not specifically defined, it is generally

understood that "[a] temporary position is for a limited time in contrast to a permanent one which is for an indefinite time." ***State ex rel. Christian v. St. Clair,*** *166 S.E.2d 785, 789 (W.Va. 1969).* The fact that the employment is not year around does not render it temporary. School teachers, for example, are permanent employees although they may work only 40 weeks a year. ***Durgin v. Director of Civil Service,*** *44 N.E.2d 781 (Mass. 1942).* Employment at will for an indefinite time is not ordinarily temporary employment. ***Boone v. United States,*** *482 F.2d 417, 419 (5th Cir. 1973).* Employment for an indefinite time may nonetheless be temporary, if the time of contemplated employment is short and the employment is for the completion of a specific task:

[A] temporary employee is a worker hired for a limited time only, frequently to meet a peak demand or a special rush job. Such an employee is hired with the understanding that his employment will end with completion of the particular task for which he was hired.

Iowa Association of School Boards v. Iowa P. E. R. B., *400 N.W.2d 571, 575 (Iowa 1987) (quoting Robert's Dictionary of Industrial Relations, rev. ed. 1971).*

The second condition also permits two alternative situations. The first is where the worker's services are furnished to "substitute for a permanent employee on leave." Since Loney claims to have no permanent employees, this alternative is inapplicable in the present case. The second alternative is that the worker's services are furnished "to meet an emergency or short-term workload." "Emergency" contemplates something unforeseen and unexpected, requiring immediate action. In the context of the statute, "short term" contemplates a workload which is greater than the normal workload and exists for a matter of weeks or at most a few months.

In reaching his decision, the hearing examiner applied a "control" test, holding that Loney was the employer of any employee over which it exercised supervision and direction (FINDINGS OF FACT; CONCLUSIONS OF LAW AND ORDER at 22.) The examiner focused on the continued control which Loney, through supervisors, exercised over work (*Id.* pp. 19-20), and the fact that Darlene Schulke, Olsten's manager, had no "expertise in the concrete industry" (*Id.* p. 16.). He also applied the presumption of section 39-71-117(3), MCA (1991) (*Id.* pp. 18, 22).

The examiner's analysis was erroneous as a matter of law. Assignment of temporary workers to temporary service contractors for purposes of workers' compensation insurance is not based on any control exercised by the contractor over the worker's job. The definition of "temporary worker" encompasses temporary replacements for permanent employees, and by inference contemplates that a company using temporary workers will exercise control over that worker. The express exemption of temporary workers from the control test of section 39-71-117(3) is conclusive evidence that the test was never intended to apply to temporary workers.

Under the statutory scheme adopted by the legislature, temporary employees are not left unprotected. Section 39-71-117(2), MCA, places the responsibility for providing workers' compensation insurance on the shoulders of the temporary service contractor. There was sworn, unrebutted testimony in this case that Olsten's had a policy of insurance covering the workers it sent to Loney.

5. Constitutionality Of Statutes

Loney also contends that the statutes governing temporary workers are unconstitutionally broad and vague. Loney bears a heavy burden in persuading the Court the statutes are in fact unconstitutional. "The constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt." ***Ingraham v. Champion Int'l.****, 243 Mont. 42, 47, 793 p.2d 769 (1990).* In determining if a statute is constitutional or not, it must not be analyzed to determine if it is possible to condemn it, but whether it is possible to uphold the legislative action. ***Stratemeyer v. Lincoln County****, 50 St. Rptr. 0731 (Mont. 1993)*. In ***Broers v. Montana Dept. of Rev.****, 237 Mont. 367, 371, 773 P.2d 320 (1989)*, the Montana Supreme Court (citing the United States Supreme Court decision in ***Broadrick v. Oklahoma****, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913 (1973)*) stated that noncriminal statutes are unconstitutionally vague if persons of common intelligence must necessarily guess at their meaning. The Court in ***Broers*** went on to state, "[I]t is the duty of the courts to uphold the constitutionality of a statute if such can be accomplished by reasonable construction." *Id.* A constitutional provision, when being tested for constitutionality, "should receive a *reasonable* and *practical* interpretation in accordance with common sense." ***Fallon County v. State****, 231 Mont. 443, 445, 753 P.2d 338 (1988)*.

The specific statute attacked as vague and overly broad is the one defining temporary worker. The statute has been analyzed and interpreted in the previous section of this opinion. It should be manifest from that discussion that the statute has a common sense meaning which should be apparent to "persons of ordinary intelligence." Accordingly, the statute does not fail for vagueness.

6. Substantial Evidence

Loney challenges a number of the hearing examiner's findings of fact, contending they are not supported by substantial evidence or are misstatements of the evidence. The standard of review is not strictly whether the findings are supported by substantial evidence but whether the decision is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." ***State Compensation Mutual Ins. Fund v. Lee Rost Logging,*** *252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA).* In light of fundamental legal errors which occurred, and the Court's determination that the errors were not harmless, it is unnecessary to address Loney's specific assignments of errors regarding the findings.

7. Harmless Error Discussion

We have found that substantial legal errors occurred. On that basis the DLI decision must be reversed unless the errors were harmless.

It is always incumbent on a party alleging error to demonstrate that any error was prejudicial. ***Kuchan v. Harvey,*** *179 Mont. 7, 11, 585 P.2d 1298 (1978).* Where the reviewing court is convinced that the eventual result will be the same if the decision under review is reversed and remanded, then the error must be deemed harmless. ***Eaton v. Morse,*** *212 Mont. 233, 244, 687 P.2d 1004 (1984).* However, where

the error might well have affected the substantial rights of the party, reversal is required. ***State Highway Commission v. Churchwell,*** *146 Mont. 52, 57, 403 P.2d 751 (1965).*

In this case, we are convinced that the result after a remand and rehearing will be the same insofar as the ultimate conclusion finding that Loney is an uninsured employer. Loney's own evidence requires the conclusion that at least some of the workers furnished through Olsten's do not fit the temporary worker definition; therefore, they are employees not of Olsten's but of Loney.

The bookkeeper, Veronica Hall, has provided bookkeeping services on a continuous basis since 1990. Though it appears that she works part-time, and therefore meets the first side of the temporary worker test, it does not appear that she meets the second side of the test. Since bookkeeping is a normal and regular activity of any construction business, her services are not unforeseen and unexpected (emergency) and, even though the number of hours she works varies from time to time, her entire services cannot be said to be due to a greater than normal workload.

Similarly, Loney's ability to keep workers on a 40-hour-a-week payroll during previous years, shows that at least some of his work force is needed on a regular basis. Fluctuations in business volume based on seasonal or economic factors cannot be considered emergencies in any ordinary sense. For Loney they are expected and are a part of the normal business cycle. Insofar as Loney experienced a recurrent baseline requirement for workers, the workers needed to fill that baseline cannot be considered as meeting a "short term workload." On the other hand, workers furnished for short-term overloads, either for a specific time, or to work on a specific short-term project until completion, may be considered temporary employees so long as they are not furnished on an indefinite basis. The difficulty with the decision of the DLI hearing examiner is that the errors contributed substantially to its determination that nine named workers were Loney employees. Without the errors it is impossible to determine which, and how many, of the construction workers should be classified as temporary workers, and which should be deemed employees of Loney. The fact that a worker had worked for Loney before, or had been referred by Loney to Olsten's, is not conclusive. It is possible, for example, that Loney's work is sufficient to keep two construction workers employed full-time all year, or for much of the year, and that during the three summer months he needs at various times a half-dozen additional workers for specific projects. The Court does not read the temporary worker statute as precluding use of temporary workers who might be hired through Olsten's or some other temporary agency for a specific summer construction project or for a specified short time, e.g. two months, when Loney's regular workers are overloaded.

Further information concerning Loney's business, its previous employees, and the workers furnished by Olsten's could clarify the status of the workers. Exhibit No. 16, for example, appears to contain information on reported wages of Loney's employees for five quarters in 1991 and 1992. It appears to indicate minimum quarterly wages of $25,000, rising to $40,000 and $50,000 during two quarters. This information may be evidence of Loney's baseline need for regular employees. However, the exhibit was never discussed or interpreted. Further information was undoubtedly available from

Loney and Olsten's. The DLI bears the burden of proof and is capable of subpoenaing that information. Sections 2-4-104 and 2-4-611(3), MCA.

The prejudice in this case is in the breadth of the decision below. In determining that all of the employees named in paragraph one of the Conclusions of Law were not temporary employees, and by indicating that any worker supervised by Loney is a Loney employee, the DLI decision exposes Loney to criminal prosecution for using workers who in fact may have been, or may in the future be temporary employees. We also take note of the statement at page 11 which states that the determination in this case is also binding with respect to Loney's unemployment insurance obligations. Those obligations may depend on determining which workers are properly deemed employees of Loney rather than Olsten's.

The matter must therefore be remanded to the DLI for a new hearing to determine more specifically what part of the Loney work force should be deemed Loney employees. In the alternative, the DLI is free to amend its findings to conform with this opinion. It can do so by limiting its decision to a finding that Loney is an uninsured employer, by excising findings and conclusions as to specific employees, and by providing that any amount owing for unemployment insurance must be determined in a separate proceeding.

ORDER

IT IS HEREBY ORDERED that the April 13, 1993 Decision of the Montana Department of Labor and Industry is **reversed**. The matter is **remanded** for a new hearing in accordance with this Decision and Order.

DATED in Helena, Montana, this 28th day of December, 1993.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Antonia P. Marra
Mr. Daniel B. McGregor

1. Loney claims that it did not realize the exhibits had been admitted. However, at the commencement of the hearing, the hearing examiner stated that he had "received [Exhibit Nos.] 1 through 11B." The statement was not as clear as it could have been but should have indicated to Loney's counsel that the exhibits would be considered.

2. See, generally, LARSON'S WORKMEN'S COMPENSATION LAW § 44.00 and subsequent sections for a discussion of loaned employees.