

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 4

WCC No. 2007-1863

SHELLY WEIDOW

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

**ORDER DENYING IN PART AND GRANTING IN PART, PETITIONER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Summary: Petitioner moved this Court for partial summary judgment on the affirmative defenses raised by the Uninsured Employers' Fund and the Bradley Howard/Howard Family 1995 Trust that Petitioner was an independent contractor and was a casual employee. The parties have filed an Agreed Statement of Undisputed Facts.

Held: Petitioner's motion is denied in part and granted in part. There are material facts in dispute that preclude summary judgment on the casual employment issue. With regard to the independent contractor defense, there are no material facts in dispute and Petitioner is entitled to summary judgment that he was not acting as an independent contractor at the time of his injury.

Topics:

Employment: Casual Employment. The Court was unable to render summary judgment on whether a claimant's injury occurred during casual employment. While it was undisputed that the putative uninsured employers managed properties for which they had a profit motive, it was unclear whether the particular property upon which the claimant worked was intended to be used as an income-generating property or simply a vacation home for personal use. The nature of the property was material to whether Petitioner was a casual employee.

Independent Contractor: Elements: Right of Control. Whether the property owner directly controlled Petitioner's work or conveyed his authorization for Petitioner's duties through another person is immaterial to the issue of whether he retained the right to control Petitioner's work.

Independent Contractor: Elements: Tools and Equipment. Petitioner brought his own screw gun to the work site, but all the other tools he used were owned by the property owner. The furnishing of tools is indicative of control.

FACTS¹

¶ 1 Bradley Howard (Howard) is a trustee of the Howard Family 1995 Trust ("Trust"). The Trust was created to own and operate real property, personal property, and hold other assets.

¶ 2 Howard purchased Lot 72 at the Yellowstone Club with Trust assets in order to build a residential home. Trust assets were then used to pay for the cost of designing and construction of a residential home on the lot. The parties dispute the ownership of the property containing the lot and home.

¶ 3 Howard contracted with William Brickowski/Northwest Timber Structures ("Northwest Timber Structures") to perform the construction of the residential home. The construction contract is dated June 1, 2004.

¶ 4 In approximately April 2005 Petitioner Shelly Weidow began working for Northwest Timber Structures as a carpenter. He was a regular employee who was paid \$33 per hour and did not have to provide his own tools. He was covered by a workers' compensation policy by his employer, Northwest Timber Structures.

¶ 5 In the course and scope of this employment, Petitioner began working on the residential construction project at Lot 72 at the Yellowstone Club.

¶ 6 Howard ordered Northwest Timber Structures off the job in approximately February or March 2006 because of performance issues.

¶ 7 The home was substantially completed but not habitable when Howard ordered Northwest Timber Structures off the job.

¹ Statement of Undisputed Facts (filed 10/9/07).

¶ 8 Petitioner and his brother, Glenn Weidow (Glenn), continued working at the job site in order to complete the cabinetry and finish work that they had started under the construction contract executed by Howard and Northwest Timber Structures.

¶ 9 Petitioner, Howard, and Glenn all believed the remaining work could be completed in a relatively short period of time.

¶ 10 Petitioner continued to be paid \$33 per hour for his work at the Yellowstone Club house after Northwest Timber Structures left the job. His wages were paid by the Trust.

¶ 11 Petitioner brought a personally-owned screw gun to the job site. There were other tools and machinery at the job site for his use. There is a dispute over whether those tools were provided and owned by Northwest Timber Structures or Howard.

¶ 12 Petitioner and Glenn verbally agreed to complete their finish carpentry work, but there was no written employment agreement.

¶ 13 Prior to working at the Yellowstone Club property, Petitioner owned and operated the business, All Trades Construction, and other construction companies. Petitioner investigated the possibility of reopening All Trades Construction for work in the Big Sky area after he left Northwest Timber Structure's employment.

¶ 14 On June 13, 2006, Petitioner was caught in the dumbwaiter while he and Glenn worked at the Yellowstone Club home.

¶ 15 Petitioner suffered injuries as a result of this accident and has accrued medical expenses.

¶ 16 Howard did not have workers' compensation insurance on the date of Petitioner's accident.

¶ 17 The Uninsured Employers' Fund ("UEF") has denied coverage based on casual employment. Howard has agreed with the casual employment characterization and argues because Petitioner's employment was casual, there was no need to provide coverage per § 39-71-401(2)(b), MCA.

CONTENTIONS

¶ 18 Howard asserts that Petitioner was an independent contractor.

¶ 19 Petitioner argues the Trust is an entity separate from Howard and that the Yellowstone Club property is business property owned by the Trust.

¶ 20 Howard contends the Trust is an estate planning tool that represents the individual activities of Bradley and Deborah Howard.

¶ 21 Howard contends the Yellowstone Club property is residential vacation property, not intended for business purposes with a profit motive.

¶ 22 Howard contends Petitioner was a short-term employee hired to work solely on the Yellowstone Club property and not on any other property owned by Howard.

STANDARD OF REVIEW

¶ 23 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.²

DISCUSSION

Issue One: Whether Petitioner was engaged in casual employment.

¶ 24 Montana law provides for several exemptions from the general requirement that all employers maintain workers' compensation insurance for their employees.³ "Casual employment" is one such exemption and is defined by statute as "employment not in the usual course of the trade, business, profession, or occupation of the employer."⁴ Because there is a fine line between what is and what is not employment in the usual course of trade, business, profession, or occupation of the employer, each claim must be evaluated on a case-by-case basis.⁵

¶ 25 In this case, Howard admits Petitioner was employed by either Howard or the Trust, but claims no workers' compensation insurance was necessary because Petitioner's employment was casual and thus subject to the exemption provided for in § 39-71-

² ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

³ § 39-71-401, MCA.

⁴ § 39-71-116(6), MCA.

⁵ *Colmore v. Uninsured Employers' Fund*, 2005 MT 239, ¶ 22, 328 Mont. 441, 121 P.3d 1007.

401(2)(b), MCA⁶. Specifically, Howard contends that Petitioner's employment was casual because he was hired to work on a short-term basis on the Yellowstone Club property, which was residential vacation property.⁷ Howard further contends that the Trust is simply an estate planning tool that represents the Howards' personal activities and should not be considered a separate entity from Bradley and Deborah Howard.⁸

¶ 26 Petitioner argues the undisputed facts demonstrate that he was employed by the Trust; that the Trust is a business entity separate from Bradley Howard, the individual; and that the Yellowstone Club property was business property.⁹

¶ 27 The issues can be narrowed from those argued by the parties. First, whether the employee is employed only on a temporary basis is inconsequential to the analysis of casual employment.¹⁰ Therefore, Howard's contentions that Petitioner was hired only on a short-term basis is irrelevant for purposes of this motion. Likewise, the issue of whether the Trust is a separate entity from Bradley Howard, as an individual, is immaterial to determining whether Petitioner was a casual employee.

¶ 28 The key factor in determining whether or not employment is casual is the "profit motive" of the employer. Although it is not necessary to make a profit to be considered an employer under the Workers' Compensation Act, the Montana Supreme Court has held that profit motive is key in determining whether the operation should be considered an employer for workers' compensation purposes.¹¹

¶ 29 Further, the Montana Supreme Court has addressed the "distinction between improvements to property that constitute activities in the usual course of business and those which do not"¹² While owning and maintaining, or even renting, a home is not

⁶ Workers' compensation benefits are determined by the statutes in effect on the date of the claimant's injury. This case is governed by the 2005 version of the Workers' Compensation Act since that was the law in effect on the date of Petitioner's alleged industrial injury.

⁷ Respondent/Employer's Opposition to Claimant's Motion for Partial Summary Judgment at 9-10 (Respondent's Answer Brief) (filed Nov. 2, 2007).

⁸ *Id.* at 10.

⁹ [Petitioner's] Brief in Support of Motion for Partial Summary Judgment at 14-17 (Petitioner's Brief) (filed Oct. 12, 2007).

¹⁰ *Colmore*, 2005 MT 239, ¶ 25.

¹¹ *Colmore*, 2005 MT 239, ¶ 28.

¹² *Colmore*, 2005 MT 239, ¶ 23.

sufficient to constitute a business, such activities rise to the level of a business operation when “they are carried on to such an extent as to require a substantial and habitual devotion of time and labor to their management and operation.”¹³ Another key consideration is whether the property in question is business property and whether the work being done was in furtherance of that business.¹⁴

¶ 30 In *Colmore*, the employer was engaged in a farming business in Tennessee through a family partnership which also purchased a ranch in Montana.¹⁵ Although the ranch was initially used primarily for recreation, Colmore eventually leased it from the partnership for “agricultural purposes only.”¹⁶ Colmore brought farm equipment with him from Tennessee for use on the ranch.¹⁷ Even after they leased the property, Colmore and his wife spent only part of the year in Montana and engaged in very limited agricultural activities on the ranch.¹⁸

¶ 31 However, when the case was tried in this Court, Colmore testified it was his intent to develop the ranch into more of an agricultural operation and the Court found that Colmore depreciated the farm equipment he brought to Montana on his income taxes and reported the Montana ranch as a business venture.¹⁹ The Court also found Colmore had taken deductions on his taxes for ranch-related expenses, including fencing – the activity the claimant was engaged in when he was killed – and Colmore’s lease payments to the partnership. Based on those key facts, this Court held Colmore was engaged in the business of agriculture and the claimant’s work (fencing) was done in furtherance of that business.²⁰ On appeal, the Montana Supreme Court affirmed this Court’s determination and held the decedent was not a casual employee.²¹

¹³ *Colmore*, 2005 MT 239, ¶ 23 (citing *Nelson v. Stucky*, 89 Mont. 277, 289, 300 P. 287, 290 (1931)).

¹⁴ *Colmore*, 2005 MT 239, ¶ 25 (citing *Nelson v. Stucky*, 89 Mont. 277, 288-89, 300 P. 287, 289-90 (1931)).

¹⁵ *Colmore*, 2005 MT 239, ¶¶ 5-6.

¹⁶ *Colmore*, 2005 MT 239, ¶ 7.

¹⁷ *Colmore*, 2005 MT 239, ¶ 9.

¹⁸ *Colmore*, 2005 MT 239, ¶ 8.

¹⁹ *Colmore v. Uninsured Employers’ Fund*, 2004 MTWCC 22, ¶¶ 40-42.

²⁰ *Colmore*, 2004 MTWCC 22, ¶ 58.

²¹ *Colmore*, 2005 MT 239, ¶ 33.

¶ 32 Following the *Colmore* analysis above, the pivotal question here is not whether the Trust or Howard had a profit motive *in general*. Rather, the question is whether the putative employer had a profit motive with regard to the Yellowstone Club property. While it is true that both Howard and the Trust owned and managed property for business purposes for which they undoubtedly had a profit motive, those activities do not change the analysis here. As the Supreme Court noted in *Colmore*, the fact that Colmore was involved in other agricultural ventures was not determinative of whether the Montana property was personal in nature.²²

¶ 33 The Trust owns assets that are personal in nature and assets that are intended to generate a profit. To that end, the Trust undoubtedly is engaged to some extent in the property management business, just as Howard is. However, as in *Colmore*, that fact alone is not determinative of whether the Yellowstone Club property is personal in nature. The central question is whether the Yellowstone Club property was property for which Howard or the Trust had a profit motive and whether Petitioner's work on the property was done in furtherance of that venture.

¶ 34 Having distilled the issues to this central question, I am unable to render summary judgment because the facts material to this question are disputed. Petitioner argues that the Yellowstone Club property was listed on Schedule E of Howard's taxes in 2004 and 2005, that Howard claimed certain deductions for the property on his 2005 taxes, and that Howard's tax treatment of the property is conclusive of the intent to treat it as income-generating business property.²³ However, Howard maintains the property was built purely as a vacation property, that the Yellowstone Club covenants would not allow the property to be used as income-generating property, and that his tax treatment of the property has no bearing on its characterization as personal property.²⁴ Howard argues that the single deduction taken on the property in 2005 is a deduction available to any homeowner and actually underscores the characterization of the property as residential property.²⁵

¶ 35 Petitioner filed an affidavit by a certified public account, who opined that when an individual lists property on Schedule E of his taxes, he intends the property to be treated

²² *Colmore*, 2005 MT 239, ¶¶ 25-26, 28.

²³ Petitioner's Brief at 16 -17; Claimant's Reply to Respondent/Employer's Opposition to Claimant's Motion for Partial Summary Judgment (Petitioner's Reply Brief) at 6-7 (filed Nov. 16, 2007).

²⁴ Respondent's Answer Brief at 11-13; Respondent's Surreply to Claimant's Motion for Partial Summary Judgment (Respondent's Surreply Brief) at 3-5 (filed Dec. 13, 2007).

²⁵ Respondent's Surreply Brief at 4.

as income-generating property.²⁶ In response, Howard filed an affidavit from his accountant, declaring the property was listed on Schedule E merely as a convenient means to track Howard's basis in the property so that gain or loss could be substantiated if the property were sold.²⁷ Howard's accountant also stated he believed the Yellowstone Club property was residential property, that the single deduction taken in 2005 was incorrectly reported under Schedule E, and that if the property had been intended as business property, they would have deducted insurance, legal and professional fees, repairs, and utilities, which they did not.²⁸

¶ 36 When material facts are in dispute, summary judgment is not appropriate.²⁹ Here, there are material facts in dispute regarding the essential issue – the nature of the Yellowstone Club property. Therefore, Petitioner is not entitled to summary judgment on this issue.

Issue Two: Whether Petitioner was an independent contractor.

¶ 37 It is undisputed that Petitioner did not have a valid independent contractor's certificate at the time he was injured. To resolve disputes involving a worker who does not possess a valid independent contractor exemption certificate, a two-part test is utilized to determine whether the worker is an independent contractor or an employee. Both parts of the test must be satisfied "by a convincing accumulation of undisputed evidence" or the worker is considered to be an employee.³⁰

Part A. Control Factors.

¶ 38 The four control factors used to determine independent contractor status are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.³¹ Each factor will be analyzed in turn.

First Factor: Direct Evidence of Right or Exercise of Control.

²⁶ Affidavit of Cynthia A. Utterback attached to Petitioner's Reply Brief.

²⁷ Affidavit of Laurence Becker attached to Respondent's Surreply Brief.

²⁸ *Id.*

²⁹ ARM 24.5.329

³⁰ *Wild v. Fregein Constr.*, 2003 MT 115, ¶¶ 33-34, 315 Mont. 425, 68 P.3d 855 (citing *Northwest Publ'g v. Montana Dep't of Labor and Indus.*, 256 Mont. 360, 363, 846 P.2d 1030, 1032 (1993); *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 424, 584 P.2d 1298, 1301 (1978)).

³¹ *Wild*, 2003 MT 115, ¶ 33.

¶ 39 In determining whether direct evidence of the employer’s control or exercise of control over the putative employee exists, it is the *right* of control, not the amount of control actually exercised – that is the critical element. In this case, Petitioner testified Howard discussed work with him and gave him instructions about work to be completed.³² Petitioner further testified that Howard called to check up on projects he instructed Petitioner to do.³³ Although Howard contends Glenn instructed Petitioner on his day-to-day activities and that he merely authorized work for Petitioner, it is readily apparent that Howard had the right to control Petitioner’s work.³⁴ Whether Howard directly controlled Petitioner’s work or conveyed his authorization through Glenn is immaterial.

Second Factor: Method of Payment.

¶ 40 Payment by the hour is a strong indication of an employer-employee relationship, while payment on a completed-project basis is an indication of independent contractor status.³⁵ Here, it is undisputed that Petitioner was paid at a rate of \$33 per hour. Nevertheless, Howard argues that Petitioner was really compensated on the “quantity of work” performed because he was not paid if he did not work and therefore Howard argues that, according to *Walling v. Hardy Construction*, the payment method should be considered a neutral factor in the independent contractor determination.³⁶ Howard’s reliance on *Walling* is misplaced.

¶ 41 In *Walling*, the putative employee was paid 23 cents per completed square foot of concrete work.³⁷ In this case, even accepting as true Howard’s contention that there was an informal agreement that Petitioner only be employed until the finish work on the property was completed, that does not change the nature by which the parties agreed Petitioner would be compensated. Unlike the claimant in *Walling*, Petitioner was paid by the hour, and not by the quantity of work. Petitioner would be paid \$33 per hour worked no matter how much or how little he accomplished in that hour. The undisputed evidence that Petitioner was paid on an hourly basis is a strong indicator of an employer-employee relationship.

³² Petitioner’s Brief at 10-11.

³³ *Id.* at 11.

³⁴ See Respondent’s Answer Brief at 17.

³⁵ *Walling v. Hardy Constr.*, 247 Mont. 441, 449, 807 P.2d 1335, 1340 (1991).

³⁶ Respondent’s Answer Brief at 15.

³⁷ *Walling*, 247 Mont. at 448, 807 P.2d at 1339.

Third Factor: Furnishing of Equipment.

¶ 42 “Providing valuable equipment indicates employment status”³⁸ The furnishing of tools is indicative of control because where the employer provides the tools, his right to control how they are used is implicit because he will naturally want to protect his assets and ensure they are being used efficiently.³⁹ In the present case, Petitioner brought his own screw gun to the work site. Aside from that single tool, all the remaining tools were owned by Howard. Although Howard came into possession of many of these tools through a clause in his contract with Northwest Timber Structures that allowed him to take possession of the tools to recoup money losses related to the home construction, the fact remains that Howard furnished all of the tools Petitioner used on the job site with the single exception of Petitioner’s screw gun.

Fourth Factor: Right to Fire.

¶ 43 The ability to terminate an individual at will or for certain performance issues, without incurring contractual liabilities, is indicative of employee status.⁴⁰ Petitioner, Glenn, and Howard all testified that Howard retained the power to fire Petitioner.⁴¹ Howard does not dispute that he would have incurred no contractual liability had he terminated Petitioner.

¶ 44 As noted above, unless **both parts** of the two-part independent contractor test are satisfied by a convincing accumulation of undisputed evidence, a worker is an employee and not an independent contractor.⁴² Since it is clear that Howard has failed to satisfy the first part of the test, I need not consider the second part. Petitioner was not an independent contractor. Accordingly, Petitioner is entitled to summary judgment on that defense.

CONCLUSION

¶ 45 Material facts in dispute preclude summary judgment on Howard’s affirmative defense that Petitioner was engaged in casual employment at the time of his injury. However, there are no facts in dispute regarding Petitioner’s status as an employee versus an independent contractor. The undisputed facts demonstrate that Petitioner was not an

³⁸ *Walling*, 247 Mont. at 449, 807 P.2d at 1340 (citing 1C A. Larson, *Workmen's Compensation Law* § 44.34(b) at 8-138 to 139 (1990)).

³⁹ *Id.*

⁴⁰ *Id.* (citing *Carlson v. Cain*, 204 Mont. 311, 324, 664 P.2d 913, 919 (1983)).

⁴¹ Petitioner’s Brief at 9.

⁴² *Wild*, 2003 MT 115, ¶ 34, 315 Mont. 425, 68 P.3d 855.

independent contractor at the time of his injury and Petitioner is entitled to summary judgment on that issue.

ORDER

¶ 46 Petitioner's motion for partial summary judgment regarding Howard's affirmative defense that Petitioner was engaged in casual employment at the time of his injury is **DENIED**.

¶ 47 Petitioner's motion for partial summary judgment regarding Howard's affirmative defense that Petitioner was an independent contractor is **GRANTED**.

DATED in Helena, Montana, this 17th day of February, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Hunt/Jonathan McDonald
Arthur M. Gorov
G. Andrew Adamek (courtesy copy)
Chad R. Vanisko (courtesy copy)

Submitted: December 26, 2007