

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 42

WCC No. 2007-1880

RICK BOWLER, d/b/a RICK'S FLOORING

Petitioner

vs.

INDEPENDENT CONTRACTOR CENTRAL UNIT

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner appealed the Independent Contractor Central Unit's Determination to this Court. Petitioner argued that the ICCU wrongly determined that Gregory D. Holm performed services for Rick's Flooring as an employee between October 6, 2005, and December 23, 2006.

Held: Holm did not possess a valid independent contractor exemption certificate during the time he was working with Petitioner. The Court therefore applies the two-part test to determine Holm's employment status. Applying this test, the Court concludes that Gregory D. Holm was Petitioner's employee during the time at issue. The ICCU's Determination is affirmed.

Topics:

Credibility. Holm testified that Petitioner rented a paint sprayer from Eastgate Rental for a church painting job Holm performed while working for Petitioner. Petitioner testified that Holm owned a paint sprayer. Petitioner further testified that he helped Holm retrieve this sprayer from a pawn shop on numerous occasions. When questioned as to the name of the pawn shop from which the paint sprayer was retrieved, Petitioner initially testified that he could not recall. Upon further questioning from the Court, Petitioner testified that the paint sprayer was retrieved from various pawn shops, but usually from the one near Hoagieville on Broadway which Petitioner could not name. I do not find Petitioner's testimony regarding this subject to be credible. Holm

specifically identified both the rental store from which the paint sprayer was rented and the specific job for which it was rented. Conversely, Petitioner testified that Holm's sprayer was retrieved from various pawn shops on numerous occasions, none of which he could name.

Witnesses: Credibility. Holm testified that Petitioner rented a paint sprayer from Eastgate Rental for a church painting job Holm performed while working for Petitioner. Petitioner testified that Holm owned a paint sprayer. Petitioner further testified that he helped Holm retrieve this sprayer from a pawn shop on numerous occasions. When questioned as to the name of the pawn shop from which the paint sprayer was retrieved, Petitioner initially testified that he could not recall. Upon further questioning from the Court, Petitioner testified that the paint sprayer was retrieved from various pawn shops, but usually from the one near Hoagieville on Broadway which Petitioner could not name. I do not find Petitioner's testimony regarding this subject to be credible. Holm specifically identified both the rental store from which the paint sprayer was rented and the specific job for which it was rented. Conversely, Petitioner testified that Holm's sprayer was retrieved from various pawn shops on numerous occasions, none of which he could name.

Independent Contractor: Elements: Right to Control. Where a flooring business owner told the worker what to accomplish on each job, even though the worker determined the best way to complete the construction projects, the Court is persuaded that the owner had the right to direct the worker's actions in the performance of his work. Also weighing in favor of the right to control is that the owner often dictated when the workday would begin and end based on the times he picked up and dropped off the worker.

Independent Contractor: Elements: Payment. 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. *Walling v. Hardy Constr.*, 247 Mont. 441, 449, 807 P.2d 1335, 1339 (1991). Where there is a dispute concerning the amount of the hourly wage but no dispute that an hourly wage was paid, a strong indication of the employer relationship exists.

Independent Contractor: Elements: Tools and Equipment. Where the worker used his own hand tools while performing work for a flooring business owner, and where the owner provided the power tools and equipment that the worker used, including air guns, a work truck, and a rented paint sprayer for at least one of the owner's painting jobs, the evidence weighs in favor of an employer-employee relationship.

Independent Contractor: Elements: Right to Fire. Where a flooring business owner testified that he and the worker decided to part ways and the worker testified that he quit, the Court finds that no clear evidence was presented which allows it to make a determinative finding concerning this factor.

Independent Contractor: Independent Business. Where a flooring business owner produced only two painting contracts that the worker entered into, both of which preceded the time period at issue, the Court finds there is virtually no evidence to support a finding that the worker was engaged in an independent trade, occupation, profession, or business while working for the owner.

¶ 1 The trial in this matter was held on November 29, 2007, in Missoula, Montana. Petitioner Rick Bowler, d/b/a Rick's Flooring, was present and represented by Douglas G. Skjelset. Respondent Independent Contractor Central Unit was represented by Arthur M. Gorov.

¶ 2 Exhibits: Exhibits 1 through 4 and A through N were admitted without objection. Exhibit O, a composition book containing Gregory D. Holm's handwritten notes, was also admitted into evidence at trial without objection.

¶ 3 Witnesses and Depositions: Petitioner, Ray Marino, and Gregory D. Holm were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issue of law:

¶ 4a Whether Mr. Holm was working as an independent contractor when he worked for Mr. Bowler.¹

¶ 5 On May 2, 2007, the Department of Labor and Industry's Independent Contractor Central Unit ("ICCU") issued a Determination that Holm performed services for Rick's Flooring as an employee between October 6, 2005, and December 23, 2006. Pursuant to § 39-71-415, MCA, Petitioner filed an appeal of the ICCU's Determination in the Workers' Compensation Court. This Court reviews an appeal of the ICCU's Determination *de novo*.²

FINDINGS OF FACT

¹ Pretrial Order at 1.

² § 39-71-415(2)(d), MCA.

¶ 6 Petitioner is the owner of Rick's Flooring, a carpet and flooring installation business located in Clinton, Montana.³

¶ 7 On January 18, 2007, Holm filed a claim for unpaid wages with the Montana Department of Labor and Industry ("DLI"), Employment Relations Division, Wage and Hour Unit.⁴ In his initial claim, Holm stated that he was entitled to receive \$17,215 for work he performed as an employee of Rick's Flooring.⁵ Holm's claim stated that he provided painting, carpentry, and general labor services for Rick's Flooring.⁶

¶ 8 I found Petitioner's testimony to be generally credible. However, as discussed in greater detail below, I have reservations concerning certain portions of his testimony.

¶ 9 I find Holm to be a credible witness and find his testimony at trial to be credible.

¶ 10 Holm applied for an independent contractor exemption certificate from the DLI in March 2005.⁷ Holm testified that he did not receive an exemption certificate at any time.⁸ The DLI records submitted to the Court are not entirely clear as to whether an exemption certificate was issued and later revoked in July 2005 or whether it was never approved in the first place.⁹ Petitioner testified that he only hires people who possess independent contractor exemption certificates. He testified at trial that, based on conversations he had with Holm, he believed Holm possessed an independent contractor exemption certificate at the time he was hired.¹⁰ Irrespective of whether Holm once held an independent contractor exemption certificate, the evidence is clear that he did not possess one at the time he began working with Petitioner.

³ Trial Test., Ex. E at 1.

⁴ Ex. M at 1.

⁵ *Id.*

⁶ Ex. M at 2.

⁷ Trial Test.

⁸ Trial Test.

⁹ Ex. C at 1-2.

¹⁰ Ex. D.

¶ 11 Petitioner and Holm first met at the Sleepy Inn Motel where Holm was performing painting and remodeling work for the motel.¹¹ Holm eventually went to work for Petitioner in October or November 2005.¹²

¶ 12 In May or June 2006, Holm moved into a trailer owned by Petitioner. Petitioner and Holm worked together to make the trailer liveable for Holm.¹³ Holm lived in the trailer until September 2007.¹⁴

¶ 13 Holm's initial claim form noted that his employer did not regulate his hours or tell him how to perform his work.¹⁵ Holm explained at trial that Petitioner would show him what he wanted done and where he wanted the work to be performed, but his skills as a carpenter allowed him to assess the best way to perform the work.¹⁶ Holm also testified that during the period of time he lived in the trailer, the work day would begin when Petitioner drove Holm to the work-site and would finish when Petitioner dropped him back off at the trailer.¹⁷

¶ 14 Holm performed carpentry work, painting services, and flooring installation during the time he worked for Petitioner.¹⁸ Some of the work was on Petitioner's personal residence and some of it was performed for customers of Rick's Flooring.¹⁹ Holm was an experienced carpenter at the time he met Petitioner.²⁰ He did not possess experience installing flooring or carpeting and Petitioner trained Holm to perform these tasks.²¹

¶ 15 Petitioner testified that Holm was working other jobs not involving Petitioner during the dates at issue in the present case, including jobs at the Belaire Motel, the Sinclair gas

¹¹ Trial Test.

¹² Trial Test.; Ex. G at 2; Ex. M at 1.

¹³ Trial Test.

¹⁴ Trial Test.

¹⁵ Ex. M at 2.

¹⁶ Trial Test.

¹⁷ Trial Test.

¹⁸ Trial Test.

¹⁹ Trial Test.

²⁰ Trial Test.

²¹ Trial Test.

station in East Missoula, an Ole's store, and a painting job for an individual named Mike Buckley.²² Holm testified that he did not perform work for other employers or businesses at the time he worked for Petitioner.²³ Holm did not begin working with Petitioner until October or November 2005. The only substantive evidence Petitioner produced in support of this contention was two painting contracts for Mike Buckley dated April 20 and 24, 2005.²⁴ Both of these contracts preceded the time period at issue. Although Petitioner testified he could have produced other evidence at trial on this matter, he did not.²⁵ Since the only evidence he produced was for a period preceding the time when Holm was working with Petitioner, I find that Holm was not engaged in any other employment during the period at issue.

¶ 16 Aside from some sheet rock that Holm purchased to install in the trailer, Petitioner furnished all the materials for the various jobs they performed. Holm picked up construction materials from Lowe's and Home Depot in Petitioner's work truck.²⁶ Petitioner provided Holm with a check to pay for these materials.²⁷

¶ 17 Except for a few of his own hand tools such as a hammer, square, and tape measure, Holm used Petitioner's equipment to perform his work. Petitioner provided power equipment, including air guns, for Holm to use on the work projects.²⁸ Petitioner also provided the work truck for Holm to drive.²⁹

¶ 18 Holm testified that Petitioner rented a paint sprayer from Eastgate Rental for a church painting job Holm performed while working for Petitioner.³⁰ Petitioner testified that Holm owned a paint sprayer. Petitioner further testified that he helped Holm retrieve this sprayer from a pawn shop on numerous occasions.³¹ When questioned as to the name of

²² Trial Test.

²³ Trial Test.

²⁴ Ex. 3 at 1-2.

²⁵ Trial Test.

²⁶ Trial Test.

²⁷ Trial Test.

²⁸ Trial Test.

²⁹ Trial Test.

³⁰ Trial Test.

³¹ Trial Test.

the pawn shop from which the paint sprayer was retrieved, Petitioner initially testified that he could not recall. Upon further questioning from the Court, Petitioner testified that the paint sprayer was retrieved from various pawn shops, but usually from the one near Hoagieville on Broadway which Petitioner could not name.³² I do not find Petitioner's testimony regarding this subject to be credible. Holm specifically identified both the rental store from which the paint sprayer was rented and the specific job for which it was rented. Conversely, Petitioner testified that Holm's sprayer was retrieved from various pawn shops on numerous occasions, none of which he could name.

¶ 19 Holm testified that he was paid ten dollars per hour while working for Petitioner.³³ Petitioner testified that he paid Holm eight dollars an hour at first but eventually paid him ten dollars per hour.³⁴ Although the initial amount of the hourly wage is disputed, the fact that Holm was paid an hourly wage is not disputed.

¶ 20 Petitioner testified that in December 2006, he and Holm decided to part ways.³⁵ Holm testified that he quit because Petitioner paid him inadequately.³⁶

CONCLUSIONS OF LAW

¶ 21 To resolve disputes involving a worker who does not possess a valid independent contractor exemption certificate, a two-step process is utilized to determine whether the worker is an independent contractor or an employee. The first step involves an analysis as to whether the "control factors" are met. This is achieved by applying a four-part test: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.³⁷ Second, it must be determined whether the worker is engaged in an independently established trade, occupation, profession, or business.³⁸ Both

³² Trial Test.

³³ Trial Test.

³⁴ Trial Test.

³⁵ Trial Test.

³⁶ Trial Test.

³⁷ *Wild v. Montana State Compensation Ins. Fund*, 2003 MT 115, ¶ 33, 315 Mont. 425, 68 P.3d 855.

³⁸ *Id.*, ¶ 34.

parts of the test must be satisfied “by a convincing accumulation of undisputed evidence” or the worker is considered to be an employee.³⁹

A. Control Factors.

1. Direct Evidence of Control or Exercise of Control

¶ 22 In determining whether direct evidence of the employer’s control or exercise of control over the putative employee exists, the *right* of control, not the amount of control actually exercised, is the critical element.⁴⁰ In this case, Holm was an experienced carpenter, although he was inexperienced at flooring installation. On each job, Petitioner told Holm what to accomplish, although Holm determined the best way to complete construction projects. I am persuaded from the evidence presented that Petitioner had the right to direct Holm’s actions in the performance of his work. Also weighing in favor of a finding of Petitioner’s right to control Holm is that Petitioner often dictated when the workday would begin based on the times he picked up and dropped off Holm at the trailer.

2. Method of Payment

¶ 23 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.⁴¹ In the present case, although there was some dispute concerning the amount of the initial hourly wage that Holm was paid by Petitioner, there was no dispute that Holm was paid an hourly wage. This evinces a strong indication of an employer-employee relationship.

³⁹ *Id.* (citing *Northwest Publishing v. Montana Dep’t of Labor & 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)).

⁴⁰ *Mortensen v. Independent Contractor Central Unit*, 2001 MTWCC 38, ¶ 14 (citing *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 584 P.2d 1298 (1978)).

⁴¹ *Walling v. Hardy Constr.*, 247 Mont. 441, 449, 807 P.2d 1335, 1339 (1991).

3. Furnishing of Equipment

¶ 24 Holm used his own hand tools while performing work for Petitioner. However, Petitioner provided the power tools and equipment that Holm used, including air guns, a work truck, and a rented paint sprayer for at least one of Petitioner's painting jobs. Taken as a whole, the evidence weighs in favor of an employer-employee relationship.

4. Right to Fire

¶ 25 Petitioner testified that he and Holm decided to part ways. Holm testified that he quit. No clear evidence was presented which allows me to make a determinative finding concerning this factor.

B. Independent Trade, Occupation, Profession, or Business.

¶ 26 There is virtually no evidence to support a finding that Holm was engaged in an independent trade, occupation, profession, or business while working with Petitioner. The only substantive evidence Petitioner produced regarding this issue was two painting contracts Holm had entered into, both of which preceded the time period at issue. The fact that Holm did not perform work for other individuals after he began working for Petitioner 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.⁴²

CONCLUSION

¶ 27 Petitioner has failed to satisfy both parts of the test by a convincing accumulation of undisputed evidence. Therefore, I conclude that Holm was Petitioner's employee between October 6, 2005, and December 23, 2006.

JUDGMENT

¶ 28 Holm was an employee of Petitioner between October 6, 2005, and December 23, 2006.

¶ 29 The ICCU's Determination is affirmed.

¶ 30 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

⁴² *Wild v. Montana State Compensation Ins. Fund*, 2003 MT 115, ¶ 37, 315 Mont. 425, 68 P.3d 855.

DATED in Helena, Montana, this 14th day of August, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Douglas G. Skjelset
Arthur M. Gorov
Submitted: December 31, 2007