

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 16

WCC No. 2009-2266

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PETE HALLQUIST, d/b/a P & M TRANSMISSION

Petitioner

vs.

INDEPENDENT CONTRACTOR CENTRAL UNIT

Respondent.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner appeals an Independent Contractor Central Unit decision which held that his automotive repair business employed five workers between January 1, 2006, and September 30, 2007. Petitioner contends that each of the alleged employees ran an independent business from the same address as Petitioner's auto repair business, although Petitioner performed administrative tasks for all the independent businesses, including collecting funds to pay the shop overhead.

**Held:** It is undisputed that two of the five alleged employees did not work out of the same shop as P & M Transmission between January 1, 2006, and September 30, 2007. A third alleged employee was indisputably an employee and was paid wages as part of vocational rehabilitation training until October 2007. The remaining two alleged employees meet the criteria for independent contractors under the AB test.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-417.** Although the department found two auto mechanics' lack of independent contractor exemption certificates to be evidence in support of the department's conclusion that the mechanics were employees, this Court gives no weight to the lack of exemption certificates because the mechanics had a fixed business location and therefore had no statutory duty to obtain independent contractor exemption certificates.

**Independent Contractor: Independent Contractor Exemption.**

Although the department found two auto mechanics' lack of independent contractor exemption certificates to be evidence in support of the department's conclusion that the mechanics were employees, this Court gives no weight to the lack of exemption certificates because the mechanics had a fixed business location and therefore had no statutory duty to obtain independent contractor exemption certificates.

**Independent Contractor: Elements: Right of Control.**

The Court concluded that an alleged employer had no right of control over auto mechanics who worked out of the same shop as his business where the alleged employer's undisputed testimony was that he did not exercise control over the mechanics, and the mechanics were free to come and go as they pleased, could accept as much or as little work as they chose, could give free or discounted work to anyone they wanted and brought and retained their own clientele. Furthermore, when one mechanic ceased to work at the shop with no explanation, the alleged employer did not demand that he return to work, nor did he offer the mechanic's space to anyone until it was clear the mechanic had no intention of returning.

**Independent Contractor: Elements: Payment.**

Where auto mechanics who were allegedly employees were paid by percentage, the Court concluded the factor was neutral in its determination of whether the mechanics were employees.

**Independent Contractor: Elements: Furnishing of Equipment.**

Several auto mechanics worked out of the same shop and each owned an extensive collection of personal hand tools which were freely shared as needed. The lifts and air compressor were fixtures of the building and owned by the landlord. The alleged employer owned a parts washer personally, and his business owned a spray wash cabinet, both of which were used by the other mechanics. While the alleged employer's ownership of some equipment suggests in an almost negligible way that he had an employer-employee relationship with the mechanics, the Court found this entitled to only a small amount of weight given the way that the mechanics in this shop shared the work space and their tools.

**Independent Contractor: Elements: Right to Fire.**

Where the alleged employer testified that he did not have the right to evict any mechanic from the shop space they shared so long as the mechanic paid his share of the overhead, and no other evidence in the record indicates that he had the

right to fire any mechanic, and where, when a mechanic ceased to work in the shop without explanation the alleged employer stored the mechanics tools indefinitely and did not demand that he return to work, the Court concluded the alleged employer did not have the right to fire the alleged employees.

**Independent Contractor: Elements.** Where two of the four factors weigh toward two alleged employees being independent contractors, one factor weighs slightly in favor of them being employees, and one factor is neutral, the Court concludes that the control factors indicate the alleged employees were independent contractors.

**Independent Contractor: Independent Business.** The Court determined that an alleged employee who ran a mobile diesel repair business prior to coming to work at the auto repair shop where he was allegedly an employee, had a large, established clientele which he brought with him to the shop, and apparently continued to do diesel repair after he left the shop, was engaged in an independently established trade, occupation, profession, or business.

**Independent Contractor: Independent Business.** The Court determined that an alleged employee who had previously run an auto repair business in a nearby city, had his own clientele, and personally owned a substantial set of automotive tools was engaged in an independently established trade, occupation, profession, or business.

¶1 The trial in this matter was held on February 12, 2010, at the Workers' Compensation Court in Helena, Montana. Petitioner Pete Hallquist was present and represented by Kevin Vainio. Patricia Bik represented the Independent Contractor Central Unit (ICCU).

¶2 Exhibits: Exhibits 1 through 13 were admitted without objection.

¶3 Witnesses and Depositions: The Court admitted the depositions of Pete Hallquist, Harvey Caldwell, and Morgan Wyatt with the agreement of the parties. Steve DeBarathy, Pete Hallquist, Scott Moothart, Carol L. Craig, and Edward A. Dawes were sworn and testified at trial.

¶4 Issue Presented: The Court restates the issue as follows:

¶ 4a Did the ICCU err when it concluded that Harvey Caldwell, Kris Loomis, Morgan Wyatt, Turone Richter, and John Blackwood were

employees of P & M Transmission for any time during the period of January 1, 2006, through September 30, 2007?

### FINDINGS OF FACT

¶5 In January 2008, Scott Moothart (Moothart), field representative for the Unemployment Insurance Contributions Bureau of the Department of Labor and Industry, was directed to audit P & M Transmission. Moothart testified at trial. I found Moothart to be a credible witness.

¶6 P & M Transmission came to the department's attention after Turone Richter (Richter) filed a claim for unemployment. Richter alleged that he had worked for P & M Transmission for \$8 per hour, but the department did not have these wages on file. Moothart contacted Petitioner Pete Hallquist (Hallquist), d/b/a P & M Transmission. Hallquist informed Moothart that all the workers at the P & M Transmission shop at 810 East Iron Street in Butte were subcontractors and that Hallquist had no employees.<sup>1</sup>

¶7 Moothart investigated whether the mechanics were independent contractors or employees of P & M Transmission. Moothart visited the shop, but did not interview any of the mechanics. Moothart determined that the mechanics performed all their work inside the shop and they all used some equipment which was part of the facility. He testified that he saw no evidence that any business other than P & M Transmission operated there. Specifically, Moothart did not see any signs for businesses other than P & M Transmission.<sup>2</sup>

¶8 Moothart looked in the yellow pages and on the internet for advertising for the individual mechanics, but he did not find any. Moothart testified that the only evidence he had of independent businesses were city business licenses for some of the mechanics and two independent contractor agreements.<sup>3</sup>

¶9 Moothart reviewed bank statements and cancelled checks from 2006 and 2007. Moothart examined the business records for 2006 and 2007, including time sheets, payroll records, dates and hours worked, withholding information for 2006, and 1099-R forms for 2007. Moothart noted that the 1099-R forms were unusual because those

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<sup>1</sup> Trial Test.

<sup>2</sup> Trial Test.

<sup>3</sup> Trial Test.

forms are usually used for distributions from a retirement account and not for non-employee compensation.<sup>4</sup>

¶10 Moothart determined that none of the individual mechanics had their own independently established trade, occupation, profession or business; they did not operate free from the right of control and direction over the performance of their services; and they did not have independent contractor exemption certificates. Moothart determined that the individual mechanics were employees because none could meet the definition of independent contractor.<sup>5</sup>

¶11 Moothart stated that he has no specific examples of Hallquist exerting control over the mechanics' work, but he also has no evidence that the mechanics were free from the right of control. Moothart alleged that Hallquist had control of the building and he could preclude people from coming and going or could change the locks. However, Moothart did not know whether any of the other mechanics had keys to the building, and admitted that any of the mechanics likely could have changed the locks.<sup>6</sup>

¶12 On August 14, 2008, Moothart completed an audit report for the Unemployment Insurance Program. In that report, Moothart noted that from May 30, 2006, through November 17, 2006, John Blackwood (Blackwood) received payments from P & M Transmission that totaled \$6,900.<sup>7</sup> From April 6, 2007, through September 25, 2007, Morgan Wyatt (Wyatt) received payments from P & M Transmission that totaled \$5,800.<sup>8</sup> The parties agree that P & M Transmission paid workers' compensation and unemployment insurance on Wyatt during that time.<sup>9</sup> From June 2, 2007, through September 25, 2007, Richter received payments from P & M Transmission which totaled \$5,041.94.<sup>10</sup> Moothart's audit report does not report any payments made from P & M Transmission to Harvey Caldwell (Caldwell) or Kris Loomis (Loomis) from January 1, 2006, through September 30, 2007.

¶13 Edward A. Dawes (Dawes) testified at trial. I found Dawes to be a credible witness. Dawes currently works in the Safety Division of the Department of Labor and Industry. In 2008, Dawes worked for the Employment Relations Division, Workers' Compensation Regulation Bureau, ICCU. At that time, he was asked to determine the

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<sup>4</sup> Trial Test.

<sup>5</sup> Trial Test.

<sup>6</sup> Trial Test.

<sup>7</sup> Ex. 9 at 9.

<sup>8</sup> Ex. 9 at 10.

<sup>9</sup> Pretrial Order at 2, Uncontested Facts.

<sup>10</sup> Ex. 9 at 11.

employment status of Caldwell, Loomis, Wyatt, Richter, Blackwood, and Harry Voss (Voss). Dawes explained that in his position with the ICCU, other state agencies asked him to determine whether a person was an independent contractor or an employee. Dawes began each investigation by reviewing the information provided by the requesting agency. He would then request completed relationship questionnaires from the alleged employees.<sup>11</sup>

¶14 Dawes explained that if a worker does not have an independent contractor exemption certificate, the worker is presumed to be an employee. Since none of the mechanics had exemption certificates, he presumed most of them to be employees. Because Dawes had personal knowledge that Voss had a separate business in Butte, he concluded that Voss had a mercantile relationship with P & M Transmission.<sup>12</sup>

¶15 Once Dawes determined that the mechanics working at 810 East Iron Street had received pay for services, he concluded they were employees. Dawes did not interview any of the mechanics. Dawes testified that the only evidence he found that indicated any mechanic had his own business was that some had local business licenses. He also noted that the mechanics appeared to perform work directly for customers without Hallquist's intervention. Dawes did not find enough information to determine how the mechanics were paid. One of the relationship questionnaires he received indicated that the mechanic was paid a percentage based on the amount of business he brought in to the shop, but Dawes was unable to determine what the percentage was or the manner of payment. Dawes' investigation also revealed that mechanics could apparently choose not to work at all during a given month and that the mechanic would not owe anything to the business, but could simply leave his tools sit in the shop.<sup>13</sup>

¶16 Dawes found that neither Caldwell, Loomis, Wyatt, Richter, nor Blackwood held a Montana independent contractor exemption certificate at any time from January 1, 2006, through September 30, 2007.<sup>14</sup> Dawes then looked to the "AB test" for guidance.<sup>15</sup> Although he noted that the five mechanics' worker relationship questionnaires were "completed with remarkable similarity," he noted that the mechanics' respective statements indicated that each was free to operate as he wished, was free to come and go, and was under no obligation to work if he did not feel like it.<sup>16</sup>

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<sup>11</sup> Trial Test.

<sup>12</sup> Trial Test.

<sup>13</sup> Trial Test.

<sup>14</sup> Ex. 12 at 4.

<sup>15</sup> See *Johnson v. Montana Dep't of Labor and Indus.*, 240 Mont. 288, 292 783 P.2d 1355,1359. (1989).

<sup>16</sup> Ex. 12 at 6.

¶17 Dawes testified that he was skeptical of the answers the mechanics provided on the relationship questionnaires because some of their answers were identical. However, he testified that he ultimately did not base his decision on the questionnaires. Rather, Dawes based his decision on his conclusion that none of the mechanics would meet the criteria to receive independent contractor exemption certificates if he applied for one.<sup>17</sup>

¶18 Dawes explained that the department has the burden of determining that a business exists before it issues an independent contractor exemption certificate. To make that determination, the department uses a list of “business-like items” with assigned point values. An applicant must score at least 15 points from the department’s list to qualify for an independent contractor exemption certificate. Dawes testified that although he did not score any of the individual mechanics, he concluded that none of them would have scored 15 points or more if he had scored the mechanics.<sup>18</sup>

¶19 Dawes also found that P & M Transmission furnished hoists, parts washers, and an air compressor for the mechanics’ use.<sup>19</sup> Regarding the method of payment, Dawes found:

The workers were paid for work on their friends['] cars and [P & M Transmission's] customer cars, sometimes the customer paid [P & M Transmission], sometimes the mechanic paid, according to the questionnaire. The workers had to pay a nominal amount to use the shop. No details of the shop lease/rental agreement were found in the independent contractor agreement or provided by [P & M Transmission.]<sup>20</sup>

Regarding the right to fire, Dawes found that each mechanic could terminate his services at any time without incurring a contractual liability.<sup>21</sup>

¶20 Based on his findings relative to these four factors, Dawes concluded that the mechanics did not satisfy the control prong of the independent contractor requirement.<sup>22</sup> On February 11, 2009, Dawes issued an ICCU decision concerning the employment status of Caldwell, Loomis, Wyatt, Voss, Richter, and Blackwood for the period of

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<sup>17</sup> Trial Test.

<sup>18</sup> Trial Test.

<sup>19</sup> Ex. 12 at 6.

<sup>20</sup> Ex. 12 at 6. Although Dawes reviewed independent contractor agreements in making his determination, the only independent contractor agreements which were entered into evidence were dated January 1, 2008, and thus are not relevant to this Court’s findings as they were outside the audit period at issue.

<sup>21</sup> Ex. 12 at 6.

<sup>22</sup> Ex. 12 at 7.

January 1, 2006, through September 30, 2007.<sup>23</sup> Dawes found that Voss sold a part to P & M Transmission and did not provide any services. Dawes concluded that Voss was not an employee.<sup>24</sup> Dawes found that Caldwell, Loomis, Wyatt, Richter, and Blackwood met the definition of employment “because they held a contract of hire to perform a service beneficial for [P & M Transmission] and they received payment for their service[s].”<sup>25</sup>

¶21 Steve DeBarathy (DeBarathy) testified at trial. I found DeBarathy to be a credible witness. DeBarathy has owned the real property located at 810 East Iron Street in Butte for over 15 years. The property consists of three buildings – a shop, a warehouse, and a small tin building – and some surrounding land. DeBarathy currently rents the warehouse to someone who uses it for storage, and an auto wrecking company rents the yard. The shop has equipment that belongs to DeBarathy as building fixtures, including a lift and an air compressor, which are available to anyone who works in the shop. A sign on the shop building says “P & M Transmission.”<sup>26</sup>

¶22 The shop consists of a work area, an office, and an adjoining lot. DeBarathy testified that when Hallquist began using the shop, a mechanic named Mike Hanson (Hanson) ran an auto repair business there. Hallquist and Hanson each had his own customers and each paid rent separately to DeBarathy. After Hanson left, Hallquist continued to work in the shop and he paid rent to DeBarathy. Since that time, Hallquist has been the only mechanic to pay rent to DeBarathy.<sup>27</sup>

¶23 Hallquist pays rent on a monthly basis. DeBarathy does not have a written lease with any of the individuals or businesses who use the shop, including Hallquist. DeBarathy testified that a steady stream of auto mechanics have come and gone from the shop over the years. DeBarathy does not know how the shop operates on a day-to-day basis, but he has always had the impression that each mechanic had his own customers.<sup>28</sup>

¶24 Hallquist testified at trial. I found Hallquist to be a credible witness. Hallquist has been an automobile mechanic for over 30 years.<sup>29</sup> He runs P & M Transmission as a

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<sup>23</sup> Ex. 12.

<sup>24</sup> Ex. 12 at 4.

<sup>25</sup> Ex. 12 at 4.

<sup>26</sup> Trial Test.

<sup>27</sup> Trial Test.

<sup>28</sup> Trial Test.

<sup>29</sup> Trial Test.



sole proprietorship.<sup>30</sup> Hallquist moved his automotive repair business to the 810 East Iron Street shop in approximately 1998 after Hanson asked him to move in and split expenses. Hallquist testified that although he and Hanson worked out of the same address, each ran a separate business and paid part of the overhead. Hanson preferred that they wrote separate rent checks to DeBarathy, and so Hallquist gave DeBarathy a check each month to cover his portion of the rent.<sup>31</sup>

¶25 Through the time of trial, Hallquist paid the monthly overhead – including rent, electricity, telephone, garbage service, coveralls, credit card terminal, internet service, parts information system, and secretarial services – for the operation of P & M Transmission at 810 East Iron Street.<sup>32</sup> Hallquist testified that the overhead at 810 East Iron Street is too high for one person to profitably run a repair business there. Mechanics can make a profit if they split the overhead.<sup>33</sup> Hallquist pays the overhead from the funds received from customers. This includes a parts mark-up and a percentage of the labor charged by each mechanic.<sup>34</sup>

¶26 The shop contains three vehicle lifts. One was present in the building when Hallquist began working there. Hallquist installed the other two. They are fixtures and will remain if Hallquist leaves.<sup>35</sup> Hallquist owns a parts washer, spray wash cabinet, and a brake lathe that are in the shop and available for all the mechanics to use.<sup>36</sup> The spray wash cabinet and the lifts were purchased via the P & M Transmission business account.<sup>37</sup> Hallquist purchased the parts washer and his tools and diagnostic equipment personally.<sup>38</sup> Hallquist does not believe any of the other mechanics except Wyatt ever used the brake lathe.<sup>39</sup> Hallquist also owns a wrecker which is not part of P & M Transmission's assets. Wyatt uses Hallquist's wrecker occasionally.<sup>40</sup>

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<sup>30</sup> Hallquist Dep. 6:12-18.

<sup>31</sup> Trial Test.

<sup>32</sup> Pretrial Order at 2, Uncontested Facts.

<sup>33</sup> Hallquist Dep. 45:4-12.

<sup>34</sup> Pretrial Order at 3, Uncontested Facts.

<sup>35</sup> Trial Test.

<sup>36</sup> Hallquist Dep. 9:21 – 10:5.

<sup>37</sup> Hallquist Dep. 67:13-17.

<sup>38</sup> Hallquist Dep. 67:2-19.

<sup>39</sup> Hallquist Dep. 10:1-3.

<sup>40</sup> Hallquist Dep. 66:1-24.

¶27 Hallquist testified that mechanics commonly share garage spaces in a cooperative arrangement such as the one at 810 East Iron Street.<sup>41</sup> Hallquist stated that every mechanic who has worked in the shop owned his own hand tools.<sup>42</sup> The individual mechanics also owned larger equipment such as welders and torches.<sup>43</sup> Hallquist noted that there are commonly-understood “ground rules” to sharing garage space: for example, mechanics do not borrow tools without permission and they return tools in the same condition as they were when borrowed. Hallquist noted that the tools required for automotive repair are numerous and expensive, and no mechanic owns every tool he might possibly need.<sup>44</sup> Hallquist estimated that he personally owns approximately \$250,000 worth of hand tools and diagnostic equipment. He stated that Richter owned one of the largest sets of tools in the shop, and estimated its value at \$80,000 to \$90,000. He estimated that Wyatt owns \$30,000 to \$40,000 worth of tools.<sup>45</sup>

¶28 Hallquist noted that independent mechanics also need to share knowledge, and most mechanics will advise each other on difficult repair jobs.<sup>46</sup> Hallquist occasionally gave advice to the other mechanics who worked at 810 East Iron Street, but he never set schedules or told anyone what hours to work. Hallquist testified that all the mechanics are free to come and go and have keys to the property.<sup>47</sup>

¶29 Hallquist testified that each mechanic who worked at 810 East Iron Street could order parts in any manner he wanted, but items purchased through the P & M Transmission accounts received volume discounts.<sup>48</sup> Hallquist knew that Blackwood had parts accounts prior to coming to work at the shop, but Blackwood used the P & M Transmission accounts instead of his own because the discounts were better.<sup>49</sup> Hallquist authorized the individual mechanics to order parts from various suppliers using the P & M Transmission business accounts with the understanding that the mechanics would pay for those parts in cash.<sup>50</sup> Hallquist testified that the P & M Transmission parts accounts were also used by other mechanics in Butte. The parts orders were a high enough volume to qualify P & M Transmission for a very favorable discount rate.

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<sup>41</sup> Hallquist Dep. 48:6-22.

<sup>42</sup> Hallquist Dep. 10:16-22.

<sup>43</sup> Trial Test.

<sup>44</sup> Hallquist Dep. 52:13-24.

<sup>45</sup> Hallquist Dep. 52:25 – 53:11.

<sup>46</sup> Hallquist Dep. 53:19 – 54:6.

<sup>47</sup> Trial Test.

<sup>48</sup> Trial Test.

<sup>49</sup> Trial Test.

<sup>50</sup> Pretrial Order at 2-3, Uncontested Facts.

Mechanics purchased parts through P & M Transmission because they could order parts less expensively than they could on their own. By allowing other mechanics to use the parts accounts, Hallquist ensured that enough volume flowed through the accounts to keep the discounts in place. The situation benefitted P & M Transmission and all the mechanics who used the accounts.<sup>51</sup>

¶30 Hallquist testified that parts purchased through the P & M Transmission parts accounts had a 30% mark-up to the customer. The parts mark-up went into the “kitty,” along with 50% of the labor cost for any work done in the shop. Each mechanic would retain the other 50% of his labor charge. At the end of the month, the money in the “kitty” would be used to pay the overhead for 810 East Iron Street. If the “kitty” was not large enough to cover the overhead, Hallquist would pay the difference out of his pocket. Hallquist stated that he was not actually at risk for losing the money he paid out of his pocket, as the mechanics always ensured that if Hallquist paid out of pocket one month, he would get reimbursed for that expenditure out of surplus in the “kitty” in a later, more profitable month. If the “kitty” was larger than needed to cover the overhead, Hallquist would divide the remaining “kitty” money between the mechanics, with each receiving a share proportionate to the amount he had brought in that month. Hallquist testified that every mechanic who worked in the shop was entitled to a share of the profit.<sup>52</sup>

¶31 Hallquist testified that none of the mechanics were required to keep set hours. The monthly rent was split according to the number of mechanics working out of the shop. After Hallquist paid the overhead each month, each mechanic received a percentage of the remaining money which was in proportion to the amount of work he had completed.<sup>53</sup>

¶32 Hallquist wrote checks on the P & M Transmission business account to pay each mechanic a percentage of the labor costs that had been charged to each customer for work completed by that individual mechanic for that customer. Hallquist calculated the payment for all mechanics working at P & M Transmission based upon a percentage of labor costs recorded on the Auto Repair Orders.<sup>54</sup>

¶33 Hallquist stated that he did not schedule jobs for the mechanics and he often would not know what jobs were in the shop.<sup>55</sup> If a customer of one of the other

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<sup>51</sup> Hallquist Dep. 19:5-21.

<sup>52</sup> Trial Test.

<sup>53</sup> Trial Test.

<sup>54</sup> Pretrial Order at 3, Uncontested Facts.

<sup>55</sup> Hallquist Dep. 18:21 – 19:1.

mechanics called to schedule a repair, Hallquist would tell the customer to drop the vehicle off and that the mechanic would get to it as soon as possible. Hallquist stated that he did not make any commitments to other mechanics' customers.<sup>56</sup>

¶34 Hallquist explained that each mechanic only took in the work he wanted to do. If a customer called and Hallquist accepted a job for a mechanic that that mechanic did not want, Hallquist did the repair himself. If a new customer called, Hallquist placed that job on a list for the mechanics to examine. The mechanics were free to take jobs from that list.<sup>57</sup> Hallquist could not recall the shop ever having a problem with a mechanic who did substandard work. As long as each mechanic paid his share of the overhead, it was not Hallquist's concern if the mechanic did not take in much work. No mechanic ever got pushed out or evicted from the shop.<sup>58</sup> Hallquist testified that he did not have the right to throw any mechanic off the property so long as he was paying his share of the expenses.<sup>59</sup>

¶35 Hallquist explained that customers pay for the work on their vehicles after the work is finished, so the mechanic who performed the work would get paid by the customer. If a mechanic began a repair but did not finish it, the only mechanic who would get paid by the customer would be the mechanic who finished the repair.<sup>60</sup> Hallquist testified that each mechanic had his own clientele. When a mechanic left, his clients usually went with him. Most of the mechanics had established businesses elsewhere prior to relocating to the 810 East Iron Street shop. Mechanics were free to set their own prices and could give a customer a discount or perform free or discounted work for someone if they wished. Mechanics did not have to ask Hallquist for approval if they intended to charge someone less.<sup>61</sup>

¶36 Hallquist admitted that he had some concerns with how Richter ran his business. Richter was slow and deliberate in making repairs and he wanted to charge his customers for the time it took him to do the job, rather than the time the repair should have taken. Hallquist told Richter that he was free to charge his own clientele any way he wanted, but that if he was taking repair jobs off Hallquist's call list, he had to charge a reasonable rate.<sup>62</sup>

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<sup>56</sup> Trial Test.

<sup>57</sup> Hallquist Dep. 18:1-18.

<sup>58</sup> Trial Test.

<sup>59</sup> Trial Test.

<sup>60</sup> Trial Test.

<sup>61</sup> Trial Test.

<sup>62</sup> Hallquist Dep. 28:2-21.

¶37 Hallquist stated that all the mechanics who worked out of the shop were very professional, experienced mechanics, and he never had an issue arise where a mechanic was unwilling to resolve a dispute. Hallquist testified that all parts installed were subject to manufacturer warranties. There was no explicit warranty for labor from P & M Transmission; however, each mechanic was responsible for resolving any problems a customer had with his work. If a mechanic had to put extra time into a repair or replace parts that were improperly installed, the mechanic was responsible for any time or expense incurred.<sup>63</sup>

¶38 Hallquist testified that when a customer requests an estimate, it is provided on a P & M Transmission invoice. The mechanic performing the work has the responsibility to stay within the estimate. If a price was negotiated with the customer, whoever negotiated the price is responsible for ensuring that the customer is billed the correct amount. Since most customers did not request estimates, invoices are usually completed after the repair work was done. Usually, each mechanic would bring a handwritten document to Hallquist which listed parts' costs and labor time. Hallquist then prepared the invoice to reflect that amount. Hallquist did not receive any direct pay for providing this service. Hallquist stated that it did not take much time for him to prepare the invoices; he simply took the information provided by the mechanic and put it into a legible form.<sup>64</sup>

¶39 Hallquist explained that when a customer came in to pay for a repair, whoever was present at the shop would accept the payment. If a mechanic collected money directly from a customer, he would inform Hallquist that he had received those funds, and they would be deducted from the amount owed the mechanic the next time the books were balanced. Customers were required to pay their bills prior to taking the vehicle, so mechanics never had to worry about collections. Hallquist stated that while he did the calculations each month for how much each mechanic received, the mechanics also kept track of their own figures and so each mechanic knew how much money he was owed.<sup>65</sup>

¶40 P & M Transmission billed customers for repair work done by all mechanics working at P & M Transmission. The individual mechanics also billed some customers individually rather than through P & M Transmission.<sup>66</sup> Hallquist testified that most of the mechanics did not like to handle book work, and so Hallquist wrote out the majority

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<sup>63</sup> Trial Test.

<sup>64</sup> Trial Test.

<sup>65</sup> Trial Test.

<sup>66</sup> Pretrial Order at 2, Uncontested Facts.

of their bills and receipts.<sup>67</sup> Hallquist stated that he functioned more like a secretary or service writer than like a shop foreman because a foreman typically tells mechanics what to do and when to do it, and he did not have any authority to tell the mechanics when or how to do their jobs.<sup>68</sup>

¶41 Hallquist testified that he and the other mechanics never put much effort into advertising their respective businesses because they all had enough work without advertising.<sup>69</sup> Wyatt, Loomis, and Caldwell each advertised his business in some fashion, however. Loomis passed out business cards and distributed flyers at bars and other businesses. Caldwell placed business cards in various parts houses. Until a recent downturn in business, most of Wyatt's advertising was word-of-mouth.<sup>70</sup> Hallquist explained that after Caldwell left, he and Wyatt discussed advertising more aggressively because they had difficulty paying the overhead with only two mechanics using the shop. They came up with the idea of advertising the available bay as a rental space for individuals to work on personal vehicles.<sup>71</sup> Wyatt has been promoting this service through flyers.<sup>72</sup>

¶42 Hallquist is not aware of any independent advertising by Blackwood, but he opined that Blackwood had established a large clientele throughout his years as a mechanic. Hallquist stated that Blackwood operated a mobile diesel repair business prior to coming to work at the shop.<sup>73</sup> Hallquist testified that Blackwood preferred working on diesels and when he left the P & M Transmission shop, he did repair work on diesels exclusively for a period of time. At the time of Hallquist's deposition, he had not seen Blackwood in approximately six months and did not know if Blackwood was still working as a diesel mechanic.<sup>74</sup>

¶43 Hallquist did not know if Richter did any independent advertising, but he knew that Richter had run an automotive repair shop in Deer Lodge prior to moving his business to the shop in Butte.<sup>75</sup> Hallquist stated that the mechanics had the name of their own businesses – not P & M Transmission – on their advertising materials. For example, Loomis's cards said "Tungsten Performance" and Caldwell's cards said "H & J

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<sup>67</sup> Hallquist Dep. 15:13-19.

<sup>68</sup> Hallquist Dep. 17:18-25.

<sup>69</sup> Hallquist Dep. 61:7-20.

<sup>70</sup> Trial Test.

<sup>71</sup> Hallquist Dep. 61:7-20.

<sup>72</sup> Trial Test.

<sup>73</sup> Trial Test.

<sup>74</sup> Hallquist Dep. 75:14 – 76:4.

<sup>75</sup> Trial Test.

Mechanical,” and then each had the shop address and phone number and their respective cellular phone numbers listed. The flyers which Wyatt has distributed for the new rental business say “Rent-A-Rack” and do not mention P & M Transmission.<sup>76</sup>

¶44 Hallquist now works full-time as a machinist at the Montana Developmental Center in Boulder and does not spend much time at the P & M Transmission shop.<sup>77</sup> He has kept the P & M Transmission business active, however, because the credit card terminal and telephone service contracts extend into the future and he would have to pay penalties to terminate the contracts early. Wyatt uses these services and he also uses the P & M Transmission checking account.<sup>78</sup>

¶45 Hallquist testified that either he or Wyatt pays the shop overhead out of the P & M Transmission business account.<sup>79</sup> Hallquist stated that Wyatt has an equal say in whatever happens in the shop, including whether to invite a mechanic to use the available bay.<sup>80</sup> Hallquist testified that Wyatt has “a virtually equal share in everything that is going on around there. He watches out for it as if everything was his very own because essentially, it is.”<sup>81</sup> Hallquist testified, “You might say that everybody that [has] been in there has actually been a partner, but never been a partner on paper.”<sup>82</sup>

¶46 Hallquist used to have Carol Craig (Craig) prepare his taxes. Hallquist ceased using Craig’s services, in part, because Craig wanted every mechanic in the shop to have an independent contractor exemption, and because she believed that allowing everyone to use the P & M Transmission parts accounts was problematic. Hallquist has not found a new tax preparer since he ceased to use Craig’s services. As a result, he has not distributed 1099 forms since 2006.<sup>83</sup> Hallquist, Caldwell and Wyatt have not filed personal or business federal or state income tax forms for 2006, 2007, and 2008.<sup>84</sup>

¶47 Hallquist testified that to the best of his recollection, in 2006, Blackwood worked at the shop, as did a mechanic named Tim Cohlhepp (Cohlhepp). Cohlhepp’s employment status is not a subject of the present case. Richter began working at the

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<sup>76</sup> Trial Test.

<sup>77</sup> Trial Test.

<sup>78</sup> Hallquist Dep. 6:24 – 7:9.

<sup>79</sup> Trial Test.

<sup>80</sup> Hallquist Dep. 69:13-19.

<sup>81</sup> Hallquist Dep. 72:21-23.

<sup>82</sup> Hallquist Dep. 73:2-4.

<sup>83</sup> Hallquist Dep. 33:1-19.

<sup>84</sup> Pretrial Order at 3, Uncontested Facts.

shop after Cohlhepp left in early 2007.<sup>85</sup> Hallquist testified that he paid Cohlhepp an hourly wage at Craig's urging but both Hallquist and Cohlhepp were unhappy with the arrangement. Cohlhepp soon left the shop to run his auto repair business elsewhere.<sup>86</sup> When Cohlhepp left, his clientele went with him.<sup>87</sup> Although Richter apparently told the unemployment office that he was paid \$8 per hour, Hallquist stated that Richter was paid 40% of whatever business he brought in each month and Richter never received an hourly wage.<sup>88</sup>

¶48 During 2007, Wyatt worked as an employee of P & M Transmission while he participated in a vocational rehabilitation program.<sup>89</sup> Wyatt was covered by unemployment insurance and workers' compensation insurance while he was in the vocational rehabilitation program.<sup>90</sup> During that time, Wyatt received an hourly wage.<sup>91</sup> Hallquist stated that the only time he performed a supervisory role was when Wyatt was an employee of P & M Transmission while completing vocational rehabilitation training.<sup>92</sup>

¶49 Hallquist testified that one day, he and Wyatt returned to the shop after lunch and Richter was gone. Richter never returned. He did not return Hallquist's phone messages. Approximately a month after Richter left, his wife came to the shop and informed Hallquist and Wyatt that Richter was ill and that she did not know if he would be able to return to work. Hallquist told her that Richter's tools were safe at the shop for as long as he wanted to store them there. The tools remained at the shop for over six months.<sup>93</sup> Richter died some time after he ceased to work at the P & M Transmission shop.<sup>94</sup> In November 2007, Caldwell began working in the shop in the space Richter had previously used.<sup>95</sup> At some point prior to Caldwell's leaving the shop, Loomis also worked there for a brief time.<sup>96</sup>

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<sup>85</sup> Hallquist Dep. 12:12-23.

<sup>86</sup> Hallquist Dep. 24:3-13.

<sup>87</sup> Hallquist Dep. 15:5-7.

<sup>88</sup> Hallquist Dep. 27:7-25.

<sup>89</sup> Trial Test.

<sup>90</sup> Hallquist Dep. 6:3-7.

<sup>91</sup> Hallquist Dep. 22:21 – 23:7.

<sup>92</sup> Hallquist Dep. 5:19-23.

<sup>93</sup> Hallquist Dep. 29:1-25.

<sup>94</sup> Trial Test.

<sup>95</sup> Hallquist Dep. 30:1-5; Caldwell Dep. 6:16-17.

<sup>96</sup> Hallquist Dep. 32:9-12.



¶50 Wyatt testified by deposition taken January 8, 2010. Wyatt testified that he has an independent contractor exemption certificate from the State of Montana.<sup>97</sup> At the time of Wyatt's deposition, he was the only mechanic using the shop at 810 East Iron Street.<sup>98</sup> Wyatt was doing his own billing, advertising, and parts ordering.<sup>99</sup> Wyatt stated that he gets 40% of whatever work he takes in, and the remaining 60% goes to Hallquist to pay the overhead.<sup>100</sup> When Wyatt gets paid for a repair, he deposits the funds in the P & M Transmission business account.<sup>101</sup> He later calculates his percentage and writes himself a check.<sup>102</sup>

¶51 Wyatt began working with Hallquist at P & M Transmission in 2007 while he was completing vocational rehabilitation and learning the automotive repair trade.<sup>103</sup> From April 6, 2007, until October 6, 2007, Wyatt participated in vocational rehabilitation training as part of his workers' compensation benefits. During that time, Hallquist paid unemployment insurance and workers' compensation insurance for Wyatt.<sup>104</sup> On September 25, 2007, Wyatt obtained a business license from Butte-Silver Bow which authorized him to engage in businesses at 810 East Iron Street in Butte.<sup>105</sup>

¶52 Wyatt testified that he owns his own hand tools, but the building owns the compressor and the lift. Wyatt further testified that if any of the mechanics at the shop needed a hand tool that the mechanic did not personally own, he was free to borrow that tool from another mechanic's tool box.<sup>106</sup>

¶53 Wyatt testified that when he began working at the shop, Blackwood and some other mechanics worked there. Loomis and Caldwell both began working at the shop after Wyatt did.<sup>107</sup> On September 26, 2007, Richter obtained a business license from Butte-Silver Bow which authorized him to engage in the business of contract mechanic

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<sup>97</sup> Wyatt Dep. 5:8-13.

<sup>98</sup> Wyatt Dep. 6:10-12.

<sup>99</sup> Wyatt Dep. 6:13-17.

<sup>100</sup> Wyatt Dep. 6:18-24.

<sup>101</sup> Wyatt Dep. 7:22-25.

<sup>102</sup> Wyatt Dep. 8:6-7.

<sup>103</sup> Wyatt Dep. 5:19-24.

<sup>104</sup> Pretrial Order at 2, Uncontested Facts.

<sup>105</sup> Pretrial Order at 2, Uncontested Facts. Although the parties agree that Harvey Caldwell and Kris Loomis also obtained business licenses, they did so after September 30, 2007. Therefore, their licenses are not relevant to the ICCU decision.

<sup>106</sup> Wyatt Dep. 11:13-24.

<sup>107</sup> Wyatt Dep. 9:17 – 10:14.

at 810 East Iron Street in Butte.<sup>108</sup> Richter's business is identified on the license as Pahaska Services.<sup>109</sup> Wyatt testified that he does not believe Richter was ever paid by the hour at P & M Transmission, but was paid by the job like the rest of the mechanics. Wyatt opined that Richter identified himself as an employee so he could get unemployment benefits.<sup>110</sup>

¶54 Wyatt testified that at the time of his deposition, Hallquist had little involvement with the shop, although he occasionally worked on a vehicle there.<sup>111</sup> Hallquist frequently refers jobs to Wyatt.<sup>112</sup> Wyatt does not know if Hallquist does any advertising for P & M Transmission aside from business cards. Wyatt testified: "It's pretty much word of mouth in this town. If you get a good reputation, you don't need to do nothing, you know, because all your buddies tell their buddies and they tell their friends, you know, and it just goes."<sup>113</sup>

¶55 Craig, an accountant who previously prepared Hallquist's tax returns, testified at trial. I found Craig to be a credible witness. Craig has a business degree from the University of Montana. She is not a Certified Public Accountant. Craig prepared Hallquist's tax returns for 2004 and 2005. During those years, Craig did not find any business expenses reported for employees of P & M Transmission, but did find payments to independent contractors.<sup>114</sup>

¶56 Craig has never been to Hallquist's business and she has never spoken to any of the mechanics who work in the shop. To the best of her knowledge, no one other than Hallquist had any financial investment in the business. Craig does not know how the shop ran or whether Hallquist had the right to control the work or schedules of the other mechanics.<sup>115</sup>

¶57 The ICCU concluded:

Harvey Caldwell, Kris Loomis, Morgan Wyatt, Turone Richter, and John Blackwood do not have Montana Independent Contractor Exemption Certificates or meet the criteria required to apply for the Montana

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<sup>108</sup> Ex.1 at 6.

<sup>109</sup> *Id.*

<sup>110</sup> Wyatt Dep. 13:5-16.

<sup>111</sup> Wyatt Dep. 8:15-21.

<sup>112</sup> Wyatt Dep. 8:22 – 9:1.

<sup>113</sup> Wyatt Dep. 9:5-8.

<sup>114</sup> Trial Test.

<sup>115</sup> Trial Test.

Independent Contractor Exemption Certificate. The decision of the ICCU is the services provided by Harvey Caldwell, Kris Loomis, Morgan Wyatt, Turone Richter, and John Blackwood for P & M Transmission during the period of 1/1/06 to 9/30/07, falls within the definition of employment. Therefore Harvey Caldwell, Kris Loomis, Morgan Wyatt, Turone Richter, and John Blackwood are deemed employees of P & M Transmission.<sup>116</sup>

¶58 It is from this ICCU determination that Hallquist appeals. Although the factual findings and legal conclusions set out in the ICCU's determination are not binding, nor even entitled to deference, the ICCU's determination helps frame the issues for the Court.<sup>117</sup>

### CONCLUSIONS OF LAW

¶59 Appeals from ICCU determinations are within the jurisdiction of the Workers' Compensation Court, as provided for in § 39-71-415, MCA. This Court reviews such determinations *de novo*.<sup>118</sup>

¶60 In the decision from which Hallquist appeals, the department determined that five mechanics – Caldwell, Loomis, Wyatt, Richter, and Blackwood – were employees of Hallquist, d/b/a P & M Transmission, at some point between January 1, 2006, through September 30, 2007. The evidence in this case has indisputably shown that neither Caldwell nor Loomis worked at the 810 East Iron Street location in **any** capacity during this time period. I therefore conclude they were not employees of P & M Transmission during the relevant time period.

¶61 Conversely, it is undisputed that Wyatt was an employee of P & M Transmission during this time period as he participated in a vocational rehabilitation program. No evidence was presented to suggest that Wyatt worked at P & M Transmission in any capacity prior to commencing his employment with P & M Transmission. The parties stipulated that Wyatt remained in this program and was paid as an employee of P & M Transmission through October 6, 2007. Therefore, while I conclude that Wyatt was an employee of P & M Transmission during the time period at issue, I further note that the evidence shows that Hallquist properly treated Wyatt as an employee during this time period and that Wyatt was covered by workers' compensation insurance and received the services Hallquist was obligated to provide as an employer. Therefore, I see no

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<sup>116</sup> Ex. 12 at 7.

<sup>117</sup> *RAM Montana, Inc. v. Indep. Contractor Central Unit*, 2004 MTWCC 13, ¶ 10.

<sup>118</sup> *Mortensen v. Indep. Contractor Central Unit*, 2001 MTWCC 38, ¶ 3.

issue for which Hallquist should be adversely affected by his employment of Wyatt during the time period at issue.

¶62 As for Richter, Hallquist testified that Richter began working in the shop in early 2007. Moothart found that from June 2, 2007, through September 25, 2007, Richter received payments from P & M Transmission which totaled \$5,041.97. On September 26, 2007, Richter obtained a business license from Butte-Silver Bow. Dawes found that Richter did not hold a Montana Independent Contractor Exemption Certificate at any time from January 1, 2006, until September 30, 2007. Although Richter filed a claim for unemployment in which he alleged that P & M Transmission paid him \$8 per hour as a shop mechanic, Hallquist stated that Richter was paid 40% of whatever business he brought in each month and Richter never received an hourly wage. Wyatt testified that he does not believe Richter was ever paid by the hour, and that Richter identified himself as an employee to obtain unemployment benefits. Hallquist's uncontroverted testimony was that Richter owned his own tools, that Hallquist did not know whether Richter independently advertised his business, that Richter left the shop one day without explanation and never returned, and that Hallquist told Richter's wife that he would store Richter's tools, which then remained at the shop for over six months. Hallquist admitted that he told Richter that while he was free to charge his own clientele any way he wanted, that he had to charge a reasonable rate when accepting jobs from Hallquist's list.

¶63 Aside from the ultimate question as to whether the mechanics were employees of P & M Transmission, the only fact in dispute regarding Richter is whether he was paid an hourly wage or on a percentage basis. Although I cannot assess Richter's credibility, I did find Hallquist to be a credible witness. Except for Wyatt's situation while he was participating in the vocational rehabilitation program, all of the evidence except for Richter's representation in his unemployment claim indicates that after Hallquist's attempt to pay Cohlhepp an hourly wage failed, the mechanics at 810 East Iron Street were paid on a percentage basis and not an hourly wage. Therefore, I find it more probable than not that Richter was paid on a percentage basis.

¶64 As for Blackwood, the evidence in the record is scant. Moothart noted in his report that from May 30, 2006, through November 17, 2006, Blackwood received payments from P & M Transmission that totaled \$6,900. Dawes found that Blackwood did not hold a Montana Independent Contractor Exemption Certificate at any time from January 1, 2006, until September 30, 2007. Both Hallquist and Wyatt testified that Blackwood worked at the shop in 2006. Hallquist testified that Blackwood had a large clientele and may not have independently advertised his business because he was not looking for more work. Hallquist further testified that Blackwood ran a mobile diesel repair service prior to working at 810 East Iron Street, and that he returned to diesel repair after leaving the P & M Transmission shop.

¶65 Both Moothart and Dawes found Richter’s and Blackwood’s lack of independent contractor exemption certificates to be evidence in support of their conclusions that these mechanics were actually employees of P & M Transmission. However, I do not give the mechanics’ lack of independent contractor exemption certificates any weight in determining whether or not they were employees in this case. Section 39-71-417(1)(a), MCA, requires a person who regularly and customarily performs services at a location ***other than the person’s own fixed business location*** to apply for an independent contractor exemption certificate. It is undisputed that the mechanics all worked at a fixed business location – 810 East Iron Street. Therefore, none of the mechanics had a statutory duty to apply for independent contractor exemption certificates.

¶66 An independent contractor determination is reached through a two-step process. First, the Court evaluates the control over the worker through the application of four control factors. Second, the Court must determine whether the worker was engaged in an independently established trade, occupation, profession, or business. Both parts of the test must be satisfied by a convincing accumulation of undisputed evidence; otherwise, the worker is an employee and not an independent contractor.<sup>119</sup>

### The Control Factors

¶67 An employer means anyone who has a person in service under an appointment or contract of hire, expressed or implied, oral or written.<sup>120</sup> An individual is in the service of another when that other has the right to control the details of the individual’s work.<sup>121</sup> In determining control, the Court employs a four-part test which guides the inquiry in determining whether an employer-employee relationship exists: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.<sup>122</sup>

¶68 Right or Exercise of Control: The ***right*** of control, not the amount of control actually exercised, is the critical element in determining this factor.<sup>123</sup> Hallquist’s uncontradicted testimony was that he did not exercise control over the mechanics. Mechanics were free to come and go whenever they pleased, could accept as much or as little work as they chose, and could give free or discounted work to anyone they

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<sup>119</sup> *Wild v. Fregein Constr.*, 2003 MT 115, ¶¶ 33-34, 315 Mont. 425, 68 P.3d 855; *Ramsey v. Yellowstone Neurosurgical Assoc., P.C.*, 2005 MT 317, ¶ 26, 329 Mont. 489, 125 P.3d 1091.

<sup>120</sup> § 39-71-117(1)(a), MCA.

<sup>121</sup> *In the Matter of Glover*, 2002 MTWCC 22, ¶ 49, citing *State ex rel. Ferguson v. Dist. Ct.*, 164 Mont. 84, 88, 519 P.2d 151, 154 (1974).

<sup>122</sup> *American Agrijusters Co. v. Montana Dep’t of Labor and Indus.*, 1999 MT 241, ¶ 21, 296 Mont. 176, 988 P.2d 782.

<sup>123</sup> *Mortensen v. Indep. Contractor Central Unit*, 2001 MTWCC 38, ¶ 14.

wanted. The mechanics brought their own clientele which went with them when they left. The mechanics had keys to the building. Although Moothart theorized that Hallquist could control the mechanics' access by changing the locks to the building, it appears that any of the mechanics could have changed the locks if they chose to do so.

¶69 Although the mechanics almost always ordered parts through P & M Transmission's business accounts, they were not required to do so, and the parts accounts were set up on a cash-only basis so that anyone – even mechanics who did not work at 810 East Iron Street – could and did order parts using these accounts. Hallquist testified that any mechanic at the shop could accept payment from customers and that any amounts owing would be settled whenever the books were balanced. In Richter's case, Hallquist testified that Richter inexplicably left in the middle of the day and never returned. Although Hallquist attempted to contact Richter to find out what had happened to him, there is no evidence that Hallquist attempted to control Richter by demanding that he return to work at the shop, or even by offering Richter's space to another mechanic until it became clear that Richter had no intention of returning. From the evidence presented, I conclude that not only did Hallquist not choose to exercise control over the mechanics, but that he had no right to do so.

¶70 Method of Payment: When payment is by quantity or percentage, the method of payment test largely cancels itself out and becomes neutral.<sup>124</sup> Since I have found that both Blackwood and Richter were paid by percentage, this factor becomes neutral in my determination of whether they were employees of P & M Transmission.

¶71 Furnishing of Equipment: An employment relationship almost invariably exists where the purported employer has furnished valuable equipment.<sup>125</sup> In the present case, all the mechanics who worked in the shop, including Blackwood and Richter, personally owned extensive collections of personal hand tools. Since no mechanic owned every possible tool, the mechanics freely shared their hand tools with each other. The lifts and air compressor were fixtures of the building and therefore owned by DeBarathy.

¶72 Hallquist testified that the mechanics used a parts washer which he owns personally, and a spray wash cabinet which P & M Transmission owns. Given that Hallquist has worked in the shop at 810 East Iron Street the longest out of all the mechanics at issue in the present case, it certainly makes sense that the shop would contain some larger equipment owned by Hallquist. The testimony in this case indicates that hand tools, equipment, and the building fixtures were freely shared and

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<sup>124</sup> *Walling v. Hardy Constr.*, 247 Mont. 441, 449, 807 P.2d 1335, 1339 (1991) (citing 1C A. Larson, *Workmen's Compensation Law* § 44.33(b), at 8-106 (1990)).

<sup>125</sup> *American Agrijusters*, ¶ 33. (Citation omitted.)

used among all the mechanics. While Hallquist's ownership of some equipment suggests in an almost negligible way that he had an employer-employee relationship with this mechanic, I find this to be only accorded a small amount of weight in the larger picture of the way the mechanics in the shop cooperatively shared the work space and their tools in order to profitably operate their respective businesses.

¶73 Right to Fire: The power to fire is the power to control.<sup>126</sup> Hallquist testified that he did not have the right to evict a mechanic so long as the mechanic paid his share of the overhead. There is no evidence in the record to indicate that Hallquist had the right to fire Blackwood or Richter. In fact, when Richter left the shop and did not return, Hallquist attempted to contact Richter and then stored his tools indefinitely. If Hallquist had the right to fire Richter, he likely would have delivered some sort of ultimatum after Richter stopped showing up to the shop. Since he did not do so, and in light of the absence of any evidence which suggests that Hallquist ever fired or believed he had the right to fire any mechanic who shared the shop space at 810 East Iron Street, I conclude that Hallquist did not have the right to fire the mechanics.

¶74 Two of the four control factors weigh in favor of Blackwood and Richter being independent contractors, one weighs only slightly in favor of them being employees, and one is neutral. Viewed in their totality, the control factors indicate that Blackwood and Richter were independent contractors and not employees of P & M Transmission.

Engagement in an Independently Established  
Trade, Occupation, Profession, or Business

¶75 In addition to the control factors, the Court must also determine whether Blackwood and Richter were each engaged in an independently established trade, occupation, profession, or business.<sup>127</sup> In *Fliehler v. Uninsured Employers' Fund*, this Court concluded that the claimant was an employee, noting that no evidence indicated the claimant was engaged in any business prior to being hired by the putative employer and concluding that this lack of evidence was fatal to the putative employer's claim that the claimant was an independent contractor.<sup>128</sup> In the present case, the evidence demonstrates that Blackwood and Richter were both engaged in the automotive repair business prior to working in the shop at 810 East Iron Street. Hallquist testified that Blackwood had a large, established clientele which he brought with him and that he previously operated a mobile diesel repair service. Hallquist also testified that Richter

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<sup>126</sup> *American Agrijusters*, ¶ 35. (Citation omitted.)

<sup>127</sup> See ¶ 6, above.

<sup>128</sup> *Fliehler*, 2001 MTWCC 29, ¶ 37 (citing *Lundberg v. Liberty Northwest Ins. Co., Inc.*, 268 Mont. 499, 503-04, 887 P.2d 156, 159 (1994)).

had previously run a repair business in Deer Lodge, had his own clientele and personally owned approximately \$80,000 to \$90,000 in automotive tools. Unlike the claimant in *Fliehler*, both Blackwood and Richter had established businesses as automotive mechanics when they each came to work at the shop. According to Hallquist, Blackwood preferred to work exclusively on diesel vehicles and continued to do so after he left the shop at 810 East Iron Street.

¶76 The evidence demonstrates that Blackwood had an independently established business both before and after he worked at 810 East Iron Street. While the record on Richter is more scant, the testimony was that he had an automotive repair business in Deer Lodge prior to working at 810 East Iron Street and that he had accumulated an extensive collection of tools, which indicates he had been in the trade for some time. Richter ceased working at 810 East Iron Street at the time he became ill and it does not appear that he held any employment or self-employment from that point forward. Based on this evidence, I conclude that both Blackwood and Richter were engaged in an independently established trade, occupation, profession, or business.

¶77 Under both prongs of the AB test, Blackwood and Richter meet the criteria for independent contractor status. I therefore conclude that neither was an employee of Hallquist d/b/a P & M Transmission during the period of January 1, 2006, through September 30, 2007.

#### JUDGMENT

¶78 Except for Morgan Wyatt during the period in which he was indisputably an employee of P & M Transmission, the ICCU erred when it concluded that Harvey Caldwell, Kris Loomis, Morgan Wyatt, Turone Richter, and John Blackwood were employees of P & M Transmission during the period of January 1, 2006, through September 30, 2007.

¶79 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.

DATED in Helena, Montana, this 10th day of June, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Kevin Vainio  
Patricia Bik  
Submitted: February 12, 2010