IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 27

WCC No. 2004-1064

ERIC HOWE

Petitioner

vs.

UNINSURED EMPLOYERS' FUND/
MIKE WILMER and STEVE HOWE

Respondents

IN RE: ROGER KURTZ

Respondent/Claimant.

FILED
JUL - 7 2006
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner is an independent contractor who worked on a residential construction project. Petitioner's brother worked on the project with him and introduced Petitioner to an acquaintance who then also began to work on the project. When the newly-hired worker was injured in an accident on the job, the Uninsured Employers' Fund determined that Petitioner was the employer of the injured worker. Petitioner appeals that determination.

Held: Petitioner has failed to prove by a preponderance of the evidence that he was not the employer of the injured worker.

¶ 1 The trial in this matter was held on Monday, February 13, 2006, in Helena, Montana. Petitioner Eric Howe was present and represented by Scott A. Restum. Uninsured Employers' Fund (UEF) was represented by Joseph R. Nevin. Mike Wilmer was present and represented by Brian P. Fay. Steve Howe was present and appeared *pro sé*. Roger Kurtz was present and represented by Richard J. Pyfer.

¶ 2 Exhibits: Exhibits 1, 3 through 6, 8, and 19 through 30 were admitted without objection. Exhibit 7 was withdrawn. Exhibits 2, 9 through 16, 17-1, 17-2, 17-3, 17-4, 17-5, 18-1, 18-2, 18-3, 31, and 32 were objected to and admitted.

DOCKET ITEM NO. 63

¶ 3 Witnesses: Eric Howe, Kristin Wilmer, Bernadette Rice, Mike Wilmer, Roger Lee Kurtz, and Steve Howe were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:

> ¶ 4a Whether Steve Howe was the employer of Roger Kurtz on September 12, 2003, and is therefore liable for workers' compensation benefits paid to Roger Kurtz by the Uninsured Employer's Fund? [sic]
>
> ¶ 4b Whether Eric Howe was the employer of Roger Kurtz on September 12, 2003, and is therefore liable for workers' compensation benefits paid to Roger Kurtz by the Uninsured Employer's Fund? [sic]
>
> ¶ 4c Whether Mike Wilmer was the employer of Roger Kurtz on September 12, 2003, and is therefore liable for workers' compensation benefits paid to Roger Kurtz by the Uninsured Employer's Fund? [sic]
>
> ¶ 4d Whether a contract existed Mike Wilmer made [sic] with Eric Howe for work performed was of a kind which is a regular or recurrent part of Mike Wilmer's occupation?
>
> ¶ 4e Whether a contract existed between Eric Howe and Steve Howe, for work performed, and if so, was the contract made between Eric Howe with Steve Howe a kind which is a regular or recurrent part of Eric Howe's occupation.[1]

FINDINGS OF FACT

¶ 5 On September 12, 2003, Roger Kurtz ("Claimant") was working at a home in Bozeman where Mike Wilmer and his family reside.[2]

¶ 6 The Wilmer residence is owned by the Michael Lee Wilmer and Kristin Livingston Wilmer Family Trust, of which Kristin and Mike Wilmer are the trustees. [3] The Wilmers created the trust for estate planning purposes. In addition to the Wilmer residence, the trust also contains a duplex and a four-plex which are used as rental properties. The

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[1] Pretrial Order at 3.

[2] Uncontested Fact, ¶¶ 1-2.

[3] Although the Pre-Trial Order states as an Uncontested Fact that the residence is owned by Mike and Kristin Wilmer, testimony at trial demonstrated that the residence is in fact not owned by the Wilmers personally, but is held in trust.

Wilmers are unsure as to how the trust is treated for tax purposes because they use an accountant to take care of their finances.[4]

¶ 7 The purpose of the construction project at the Wilmer residence was to add more square footage to the house because the Wilmers needed space for their growing family. The Wilmers have lived in this home for several years and have no plans to sell it.[5]

¶ 8 Claimant worked on the Wilmer residence from September 6, 2003 through September 12, 2003. Claimant was injured on September 12, 2003. At the time of his injury, Claimant was assisting in setting roof trusses when the trusses fell over during windy conditions, injuring Claimant.[6]

¶ 9 Steve Howe, Eric Howe, Phil Auble, and Mike Wilmer were also working on the residence on September 12, 2003.[7] Eric,[8] Mr. Auble, Mr. Wilmer, and Claimant were on the roof and Steve was on the ground at the time of the accident. Claimant's work that day was directed by Mr. Wilmer and Eric. Although Mr. Wilmer did not usually work on the construction project, he was assisting that day because extra hands were needed to set the roof trusses.[9]

¶ 10 Claimant submitted a Worker Relationship Questionnaire to the UEF on October 14, 2003, in which he listed his employer as Howe Construction.[10] Claimant stated that his work arrangement was that he would be paid $10 per hour, and that he received $455 in compensation.[11] He asserted that he worked at "their" direction, and that Howe Construction supplied all the tools he used.[12] Claimant also stated, "The brother of the owner, Steve Howe hired me."[13]

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[4] Trial Test.

[5] *Id.*

[6] *Id.*

[7] Uncontested Fact, ¶ 3.

[8] For ease of reference, Eric Howe and Steve Howe will be referred to by their first names throughout the remainder of these Findings of Fact, Conclusions of Law and Judgment.

[9] Trial test.

[10] Ex. 1 at 1.

[11] *Id.* at 2.

[12] *Id.* at 2-3.

[13] *Id.* at 5.

¶ 11 The UEF determined that Eric was Claimant's employer. Eric then petitioned this Court *pro se*, arguing that Mr. Wilmer was Claimant's employer at the time of the accident.[14] The UEF responded that it believed Claimant's employer to be either Eric, Steve, or Mr. Wilmer, and requested that Steve be joined as a party to the action.[15] Mr. Wilmer responded that Claimant's employer at the time of the accident was either Eric or Steve.[16]

¶ 12 Bernadette Rice, a workers' compensation claims adjuster, testified about the investigation the UEF conducted to determine Claimant's employer.[17] The Court finds her to be a credible witness.

¶ 13 Ms. Rice testified that the UEF contacted Claimant, Eric, Steve, Mr. Auble, Mr. Wilmer, and an electrician who worked on the residence as part of the UEF's investigation. In order to identify Claimant's employer, the UEF looked at the witness' statements and the relationships amongst the parties as described by Claimant.[18]

¶ 14 Following the investigation, the UEF determined that Eric was Claimant's employer, that neither Eric, Steve, nor Mr. Wilmer had workers' compensation coverage, and that neither Steve nor Claimant had an independent contractor exemption at the time of the accident. Ms. Rice explained that the UEF concluded Steve could not be Claimant's employer because he did not have an independently established business. Furthermore, although it was Steve who first brought Claimant to the job site, it was Eric who controlled his day-to-day activities and who agreed to have Claimant working at the site.[19]

¶ 15 Eric had a current independent contractor's exemption. The UEF ultimately concluded that he was Claimant's employer because Eric stated that Steve was working on the residence only because he needed something to do and Claimant believed Eric to be his employer.[20]

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[14] Petition for Hearing. Eric Howe eventually retained counsel and was represented at the time of trial.

[15] UEF's Response to Petition at 2.

[16] Respondent, Wilmer's Response to Petition for Trial at 1.

[17] Trial Test.

[18] *Id.*

[19] *Id.*

[20] *Id.*

¶ 16 Eric is an independent, self-employed workers' compensation exempt contractor who has been in the construction business for 30 years. He testified that he has no employees and has not had any employees for approximately 15 years.[21]

¶ 17 Eric first met Mr. Wilmer on a job site in Big Sky in approximately 1989. In the late 1980s and early 1990s, Mr. Wilmer was a licensed subcontractor who had also worked as a finish carpenter. Mr. Wilmer became a licensed real estate salesperson in 1994 or 1995. Since approximately 2002, Mr. Wilmer has been a licensed real estate broker and is currently self-employed in that field.[22]

¶ 18 In April 2003, Mr. Wilmer asked Eric to frame the addition Mr. Wilmer had planned for his residence. Mr. Wilmer wanted to remove the residence's existing garage and build a new garage with bedrooms above it for his children. He further wanted to remove the home's existing roof and replace the trusses with attic trusses.[23]

¶ 19 In addition to hiring Eric and Mr. Auble, Mr. Wilmer hired an electrician, plumber, excavator, and concrete layer to work on his residence. Mr. Wilmer asserted that he did not hire Steve or Claimant.[24]

¶ 20 Aside from this construction project on his residence, Mr. Wilmer has not hired contractors to work on any real estate owned by him, Ms. Wilmer, or the trust in the last several years.[25]

¶ 21 Eric began working on the Wilmer residence in August 2003. Eric was busy with other construction projects and Steve, Eric's brother, was staying with Eric. Because Steve had recently been released from a period of incarceration and was unemployed, Eric stated that Steve was looking for a project to keep himself busy. Therefore, Eric took Steve to the Wilmer residence and explained what needed to be done on the construction project.[26]

¶ 22 Mr. Wilmer was not home when Eric put Steve to work. Mr. Wilmer later called Eric and expressed concern about Steve working on the job alone in light of Steve's history of

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Trial Test.

[26] Trial test.

alcoholism and incarceration. Although Mr. Wilmer told Eric that he did not want Steve working alone on the project, Steve continued to do so while Eric worked on other projects.[27]

¶ 23 Ms. Wilmer first met Steve when he appeared at the residence one day and informed her that he was working on the construction project. She called Mr. Wilmer, who confirmed that Steve was doing some work for Eric because he and Mr. Auble were tied up on another project. Ms. Wilmer did not hire Steve and never discussed an hourly rate with him.[28]

¶ 24 Ms. Wilmer believed Steve was Eric's employee since Steve was paid through Eric's business and, with the exception of a single cash payment, she never gave cash or a check to anyone but Eric. In the case of that one-time cash payment, she first called Eric to discuss whether she should make this payment to Steve, and whether Eric had already billed the Wilmers for this portion of Steve's time.[29]

¶ 25 Steve was not advertising his services nor bidding on jobs. He did not bid any work on the Wilmer residence. Steve did not keep track of his hours when he worked on the Wilmer residence and he does not know if Eric owes him any wages.[30]

¶ 26 The Court finds both Mike and Kristin Wilmer to be credible witnesses. Where their testimony conflicts with Steve's or Eric's version of events, the Wilmers' version is specifically adopted by the Court in these findings.

¶ 27 Eric asserted that he was not Steve's employer. He stated that he believed Steve was not working for anyone and Steve was only working on the job site for "something to do." Eric admitted that he billed the Wilmers for Steve's time. However, he explained that he was keeping the money he billed the Wilmers for Steve's time to cover Steve's room and board. He further testified that he occasionally gave Steve gas money, and once gave him $100 but, aside from that, Steve had no other income.[31]

¶ 28 Claimant met Steve through mutual acquaintances. At the time, Claimant had recently moved to Bozeman from Helena and was staying in a hostel. Steve told Claimant that he and his brother were working on a home in Bozeman and asked Claimant if he

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[27] Trial test.

[28] Trial test.

[29] Trial test.

[30] *Id.*

[31] *Id.*

would like to work on the house for Steve's brother. Claimant stated that he would and Steve arranged to take Claimant to the job site the next morning to meet Eric.[32]

¶ 29 On September 6, 2003, Steve took Claimant to the job site and introduced him to Eric. Claimant initially stated that he would work for $8 per hour. After some discussion, however, Eric agreed to pay Claimant $10 per hour. Claimant began working on the residence that day. Claimant owned no tools and used tools supplied to him on the job.[33]

¶ 30 Steve testified that in the days prior to the accident, he directed Claimant's work and told him what tasks to complete. Steve claims that after he took Claimant to the job site, he introduced Claimant to Mr. Wilmer, not Eric, and told Mr. Wilmer that Claimant wanted $8 per hour. Both Mr. Wilmer and Claimant dispute Steve's version of events, and Claimant asserted Steve introduced him to Eric that first morning. Irrespective, Steve further testified that he believed Claimant would be working for Eric.[34]

¶ 31 Steve also stated that he does not know who Claimant was working for, although since he is the one who took Claimant to the job site, directed him, and could have fired him, he believes that Claimant might have been working for him. He also stated that he kept a toolbox on the job site and Claimant sometimes used some of his tools.[35]

¶ 32 Eric testified that on approximately September 6, 2003, Steve came to work with Claimant, introduced Claimant to Eric, and then put Claimant to work on the job. Eric stated that he did not discuss wages with Claimant, and that a few days later, Steve commented that he was going to get Claimant $10 per hour. Eric testified that he did not know where Steve intended to get the money from, and he did not question the statement.[36]

¶ 33 Eric testified that it was his understanding that Steve hired Claimant and that Mr. Wilmer was the general contractor on the project.[37]

¶ 34 Eric gave Claimant $20 on September 6 because Claimant needed money for food. Later that week, Eric gave Claimant an additional $30. Steve also gave Claimant money

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

almost every day so that Claimant could pay for the hostel and buy food and cigarettes. Claimant understood the payments from Eric to be draws against his income. He believed the money Steve gave him was a loan that Claimant would pay back after he received his wages.[38]

¶ 35 Ms. Wilmer first became aware of Claimant working on the residence when Eric pointed him out to her. Ms. Wilmer assumed Eric was paying Claimant's wages.[39]

¶ 36 Claimant never had any discussions with the Wilmers about going to work for them and he never discussed an hourly wage with the Wilmers. He does not believe that he was hired by the Wilmers.[40]

¶ 37 Claimant used Eric's tools on the job, which Eric kept stored in a trailer parked at the job site. Claimant reported to Eric but if Eric was not present, he would ask Steve or Mr. Auble what to do. On days when Eric was present on the job site, he decided when it was quitting time. Claimant believed that Eric could fire him, and that Mr. Wilmer could tell him to leave because it was his property.[41]

¶ 38 The Court finds Claimant to be a credible witness. Where others' versions of events and facts conflicts with Claimant's in this case, Claimant's version is specifically adopted by this Court.

¶ 39 The Court does not find Eric to be a credible witness. His testimony that Steve was not his employee is contradicted by the fact that Eric billed the Wilmers for Steve's time as well as his statement to Ms. Wilmer that she should pay Eric's business for Steve's time. Eric further testified that he was retaining the majority of Steve's wages to cover Steve's room and board and Steve had no other income. Yet, when Steve allegedly informed Eric that Steve was going to pay Claimant $10 per hour, Eric did not question this.

¶ 40 After the accident occurred, Mr. Auble and Eric took Claimant to the emergency room. Eric also required stitches for a cut received in the accident. After getting his elbow stitched, Eric returned to the job site to put a tarp over the residence's roof. Eric and Mr. Auble never returned to work on the Wilmer residence after that day because they had committed to another construction job. Claimant also did not return to work on the Wilmer residence. Mr. Wilmer and some friends and neighbors righted the roof trusses and Steve

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

arranged for an independent contractor, Lynn Hogness, to cover the roof. Mr. Wilmer later paid Mr. Hogness for that work.[42]

¶ 41 After the accident, Steve paid for Claimant's stay at a local motel and brought Claimant groceries and cigarettes. Eric also brought some groceries to Claimant. Claimant understood that he would have to pay Steve back out of the wages he received.[43]

¶ 42 Steve later contacted Mr. Wilmer and stated that Eric had not paid him his wages. Steve requested Mr. Wilmer to pay wages to him directly. Ms. Wilmer then contacted Eric to straighten out whether Steve's and Claimant's time had been billed to the Wilmers by Eric. Eric's latest bill apparently reflected some, but not all, of Claimant's and Steve's time. The bill was then adjusted to remove Steve's time as Eric agreed the Wilmers could give Steve the money directly as requested by Steve. Mr. Wilmer met Steve and Claimant and gave Steve $2,200 in cash. Steve cannot clearly remember the particulars of the meeting with Mr. Wilmer. However, he does recall that Mr. Wilmer gave him some money at some time after the accident. [44]

¶ 43 Steve admitted that his alcoholism affects his ability to recall events. He further admitted that he had a preexisting knee injury at the time he worked on the Wilmer residence and he was receiving workers' compensation benefits at the time he worked on the construction project. He later entered into a settlement with the workers' compensation insurer in which he agreed to pay back the money he received inappropriately.[45]

¶ 44 After Eric filed his Petition in this matter, Steve informed this Court that he would be willing to accept responsibility for Claimant's injury.[46] At trial, he admitted making an offer to Mr. Wilmer and Eric that he would accept responsibility for Claimant's injury with the intention of discharging the debt in bankruptcy if either Mr. Wilmer or Eric would pay for his attorneys' fees.[47]

¶ 45 This Court does not find Steve to be a credible witness. Taken as a whole, his testimony is tainted by the facts set forth in the preceding two paragraphs. Moreover, there

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] See October 1, 2004, Memorandum to File regarding phone conversation with Deputy Clerk of Court; October 8, 2004, letter from Workers' Compensation Court Hearing Examiner Jay Dufrechou to Steve Howe.

[47] *Id.*

is simply no credible evidence to support his assertions that he had any authority with respect to personnel on this project. The Court places no value in Steve's testimony.

CONCLUSIONS OF LAW

¶ 46 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Claimant's industrial accident.[48]

¶ 47 It is undisputed that Claimant was an employee at the time of injury. The question before this Court is whether that employer was Eric, Steve, or Mr. Wilmer. If the employer was Eric or Steve, a further question which must be addressed is whether Mr. Wilmer contracted with that employer for the work performed, and whether that contract is a regular or recurrent part of Mr. Wilmer's business.

¶ 48 As the Petitioner, Eric bears the burden of proving his case by a preponderance of the evidence.[49] The Court concludes that Eric has not met his burden.

¶ 49 An employer means anyone, including an independent contractor, who has a person in service under an appointment or contract of hire, expressed or implied, oral or written.[50] An individual is in the service of another when that other has the right to control the details of the individual's work.[51] 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.[52]

¶ 50 Right or Exercise of Control: In the situation at hand, it is undisputed that Eric had the right to direct Claimant on the job and that he exercised that right. In his Worker Relationship Questionnaire, Claimant stated that he worked at the direction of Howe Construction, Eric's company. If Eric was on the job site, Claimant reported to him.

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[48] This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Claimant's industrial accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Any reference to statutes cited from the Montana Code will employ the language from the 2003 version.

[49] *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[50] Section 39-71-117(1)(a), MCA.

[51] *In the Matter of Glover*, 2002 MTWCC 22, ¶ 49, citing *State ex rel. Ferguson v. District Court*, 164 Mont. 84, 88, 519 P.2d 151, 154 (1974).

[52] *American Agrijusters Co. v. Montana Dept. of Labor and Indus.*, 1999 MT 241, ¶ 21, 296 Mont. 176, 988 P.2d 782.

Claimant was working at Eric's direction at the time of the accident. Although Steve testified that he also exerted control over Claimant, Steve's testimony is not credible and is contradicted by Claimant and Mr. Wilmer.

¶ 51 Method of Payment: This Court has also found that Eric billed the Wilmers for Claimant's services. Ms. Wilmer testified that she assumed Claimant was being paid by Eric. Claimant testified that he negotiated with Eric for wages of $10 per hour. Claimant further testified that Steve gave him money throughout the week and that Claimant understood that money to be in the form of a loan that Claimant would pay back once he got paid.

¶ 52 Furnishing of Equipment: An employment relationship almost invariably exists where the purported employer has furnished valuable equipment.[53] Although Steve apparently kept a toolbox at the job site and Claimant may have used some of Steve's tools, it is uncontroverted that Eric parked his tool trailer on the job site and Claimant used tools supplied by Eric throughout the week he worked on the Wilmer residence.

¶ 53 Right to Fire: The power to fire is the power to control.[54] Although Steve testified that he believed he had the right to fire Claimant, Claimant testified that he believed it was Eric who had the right to fire him, although Mr. Wilmer as the homeowner could have ordered him to leave the property. Eric did not dispute that he could have fired Claimant. Mr. Wilmer apparently had little or no control over whom Eric had working on the project, as evidenced by Mr. Wilmer's request of Eric not to allow Steve to work on the project alone and Eric's disregarding of that request. Clearly, if Mr. Wilmer had control over the people whom Eric sent to work on the property, he would have been able to prevent Steve from working alone.

¶ 54 Applying the four factors set forth above, the evidence overwhelmingly supports a finding that Claimant was Eric's employee.

¶ 55 Having found Claimant to be Eric's employee, the Court must then turn its attention to the question of whether Mr. Wilmer may nevertheless be liable for Claimant's injuries pursuant to § 39-71-405(1), MCA. The Court finds that he is not.

¶ 56 Under § 39-71-405(1), MCA, an employer who contracts with an independent contractor to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment

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[53] *American Agrijusters*, ¶ 33, quoting *Solheim v. Tom Davis Ranch* (1984), 208 Mont. 265, 273, 677 P.2d 1034, 1038.

[54] *American Agrijusters*, ¶ 35, quoting *Solheim v. Tom Davis Ranch* (1984), 208 Mont. 265, 274, 677 P.2d 1034, 1039.

of benefits under Title 39, chapter 71 if the contractor has not properly complied with the coverage requirements of the Workers' Compensation Act. In the present case, Mr. Wilmer admitted that he contracted with Eric and Mr. Auble to work on the Wilmers' home improvement project. However, this Court finds that Mr. Wilmer's occupation is real estate broker, that this construction project was a home improvement project on the Wilmers' personal residence, and that Mr. Wilmer has not hired construction workers for any other real estate projects on any property that he owns for several years, if ever. Although Mr. Wilmer hired the individual independent contractors – electricians, plumbers, framers, etc. – to complete the work on this project and perhaps acted as a general contractor on the project, it was nonetheless a one-time occurrence to remodel his own residence and was not a regular or recurrent part of his business as a real estate broker. Mr. Wilmer's own testimony was that he had not done any work in the construction industry since the mid-1990s and no evidence was submitted to the contrary. Therefore, the home improvement project cannot be said to be a part of Mr. Wilmer's regular course of business, and this Court concludes that he is not liable for workers' compensation benefits in this instance.

¶ 57 The UEF asked this Court to take judicial notice of certain federal tax regulations,[55] arguing that Eric's liability may also migrate to the Wilmers because improving their property was part of a regular course of business in using the trust as an income-producing entity. Although the UEF attempts to argue that the Wilmer Family Trust received tax benefits as a result of the deductions taken for improvements to the trust corpus, the testimony at trial was that the Wilmers did not even know if a separate tax return was filed for the trust, or if any deductions or other advantageous tax benefits occurred. The UEF did not introduce any tax returns or other documents into evidence or submit any testimony that would raise their income-production argument to more than mere speculation. Therefore, the Court rejects the UEF's argument that improvements made to the Wilmer residence constitute a regular or recurrent part of the trust's "business" because of potential tax benefits.

JUDGMENT

¶ 58 This Court has jurisdiction over this matter pursuant to § 39-71-2905, MCA.

¶ 59 Claimant was employed by Eric Howe on September 12, 2003, when the accident occurred and Eric is therefore liable for payment of workers' compensation benefits.

¶ 60 The work which Mr. Wilmer contracted to have performed on his residence was not of a kind which was a regular or recurrent part of his occupation, pursuant to § 39-71-405, MCA.

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[55] Treas. Reg. §§ 1.641(a)-0, 1.641(b)-1.

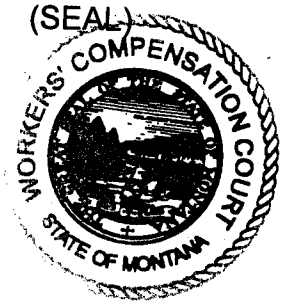
¶ 61 The UEF has not proven by a preponderance of the evidence that the Wilmers' home improvement project should be treated as a regular or recurrent part of the Wilmer Family Trust's business, pursuant to § 39-71-405, MCA.

¶ 62 This JUDGMENT is certified as final for purposes of appeal.

¶ 63 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 7th day of July, 2006.

(SEAL)



JUDGE

c: Scott A. Restum
Joseph R. Nevin
Brian P. Fay
Steve Howe
Richard J. Pyfer

Submitted: March 17, 2006