

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 5

WCC No. 2011-2740

OLIN JENSEN

Petitioner

vs.

UNINSURED EMPLOYERS' FUND and MONTANA STATE FUND

Respondents

and

UNINSURED EMPLOYERS' FUND

Third Party Petitioner

vs.

**PAUL KESSLER, STEVEN KESSLER, and JEFF HUNTER d/b/a/ ARTISTIC
EXTERIORS Jointly and Severally, and DANIEL CHRISTIANSON, Individually
and/or Sole Proprietor**

Third Party Respondents

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Summary: The parties agreed to submit this matter to the Court upon agreed facts and briefs, and the Court treated the parties' submissions as cross-motions for summary judgment pursuant to ARM 24.5.329. Petitioner made a claim for benefits for injuries sustained in a fall from a roof while a resident of the Butte Prerelease Center under contract with the Montana Department of Corrections. The partnership that hired Petitioner to replace the roof on a rental house was uninsured, as was the owner of the house. The Uninsured Employers' Fund maintained that Petitioner was an employee of the partnership which was in turn a subcontractor of either the owner of the house or the Butte Prerelease Center under § 39-71-405, MCA.

Held: Petitioner was at most only a casual employee of the owner of the house where Petitioner was injured. Although the Butte Prerelease Center was required to assist its residents in attaining employment, there was no contractual relationship between the Butte Prerelease Center and the partnership that employed Petitioner. Since there was no statutory employer pursuant to § 39-71-405, MCA, the Uninsured Employers' Fund is liable for Petitioner's workers' compensation benefits, with a right to indemnification from the partners of the partnership who hired and employed Petitioner.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-405. A requirement for finding a statutory employer liable for an injured employee of an uninsured contractor is that a contract existed between the employer and the contractor for the work to be performed. Since the parties agreed that no consideration was exchanged between the Butte pre-release center and the contractor, the pre-release center could not fit the definition of a statutory employer under § 39-71-405(2), MCA, as consideration is an essential element of a contract.

Employer: Statutory Employer. A requirement for finding a statutory employer liable for an injured employee of an uninsured contractor is that a contract existed between the employer and the contractor for the work to be performed. Since the parties agreed that no consideration was exchanged between the Butte pre-release center and the contractor, the pre-release center could not fit the definition of a statutory employer under § 39-71-405(2), MCA, as consideration is an essential element of a contract.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-401. The owner of the house where Petitioner was injured was exempt from the WCA pursuant to the casual employment provision of § 39-71-401(2)(b), MCA, since he derived no tax benefits from owning the property and netted only \$6,655 in rent over fifteen months and therefore, had no profit motive in owning the house. The scant attention he paid to the property from afar did not rise to the level of the "substantial time and labor for management and operation" test so as to constitute a rental business as required by *Weidow v. Uninsured Employers' Fund*.

Employment: Casual Employment. The owner of the house where Petitioner was injured was exempt from the WCA pursuant to the casual employment provision of § 39-71-401(2)(b), MCA, since he derived no tax benefits from owning the property and netted only \$6,655 in rent over fifteen months and therefore, had no profit motive in owning the house. The scant attention he paid to the property from afar did not rise to the level of the “substantial time and labor for management and operation” test so as to constitute a rental business as required by *Weidow v. Uninsured Employers’ Fund*.

¶ 1 On October 3, 2011, I issued an Order Granting Motion for Default Judgment¹ against Paul Kessler and Steven Kessler d/b/a Artistic Exteriors for failing to respond to the Uninsured Employers’ Fund’s Third Party Petition and Request for Amended Caption² filed on June 22, 2011, and for failing to appear at the hearing held on September 23, 2011, following this Court’s Order to Respond or Show Cause.³

¶ 2 On December 12, 2012, counsel for the Uninsured Employers’ Fund (UEF) advised the Court that the parties were in agreement to submit this matter on briefs, and trial was vacated.⁴ On January 14, 2013, Petitioner Olin Jensen’s attorney e-mailed the Court that the parties desired to await the Court’s ruling on Third Party Respondent Daniel Christianson’s Motion for Leave to Re-file Motion for Summary Judgment⁵ before agreeing to a briefing schedule.⁶ Thereafter, I issued my Order denying Christianson’s motion and requiring the parties to agree to stipulated facts or a stipulated record and a briefing schedule in order to facilitate submission of this matter without trial.⁷ An Order Setting Briefing Schedule was issued on March 27, 2013, setting dates for the simultaneous submission of briefs and a joint statement of agreed facts.⁸ The Court

¹ Docket Item No. 23.

² Docket Item No. 5.

³ Docket Item No. 19. During an August 12, 2011, telephonic conference, counsel for the UEF advised that its attempts to complete personal service on Jeff Hunter were unsuccessful. Therefore, default was not entered against Mr. Hunter, and he is not addressed in this Order.

⁴ Telephone Memorandum from [Clerk] to Parties of Record, Docket Item No. 94.

⁵ Docket Item No. 93.

⁶ E-Mail Communication from Rasmusson to [Clerk], Docket Item No. 99.

⁷ Order Denying Third-Party Respondent’s Motion for Leave to Re-file Motion for Summary Judgment and Requiring Parties to Stipulate to Agreed Facts or Agreed Record to Facilitate Submission of this Matter on Briefs, Docket Item No. 100.

⁸ Docket Item No. 103.

subsequently granted an extension to file the stipulated facts upon agreement of the parties.⁹

¶ 3 The parties submitted a Joint Statement of Agreed Facts and Issues (Joint Statement)¹⁰ and have fully briefed this matter. Since there are no issues as to any material fact, I will address the parties' submissions as cross-motions for summary judgment pursuant to ARM 24.5.329.

¶ 4 Issues Presented: The Court restates the issues set forth in the parties' Joint Statement,¹¹ as follows:

Issue One: Whether at the time of Jensen's December 10, 2010, injury, Community Counseling & Correctional Services d/b/a Butte Prerelease Center (Butte PRC) was Jensen's statutory employer pursuant to § 39-71-405, MCA, and its insurer, Montana State Fund (State Fund), is the liable insurer for all benefits paid or payable on Jensen's claim and obligated pursuant to § 39-71-504, MCA, to reimburse the UEF for all benefits it paid on the claim.

Issue Two: Whether at the time of Jensen's December 10, 2010, injury, Christianson was an uninsured employer as defined by § 39-71-501, MCA, and Jensen's statutory employer pursuant to § 39-71-405, MCA, and therefore, obligated pursuant to § 39-71-504, MCA, to indemnify the UEF for all benefits paid or payable with respect to Jensen's claim.

Issue Three: In the event the Court finds that neither the Butte PRC nor Christianson was the statutory employer under § 39-71-405, MCA, for Jensen's claim, then to the extent the UEF has liability with respect to Jensen's claim and pursuant to the Court's Order Granting Motion for Default Judgment, the uninsured employers, Paul Kessler and Steven Kessler d/b/a Artistic Exteriors, are ordered, jointly and severally, to indemnify the UEF pursuant to § 39-71-504, MCA, for all benefits paid and payable with respect to Jensen's claim.

⁹ E-Mail Correspondence - Extension Granted Through 05/07/13 for Filing Stipulated Facts, Docket Item No. 107.

¹⁰ Docket Item No. 108.

¹¹ Joint Statement at 2. The parties originally set forth five issues for ruling. However, Petitioner withdrew his claim for attorney fees, costs, and a penalty. (Petitioner's Brief, Docket Item No. 112, at 2.) Therefore, the Court does not consider issues four and five.

Agreed Facts¹²

¶ 5 Jensen was a resident at the Butte PRC from August 2010 to March 2011.¹³

¶ 6 Residents at the Butte PRC are in the custody of the Montana Department of Corrections (DOC). A contract between the Butte PRC's parent division and DOC governs the services provided to residents by the Butte PRC, which include counseling, education, and work placement. The Butte PRC must follow guidelines prescribed by DOC in assisting adult offenders in transitional living, including job placement.¹⁴

¶ 7 Pursuant to the contract between DOC and the Butte PRC's parent division, DOC pays the Butte PRC a daily fee for the successful delivery of services to each resident. The contract includes the provision that the Butte PRC must comply with the provisions of §§ 39-71-120, -401, and -405, MCA. The Butte PRC has an internal requirement to confirm that an employer for whom a resident performs work has workers' compensation coverage. If a resident is injured while performing community service for a nonprofit organization, the Butte PRC has workers' compensation coverage for that resident.¹⁵

¶ 8 The Butte PRC has an internal policy not to send a resident to an employer for community service work or paid work if the employer does not have workers' compensation coverage. In accordance with its parent division's contract with DOC, the Butte PRC physically checks on residents while outside of the center, including checking on them at job sites. If the Butte PRC learns that a resident is at a job with no workers' compensation coverage, it removes the individual from the job.¹⁶

¶ 9 As part of their treatment plans, residents are required to maintain employment to meet their financial obligations, and they are assisted in finding employment by staff at the Butte PRC who also direct residents to non-paying community service work.¹⁷

¶ 10 Jensen was not an employee of the Butte PRC, and the Butte PRC is not a temporary employment agency.¹⁸ The Butte PRC posts jobs on a bulletin board at its

¹² Although all of the agreed facts set forth are taken from the parties' Joint Statement, I have set forth only those facts that I found to be material to the issues presented.

¹³ Joint Statement at 3, ¶ 1.

¹⁴ Joint Statement at 3, ¶¶ 2, 3.

¹⁵ Joint Statement at 3, ¶¶ 4-7.

¹⁶ Joint Statement at 4-5, ¶¶ 8, 16-17.

¹⁷ Joint Statement at 5, ¶¶ 19-21.

¹⁸ Joint Statement at 5, ¶¶ 19, 23.

facility and employs an “Employment Specialist” who assists residents in finding employment.¹⁹

¶ 11 The Butte PRC has a series of questions it asks employers before it sends a resident for either paid work or community service work in order to document vehicle insurance and registration, drivers’ licenses, and the employer’s workers’ compensation insurance coverage.²⁰

¶ 12 On December 8, 2010, Paul Kessler, on behalf of Artistic Exteriors, phoned Scott Harding at the Butte PRC looking for workers for a roofing job in Anaconda. Harding informed Kessler he needed proof of vehicle registration, drivers’ licenses, and workers’ compensation coverage. Harding had Jensen and another resident, Corbin Eystad, complete a form to work on the job for Kessler.²¹

¶ 13 On December 10, 2010, Kessler picked up Eystad and Jensen to work on the roofing job in Anaconda. Harding was out of the office at the time, and when he arrived later and realized Kessler had not provided proof of workers’ compensation coverage, Harding travelled to the job site. On December 10, 2010, while working on the roof of the house owned by Christianson, Jensen slid off the roof and suffered an injury to his left leg.²²

¶ 14 When Harding learned that Artistic Exteriors had no workers’ compensation coverage, Harding “blacklisted” the company and Kessler so that none of the “center’s employees” would be referred again for work for Kessler or his company.²³

¶ 15 Jensen would not have been on the job on December 10, 2010, when he was injured if he had not learned of the job from the Butte PRC. Neither Christianson nor Artistic Exteriors hired the Butte PRC to work on Christianson’s roof, and the Butte PRC received no consideration or remuneration from Artistic Exteriors or Christianson for the work performed on Christianson’s property.²⁴

¹⁹ Joint Statement at 5, ¶¶ 23-25.

²⁰ Joint Statement at 6, ¶ 28.

²¹ Joint Statement at 6, ¶ 29.

²² Joint Statement at 6, ¶¶ 30-31.

²³ Joint Statement at 6, ¶ 32.

²⁴ Joint Statement at 7, ¶¶ 33-36.

¶ 16 At the time of Jenson's injury on December 10, 2010, State Fund insured the Butte PRC for workers' compensation coverage.²⁵

¶ 17 Christianson purchased the house at 510 W. 6th Street in Anaconda in September 2009 for \$25,000 while he was still living in his primary residence in Alice, North Dakota. On December 16, 2009, Christianson signed a Management Agreement with Tri-County Property Management to rent, lease, operate, and manage his Anaconda property. The Management Agreement provided that the property manager would receive 10 percent of the gross monthly rental of the property. The agreement also provided that Christianson would carry public liability and workers' compensation insurance at his own expense and name the property manager as a co-insured.²⁶

¶ 18 From February 2010 through April 2011, the property was rented to Brenda and Brent Martin for \$550 per month. After deduction of rental fees and utilities, Christianson netted \$6,655.45 for the period. Christianson did not file tax returns for the rent he received in 2010 and 2011.²⁷

¶ 19 In September 2010, Christianson sold his primary residence in Alice, North Dakota, and lived with his brother in Fargo, North Dakota, for a month before moving to Arizona. While living in Arizona in the fall of 2010, Christianson received a bid from Artistic Exteriors to replace the roof of his Anaconda house, and they agreed to a price of \$7,000 to reroof his house.²⁸

¶ 20 Around December 12 or 13, 2010, Kessler contacted Christianson and asked for final payment for the roofing job. Christianson had a friend living in Anaconda confirm that the work was completed, then wrote a check for the final payment and deposited it in Artistic Exteriors' account at a US Bank in Arizona. At the time, Christianson was not aware that Jensen had been injured falling off the roof of his house and he had no further contact with anyone at Artistic Exteriors.²⁹

¶ 21 Beginning in July 2011, Christianson allowed his friend, Debbie Eckelson, to stay in the Anaconda house rent-free until July 2012. Christianson put his Anaconda house on the market in May 2011, and finally sold it in August 2012 for \$49,498.85. The

²⁵ Joint Statement at 7, ¶ 37.

²⁶ Joint Statement at 7-8, ¶¶ 38-40, 42, 44-45.

²⁷ Joint Statement at 8, ¶¶ 46-48.

²⁸ Joint Statement at 9, ¶¶ 50-54.

²⁹ Joint Statement at 10, ¶¶ 59-62.

closing documents listed Christianson's primary residence as being in Prescott, Arizona.³⁰

¶ 22 Christianson was not insured under Montana Workers' Compensation Plan Nos. 1, 2, or 3 at the time of Jensen's December 10, 2010, injury.³¹

¶ 23 On December 15, 2010, the UEF received a first report of injury from Jensen. The UEF learned that Artistic Exteriors was uninsured at the time of Jensen's injury and that it was a partnership with three partners: Paul Kessler, Steven Kessler, and Jeff Hunter. On January 12, 2011, the UEF issued an administrative determination to Jensen, the partners in Artistic Exteriors, and Christianson that it was accepting Jensen's claim for benefits under a reservation of rights.³²

¶ 24 On January 12, 2011, the UEF issued a second administrative determination finding that Artistic Exteriors was the contractor primarily liable for Jensen's injury under § 39-71-405, MCA, and that Christianson was deemed to be the prime contractor and had the statutory right to demand reimbursement from Artistic Exteriors.³³

¶ 25 On January 12, 2011, the UEF issued a third administrative determination, informing all parties that it found Christianson to be the prime contractor under § 39-71-405, MCA, and because he was uninsured, the UEF would administer Jensen's claim and seek indemnity from Christianson for all benefits paid and to be paid to Jensen.³⁴

¶ 26 On January 13, 2011, the UEF issued a fourth administrative determination that it found the Butte PRC to be the prime contractor for Jensen's injury under § 39-71-405, MCA, and it tendered Jensen's claim for benefits to State Fund, the Butte PRC's workers' compensation insurer.³⁵

¶ 27 On January 13, 2011, the UEF issued a fifth administrative determination, informing the parties that because it had tendered Jensen's claim to an insurer, the UEF was no longer liable for Jensen's claim and it was therefore denied. On the same date the UEF issued a sixth administrative determination, informing the parties that because

³⁰ Joint Statement at 11, ¶¶ 66-68.

³¹ Joint Statement at 11, ¶ 70.

³² Joint Statement at 11-13, ¶¶ 75, 77, 83.

³³ Joint Statement at 13, ¶ 84.

³⁴ Joint Statement at 13, ¶ 85.

³⁵ Joint Statement at 14, ¶ 88.

it had tendered Jensen's claim to State Fund, State Fund had the right to demand reimbursement from Artistic Exteriors.³⁶

¶ 28 The contract for work at issue relative to § 39-71-405(2), MCA, when Jensen's injury occurred, was the removal of the roof on Christianson's house.³⁷

¶ 29 On February 2, 2011, the UEF received a letter from State Fund in which it denied liability for Jensen's claim. Although the UEF has denied Jensen's claim for benefits, it has paid Jensen's benefits under a reservation of rights pending a determination of liability.³⁸

¶ 30 As of March 2013, the UEF has paid approximately \$6,771.43 in indemnity benefits, including an impairment award, and approximately \$25,076.35 in medical benefits on Jensen's claim. Regardless of who the Court holds liable for Jensen's claim for benefits, the UEF has no intention of seeking reimbursement from Jensen for the benefits it has paid, or that will be paid, to him.³⁹

Analysis and Decision

¶ 31 This case is governed by the 2009 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of Jensen's injury.⁴⁰

¶ 32 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.⁴¹ The material facts necessary for disposition of all issues in this case are undisputed. Accordingly, this case is appropriate for summary disposition.

Issue One: Whether at the time of Jensen's December 10, 2010, injury, the Butte PRC was Jensen's statutory employer pursuant to § 39-71-405, MCA, and its insurer, State Fund, is the liable insurer for all benefits paid or payable on Jensen's claim and obligated pursuant to § 39-71-504, MCA, to reimburse the UEF for all benefits it paid on the claim.

¶ 33 In *Howe v. Uninsured Employers' Fund*, I addressed the issue of what constitutes an employer under the relevant statutes and case law:

³⁶ Joint Statement at 14, ¶¶ 89-90.

³⁷ Joint Statement at 15, ¶ 94.

³⁸ Joint Statement at 15, ¶¶ 95-96.

³⁹ Joint Statement at 15-16, ¶¶ 97,103.

⁴⁰ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁴¹ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

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. An individual is in the service of another when that other has the right to control the details of the individual's work. 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.⁴²

¶ 34 Applying the four factors set forth above, the evidence before the Court supports a conclusion that Jensen was a direct employee of Kessler and Artistic Exteriors, and not the Butte PRC. Specifically, Kessler hired Jensen, transported him to Anaconda, directed him in the reroofing of Christianson's house (for the short period before Jensen's injury), evidently supplied the tools and material to do the roofing work, and could have fired Jensen at any time for poor performance.

¶ 35 Having determined that Jensen was a direct employee of Kessler and Artistic Exteriors, and not the Butte PRC, I turn to the issue of whether Jensen was a statutory employee of the Butte PRC pursuant to § 39-71-405, MCA. I conclude he was not.

¶ 36 Section 39-71-405(2), MCA, provides as follows:

Where an employer contracts to have any work to be done by a contractor other than an independent contractor, and the work so contracted to be done is a part or process in the trade or business of the employer, then the employer is liable to pay all benefits under this chapter to the same extent as if the work were done without the intervention of the contractor, and the work so contracted to be done shall not be construed to be casual employment. Where an employer contracts work to be done as specified in this subsection, the contractor and the contractor's employees shall come under that plan of compensation adopted by the employer.

¶ 37 An agreed fact here is that the contract for work at issue relative to § 39-71-405(2), MCA, was the removal of the roof on Christianson's house.⁴³ The UEF urges the Court to find that an oral contract also existed between the Butte PRC and

⁴² 2006 MTWCC 27, ¶ 49 (internal citations omitted), citing *American Agrijusters Co. v. Montana Dep't of Labor and Indus.*, 1999 MT 241, ¶ 21, 296 Mont. 176, 988 P.2d 782.

⁴³ See *supra* ¶ 28.

Artistic Exteriors to provide two Butte PRC residents to remove Christianson's roof.⁴⁴ Beyond this bare request, however, the UEF provides the Court with no analysis regarding how or in what fashion such a contract may have been formed.

¶ 38 In *Doyle v. Clark*, the Montana Supreme Court analyzed the elements of a contract:

The essential elements of a contract are: (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. Consideration is something of value received by a promisor from a promisee Consideration can take the form of many things, including, but not limited to a monetary payment, an act, a forbearance, or a return promise. However, there was no evidence of consideration passing from Doyle to Clark presented during this case; therefore, the District Court correctly concluded that no oral or written contract was created.⁴⁵

¶ 39 In this case, it is an agreed fact that the Butte PRC received no consideration or remuneration from either Artistic Exteriors or Christianson for the work performed on Christianson's roof.⁴⁶ There was therefore no binding contract between the Butte PRC and Artistic Exteriors, and the Butte PRC was under no duty to supply residents for voluntary paid work with Artistic Exteriors.

¶ 40 "Subsection (2) [of § 39-71-405, MCA,] holds liable for benefits the employer of a non-independent contractor engaged in work which is a part or process in the business of the employer."⁴⁷ Paul Kessler and Artistic Exteriors and not the Butte PRC employed Jensen, a non-independent contractor, to work on Christianson's roof, which was a part or process of Kessler and Artistic Exteriors' regular business.

¶ 41 The UEF maintains that because workers' compensation coverage is extended on occasion by the Butte PRC for residents injured while performing community service, there is no rational basis not to also extend coverage for residents performing paid work.⁴⁸ The basis for this disparity, however, is found in the statutory framework. Workers' compensation coverage is mandated for those performing community service work pursuant to § 39-71-118(1)(e), MCA, and compensation and premiums for such

⁴⁴ Uninsured Employers' Fund Opening Brief (UEF Opening Brief), Docket Item No. 111, at 6.

⁴⁵ 2011 MT 117, ¶ 29, 360 Mont. 450, 254 P.3d 570. (Internal citations omitted.)

⁴⁶ See *supra* ¶ 15.

⁴⁷ *State Comp. Ins. Fund v. Castle Mountain Corp.*, 227 Mont. 236, 240, 739 P.2d 461, 464 (1987).

⁴⁸ UEF Opening Brief at 8.

workers is limited under § 39-71-118(1)(e)(i) and (ii), MCA. No corresponding statutory mandate exists for those performing paid labor.

¶ 42 The UEF admits in its answer brief that § 39-71-504, MCA, permits reimbursement only from uninsured employers and is inapplicable here.⁴⁹ The UEF further admits that it is not an insurer as that term is defined in § 39-71-116(14), MCA, and, therefore, this matter is not a dispute between insurers pursuant to § 39-71-407(5), MCA. Instead, as a “stand-in insurer,” the UEF claims an entitlement to reimbursement from State Fund if State Fund is found liable for Jensen’s claim.

¶ 43 Since the UEF agrees that: (1) Jensen was not an employee of the Butte PRC; and (2) the Butte PRC was not a temporary employment agency,⁵⁰ and because the Butte PRC does not fit within the language of § 39-71-405(2), MCA, I conclude that the Butte PRC and State Fund have no liability for Jensen’s claim.

Issue Two: Whether at the time of Jensen’s December 10, 2010, injury, Christianson was an uninsured employer as defined by § 39-71-501, MCA, and Jensen’s statutory employer pursuant to § 39-71-405, MCA, and therefore, obligated pursuant to § 39-71-504, MCA, to indemnify the UEF for all benefits paid or payable with respect to Jensen’s claim.

¶ 44 Sections 39-71-401 and -501, MCA, describe uninsured employers as those with employees in service under any appointment or contract of hire, expressed or implied, oral or written, who have failed to be insured under Workers’ Compensation Plan Nos. 1, 2, or 3, unless specifically exempted. Christianson was not insured under any workers’ compensation plan.⁵¹ The UEF contends that Christianson qualifies as a statutory employer pursuant to § 39-71-405, MCA. Christianson contends that he is exempt from application of the WCA pursuant to the casual employment provision of § 39-71-401(2)(b), MCA.

¶ 45 “Casual employment” is defined in § 39-71-116(6), MCA, as “employment not in the usual course of the trade, business, profession, or occupation of the employer.”

¶ 46 Christianson argues that an essential consideration in determining whether he was a casual employer is whether he had a profit motive in owning his Anaconda house. Christianson maintains that because he filed no tax returns on his rental income, had no control over the roofing work, and provided no instructions and no

⁴⁹ Uninsured Employers’ Fund Answer Brief, Docket Item No. 115, at 2.

⁵⁰ See *supra* ¶ 10.

⁵¹ See *supra* ¶ 22.

material for the work on the house,⁵² the evidence supports his status as a causal employer.

¶ 47 In *Weidow v. Uninsured Employers' Fund*, the Montana Supreme Court held:

The distinction between casual employment and employment that qualifies for workers' compensation coverage requires analysis of the facts and circumstances surrounding the alleged employment. Whether a person has a profit motive plays an important consideration in determining whether that person is operating a business. We also have distinguished improvements to property that constitute business and those that do not. Merely owning a house, or many houses, and maintaining, repairing, and renting the house so as to produce an income does not necessarily constitute a business. Such activity constitutes a business, however, if it requires substantial time and labor for management and operation.⁵³

¶ 48 *Weidow* involved an injured worker who was helping build a house for a property owner who took over managing the construction of the home. The property owner directed the subcontractor's work, sent his own employees from California to work on the house, paid Weidow and his brother an hourly wage for 40-hour work weeks, and devoted substantial time and labor to the construction of the home. The owner listed the house as a business rental property for two years on his tax returns, reaping significant tax benefits. The owner also purchased a plane and registered it to that property address to avoid paying higher California taxes. The Montana Supreme Court affirmed my conclusion that the property owner had managed his property with a profit motive and therefore was not engaged in casual employment.

¶ 49 Similarly, in *Colmore v. Uninsured Employers' Fund*,⁵⁴ a retired Tennessee farmer who owned a Montana ranch was found to be in the agricultural business with regard to the ranch because he deducted his ranch expenses on his federal tax return and signed a lease for the grazing of livestock and the planting of livestock-supporting crops on the ranch. The claimant's deceased husband only had one job at the time of his death: erecting fences on Colmore's ranch. Even though the ranch did not earn a profit, it reduced the owner's overall income taxes by being listed as a business on his tax returns. The court therefore concluded that the deceased worker was *not* a casual employee because the ranch was operated with a profit motive and not merely as a summer home.

⁵² See *supra* ¶ 18; Third Party Respondent Daniel Christian[son]'s Opening Brief, Docket Item No. 109, at 5.

⁵³ 2010 MT 292, ¶ 36, 359 Mont. 77, 246 P.3d 704. (Internal citations omitted.)

⁵⁴ 2005 MT 239, 328 Mont. 441, 121 P.3d 1007. (Overruled on other grounds.)

¶ 50 The facts in this case are readily distinguishable from both *Weidow* and *Colmore*. Notably, in this case Christianson filed no tax returns, as distinguished from the facts in *Weidow* and *Colmore* where the property owners claimed significant tax deductions on their tax returns.

¶ 51 The circumstances of the present case are more analogous to those in two out-of-state cases: *Vogl v. Smythe*⁵⁵ and *Barlow v. Anderson*.⁵⁶ In *Vogl*, a property owner hired a worker to clear a road to the property owner's summer home, which was maintained separately from the owner's business properties. The court concluded that the form of employment – dragging a county road and cleaning up driftwood – was only occasional and not recurring and therefore only casual employment.

¶ 52 Likewise, in *Barlow*, a horse owner was not required to cover her horse trainer for workers' compensation insurance where the evidence showed the owner kept the horses not for a profit but merely as a hobby. The horse owner was *not* the employer of the injured horse trainer because the owner "was not engaged in a trade, business, profession or occupation within the definition of that term applicable to the [Texas Workmen's Compensation Act]."⁵⁷

¶ 53 Finally, in *Raymond v. Uninsured Employers' Fund*,⁵⁸ I analyzed the employment status of an injured worker whose only work for over ten months was helping build a cabin in Lincoln. The sole issue at trial was whether the claimant was engaged in "casual employment" at the time of his injury. Raymond was paid for his work mostly by check from the owner's business account, which issued checks for the owner's personal as well as business expenses. The owner also owned a residence, an office building, a "tear-down property" in Great Falls, and a cabin on leased property in Hungry Horse. The Lincoln property was allegedly intended as the owner's second home, and there was no evidence the owner deducted the cabin's building expenses or Raymond's payments on his taxes. Neither the owner nor the business had workers' compensation insurance because the owner considered Raymond, and anyone else who worked for him or his business, as "under contract or independent."⁵⁹ Although I had a suspicion the owner may have had a profit motive for owning the Lincoln property, I concluded Raymond failed to prove a profit motive by a preponderance of the evidence.⁶⁰

⁵⁵ 74 Idaho 115, 258 P.2d 355 (1953).

⁵⁶ 346 S.W.2d 632 (Tex. Civ. App. 1961).

⁵⁷ *Id.* at 634.

⁵⁸ 2009 MTWCC 31.

⁵⁹ *Raymond*, ¶ 25.

⁶⁰ *Raymond*, ¶ 41.

¶ 54 Here, Christianson was not in the business of fixing up older homes for a profit. He owned a total of three houses during the period in question: in Alice, North Dakota; in Anaconda; and in Prescott, Arizona. The Anaconda property was the only rental property Christianson owned during that period and he only rented it for slightly more than a year, after which time he allowed a friend to live there rent-free until he sold the house in August 2012. Moreover, as noted above, Christianson derived no tax benefits from the home.

¶ 55 The UEF cites to *Colmore* for the proposition that “business” means the “habitual or regular occupation that a person [is] engaged in with a view to winning a livelihood or gain,”⁶¹ yet fails to show how this applies to Christianson’s ownership of his Anaconda property. To the contrary, the \$6,655.45 in net rent that Christianson collected for the fifteen months he rented the property can hardly be said to rise to the level of “a livelihood.” Moreover, the scant attention Christianson paid to the property from afar, first from North Dakota, then from Arizona, fails the “substantial time and labor for management and operation” test so as to constitute a rental business as required by *Weidow*.⁶²

Issue Three: In the event the Court finds that neither the Butte PRC nor Christianson was the statutory employer under § 39-71-405, MCA, for Jensen’s claim, then to the extent the UEF has liability with respect to Jensen’s claim and pursuant to the Court’s Order Granting Motion for Default Judgment, the uninsured employers, Paul Kessler and Steven Kessler d/b/a Artistic Exteriors, are ordered, jointly and severally, to indemnify the UEF pursuant to § 39-71-504, MCA, for all benefits paid and payable with respect to Jensen’s claim.

¶ 56 Having concluded that neither the Butte PRC nor Christianson was Jensen’s statutory employer under § 39-71-405, MCA, for Jensen’s claim, and having previously defaulted Paul Kessler and Steven Kessler d/b/a Artistic Exteriors due to their failure to respond to the UEF’s third party petition, to the extent the UEF has liability for Jensen’s claim, Paul Kessler and Steven Kessler d/b/a Artistic Exteriors, are ordered, jointly and severally, to indemnify the UEF pursuant to § 39-71-504, MCA, for all benefits paid and payable with respect to Jensen’s claim.

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⁶¹ UEF Opening Brief at 12, *citing Colmore*, ¶ 19.

⁶² See *Weidow*, ¶ 36.

ORDER

¶ 57 Issue One: Summary judgment is **GRANTED** in favor of the Montana State Fund.

¶ 58 Issue Two: Summary judgment is **GRANTED** in favor of Daniel Christianson.

¶ 59 Issue Three: Summary judgment is **GRANTED** in favor of the Uninsured Employers' Fund.

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

DATED in Helena, Montana, this 13th day of February, 2014.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Eric Rasmusson
William Dean Blackaby
Leanora O. Coles
Jeffrey Dahood/Michelle Sievers
Paul Kessler, Steven Kessler, and Jeff Hunter d/b/a Artistic Exteriors
Submitted: June 13, 2013