

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2005 MTWCC 24**

**WCC No. 2004-1125**

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**KORMAN MARKETING GROUP**

**Appellant**

**vs.**

**INDEPENDENT CONTRACTOR CENTRAL UNIT**

**Respondent.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** Icefox (his real name), a dogsled racer who had previously operated a business offering dogsled rides, bid and entered into a contract to provide dogsled races to guests of the operator of a guest ranch. The first contract was for the winter of 2001-2002. Icefox requested and received advances so he could purchase dogs and equipment. He in fact purchased the necessary dogs and equipment, laid out the specific dogsled routes on Ranch property, employed and paid others to assist him, supervised and operated the rides, and made safety decisions. He entered into a second contract for a second season, again specifying a price to which the Ranch then agreed. He did not enter into a contract for a third season and then sought unemployment benefits. The Ranch objected to his claim on the ground that he was an independent contractor and the matter was referred to the Independent Contractor Central Unit of the Montana Department of Labor and Industry, which is responsible for making an initial determination as to whether a worker is or is not an independent contractor. Following an ICCU decision, the Ranch filed a petition with the Workers' Compensation Court seeking a final determination of Icefox's status.

**Held:** Icefox was an independent contractor.

**Topics:**

**Independent Contractor: Independent Business.** Where an individual has previously been in the same line of business, negotiates a contract for the same sort of services and does so at arm's length, intends to go back into

his prior business, thereafter purchases the necessary equipment to operate the business, hires and pays employees, and is responsible for the actual services, including safety, the independent business requirement under part B of the AB test is met.

**Independent Contractor: Independent Business.** The fact that a contractor provides his or her services serially, a single client at a time, rather than to multiple clients simultaneously, does not disqualify the contractor from being deemed an independent contractor.

**Independent Contractor: Independent Business.** The fact that a contractor is not engaged in an actual business at the time he solicits a contract for his or her services does not disqualify the contractor from being deemed an independent contractor where he or she has been engaged in the same business previously and shows a clear intention to recommence that business as an independent enterprise.

**Independent Contractor: Elements: Tools and Equipment.** The fact that a contractor may rent or lease, or be provided with the premises on which he or she conducts business, is not *per se* inconsistent with being an independent contractor.

**Independent Contractor: Specific Cases.** A dogsled racer, who had previously operated a business giving dogsled rides to others; who entered into an arm's-length contract to provide dogsled rides for a guest ranch; specified the contract price, which was paid in installments; hired and paid his own employees; purchased and owned his own dogs, harnesses, truck for transport, and other equipment; laid out the dogsled route; was contractually committed to providing services; could not be terminated by the hiring party without liability; and was responsible for the operation and safety of the dogsled rides, was an independent contractor.

¶1 The trial in this matter was held in Helena, Montana, on February 16, 2005. The petitioner was present and represented by Mr. Tom W. Stonecipher and Ms. Bridget W. leFeber. Respondent, Independent Contractor Central Unit, was represented by Mr. Joseph R. Nevin.

¶2 Exhibits: Exhibits 1 through 31 and 35 through 37 were admitted without objection. Pages 2 through 8 of Exhibit 33 were admitted; the remaining pages of that exhibit were refused. Pages 33 through 38 and page 41 of Exhibit 34 were admitted; the remaining pages of that exhibit were refused. At the time of trial, the Court reserved ruling on Exhibit

32, which is the Determination of the Independent Contractor Central Unit. That exhibit is now admitted for purposes of procedural history only.

¶3 Witnesses and Depositions: Dan Martin, Kelly Johnson, and Icefox testified at trial. In addition, Icefox's deposition was submitted for the Court's consideration.

¶4 Issues Presented: The sole issue presented for the Court's determination is whether Icefox was an independent contractor or an employee when providing dogsled rides for Korman Marketing Group during the winters of 2001-2003.<sup>1</sup>

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

#### FINDINGS OF FACT

##### I. Korman Marketing Group, L.P.

¶6 Korman Marketing Group, L.P. (KMG) is a Texas Limited Partnership registered to do business in the state of Montana. It is an "experiential marketing" and consulting business, specializing in event planning for other businesses. As a part of its event planning business, it plans for and provides unique "experiences" for customers of its clients.

¶7 At times relevant to this action, KMG had a contract with Philip Morris, USA (Philip Morris), to provide event planning services for it at Crazy Mountain Ranch (Ranch). The Ranch is a guest facility located in Clyde Park, Montana. As a part of a rewards program to advertise its cigarettes, Philip Morris gives away Ranch vacations to selected smokers. The Ranch vacations are aimed at providing a western experience and promoting the Marlboro brand of Philip Morris cigarettes.

¶8 KMG planned and provided "experiences" for the Ranch guests. Examples of the "experiences" it provided during the winter months are downhill and cross-country skiing

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<sup>1</sup>The Final Pretrial Order sets out a second issue, that being whether Korman Marketing Group is liable for unemployment benefits paid to Icefox. That issue is not strictly within the jurisdiction of the Workers' Compensation Court, whose jurisdiction extends only to the independent contractor dispute. However, resolution of the independent contractor dispute will determine Korman Marketing Group's liability for unemployment benefits.

and ice fishing. In 1999 it added dogsled rides. Since that time it has contracted with three different dogsled providers to provide the rides.

## II. Icefox

¶9 Icefox is an experienced dogsledder. He has participated in dogsled racing and was known on the circuit as “Icefox,” a name he legally adopted in January 1999 or 2000 (Icefox Dep. at 5.) During the winters of 1991 through 1994, while living in Colorado, he provided dogsled rides to the public. Although he had a tough go of it and never made a profit, his intent was to make a profit. At the time, he owned his own dogs, sleds, and harnesses. Although he offered dogsled rides to the general public, many of his riders were guests of the various ranches over which he ran his dogs and sleds. In some cases, Icefox paid the ranchers for use of their land and trails.

¶10 When operating his dogsled rides in Colorado, Icefox used the name “Icefox Racing.” He also used the name “Icefox” in races he entered during that time.

¶11 From 1995 until 1999, Icefox focused on dogsled racing and entered a number of races.

¶12 In 1999, Icefox fell on hard times and had to sell his dogs and equipment.

¶13 In December 2000, Icefox moved to Montana and took a job as a dogsled guide<sup>2</sup> with Spirit of the North. During that winter, Spirit of the North contracted with KMG to provide dogsled rides for Ranch guests. Icefox ran the sled rides for his employer.

## III. The Contract with Icefox

¶14 In early 2001, Icefox became disenchanted with Spirit of the North and its operators. He told Dan Martin (Martin), who is KMG’s director of operations, that he would not be returning the next season. However, in discussions with Martin he indicated an interest in himself contracting to provide dogsled rides the next winter. He told Martin that he had more experience than the operators of Spirit of the North.

¶15 In March of 2001, Icefox submitted a proposal for the 2001-2002 winter season. Therein, he indicated he had found a house where he could live and keep his dogs, but he would need to lease it for one year and pay the rent up front. He outlined starting times for dogsleding sessions and the length of the trail, proposing to expand it from 1.8 miles to 3

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<sup>2</sup>See Icefox resume at page 6, Exhibit 37, wherein he lists his position with Spirit of the North as that of dogsled guide.

to 4 miles. He also proposed some additional dogsledding activities. Icefox specifically requested that Icefox employees be provided the same clothing as KMG staff and asked that they be allowed to eat with KMG staff. (Ex. 37.)

¶16 At the time of his proposal, Icefox lacked dogs, sleds, and harnesses. He also lacked the funds needed to lease the house. He therefore proposed that KMG provide significant up-front payments to enable him to purchase sleds, dogs, and harnesses and to pay the house rental. The total contract amount proposed by Icefox was \$49,000, which was in line with the amounts paid by KMG to previous dogsled operators.

¶17 KMG orally accepted the proposal in April 2001 after reviewing it with Philip Morris representatives. However, a formal contract was not signed until December 2001, either on December 14, 2001, or shortly thereafter. (Ex. 6.)

¶18 KMG provided advances to Icefox. The advances were envisioned by his original proposal (Ex. 37), but made on a somewhat different schedule than what Icefox originally proposed. The first advance was made July 31, 2001, for \$9,800. A second advance for \$9,800 was made August 21, 2001. Thereafter, three more advances of \$4,900 were made, the final one on November 27, 2001, just prior to the dogsledding season. (Ex. 10 at 4.) The advances totaled \$34,300. (*Id.* and Ex. 6 at 10.) The balance of the contract price was paid in installments during the dogsled season. (Ex. 6 at 10.)

¶19 Icefox used the advances to rent the house which he used as his base of operations, purchase sled dogs, sleds, and harnesses, maintain his truck, and pay expenses. (See Ex. 37.) A significant portion of the advance was used for the dogs, sleds, and harnesses.

¶20 The 2001-2002 contract expressly provided that Icefox was an independent contractor. (Ex. 6, ¶ 7.)

¶21 The contract obligated Icefox to provide dogsledding for Ranch guests from January 9, 2002, through March 19, 2002. (Ex. 6 at 7-9.) The times for dogsled tours were not specified, although they were outlined in Icefox's proposal. (Ex. 37.) The contract further provided that KMG could make recommendations concerning his services and that Icefox was to "effectuate such recommendations whenever reasonably possible . . . ." (Ex. 6, ¶ 1b.)

¶22 Under the agreement, Icefox was required to furnish his own equipment and supplies, and in fact he did so. Although KMG advanced monies which Icefox used to purchase equipment and supplies, it retained no legal interest in them; Icefox was the sole owner of the dogs and equipment and responsible for his own expenses. Upon any default, KMG's contractual remedy was monetary damages. (Ex. 6.)

¶23 Icefox already owned the truck used to transport the dogs.

¶24 Icefox was required to hire at least one assistant who was at least 21 years or older (*id.*, ¶ 1(e)(iv)), but he was responsible for hiring employees, determining their wages, and paying their wages. The minimum age requirement was imposed by Philip Morris on account of a national tobacco litigation settlement agreement which prohibited employees of less than 21 years of age from having contact with the company's guests.

¶25 The contract also required Icefox and his employees to wear KMG clothing; however, this requirement was inserted at the request of Icefox.

¶26 The contract contained specific provisions regarding termination. The termination provisions are not a paradigm of draftsmanship. The agreement could be terminated for cause; however, one paragraph states the KMG could "unilaterally terminate this Agreement with or without cause . . . **after** KMG has notified Vendor of any failure of Vendor to perform the terms and conditions of this Agreement to the satisfaction of KMG . . ." (*Id.*, ¶ 9, emphasis added, and see *Id.*, ¶¶ 2, 6.) If terminated by KMG prior to the actual dogsleding season, Icefox was to reimburse KMG for the advances paid to him. (*Id.*, ¶ 9.) If terminated by KMG after the start of the season, Icefox was not obligated to reimburse KMG for the advances. (*Id.*) Icefox could terminate the agreement but only upon thirty-day's notice and after providing KMG "the opportunity to cure . . . [the] cause for cancellation," thus indicating he could terminate only for cause and then only upon thirty-day's notice. (*Id.*)

¶27 Dogsleding was provided on property owned or leased by the Ranch. Icefox laid out the original trails for the 2001-2002 season, but snow was sparse and the trails had to be moved to another area. The other area was chosen by KMG but Icefox laid out the actual course using his own all-terrain vehicle. Ranch employees groomed the trails once he had laid them out and kept them groomed throughout the dogsled season.

¶28 The only equipment provided by KMG to Icefox was a radio which allowed him to keep in touch with the Ranch. KMG also transported guests to the trailhead.

¶29 Both parties performed their obligations under the 2001-2002 agreement. KMG was satisfied with Icefox's service and the parties agreed to a second season on essentially the same terms. (Ex. 9.) The only significant change was in the amount and schedule of payments to Icefox. At his request, the amount was increased to \$56,350 for the season. He requested the increase so he could add a sled and a handler. The other change was in the provision requiring Icefox to repay advances in the event the contract was terminated. That provision was eliminated.

¶30 There was conflicting testimony as to whether KMG required dogsled trips over objections by Icefox. I find that Icefox in fact did cancel dogsled trips due to adverse weather conditions and also cancelled a trip because his employee quit. KMG could make operational recommendations but ultimate decisions were made by Icefox.

¶31 Icefox provided his own liability insurance.

¶32 Following the 2002-2003 season, Icefox and KMG's manager discussed a third season. During those discussions, Icefox indicated dissatisfaction with the KMG arrangement and indicated that he had received other offers. He ultimately quoted \$70,000 as the price for another season and an oral understanding to renew the agreement was reached. However, Icefox did not thereafter contact KMG, no advances were made, and when KMG communicated with Icefox in November he replied that he had sold his sleds. No written contract was ever executed and KMG contracted with another dogsled provider for the 2003-2004 season.

¶33 Icefox filed a claim for unemployment benefits. As a result of his claim, the matter was referred to the Independent Contractor Central Unit of the Department of Labor and Industry (ICCU) which determined that Icefox was an employee. KMG then petitioned this Court.

¶34 In assessing the evidence, I found portions of Icefox's testimony not credible.

#### CONCLUSIONS OF LAW

¶35 Pursuant to section 39-71-415(3), MCA (2003), this Court has jurisdiction over the present controversy. § 39-71-415(3), MCA (2003). The proceeding is *de novo* and the Court's review is plenary. *Id.*

¶36 While the genesis of the present controversy was a claim for unemployment benefits, the standard for determining whether Icefox was an employee or independent contractor is the same as set out in section 39-71-120, MCA (2003), under the Workers' Compensation Act. Section 39-51-201(15), MCA, which is part of the provisions governing unenforcement benefits, defines "independent contractor" as follows:

(15) "Independent contractor" means an individual who renders service in the course of an occupation and:

(a) has been and will continue to be free from control or direction over the performance of the services, both under a contract and in fact; and

(b) is engaged in an independently established trade, occupation, profession, or business.

§ 39-51-201(15), MCA (2003). The two criteria set out in the section are commonly known as the AB test or as parts A and B.

### I. Part A – Control

¶37 Part A analysis has four subparts. Those parts are “(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.” *Wild v. Fregein Constr.*, 2003 MT 115, ¶ 33, 315 Mont. 425, 68 P.3d 855.

#### 1. Right of Control

¶38 In determining whether the hiring party exercises or has a right of control inconsistent with independent contractor status, the Court must determine whether the hiring party “has the right to control the details, methods, or means of accomplishing the individual's work, and not just the end result of the work.” *American Agrijusters Co. v. Montana Dept. of Labor and Industry*, 1999 MT 241, ¶ 22, 296 Mont. 176, 988 P. 2d 782. However, the specification of details of the work is not inconsistent with independent contractor status so long as the details specified are “necessary to ensure that . . . [the hiring party] gets the end result from the contractor that he bargained for.” *Walling v. Hardy Constr.*, 247 Mont. 441, 448, 807 P.2d 1335, 1339 (1991).

¶39 In the present case, the end result bargained for by KMG was the provision of a wilderness experience involving dogsled rides for Ranch guests. To assure that end result, it was necessary to spell out a schedule of rides so that all Ranch guests had an opportunity to participate. It was also necessary for KMG to designate the general area where dogsled rides were offered since the rides took place on Ranch owned or leased property.

¶40 Significantly, KMG did not specify the specific dogsled routes. It relied on Icefox's expertise to lay out the routes and assure their safety. Similarly, KMG was not involved in the actual dogsled operations; again, Icefox had the expertise in that area and KMG relied upon him to provide safe and exhilarating rides for Ranch guests. Icefox was also responsible for the care and feeding of his dogs and the maintenance of dogsled equipment, again, without any evidence of interference or control by KMG.

¶41 Icefox also determined the number of employees he needed to assist him, although the contract specified a minimum number essential to operations and a minimum age of the employees. The minimum age requirement was required by a nationwide tobacco litigation settlement. But beyond those basic requirements, Icefox determined who he hired, fixed the wages of his employees, and directly supervised them.



¶42 Icefox's exercise of control was more consistent with his being an independent contractor than an employee. I therefore conclude that KMG did not retain the degree of control of details which are indicative of an employment relationship.

## 2. Method of Payment

¶43 The method of payment factor clearly favors a finding that Icefox was an independent contractor. The contract called for payment of a specific amount rather than hourly wages. Moreover, it was Icefox who fixed the amount of compensation and the schedule of compensation.

## 3. Equipment

¶44 The equipment factor similarly favors a finding that Icefox was an independent contractor. He purchased and owned all of the equipment essential to dogsledding, including the sleds, dogs, harnesses, and the truck used to transport the dogs and equipment. He fed and cared for the dogs.

¶45 Icefox insists that KMG's contribution of the property on which the dogsledding took place and its furnishing a worker and equipment to groom trails constitutes equipment essential to the dogsled operations, thus tipping the equipment factor in favor of employment. I am unpersuaded by the argument. Independent contractors often furnish services on property owned and maintained by others. Construction contractors, for example, work on property owned or controlled by others. Food service providers at universities utilize space furnished and maintained by universities. Retailers often lease rather than own retailing space.

¶46 The furnishing of the property and groomed trails in this case is a far cry from the sort of services and facilities which I found were indicative of an employment relationship in my recent decision in *Tyad, Inc. v. Independent Contractor Central Unit*, 2005 MTWCC 16. That decision involved exotic dancers. The equipment they furnished – dancing outfits – was a minuscule part of what was required for them to perform. They could not perform without a stage, a disc jockey, stereo equipment, and bouncers, all of which were furnished by the bar at which they were employed. While the contract with the dancers was structured as a "stage rental agreement," the agreement was simply a device to obtain their dancing services. Moreover, their services were the core attraction and an integral part of the business operation itself, unlike here where Icefox contracted to furnish only one of many activities provided for Ranch guests.

#### 4. Right to Fire

¶47 As with the other factors, this factor too favors a finding that Icefox was an independent contractor. The right to terminate the relationship was spelled out in the contract. Once the sledding season began and Icefox began rendering actual services, KMG could terminate only for cause and forfeited any right to recover advance payments made to Icefox. (Ex. 6, ¶ 9.)

#### II. Part B – Independent Business

¶48 Under part B of the independent contractor analysis, KMG must show that Icefox was engaged in an independently established trade, occupation, profession, or business. In *Lundberg v. Liberty Northwest Ins. Co., Inc.*, 268 Mont. 499, 887 P.2d 156 (1994), the Supreme Court held that where a business is involved, the business must exist independently of the relationship at issue and must offer similar services to others. 268 Mont. at 504, 887 P.2d at 159. *Lundberg* does not require that the services be provided to others simultaneously. Thus, it does not preclude a finding of an independent contractor relationship where the contractor offers his or her services serially rather than concurrently, as for example an independent mason who limits his work to a single project at a time.

¶49 In this case, Icefox had previously operated a business offering the same services – dogsled rides – as he offered to KMG. While he was not operating that business at the time he contracted with KMG, his actions evidence his clear intent to go back into a business of operating dogsled rides on an independent basis rather than simply hire himself out as an employee. The contract he entered into with KMG was an arm’s-length one. He made an offer, including a price, which was accepted by KMG. He used the advances, which he requested in his offer and which were incorporated into the contract, to purchase dogs, sleds, harnesses, and other necessities which he could use to offer his services to others. The sort of assets purchased by Icefox are not the sort of assets an employee would purchase. Moreover, the contract with KMG did not limit him from offering dogsled rides to others, and in any event was for one season. Indeed, at the end of the second season with KMG, Icefox indicated an intent to explore other opportunities and indicated he had other offers. I therefore find and conclude that Icefox reestablished an independent business at the time he entered into the agreement with KMG.

#### III. Resolution

¶50 The contracts in this case expressly state that Icefox was an independent contractor. However, designating a worker an independent contractor is not dispositive of the worker’s status. *Lundberg, supra*. The worker must in fact meet the test laid out in section 39-51-201(15), MCA (2003). Moreover, “[u]nless both parts of the test are satisfied by a

convincing accumulation of undisputed evidence, the worker is an employee and not an IC.” *Wild, supra.*, ¶ 34.

¶51 The contract for Icefox’s services satisfies both parts A and B of the independent contractor test. Icefox had previously been engaged in a business furnishing dogsled rides, albeit an unsuccessful one, and clearly intended to reestablish himself in that business. He negotiated the agreement to furnish his services. Indeed, he determined essential terms, including compensation, for providing dogsled rides. He purchased and owned the equipment necessary to his operations. He controlled the details involved with providing dogsled rides. He was paid on a contract basis and under a payment schedule he himself determined. He could not be terminated at will without KMG incurring liability. I therefore find and conclude that Icefox was an independent contractor.

### JUDGMENT

¶52 Judgment is hereby entered finding that Icefox was an independent contractor while working for Korman Marketing Group, L.P. during the winters of 2001-2002 and 2002-2003.

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

¶54 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 3<sup>rd</sup> day of May, 2005.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Tom W. Stonecipher  
Ms. Bridget W. leFeber  
Mr. Joseph R. Nevin  
Submitted: February 16, 2005