

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 10

WCC No. 2005-1311

STEVEN KINNEY

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

MARGARET AND ALVIN THERRIAULT, d/b/a WOODLAND CREATIONS

Employer/Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner was injured on his first day working at a hardware store and cabinetmaking shop while he was clearing out an area of the shop in which he could create woodcarvings on cabinet doors. He claimed he was an employee hired to apprentice as a cabinetmaker and to create woodcarvings. The shop owner claimed Petitioner was an independent contractor hired only to create woodcarvings on cabinet doors and to occasionally peel logs for furniture.

Held: While only a handful of facts were established due to the short nature of Petitioner's relationship with the cabinetmaking shop prior to his injury, the facts which were established support a finding that Petitioner was an independent contractor and not an employee.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: § 39-71-120. As an artist who sells his work directly to individuals and by placing pieces on consignment, Petitioner is clearly

engaged in an independently established trade, occupation, profession, or business, thereby meeting the requirements of § 39-71-120(1)(b), MCA.

Independent Contractor: Independent Business. As an artist who sells his work directly to individuals and by placing pieces on consignment, Petitioner is clearly engaged in an independently established trade, occupation, profession, or business, thereby meeting the requirements of § 39-71-120(1)(b), MCA.

Independent Contractor: Elements: Right of Control. Petitioner presented a calendar to his alleged employer which indicated he would be available for work for only six days in six weeks. Petitioner admitted he was dictating his hours of employment, and this tends against his alleged employer having the right of control.

Independent Contractor: Elements: Payment. Payment by the hour is a strong indication of an employer-employee relationship, while payment on a completed-project basis is an indication of independent contractor status. *Walling v. Hardy Constr.*, 247 Mont. 441, 449, 807 P.2d 1335, 1339 (1991). Petitioner stated his alleged employer agreed to pay him \$10 per hour. His alleged employer testified that she believed Petitioner would bid his work so that he would make approximately \$10 per hour for his labor on each contract. On the only day Petitioner worked, no one kept track of his hours. If Petitioner was to be paid on an hourly basis, it seems unlikely that neither party would be able to account for his time.

¶ 1 The trial in this matter was held on Tuesday, May 2, 2006, in Helena, Montana. Petitioner Steven Kinney was present and represented by David M. McLean. Respondent Uninsured Employers' Fund (UEF) was represented by Arthur M. Gorov. Margaret and Alvin Therriault, d/b/a Woodland Creations (Therriaults), were represented by Jesse Beaudette.

¶ 2 Exhibits: Exhibits 1 through 15 were admitted without objection. Exhibits 16, 18, 19, and 21 were objected to by the UEF and the Therriaults and were not admitted. Exhibit 17 was withdrawn. Exhibit 21 is the UEF investigation file, some of which is admissible, but portions of which are not because these portions consist of hearsay statements taken by Petitioner and forwarded to UEF. Counsel conferred after trial and agreed to remove the inadmissible portions of Exhibit 21. The remainder of Exhibit 21 was admitted. Exhibit 22 was submitted at the time of trial and admitted.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Kathy Stinson, M.D., Pat Abbott, RN, Margaret Therriault, and Alvin Therriault were taken and submitted to the Court. Petitioner, Margaret Therriault, and Alvin Therriault were sworn and testified at trial.

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

¶ 4a Whether Petitioner was an employee or an independent contractor.

¶ 4b If Petitioner was an employee, the amount of compensation due.¹

FINDINGS OF FACT

¶ 5 Petitioner resides in Philipsburg, Montana.²

¶ 6 Margaret and Alvin Therriault are the owners/operators of a hardware store and cabinetmaking business called Woodland Creations located in Philipsburg, Montana. Ms. Therriault runs the hardware store and makes cabinets. Mr. Therriault occasionally works in the hardware store.³

¶ 7 Mr. Therriault also runs a construction business called Woodland Construction.⁴

¶ 8 Ms. Therriault opened Woodland Creations and Home Center in June 2004. Prior to opening Woodland Creations, Ms. Therriault worked with Mr. Therriault doing construction work for Woodland Construction.⁵

¶ 9 Woodland Construction has had employees and has had workers' compensation insurance. Woodland Construction also hires independent contractors.⁶

¶ 10 Woodland Creations is regularly open Monday through Fridays. Ms. Therriault advertises that if she is around on Saturdays, the hardware store will be open. On Wednesdays, Mr. Therriault usually watches the store while Ms. Therriault goes out of town.⁷

¹ Pretrial Order at 2.

² Trial Test.

³ [Therriaults'] Response to Petition for Hearing at 1-2.

⁴ Trial Test.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

¶ 11 On August 20, 2004, a friend of Petitioner's told him that work might be available at Woodland Creations. Petitioner called the store and arranged to meet with Ms. Therriault.⁸

¶ 12 Petitioner is an artist by trade and creates woodcarvings, sculptures, and other artwork. Petitioner also does taxidermy. Petitioner made his living by selling his artwork and by picking up odd jobs in and around Philipsburg. He has no cabinetmaking knowledge or skills. Petitioner had not worked a full-time job since the late 1970s or early 1980s.⁹

¶ 13 Petitioner admitted that he has not filed income taxes in at least ten years. Petitioner considers his artwork and taxidermy to be his profession, and while he keeps a logbook of projects he has completed in addition to his portfolio, he does not know how much money he makes in a given year. Petitioner sometimes completes artwork and places it in local shops on consignment, while at other times he creates custom pieces for individuals.¹⁰

¶ 14 Some of the odd jobs Petitioner has held in the recent past include fencing, night calving, cutting posts and rails, carpentry, and brush clearing. In some of these jobs he was paid by the hour. For cutting posts and rails, he was paid by the piece. Petitioner considered himself to be an employee and not an independent contractor because he was directed what to do. However, he never filled out any employment paperwork and his employers never withheld money from his paychecks for taxes or other items.¹¹

¶ 15 The difficulty in this case lies in the fact that the parties' versions of events differ, and this Court finds Petitioner's credibility to be lacking in some respects. Furthermore, since Petitioner's relationship with Woodland Creations lasted less than a day, little empirical evidence exists to guide this Court in determining the nature of the parties' relationship.

¶ 16 According to Petitioner, he and Ms. Therriault agreed that he would have a job with Woodland Creations. Petitioner understood he would apprentice under Ms. Therriault to learn how to build cabinets and doors, and create custom woodcarvings for the cabinets. Petitioner testified that he believed Ms. Therriault hired him as an employee. Petitioner explained that he and Ms. Therriault agreed that he would be paid \$10 per hour and that his schedule would be four ten-hour days per week.¹²

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Kinney Dep. 8:24 - 14:21.

¹² Trial Test.

¶ 17 Petitioner stated that Ms. Therriault never asked him if he was an independent contractor, and she never asked him to obtain an independent contractor license.¹³

¶ 18 Petitioner owns his own woodcarving tools and would have used his own tools for any woodcarvings he created for Ms. Therriault. Petitioner does not own any cabinetmaking tools. Petitioner never discussed working in the hardware store with Ms. Therriault.¹⁴

¶ 19 In addition to his work at Woodland Creations, Petitioner agreed to provide peeled logs for Ms. Therriault for furniture. He planned to use his own tools to strip the logs. Petitioner never provided any logs to Ms. Therriault.¹⁵

¶ 20 Ms. Therriault explained for the Court the procedure either Woodland Construction or Woodland Creations would go through when it hired an employee, in terms of filling out tax withholding paperwork and filling out time sheets. Ms. Therriault stated that in August 2004, she was very busy and did not want to hire any employees because she would not have time to direct and instruct them. However, she wanted to find an independent contractor who could independently perform work that she could not do.¹⁶

¶ 21 Prior to August 21, 2004, Woodland Creations never had any employees although it has subsequently hired three employees who worked in the hardware store and were covered by workers' compensation insurance. Ms. Therriault explained that each time she hired an employee, she would interview the prospective employee and discuss hours and wages. On the first day of work, each employee would fill out a W-4 form and Ms. Therriault would photocopy the employee's identification. Every two weeks the employee would submit a completed time sheet which Ms. Therriault would forward to her accountant.¹⁷

¶ 22 On August 20, 2004, Ms. Therriault met with Petitioner and reviewed his portfolio. Ms. Therriault testified that she explained to Petitioner she did not want an employee. Rather, she explained that she was looking for an independent contractor to do woodcarvings. Ms. Therriault claims that Petitioner told her he was an independent contractor although he had never completed the State certification, but that he would be

¹³ Kinney Dep. 21:12-25.

¹⁴ Trial Test.

¹⁵ *Id.*

¹⁶ M. Therriault Dep. 17:24 - 18:6.

¹⁷ Trial Test.

willing to do so. Ms. Therriault stated that Petitioner agreed that he would begin the independent contractor licensing process the following Monday.

¶ 23 Ms. Therriault was interested in having Petitioner put woodcarvings on some of her cabinetry. She said that she did not want a cabinetmaking apprentice, never intended to use Petitioner in that capacity, and never told Petitioner that she would teach him to make cabinets.¹⁸

¶ 24 Ms. Therriault said she never agreed on a rate of pay with Petitioner. He informed her that he would like to make about \$10 per hour for his work, and she understood this to mean that when he bid carving jobs for her, his price would reflect his calculation of how many hours' work the job would take him.¹⁹

¶ 25 Ms. Therriault agreed that she and Petitioner also discussed Petitioner peeling logs for Ms. Therriault to use in her furniture. She explained that when people peeled logs for her previously, they had informed her how much they would like to be paid per log and she would either accept or reject the bid. Ms. Therriault said Petitioner was to have used his own tools to obtain and peel the logs.²⁰ She ascertained that Petitioner had his own chainsaw, drawknife, and pickup truck.²¹ She added that if there were no logs to be peeled and no carvings to complete, there would be no working relationship between herself and Petitioner.²²

¶ 26 Petitioner agreed that he could start work on Monday. Because Petitioner was anxious to begin work, Ms. Therriault agreed that he could come to the shop on Saturday and prepare a space in which to do his carvings.²³

¶ 27 On Saturday, August 21, 2004, Petitioner arrived at Woodland Creations at 8:00 a.m. The Therriaults arrived around 8:30.²⁴ Petitioner did not bring his woodcarving tools. He did not fill out any employment paperwork.²⁵ Petitioner and Ms. Therriault spent some

¹⁸ Trial Test.; M. Therriault Dep. 28:16-19.

¹⁹ Trial Test.

²⁰ *Id.*

²¹ M. Therriault Dep. 19:11-12.

²² M. Therriault Dep. 21:4-10.

²³ Trial Test.

²⁴ Kinney Dep. 16:10-13.

²⁵ Trial Test.

time reviewing Petitioner's portfolio.²⁶ The portfolio is several inches thick and contains numerous photographs of Petitioner's artwork and taxidermy.²⁷

¶ 28 Petitioner also brought a calendar on which he had written which days he would be available to work.²⁸ On the calendar, Petitioner had written "OFF" or "WORK" on each day for the remainder of August, plus September. For the remainder of August, he indicated he could work two days.²⁹ For the month of September, he indicated he could work four and a half days.³⁰

¶ 29 Petitioner cleaned out an area of the shop behind the hardware store to do his woodcarvings. Ms. Therriault explained that she preferred Petitioner do this work at her shop because she did not want to risk assembled pieces being lost or damaged.³¹

¶ 30 Petitioner testified that Ms. Therriault showed him how to use the table saw and Petitioner cut up some plywood and built shelves for a small storage room located off the shop which Petitioner then filled with cans of paint and varnish from the shop. Ms. Therriault testified that Petitioner did not cut any plywood on her table saw and that he did not build shelves for her storage room on August 21. She stated that the shelves were already in existence and that the paint had been stored on them for some time.³²

¶ 31 Mr. Therriault was also on the premises that day. Petitioner needed to relocate some 2x6 lumber from the area he was clearing. Mr. Therriault told Petitioner he could move it outside to one of two shipping containers used for storage. Petitioner loaded the lumber into his pickup truck and transported the lumber to one of the shipping containers.³³

¶ 32 The shipping container had a door on one of the narrow ends. In the container, lumber was stacked according to size and length. On the right-hand side of the door, 2x6

²⁶ *Id.*

²⁷ Shown to the Court as a demonstrative exhibit; see Minute Book Hearing No. 3704, Docket Item No. 41.

²⁸ Exhibit 15.

²⁹ Exhibit 15 at 1-2.

³⁰ Exhibit 15 at 3-4.

³¹ Trial Test.

³² *Id.*

³³ *Id.*

lumber was stacked. On the left-hand side of the door were other sizes of lumber. A narrow aisle ran the length of the shipping container between the stacks.³⁴

¶ 33 After Mr. Therriault left, a stack of 2x6 lumber tipped and collapsed on Petitioner, knocking him onto a stack of lumber across the aisle. Petitioner, unable to extricate himself, yelled for help.³⁵

¶ 34 Petitioner believes about a half-hour passed until the Therriaults discovered him pinned beneath the lumber in the shipping container.³⁶ The Therriaults removed the lumber and drove Petitioner to the emergency room, arriving at about 2:30 p.m.³⁷

¶ 35 Petitioner was treated for a broken rib and other injuries. While filling out the hospital paperwork, Petitioner was asked how the accident occurred and whether it was a workers' compensation injury. Petitioner claims Mr. Therriault informed the attending nurse that it was not a workers' compensation injury because Petitioner was an independent contractor. Petitioner testified that he did not know what an independent contractor was and he was so "shocked" when Mr. Therriault made that statement, that Petitioner did not contradict him. Petitioner began to worry that he was not going to be able to afford the medical treatment. When he was asked whether he was insured, he recalled that his parents had taken an insurance policy out on him as a child, and he handed his old insurance card to the nurse.³⁸

¶ 36 Ms. Therriault recalled that it was Petitioner who informed the nurse that he was an independent contractor. Later, when Petitioner went for x-rays, another hospital staff member spoke to the Therriaults and they informed that staff member that Petitioner was an independent contractor.³⁹

¶ 37 Mr. Therriault testified that Petitioner informed the nurse that he was an independent contractor and that he was insured, and that Petitioner then gave the nurse his insurance card. Mr. Therriault said later a different nurse asked him if Petitioner was an independent contractor and Mr. Therriault said he was.⁴⁰

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Exhibit 1 at 3.

³⁸ Trial Test.

³⁹ *Id.*

⁴⁰ *Id.*

¶ 38 Pat Abbott, RN, was the registered nurse on duty when the Therriaults brought Petitioner to the emergency room.⁴¹ Ms. Abbott filled out the Emergency Department Record when Petitioner arrived.⁴² On the form, Ms. Abbott wrote “Therriault Construction” on the line for employer. Underneath, she wrote “Independent Contractor.”⁴³

¶ 39 Ms. Abbott stated that Petitioner told her that Therriault Construction was his employer. She knows that either Ms. Therriault or Petitioner told her that Petitioner was an independent contractor, but she does not recall which one.⁴⁴ Ms. Abbott stated that she always asks if an injury that happened on the job is a workers’ compensation injury. She believes that is when someone said Petitioner was an independent contractor.⁴⁵

¶ 40 Ms. Abbott also asked Petitioner who was responsible for the billing, and he replied, “Self,” which she then wrote on the form in the blank next to “responsible party name.”⁴⁶ Next to the blank designated for insurance information, was written “Colonial,” but Ms. Abbott stated that this was not her handwriting and someone else must have added that information to the form later.⁴⁷

¶ 41 Kathy Stinson, MD, treated Petitioner in the emergency room on August 21, 2004. Dr. Stinson knew Petitioner had been injured while working, but she did not know whether he was an employee or an independent contractor.⁴⁸ Dr. Stinson did not recommend that Petitioner stay in the hospital overnight for observation.⁴⁹ Petitioner testified that the treating doctor advised him to stay overnight for observation, but he refused because of the expense.⁵⁰

⁴¹ Abbott Dep. 6:6-8.

⁴² Abbott Dep. 6:15-19.

⁴³ Exhibit 1 at 1.

⁴⁴ Abbott Dep. 7:5 - 8:2.

⁴⁵ Abbott Dep. 9:14-17.

⁴⁶ Abbott Dep. 9:11-13.

⁴⁷ Abbott Dep. 9:20-10:1.

⁴⁸ Stinson Dep. 11:18 - 12:1.

⁴⁹ Stinson Dep. 12:15-21.

⁵⁰ Trial Test.

¶ 42 After Petitioner was finished in the emergency room, the Therriaults returned with him to the hardware store where Mr. Therriault retrieved Petitioner's pickup truck and drove it to Petitioner's residence while Ms. Therriault drove Petitioner in the Therriaults' vehicle.⁵¹

¶ 43 Petitioner never performed any work for the Therriaults after August 21, 2004. He was released to work without restrictions on January 10, 2005.⁵² Aside from some artwork and taxidermy, Petitioner was not employed until after that date.

¶ 44 Petitioner claims he worked for seven hours on August 21 before the accident occurred. He was never paid for his time.⁵³

¶ 45 Ms. Therriault agreed that Petitioner has never been paid for the clean-up work he did on August 21. She testified that she believed he worked about four hours⁵⁴ and had expected Petitioner to incorporate this time into his first bid. After the accident, Ms. Therriault spoke by telephone with Petitioner a few times and Petitioner indicated that he still wanted to do some woodcarvings for Woodland Creations, but he never came back to the shop.⁵⁵

¶ 46 Mr. Therriault testified that in the week following Petitioner's accident, Mr. Therriault and one of his employees restacked the lumber in the cargo container.⁵⁶ On cross-examination, he identified that employee as Ross Macon, and confirmed that Mr. Macon was an employee of Woodland Construction and not an independent contractor. However, just prior to the close of the trial, Mr. Therriault informed the Court that upon reflection, he did not believe Mr. Macon helped him stack the lumber and he could not remember who, if anyone, did.

¶ 47 On November 1, 2004, Petitioner completed a First Report of Injury and Occupational Disease to the Department of Labor and Industry.⁵⁷ On December 14, 2004, he completed a Worker Relationship Questionnaire for the UEF.⁵⁸ On the questionnaire,

⁵¹ *Id.*

⁵² Exhibit 22.

⁵³ Trial Test.

⁵⁴ M. Therriault Dep. 42:21-25.

⁵⁵ Trial Test.

⁵⁶ *Id.*

⁵⁷ Exhibit 11.

⁵⁸ Exhibit 13.

Petitioner stated that the work he completed was “shop clean up & organization prior to building custom doors & cabinets.”⁵⁹ Petitioner described the terms of his work arrangement:

I was assigned [sic] clean up duties in the cabinet shop & once cleaned & organized I would work in the shop with the Therriaults building doors & cabinets. I would also be asked to load building materials into customers [sic] vehicles.⁶⁰

¶ 48 Petitioner further explained that he was going to apprentice in the cabinet shop, that his employer set the work schedule and rate of pay and directed his work, and that he and his employer discussed his work schedule to be four ten-hour days.⁶¹ Petitioner asserted that he was to report daily to get job assignments, that his employer owned and furnished all tools, equipment, supplies, and materials he was to use, and that Petitioner would furnish none.⁶²

¶ 49 The UEF denied Petitioner’s claim on December 15, 2004, stating that there was insufficient evidence to prove liability.⁶³ Following mediation, Petitioner filed a Petition for Hearing in this Court on May 4, 2005.⁶⁴

CONCLUSIONS OF LAW

¶ 50 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 Petitioner’s injury.⁶⁵

¶ 51 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁶⁶

⁵⁹ *Id.* at 1.

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 2.

⁶² *Id.* at 3.

⁶³ Exhibit 21 at 122.

⁶⁴ Petition for Hearing.

⁶⁵ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁶⁶ *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).

¶ 52 An independent contractor is one 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; and (b) is engaged in an independently established trade, occupation, profession, or business.⁶⁷ If Petitioner is an independent contractor, he is not entitled to compensation.⁶⁸

¶ 53 Petitioner clearly meets the requirements of § 39-71-120(1)(b), MCA. As an artist who sells his work directly to individuals and by placing pieces on consignment, he is clearly engaged in an independently established trade, occupation, profession, or business. However, an independent contractor relationship can be established only if both subparts of § 39-71-120(1), MCA, are met.⁶⁹ Therefore, in order to be considered an independent contractor, it must also be demonstrated that Petitioner was free from control or direction over the performance of his services to Woodland Creations.

¶ 54 A four-part test was developed to determine whether or not an employer has the right of control. The elements are: “(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.”⁷⁰ A finding that an individual is an independent contractor demands a convincing accumulation of these and other tests, while a finding of employee status can, if necessary, often be proven on the strength of one of the four items.⁷¹

¶ 55 The *Walling* case explains the first element:

The traditional test of employer/employee status is the *right* of the employer to control details of the work, not necessarily the exercise of that control. An employer of an independent contractor controls the “end result” of the contractor’s work, while control of the “means” by which the work is accomplished indicates that the worker is an employee. Without destroying independent contractor status, the owner or general contractor “is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for.”⁷²

⁶⁷ § 39-71-120(1), MCA.

⁶⁸ *Feather v. UEF*, 2005 MTWCC 15, ¶ 27 (citing §§ 39-71-118(1)(a) and -401(1), MCA (2003)).

⁶⁹ *Feather* ¶ 29 (citing *Wild v. Fregein Constr.*, 2003 MT 115, ¶ 34, 315 Mont. 425, 68 P.3d 855).

⁷⁰ *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 425, 584 P.2d 1298, 1301-02 (1978).

⁷¹ *Walling v. Hardy Constr.*, 247 Mont. 441, 447, 807 P.2d 1335, 1338-39 (1991) (quoting *Sharp*, 178 Mont. at 425, 584 P.2d at 1302).

⁷² *Walling*, 247 Mont. at 447-48, 807 P.2d at 1339 (citations omitted).

¶ 56 The parties agree that Petitioner was cleaning out an area of Woodland Creations' shop which he would use to create his carvings and it was while completing this task that Petitioner was injured. According to Ms. Therriault, that was Petitioner's only task on the day he was injured, and he was shown where he could relocate the moved items, but not instructed on how to go about doing so. According to Petitioner, he also built a set of shelves for paint storage in another room, a task unrelated to cleaning out a space for his woodcarving work.

¶ 57 The parties also disagree on specifically what tasks Petitioner would have performed had a working relationship continued between himself and Woodland Creations. Both parties agree that Petitioner would have created woodcarvings to adorn Ms. Therriault's cabinets. The parties agreed that Ms. Therriault would provide basic instructions – telling Petitioner, for example, to carve an elk on a particular door – but it would be up to Petitioner to determine how the actual carving was to be done.

¶ 58 Both parties also agreed that from time to time, Petitioner might bring Ms. Therriault peeled logs which Ms. Therriault would then use to build furniture. Ms. Therriault would tell Petitioner when she could use some logs and she would specify a quantity of logs and leave it up to Petitioner to determine where and how to obtain the logs.

¶ 59 Petitioner, however, claims that in addition to woodcarving and log peeling, he was going to apprentice with Ms. Therriault and learn how to make cabinets and doors. When Petitioner filed his first report of injury form, he omitted any mention of woodcarving or log peeling. Ms. Therriault testified that Petitioner was not going to apprentice and that she would not have had the time to teach him. She further testified that the reason she did not want an employee is because she was too busy to train one.

¶ 60 The calendar which Petitioner presented to Ms. Therriault on August 21, 2004, does not support Petitioner's claim that he was hired to be an apprentice to Ms. Therriault to learn cabinetmaking. Petitioner's calendar indicated that he would be available for only six days of work in six weeks. If Ms. Therriault intended to have an apprentice learn the cabinetmaking trade, it would make little sense for her to hire someone who would only be available one-tenth of the time during the ensuing month and a half. On the other hand, if Ms. Therriault desired, as she claims, to have Petitioner do occasional woodcarvings and supply her with peeled logs for furniture making, this arrangement makes more sense. Given the fact that the market for the woodcarvings was speculative based upon Ms. Therriault's belief that some of her cabinetry customers would like to have woodcarvings on the doors of cabinets which they purchased from her, there may very well have been no more than a few days' worth of work each month for Petitioner if woodcarving was the task he was hired to perform.

¶ 61 At trial, Petitioner admitted he was dictating his hours of employment. Petitioner's dictating his hours of work also tends against Ms. Therriault having the right of control.

¶ 62 The next element is the method of payment. *Walling* adopted the criteria set forth in *Larson*,⁷³ explaining payment by the hour is a strong indication of an employer-employee relationship, while payment on a completed-project basis is indication of independent contractor status. Payment on a piecework or commission basis is consistent with either status. Here, both parties agree that the amount discussed was \$10 per hour. Petitioner testified that he believed Ms. Therriault would pay him \$10 per hour, while Ms. Therriault testified that she believed Petitioner would bid his work so that he would make approximately \$10 per hour for his labor on each contract.

¶ 63 On August 21, 2004, apparently neither Petitioner nor Ms. Therriault kept track of how many hours Petitioner spent working in the shop. If Petitioner was to be paid on an hourly basis, it seems unlikely that neither party would be able to account for Petitioner's time. Although the Therriaults arrived at the shop around 8:30 a.m., Ms. Therriault and Petitioner spent some time reviewing his extensive portfolio and discussing his artwork prior to Petitioner beginning to clear out the area in the shop. Petitioner claims he worked seven hours that day, while Ms. Therriault estimated Petitioner worked four hours. The hospital records reflect that Petitioner was in the emergency room at 2:30 p.m. Petitioner's lack of care in keeping track of his hours indicates that he did not expect to get paid by the hour for his work at Woodland Creations.

¶ 64 Ms. Therriault also testified regarding a bidding process which she and Petitioner would use to determine a price for the logs. However, no logs were ever ordered and whether this is the process that would have been used is too speculative for the Court to give it any weight.

¶ 65 The third element is furnishing of equipment. Although Petitioner reported to the UEF that Woodland Creations would furnish all the tools and equipment he would use, and that he would furnish none, he acknowledged at trial that this was not the case, and that he would furnish all the tools and equipment he would use for woodcarving and log peeling. However, Petitioner owned no cabinetmaking tools. Therefore, if he were to perform any cabinetmaking duties for Woodland Creations, he would have had to use Ms. Therriault's woodworking tools.

¶ 66 On August 21, Petitioner did not bring his woodcarving tools with him to Woodland Creations. He and Ms. Therriault differ on whether he used her table saw to build shelves for a storage room. They agree he used his pickup truck to move the lumber from the shop to the storage container. Again, with Petitioner available for only a few days of work in the coming months, it does not appear realistic that Ms. Therriault would be able to teach Petitioner how to use her cabinetmaking tools and then, in light of Petitioner's limited availability, to get enough cabinetmaking work out of Petitioner that would have made it

⁷³ *Walling*, 247 Mont. at 449, 807 P.2d at 1339 (citing 1C A. Larson, *Workmen's Compensation Law*, § 44.33 at 8-94 (1990)).

economically worthwhile for her to spend her time teaching him. Aside from the cabinetmaking claim, every other task which Petitioner would have been asked to perform would have involved the use of tools and equipment which he owned and which he already used in his trade.

¶ 67 Additionally, irrespective of whether it was Petitioner or the Therriaults who informed Ms. Abbott that Petitioner was an independent contractor rather than an employee, Petitioner was aware that this representation had been made and he did not correct it. Ms. Abbott further recalled that Petitioner told her that he was the party responsible for the medical bills. Therefore, Petitioner apparently believed he was an independent contractor at the time of the emergency room visit. While this, of itself, is not conclusive, it further tends toward the Court's conclusion that Petitioner was an independent contractor.

¶ 68 The final element is right to fire. "Termination at will or for failure to perform certain details unrelated to the end result strongly indicates employee status."⁷⁴ Ms. Therriault testified that she did not have the right to fire Petitioner, but could terminate a contract. Petitioner did not comment upon whether he believed Ms. Therriault had the right to fire him. Regarding this element, there is simply not enough information in the record for this Court to make a determination.

¶ 69 Considering all these factors, the Court concludes Petitioner was an independent contractor when he was injured at Woodland Creations on August 21, 2004. Petitioner is clearly engaged in an independent occupation or business pursuant to § 39-71-120(1)(b), MCA. The Court further concludes that Petitioner was free from control or the direction of his services for Woodland Creations pursuant to § 39-71-120(1)(a), MCA.

¶ 70 At the time Petitioner was injured, he was in the process of clearing out a space in the Woodland Creations workshop where he could create woodcarvings. Petitioner was using his own pickup truck to transport lumber to a storage area outside the shop. He testified that he was able to dictate his own hours of work, and that he intended to use his own tools to create woodcarvings and to peel logs for Ms. Therriault. He and Ms. Therriault both agreed that Petitioner would be told what to carve, but not how to create the carving. Although Petitioner asserted that he was hired as a cabinetmaking apprentice, the evidence simply does not support his assertion. Ms. Therriault testified that she was too busy between running the hardware store and the cabinetmaking business to take on training an employee to help around the shop and store, let alone train someone in the cabinetmaking trade. What is most convincing to this Court, however, is the calendar which Petitioner submitted to Ms. Therriault indicating his hours of availability. The Court does not believe that Petitioner's assertion that he was to apprentice as a cabinetmaker is consistent with his being available to Ms. Therriault for only six days in the next month and a half.

⁷⁴ *Walling*, 247 Mont. at 449, 807 P.2d at 1339 (citation omitted).

¶ 71 As to the third element, with no evidence to the contrary, Petitioner's failure to keep track of his hours suggests that he did not expect to be paid by the hour for his work. As to right to fire, the Court does not have enough information from which to reach a conclusion.

¶ 72 While, as the Court notes above, the strength of one of the four items of the *Walling* test can be sufficient to indicate an individual is an employee and not an independent contractor, in this case the Court has not found even one such item. The evidence in this case is scant due to the short time in which Petitioner worked at Woodland Creations prior to his injury. Nonetheless, the existing evidence demonstrates Petitioner was free from control or direction over the performance of his services. Therefore, the Court concludes he was an independent contractor.

JUDGMENT

¶ 73 This Court determines that at the time of his August 21, 2004, injury, Petitioner was an independent contractor, pursuant to § 39-71-120(1), MCA.

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

¶ 75 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 5th day of March, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: David M. McLean
Arthur M. Gorov
Jesse Beaudette
Submitted: May 2, 2006