

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 31

WCC No. 2007-2021

MATTHEW R. RAYMOND

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner Matthew R. Raymond was injured on July 29, 2007, while working on the construction of a cabin. He worked on the project for eleven months. The property was owned by Joseph and Jean Seipel. Each week, Petitioner called on Joseph Seipel at the office of Market Research Group, a company which performs appraisals and conducts market research which Joseph operates as a sole proprietorship. Joseph paid Petitioner with checks bearing the Market Research Group name and address. Neither Joseph nor Market Research Group carried workers' compensation insurance at the time of Petitioner's injury. The Uninsured Employers' Fund denied liability for Petitioner's claim on the grounds that Petitioner was engaged in casual employment.

Held: Although Petitioner was paid out of the Market Research Group checking account, the evidence demonstrates that Joseph wrote many personal checks on that account. Joseph testified that he did not deduct personal expenses, including the money paid to Petitioner, as a business expense. While some evidence suggests that Joseph may have had a "profit motive" for the Lincoln property, ultimately, Petitioner offered insufficient proof to meet his burden. Therefore, I conclude Petitioner was engaged in "casual employment" as defined by § 39-71-116(6), MCA.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. Petitioner was found to be engaged in "casual employment" where he worked on a home being constructed as a second

residence and where no evidence indicated that the homeowner deducted the property as a business expense. While the homeowner paid Petitioner with checks written on a business account, the evidence demonstrated that the homeowner wrote many personal checks on that account and the amount of money expended from this account far exceeded the amount claimed as business expenses. Petitioner failed to prove that the homeowner had a “profit motive” regarding this property.

Employment: Casual Employment. Petitioner was found to be engaged in “casual employment” where he worked on a home being constructed as a second residence and where no evidence indicated that the homeowner deducted the property as a business expense. While the homeowner paid Petitioner with checks written on a business account, the evidence demonstrated that the homeowner wrote many personal checks on that account and the amount of money expended from this account far exceeded the amount claimed as business expenses. Petitioner failed to prove that the homeowner had a “profit motive” regarding this property.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. Although in *Colmore*, the Supreme Court noted that “[t]he important fact” was that the injured worker’s only employment and occupation at the time of his injury was with the employer at issue, § 39-71-116(6), MCA, specifically states that casual employment is defined by whether the employment is in the usual course of business, etc., for the employer – not the employee. In *Colmore*, the Supreme Court ultimately based its decision that the injured worker was not a casual employee not on the employee’s occupation, but on the employer’s “profit motive.”

Employment: Casual Employment. Although in *Colmore*, the Supreme Court noted that “[t]he important fact” was that the injured worker’s only employment and occupation at the time of his injury was with the employer at issue, § 39-71-116(6), MCA, specifically states that casual employment is defined by whether the employment is in the usual course of business, etc., for the employer – not the employee. In *Colmore*, the Supreme Court ultimately based its decision that the injured worker was not a casual employee not on the employee’s occupation, but on the employer’s “profit motive.”

¶ 1 The trial in this matter was held on March 24, 2009, in Great Falls, Montana. Petitioner Matthew R. Raymond (Raymond) was present and represented by J. Kim Schulke. Respondent Uninsured Employers’ Fund (UEF) was represented by Arthur M. Gorov and Leanora O. Coles.

¶ 2 Exhibits: Exhibits 1 through 15, 17, and 19 through 26 were admitted without objection. Exhibits 16 and 18 were withdrawn.

¶ 3 Witnesses and Depositions: The parties agreed that the deposition of Jacob Seipel (Jacob) and the March 14, 2008, and February 23, 2009, depositions of Joseph Seipel (Joseph) can be considered part of the record. The depositions had also been copied and listed as Exhibits 19, 20, and 26, respectively. Raymond was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issue of law:¹

¶ 4a Whether Petitioner was engaged in “casual employment” as defined by § 39-71-116(6), MCA.

FINDINGS OF FACT

¶ 5 Raymond testified at trial and I found him to be a credible witness. Raymond resides in Great Falls and is currently self-employed as a handyman and carpenter. In the fall of 2006, Raymond’s acquaintance, Jacob, asked him to work for a few weeks on a cabin in Lincoln, Montana, which was under construction.² The property was owned by Joseph and Jean Seipel.³ Raymond accepted Jacob’s offer. He understood that he would help set logs for roof supports. Prior to this time, he had not earned a living doing construction work, but had some experience with home improvement projects.⁴

¶ 6 Raymond began working on the Lincoln property in September 2006.⁵ Although Raymond was initially hired to set logs for a couple of weeks, the construction crew was short-handed and he agreed to continue working on the cabin with Jacob.⁶ On a typical workday, Jacob picked Raymond up from his home in Great Falls at 7:30 a.m. They would travel to the Lincoln property and perform whatever construction work was pending, including framing, installing doors and windows, and insulating. They ceased work between 3:30 and 6:00 p.m. and returned to Great Falls. On most days, Raymond was

¹ Pretrial Order at 2.

² Trial Test.

³ Pretrial Order at 2, Uncontested Fact No. 3.

⁴ Trial Test.

⁵ Pretrial Order at 2, Uncontested Fact No. 4.

⁶ Trial Test.

home by 6:00 or 6:30 p.m. Raymond and Jacob usually worked three or four days per week. With the exception of the day Raymond was injured, he traveled and worked with Jacob every day that he worked on the Lincoln property.⁷

¶ 7 Raymond testified that Jacob never discussed workers' compensation coverage with him, nor did they discuss how Raymond would be paid for his labor. After his first two weeks of work, Raymond received payment from Joseph in an amount which worked out to approximately \$125 per day. Raymond thereafter visited Joseph's office at Market Research Group in Great Falls each Friday and informed Joseph how much he had worked that week. Joseph paid him at a rate of \$125 per day. Raymond recalled that he was also paid in cash on one occasion.⁸

¶ 8 On July 21, 2007, Joseph wrote a letter which stated that Raymond had been employed doing construction work in Lincoln since September 2006. Joseph indicated that Raymond's average pay was approximately \$2,000 per month. The letter was signed by "Joe Seipel" for "Market Research Group," listing the business address and phone number.⁹ Raymond testified that Joseph prepared this letter at Raymond's request to help Raymond qualify for financial assistance for his daughter's medical treatment. Raymond asked Joseph to write the letter, but he did not specifically ask him to sign the letter on behalf of Market Research Group.¹⁰

¶ 9 On July 29, 2007, Raymond lacerated his right index finger while operating a table saw at the Lincoln property.¹¹ Raymond was working alone that day because Jacob was out of town. Raymond went to the closest neighbor, and the neighbor drove him to another location where Raymond met his father, who drove him to the emergency room.¹² Raymond did not perform any more work on the Lincoln property after his industrial accident. The last time Raymond visited the Lincoln property was a day or two later to pick up his truck.¹³

⁷ Trial Test.

⁸ Trial Test.

⁹ Pretrial Order at 2, Uncontested Fact No. 8; Exhibit 8.

¹⁰ Trial Test.

¹¹ Pretrial Order at 1, Uncontested Fact No. 1.

¹² Trial Test.

¹³ Trial Test.

¶ 10 From September 2006 until his injury on July 29, 2007, Raymond's only employment was at the Lincoln property.¹⁴ While Raymond generally worked with Jacob except when Jacob left to conduct appraisals, he only saw Joseph at the job site once or twice a month when he checked on the construction progress. Occasionally, when Raymond went to the Market Research Group office to pick up his paycheck, he discussed construction projects with Joseph. Joseph gave him a general idea of how he wanted certain features of the home to look.¹⁵

¶ 11 Raymond's paychecks were written by Joseph on a checking account at Montana Federal Credit Union in Great Falls. "The checks bear the business name of Market Research Group and the business telephone number and business address for that business."¹⁶ Raymond never received a W-2 form from Joseph and he never asked for one. He listed the checks Joseph wrote to him on a schedule attached to his tax return. Raymond never received any other kind of tax form from Joseph, and he did not have any type of insurance coverage provided by Joseph.¹⁷

¶ 12 Raymond worked on the Lincoln property for nearly eleven months, and was paid over \$16,000 for his work.¹⁸ During the time Raymond worked on the Lincoln property, he never saw anyone looking at the property for the purpose of purchasing it, and he never saw a sign advertising it for sale. Raymond does not know if the property was intended to be sold as part of Joseph's business. He testified that he does not believe Joseph had decided what his plans were for the Lincoln property at that time.¹⁹

¶ 13 Neither Joseph nor Market Research Group had workers' compensation insurance in effect on July 29, 2007.²⁰ The Uninsured Employers' Fund received the claim and has denied liability on the grounds that Raymond was a casual employee.²¹

¹⁴ Ex. 7 at 77.

¹⁵ Trial Test.

¹⁶ Pretrial Order at 2, Uncontested Fact No. 7.

¹⁷ Trial Test.

¹⁸ Pretrial Order at 2, Uncontested Fact No. 6.

¹⁹ Trial Test.

²⁰ Pretrial Order at 2, Uncontested Fact No. 9.

²¹ Pretrial Order at 2, Uncontested Fact No. 11.

¶ 14 Jacob is a self-employed real estate appraiser.²² At his deposition, Jacob testified that he does not do any work other than real estate appraisal, and that he was not “really” paid for the construction work he performed on the Lincoln property.²³ He estimated that 99% of his income in 2006 and 2007 came from performing real estate appraisals, and the other 1% came from doing odd jobs for Joseph. During the time Jacob worked on the Lincoln property, he also performed real estate appraisals for which Joseph paid him. Jacob testified that he considered the construction work he performed on the Lincoln property to be assisting his father, rather than a paid job. Joseph paid him by check, but the work was not itemized and he does not know if Joseph intended any of the money to be compensation for construction work.²⁴

¶ 15 Jacob sometimes came to Joseph’s office at the same time as Raymond, and Jacob occasionally received a check from Joseph at the same time. Raymond never heard the Seipels discuss whether Jacob’s pay was for work done on the cabin or for appraisal work.²⁵ Raymond recalled that Jacob left the job site in Lincoln three times to perform appraisal work.²⁶

¶ 16 When Jacob worked on the Lincoln property with Raymond, he supervised Raymond’s work. Raymond did not bring any tools except possibly some small hand tools. Joseph paid Raymond for his work, but did not supervise Raymond.²⁷

¶ 17 Jacob testified that he has not worked on any construction projects for Market Research Group in the last ten years, but that he has worked on “family-oriented” construction projects for Joseph for which he was not directly paid.²⁸ These projects included building a deck and a fence at Joseph’s home as well as reattaching trim to Joseph’s home. Jacob stained wood and fixed a roof vent at a cabin Joseph owns in Hungry Horse. Jacob also helped Joseph on the construction of the cabin in Lincoln because the general contractor was short-staffed.²⁹ Jacob testified that Joseph paid him

²² Jacob Seipel Dep. 6:6-9.

²³ Jacob Seipel Dep. 6:10-24.

²⁴ Jacob Seipel Dep. 7:4-25.

²⁵ Trial Test.

²⁶ Trial Test.

²⁷ Jacob Seipel Dep. 26:13-25.

²⁸ Jacob Seipel Dep. 12:6-24.

²⁹ Jacob Seipel Dep. 13:1-14.

to build a garage during the time when Jacob ran a now-defunct construction and contracting business called Foothills Construction and Contracting, LLC.³⁰ Jacob ran that business for a short time in the late 1990s or early 2000, but he has not been a contractor in the last five years.³¹

¶ 18 Jacob does not know why his parents decided to build a home in Lincoln and he does not know if they intend to sell it. At the time of his deposition in March 2008, he estimated that the home was approximately 85% completed.³²

¶ 19 Jacob testified that in the last ten years, Joseph has been a licensed real estate appraiser, he has a Ph.D. and has taught college classes, and he occasionally performs market research.³³ Jacob stated that to the best of his knowledge, Joseph has never done construction or contracting work for a living.³⁴

¶ 20 Joseph resides in Great Falls. He is married to Jean.³⁵ Joseph is an independent real estate appraiser.³⁶ Joseph personally owns several pieces of real estate, including a cabin in Hungry Horse which is on leased ground; an office building in Great Falls where his business is located; the Lincoln property where Raymond was injured; he and his wife's residence on Flood Road in Great Falls; and a "tear-down property" on Heavens View Lane in Great Falls.³⁷ Joseph stated that neither his wife Jean nor any of his businesses own any other real property.³⁸ Prior to living in the residence on Flood Road, the Seipels owned and lived in a residence on First Avenue South. Joseph did not recall how much they paid for that home, nor for what price they sold it. He stated that he does not know how much the Flood Road residence cost because it was a construction project that went on for an extended period of time.³⁹ In 2006, Joseph engaged a home-building company to build a

³⁰ Jacob Seipel Dep. 14:10-22.

³¹ Jacob Seipel Dep. 24:7-23.

³² Jacob Seipel Dep. 16:11-16.

³³ Jacob Seipel Dep. 25:20-25.

³⁴ Jacob Seipel Dep. 26:1-6.

³⁵ Joseph Seipel 3/14/08 Dep. 5:11-16.

³⁶ Joseph Seipel 3/14/08 Dep. 6:2-3.

³⁷ Joseph Seipel 3/14/08 Dep. 7:11-18.

³⁸ Joseph Seipel 3/14/08 Dep. 8:2-10.

³⁹ Joseph Seipel 3/14/08 Dep. 54:3-15.

home on the property at Heavens View Lane. The home was improperly built, however, and has to be torn down.⁴⁰ At the time of Joseph's deposition, litigation was pending in district court regarding the construction of that home.⁴¹ Joseph is the plaintiff in that litigation.⁴²

¶ 21 Joseph testified that in the last ten years, he had his Flood Road residence built, and he had a garage built on the property where his office is located.⁴³ He also purchased the property on Heavens View Lane and contracted to have the home built which is now in litigation.⁴⁴ Joseph testified that his wife also purchased and "flipped" a home in the last ten years.⁴⁵

¶ 22 Joseph purchased the property in Lincoln as bare land, and had it for a few years before he began construction of the cabin in the spring of 2006.⁴⁶ He believes the property was initially in his name, but he and his wife took out several different construction loans and other loans on the property and some were in her name, or both of their names.⁴⁷

¶ 23 Joseph does not live at the Lincoln property. He stated that it is a "second property" and he does not intend to reside there. At the time of his deposition on March 14, 2008, the construction on the cabin had progressed to the point that the property was habitable. Joseph explained, however, that he did not find Lincoln to be a "great place to hang out in the winter," so he had only spent one night there.⁴⁸ He stated that he believed it was possible that he would someday sell the Lincoln property, but he had no specific plans to do so.⁴⁹ He stated that he built the cabin with the purpose of using it as a second home.⁵⁰

⁴⁰ Joseph Seipel 3/14/08 Dep. 54:22 - 55:15.

⁴¹ Joseph Seipel 3/14/08 Dep. 55:16-20.

⁴² Joseph Seipel 3/14/08 Dep. 56:12-17.

⁴³ Joseph Seipel 3/14/08 Dep. 18:14-23.

⁴⁴ Joseph Seipel 3/14/08 Dep. 19:7-11.

⁴⁵ Joseph Seipel 3/14/08 Dep. 22:1-4.

⁴⁶ Joseph Seipel 3/14/08 Dep. 14:6-20.

⁴⁷ Joseph Seipel 3/14/08 Dep. 14:21 - 15:17.

⁴⁸ Joseph Seipel 3/14/08 Dep. 13:1-20.

⁴⁹ Joseph Seipel 3/14/08 Dep. 13:21 - 14: 1.

⁵⁰ Joseph Seipel 3/14/08 Dep. 14:2-5.

¶ 24 Market Research Group conducts research projects for other companies. Market Research Group occasionally conducts surveys or performs other marketing and market research projects when it is hired by other companies.⁵¹ Joseph also runs a related business called Foothills Research Institute, LLC. He explained that at one time he intended to shift the work done as “Market Research Group” under the “Foothills Research Institute” company name, but that never happened. In some directories, his company is listed under both names.⁵² Foothills Research Institute is essentially inactive.⁵³ Joseph testified that his real estate appraisal work has always been performed under the Market Research Group business name.⁵⁴ Neither Market Research Group nor Foothills Research Institute has ever owned any real estate.⁵⁵ Joseph testified that he and his businesses conduct real estate appraisals and market research, and those are his only profitable activities.⁵⁶

¶ 25 Neither Market Research Group nor Foothills Research Institute had any employees in 2006 or 2007. Joseph testified, “We’re self-employed and anybody that does work with us is under contract or independent.”⁵⁷ He further stated that Jacob primarily conducts appraisal work for the company and is paid to conduct appraisals by Market Research Group.⁵⁸

¶ 26 Joseph stated that he prepares all of the financial paperwork for himself and his businesses. He does not use an accountant.⁵⁹ He prepares his own taxes.⁶⁰

⁵¹ Joseph Seipel 3/14/08 Dep. 9:9-24.

⁵² Joseph Seipel 3/14/08 Dep. 9:25 - 10:22.

⁵³ Joseph Seipel 3/14/08 Dep. 57:23-24.

⁵⁴ Joseph Seipel 3/14/08 Dep. 10:25 - 11:1.

⁵⁵ Joseph Seipel 3/14/08 Dep. 23:16-19.

⁵⁶ Joseph Seipel 3/14/08 Dep. 31:23 - 32:4.

⁵⁷ Joseph Seipel 3/14/08 Dep. 11:10-15.

⁵⁸ Joseph Seipel 3/14/08 Dep. 17:14-19.

⁵⁹ Joseph Seipel 3/14/08 Dep. 12:10-15.

⁶⁰ Joseph Seipel 3/14/08 Dep. 29:25 - 30:1.

¶ 27 While Joseph had hired contractors for the Lincoln property, Raymond was the only person he ever hired to work individually on the property.⁶¹ Joseph had only a general knowledge of the tasks Raymond performed on the home because Jacob supervised him.⁶² Joseph stated that Jacob is paid by Market Research Group to perform appraisals and not for the construction work he performed on the Lincoln property.⁶³ Jacob drove Raymond to and from the Lincoln job site using Joseph's pick-up truck. Either Jacob or Joseph paid for the gas and maintenance on the vehicle, and Joseph paid for the licensing and insurance. Joseph testified that Market Research Group did not pay for the gas, but acknowledged that checks may have been written on the Market Research Group checking account for some of the vehicle expenses.⁶⁴ However, Joseph asserted that he pays bills from several different checking accounts and that he later determines whether each check is deductible as a business expense. He uses a different vehicle for appraisals which he uses solely for appraisal work, and he does not deduct mixed-use vehicles like the pick-up truck Jacob used for commuting to the Lincoln property.⁶⁵

¶ 28 Joseph testified that he wrote the July 21, 2007, letter regarding Raymond's employment at Raymond's request to help him obtain a loan.⁶⁶ Raymond was not paid hourly. Raymond's pay was determined by considering how many hours he had worked and what kind of work he was doing, and then agreeing on an amount.⁶⁷ No timesheets or paystubs were created.⁶⁸ On a few occasions, Raymond was paid in cash.⁶⁹ Joseph alleges he has no records of the cash payments or of any other payments made to Raymond because he only keeps records of his business expenses, and he did not consider Raymond's labor to be a business expense.⁷⁰

⁶¹ Joseph Seipel 3/14/08 Dep. 17:20 - 18:6.

⁶² Joseph Seipel 3/14/08 Dep. 33:20-23.

⁶³ Joseph Seipel 3/14/08 Dep. 25:15 - 26:3.

⁶⁴ Joseph Seipel 3/14/08 Dep. 27:12 - 28:25.

⁶⁵ Joseph Seipel 3/14/08 Dep. 28:25 - 29:24.

⁶⁶ Joseph Seipel 3/14/08 Dep. 42:8 - 43:4.

⁶⁷ Joseph Seipel 3/14/08 Dep. 43:17-23.

⁶⁸ Joseph Seipel 3/14/08 Dep. 44:2 -7.

⁶⁹ Joseph Seipel 3/14/08 Dep. 44:12-15.

⁷⁰ Joseph Seipel 3/14/08 Dep. 44:16-20.

¶ 29 Raymond's counsel deposed Joseph for a second time on February 23, 2009, after Joseph produced tax returns and other financial documents pursuant to this Court's Order compelling their production. Joseph testified that his 2007 tax return indicates that he paid \$199,095 in wages in 2007, and that those wages were paid to himself, his sons Jacob and Jesse, and his wife Jean.⁷¹ Joseph testified that he usually spends a few days each year sorting through his receipts and completing his income tax returns, but he does not keep detailed records and he does not keep vehicle mileage logs.⁷² However, he further stated that the amounts claimed as deductions on his 2007 taxes do not include any wages paid to Raymond.⁷³ Regarding his 2006 tax returns, Joseph also could not account specifically for particular deductions, but stated that he was sure those deductions did not include Raymond's wages because he never deducted any construction wages as they were not a business expense.⁷⁴ Joseph further stated that he does not reconcile his bank account on a monthly basis, and he only briefly reviews bank statements when he receives them.⁷⁵

¶ 30 A review of cancelled checks from Joseph's accounts indicated that he paid Jacob approximately \$64,000 between September 2006 and July 2007. Joseph stated that this amount would have been for appraisal work Jacob performed for Market Research Group.⁷⁶ Joseph stated that because of Jacob's background in construction, he assisted the Seipels with construction projects. However, the wages paid to him were for appraisal work and he was not paid for the construction work he did on the Lincoln property.⁷⁷

¶ 31 Joseph believes that, except for the cash payments, all of the money he paid to Raymond for work on the Lincoln property came from the checking account with Market Research Group's name and address on the checks.⁷⁸ Joseph admitted that other checks written on that account paid for materials for the Lincoln home.⁷⁹ Joseph stated that he commingles his accounts and that checks written on this account could be for business or

⁷¹ Joseph Seipel 2/23/09 Dep. 6:17 - 7:25.

⁷² Joseph Seipel 2/23/09 Dep. 9:7-23.

⁷³ Joseph Seipel 2/23/09 Dep. 9:24 - 10:1.

⁷⁴ Joseph Seipel 2/23/09 Dep. 14:4-21.

⁷⁵ Joseph Seipel 2/23/09 Dep. 17:2-12.

⁷⁶ Joseph Seipel 2/23/09 Dep. 31:1-13.

⁷⁷ Joseph Seipel 2/23/09 Dep. 32:2-15.

⁷⁸ Joseph Seipel 2/23/09 Dep. 33:21-25.

⁷⁹ Joseph Seipel 2/23/09 Dep. 36:21 - 38:2.

personal expenses.⁸⁰ He also wrote checks on this account to make payments on lines of credit which could have been either personal or business lines of credit.⁸¹

¶ 32 On September 4, 2007, Joseph wrote a letter to the UEF which explained that Foothills Research Institute, LLC, was not an active entity, and that his business was Market Research Group. Joseph also clarified that Market Research Group is not the same business as “Market Research Group, Inc.,” which was an unrelated corporation operating in Great Falls. Joseph further stated that Raymond worked for him at a personal residence and was not employed by Market Research Group.⁸²

¶ 33 From 2001 through some point in 2008, property transactions in Cascade County which involved Joseph, Jean, or Jacob occurred on six parcels of real estate. It appears that Jacob bought and later sold one piece of property, Jean “flipped” one property, and Joseph and/or Jean purchased, refinanced, or made other modifications to the deeds of the other four properties.⁸³

CONCLUSIONS OF LAW

¶ 34 This case is governed by the 2007 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of Raymond’s industrial accident.⁸⁴

¶ 35 Raymond bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁸⁵

¶ 36 The only issue before the Court is whether Raymond was engaged in “casual employment.” Section 39-71-116(6), MCA, states, “‘Casual employment’ means employment not in the usual course of the trade, business, profession, or occupation of the employer.”

⁸⁰ Joseph Seipel 2/23/09 Dep. 54:10-14.

⁸¹ Joseph Seipel 2/23/09 Dep. 55:10-22.

⁸² Ex. 7 at 66.

⁸³ Ex. 11 at 1-7.

⁸⁴ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁸⁵ *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).

¶ 37 In *Colmore v. Uninsured Employers' Fund*,⁸⁶ the Montana Supreme Court considered whether a worker who died in a work-related accident on a ranch was a casual employee under the Workers' Compensation Act. In that case, the employer was engaged in other businesses in addition to leasing the ranch where the accident occurred. The Supreme Court noted that the worker was hired to replace and repair fencing on a working ranch that Colmore leased as a tax write-off. The ranch was not merely a summer home, but was deducted as a "business" expense on Colmore's federal tax return. The Supreme Court noted, "Therefore, even though he did not make a profit running the ranch, he did operate the ranch with a profit motive in mind – that of reducing his overall income tax through the business expenses he incurred while operating the ranch."⁸⁷ The Supreme Court concluded that the worker was not a casual employee because Colmore operated the ranch with a "profit motive."⁸⁸

¶ 38 The UEF argues that this case is distinguishable from *Colmore* because in the present case, Raymond was working on a private residence and not a property which was used as part of a business. In *Colmore*, the injured worker was working on a property which his employer deducted on his taxes as a business expense. In the present case, there is no evidence that Joseph deducted the Lincoln property as a business expense. Joseph testified that he intended the property to be a second residence, and the UEF argues there is no evidence to the contrary. The UEF further points out that while Joseph paid Raymond with checks bearing the Market Research Group name and address on them, the evidence further demonstrates that Joseph wrote a myriad of checks on that account for both business and personal reasons, and the fact that Raymond was paid out of this account does not establish whether Joseph deducted Raymond's pay as a business expense. In fact, the Court's own review of the Market Research Group checking account reveals that the amount of money expended from this account far exceeds the amount claimed as business expenses in the same year, thus bolstering the UEF's contention that this account was used for personal as well as business expenses.

¶ 39 Conversely, Raymond argues that the evidence demonstrates that Joseph engaged in buying and selling real estate as a business venture, and that he also acted as the general contractor on the Lincoln property and therefore was in the business of constructing the home. Raymond points to the July 21, 2007, letter which Joseph signed with the Market Research Group business name and address as further evidence that he was an employee of the business. Finally, Raymond argues that he worked on the Lincoln

⁸⁶ *Colmore*, 2005 MT 239, 328 Mont. 441, 121 P.3d 1007.

⁸⁷ *Colmore*, ¶ 28.

⁸⁸ *Colmore*, ¶ 32.

cabin as his exclusive employment for approximately ten months, and that an employment of that duration cannot be considered to be “casual.”

¶ 40 Although in *Colmore*, the Supreme Court noted, “The important fact is that [the injured worker] was employed to work for Colmore in the course of his agricultural business, and that [his] only occupation at the time was to repair and replace fences for Colmore,”⁸⁹ § 39-71-116(6), MCA, specifically states that casual employment is defined by whether the employment is in the usual course of the trade, business, profession, or occupation of the **employer** – not the employee. And while the Supreme Court noted that Colmore’s employee’s only occupation was to work for Colmore, it ultimately concluded that the employee was not a casual employee because of the **employer’s** “profit motive.”

¶ 41 The evidence demonstrated that on at least one occasion, Jean bought and sold a piece of real estate for profit. Although I harbor my own suspicions that Joseph **may** have had a profit motive for the Lincoln property, Raymond has failed to prove these suspicions by a preponderance of the evidence.

JUDGMENT

¶ 42 Petitioner was engaged in “casual employment” as defined by § 39-71-116(6), MCA.

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

DATED in Helena, Montana, this 4th day of September, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Leanora O. Coles
Joseph Seipel (courtesy copy)
Submitted: March 24, 2009

⁸⁹ *Colmore*, ¶ 26.