

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 28

WCC No. 2007-1984

EMERGENCY PREPAREDNESS SYSTEMS, LLC

Petitioner

vs.

WILLIAM C. SCOBIE

and

INDEPENDENT CONTRACTOR CENTRAL UNIT

Respondents.

***Appealed to Montana Supreme Court - 09/16/09;
Appeal Voluntarily Dismissed - 12/28/09***

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Respondent William C. Scobie filed a wage claim against Emergency Preparedness Systems, LLC, in the Wage and Hour Unit of the Montana Department of Labor on April 3, 2007. Scobie alleged he was owed wages for work performed for EPS between January 1, 2005, and March 30, 2007. The Wage and Hour Unit referred the question of whether Scobie was an independent contractor or an employee to the Independent Contractor Central Unit. The ICCU determined Scobie was an employee of EPS and not an independent contractor. EPS appealed the ICCU determination to this Court.

Held: The Court applies a two-part test to determine Scobie's employment status as either an employee or independent contractor. First, the Court must determine whether four control factors are met. Second, the Court must determine whether the individual is engaged in an independently established trade, occupation, profession, or business. Both parts of the test must be satisfied by a convincing accumulation of undisputed evidence in order to establish independent contractor status. EPS failed to satisfy the first part of the test. Therefore, the ICCU's determination that Scobie was an employee is affirmed.

Topics:

Independent Contractor: Elements: Right of Control. Where the employer and employee both testified that the employee's contribution to the company included his relationships with a vast network of medical products distributors, the employee testified that he made his own schedule, worked from home, and determined how to identify distributors for the alleged employer, and the employee admitted that the alleged employer did not tell him how to perform his work, the right of control factor weighed in favor of independent contractor status.

Independent Contractor: Elements: Method of Payment. One area that may be considered in evaluating the method of payment is the manner in which the individual treated income in tax filings. Where the employee did not initially report his commissions as wages, but rather reported his commissions on a Schedule C as profit from his own independent business, the Court held that this factor weighed in favor of independent contractor status.

Independent Contractor: Elements: Furnishing of Equipment. The furnishing of equipment is strong evidence of control and by itself is sufficient to establish status as an employee. Where the employee facilitated the sale of TEMPS beds, recruited distributors through phone, e-mail, and travel to conferences around the country and the employer reimbursed the employee for all the travel-related expenses he submitted, and provided him with promotional materials, business cards identifying him as "Sales Director" for the company, and letterhead and envelopes that bore the company's logo, the Court held that this factor weighed in favor of employee status.

Independent Contractor: Elements: Right to fire. Where the employee testified he could be terminated by the employer, and the employer testified that he did not believe he could "terminate" the employee, but could have told him to stop locating independent distributors, the Court did not find the employer's testimony credible, and therefore held that this factor weighed in favor of employee status.

Independent Contractor: Elements. Where the Court found that two of the four control factors weighed in favor of employee status because the employer furnished the employee with essential equipment necessary for the performance of his duties and had the right to fire the employee, the Court

concluded that the employer failed to satisfy the first part of the two-part test used to determine employment status.

¶ 1 The trial in this matter was held on August 12, 2008, and September 3, 2008, in Helena, Montana. Petitioner Emergency Preparedness Systems, LLC, (EPS) was represented by Oliver H. Goe and Jason B. Jewett. Respondent William C. Scobie (Scobie) was present and represented by Geoffrey C. Angel. Mark E. Cadwallader appeared on behalf of the Independent Contractor Central Unit (ICCU) as an interested party.

¶ 2 Exhibits: Exhibits 1, 3-11, 13, 18, and pages 175-78, 180, 190-92, 200-11, and 251-432 of Exhibit 16, and pages 49-80 and 220-318 of Exhibit 17 were admitted without objection. Objections to Exhibit 12 and pages 1-167, 179, 212-17, 221, 226-50 of Exhibit 16, and pages 2-10 of Exhibit 19 were overruled and these exhibits were admitted. After voir dire, portions of Exhibit 17 were admitted, i.e., correspondence containing "To:" in the heading. The remaining exhibits were withdrawn or denied admission.^{1, 2}

¶ 3 Witnesses and Depositions: The depositions of Scobie, Thomas E. Roberts (Roberts), and Nels Sanddal (Sanddal) were taken and submitted to the Court. Roberts, Scobie, and David Johnson (Johnson) were sworn and testified at trial.

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

¶ 4a Whether Scobie was an independent contractor or an employee of EPS.³

¹ Counsel for Scobie moved to admit a Declaration purportedly made by Roberts in an unrelated matter in United States District Court for the Northern District of Florida, Tallahassee Division. Admission was denied because the copy counsel offered was not the entire document and did not include a signature page. I denied admission of the document offered and instructed counsel that if he could submit a **complete** copy of the document within 14 days after conclusion of the first day of trial, I would consider its admission after allowing EPS to respond. Counsel for Scobie failed to submit the complete document. Instead, Scobie's counsel filed **only** the signature page of the Declaration, which had no probative value. Accordingly, admission of the Declaration was denied.

² Exhibit 33 was a compilation of Scobie's amended tax returns. Although I ruled that the amended returns could be admitted into evidence, there was some confusion at trial as to whether EPS and Scobie had the same documents. Therefore, I ordered the parties to confer and determine which amended returns would be submitted into evidence by stipulation. The Court did not receive any further notice from the parties regarding which amended returns were stipulated to. In the absence of a stipulation, Exhibit 33 is not admitted.

³ Pretrial Order at 2.

FINDINGS OF FACT

¶ 5 Scobie filed a wage claim against EPS in the Wage and Hour Unit of the Montana Department of Labor on April 3, 2007. Scobie alleged he was owed wages for work performed for EPS between January 1, 2005, and March 30, 2007. The Wage and Hour Unit referred the question of whether Scobie was an independent contractor or an employee to the ICCU. The ICCU determined Scobie was an employee of EPS and not an independent contractor. EPS appealed the ICCU's determination.⁴

¶ 6 I found Scobie's testimony to be generally credible. However, as described in greater detail below, I have reservations about certain portions of his testimony.

¶ 7 EPS sells a product called a TEMPS bed. "TEMPS" is an acronym for Triage and Emergency Management Preparedness System. The company was officially formed as a limited liability company in January 2007. Prior to that time it was operated as a division of Assistive Technologies, Inc. (ATI), a company that manufactures medical equipment.⁵

¶ 8 Roberts is the president of ATI and the managing member of EPS. Roberts is in the business of manufacturing medical products through a number of different companies.⁶

¶ 9 I found Roberts' testimony to be generally credible. However, as described in greater detail below, I did not find certain portions of his testimony credible.

¶ 10 Scobie has worked in the healthcare industry selling various medical products since approximately 1980. Scobie operated through Norsco Medical Products (Norsco) during many of those years, starting sometime around 1986. Scobie incorporated Norsco for some of those years and continued to operate it as a sole proprietorship using the assumed business name, Norsco, after it was administratively dissolved in 1995. Scobie continued to operate under the name Norsco until at least 2006.⁷

¶ 11 Scobie continues to work in the healthcare industry acting as an independent distributor for a variety of companies.⁸

⁴ Ex. 12; Ex. 14.

⁵ Trial Test.; Roberts Dep. 9:13-15.

⁶ Trial Test.; Roberts Dep. 32:12-18, 75:15-21.

⁷ Trial Test.; Scobie Dep. 49:10 - 50:13, 53:5 - 61:19.

⁸ Trial Test.

¶ 12 There is no dispute that from 1986 to 2005 Scobie acted as an independent contractor and was not an employee of the various companies for which he sold products.⁹

¶ 13 Scobie and Roberts became acquainted in the late 1980s or early 1990s, when Scobie began acting as an independent distributor for medical products sold by one of Roberts' other companies, Cyto Safetech. Scobie also acted as an independent distributor for medical products made by ATI starting in approximately 2004 or 2005.¹⁰

¶ 14 As an independent distributor for Roberts' companies, Scobie purchased medical products from the company, took title to the products and resold them to the end-user. Similarly, Scobie acted as an independent distributor – either through Norsco or individually – for other medical supply companies. Scobie also had relationships with medical supply companies which allowed him to sell a product and receive a portion of the profit from that company rather than receiving payment directly from the customer.¹¹

¶ 15 In approximately September 2002, Sanddal approached Scobie with a concept for selling temporary beds that could be used by hospitals in the event of a mass casualty situation.¹²

¶ 16 Scobie took Sanddal's idea to Roberts in late 2002. The three of them corresponded about Sanddal's temporary bed idea and eventually met in Montana to discuss the concept. Scobie, Sanddal, and Roberts attended a conference in January 2004 to present the idea to assembled representatives from the healthcare industry and to continue formulating a plan to manufacture and market the product.¹³

¶ 17 During those initial meetings, Roberts proposed that his company, ATI, manufacture the product and provide the working capital. Roberts also proposed that they form a new entity to market and sell the beds, and Scobie and Sanddal would become minority shareholders in that new entity.¹⁴

⁹ Trial Test.; Scobie Dep. 62:12-18.

¹⁰ Trial Test.; Scobie Dep. 70:2 - 73:6.

¹¹ Trial Test.; Scobie Dep. 56:16 - 73:2.

¹² Trial Test.; Sanddal Dep. 5:8 - 6:1.

¹³ Trial Test.

¹⁴ Trial Test.; Scobie Dep. 91:10-15; Roberts Dep. 175:10-24; Sanddal Dep. 5:18 - 7:5.

¶ 18 According to Roberts, Scobie did not have an equity interest in EPS until it was formed as a limited liability company in January 2007. Prior to that time, Roberts characterized EPS as a “division of ATI,” and testified that Scobie did not have any ownership interest in ATI.¹⁵

¶ 19 The parties agreed that Scobie would utilize his industry contacts to locate, recruit, and train distributors to sell the TEMPS beds, and that he would receive a commission on bed sales. Unlike his prior arrangements with medical supply companies, however, Scobie did not buy the product himself or sell it directly and forward payment to the company. Rather, Scobie found distributors to sell the TEMPS beds, and occasionally worked directly with customers to facilitate a direct sale between a customer and EPS.¹⁶ Scobie received commissions for the sale of all TEMPS beds, not just those whose sales he facilitated.¹⁷

¶ 20 In 2004, Scobie began identifying distributors for the TEMPS bed. Scobie worked from his home in Bozeman, Montana, even though EPS was located in Indiana. EPS did not provide Scobie with any office equipment and did not reimburse him for office expenses.¹⁸

¶ 21 EPS did not direct Scobie with regard to when or where he worked nor did EPS regulate his hours or tell him how to perform his work.¹⁹

¶ 22 EPS did not direct Scobie with regard to how he located distributors. However, EPS retained authority over whether an individual would be approved as a distributor. Scobie contacted potential distributors by phone, e-mail, or by traveling to conferences. Scobie also made trips in which he demonstrated the TEMPS bed in order to facilitate a direct sale of the product.²⁰

¶ 23 EPS reimbursed Scobie for his travel to each of the conferences he attended on behalf of the company and for his trips to facilitate direct sales of the product. EPS paid Scobie for each reimbursement request submitted even if the travel was not endorsed by Roberts. For example, Roberts testified that when Scobie traveled to Massachusetts to try and finalize a deal with the State of Massachusetts for the sale of TEMPS beds, EPS

¹⁵ Trial Test.

¹⁶ Trial Test.; Roberts Dep. 85:3-17.

¹⁷ Trial Test.

¹⁸ Trial Test.

¹⁹ Trial Test.; Ex. 16 at 232-33.

²⁰ Trial Test.

reimbursed Scobie for the trip even though Roberts preferred Scobie had not made the trip.²¹

¶ 24 EPS provided Scobie with sales materials, including brochures, DVDs, and CDs that described the TEMPS bed and demonstrated its use.²² EPS also provided Scobie with business cards that identified him as the company's "Sales Director," and provided him with company letterhead and envelopes. Although Roberts testified that EPS would provide such materials to any dealer or distributor that asked, I did not find his testimony credible in that regard.²³

¶ 25 EPS received its first order for the TEMPS bed in late 2004. Scobie received commission checks from EPS during 2005 and 2006.²⁴

¶ 26 EPS did not provide Scobie with a W-2 or a 1099 for the commissions he received. Scobie reported the income in 2005 and 2006 as business income for Norsco, not as wages. Scobie testified that he knew absolutely nothing about taxes, did not have a basic understanding of tax principles with regard to wage income versus business or independent contractor income, and that he left all tax decisions up to his wife and his accountant because he did not have basic knowledge on the subject.²⁵ I did not find Scobie's testimony in that regard credible. In fact, in the ICCU proceeding, Scobie wrote a letter in which he went into detail about the difference between the tax treatment of earned income from commissions versus income from the year-end profits of a business. That letter belies Scobie's claim to have absolutely no knowledge of tax principles.²⁶

¶ 27 Johnson testified as a tax expert for EPS.²⁷ I found Johnson's testimony credible.

¶ 28 Johnson testified that Scobie reported his commission income from EPS on a Schedule C in both 2005 and 2006. Johnson explained that a Schedule C is a profit and loss business form for sole proprietorships. Johnson testified that after reviewing Scobie's

²¹ Trial Test.; Ex. 16 at 12.

²² Trial Test.

²³ Trial Test.; Ex. 16 at 190.

²⁴ Trial Test.; Ex. 16 at 12.

²⁵ Trial Test.; Ex. 1; Ex. 3.

²⁶ Ex. 16 at 222-24.

²⁷ Trial Test.

tax documents for 2005 and 2006, he concluded Scobie represented himself to the federal and state governments as an independent contractor, not as an employee.²⁸

¶ 29 Sometime in 2005 or 2006, Scobie became frustrated that his commission checks were not arriving in the time frame he expected. Scobie testified he had to make numerous requests to Roberts before receiving his commission checks. It was his frustration over these commission checks that eventually led Scobie to terminate his relationship with the company through a letter dated March 20, 2007. Scobie's letter stated his relationship with EPS would end as of March 30, 2007.²⁹

¶ 30 Scobie testified that at the time he worked on behalf of EPS, he believed he could be terminated by the company and that he could likewise terminate the relationship.³⁰ I find this testimony credible.

¶ 31 Roberts testified he could have told Scobie that EPS did not need him to locate any more distributors for the company, but that he did not believe he had the right to terminate Scobie.³¹ I do not find Roberts' testimony to be credible in this regard.

CONCLUSIONS OF LAW

¶ 32 The Court has jurisdiction over this matter pursuant to § 39-71-415, MCA. An appeal from the ICCU is a new proceeding in the Workers' Compensation Court.³²

¶ 33 An independent contractor determination is reached through a two-step process. First, the Court evaluates the control exerted over the worker through the application of four control factors. Second, the Court must determine whether the worker was engaged in an independently established trade, occupation, profession, or business. Both parts of the test must be satisfied by a convincing accumulation of undisputed evidence; otherwise, the worker is an employee and not an independent contractor.³³

²⁸ Trial Test.

²⁹ Trial Test.

³⁰ Trial Test.

³¹ Trial Test.; Roberts Dep. 152:4-18.

³² § 39-71-415(3), MCA.

³³ *Wild v. Fregein Constr.*, 2003 MT 115, ¶¶ 33-34, 315 Mont. 425, 68 P.3d 855; *Ramsey v. Yellowstone Neurosurgical Assoc.*, P.C., 2005 MT 317, ¶ 26, 329 Mont. 489, 125 P.3d 1091.

Four Control Factors

¶ 34 The Court evaluates the exercise of control using the following four factors: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. The test is weighted toward employee status in that a showing of control under any one of the factors can lead to a finding of employee status.³⁴

1. Direct evidence of right or exercise of control.

¶ 35 When the purported employer 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,” the individual is an employee and not an independent contractor.³⁵ In this case, both Scobie and Roberts testified that Scobie’s contribution to the company included his relationships with a vast network of medical products distributors who could sell the TEMPS beds.³⁶ Scobie testified he made his own schedule, worked from home, and determined how to identify distributors for EPS. Scobie admitted that EPS did not tell him how to perform his work. This factor weighs in favor of independent contractor status.

2. Method of payment.

¶ 36 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, and payment on a piecework or commission basis is consistent with either determination.³⁷ In this case, it is uncontested that Scobie was paid solely on a commission basis.

¶ 37 Another area that may be considered in evaluating the method of payment control factor is the manner in which the individual treated the income in tax filings.³⁸ Scobie did not initially report his EPS commissions as wages. Rather, he reported the commissions on a Schedule C of his income tax filings as profit from Norsco. While the commission

³⁴ *Id.*; *Solheim v. Tom Davis Ranch*, 208 Mont. 265, 271-72, 677 P.2d 1034, 1037 (1984) (citing *A. Larson’s Workmen’s Compensation Law*, Vol. 1C, § 44.00 at 8-31); *American Agrijusters Co. v. Mont. Dep’t of Labor and Indus.*, 1999 MT 241, ¶ 21, 296 Mont. 176, 988 P.2d 782.

³⁵ *American Agrijusters*, 1999 MT 241, ¶ 22, 296 Mont. 176, 988 P.2d 782.

³⁶ Trial Test.

³⁷ *Walling v. Hardy Constr.*, 247 Mont. 441, 449, 807 P.2d 1335, 1339 (1991) (citing *A. Larson’s Workmen’s Compensation Law*, Vol. 1C, § 44.33 at 8-94 (1990)).

³⁸ ARM 24.35.202.

method of payment is a neutral factor, Scobie's tax treatment of those payments indicates independent contractor status.

3. Furnishing of equipment.

¶ 38 “[T]he furnishing of equipment is strong evidence of control and of a lack of independence and by itself is sufficient to establish . . . status as an employee.”³⁹ In that regard, the Montana Supreme Court has held:

[W]hen an employer furnishes valuable equipment, an employment relationship almost invariably exists, but the test does not cut in both directions with equal force. Proof showing the worker furnishes his own equipment is not necessarily fatal to a finding of employee status.⁴⁰

¶ 39 In this case, Scobie facilitated the sale of TEMPS beds and recruited distributors through phone, e-mail, and travel to conferences around the country. EPS reimbursed Scobie for all the travel-related expenses he submitted. Although Scobie provided his own office equipment at his home office in Bozeman, EPS provided Scobie with the promotional materials – brochures, DVDs, and CDs – that enabled him to perform the essential function of his job, facilitating the sale of beds through the distributors he recruited on behalf of EPS. EPS also provided Scobie with business cards that identified him as EPS's “Sales Director,” and with letterhead and envelopes that bore the EPS name and logo. EPS argued these items had relatively little value and no doubt the material value of an individual brochure, CD, or DVD is insignificant. However, Scobie would not have been able to perform his job without this equipment. The value of these items lies not in the value of the raw materials from which they are made but rather in the intellectual property value of their contents. I doubt that if another company appropriated these materials from EPS for use in selling a competing product, EPS would consider these items to have relatively little value. I conclude that this factor weighs in favor of employee status.

4. Right to fire.

¶ 40 The ability to terminate an individual at will or for certain performance issues, without incurring contractual liabilities, is indicative of employee status.⁴¹ While an

³⁹ *St. John's Lutheran Church v. State Comp. Ins. Fund*, 252 Mont. 516, 523, 830 P.2d 1271, 1276 (1992).

⁴⁰ *Id.* (citing *Solheim v. Tom Davis Ranch*, 208 Mont. 265, 273-74, 677 P.2d 1034, 1038 (1984)).

⁴¹ *Walling*, 247 Mont. at 449, 807 P.2d at 1340 (citing *Carlson v. Cain*, 204 Mont. 311, 324, 664 P.2d 913, 919 (1983)).

employee may be terminated, an independent contractor should have the contractual right to complete his work and to treat attempts to prevent him from doing so as a breach of contract.⁴² Scobie testified he could be terminated by EPS. Roberts testified that while he did not believe he could “terminate” Scobie, he could have told him to stop locating independent distributors. In other words, Roberts could have told Scobie to stop performing the work which earned him a commission. As noted above, I did not find Roberts’ testimony on this point to be credible. Although it is conceivable Scobie may have wanted to continue locating independent distributors *pro bono*, I conclude that EPS had the right to terminate Scobie. Therefore, this factor weighs in favor of employee status.

CONCLUSION

¶ 41 Two of the four control factors weigh in favor of Scobie’s status as an employee of EPS. EPS furnished Scobie with essential equipment necessary for the performance of his duties and had the right to fire Scobie. As the Montana Supreme Court noted in *St. John’s Lutheran Church v. State Comp. Ins. Fund*, “the furnishing of equipment is strong evidence of control and of a lack of independence and **by itself** is sufficient to establish . . . status as an employee.”⁴³ Although the other two control factors indicated an independent contractor status, I conclude that EPS has failed to satisfy the first part of the two-part test. Because both parts of the test must be satisfied by a convincing accumulation of undisputed evidence in order to find independent contractor status, I need not consider the second part of the test.

JUDGMENT

¶ 42 Scobie was an employee of EPS from January 1, 2005, through March 30, 2007.

¶ 43 The ICCU’s determination is affirmed.

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

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⁴² *American Agrijusters Co.*, 1999 MT 241, ¶ 35, 296 Mont. 176, 988 P.2d 782 (citing *Solheim*, 208 Mont. at 274, 677 P.2d at 1039).

⁴³ *St. John’s Lutheran Church v. State Comp. Ins. Fund*, 252 Mont. 516, 523, 830 P.2d 1271, 1276 (1992) (emphasis added).

DATED in Helena, Montana, this 17th day of August, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Oliver H. Goe and Jason B. Jewett
Geoffrey C. Angel
Mark E. Cadwallader

Submitted: September 15, 2008