

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 110

WCC No. 9311-6942

**GERALD THAYER (Deceased)
PHYLLIS THAYER**

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Laborer in salvage operation died from burn injuries after his clothing caught fire while he was cutting metal with a torch. His widow sought benefits from the Uninsured Employers' Fund. Employer contended the decedent was an independent contractor.

Held: Although employer sought to minimize his control over salvage operation workers, the Court was convinced the employer retained the right of control over workers, making them employees for purposes of the Workers' Compensation Act. The decedent's designation as an independent contractor by the employer is not conclusive as to his status, nor is the fact that he owned an independent scrap business. Though this satisfied the independently established trade criterion of part (b) of section 39-71-120(1), MCA (1991) for independent contractor status, part (a) was not satisfied where the employer retained control over decedent's work, paid him by the hour and then piece-meal, and furnished necessary equipment.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-120, MCA (1991). Although employer sought to minimize his control over salvage operation workers, the Court was convinced the employer retained the right of control over workers, making

them employees for purposes of the Workers' Compensation Act. The decedent's designation as an independent contractor by the employer is not conclusive as to his status, nor is the fact that he owned an independent scrap business. Though this satisfied the independently established trade criterion of part (b) of section 39-71-120(1), MCA (1991) for independent contractor status, part (a) was not satisfied where the employer retained control over decedent's work, paid him by the hour and then piece-meal, and furnished necessary equipment.

Independent Contractor: Generally. Although employer sought to minimize his control over salvage operation workers, the Court was convinced the employer retained the right of control over workers, making them employees for purposes of the Workers' Compensation Act. The decedent's designation as an independent contractor by the employer is not conclusive as to his status, nor is the fact that he owned an independent scrap business. Though this satisfied the independently established trade criterion of part (b) of section 39-71-120(1), MCA (1991) for independent contractor status, part (a) was not satisfied where the employer retained control over decedent's work, paid him by the hour and then piece-meal, and furnished necessary equipment.

The trial in this matter was held on March 29, 30, and 31, 1994 in Great Falls, Montana. Petitioner, Phyllis Thayer (claimant), was present and represented by Mr. Norman J. Newhall. The Uninsured Employers' Fund (UEF) was represented by Mr. Claren J. Neal and Mr. Kevin Braun. Richard Smith, was present and represented by Mr. Leo S. Ward. Richard Smith, Harold Brownell, Phyllis Thayer, Gerald Ruth, Garry Thompson, Jim Filipowicz, Betty Pfeifer, Chester Heitmann, Steve Greenwood, Ralph Gobert, James Printy, David Larson and Mike Christen testified in person. By agreement of the parties, Marilyn Groussman testified by telephone from Salt Lake City, Utah. The depositions of James Collins, Tim Wells, Ken Halko, Robert Smith, Robert Michaels, William Dagel, Betty Dagel, Bert Guith, Harold Brownell, Phyllis Thayer and Susan Thayer were submitted for the Court's consideration. Exhibits 1, 3, 4, 5, 5A, 6, 8, 9, 12, 13, 15, 16, 18-38, 41-44 and 48 were admitted. Exhibits 10, 11 and 39 were refused. Exhibit 17 was not offered. Exhibits 2, 7 and 14 were withdrawn. Exhibit 40 is a duplicate of Exhibit 1. There were no Exhibits 45 and 46. Exhibit 47 was admitted for demonstrative purposes only.

Issue Presented: The issue in this case is whether the claimant's husband, Gerald Thayer, was an employee of Richard Smith at the time he was fatally injured on October 15, 1992. A second issue as to whether claimant may be entitled to compensation pursuant to the provisions of section 39-71-405, MCA, was not mediated and is not considered.

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

FINDINGS OF FACT

1. On October 15, 1992, the claimant's husband, Gerald Thayer (Thayer), was injured in an industrial accident at the Flying J Refinery site near Cut Bank, Montana. His clothes caught fire while he was cutting metal with a cutting torch. He was badly burned. On October 31, 1992, Thayer died from his injuries.
2. Claimant thereafter filed a workers' compensation claim seeking death benefits.
3. Thayer's alleged employer, Richard Smith (Smith), did not have workers' compensation insurance coverage at the time of the accident. However, Smith contends that claimant was an independent contractor.
4. The Uninsured Employers' Fund (UEF) denies liability, also contending that Thayer was an independent contractor.

Richard Smith and His Salvage Business

5. Richard Smith has been engaged in salvage work since the 1960's. Salvage work involves dismantling, cutting up and selling materials for scrap. Some components, such as valves, are recycled. Metal materials sold for scrap must be cut into smaller pieces for shipping to scrap dealers.
6. Until the mid 1980's Smith principally salvaged derailments for the Burlington Northern Railroad, working in twenty-three different states, often cutting up damaged railroad cars. (Tr. at 55-57.) He retired in the mid-1980's but began working again in the late 1980's when he cut up and salvaged a ship in Superior, Wisconsin. (Tr. at 62-64.)
7. Smith's 1992 gross receipts from his salvage business were \$483,200; his net profit was \$208,510. (Ex. 5A.)
8. Smith has never maintained any separate business accounts. (Tr. at 113.) All income and expenses from his salvage operations have been run through his personal checking account. (*Id.*)
9. Over the years Smith has hired other individuals to assist in cutting up scrap. For example, he hired twenty (20) other individuals to cut up a ship in Superior, Wisconsin. (Tr. at 65.) However, Smith claims that every person who has ever worked for him on a

salvage project has been an independent contractor. He claims that he has never had an employee, (Tr. at 113) and he requires every person working for him to sign a release similar to the one quoted in Finding 33. (Tr. at 91.)

Flying J Refinery Salvage Contract

10. The Flying J Refinery (Flying J) is located near Cut Bank, Montana. It is no longer used and its owner entered into a contract with Smith to clean, remove and dispose of petroleum storage tanks and equipment located on the site.

11. The contract names RRS, Inc. as the contractor. However, RRS, Inc. is a pseudonym used by Smith and is not a legally organized corporation.

12. The contract provided that Smith was entitled to all monies from any sale of the salvaged tanks and equipment.

13. The contract period commenced July 15, 1991 and terminated December 31, 1992. (Ex. 6.) It required Smith to obtain all necessary "licenses and permits." (Id.) It also required Smith to indemnify Flying J against all liabilities and to secure liability insurance in the amount of \$1,000,000 prior to commencement of work. (Id.)

Work at the Flying J Job Site - General Description

14. Smith's contract called for him to dismantle and remove the refinery equipment and petroleum storage tanks. Some components, for example pipes, brick, cooling towers, cylinders, motors and valves, were dismantled, put on pallets and sold for resale. (Tr. at 83-84.) Iron components which could not be sold for their original use were sold as scrap. (Tr. at 80-85.) Iron sold for scrap had to be cut into pieces no larger than two feet (2') by five feet (5'). (Tr. at 81.) The pieces were then loaded onto railroad cars and shipped to scrap dealers. (Tr. at 78-81.) Unsalable materials, such as contaminated metal, cardboard, and paper were loaded onto a trailer and taken to a dump. (Tr. at 79-80.)

15. Much of the work involved the razing of storage tanks. Initially, the tanks, standing in place, were cut into large segments. The segments were then pulled to the ground and cut into pieces no larger than two (2') feet by five (5') feet. Exhibit 3, a videotape, shows the basic operation.

16. Cutting the tanks into sections, and thereafter into the smaller pieces, required use of cutting torches. The cutting torches were fueled by propane and oxygen.

Smith's Hiring of Salvage Workers: Jerry Ruth and Garry Thompson

17. After entering into the agreement with Flying J, Smith hired Jerry Ruth (Ruth) and Garry Thompson (Thompson) to help him remove and salvage the Flying J tanks and equipment. Both Ruth and Thompson had worked for Smith on many occasions over the years, putatively as independent contractors.

18. Thompson drove one of Smith's trucks from Minnesota to Cut Bank, Montana so that it could be used in the Flying J salvage operation. (Tr. at 363.) He then returned to Minnesota for his own truck. On a second trip from Minnesota to Montana, Thompson drove his own truck and pulled a trailer with Smith's forklift and some of Smith's materials on it. (*Id.*)

19. Thompson and Ruth were paid by the hour. (Tr. at 292, 368.) According to Ruth, the primary reason for hourly rather than some other basis of compensation was the variety of tasks they were to do on the project. (Tr. at 292.) Smith also provided housing to both men. (Tr. at 340.)

Gerald Thayer

20. At the time of his death Gerald Thayer was 45 years old. He had a limited education. He did not complete high school and it is unclear what grade in school he did complete. (Tr. at 235.) He had difficulty reading (Tr. at 243) and was unable to pick up a book and read it (Susan Thayer Dep. at 7.)

21. From what is known about Thayer's employment history, he worked as a musician, farm and ranch hand, laborer and logger. (Tr. at 224, 232, 235, 236, 259; Susan Thayer Dep. at 21-22.)

Thayer Scrap Cutting Business

22. Over the years, Thayer also engaged in a small scrap cutting business. Thayer's daughter, Susan Thayer, testified that Thayer had cut and sold scrap iron off and on since she was a little girl. (Susan Thayer Dep. at 21.)

23. Thayer and claimant moved to Montana in approximately 1988. It is unclear when he began cutting and hauling scrap after his move but by 1990 he was cutting and hauling scrap metal for farmers and ranchers in the Cut Bank area. (Tr. at 205-206, 407-408, 488, 502-505; Michaels Dep. at 5-8; Robert A. Smith Dep. 5; Exs. 20-21.) The scrap was typically old equipment and machinery.

24. During 1990 and 1991, Thayer sold the scrap metal to various businesses, including Carl Weissman and Sons (Tr. at 320; Ex. 19); Cut Bank Hide and Fur (Tr. at 488; Exs. 20-21); Ruth's Salvage and Scrap in Valier (Claimant's Dep. at 63 and Ex. 22); Filipowicz

Brothers in Black Eagle (Claimant's Dep. at 129 and Ex. No. 23); and Jim's Auto in Cut Bank (Tr. at 511; Ex. 24).

25. On one occasion Thayer approached Jim Filipowicz (Filipowicz), a fifteen-year employee of Weissmans, and offered to cut scrap for Weissmans for \$25 per ton. (Tr. at 320.) Decedent told Filipowicz that he cut scrap for a living, charging a flat rate per ton. (Tr. at 322.)

26. Thayer sold scrap to Cut Bank Hide and Fur frequently in the fall of 1990. (Tr. at 488; Exs. 18, 20 and 21; Halko Dep. at 7; Ex. 18.) Chester Heitmann (Heitmann), who owned the company in 1990, testified that Thayer was a regular provider when he first started selling scrap and sold one or two loads of scrap per week. Heitmann loaned Thayer money to buy equipment for cutting scrap. (Tr. at 489.) Thayer told Heitmann that he was cutting scrap as a business. (Tr. at 490.)

27. Thayer had no employees and did all of his own work. However, on one occasion he paid Ralph Gobert (Gobert) to haul three loads of scrap at the rate of \$20 per load. (Tr. at 505.)

28. Thayer had no office or shop. (Tr. at 238.) He had no separate business telephone number, business license or business cards. (Tr. at 207.) He performed his work wherever he found scrap, and arranged to cut and salvage the scrap through personal contacts.

29. Thayer used his own equipment for cutting and hauling scrap metal, and purchased his own supplies. He owned one propane tank and rented another. (Claimant's Dep. at 86.) He also owned two trucks, a boom, a torch, cutting tips for the torch, hoses, regulators, fuel, gloves, goggles, boots and coveralls. (Claimant's Dep. at 75-78; Tr. at 211, 412-414, 462.)

30. In 1990, Thayer earned at least \$1,040 from cutting and selling scrap metal. (Exs. 20 and 47.) In 1991, Thayer earned at least \$3,031.46 from cutting and selling scrap metal. (Exs. 18-21 and 47.) During those years he was also employed as a farm worker. His income from farm work was \$4,800 in 1991 and \$10,500 in 1990. (Ex. 4.)

31. The evidence shows that Thayer operated a small-time scrap cutting business.

Hiring of Gerald Thayer

32. In January of 1992, Gerald Thayer approached Smith and offered to cut scrap for him. (Tr. at 86.) He told Smith that he had twenty (20) years of experience cutting scrap. (Tr. at 528.) Smith agreed to hire¹ Thayer on.

33. On January 17, 1992, Thayer signed a document entitled "PERSONAL RELEASE." The document stated inter alia: "THIS IS TO CONFIRM THAT I AM AN INDEPENDENT CONTRACTOR." In full part, it stated:

PERSONAL RELEASE

THIS IS TO CONFIRM THAT I AM AN INDEPENDENT CONTRACTOR

JOB LOCATION Flying J — Refinery

TYPE OF WORK TO BE DONE Cutting - Scrap.

DATED 1-17-1992

I do here-by assume all risk of personal injury or death, and loss of or damage to property in my custody or possession, which shall in any manner arise from or be caused by any defects, or other equipment or apparatus of any kind whatsoever, or by any accident of any kind whatsoever, however it may occur or be caused. [sic] whether due to the negligence of Richard Smith and or other employees or otherwise, in any manner arising or growing out of the above mentioned permission, and I here-by, for myself, my heirs, and legal representatives, release and forever discharge Richard Smith and Flying J Inc. and Flying J. Refinery, from all claims, liabilities and costs of every kind by reason of any injury, death, or loss or damage to property.

This form MUST be completed before entering job site.

WITNESS:

/s/ D. Smith Jan 17-92 /s/ Jerry Thayer
Contractors, sign here

¹ The Court uses "hire" in a general sense. The word as used here is not intended to connote the creation of an employer-employee relationship.

(Ex. 1.) The document was prepared by Smith, who required that it be signed as a condition of work. (Tr. at 91.)

34. While Thayer signed the release, it is doubtful he read or understood it. (Tr. at 233, 243.)

Generalized Use of the "Release"

35. Ruth and Thompson signed similar releases prior to going to work on the Flying J project. Indeed, Smith requires all persons who work for him to sign similar releases. (Tr. at 91.)

Thayer's Commencement of Work

36. Thayer began work in early February of 1992. (Ex. 9 at 20-21.) From that time until his industrial accident he cut metal into pieces for shipment to scrap dealers. Most of his cutting was on storage tanks.

Thayer's Compensation and Hours of Work

37. The initial agreement between Smith and Thayer called for Smith to pay Thayer on an hourly basis at \$8 an hour. (Tr. at 87.) The \$8 an hour was the amount requested by Thayer. Smith later raised the hourly amount to \$10 an hour. (Tr. at 87.) Exhibit 9 indicates that the hourly basis of pay continued until at least May 1992.

38. Claimant, initially recorded Thayer's hours for pay purposes. (Tr. at 87-88.) However, after a disagreement over the record keeping, Smith took over the responsibility for recording Thayer's hours of work. (Tr. at 244, 452.) Claimant testified:

Q Did there come a time when you discontinued keeping records of his [Thayer's] time?

A That's correct.

Q And why was that?

A Because Mr. Smith said that -- how do I explain that -- a half a penny adds up in a month's time to be -- all right, Mr. Smith -- what was it now? He didn't agree with my hours, and I was like maybe a half a penny off or a penny one way or the other, and so I just said, "Mr. Smith, you have at it." So I didn't keep his [Thayer's] time anymore.

(Tr. at 245.)

39. Smith initially paid claimant an hourly rate to "see what he's [Thayer's] capable of." (Tr. at 572.) His testimony concerning payment is illuminating:

Q I'm showing you Page 41, Lines 3 through 11 of your deposition, and in response to my question, did you not answer, "So, you know, I'm not a fool, I'm not going to put a guy on something I'm not comfortable with until I see what he's capable of, and then after I realized that he was capable and that he had done this work for other people at other locations, then I put him on to a piecework where hopefully he could use his own time frame, work as many hours as he wished, etcetera, etcetera, so he could make some, a decent wage."

Was that your answer?

A Yeah, correct. But I didn't set that wage.

Q And it's true that after you saw how capable he was, then you offered him piecework; correct?

A That was the mode of him coming to work there in the first place was piecework.

(Tr. at 572-573.)

Thus, once Smith determined that Thayer was a capable scrap cutter he "put him [Thayer] on to a piecework where hopefully he could use his own time frame, work as many hours as he wished, etcetera, etcetera, so he could make some, a decent wage." (Tr. at 573.) The quoted words are those used by Smith in his deposition, although at trial Smith qualified them by stating that he "didn't set that wage." (*Id.*)

40. Thereafter, Smith paid Thayer by the tank. The amount varied by tank size, \$300 for the smallest size and up to \$1000 for the largest size. (Tr. at 89.)

41. Based on Smith's testimony concerning his pay arrangement with Thayer, as well as the Court's overall assessment of Smith's testimony and credibility, the Court finds that Smith dictated the amount and method of Thayer's compensation and exercised a right to change both the amount and manner of Thayer's compensation. Smith testified that Thayer quoted him prices for the various tanks (Tr. at 89), but the Court does not find his testimony on this point credible and finds it more likely that Smith fixed the prices.

42. Thayer worked outside. Time records kept while he was paid by the hour show that he most often commenced work between 7:00 and 8:00 a.m. and worked until between 5:00 and 7:00 p.m. (Ex. 9 at 2-9.) These were approximately the same hours as worked by Ruth. (Tr. at 276.)

43. Smith did not set any hours of work or any minimum hours per week. However, the nature of the job provided an incentive to Thayer and other workers to work most of the day-light hours.

Right-to-Fire

44. Smith testified that he had an oral agreement with Thayer for each tank, and when a tank was finished he could let Thayer go. (Tr. at 116-117.) He testified that he could let Thayer go before a given tank was complete if he was not performing the service he agreed to perform. (Tr. at 165.) Finally, Smith testified that he never discussed firing Thayer. At trial Smith answered questions regarding a right-to-fire Thayer as follows:

Q Did you discuss with him at any time firing?

A No, sir, had no need to.

Q Have you ever fired anyone?

A Never hired anybody.

Q Have you ever discussed firing with anyone?

A No need to.

(Tr. at 533 -534.)

45. Two months after the accident Smith provided the following answer to a "Worker Relationship Questionnaire" sent to him by the Department of Labor and Industry:

a. Can the firm discharge the worker at any time without incurring a liability? x Yes No
.....

b. Can the worker terminate his services at any time without incurring a liability? x Yes No
.....

(Ex. 26 at 5.)

46. Ruth understood that Smith could let him go at any time without any further liability:

Q (By Mr. Newhall) Now, Mr. Ruth, it was your understanding, was it not, that Mr. Smith could let you go at any time?

A Correct.

Q All right. And likewise it was your understanding that you could quit at any time; correct?

A Correct.

Q And it was also your understanding that if Mr. Smith didn't like what you were doing, he could simply tell you to change it; correct?

A Far as I know, he never did, but if he wanted to, I suppose he could. He was the boss.

(Tr. at 286-287.) Thompson had a similar understanding. (Tr. at 379-380.)

Razing the Tanks - More Details

47. Taking down the tanks was done by cutting the tanks, while standing, into large segments. This was done by cutting a hole in the top of the tank, then cutting the tank vertically from top to bottom into segments.

48. The equipment required for this operation included cutting torches, a "man lift", and a bulldozer. The "man lift" is similar to a cherry picker and is a piece of machinery which mechanically lifts a person to the heights needed for work. The old adage that a picture is worth a thousand words resolves any difficulty in imagining the work involved in this case. The operation is clearly shown in the video tape which is Exhibit 3.

49. Smith and two others -- Ruth and Thompson -- took down the tanks. The task required a cooperative effort among the three. A "man lift" was used to raise and lower one individual along the tank while cutting. In the video tape Ruth was in the man lift and cutting on the tank.

50. Once cut, the tank segments were pulled down onto the ground using a bulldozer. In the video tape Thompson was operating the bulldozer.

51. Smith was clearly in charge of this particular operation, giving directions to the other two men. (Ex. 3.)

52. After the sections were pulled to the ground, Thayer cut the sections into two (2') feet by five (5') feet pieces. (Tr. at 81.)

53. The pieces were then loaded onto gondola cars using a "mag truck", which is a truck with a magnetic grapple. (Tr. at 78.) The grapple was used to pick up the metal pieces and drop them into the railroad cars. (*Id.*) The mag truck was operated by either Thompson or Ruth.

54. The railroad cars were then routed to scrap dealers. Smith received the proceeds from the sale of the scrap.

Furnishing of Equipment and Supplies

55. Smith provided much of the equipment used on the project. Specifically, he provided the bulldozer, the man lift, the mag truck, and a forklift. (Tr. at 77-78, 85-86.)

56. Thompson had his own pickup and also provided a trailer which was used to haul unsalvageable items to the dump. (Tr. at 79.)

57. Ruth also operated Smith's forklift, man lift and bulldozer on a regular basis. (Tr. at 277.)

58. Thompson and Ruth had their own cutting equipment, including tanks, hoses, torches, cutting tips, and face protection.

59. Thayer also had his own cutting equipment, including his own tanks, hoses, torch and cutting tip, and an orange pickup truck he used to haul it around.

60. However, Thayer's equipment was inadequate for the type and magnitude of the work he did at the Flying J. Ruth and Thompson, therefore, provided him with a welding helmet, additional tips for his torch, better gloves, boots, (spray) fire retardant and a long cutting torch that enabled Thayer to cut metal while standing up. (Tr. at 282-284, 375-378, 341-342; Phyllis Thayer Dep. at 75-77.) In return Thayer did mechanical work for Thompson and Mrs. Thayer provided a home-cooked meal for Ruth. (Tr. at 375-378, 350-351, 418-419; Phyllis Thayer Dep. at 76.)

61. The mechanical work done by Thayer in exchange for items Thompson gave him included servicing the brakes on the trailer which was used in hauling unsalvageable material to the dump, and changing the oil and filters on the bulldozer, forklift and mag truck. Ruth and Thompson were responsible for servicing Smith's equipment. With regard to Thayer's help in servicing that equipment, Thompson testified:

[W]hen it was my turn to service the equipment, instead of working two days or whatever on it, I brought Jerry with me, because the other men went home, and he [Smith] wanted everything serviced before he got back, so that's why I had Jerry Thayer help me do everything.

(Tr. at 378.)

62. Large quantities of liquid oxygen (LOX) were used in cutting. Smith, Ruth, Thompson and Thayer all used the oxygen.

63. Regular deliveries of tanks of LOX were made to the Flying J. The tanks weighed several hundred pounds. Smith, Ruth, Thompson and Thayer exchanged their empty tanks for full ones as needed. The exchange required removal of the empty tanks from the back of the workers' trucks and replacing them with full ones.

64. The oxygen was provided by or through Smith's brother. (Tr. at 351-354.)

65. On at least one occasion, Thayer used Smith's forklift to load a liquid oxygen tank onto his truck. (Tr. at 351-354, 294.) At other times when Ruth was around, he loaded the tanks onto Thayer's truck. (Tr. at 355.) Based on the need to use a forklift to load the tank, Thayer's actual operation of the forklift, the general use of Smith's equipment by Ruth and Thompson (see above), and Smith's generalized control over work at the Flying J (see below), I find that Smith implicitly, if not explicitly, consented to Thayer's use of the forklift.

66. While Smith denied paying for the oxygen of any of the workers (Tr. at 536-538), Ruth testified credibly that Smith reimbursed him and Thompson for the liquid oxygen they used, and the Court so finds. (Tr. at 357-358.)

67. Claimant testified that at some point in time Smith began paying for Thayer's oxygen. (Tr. at 419.) According to claimant, she and Thayer did not pay for the oxygen. (*Id.*) Her testimony, taken together with Ruth's testimony, persuades the Court that Smith in fact paid for some of Thayer's oxygen. Although some receipts have been presented indicating payment for oxygen was received on account from claimant (Ex. 30), the receipts do not provide persuasive evidence overcoming this conclusion. Smith testified that the company delivering the oxygen (General Distributing Co.) did not want to make out "15

delivery receipts for the various peoples that would be utilizing their product, so that was agreed that the billing would come to, [sic] by way of Recycle Sales." (Tr. at 536.) Recycle Sales was a business name used by Smith's brother. As to the manner of payment, Smith further testified that "when the driver comes periodically on a Tuesday afternoon, whomever has used some [oxygen] over the previous period will get together and pay for the materials that they utilized." (Tr. at 537.) Ruth testified that he and Thompson paid the drivers but were then reimbursed. (Tr. at 357.) The receipts which are part of Exhibit 30 are made out by General Distributing. Smith's testimony that General Distributing did not want to make out "15 delivery receipts" and therefore charged the oxygen to Recycle Sales makes it unlikely that General Distributing maintained separate accounts for Thayer, Thompson and Ruth, and more likely that the receipts reflected the person tendering the particular payment.

68. Thayer furnished and paid for his own propane. (Ex. 27-28; Collins Dep. at 6-8.)

69. After the tank sections were pulled down, they were left for Thayer to cut them up.

70. On one occasion Ruth pulled tank sections out of the mud to enable Thayer to work on them. (Tr. at 281.) The sections were in thick mud and Thayer could not get his truck, and therefore his cutting equipment, near the sections. (*Id.*) Ruth did not identify the equipment he used to accomplish this task but the Court takes note that a pickup apparently could not accomplish the task since Thayer had a pickup and still needed help. It also notes that Ruth had a bulldozer available to him.

Other Assistance Provided to Thayer

71. In addition to the assistance previously identified in these findings, there was testimony showing that Ruth helped Thayer turn over metal sheets when needed to enable Thayer to work on them, and that he also assisted Thayer in taking "some steps off a tank." (Tr. at 283.)

Right to and Exercise of Control

72. Thayer's job was to cut up scrap metal into pieces suitable for shipment and sale. The job required operation of a cutting torch. The size of the pieces was specified as no larger than two (2') feet by five (5') feet. The job required the ability to use a cutting torch and the ability to determine dimensions. No special skills or specialized training was required. (Tr. at 500, 517.) As Smith testified:

Q As a practical matter, Jerry's whole job was to sit out there all day and cut scrap iron; is that correct?

A That's correct.

Q So there really wasn't any other reason to supervise him?

A No.

(Tr. at 349.)

Q (By Mr. Newhall) Okay, as far as the cutting that Jerry Thayer was doing, these were just slabs of iron that were placed on the ground, right?

A Right.

Q Just basically stand there all day and cut those up; correct?

A Correct.

(Tr. at 290.)

Q Okay, you've cut iron. And basically cutting just flat sheets of iron is a pretty basic job, is it not? You just use the torch and you go down it and cut through it; correct?

A Yes.

Q Kind of basic general labor, is it not?

A It's one of those tough jobs that's hard on the back. There's a lot of bending involved.

Q But other than that, it doesn't require any kind of specialized training or anything of that sort, does it?

A I don't think so, no. I've never had any special training.

(Tr. at 517.)

73. Thus, Thayer's job did not require supervision.

74. Smith determined the flow of work at the job site in that he determined the order in which equipment and tanks were salvaged.

75. According to Ruth, whose testimony is found credible, Smith lined up his jobs and told him what was to be done. (Tr. at 328.)

76. Smith was the supervisor during the leveling of the tanks. (See previous findings.)

77. Smith supervised and directed Ruth and Thompson. He directed them when leveling the tanks. He required them to maintain his equipment. (See previous findings.)

78. Ruth's testimony shows that Thayer's actual work went beyond the cutting of tanks into pieces. Ruth testified, and the Court finds, that Thayer also removed steps from a tank (Tr. at 283) and helped service equipment on at least one occasion.

79. According to Thompson, whom the Court found credible, Smith managed the whole operation:

Q And in your estimation, it was Mr. Smith that was managing the whole operation; isn't that correct?

A Yes.

Q And if you had any questions about what you were supposed to do, you would simply ask Mr. Smith; correct?

A Yes.

Q And it would be Mr. Smith that would indicate what items were to be sold and what pieces should be cut up; isn't that correct?

A Yes.

Q Showing you Plaintiff's Exhibit 1, now you were required, were you not, to sign a document such as that before you went to work on the job site?

A Yes.

Q And it was your understanding that if you didn't sign that document, that you didn't work; correct?

A Yes.

Q Now, what were your job duties on the job site?

A Cut scrap.

THE COURT: I'm sorry, I missed your answer.

THE WITNESS: Cut scrap iron.

THE COURT: Okay.

Q (By Mr. Newhall) And did you perform any other job?

A If I was instructed to operate, I operated.

Q All right. So if you were instructed to operate equipment, then you would do that; is that correct?

A Right, yes.

Q What equipment did you have occasion to operate while you were on the job site?

A I operated the dozer, the tractor, I operated the mag truck to pick up the iron, I operated the forklift. I never operated the man lift, never got to do that.

(Tr. at 367-368.)

80. Smith was often absent from the job site. (Tr. at 369.) During these times, the work proceeded without him.

81. Ruth and Thompson had worked with Smith on previous projects. They were experienced in salvage operations on the scale of the Flying J operation. They worked well with Smith and Smith had confidence in their abilities.

82. After considering all of the evidence in this case, the Court concludes that Smith retained a right of control over Ruth, Thompson, **and** Thayer. I am persuaded that in his testimony Smith deliberately understated his authority over his workers' in an attempt to have them characterized as independent contractors. Thayer is deceased and cannot testify as to the extent of authority Smith, in fact, exercised over him. However, based on

all the evidence presented, I am persuaded that whatever control was in fact exercised over Thayer, Smith retained a right of control over Thayer's work.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1991 version of the Workers' Compensation Act governs this case.

2. The claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 512 P.2d 1304 (1973); ***Dumont v. Aetna Fire Underwriters***, 183 Mont. 190, 201, 598 P.2d 1099 (1979).

3. Claimant must prove that her husband was an employee of Smith within the meaning of the Workers' Compensation Act. Section 39-71-401, MCA, which provides that the Workers' Compensation Act does apply to "employment of sole proprietors . . . except as provided in subsection (3)." An employee is defined in section 39-71-118(1)(a), MCA, as: ". . . each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written."

4. The issue in this case is whether Thayer was an employee or an independent contractor. Section 39-71-120, MCA (1991), defines an independent contractor as:

(1) . . . 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, both under his contract and in fact; and

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

(2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met. [Emphasis added.]

5. The fact that Thayer was expressly designated an independent contractor by Smith is not conclusive. Thayer "must have been independent in fact." ***Schrock v. Evans Transfer & Storage***, 225 Mont. 348, 351, 732 P.2d 848 (1987). Thus, the Court must examine all of the facts of the relationship to determine if it satisfies the criteria of the statute.

6. A preponderance of credible evidence persuades the Court that Thayer was engaged in an independent scrap business prior to his being hired by Smith. That business, however, was a small- scale one involving the scavaging of old farm equipment and similar items. Prior to going to work for Smith, Thayer's scrap business was never full-time and merely supplemented his income from other employment. Nonetheless, the nature of the business was sufficiently similar to the work Thayer performed for Smith so the "independently established trade" criteria of section 39-71-120 (1) (b), MCA, has been met.

7. In determining whether the "free from control" test of section 39-71-120 (1)(a), MCA, has been met, four factors are considered. **Sharp v. Hoerner Waldorf Corporation**, 178 Mont. 419, 425, 584 P.2d 1298 (1978). The four factors are: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire." *Id.* (citations omitted); **Loos v. Waldo**, 257 Mont. 266, 273, 849 P.2d 166 (1992). Consideration of the four factors "is not a balancing process. Direct employment status can be established upon satisfaction of one of the four factors." **Schrock**, 225 Mont. at 352. An independent contractor relationship can be established only by a convincing accumulation of factors favoring independent contractor status. **Sharp**, 178 Mont. at 425.

8. The right of control has been held determinative in previous cases. In **Loos v. Waldo**, 257 Mont. 266, 273, 849 P.2d 166 (1993), the Supreme Court affirmed a decision of this Court which held that the control factor was determinative. In that case the claimant had entered into an agreement to purchase a bar, including all inventory, the liquor license and the premises. He thereafter began operating the bar. However, the liquor license was not transferred and the owner maintained his name, jointly with claimant, on the checking account. This Court held that retention of the liquor license and the owner's status of signatory on the bar's checking account evidenced a right of control which rendered claimant an employee of the owner. The Supreme Court affirmed.

9. The control test "is based on the right, not just the exercise, of control." **Sharp**, 178 Mont. at 424. As a general rule, one hiring an independent contractor may control 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. **Johnson v. Department of Labor & Industry**, 240 Mont. 288, 292-293, 783 P.2d 1355, 1358 (1989). Where the right of control is limited to those few matters required to ensure a satisfactory end result, that right is not inconsistent with independent contractor status. **Solheim v. Davis Ranch**, 208 Mont. 265, 677 P.2d 1034 (1984). 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 he bargained for. **Walling v. Hardy Construction**, 247 Mont. 441, 447-448, 807 P.2d 1335 (1991) (citation omitted).

10. After examining all of the evidence in this case, the Court concludes that Smith retained a right of control over Thayer. Moreover, that right of control was exercised.

The fact that Thayer had his own independent scrap business does not preclude a conclusion that he was an employee of Smith. **See *Grief v. Industrial Accident Fund*, 108 Mont. 519, 93 P.2d 961 (1939)** (when a tow truck operator was given a flashlight by a road construction company's supervisor and told to direct traffic at an accident scene, the operator became an employee of the construction company). As found by the Court in this case, Thayer's business was a small-scale subsistence one. It differed from what he did for Smith both in magnitude and duration. **Grief** stands for the proposition that a worker engaged in an independent business may become another's employee depending on the circumstances. Thus, the particular circumstances of Thayer's work are important in this case.

The Court has made a number of findings of fact concerning Smith's relationship with Ruth and Thompson. Ruth and Thompson were clearly employees of Smith. They were paid by the hour. They used major equipment provided by Smith. Smith paid for their liquid oxygen. He required them to maintain his equipment. He directed their work in taking down the tanks. He could fire them at any time. All four factors overwhelmingly support a conclusion that Ruth and Thompson were employees. The Court recognizes that the status of Ruth and Thompson is not the issue in this case. Thayer may still be an independent contractor and the Court must determine *his* status.

Nonetheless, Smith's control over Ruth and Thompson is strong evidence that he retained a right of control over Thayer's work. The relationship which Smith legally sought to establish with Thayer — i.e., that of independent contractor — was no different than the relationship he sought to establish with Ruth and Thompson, and with every other scrap cutter who ever worked for him. The fact that Smith exercised actual and extensive control over Ruth and Thompson demonstrates that he never relinquished control over details of the work at the Flying J project, including the work of Thayer.

Given the repetitive and simple nature of Thayer's work, detailed supervision of his day-to-day work was unnecessary. But Smith was still "captain of the ship", retaining the right-to-control where needed. He controlled the flow of work at the project. He determined which equipment and tanks would be salvaged next. He directed Thompson and Ruth, also so-called independent contractors, to maintain his equipment. Thompson and Ruth did what they were told to do, and considered Smith to be in charge.

In fact, Smith exercised control over Thayer. Thayer's job was a full-time one. There is no evidence that he continued to do any independent scrap cutting after he was hired by Smith. The Flying J project provided as much scrap cutting as he could handle, a fact clearly recognized by Smith. While Thayer may have asked for and received hourly

remuneration at \$8 an hour, Smith thereafter raised the hourly amount to \$10, then converted Thayer to a piece-meal basis of pay. Having considered all of the evidence in this case, the Court is persuaded that Smith controlled the method and manner of pay, and that it was not determined by arms-length bargaining between Smith and Thayer.

Thayer also needed and was provided assistance in his work. Thompson helped him in the removal of stairs. Using Smith's equipment, on at least one occasion, Thompson pulled a tank section out of the mud so Thayer could work on it. Thompson helped Thayer flip sheets of metal so he could work on them.

Smith also took over accounting for Thayer's hours of work when he became unhappy with the accounting that Thayer's wife had provided. While claimant's testimony may make it appear that she voluntarily relinquished the accounting in the face of Smith's criticism of her record keeping, the Court is persuaded that in the face of Smith's personality and control over Thayer's continued employment, she had little choice in the matter. The right and exercise of control already outlined is sufficient to render Thayer an employee and entitle claimant to judgment in this case.

Further supporting that ultimate conclusion is the evidence concerning Thayer's relationship with Ruth and Thompson, who were responsible for maintaining Smith's equipment. Ruth and Thompson provided Thayer with some of the essential equipment he needed to do his job, including adequate cutting gloves, adequate boots, a face mask, a long cutting torch, cutting tips, and fire retardant. In return they received not only some home cooked meals from Thayer's wife, but also directed Thayer to help in servicing Smith's equipment. Thompson also had Thayer fix his trailer, which was used in taking unsalvageable items to the dump. Thayer was thereby employed to perform a part of the jobs assigned to Thompson and Ruth, and his work for them may be imputed to Smith. ***Carlson v. Lee Enterprises***, 204 Mont. 311, 323-326, 664 P.2d 913 (1983).

11. The method of payment test also cuts in favor of a finding of an employment relationship.

Payment on a time basis strongly indicates the existence of an employment relationship. ***Sharp***, 178 Mont. at 425; accord, ***Morris v. Montana Forward***, 245 Mont. 153, 156, 799 P.2d 1063 (1990). Thayer was paid on a time basis for several months. Moreover, after Thayer had worked for a short time, Smith determined that his pay should be raised from \$8 an hour to \$10 an hour. The pay raise is more indicative of an employment relationship than one of an independent contractor.

Smith ultimately placed claimant on a piece-meal payment basis. "Payment on a completed project basis is [a] indication of independent contractor status." ***Walling v. Hardy Construction***, 247 Mont. 441, 449, 807 P.2d 1335 (1991). But in this case, the change in the basis of payment did not change the basic nature of the relationship between

Smith and Thayer. Smith made the decision to make the change; it is unlikely that Thayer initiated the change. The ultimate plan to take down and cut up all of the equipment and tanks at the refinery did not change. The expectation that Thayer would continue to cut up the tanks as they were dismantled did not change. Overall, the method-of-payment factor favors the claimant in this case.

12. The third factor — the furnishing of equipment by the employer — also favors claimant in this case. While Thayer had the basic equipment required for cutting metal into scrap, he did not have the equipment necessary to cut scrap on the scale demanded by Smith. The job required a longer cutting torch, which was provided to Thayer by Thompson. Thayer did not have adequate cutting gloves and boots. Smith's equipment was needed to pull the tank sections into position for cutting. When one of the sections ended up in the mud, Smith's equipment was needed to pull it out of the mud so Thayer could work on it.

13. The fourth factor — the right to fire — is more equivocal.

The right to fire is strong evidence of an employer-employee status since the right to terminate the relationship without liability is not consistent with the concept of independent contractorship. **Solheim**, 208 Mont. at 276. "Termination at will or for failure to perform certain details unrelated to the end result strongly indicates employee status." **Walling**, 247 Mont. at 449 (citations omitted).

Initially, Thayer was hired on an hourly basis. Ruth and Thompson also worked on an hourly basis. They testified that they could be terminated at any time, and the Court found their testimony credible. The evidence is compelling that while paid on an hourly basis, Thayer could have been terminated at any time without further liability to Smith.

Did Smith's change of compensation to a per-tank basis alter the right to fire? If the method of compensation is considered in isolation, perhaps yes. Where payment is conditioned on completion of a specific task, termination prior to completion may amount to a breach of contract. **Solheim** 208 Mont. at 275-276. Thayer might well have been able to insist on this legal principal had he been terminated prior to his completing his cutting of any given tank. On the other hand, Smith clearly controlled the nature and manner of compensation, and retained the right to fire his other "independent contractors." Ultimately, this factor is not determinative.

14. In conclusion, Thayer was an employee of Smith when injured on October 15, 1992. His widow, Phyllis Thayer, is therefore entitled to death benefits under the Workers' Compensation Act. §§ 39-71-701 and 39-71-721, MCA. Since Smith was uninsured, the UEF is liable for those benefits. § 39-71-503, MCA.

15. The ultimate result in this case should in no way indicate that Smith and the UEF are *blameworthy* in their denial of this claim. So long as the law permits an exemption for independent contractors, businesses will attempt to take advantage of the exemption. They cannot be faulted for doing so. Workers' compensation insurance coverage is a significant cost of doing business. By permitting the exemption, businesses are encouraged to use independent contractors when possible. Unfortunately, whether a particular worker is an independent contractor or an employee is fact specific and is left to the after-the-fact determination of this Court and, ultimately, the Supreme Court. The consequence of guessing wrong may be economically catastrophic for both the business and the employee.

16. Claimant is not entitled to a penalty or attorney fees. This case is a close one. It has required a careful and reflective consideration of evidence presented over three days, numerous exhibits and several depositions. It is not a case where the evidence is clear and convincing or beyond a reasonable doubt. It has been decided in claimant's favor based on a simple preponderance of the evidence. The UEF's denial of the claim was not unreasonable.

17. Claimant is entitled to her reasonable costs.

JUDGMENT

1. Gerald Thayer was an employee of Richard Smith, and was injured in the course and scope of his employment on October 15, 1992, when his clothes caught fire and he was burned. Thayer died as a result of his injuries.

2. Petitioner, Phyllis Thayer, is Gerald Thayer's widow. She is entitled to death benefits under sections 39-71-704 and 39-71-721, MCA.

3. Since Richard Smith, the employer in this matter, was uninsured, benefits are payable by the Uninsured Employers' Compensation Fund to the extent provided by section 39-71-503, MCA.

4. Petitioner is not entitled to attorney fees and has not requested a penalty.

5. Petitioner is entitled to costs in an amount to be determined by the Court. She shall have fourteen (14) days from the date of this decision to submit an affidavit of costs. The UEF shall have ten (10) days thereafter to file its objections.

6. The JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

7. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 8th day of December, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Norman L. Newhall
Mr. Kevin Braun
Mr. Claren J. Neal
Mr. Leo S. Ward