

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 7

WCC No. 9311-6942

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GERALD L. THAYER (Deceased)  
PHYLLIS THAYER

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer for

RICHARD SMITH, d/b/a RRS, INCORPORATED

Employer.

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ORDER DENYING PETITION FOR A NEW TRIAL

**Summary:** Uninsured employer filed petition for new trial arguing that he was unfairly surprised by evidence admitted at trial.

**Held:** Under ARM 24.5.344, any party may “petition for a new trial or request amendment to the court’s findings of fact and conclusions of law within 20 days after the order or judgment is served.” The grounds for granting a new trial are enumerated in section 25-11-102, MCA, and include irregularity in the earlier proceeding preventing a fair trial and accident or surprise which ordinary prudence could not have guarded against. Smith’s claim of surprise by admission of evidence concerning the scope of control he exercised over a worker was unconvincing. The individuals involved were all listed as witnesses. Evidence of scope of control was relevant to employment status and contemplated by the issues stated in the pretrial order.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 25-11-102, MCA.** Under ARM 24.5.344, any party may “petition for a new trial or request amendment to the court’s findings of fact and conclusions of law

within 20 days after the order or judgment is served.” The grounds for granting a new trial are enumerated in section 25-11-102, MCA, and include irregularity in the earlier proceeding preventing a fair trial and accident or surprise which ordinary prudence could not have guarded against. Smith’s claim of surprise by admission of evidence concerning the scope of control he exercised over a worker was unconvincing. The individuals involved were all listed as witnesses. Evidence of scope of control was relevant to employment status and contemplated by the issues stated in the pretrial order.

**Constitutions, Statutes, Regulations and Rules: Workers’ Compensation Court Rules: ARM 24.5.344.** Under ARM 24.5.344, any party may “petition for a new trial or request amendment to the court’s findings of fact and conclusions of law within 20 days after the order or judgment is served.” The grounds for granting a new trial are enumerated in section 25-11-102, MCA, and include irregularity in the earlier proceeding preventing a fair trial and accident or surprise which ordinary prudence could not have guarded against. Smith’s claim of surprise by admission of evidence concerning the scope of control he exercised over a worker was unconvincing. The individuals involved were all listed as witnesses. Evidence of scope of control was relevant to employment status and contemplated by the issues stated in the pretrial order.

**Procedure: Post-Trial Proceedings: New Trial.** Under ARM 24.5.344, any party may “petition for a new trial or request amendment to the court’s findings of fact and conclusions of law within 20 days after the order or judgment is served.” The grounds for granting a new trial are enumerated in section 25-11-102, MCA, and include irregularity in the earlier proceeding preventing a fair trial and accident or surprise which ordinary prudence could not have guarded against. Smith’s claim of surprise by admission of evidence concerning the scope of control he exercised over a worker was unconvincing. The individuals involved were all listed as witnesses. Evidence of scope of control was relevant to employment status and contemplated by the issues stated in the pretrial order.

The employer in this matter, Richard Smith (Smith), has filed a petition for a new trial. In his supporting brief he argues that he was unfairly surprised by the Court's admission of evidence pertaining to the relationship among Smith and Gary Thompson and Jerry Ruth. He contends that petitioner should have specifically made that relationship an issue in the Pretrial Order, citing a prior order of this Court, ***Rasmussen v. State Compensation Insurance Fund***, No. 92-12-6647 (July 28, 1994 Order Granting New Trial). He further contends that the Court abused its discretion in admitting and considering evidence of the relationship.

Petitions for new trials are governed by ARM 24.5.344, which provides, inter alia, that any party "may petition for a new trial or request amendment to the court's findings of fact and conclusions of law within 20 days after the order or judgement is served." The grounds for granting a new trial are enumerated in section 25-11-102, MCA. There are three grounds applicable to cases tried without jury. They are:

- (1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
- ...
- (3) accident or surprise which ordinary prudence could not have guarded against;
- (4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial.

Smith's arguments fall under grounds (1) and (3); he does not offer any newly discovered evidence.

Smith is correct that the issue to be decided by the Court in this case concerned the relationship between Smith and Thayer, specifically whether Thayer was Smith's employee. He is incorrect in arguing that evidence concerning interaction among Smith, Ruth and Thompson was inadmissible unless the relationship among them was listed as a separate issue in the Pretrial Order. He is also incorrect in contending that the evidence was inadmissible in any event or that it constituted surprise.

The evidence pertaining to Ruth and Smith was circumstantial evidence of the scope of control Smith reserved and exercised over the project for which Thayer was hired. It was admitted because it was relevant to Smith's right of control in his relationship with Thayer. As such it was relevant to the issue raised in the Pretrial Order. Ruth and Thompson were identified as witnesses. The videotape to which Smith vigorously objects was identified as an exhibit claimant intended to offer. There was no undue surprise. The Court carefully considered this matter, including Smith's arguments, and still believes that it reached the correct result.

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The petition for a new trial is **denied**.

Dated in Helena, Montana, this 27th day of January, 1995.

(SEAL)

/S/ Mike McCarter  
JUDGE

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