IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 15

WCC No. 2004-0973

KAREN FEATHER

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

DORENE LEIGH

Party/Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The long-time companion of an elderly, disabled individual hired caregivers to provide for his care, paying for that care out of the disabled person's funds. One of the caregivers was injured while working and sought workers' compensation benefits. The companion was uninsured and the claim was routed to the UEF, which accepted liability and paid benefits. The companion reimbursed the UEF for the benefits but did so under protest and then petitioned the Court for a refund of the payment on the grounds that the caregiver was an independent contractor and in any event faked her injury.

Held: (1) The injury was real, not faked.

(2) The caregiver was an employee, not an independent contractor, where details governing care were controlled by the employer who reserved in writing the right to dictate the details; where all supplies were furnished by the employer; and where the caregiver could be terminated at will with the employer's liability being only for the daily wages for the day on which the caregiver was terminated if any time was worked that day.

Topics:

Independent Contractor: Presumption. A person working for another is presumed to be an employee. The presumption, however, may be rebutted by evidence demonstrating that the hiring party does not exercise or have a right of control over the work involved and the party hired is engaged in an independently established trade, occupation, profession, or business. § 39-71-120, MCA (2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-120, MCA (2003). A person working for another is presumed to be an employee. The presumption, however, may be rebutted by evidence demonstrating that the hiring party does not exercise or have a right of control over the work involved and the party hired is engaged in an independently established trade, occupation, profession, or business. § 39-71-120, MCA (2003).

Independent Contractor: Elements. Under part (a) of the statutory two-part test for determining whether a worker is an independent contractor, the party hiring the worker must demonstrate that the worker is in fact free from the hiring party's control and from any right to control. In determining the right to control, four factors must be considered. Those factors are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.

Independent Contractor: Elements. Where the party hiring a caregiver dictates the details and schedule for care, and expressly reserves the right to dictate those details, provides all supplies, and retains the right to fire at will with liability for payment of a full day's wages for any day or part of a day worked, part (a) (freedom from control) of the independent contractor test is not met and the caregiver is an employee.

Independent Contractor: Elements: Right of Control. Where the party hiring a caregiver dictates the details and schedule for care, and expressly reserves the right to dictate those details, part (a) (freedom from control) of the independent contractor test is not met and the caregiver is an employee.

Procedure: Pretrial Order. Even though a party represents herself, the Court cannot inject and consider issues which are not within the scope of even the broadest or most liberal construction of the issues framed in the pleadings and Pretrial Order.

Pro se. Even though a party represents herself, the Court cannot inject and consider issues which are not within the scope of even the broadest or most liberal construction of the issues framed in the pleadings and Pretrial Order.

¶1 The trial in this matter was held in Kalispell, Montana on December 8, 2004. The petitioner was present and represented herself. The respondent was represented by Mr. Joseph Nevin. The claimant was present and represented herself.

¶2 Exhibits: Exhibits 1 through 7, 9, 11, and 14 through 34 were admitted without objection. Exhibit 8 was admitted over objections. Exhibit 10 was admitted for impeachment purposes only. Exhibits 12 and 13 were refused.

¶3 Witnesses and Depositions: The petitioner, Doreen Leigh, Janelle Moon, Michael Moon, and Bernadette Rice testified. No depositions were offered.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are as follows:

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

¶4b Whether Leigh faked her August 15, 2003, injury.

¶4c Whether Montana State Fund would have paid benefits to Leigh if Feather had been insured by them.

(Pretrial Order at 5.)

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

FINDINGS OF FACT

¶6 Jerome S. DeSanto (Jerry) and the petitioner, Karen Feather (Karen or petitioner), have been companions for twenty-two years, living together during that time except when Jerry was institutionalized following illness with viral encephalitis.

¶7 On April 1, 1999, Jerry contracted viral encephalitis. He thereafter became disabled and unable to care for himself.

¶8 On the day Jerry contracted encephalitis, Karen retired from gainful employment and has not returned to work since then. Her prior jobs were as a cook, waitress, and secretary – mostly as a cook.

¶9 For approximately the first two years following his infection, Jerry was cared for at the Montana Veterans' Home (Veterans' Home) in Columbia Falls, Montana. During the next two years, Karen cared for him in their home. Jerry then spent approximately another two years in the Veterans' Home.

¶10 In May 2003, Karen again took Jerry home to care for him. She was appointed his temporary guardian but was required by the Court to employ a Certified Nurses' Assistant (CNA) as a caregiver to assist in his care. On March 23, 2004, she was appointed his guardian and conservator without restrictions. (Ex. 35.)

¶11 After taking Jerry home in May 2003, Karen hired caregivers to provide twenty-four hour, seven-days-a-week care to Jerry. All caregivers have been paid from Jerry's funds pursuant to a power of attorney executed by Jerry in 1999.[1] Karen is also his conservator, apparently since 1999.

¶12 Two caregivers worked during each week, splitting the week. Each one worked twenty-four hour shifts and consecutive days.

¶13 The claimant, Doreen Leigh (Doreen or claimant), was hired as one of Jerry's caregivers on June 14, 2003. She split Jerry's care with Janelle Moon (Janelle), another caregiver. Doreen was scheduled to work four days a week, with Janelle working the other three days.

¶14 Doreen was paid $100 per day from Jerry's funds. In conversations with Karen she indicated she would work as an independent contractor.

¶15 At the time Doreen was hired, Karen gave her a list of instructions or guidelines for Jerry's care. The list was prepared by or at least with the help of Jerry's first caregiver. The instructions, which are found at Exhibit 25, are extensive and detailed. Examples are:

> Fittness [sic]: We'll do it with exercise, primarily two walks a day, loosening up before moving . . . . Hydration. We measure two 20 ounce bottles at the beginning of the day and use that water until it's gone. . . .
>
> Part of Jerry's caregiving is getting him to do as much as he can for himself. That's where you need PATIENCE . . . . Always give in to him before your patience gives out. You can always call me to take over.

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[1]Karen testified to these facts and I found her testimony credible. However, I requested that post-trial she furnish the UEF with copies of the power of attorney and checks paid for domiciliary care. She did so and also furnished those documents, which confirm her testimony, to the Court. Copies are in the Court file.

> Daily Routine. Before 7 AM, turn on heaters if needed. Out of bed at 7 and to toilet where he drinks Metamucil and another glass of water. Teeth in. To the bath. . . . Shave him in the tub -- that is, get him to shave as much as he can and you finish up.
>
> To the dining room and rocking chair. Music and rocking for 10 minutes then breakfast. When it's convenient during or after this routine, start laundry, make bed, tidy up, etc.
>
> . . . .
>
> Before dinner and lunch I'd like him to "wash up." Give him a warm washcloth so he can wipe his face.
>
> . . . .
>
> Take advantage of Jerry's naps, TV, while you are here. Get away for some quiet time or a walk. I will stand by. Just let me know when you want that break.
>
> . . . .
>
> **Please address any complaints you have to me. We can change almost anything and I want the opportunity to make your stay with us as pleasant and productive as possible. Please help me with opinions about the best way to care for Jerry. I may not take the advice but give me the chance to consider it.**

(Ex. 25, emphasis added.)

¶16 Karen also instructed Doreen to fill out a daily checklist form. The form, which is found at Exhibit 34, lists specific activities and tasks to be done each day, including walks, naps, snacks, and toileting, and the times for various activities. The form also provides for remarks and ratings of Jerry's cognition, disposition, and physical state during the day.

¶17 All supplies for Doreen's work were provided by Karen.

¶18 Doreen has a history of back problems and on the morning of August 15, 2003, while bending over to help Jerry bathe, she experienced a sharp pain in the middle of her back. She telephoned Karen and reported the incident but continued to work, albeit with continuing back pain.

¶19 August 16 and 17, 2003, were regularly scheduled days off for Doreen.

¶20 Unable to find someone to cover her shift on August 18, 2003, Doreen returned to work on that day. She took Jerry to the Veterans' Home. Karen met her there and asked Doreen about her back. Doreen replied that it was "pretty bad." Karen then told her to go home. Doreen worked for two hours that day and thereafter did not return to care for Jerry.

¶21 On August 21, 2003, Doreen sought chiropractic care from Gregory D. Pisk, D.C., C.C.S.P. (Ex. 31 at 59.) Dr. Pisk diagnosed an "[a]cute lumbar sprain." (*Id*. at 60.) He limited her to light-duty work. (*Id*.) After a series of chiropractic treatments, he found her at maximum medical improvement on December 12, 2003, with a "0% impairment rating," indicating that she had reached preinjury status. (*Id*. at 9.)

¶22 I find as a matter of fact that the claimant suffered a lumbar strain on August 15, 2003, while caring for Jerry.

¶23 On August 22, 2003, Doreen filed a claim for workers' compensation benefits. (Ex. 16.) Since Karen was uninsured, the claim was routed to the Uninsured Employers' Fund (UEF).

¶24 After investigation, the UEF determined that the claim was compensable, accepted liability, and paid benefits. It then billed Karen, who reimbursed the UEF for the benefits but did so under protest. Karen then brought the present petition. The parties agree that she is seeking a return of the monies she paid to the UEF.

¶25 The foregoing findings of fact reflect assessment of the witnesses' credibility and my ultimate resolution of conflicting testimony.

CONCLUSIONS OF LAW

¶26 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

I. Employee Versus Independent Contractor

¶27 The first issue is whether Doreen was an employee or independent contractor. If an independent contractor, then Doreen was not entitled to compensation, § 39-71-118(1)(a) and -401(1), and Karen is entitled to reimbursement for monies paid to the UEF.

¶28 Section § 39-71-120(1), MCA (2003), defines "independent contractor" as follows:

> (1) An "independent contractor" is one who renders service in the course of an occupation and:
>
> (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact; and
>
> (b) is engaged in an independently established trade, occupation, profession, or business.

A worker is presumed to be an employee, however, that presumption is a disputable one. *State ex rel. State Compensation Mut. Ins. Fund v. Berg*, 279 Mont. 161, 182-84, 927 P.2d 975, 988 (1996). Subsection (2) of section 39-71-120 provides:

> (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.)

¶29 As set forth in section 39-71-120(1), MCA (2003), an independent contractor relationship can be established only if both subparts (a) and (b) are satisfied. "Unless both parts of the test are satisfied by a convincing accumulation of undisputed evidence, the worker is an employee and not an IC." *Wild v. Fregein Constr.,* 2003 MT 115, ¶ 34, 315 Mont. 425, 68 P.3d 855.

¶30 To determine whether part (a) – freedom from control – is met, four factors are considered. Those factors are: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire." *Wild,* ¶ 33. In this case, three of the factors indicate an employment rather than an independent contractor relationship, while the fourth factor is more neutral.

¶31 Initially, the detailed instructions adopted and applied by Karen with respect to Jerry's care and the timing of care indicate an actual exercise of control going beyond the minimum necessary for Doreen to care for Jerry. Those instructions expressly stated that while Karen would consider Doreen's suggestions as to Jerry's care, she reserved the right not to take and implement that advice. The instructions read in relevant part:

> Please help me with opinions about the best way to care for Jerry. **I may not take the advice but give me the chance to consider it.**

(Ex. 25, emphasis added.) This reservation of the right of control of nearly every aspect of Jerry's care is incompatible with independent contractor status and in itself requires a finding that Doreen was an employee.

¶32 Karen also furnished all supplies and tools for Doreen's work. Thus, the third factor is more consistent with employment rather than independent contractor status.

¶33 With respect to the fourth factor – the right to fire – there was nothing to preclude Karen from terminating Doreen at any time. At best, she would have been liable for a full day's wages if any work was performed on that day since the agreement was for a daily wage rather than hourly wages. Thus, this factor indicates an employment relationship.

¶34 Since the first factor in itself shows an employment relationship, and since the four factors overall indicate an employment relationship, I hold that Doreen was an employee, not an independent contractor. I need not consider whether part (b) of section 39-71-120(1), MCA (2003), was met.

II. Industrial Accident

¶35 Karen alleges that Doreen did not in fact injure herself on August 15, 2003, as she alleges. However, I have found as a matter of fact that Doreen did suffer an unusual back strain on that date and that she did not fake her injury.

III. The State Fund Contention

¶36 Finally, Karen contends that she or Jerry should not be liable for Doreen's benefits since the Montana State Fund (State Fund) would not have accepted liability for her claim had it been the insurer. What the State Fund would or would not have done in response to this claim is a matter of pure speculation. Moreover, whether or not it would have accepted the claim is immaterial. Even if the State Fund had denied the claim, its denial would have been subject to judicial review and an independent judicial determination of the merits of the claim.

IV. Casual Employment Exception

¶37 At the inception of the trial of this matter, I noted a significant question as to whether the claimant's employment was "casual employment" and therefore exempt from workers' compensation insurance coverage requirements. "Casual employment" is defined in section 39-71-116(7), MCA (2003), as "employment not in the usual course of the trade, business, profession, or occupation of the employer." Section 39-71-401(2), MCA (2003), provides:

> (2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following employments:
>
> (a) household and domestic employment;
>
> (b) casual employment as defined in 39-71-116 . . . .

There is no question that the petitioner in this case is retired and, despite UEF's contention to the contrary (Objection and Supplemental Brief at 7), is certainly **not** engaged in a trade,

business, profession, or occupation involving the provision of domiciliary care.[2] Moreover, the evidence adduced at trial showed that Karen was in fact acting on behalf of Jerry in employing Doreen and that Jerry was in fact paying for Doreen's services. Jerry is disabled and similarly is not engaged in any trade, business, profession, or occupation involving the provision of domiciliary care.

¶38 Section 39-71-501, MCA (2003), defines an uninsured employer as "an employer who has not properly complied with the provisions of 39-71-401." Thus, if the claimant's employment was casual employment exempt from coverage requirements, then the petitioner (or Jerry) was not required to provide coverage and therefore was not an uninsured employer.

¶39 At trial the UEF argued that the claimant's employment was not exempt because domiciliary care should not be considered casual employment. It relied on the definition of household and domestic employment, which is similarly exempt from workers' compensation insurance coverage requirements. Section 39-71-116(13), MCA (2003), however, expressly excludes domiciliary care from the definition of household and domestic employment, providing:

> (13) "Household or domestic employment" means employment of persons other than members of the household for the purpose of tending to the aid and comfort of the employer or members of the employer's family, including but not limited to housecleaning and yard work, but does not include employment beyond the scope of normal household or domestic duties, such as home health care or domiciliary care.

The UEF argued that the household and domestic employment definition must be read together with the casual employment definition so as to limit casual employment to situations **not** involving domiciliary care.

¶40 The problem with the UEF's argument is obvious. The casual employment definition and exemption do not contain any exception for domiciliary care. While casual employment may include employment that may also qualify as household and domestic employment, the legislature chose to make a separate and specific provision for casual employment and chose **not** to provide *any* exceptions to the general definition. To read the casual employment exemption as the UEF suggests would seemingly invite the Court to write in an exception in violation of section 1-2-101, MCA (2003), which admonishes courts to **not** "insert what has been omitted" by the legislature.

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[2]"Trade, business, profession, or occupation" involves work for wages or profit, not employment of others to provide life's necessities.

¶41 However, I need not finally and authoritatively construe the casual employment exemption as that issue was not raised by the parties and I conclude, after further and extended reflection, that it was improper for me to inject the issue into the case. While "[t]he pretrial order should be liberally construed to permit any issues at trial that are 'embraced within its language,'" *Ingbretson v. Louisiana-Pacific Corp.,* 272 Mont. 294, 298, 900 P.2d 912, 915 (1995), "a legal theory or factual issue must be at least implicitly included in the pretrial order," *Plath v. Schonrock,* 2003 MT 21, ¶55, 314 Mont. 101, 64 P.3d 984. The issues as set out in the Pretrial Order in this case, construed in their broadest sense and most favorably to the petitioner, do not encompass any contention or issue involving the casual employment exemption. The sole issues raised by the Pretrial Order are whether the claimant was an independent contractor, whether she was injured, and whether the State Fund would have accepted her claim. Those issues are the same ones raised by the petition. (Petition for Hearing, ¶ 3.)

¶42 In determining that I cannot consider the casual employment exception, I note that the petitioner is representing herself and that one of the express purposes of the Workers' Compensation Act is to minimize the reliance on lawyers. Section 39-71-105(3), MCA (2003), provides:

> (3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, **the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities**.

(Emphasis added.) However, the Court cannot become an advocate for a litigant, even where that litigant is proceeding without an attorney. Moreover, the claimant in this case was unrepresented as well. Injecting the casual employment exemption into the case may prejudice the claimant's rights and expose her to repaying benefits to the UEF.

V. Resolution

¶43 Karen has failed to establish that Doreen was an independent contractor or that she faked her industrial injury. Since those were the only material grounds alleged by her in support of her request for a refund of monies she paid on Jerry's behalf to the UEF to reimburse the UEF for Doreen's benefits, Karen is not entitled to a refund.

JUDGMENT

¶44 The petitioner and her long-time, now disabled, companion are not entitled to a refund of monies paid to the UEF. The petition is therefore **dismissed with prejudice**.

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

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

DATED in Helena, Montana, this 28th day of March, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Karen Feather
Mr. Joseph Nevin
Ms. Dorene Leigh
Submitted: January 5, 2005