

STATE OF MONTANA

DEPARTMENT OF LABOR AND INDUSTRY

HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS ) Case No. 2194-2001
OF PAMELA C. KING, KATHLEEN PRICE, ) Case No. 210-2002
and JUDY BURKLO, ) Case No. 405-2002

Claimants, )

vs. ) Final Agency Decision

CS LEGAL DICTATION, L.P., a Texas )
limited partnership not registered in Montana, )
d/b/a Cyber Secretaries, Inc., a/k/a )
CyberSecretaries, Inc. not registered in Montana )
Respondents. )

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I. Introduction

The department consolidated the wage claims of Pamela King, Kathleen Price and Judy Burklo (formerly Steinbrink) for contested case hearing. The Hearing Officer convened the telephone hearing on October 25, 2002. Previous orders addressed the preliminary issues involved (jurisdiction, propriety of telephonic hearing). Pamela C. King, Kathleen Price and Judy Burklo, the claimants, appeared by telephone, testified under oath and participated in the hearing on their own individual behalf. Richard Jackson, counsel for respondent, participated by telephone in the hearing.

In addition to the claimants, Joan McChesney appeared by telephone and testified under oath. The Hearing Officer admitted Exhibit K45 (consisting of pages K45 though K87), overruling respondent's objections, and respondent's Exhibits 1 through 4 ("R1," etc.) without objection. The Hearing Officer refused Exhibit P93, sustaining respondent's hearsay, foundation and disclosure objections.

At the conclusion of the hearing, after the opportunity to present oral argument, the parties submitted the cases for decision.

II. Issues

The issues in these consolidated cases are: (1) whether King, Price and Burklo were employees of the respondent, CS Legal Dictation, L.P., a Texas limited partnership not registered in Montana, doing business as Cyber Secretaries, Inc., also known as CyberSecretaries, Inc., not registered in Montana; (2) whether the respondent owes wages to King, Price and Burklo, as alleged in their several complaints and (3) whether the respondent owes penalties, as provided by law, to King, Price and Burklo. The Hearing Officer will also briefly revisit the threshold issues of jurisdiction and due process.

### **III. Findings of Fact**

1. Kathleen Price is an experienced legal secretary and legal assistant, residing in New Jersey. In 2000, she was searching for a means of working from her home, either in addition to or instead of working in a law firm. She found an Internet offer of work transcribing dictation. The offer appeared on a web site ("youdictate.com") operated by or on behalf of CS Legal Dictation, L.P., a Texas limited partnership not registered in Montana, doing business as Cyber Secretaries, Inc., also known as CyberSecretaries, Inc., not registered in Montana, the respondent in this case.
2. Using the Internet from her home in New Jersey, Price submitted application materials, took a proficiency test, obtained a manual with directions for dictation, received and signed a document identified on its face as a confidentiality agreement<sup>(1)</sup> and submitted a schedule of what hours she would be available and performing the work, within the shift choices the respondent provided. The respondent provided work via the Internet. The respondent did not require and Price did not submit any documents to permit or require deductions from her pay for any taxes, government programs or benefits.
3. In dealing with the respondent, both by e-mail and (less frequently) by telephone, Price dealt with Richard Jackson and members of his immediate family, all (so far as she knew) situated in Montana. For part of the time that Price provided work for the respondent, she also was under the supervision of Joan McChesney, who lived and worked in Montana. The respondent told Price during that time that McChesney was her immediate supervisor.
4. The respondent required Price to work specific scheduled hours, to perform the work in a specific fashion, to use specific tools (software and hardware) provided by the employer or purchased by Price at the employer's direction. The respondent reviewed the work Price submitted and sometimes directed changes to it. The respondent, through McChesney and Richard Jackson, as well as through the directions in the manual periodically provided by Internet, supervised the fashion in which Price performed the transcription work.
5. Price performed the transcription work, submitting her transcriptions via the Internet through the respondent's web site. She worked both as a transcriptionist and as a supervisor of the other transcriptionists working during her shift. The respondent gave directions regarding the work by e-mail and by telephone. In all of these actions and transactions, Price participated from her home. Price also obtained software and hardware to use in performing the work, at the direction of the respondent.

6. Price also dealt with the individual (David Bardwick) the respondent told her was the computer administrator (computer maintenance person), who provided assistance on behalf of the respondent when Price experienced or learned of problems with the computer. Bardwick, acting in his capacity for the respondent, told Price that the computer or computers of the respondent were situated in his home in Montana.

7. Price received payment from the respondent for some of her services. The checks were drawn on a bank located in Montana. The respondent sent her a federal form 1099 reflecting the amount it had paid her. No deductions for any purpose were taken from the amount paid, which the respondent treated as the entire amount due to Price.

8. On April 19, 2001, the respondent terminated the work relationship with Price, by e-mail. The respondent failed to pay Price for 92 hours she worked during the relationship, at \$9.50 per hour, for a total of \$874.00.

9. Pamela C. King is an experienced legal secretary and legal assistant, residing in Louisiana. In February 2001, she was searching for a means of working from her home, either in addition to or instead of working in a law firm. She found an Internet offer of work transcribing dictation. The offer appeared on a web site ("youdictate.com") operated by or on behalf of CS Legal Dictation, L.P., a Texas limited partnership not registered in Montana, doing business as Cyber Secretaries, Inc., also known as CyberSecretaries, Inc., not registered in Montana, the respondent in this case.

10. Using the Internet from her home in Louisiana, King submitted application materials, took a proficiency test, obtained a manual with directions for dictation, received and signed a document identified on its face as a confidentiality agreement and submitted a schedule of what hours she would be available and performing the work, within the shift choices the respondent provided. The respondent provided work via the Internet. The respondent gave directions regarding the work by e-mail and by telephone. In all of these actions and transactions, King participated from her home. King also obtained software and hardware to use in performing the work, at the direction of the respondent. The respondent did not require and King did not submit any documents to permit or require deductions from her pay for any taxes, government programs or benefits.

11. In dealing with the respondent, both by e-mail and (less frequently) by telephone, King dealt with Richard Jackson and members of his immediate family. She also dealt with Price, identified by the respondent as her immediate supervisor.

12. The respondent required King to work specific scheduled hours, to perform the work in a specific fashion, to use specific tools (software and hardware) provided by the employer or purchased by King at the employer's direction. The respondent reviewed the work King submitted and sometimes directed changes to it. The respondent, through Price and Richard Jackson, as well as through the directions in the manual periodically provided by Internet, supervised the fashion in which King performed the work.

13. During the first two weeks of her work, beginning on or about March 1, 2001, King performed 82.5 hours of the transcription work, submitting her transcriptions via the Internet

through the respondent's web site. She and the respondent had agreed she would be paid \$8.00 an hour for her transcription work.

14. In mid-March, the respondent advised King that her work was of unacceptably poor quality. The respondent refused to pay King for her work. King, seeking to receive pay for the time she had already worked, agreed to work thereafter for \$.00333 per word and agreed that the employer would pay her money for the hours already worked if she submitted sufficient work of acceptable quality under the new agreement. King did not agree that her previous work was unsatisfactory but only entered into the agreement to be paid for the time already worked. Pursuant to this arrangement, King provided 28,132 words of transcription to the respondent, in the same fashion and under the same circumstances as her previous hourly dictation transcription.

15. On March 27, 2001, the respondent terminated the work relationship with King, by e-mail, on the grounds that her work was still of too poor a quality. The respondent did not pay King for any of her work. King worked 82.5 hours during the first two weeks of the relationship, at \$8.00 per hour, for a total of \$660.00, and provided 28,132 words of transcription at \$.00333 per word, for a total of \$94.68.

16. Judy Burklo (formerly known as Judy Steinbrink) is an experienced legal secretary and legal assistant, residing in Ohio. In March 2001, she was searching for a means of working from her home, either in addition to or instead of working in a law firm. She found an Internet offer of work transcribing dictation. The offer appeared on a web site ("youdictate.com") operated by or on behalf of CS Legal Dictation, L.P., a Texas limited partnership not registered in Montana, doing business as Cyber Secretaries, Inc., also known as CyberSecretaries, Inc., not registered in Montana, the respondent in this case.

17. Using the Internet from her home in Ohio, Burklo submitted application materials, took a proficiency test, obtained a manual with directions for dictation, received and signed a document identified on its face as a confidentiality agreement and submitted a schedule of what hours she would be available and performing the work, within the shift choices the respondent provided. The respondent provided work via the Internet. The respondent did not require and Price did not submit any documents to permit or require deductions from her pay for any taxes, government programs or benefits.

18. Burklo and the respondent agreed to a rate of \$9.00 per hour for her transcription services. Burklo performed 59 hours of transcription work, submitting her transcriptions via the Internet through the respondent's web site. The respondent gave directions regarding the work by e-mail and by telephone. In all of these actions and transactions, Burklo participated from her home. Burklo also obtained software and hardware to use in performing the work, at the direction of the respondent.

19. In dealing with the respondent, both by e-mail and (less frequently) by telephone, Burklo dealt with Richard Jackson and members of his immediate family. Burklo also was under the supervision of Price, identified by the respondent as her immediate supervisor.

20. The respondent required Burklo to work specific scheduled hours, to perform the work in a specific fashion, to use specific tools (software and hardware) provided by the employer or purchased by Burklo at the employer's direction. The respondent reviewed the work Burklo submitted and sometimes directed changes to it. The respondent, through Price and Richard Jackson, as well as through the directions in the manual periodically provided by Internet, supervised the fashion in which Burklo performed the work.

21. The respondent discharged Burklo and never paid her any of the \$531.00 it owed her for the work she did.

## **IV. Opinion**

### **A. Preliminary Matters Jurisdiction**

In addition to the findings herein and the previous ruling, the Hearing Officer notes that the Department filed affidavits of fact in opposition to the respondent's motion to dismiss for lack of jurisdiction, and that the previous Hearing Officer relied upon those affidavits in the original ruling upon the Motion to Dismiss. The respondent had offered no evidence to rebut those affidavits since that ruling.

The respondent conceded, in the proceedings on the motion to dismiss, that the Department had jurisdiction over its person. Its sole argument was that the Department lacked subject matter jurisdiction over the claims of King, Price and Burklo. The central argument the respondent made was that it was not "an employer of labor in the state of Montana" pursuant to Mont. Code Ann. § 39-3-204. However, as the Department pointed out in its prehearing brief opposing the motion to dismiss, the physical presence of the respondent in Montana establishes the requisite jurisdictional presence for subject matter as well as personal jurisdiction. The respondent's computers, the supervisors of all three claimants, the only identified principal of the respondent, the computer administrator and the bank account out of which Price received her wages were and apparently are all in Montana. The work the claimants each performed was performed on dictation provided to the claimants through the web site from Montana, and received by the respondent through the web site in Montana. The respondent did employ labor (see Section C of this opinion, *infra*). The respondent was and is in Montana. The respondent's effort to stretch the statutory meaning to eliminate subject matter jurisdiction because the claimants were not in Montana is unpersuasive.

### **B. Preliminary Matters Due Process**

The respondent also raised anew the propriety of a telephone hearing. The order rejecting that challenge still applies. At this hearing, the three claimants, by their testimony under oath and by their knowledge of the pertinent events, clearly demonstrated their identities. Joan McChesney's identity was not subject to any doubt even respondent's counsel (by threatening her with litigation regarding her confidentiality agreement) clearly accepted her identity. Thus, the only basis for the challenge is the absence of face to face confrontation of the witnesses by counsel for respondent, and the absence of any opportunity for the Hearing Officer to observe the witnesses.

The Hearing Officer does not agree that those absences denied due process. Indeed, since the respondent elected not to put on any evidence of its own aside from exhibits, there is no potential prejudice. The cross-examination of the claimants did not give rise to sufficient credibility questions to support even a faint suggestion that the actual physical presence of the parties would have aided the Hearing Officer in deciding the limited credibility issues involved. The respondent failed to demonstrate any actual or presumptive prejudice in the conduct of the telephone hearing. Indeed, the only real prejudice was that the respondent was unable to prevent the claimants from proceeding in this forum because it was unable to persuade the Department to subject the claimants to the unfairly onerous burden of attending an in-person hearing in Montana.

### **C. Status for Liability Employees versus Independent Contractors**

Montana law requires employers to compensate employees for all hours worked. For that law to apply, there must be an employer-employee relationship, determined by the two part test (control and independent trade) articulated in Mont. Code Ann. § 39-51-201(15) and *Sharp v. Hoerner Waldorf Corp.* (1978), 178 Mont. 419, 584 P.2d 1298, to address independent contractor status for wage and hour purposes.<sup>(2)</sup>

*Sharp, supra*, applying the statute, recognized four factors in determining if the right to control exists: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire.

With regard to the right to fire, the agreements between the claimants and the respondents were terminable at will by either party. The evidence is clear that all the parties treated their agreements in this fashion. This is precisely the relationship between a probationary employee and the employer, during a probationary period that (unless otherwise specified) lasts for six months. It is inconsistent with the limitations placed upon an employer for discharging employees who have completed their probationary periods. *See* Mont. Code Ann. §§ 39-2-904(2) and 912(2).

With regard to the furnishing of equipment, the respondent either provided or assisted and directed the claimants in obtaining the equipment (manuals, software and hardware) necessary for the work. That is more consistent with an employment relationship than with an independent contractor relationship.

With regard to method of payment, the claimants were supposed to receive regular payments, although that never really happened, even for Price. The respondent apparently regularly chose to raise questions about quality when it came time to pay the claimants for the work already performed in accord with their several agreements. However, the putative method of payment is consistent with employment.

Of the three factors already discussed (payment, equipment and firing), two favor an employment relationship for Price, and all three favor an employment relationship for King and Burklo. The fourth factor, direct evidence of the right or exercise of control, is the central element involved in the statutory test. If the respondent exercised such control over the claimants

that it acted as their employer, it was, on that basis alone, their employer, regardless of the other three factors. Mont. Code Ann. § 39-51-201(15)(A).

The respondent did exercise such control over the claimants. It controlled their hours of work, it controlled their methods of work and it exercised direct supervision over them. The beauty of the dictation transcription work, as the respondent offered it to the claimants, was that they could do essentially what they would do in the typing pool of a large law firm or other business, but do so at home. The element of control was otherwise virtually identical to that exercised by a large law firm or other employer of typists. Because the claimants attended their work shifts over the Internet, there was no dress code and no commuting time, but they still had to be "at work" (on the Internet from their home computers) during their work hours. The respondent, in every respect other than what the claimants wore to work, exercised the same degree of control over the claimants as would a law firm employing them. The respondent employed the claimants.

Pursuant to Mont. Code Ann. § 39-51-201(15) and *Sharp, op. cit.*, the claimants cannot simply agree (by the "confidentiality" agreements) that their relationships with the respondent are those of independent contractors and thereby defeat the meaning and intent of the law. To be independent contractors, King, Price and Burklo must each engage in an independently established trade, occupation, profession or business, as well as being free from the respondent's control or direction over the performance of those services. Here, in addition to the control the respondent exercised, there is no evidence that these three workers engaged in any independently established trade, profession or business. Stating in the confidentiality agreements that they are independent contractors does not make it so.

On the face of it, there was evidence at hearing that the claimants were independent contractors, consisting of the confidentiality agreements and the absence of the usual formal indicia of employment. The claimants knew or should have known of the respondent's intent (manifested in the agreements) that they be independent contractors. In addition, none of them filled out the usual forms for a new employee, such as income tax withholding documentation for federal or state governments, Social Security information, Unemployment Insurance information, INS and other government program forms. Likewise, there is no evidence that the claimants received any notice of coverage under any Workers' Compensation insurance policy in Montana or any other jurisdiction.

Although only Price received any payments from the respondent for her work, none of the claimants could have reasonably expected that their payments (if and when received) would be for less than the full amount. In short, the claimants all knew or should have known that they would receive (as Price actually did) 100% of the amount the respondent concluded was due to them, with documentation appropriate to such payments (federal 1099s).

None of the claimants applied for or received a Montana independent contractor exemption. None of them lived in Montana and none of them, until the respondent failed and refused to pay them, evidenced any interest in being employees. Only after the respondent failed and refused to pay them and their ensuing efforts to vindicate their claims in their home states and in Texas failed, did the claimants seek relief from the Department in these proceedings. Nonetheless, since they established the elements of the employment relationship, they are entitled to recover.

Even though there was a manifest intent on respondent's part to define the claimants as independent contractors rather than employees, that intent cannot overcome the facts, and the bald language of the confidentiality agreements, if it were effective to bar an employment relationship, is void. Mont. Code Ann. § 37-3-208. Likewise, the respondent's failure to take the steps an employer must take regarding deductions and regulatory programs cannot defend it from its liability as an employer regarding workers it controlled as employees. While saying it was retaining the claimants as independent contractors, the respondent exercised the prerogatives of an employer in its treatment of the claimants, and is therefore liable to them as their employer.

#### **D. Proof of Wages Due and Identity of the Employer**

The respondent elected to stand upon its legal defenses, and offered no evidence except documentary evidence. With virtually no exceptions, the claimants' evidence was uncontested as a result. Comments upon a few of the exceptions follow. For the most part, the claimants credibly testified to the amount of work they did and the amount the respondent had agreed to pay them for that work.

The respondent cross-examined the claimants, perhaps in part, in an effort to establish that their work was, indeed, substandard. If that was the intent, it failed. Even if it had succeeded, poor performance does not justify withholding an employee's pay.<sup>(3)</sup> Poor performance may provide a basis for disciplinary action or discharge, but employees are entitled to their pay for the hours already worked. Wages earned are due and payable. Mont. Code Ann. § 37-3-204.

King renegotiated her agreement in an effort to receive pay the respondent was withholding for work she already had done. The portion of that agreement that involved conditioning her payment for work already performed upon acceptance of her further work over a period of time is void as a matter of public policy. An employee cannot waive her right to money due for work already performed, under threat of not getting that pay unless she does more work. However, the portion of that agreement that converted her to a "per word" agreement was valid as far as the evidence reflects, and therefore applies. The record does not allow the Hearing Officer to ascertain that the new method of calculating earnings violated any minimum wage law.

The respondent also attacked the claimants' credibility with regard to the hours they reported, but cross-examination was insufficient to rebut the affirmative statements each claimant made under oath about the time spent working.

Price's confidentiality agreement was with "Druid Group, Inc., dba Cybersecretaries." Given the identity of supervision, computer administration, contact persons, method of work and common practice (even including Price supervising King and Burklo), the overwhelming evidence established that the respondent was the employer of Price as well as King and Burklo.

#### **E. Penalty**

The respondent owed each of the claimants wages, due within 10 business days. Mont. Code Ann. § 39-3-204. The respondent did not pay the amount determined due by the Department within the time due pursuant to the law. Therefore, the Department must assess a penalty against

the respondent of up to 110% of the wages due and unpaid. The circumstances of this case include the delaying tactics of the respondent in claiming quality problems with the work, the continuing efforts of the respondent to prevent the claimants from finding any forum in which they could present their claims and the real possibility that the respondent set up its business in the fashion it did precisely to avoid and defeat wage claims on technical bases. However, none of these circumstances are within the scope of Admin. R. Mont. 24.16.7556, and therefore the penalty is 55% of the wages due. Admin. R. Mont. 24.16.7566.

## V. Conclusions of Law

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over the claims. Mont. Code Ann. § 393-201 et seq.; *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).
2. The respondent employed all three claimants. The respondent owes each claimant wages that are due and unpaid. The respondent owes Price \$874.00, with a penalty of \$480.70. The respondent owes King \$754.68, with a penalty of \$415.07. The respondent owes Burklo \$531.00, with a penalty of \$292.05.

## VI. Order

CS Legal Dictation, L.P., a Texas limited partnership not registered in Montana, doing business as Cyber Secretaries, Inc., also known as CyberSecretaries, Inc., not registered in Montana is hereby ORDERED to tender cashiers' checks or money orders as follows:

1. In the amount of \$1,354.70, representing \$874.00 in wages and \$480.70 in penalty, made payable to KATHLEEN PRICE, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision;
2. In the amount of \$1,169.75, representing \$754.68 in wages and \$415.07 in penalty, made payable to PAMELA C. KING, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision;
3. In the amount of \$823.05, representing \$531.00 in wages and \$292.05 in penalty, made payable to JUDY BURKLO, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 4th day of December, 2002.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ TERRY SPEAR  
Terry Spear  
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. *See also* Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

1. <sup>1</sup> Price's confidentiality agreement identified the respondent as "Druid Group, Inc., dba Cybersecretaries." The facts support a finding that notwithstanding the different name, the entity that employed Price was the same entity as the employer of King and Burklo, and no further reference to "Druid Group" appears in these findings.

2. <sup>2</sup> Montana law currently provides for a Department independent contractor certification of exemption to permit independent contractors to maintain their own businesses without buying workers' compensation insurance to cover themselves. Mont. Code Ann. § 39-71-401(2)(d) and (3). The absence of such a certification (none of the claimants in this case obtained the certification) renders that law inapplicable to this case, although the absence of the certification is not fatal to the respondent's defense.

3. <sup>3</sup> Delivery of an unacceptable product would be pertinent to the amount due under an independent contractor arrangement, of course.