

**STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU**

IN THE MATTER OF THE WAGE CLAIM)	Case No. 2198-2000
OF MARILYN RAMSAY,)	
Claimant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND ORDER
YELLOWSTONE NEUROSURGICAL)	
ASSOCIATES, P.C.,)	
Respondent.)	

I. INTRODUCTION

Marilyn Ramsay filed a wage claim on April 30, 2000, alleging that Yellowstone Neurosurgical Associates (YNA) owed her unpaid wages in the amount of \$38,966.00 for work performed from April 8, 1998 through December 28, 1999. The Wage and Hour Unit determined Ramsay to be an independent contractor, and dismissed the claim on the basis that it did not have jurisdiction. Ramsay appealed, contending she was an employee of YNA, and that it owed her additional wages. On February 1, 2002, Bernadine Warren, Hearing Officer for the Department of Labor and Industry, conducted a telephonic hearing in this matter. James Healow, attorney, represented Ramsay. Ramsay appeared as a witness and testified on her own behalf. Robert Sterup, attorney, represented the Respondent.

Respondent exhibits E, F, F1, G, H, I, J, L, M, N, O, P, Q, R, T, U, V, W, X, Y, AA and DD were admitted into the record without objection. Respondent exhibits D and K were admitted over Claimant's objection that Exhibit D was not evidence, and that exhibit K was irrelevant. Claimant exhibits 1, 4, 5, 8, and 10, were admitted into the record without objection. Claimant exhibit 9 was admitted into the record over Respondent's objection that the exhibit should only be admitted through the Grela deposition.

II. RULINGS ON OBJECTIONS TO TESTIMONY BY DEPOSITION

a. Fred Henslin

Respondent requested admission of the deposition of Fred Henslin. Claimant objected to admission of the deposition on the basis that she had multiple objections to the testimony contained within the deposition. Those objections have been ruled upon through an Order issued

March 5, 2002. Other than testimony stricken or denied through the rulings on objections, the Henslin deposition is admitted into the record.

b. Dr. Fred McMurray

Respondent requested admission of the deposition of Dr. Fred McMurray. Claimant objected on the basis that she did not have opportunity to conduct a full and complete cross examination of McMurray. The Hearing Officer ruled that Claimant had not been able to conduct a complete cross examination, and ordered the parties to reconvene the deposition no later than March 3, 2002 to continue McMurray's deposition. On March 6, 2002, the Hearing Officer received notification from Respondent that Claimant had failed to contact YNA's counsel to clear a date for continued deposition, or to make any effort to arrange for deposition of McMurray. By March 15, 2002, neither the Claimant nor her counsel had contacted the Hearing Officer regarding the issue. Therefore, Claimant's objection to the admission of the McMurray deposition on the basis that she did not have opportunity to conduct a full and complete cross examination is **denied**. The deposition is admitted into the record, subject to the Hearing Officer's rulings on Claimant's other objections to the McMurray deposition, as follows:

1. Objection P. 7, 1. 10 through p. 8, 1.25.: Lack of foundation, hearsay, argumentative, lack of competence and lack of expertise.
Ruling: Sustained in part and overruled in part. Although Dr. McMurray is not an expert on independent contractor determinations, he may testify as to his understanding of his relationship with Respondent. However, to the extent that Dr. McMurray offers hearsay, opinion or expert testimony regarding independent contractorship, the objection is sustained.
2. Objection p. 10, 1. 8 - 16: non-responsive and same objections as ¶ 1.
Ruling: Sustained as pertains to non-responsive testimony. With regard to expert and opinion testimony, same as Ruling to ¶ 1.
3. Objection: p. 14, 1. 15: Same as ¶ 1.
Ruling: Same as Ruling to ¶ 1.
4. Objection: p. 17, 1. 6: Same as ¶ 1.
Ruling: Same as Ruling to ¶ 1.
5. Objection: p. 19, 1. 1 - 25: Same as ¶ 1.
Ruling: Same as Ruling to ¶ 1.
6. Objection: p. 22, 1. 4 - 18: Same as ¶ 1.
Ruling: Same as Ruling to ¶ 1.
7. Objection: p. 24, 1. 22 through p. 25, 1. 12: Non-responsive and for reasons outlined in ¶ 1.
Ruling: Sustained as to non-responsive. Otherwise, same as Ruling to ¶ 1.

8. P. 25, 1. 20-21: Non-responsive and for reasons outlined in ¶ 1.
Ruling: Sustained as to non-responsive. Otherwise, same as Ruling to ¶ 1.

c. Laurie Grela

Respondent requested admission of the deposition of Laurie Grela, the transcript of which had not been completed at the time of hearing. Claimant objected to the admission on the basis that she did not have opportunity to conduct a full and complete cross examination of Grela. The Hearing Officer delayed ruling until receipt of the transcript, which occurred on February 26, 2002.

During the deposition, Claimant's counsel requested information from Grela regarding how she arrived at the figures included on a spreadsheet, exhibit 9. Exhibit 9 documented the Respondent's position on which patient assists it had paid Ramsay, and which assists it still owed. Grela explained that she had compiled the information from handwritten documents prepared by a former bookkeeper, and from information contained on the company computer system. Claimant's counsel asked Grela to provide the surgeon billing information for each case documented on exhibit 9. Respondent's counsel refused to allow Grela to obtain the computerized information, insisting that it would take too much time, and that Claimant take the matter up with the Hearing Officer.

Since the documents referred to by Grela during the deposition form the basis for YNA's position on the amount owed, or not owed, to Ramsay, and Ramsay was paid a percentage of surgeon billed fees during the time periods covered by her claim, Ramsay's request for surgeon billing information is reasonable. She did not have opportunity for a full and complete cross examination of Grela without the information. The Hearing Officer, however, is not inclined to further lengthen this process. Respondent has had since August 2001 to schedule depositions and conduct discovery. It offers the Grela deposition into evidence, but waited to conduct the deposition only one day before the scheduled hearing, thereby denying the Claimant the opportunity to thoroughly cross examine Grela regarding her facts and figures. The deposition is admitted into the record. However, the Hearing Officer will take into consideration the fact that exhibit 9 has no foundation, and weight it accordingly.

III. ISSUES

- 1) Whether Marilyn Ramsay was an employee of Yellowstone Neurosurgical Association, P.C., and was therefore subject to the provisions of Title 39, Chapter 3, MCA.
- 2) If Ramsay was an employee of Yellowstone Neurosurgical Association, P.C., whether it owes Ramsay wages pursuant to § 39-3-204, MCA.
- 3) If Ramsay was an employee of Yellowstone Neurosurgical Association, P.C., whether it owes Ramsay penalties for unpaid wages pursuant to § 39-3-206, MCA.

IV. FINDINGS OF FACT

1. Marilyn Ramsay became a Licensed Practical Nurse, board certified, in 1976. She worked as a surgical scrub technician until 1986, and then began employment with three surgeons. Over the following years, Ramsay obtained her surgical assistant certification, and became a National Surgical Assistant.
2. As a surgical assistant, Ramsay acted as an extension of the surgeon's hands, handing the surgeon tools, suctioning, retracting tissues, suturing and cauterizing, and performing whatever duty the surgeon required of her during a surgery. She did not perform any surgery.
3. In 1997, Ramsay performed work as a surgical assistant with eight surgical offices, groups of surgeons, or surgical clinics. She performed 24 cases with YNA surgeons, and 165 cases for all the other businesses.
4. In 1998, Ramsay performed work as a surgical assistant with six different offices, groups or clinics. She performed 282 cases with YNA surgeons, and 119 cases for all the other businesses.
5. In 1999, Ramsay performed work as a surgical assistant with five different offices, groups or clinics. She performed 366 cases with YNA surgeons, and 25 cases with all the other businesses.
6. In 2000, Ramsay performed work as a surgical assistant with three different offices, groups or clinics. She worked 7 cases with YNA surgeons, and 15 cases with all the other businesses.
7. In 2001, Ramsay performed work as a surgical assistant with two different groups or clinics on three cases. She performed no work with YNA surgeons.
8. On June 20, 1996, the Employment Relations Division of the Department of Labor and Industry issued Ramsay a certificate of independent contractor exemption for the occupation of Certified Surgical Assistant. The certificate exempted her from workers' compensation and unemployment insurance coverage requirements, and was effective from June 20, 1996 through June 20, 1998.
9. On June 20, 1998, the Employment Relations Division issued Ramsay an independent contractor exemption for the occupation of Certified Surgical Assistant. The certificate exempted her from workers' compensation and unemployment insurance coverage requirements. The exemption was effective from June 20, 1998 through June 20, 2001.
10. For the federal and state tax year 1998, Ramsay reported her income from YNA and the other surgical groups, individuals or clinics as self employment business income. She received IRS forms 1099 from each business. Ramsay claimed business expenses such as auto, depreciation, telephone, uniforms, pager, dues and membership, nursing license fees, and other expenses associated with

her work as a surgical assistant. She reported and paid self employment taxes on her income as a surgical assistant, and deducted expenses for surgical assistant business use of her home. Ramsay made similar state and federal tax reportings in 1999, showing her surgical assistant income as self employment business income, deducting surgical assistant expenses, as well as business use of her personal assets, as business expenses and paying self employment taxes on her surgical assistant income.

11. In 1997, 1998 and 1999, YNA paid Ramsay 20% of the surgeon's billed fees to patients. Ramsay logged the names of patients she assisted, and the medical procedure performed on each patient. She did not track the amount YNA billed as the surgeon fee to the patient because YNA did not inform her of the amount billed.

12. YNA typically paid Ramsay the 20% fee upon receipt of payment from the patient or the insurance provider. When she received payment, Ramsay documented in her logs that payment for the named patient had been received, and logged the amount of the payment.

13. Many patient surgeries were performed at St. Vincent Hospital. As a surgical assistant, Ramsay necessarily had to perform some work at the hospital. St. Vincent Hospital required Ramsay to have specific medical privileges before allowing her to perform surgical assists at the hospital. To obtain these privileges, a surgeon had to sponsor her. A YNA surgeon sponsored Ramsay.

14. When Ramsay performed surgical assistant services at the hospital on patients covered by Medicare or Medicaid, the hospital billed for, and paid, an amount to Ramsay that was set by the Medicare or Medicaid program. Ramsay had to agree to accept the set amounts in order to perform services at the hospital on Medicare or Medicaid covered patients.

15. In mid-1999, Ramsay reconciled her logs and determined that YNA had failed to pay her for many surgical assists. The claimant worked with YNA accounting staff in an attempt to clear up the matter. In late 1999, YNA sent Ramsay a check in the amount of \$49,751.78. It determined that an additional \$44,729.73 had been billed to patients or insurance providers, but was not yet paid. YNA requested that Ramsay sign a waiver and release upon receipt of the check. Ramsay refused to sign the release. In addition, YNA requested that she sign an "Independent Contractors Agreement First Surgical Assistant" contract with YNA, which would become effective on December 1, 1999. In part, the contract changed the amount of payment that Ramsay would receive for assisting YNA surgeons. Instead of receiving 20% of the surgeon fee, YNA would pay Ramsay \$100.00, \$200.00, or \$350.00 per procedure, depending upon the type of procedure performed, as outlined in an attachment to the contract. Ramsay signed the contract on November 3, 1999. YNA signed the contract on November 5, 1999.

16. On March 6, 2000, Ramsay presented YNA with a listing of unpaid surgical assists performed on patients from February 17, 1998 through December 29, 1999 totaling \$39,466.00. YNA researched its records and determined that it had paid Ramsay for a number of the patients, was unable to identify some of the patients, and had not yet received payments from some of the patients or the patient's insurance provider.

17. Ramsay determined the amount she claimed was owed her on the unpaid assists by reviewing the amount paid on similar assists and assigning that amount to each unpaid assist, as documented in her records. YNA determined the amount owed Ramsay by using the new remittance amounts per the December 1, 1999 contract, and assigning that amount to each unpaid assist, as documented in its records.

V. DISCUSSION/RATIONALE

The first issue to be addressed, the employment status of Ramsay with YNA, is dispositive. If Ramsay was an independent contractor for YNA, the Department of Labor and Industry has no jurisdiction over her claim for unpaid wages. If Ramsay was an employee of YNA, the Department has jurisdiction, and may issue a decision on the merits of her claim.

The Wages and Wage Protection statutes, outlined in Title 39, Chapter 3, MCA, define an "employee" as any person who works for another for hire. The wage statutes contain no definition of "independent contractor." However, ARM 24.35.201 through 24.35.303 establishes rules governing employment status determinations for the entire Department of Labor and Industry. ARM 24.35.301 sets forth a two-part test to determine whether a worker is an employee or an independent contractor: (a) whether the worker is and will continue to be free from control or direction over the performance of the services, both under contract and in fact; and (b) whether the worker is engaged in an independently established trade, occupation, profession or business. The tests are in the conjunctive. Accordingly, both parts must be met for a worker to be considered an independent contractor.

The Department issued Ramsay independent contractor exemptions that were effective from June 20, 1996 through June 20, 2001, pursuant to § 39-71-401, MCA. When an individual obtains an exemption, her status as an independent contractor is conclusively presumed for purposes of workers' compensation and unemployment insurance coverage. §§ 39-71-401(3) and 39-51-401(3)(c), MCA. The law does not explicitly establish a presumption of independent contractor status for purposes of the wage protection statutes. However, in Foster v. Commissioner of Labor and Industry, 225 Mont. 246, 731 P.2d 1313 (1987), the Supreme Court, in a wage claim matter, chose the definition of an independent contractor as found in § 39-71-120(1), MCA, (1987), as the proper definition of an independent contractor to be used in a wage claim similar to this case. Other than to change to gender neutral phrasing, the 1987 and 1997 statutes defining an independent contractor are virtually identical.

The Montana Workers' Compensation Court has repeatedly held that possession of an independent contractor exemption is conclusive when determining the independent contractor

status of an individual, based on § 39-71-401(3), MCA. See Wild v. State Compensation Ins. Fund, 2002 MTWCC 9 (February 12, 2002), Mathews v. Liberty Northwest Ins. Corp., 2002 MTWCC 6 (February 1, 2002), and American Seamless Raingutters v. Independent Contractor Central Unit, 2001 MTWCC 4 (January 25, 2001).

Ramsay held an independent contractor exemption over the entire course of her work with YNA. Since Foster held that the workers' compensation definition of independent contractorship applied to wage claimants, the Workers' Compensation Court's holdings are applicable to this case. Ramsay's holding of an independent contractor exemption throughout her work with YNA is conclusive proof that she performed services as an independent contractor.

Even if the exemption were not conclusive in determining her employment status, the facts show that Ramsay meets both parts of the test outlined in statute, which establishes that she was an independent contractor while performing services for YNA.

Part "a" of the two-part test requires that a worker be free from the direction and control of the employing unit. The issue of control goes beyond actual control, and focuses on the right to control. The Supreme Court set out four factors to be considered when analyzing the right to control: 1) direct evidence of right or exercise of control; 2) method of payment; 3) furnishing of equipment; and 4) right to fire. Foster, supra, citing Sharp v. Hoerner Waldorf Corporation, 178 Mont. 419, 425, 584 P.2d 1298, 1301 (1978). The Court has consistently held, however, that "statutes used as guides in determining a worker's status must not be distorted to allow persons who are truly independent in their operation to be held employees merely for tax purposes and resulting benefits derived from an employer-employee relationship." St. Regis Paper Company v. Unemployment Compensation Comm'n, 157 Mont. 548, 552, 487 P.2d 524, 526 (1971). An employer of an independent contractor, however, "is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result that he bargained for." Walling v. Hardy Construction, 247 Mont. 441, 807 P.2d 1335 (1991). In Walling, the Court found that Hardy Construction could control the sequence of the work, a condition necessary to ensure the end result on a project employing as many as 40 Hardy Construction employees and approximately 15 subcontractors. This provision in the subcontract was not enough to strip Walling of control. In Johnson v. Department of Labor and Industry, 240 Mont. 288, 783 P.2d 1355 (1989), the Court held: "All of the facts pointed to by the Hearings Examiner and the District Court to support their finding of control are usual and ordinary practices in the carpentry business. The finding does not so much show control as it does indicate a business practice. In other words, Johnson told Voeller and Pontdt what he wanted done but not how to do it." Similarly in the instant case, YNA surgeons could control the sequence of Ramsay's work in order to obtain the end result of the surgery. The instructions and directions given by a surgeon to Ramsay are usual and ordinary practices in the medical field. As in Johnson and Walling, this does not so much show control as it does indicate a business practice.

YNA offered Ramsay work, but made no representation as to the amount of work it would offer. Ramsay agreed to accept 20% of the surgeon's payment as payment for her services, and Ramsay was free to accept or reject any and all work. Although Ramsay was required to perform her services at scheduled times and places once she accepted an offer to assist a surgery, the scheduling of times and places, as discussed above, is not evidence of control. "If control of a

trucker goes no farther than direction on where to pick up or put down a load, this is usually only part of the result." Solheim v. Tom Davis Ranch and State Compensation Fund, 208 Mont. 265, 677 P.2d 1034 (1984).

Part "b" of the test requires that an independent contractor have an independently established business or profession. The evidence shows that Ramsay has an independent profession separate and apart from YNA. She performed services within her profession for other surgeons, clinics and hospitals as an independent contractor. Ramsay displayed all the trappings of an independent business person, such as setting up a home office, paying self employment taxes, and deducting home office and other items as business expenses.

Ramsay was an independent contractor. As such, the Department does not have jurisdiction over her claim for unpaid wages.

VI. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over wage complaints under § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).
2. Marilyn Ramsay was an independent contractor. The Department of Labor and Industry does not have jurisdiction over her wage claim.

VII. ORDER

The wage claim of Marilyn Ramsay is hereby dismissed.

DATED this 17th day of April, 2002.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ Bernadine E. Warren
Bernadine E. Warren
Hearing Officer