STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF RONALD W. CARLSON,	)	**Case No. 2423-2001**
Claimant,	)	
vs.	)	**FINAL AGENCY DECISION**
MORRIS PLACE RANCH, INC., a Montana Corportation,	)	
Respondent.	)	

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I. Introduction

The Hearing Officer convened an in-person hearing on the above claimant's wage claim on May 7, 2002. The claimant, Ronald W. Carlson, appeared with his attorney, R. Russell Plath, and testified. Respondent appeared through counsel, Peter Michael Meloy, and called Wesley Oja, who testified. The hearing officer admitted into evidence claimant's exhibit numbers C1-C4, C9-C12, C14-C19, and Bates stamped exhibits B6-B7 (also referenced as respondent's exhibits R3 and R4), B21-B24, B26-B31, B33-B58, B60-B66, B69-B72, B75-B78, B81-B102, B104-B118, B121-B135, B137, B152-B194, B196-B215, B218-B225, B288-B294, B301-B302, B305-B352, B354-B356, B359-B376, B380-B583, B629-B643, B660-B665 and B668.

The parties filed their last post-hearing submissions on June 17, 2002, and the hearing officer deemed the case submitted for decision.

II. Issue

The issue in this case is whether Morris Place Ranch, Inc., a Montana corporation, owes wages for work performed, as alleged in the complaint filed by Ronald W. Carlson.

III. Findings of Fact

1. Morris Place Ranch, Inc., owns a recreational ranch approximately twenty miles outside of Big Timber, Montana. The family of Lodovico Antinori, an Italian citizen, uses the ranch, as do the family's guests. The ranch is unoccupied by any family members and guests for the majority of the year. At all pertinent times the corporation's board of directors consisted of Peter DeGaetano, George DeGaetano, and Pamela DeGaetano Carr. Carr was the corporate treasurer. There is no evidence of the precise relationship between the Antinoris and the corporation.

2. Ronald Carlson is a retired Montana Fish and Game employee who resides full time in Big Timber, Montana. He supplements his retirement income by working part time as a ranch care

taker and as a contract fire arms trainer, process server and private investigator. Carlson sometimes operates these endeavors as Carlson Enterprises, a sole proprietorship.

3. In April of 1997 Carlson obtained a State of Montana Independent Contractor Exemption from the Department of Labor & Industry for the occupations of contract fire arms training, process server, private investigator and ranch care taker. The exemption was effective from April 9, 1997 to April 9, 2001. Carlson renewed his independent contractor exemption for April 9, 2001 to April 9, 2004. Carlson obtained and maintained the exemption at the suggestion of attorneys in Big Timber, for whom Carlson performed process server and private investigator services.

4. Carlson has provided ranch care taker services for several clients. His services typically include checking on ranch properties, preventing damage or destruction of the properties beyond normal wear and tear and taking the necessary steps to have the properties maintained or repaired. When Carlson provides these services, he is free from control or direction by the property owner over the performance of his care taker duties. If he hires a third party to work on property, he does so only after consultation and authorization from the property owner. He charges the client for any expenses he incurs. The client either provides the necessary equipment or pays Carlson for the use of his equipment or any equipment he must rent or buy.

5. In August of 1997, the corporation contracted with Carlson, doing business as Carlson Enterprises, to act as a ranch care taker for the ranch. Carlson agreed to accept $1,500 per month, plus reimbursement of expenses, in exchange for overseeing all aspects of the ranch as care taker. Every month thereafter, throughout the contractual relationship between Carlson and the corporation, the corporation paid invoices submitted by Carlson in the name of "Carlson Enterprises" which included the monthly charge for services as well as itemized expenses. Carlson charged the corporation when he used his own equipment (vehicles, etc.), otherwise the corporation provided him with the use of its equipment at its expense.

6. Under the contract, Carlson acted as a ranch care taker for the corporation. He oversaw the ranch property and any contractors working upon it. The corporation relied upon him to hire outside workers or contractors to assist with ranch operations as needed, after consultation. His responsibilities varied on a daily basis to meet the needs of protecting and preserving the ranch. The only routine the corporation required of him was that he file monthly reports.

7. In 1998, Carlson found he was dealing more frequently with the corporation regarding activities on the ranch. Construction projects Carlson undertook at the direction of the corporation involved extensive telephone conversations with Antinori about how and when he wanted the projects to proceed and finish. Antinori was at the ranch from approximately August 1 to November 1, in 1998 and Carlson consulted with Antinori daily about the status and priority of ongoing projects.

8. During 1998, Carlson was also negotiating with the corporation's board members regarding a renewal of his contract with the corporation. In spring 1998, Carlson told Carr in writing, "You are entirely right in stating that I am not an employee, thus the employer has no obligation to take out taxes or provide a disability insurance policy." The corporation never withheld taxes,

purchased workers' compensation insurance or otherwise took any action necessary for it to take if it had employed Carlson.

9. Carlson continued to be very concerned about the status of his employment. In mid-1999, Carlson sought to negotiate with Antinori about the contract when he was at the ranch, despite the absence of any indicia of authority on Antinori's part to bind the corporation. In November 1999, Carlson met with employees of a local realty and management company that was acting for the corporation regarding the contract. Carlson prepared a proposed draft of a job description of his work at the ranch. The job description was finalized in January 2000, and described Carlson's services as those of a "ranch manager." The compensation remained the same--reimbursement for out of pocket expenses and $1,500 per month for his services.

10. In May 2000, Carlson's dissatisfaction over the work the corporation expected of him prompted him to demand changes in the contract. Carlson felt that he was spending too much time satisfying the corporate directive that he be available to members and guests of the Antinori family and treat them as if they were the best customers of a dude ranch he was operating. He felt that he was working for Antinori. He disliked dealing with the local management company and the board members, and wanted to work directly for Antinori, for a higher monthly fee or an hourly payment for additional time beyond what he considered being the scope of the contract. During the course of the discussions Carlson could not avoid having with the management company and with the corporate representatives, they told Carlson that the corporation still considered him an independent contractor, notwithstanding his requests for changes.

11. The corporate representatives, as well as Antinori, were involved in Carlson's day to day activities at the ranch. When Antinori was at the ranch, he would call Carlson, leaving urgent messages if unable to immediately reach him, expecting prompt attention and service. Other times of year, detailed e-mails and telephone conversations regarding projects continued between Carlson and Antinori, as well as the board members and the local management company.

12. On July 22, 2000, Carlson wrote a letter to Wes Oja at Hall and Hall (the local management company) advising that Carlson would soon exceed half time for the year (1040 hours) and that Carlson was concerned about his "on call" status while Antinori and his family and guests were at the ranch.

13. Carlson got no satisfaction from either Oja or the corporate representatives. He again attempted to obtain the assistance of Antinori to obtain a more favorable contract with the corporation. On August 10, 2000, Carlson sent Oja a letter stating he was terminating his position with the ranch, and delivered a letter the next day to Antinori at the ranch, terminating the employment agreement. Carlson then met with Antinori on August 13, 2000, regarding the contract with the corporation, despite the continuing absence of any indicia of authority on Antinori's part to bind the corporation.

14. Carlson did not terminate the contract. Instead, he continued to serve and claimed that Antinori had agreed that the corporation would pay him a higher monthly amount. On October 26, 2000, Carr responded that the $1,500.00 per month would continue until further notice, that Carlson was still an independent contractor, and that the corporation would pay him an

additional $3,000.00 for past services patrolling the ranch. She indicated that further discussion could be had about an increase in his monthly charge from $1,500.00 to $2,000.00. Starting in November 2000, Carlson nevertheless included hourly billing in his monthly statement, without any direction or approval from the corporation.

15. In January 2001, Carlson began submitting a monthly bill for $2,000.00 for services, plus expenses (including a retroactive claim for $1.00 per hour for all hours he was not actually providing services, as an "on call" fee). The local management company mistakenly approved the $2,000.00 bill for January, and the corporation erroneously paid it. In May 2001, when Carlson realized that the corporation had returned to paying him $1,500.00 per month plus expenses, as Carr had told him it would, Carlson terminated his services to the corporation. He then filed his wage claim, asserting employee status.

IV. Opinion

Montana law requires employers to compensate employees for all hours worked. For that law to apply, there must be an employer-employee relationship.

In April 2001, just one month before he terminated his contract with the ranch, Carlson renewed his independent contractor exemption, stating under oath that he was an independent contractor engaged in several occupations, including "ranch care taker," that he was engaged in an independently established business and that he was free from the control or direction of the hiring agent in the performance of his duties. The department approved his application making it "conclusive as to the status of an independent contractor" for purposes of workers' compensation insurance with regard to the activity to which the exemption applied. ***See***, ***e.g.***, §39-71-401(3)(c), MCA; *American Seamless v. ICCU*, 2001 MTWCC 4 (W.C.Ct. No. 2000-0110 Jan. 25, 2001).

However, the certificate of exemption may not be conclusive with regard to controversies arising outside of Chapter 71, the workers' compensation chapter of Title 37. For example, §39-51-201(15) MCA defines "independent contractor" for unemployment insurance purposes and does not refer to independent contractor certification. Under §39-51-203(4) MCA, there is a presumption in favor of employment whenever an individual receives wages for work, "until it is shown to the satisfaction of the department that the individual is an independent contractor."

The department's regulations define Independent Contractor Central Unit "determinations" as "binding on all parties with respect to employment status issues under the jurisdiction of the department of labor and industry." 24.35.205(1) A.R.M. However, the certifications of exemption that Carlson obtained are not denominated as "determinations." They are purely certifications that Carlson did swear under oath to the department that he was an independent contractor. According to the department's ICCU regulations, ICCU determinations "must be called a 'determination'." 24.35.204(4) A.R.M. Thus, the regulation on its face does not accomplish what the codified statute fails to accomplishpreclusion of dispute over employment status for wage and hour issues by an ICCU certificate of exemption. The Workers' Compensation Court has commented that the absence of any express statute rendering the certification conclusive outside of workers' compensation disputes suggests that the old rule still applies in unemployment insurance and in wage and hour claims. *Art v. ICCU*, 2000 MTWCC

37, ¶14 (W.C.Ct. No. 9908-8298 June 23, 2000). The Hearing Officer recognizes that the legislature may have intended to render certification conclusive for all regulated purposes. However, the law as codified and the regulations as adopted leave intact the two part test (control and independent trade) under §39-51-201(15) MCA and *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 584 P.2d 1298 (1978) to address independent contractor status for wage and hour purposes, whether the individual has or lacks a certificate of independent contractor exemption.[(1)]

The legal question is whether the corporation can prove, on this record, that Carlson remained an independent contractor. To be an independent contractor Carlson must render services in the course of an occupation, be free from control or direction over the performance of services and engage in an independently established trade, occupation, profession or business. §39-51-201(15) MCA. Since Carlson did render services in the course of an occupation as a ranch care taker and did engage in an independently established occupation as a ranch care taker, the sole question is control.

Sharp v. Hoerner Waldorf Corp, supra, 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 agreement was terminable at will by either party. This is actually a greater right for the parties to terminate their relationship than would be available in an employment relation. ***See*** §39-2-602 MCA. With regard to the furnishing of equipment, Carlson utilized the same kind of arrangement as he had with his other ranch care taking clients. With regard to method of payment, Carlson and the corporation agreed to a flat monthly rate, irrespective of the actual time and effort involved for Carlson, an arrangement not characteristic of wages or salary. Only when Carlson decided he was spending too much time (rather than only a little time) for $1,500.00 per month did he introduce time into the equation.

Nevertheless, control is the central element involved in the statutory test. If the corporation exercised such control over Carlson that it acted as an employer, that would be sufficient to establish an employment relationship. §39-51-201(15)(A) MCA. The corporation did not exercise such control over Carlson. In truth, Carlson's problem with the corporation was not that it exercised control over him, but rather that it interfered with the relationship he was trying to nurture with Antinori, particularly when the local management company got involved. Carlson wanted to change the contract, not into an employment contract, but into a higher paying independent contractor agreement. He was ready to devote all of his time to being an independent contractor for Antinori, if the corporation would approve the change and pay him twice the monthly fee. The corporation simply wanted its independent contractor to provide the services it required: care taking of the ranch and being ready to please and placate Antinori and his family and guests when they were present. Carlson's plan was to become a contractor for Antinori rather than the corporation. Only when that plan failed did he terminate his contract and claim retroactively to be a corporate employee. The extra time involved in catering to Antinori did not evidence such control over Carlson as to render him an employee of the corporation.

V. Conclusions of Law

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under § 39-3-201 et seq. MCA. *State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Ronald W. Carlson was, at all times pertinent to his claims, an independent contractor with regard to Morris Place Ranch, Inc., and has no claim to wages for services he performed. §39-51-201(15) MCA.

VI. Order

Respondent does not owe Claimant any wages or penalty, and this claim is DISMISSED.

DATED this 18th day of July, 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 § 39?3?216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.

[1] Carlson originally entered into an agreement to act as an independent contractor to the corporation, providing the same services for which he was an independent contractor to other ranches in the area. Carlson never held himself out to the state or the federal government as an employee of the corporation. There is no evidence that Carlson ever took any action to present himself as an employee of the corporation to any regulatory entity of any kind. Indeed, until after he terminated the contract, Carlson never unequivocally told the corporation that he had somehow become its employee, sending mixed signals while he attempted to obtain a higher monthly payment without becoming an employee. Perhaps it would be fair to conclude that Carlson is estopped to claim employee status to seek more pay, and in that fashion forge a conclusive effect to the certification of exemption. In this case, where the corporation did establish that it never became Carlson's employer, no such stretch is necessary.