STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF WILLIAM M. COOK,	)	Case No. 231-2003
Claimant,	)	*Final Agency Decision*
vs.	)	
OMEGA TELEVISION PRODUCTIONS LLC,	)	
Respondent.	)	

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I. Introduction

The hearing officer convened an in-person hearing on the above claimant's wage claim on May 27, 2003. Claimant William M. Cook attended with counsel, Patricia D. Peterman, Patten, Peterman, Bekkedahl & Green, PLLC. Respondent Omega Television Productions, LLC, attended through its designated representative, W. Stephen Dee, with counsel, Carl A. Hatch, Doubek & Pyfer, LLP. Claimant Cook, Michael T. Hill, Troy Timmer, designated representative Dee and Bruce Michael Parker testified. The hearing officer admitted exhibits 1 through 41 into evidence. On July 1, 2003, Cook filed the last post hearing brief and this matter was submitted for decision.

II. Issue

The issue in this case is whether Omega owes Cook wages, in the form of value for an ownership interest in Omega, for work Cook performed.

III. Findings of Fact

1. Prior to the summer of 2000, the Montana Power Company (MPC) had operated a sports television broadcasting enterprise, televising live college and high school basketball and football games involving Montana teams. A cadre of technicians, announcers and directors/producers had worked regularly on the broadcasts. MPC had leased the necessary equipment (cameras, sound and electronic equipment, including the necessary mix and broadcast equipment, and its vans for transportation/setup). In 2000, MPC decided not to continue this enterprise, and solicited bids to assume the enterprise.

2. W. Stephen Dee, a Vice President in marketing, had originated the sports television broadcasting enterprise at MPC. He submitted the successful bid to assume the enterprise. Dee was retiring from MPC. Using his own money (relying largely upon his personal retirement and investment accounts from MPC), Dee formed Omega Television Productions, LLC, as a

television production and broadcast company specializing in airing live Montana high school and college sporting events. Dee initially owned 100% of Omega. Omega registered with the Secretary of State and was and is an active member-managed limited liability company.

3. On May 21, 2000, Dee signed an operating agreement for Omega, which identified him as president and CEO. The agreement also identified other people who had worked on the MPC broadcasts as officers of Omega, including the claimant, William M. Cook (also known as Rep Cook). Dee successfully recruited many of the MPC broadcast personnel, including Cook, to perform the same functions for Omega as they had for MPC.

4. Cook was a graduate of Montana State University at Bozeman, in film and television. He had worked after graduation in television reporting, directing and producing for stations around Montana, and then worked for satellite sports networks on the east coast. He obtained a Master's Degree in Telecommunications from George Mason University while working in Washington, D.C. He returned to Montana in 1998 and assumed the duties of director for the MPC broadcasts. MPC paid him $750.00 per broadcast. When the producer for the broadcasts left MPC's broadcast and production team, Cook became the producer as well as the director, and received $1,000.00 per broadcast from MPC.

5. Omega's success or failure depended entirely upon its ability to sell advertising spots to potential customers. Omega's market was almost exclusively Montana. As part of the agreement to assume MPC's lease on the equipment, Omega obtained commitments from MPC and Western Energy Co. to purchase substantial amounts of advertising for the broadcasts. Without that commitment, the venture would have been extremely risky financially, and Dee probably would not have attempted it. Even with that commitment, Dee formed Omega as a limited liability company in an attempt to protect himself from personal liability, limiting his risk to the amounts he chose to invest in Omega.

6. To contain costs, Dee offered the persons who agreed to work on broadcasts for Omega substantially lower fees per broadcast than MPC had paid. Despite the lower fees, Dee recruited many of the MPC broadcast and production team members. Cook and others from the team enjoyed the work and wanted to continue to be part of the broadcasts. In addition, Dee proposed that if Omega was successful, as he and all the persons he recruited hoped and expected, the participants would earn an ownership interest in Omega by their participation, called "sweat equity."

7. In a further effort to limit Omega's costs, Dee and the initial participants, including Cook, agreed that Omega would have no employees. Each team member agreed to a "piecework" fee per broadcast, with reimbursement of claimed expenses Omega approved. Omega did no withholding, paid no unemployment insurance, had no workers' compensation coverage, and issued its workers 1099's at the end of each tax year.[1] Dee was Omega's executive producer for money and management.

8. Cook knew the terms of the operating agreement. He knew the pay arrangements. He reported his Omega income as an independent contractor.

9. Omega's live broadcast season began in the fall with high school and college football games (and high school girls' basketball, until the Montana High School Association changed the seasons), and continued through the basketball season in the winter, ending with the last of the college and high school live basketball broadcasts in the early spring. Thus, a single "season" for Omega included both the football and basketball seasons for the schools Omega covered. Omega's fiscal year ended on August 31 of each calendar year, just at the beginning of its season. After the end of basketball play, Omega sought advertising to pay for rebroadcasts of games and highlights during the period from the end of the basketball broadcasts to the close of its fiscal year. Cook worked for Omega under this agreement for two broadcast seasons, during 2000-2001 and 2001-2002, with some additional work after the 2000-2001 season on the rebroadcast projects.

10. Omega paid Cook $550.00 for each broadcast. Cook and at least one other member of the team, Troy Timmer, each believed that their "sweat equity" accrued on a "dollar for dollar" basis. For each dollar paid, they thought they had earned a dollar's ownership interest in Omega. Timmer received $175.00 per broadcast and believed that he had earned $175.00 dollars in ownership in Omega for each broadcast. Cook believed that he earned $550.00 per broadcast in "sweat equity" ownership rights.

11. Another participant, Michael T. Hill, who joined Omega in January 2001, understood that his "sweat equity" would accrue at .5 % per month for 12 months, to a maximum ownership interest of 6%, if the company was profitable. Although he thought he had earned that interest when he left Omega in the spring of 2002, he acknowledged at hearing that he could not assign any value to the interest he claimed, because Omega to that point had not been profitable. He has not pursued a claim for the interest in Omega he thought he had earned.

12. Another participant who still works for Omega, Bruce Michael Harper, still expects to receive an ownership share if he is still working for Omega when and if it becomes profitable. Harper admits he does not have a vested right to an ownership interest because he worked for a lower fee per broadcast for the past two years.

13. All of the participants understood and agreed that their "sweat equity" (however that might ultimately be calculated) accrual did not obligate them to invest any money in Omega. The vesting of any "sweat equity" in actual ownership interests required that Omega become financially successful, *i.e.*, profitable. Otherwise, "sweat equity" could only become real if its holders would also assume financial obligations to sustain Omega while it was not self-sustaining, and none of the participants who expected to earn "sweat equity" ever agreed to any assumption of liabilities.

14. Cook's duties during his two-season tenure with Omega included locating, hiring, training and supervising technicians, editing video footage, purchasing and renting equipment, setting up work schedules and generally doing the operational logistics regarding the various ball games. Omega paid Cook $53,350.00 over the two seasons, exclusive of Cook's expense reimbursements.[2]

15. Omega controlled and provided all of the equipment and supplies for the broadcasts including a television production truck, a satellite uplink truck, and all electrical supplies for Cook to use. Michael Hill, Omega's sales manager, and Dee decided and dictated which commercials would air, how often and at what points during the broadcast. Although Cook resisted some of their dictates regarding use of the broadcasters for commercial comments, he was under their control with regard to advertising aspects of the broadcasts. Omega determined how many games and what games would be aired. It controlled where the crew would work on various games, and controlled who would be on the crew. In addition, Omega provided suggestions and input to Cook on how to run the broadcasts, apart from the advertising dictates.

16. Cook did not provide any tools, equipment or supplies except his personal vehicle for which he was reimbursed mileage. Omega also reimbursed Cook for all related expenses including per diem, mileage, lodging, long distance, cellular phone service and office supplies. Dee did not routinely review expense reimbursement requests himself, instead relying upon Omega's office staff to do so. He periodically requested that Cook and other participants keep their expenses as low as possible.

17. Cook used Omega's name in his business dealings. Omega supplied him with business cards which had its name, address and phone number. Cook never advertised an independently established business to the public during the time he worked for Omega and did not have an independent contractor exemption from the Department of Labor and Industry. He was not working for any other hiring agent during the time in question.

18. Cook could have ended the working relationship at any time and for any reason without incurring liability. In fact, Timmer did end his working relationship with Omega during a broadcast season, without prior notice and without incurring any liability. Omega could have fired Cook at any time during the two seasons he worked as producer and director.

19. During the two seasons he worked for Omega, Cook tried repeatedly to formalize the "sweat equity" understanding. He had conversations and written exchanges with Dee, brought up the topic at Omega meetings and communicated his concerns to other members of the Omega team. At various times he worked with Dee and other team members to create a table of percentages of ownership accruing to the Omega team members. Dee was always willing to make ownership distributions to the Omega team members, if and when Omega became a self-supporting "going concern." He intended to keep a majority interest in Omega, and all of the team members knew of and accepted this intention. There were perhaps eight to twelve persons involved in this "sweat equity" understanding, which remained a topic of conversation for Omega participants over the first years of the enterprise. There was never any written agreement, signed by Dee and the team members, binding the individuals and Omega to any structure or schedule of ownership distribution. There was never any agreement between Cook and Dee, with clear, mutually understood and accepted terms, regarding Cook's "sweat equity" entitlement.

20. Common themes of the discussions were that individuals' maximum "sweat equity" ownership entitlement would not exceed 6% to 7% and that Dee would retain at least 54% of the

Omega ownership. The discussions never included an understanding or agreement that "sweat equity" would accrue on a dollar basis fixed by wages for the broadcasts.

21. Omega was not profitable during the first two seasons of its operation.[3] Advertising purchases did not bring in the anticipated revenues. Dee continued to resort to his personal retirement and investment accounts to keep Omega meeting its expenses, including the payroll for the broadcast and production team, significantly depleting those personal accounts. During the first two seasons, Dee's retirement and investment accounts also shrunk substantially from their original total worth of approximately $600,000.00, because a significant portion of the accounts consisted of investments in MPC and the related corporations. MPC's venture into private enterprise proved catastrophic to investors.

22. With his investment in Omega growing, without return, and his source accounts for that investment shrinking, Dee began to tell Cook and the other team members that any present distribution of ownership interests would necessarily involve corresponding investments in Omega to keep it afloat. One of the ways he made this clear was by saying that any team member who wanted a present ownership interest would either have to "open his checkbook" or "bring his checkbook." None of the team members had any interest in a binding agreement to assume ownership interests and make proportionate investments with the other owners. No ownership distributions under such conditions occurred during the two seasons Cook worked for Omega.

23. Cook left Omega at the end of the 2001-2002 season. He realized that unless and until Omega became profitable, he would not obtain any ownership interest. He recognized that this meant he might someday receive a total of a 6% ownership interest in Omega, for a share in future profits. He did not consider that a sufficient return for the work he had already done for Omega. He decided that Dee owed him the dollar for dollar "sweat equity" he thought he had earned, even though he was unwilling to assume responsibility for any of Dee's investments in Omega. At hearing, Cook did not see any contradiction between a accruing a potential maximum entitlement of 6% ownership as a result of "sweat equity" (with no responsibility to make investments) and claim for an ownership amount equal to his entire pay.

24. For the 2002-2003 season, Omega bought the equipment it had leased. The lease, originated by MPC, came to the end of its term, with a residual due for equipment purchase of approximately $284,000.00. Omega needed the equipment to continue operations. Dee obtained a bank loan for Omega to buy the equipment for the residual amount by providing a personal guarantee to the bank. By the time of this hearing, Dee's retirement and investment accounts from MPC both had zero value. The amount still due on the bank loan at the time of hearing was more than $200,000.00, due over three years, with monthly payments of approximately $7,100.00 and a $55,000.00 balloon payment due at the end of the loan term.

IV. Opinion

Omega Employed Cook

Montana law requires employers to compensate employees for all hours worked. The law applies when there is an employer-employee relationship. There is a two-part test (control and independent trade) to determine whether a wage and hour claimant was an independent contractor or an employee. To be an independent contractor Cook had to (1) render services in the course of his occupation, (2) be free from control or direction over the performance of his services and (3) engage in an independently established trade, occupation, profession or business. Otherwise, Cook was an employee of Omega. ***See, e.g.***, Mont. Code Ann. § 39-51-201(15); *Sharp v. Hoerner Waldorf Corp.* (1978), 178 Mont. 419, 584 P.2d 1298. The law recognizes 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. All four factors indicate that Cook was an employee of Omega.

The parties never reached an enforceable agreement about Cook's status that could modify the applicable law. Pursuant to Mont. Code Ann. § 39-51-201(15) and *Sharp*, ***supra***, the parties could not simply agree that their relationship was one of independent contract and thereby defeat the meaning and intent of the law. To be an independent contractor, Cook had to engage in an independently established trade, occupation, profession or business, and also be free from Omega's control or direction over the performance of services. There was no credible substantial evidence that Cook engaged in an independently established trade, profession or business, although he did take some outside work. Even if the general understanding that Omega would have no employees constituted an agreement between Cook and Omega that he was an independent contractor, saying it was so could not make it so. Cook could not waive his rights as an employee, established as a matter of public policy. *In re Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232, 234-35.

This is troubling. Cook agreed with Dee (for Omega) to work in a business venture that involved piecework payment for jobs completed and a possible ownership interest if the venture succeeded. Piecework sometimes, but not always, indicates the absence of an employment relationship. Until Cook left because the ownership interest had not materialized soon enough, neither party contemplated that Cook would be an employee. Nonetheless, the law is clear that good faith belief that a person is not an employee or has been paid in full does not defeat application of Montana's employment laws to the relationship. ***E.g.***, *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222, 1228. Cook was an employee of Omega.

<u>Omega Did Not Enter into any Binding Agreement to Share Ownership with Cook</u>

Cook's wages included any money due from Omega, whether to be paid by the hour, day, week, semimonthly, monthly, or yearly and including bonus, piecework, and all tips and gratuities. Mont. Code Ann. § 39-3-201(6)(a). If Omega failed to maintain records of the amount of Cook's work, then Cook could introduce evidence "to show the amount and extent of that work as a matter of just and reasonable inference." *Lewis v. B & B Pawnbrokers, Inc.* (1998), 292 Mont. 82, 968 P.2d 1145; ***quoting*** *Garsjo v. Dept. of Lab. and Indus.* (1977), 172 Mont. 182, 562 P.2d 473, 476; ***as quoted in*** *Holbeck v. Stevi-West, Inc.* (1989), 240 Mont. 121, 783 P.2d 391, 394-5. However, there is no issue about Omega's maintenance of records of the work Cook performed.[4] The issue is whether Omega agreed to additional pay for Cook.

Citing Mont. Code Ann. § 28-2-903(1)(a), Omega interposed a statute of frauds defense. The statute requires written contracts in certain circumstances. It can support and aid in the perpetration of frauds, when wily wheeler-dealers cozen the unwary into unenforceable oral agreements, then hide behind the statutory requirement for a written contract. The statute is not useful in this case. Cook was an employee of Omega, with the statutory right to seek wages due and unpaid for a period of two years. Mont. Code Ann. § 39-3-207(2). The statute of frauds is inapplicable to whether an ownership interest was part of Cook's wages.

Cook testified that he reached a binding "hand shake" agreement with Dee that he would receive an ownership interest in Omega equal to the number of dollars he earned for jobs completed. His testimony in this respect was not credible. Cook never stopped trying to confirm the "sweat equity" entitlements he and the other participants hoped to earn. He continued until he left Omega to make various proposals about formalizing the "sweat equity" expectations. His conduct was not consistent with that of an employee who had an agreement with the employer for a certain dollar figure in ownership interest for each broadcast, as part of his wages.

Cook would never have agreed to a set accrued ownership interest in any event. He was not willing to join Dee in paying for shortfalls. An owner of a limited liability company has protection against personal liability to company creditors, but can have duties to co-owners to participate in providing funds to keep the company solvent. Cook never would have accepted any deal that committed him to investing money in Omega. It is inherently incredible that Cook and Omega agreed upon an accruing ownership interest which would only have value if the owners, including Cook under his analysis, funded Omega until it showed a profit.

Had he entered into such an agreement, the value of his accrued interest in Omega would be impossible to ascertain. The evidence at hearing did not establish that Omega had any current value beyond its debt. If Omega had agreed that Cook earned 50 cents' worth of ownership for every dollar in piecework wages, there is still no standard by which to determine how much ownership is worth 50 cents. Such an agreement cannot be converted from ownership value to cash. Cook's arguments to the contrary are unpersuasive and unsupported by fact as well as law.

An uncertain entitlement to some unquantifiable ownership interest is not the same as a contractual entitlement to a commission. An accrual of an ownership interest could be part of a wage package, just as a commission can be. However, the case Cook cited[5] does not mean that a possible entitlement to an unspecified commission, accruing only if the business as a whole is profitable, would entitle a claimant to a specific dollar amount over and above wages paid without regard to profitability. Thus, it does not support Cook's "sweat equity" argument.

Cook also argued that Dee's failure to reply to the first paragraph of his electronic mail message ("e-mail") of July 31, 2000, was affirmative evidence of the "hand shake" agreement and also estopped Omega to defend against the claim for $550.00 of equity ownership for each broadcast. Neither argument was well founded. The e-mail (exhibit 3) is ambiguous at best, particularly in light of the welter of e-mails in 2001 which approached the "sweat equity" issue on a percentage of ownership basis. Thus, the earlier e-mail did not establish a clear meeting of the minds regarding any absolute ownership entitlement. In addition, Cook cannot claim he acted in reliance upon the "hand shake" agreement, when his subsequent conduct (evidenced in

the e-mails) clearly indicates he did not. Reliance is a fundamental element of equitable estoppel. *Shelley v. Liberty Northwest Ins. Corp.*, 2000 MT 76, ¶ 10, 299 Mont. 127, 998 P.2d 156 ***and*** Mont. Code Ann. § 26-1-601(1).

Even under the relaxed standard of proof Cook urges (misapplying *Lewis*), Finding 19 still reflects the reality. Based on the evidence of record, it is more likely than not that Omega (through Dee) never entered into any binding agreement to provide specific ownership interests to Cook as part of his wages. Cook received his full pay for his work for Omega. Perhaps individuals who work for Omega when and if it makes money will obtain an ownership interest. Cook and Omega did not agree that he accrued an ownership interest as part of his wages for broadcasts he worked.

V. Conclusions of Law

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

2. Omega Television Productions, LLC, employed William M. Cook as a piecework director and producer from September 2000, through March 2002. Mont. Code Ann. § 39-51-201(15).

3. Omega Television Productions, LLC, never entered into a binding agreement to provide to William M. Cook, as part of his wages for his work on broadcasts, an ownership interest in the company in addition to the agreed upon piecework wages. Omega timely paid Cook all wages he earned.

VI. Order

Omega Television Productions, LLC, does not owe William M. Cook any wages or penalty, and this claim is DISMISSED.

DATED this 30th day of July, 2003.

By /s/ TERRY SPEAR
Terry Spear, Hearing Office
Montana Department of Labor and Industry
Hearings Bureau

NOTICE: You are entitled to judicial review of this final agency decision pursuant to §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] MPC had also paid Cook without withholding and issued him a 1099 at the end of the tax year, under a written agreement that specified that Cook was an independent contractor and provided for a $5,000.00 payment if MPC terminated the agreement before the end of the contractual term.

[2] Mathematically, this would be 97 broadcasts at $550.00 per broadcast, but since Cook did some additional work for rebroadcasts and highlights, this total may reflect slightly fewer live broadcasts.

[3] Omega showed a small profit at the end of the 2002-2003 season. Whether there would ultimately be a profit for the fiscal year remained uncertain.

[4] Cook never disputed the piecework basis for his wages. Even if he had done so, Cook was an exempt employee pursuant to Mont. Code Ann. § 39-3-406(j), and had no minimum wage or overtime claim, despite the staggering number of hours he claimed to have worked.

[5] *Delaware v. K-Decorators, Inc.*, 1999 MT 13, 293 Mont. 97, 973 P.2d 818.