PUBLIC HEALTH, WELFARE & SAFETY
Exhibit No. 7
Date 2-23-09
Bill No. SB 463

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

UNEMPLOYMENT INSURANCE DIVISION,	) Case No. 1085-2008
	)
Complainant,	) **ORDER GRANTING STEP'S**
	) **MOTION FOR SUMMARY**
vs.	) **JUDGMENT AND DENYING**
	) **UID'S CROSS MOTION FOR**
STEP, INC.,	) **SUMMARY JUDGMENT**
	)
Respondent.	)

* * * * * * * * * * *

Respondent STEP, Inc. appealed from a November 26, 2007 redetermination issued by the Complainant in which it determined that Shirley Lee was an employee of STEP and that STEP was therefore liable for reporting wages of Shirley Lee and any similarly situated workers to the Unemployment Insurance Division (UID). The parties originally agreed to submit the matter to the hearing officer on stipulated facts, but were unable to agree until counsel for UID submitted his opening brief which identified the stipulated facts listed below. STEP subsequently sought summary judgment that it was not an employer and therefore not liable for reporting or paying Shirley Lee's unemployment insurance taxes. Having considered the arguments and the written materials for and against the motion for summary judgment, the hearing officer now rules that STEP is entitled to a summary judgment that it was not the employer of Shirley Lee when she provided respite services to DeLinda Jefferson in 2006.

I. STIPULATED FACTS

1. STEP, Inc. is a Montana non-profit corporation in good standing.

2. STEP is in the business of assisting people with developmental disabilities and their families, pursuant to a contract with the State of Montana Department of Public Health and Human Services (DPPHS).

3. DPPHS is mandated by statute to provide services to developmentally disabled persons. See Title 53, Part 20, MCA. It is authorized to contract with other entities for provision of these services, some of which are provided under state and federal Medicare guidelines.

4. Shirley L. Lee provided respite care services to certain clients of STEP. She made a claim for unemployment insurance benefits on October 1, 2006. STEP denied that Lee was its employee.

5. UID disagreed, finding that STEP was Lee's employer. STEP timely appealed that decision pursuant to Admin. R. Mont. 24.11.315, and requested redetermination. Finally, on November 26, 2007, UID issued a redetermination finding again that Lee was an employee of STEP. STEP here appeals that decision.

6. Respite care is considered to be a state funded and federally funded Part H [of the Individuals with Disabilities Education Act] education and support service and is defined by administrative regulation, Admin. R. Mont. 37.34.604(19), as:

   "Respite services" means services to relieve the stress of constant care. Respite care services include, but are not limited to, respite care hours, transportation, and recreation or leisure activities for the child and family. These services are designed to meet the safety and daily care needs of each child and the needs of the child's family so as to reduce family stress generated by provision of constant care to a family member with a developmental disability. Respite services are provided based on the availability of funds.

7. Community Lifespan Respite (CLR) is a coalition of six providers of similar services, including STEP. CLR serves as a single point of access for any family in the community with respite needs. The program recruits, screens, and trains respite care workers, and provides families with information regarding existing respite resources. It is the result of the collaborative efforts of a number of area agencies representing several human service groups. The program also screens, trains, and links respite workers to families based upon individual needs.

8. When a family informs CLR that it wishes to retain a respite care provider, the family can access the database of trained persons to locate a suitable respite care worker. Families are free to select individuals not included in the database if they prefer to do so.

9. Respite care workers may work for more than one family during the same period of time.

10. The family is not required to advise STEP or CLR when it will be using respite care. Neither STEP nor CLR has to give advance approval for the use of a respite care worker.

11. Certain government programs will pay for respite services for qualified disabled persons. Medicaid will not, however, make payment directly to the family or the respite care worker. Instead, payment must pass through a certified Medicaid provider such as STEP.

12. STEP and similar agencies were subsequently informed by the state and by representatives of the federal Centers for Medicare and Medicaid Services (CMS) that Medicaid payments could not be provided directly to parents or spouses of disabled children or adults.

13. The agencies had no choice but to adopt another method of payment. The nature and manner in which respite services were provided did not change.

14. In 2003, the Montana legislature passed House Bill 150, which exempted providers of respite care from minimum wage and overtime laws, unemployment insurance, and worker's compensation insurance "if the person providing the service is employed directly by the family or legal guardian."

15. House Bill 150 amended § 39-51-204 of the Unemployment Insurance Law to provide as follows:

    (1) The term "employment" does not include: . . .
    (y) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing service is employed directly by a family member or an individual who is a legal guardian.

16. 29 CFR 552.6 provides:

    As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

II. UNDISPUTED FACTS

17. Complainant issued a determination on January 18, 2007 that STEP is a subject employer. Complainant determined the respite care exemption did not apply to STEP, citing Mont. Code Ann. § 39-51-204(3).

18. Prior to 2002, STEP and other agencies authorized as providers of Medicaid services simply reimbursed parents for the payments that the parents had made to respite care workers. This procedure ceased after the agencies were informed in August 2001 by the State of Montana in a memo from Jeff Sturm of the DPPHS Developmental Disabilities Program (DDP) that:

    Federal regulations at 42 C.F.R. 447.10 implement § 1902(a)(32) of the [Medicare] Act, which prohibits State payments for Medicaid services to anyone other than a provider or recipients (only in certain instances), or in exceptions as specified by law.

19. In 2006, Lee was providing nursing care to a disabled baby in the home of DeLinda Jefferson. Lee provided these services as an employee of A Plus Health Care. Home Health provided Jefferson with up to six hours a day of nursing care.

20. Jefferson was also budgeted for four hours a day of respite care. Jefferson and Lee agreed that Lee would provide the respite services. Lee was to receive $7.00 per hour for her respite services.

21. Lee then went to STEP to sign forms allowing her to be paid through STEP.

22. Lee had to fill out a voucher verifying the dates of service, the number of hours worked, and setting out the agreed hourly wage. Both Jefferson and Lee signed the voucher. Lee presented the voucher to STEP and received payment.

23. Jefferson provided Lee with feeding equipment for the baby. STEP provided Lee with no equipment.

24. In September 2006, Jefferson fired Lee.

25. STEP did not hire or fire Lee.

26. In her Worker Relationship Questionnaire, Shirley Lee indicated that both she and STEP could sever their working relationship without incurring a liability.

27. STEP has listed Lee as an employee for unemployment insurance tax purposes for each quarter of 2007.

28. The Complainant issued a redetermination, dated November 26, 2007, which found Lee employed by STEP. Factors cited by Complainant indicating STEP was the employer included: Lee's hourly wage; paid by STEP; no payment from

the family to Lee; Lee's having to track and submit her hours to STEP; STEP's issuance of paychecks to Lee; the Respite Provider Agreement was between STEP and Lee; and no written contract between Lee and the family for whom she provided respite services.

III. DISCUSSION

Summary judgment is proper when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Rule 56(c), Mont.R.Civ.P.[1] The party moving for summary judgment has the initial burden of establishing both the absence of genuine issue of material fact and the entitlement to judgment as a matter of law. *Bowen v. McDonald* (1996), 276 Mont. 193, 915 P.2d 201, 204. To meet its burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Minnie v. City of Roundup* (1993), 257 Mont. 429, 849 P.2d 212, 214. The burden then shifts to the opposing party to show, by more than mere denial and speculation, that there are genuine material fact issues for trial. *Sunset Point v. Stuc-O-Flex Int'l* (1998), 287 Mont. 388, 954 P.2d 1156, 1159; *Bowen*. The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

The parties stipulated to Facts 1-16. Facts 17-28 are based upon the unopposed affidavit of Shirley Lee. UID has not argued that there are material facts in dispute, making this issue ripe for summary judgment.

A. State statutory analysis.

This matter involves a determination of whether STEP was Shirley Lee's employer for UI tax purposes during the time in 2006 when Lee was providing respite care to DeLinda Jefferson and other families. Accordingly, state law governs the determination of the issue.

Mont. Code Ann. § 39-51-202 defines employer as "any *employing unit* whose total annual payroll within either the current or preceding calendar year equals or exceeds the sum of $1,000."

Thus, an employer is an "employing unit" which is defined as:

> any individual or organization, including the state government and any of its political subdivisions or instrumentalities or an Indian tribe or tribal unit, partnership, association, trust, estate, joint-stock company, insurance company, limited liability company or limited liability partnership that has filed with the secretary of state, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee

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[1] Even when the statutory rules of evidence and civil procedure do not apply, the principles underlying them do. *Bean v. State Bd. of Labor Appeals*, ¶¶ 12-32 ***generally***, 1998 MT. 222, 290 Mont. 496, 965 P.2d 256.

> or the trustee's successor, or legal representative of a deceased person *in whose employ one or more individuals perform or performed services within this state*, except as provided under 39-51-204(1)(a) and (1)(q). All individuals performing services within this state *for any employing unit* that maintains two or more separate establishments within this state are considered to be employed by a single employing unit for all the purposes of this chapter. Each individual employed to perform or assist in performing the work of any agent or employee of an employing unit is considered to be employed by the employing unit for the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by the agent or employee, provided that the employing unit has actual or constructive knowledge of the work.

Mont. Code Ann. § 39-51-201(10)(emphasis added).

Reading the entire definition results in an employer being an entity that employs one or more individuals who perform services <u>for the employer</u> within the state of Montana. Under this definition, STEP is not an employing unit and therefore not an employer with respect to Shirley Lee when she performed respite services for and at the direction of DeLinda Jefferson. On this basis alone, STEP is not subject to the requirements of Montana's Unemployment Compensation laws with respect to its relationship with Shirley Lee.

B. <u>State common law analysis</u>.

This conclusion is further supported by analyzing the relationship between Lee and STEP to determine whether an employer-employee relationship existed in 2006. While the unemployment laws do not define the term "employ," the Montana Supreme Court has adopted a test to determine whether an employer-employee relationship exists.

> The test to determine whether or not an employer-employee relationship exists . . . is the so called control test. Under that test, an individual is in the service of another when that other has the right to control the details of the individual's work.

State ex rel. Ferguson v. Dist. Court (1974), 164 Mont. 84, 88, 519 P.2d 151; ***quoted in*** *Kosmerl v. Barbour* (1979), 180 Mont. 208, 215, 589 P.2d 1017.

While this test has most often been used to determine whether or not an individual was an independent contractor or an employee, it may also be used to determine who the employer is, in a given situation. *State ex rel. Ferguson*, ***op. cit.***; *Biggart v. Texas Eastern Transmission Corp.* (Miss.1970), 235 So.2d 443. The determinative test is based on the right, not just the exercise, of control. *Ferguson*, Larson, WORKMEN'S COMPENSATION LAW, Vol. 1A, § 44.10, p. 8-19.

> Larson's treatise enumerates four factors to consider when attempting to determine right of control in a given situation. Those factors are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Larson, § 44.31., p. 8-35. The treatise further points out that the consideration to be given these factors is not a balancing process, rather ". . .

independent contractorship . . . is established usually only by a convincing accumulation of these and other tests, while employment . . . can if necessary often be solidly proved on the strength of one of the four items [above]." Larson, supra.

Sharp v. Hoerner Waldorf Corp. (1978), 178 Mont. 419, 425, 584 P.2d 1298.

In this matter, the facts show that Jefferson, not STEP, had the right to exercise control over Lee. Jefferson hired Lee and determined the dates and times when Lee would provide her with respite services. While STEP did provide Lee with a paycheck, it did so as an agent of Jefferson and the federal Medicaid program. Lee had to submit vouchers to STEP that she and Jefferson signed and which showed the hours Lee worked and her rate of pay. STEP provided no equipment to either Lee or Jefferson. STEP did not have the right to fire Lee. Jefferson had, and in fact exercised, that right.

Under the test, there was no employer-employee relationship between STEP and Lee with respect to Lee's furnishing of respite services to DeLinda Jefferson. Lee did become an employee of STEP after the time period in question and in respect to her nursing services, which is why STEP included her as an employee on its 2007 tax returns and why Lee's questionnaire showed her as an employee of STEP. Lee was not an employee of STEP while providing respite services to Jefferson.

Under the common law control test, STEP was not Lee's employer and is therefore exempt from Montana's Unemployment Compensation Act.

C. Federal statutory analysis.

Counsel for UID argues that federal, not state, law controls whether STEP is an employer. Counsel argues that under 26 USC 33401(d) STEP is an employer because it had control of the payment of Lee's wages.

Under *Otte v. United States* (1974), 419 U.S. 93, if the common law employer does not have control of the payment of wages, the person in control of the payment of wages is an employer with respect to liability for the FICA employee tax. The *Otte* decision has been interpreted to provide that the person having control of the payment of the wages is also an employer for purposes of code sections 3111 (the employer portion of FICA tax), and 3301 (FUTA tax). *In re Armadillo Corp.*, 410 F. Supp. 407 (D. Colo. 1976), ***aff'd***, 561 F. 2d 1382 (10th Cir. 1977).

However, the Ninth Circuit later took a more expansive view of "in control of the payment of wages." *In matter of Southwest Restaurant Syst., Inc. v. United States*, 607 F.2d 1237 (9th Cir. 1979). In that case, the debtor corporation paid the compensation of employees of three other related corporations. The court overturned lower courts' opinions that the debtor in question was not "in control of the payment of wages" for purposes of federal employment taxes. ***Id.*** The court stated that the lower courts improperly relied on such "irrelevant factors" as control over the hiring and firing, control over the performance of services, and control over the amount of the pay and the terms of the payment. ***Id.*** The court stated:

> No one other than the person who has control of the payment of wages is in a position to make the proper accounting and payment to the United States. It matters little who hired the wage earner or what his duties were or how responsible he may have been to his common law employer. Neither is it important who fixed the rate of compensation. When it finally comes to the point of deducting from the wages earned that part which belongs to the United States and matching it with the employer's share of FICA taxes, the only person who can do that is the person who is in "control of the payment of such wages."
>
> 607 F.2d ***at*** 1240.

In *General Motors v. United States*, 91-1 U.S. T. C. at p. 87, 145, the court held that only the person in control of the payment of wages (UTS in that case) was liable for the employment taxes. The court interpreted *Otte* as providing that "the responsibility for withholding employment taxes is directed toward the person who pays the workers and not the person who has control over the workers' duties." ***Id.***

If federal law was controlling, under these precedents, STEP would have responsibility *to collect* federal taxes owed by Jefferson, the person for whom Lee provided services. However, Jefferson is not liable for reporting wages to UID because Jefferson's "employment" of Lee is excluded from the definition of employment found in Mont. Code Ann. § 39-51-204(1)(y), as previously noted in this order.

STEP is not liable to collect or report unemployment taxes related to Lee's provision of respite services to Jefferson because that service is not employment under that applicable act.

UID's argument that Lee was not directly employed by Jefferson for purposes of the statute would lead to the absurdity neither STEP nor Jefferson was exempted from taxation under the statutory provision, rendering the exception an idle act with regard to respite care providers. This cannot be the correct interpretation, because the law neither does nor requires idle acts. Mont. Code Ann. § 1-3-223.

For the reasons cited above, STEP, Inc. is entitled to summary judgment as a matter of law.

IV. ORDER

With respect to its relationship with Shirley Lee or other similarly situated respite service providers, STEP, Inc. is not an employer for purposes of unemployment insurance.

DATED this 11th day of September, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

This decision is the final decision of the Montana Department of Labor and Industry in this case. You may appeal this decision to the Board of Labor Appeals within 10 days after this decision was mailed to your last known address. The time for appeal may be extended for good cause. Your appeal must be filed with the Board of Labor Appeals (BOLA), P.O. Box 1728, Helena, Montana 59624; phone (406) 444-3311; fax (406) 444-9038.