

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HOPE J. MARSH,)	
)	
Claimant,)	IC 03-013869
)	
v.)	
)	
HEADMASTERS OF LEWISTON, INC.,)	
)	FINDINGS OF FACT,
Employer,)	CONCLUSIONS OF LAW,
)	AND ORDER
and)	
)	
STATE INSURANCE FUND)	Filed February 17, 2005
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission originally assigned this case to Referee Lora Rainey Breen. Shortly afterwards, Referee Breen was called up to active duty in the military. The case was therefore reassigned to the Commissioners who, represented by Commissioner James F. Kile, conducted a hearing in Lewiston, Idaho, on August 31, 2004. Claimant was present in person and represented by Craig M. Young, of Lewiston. Bradley J. Stoddard, of Coeur d'Alene, represented Defendants. Oral and documentary evidence was presented. The parties submitted post-hearing briefs and the matter is now ready for decision.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Claimant was an employee of Employer at the time of the accident, or an independent contractor; and

2. Whether Claimant has complied with the notice limitations as set forth in Idaho Code § 72-448.

CONTENTIONS OF THE PARTIES

Claimant, Hope J. Marsh, argues she was an "employee" of her "employer," Headmasters of Lewiston, Inc. (Headmasters), at the time her DeQuervain's tenosynovitis condition became "manifest" on June 17, 2003, and is entitled to medical services, medical benefits and income benefits under Title 72 of the Idaho Code. Claimant also claims she gave sufficient "notice" after manifestation in accordance with Idaho Code § 72-448(1).

Defendants, Headmasters and State Insurance Fund (Surety), argue Claimant was at all times a cosmetology student enrolled at Headmasters studying to become a licensed cosmetologist. Headmasters and Claimant never entered into a contract of hire, express or implied, for Claimant to be an employee or apprentice of Headmasters. At all times, Claimant conducted herself like a student and not an employee of Headmasters. At all times, Headmasters conducted itself like a school of cosmetology and treated Claimant like a student, never as Claimant's employer. There existed no agreement and no tacit understanding between Headmasters and Claimant concerning an employer-employee relationship. And, as a result, Defendants argue this action should be dismissed with prejudice. Defendants further argue that because there existed no contract of hire, either express or implied, between Claimant and Headmasters, the "right to control" test, as set forth in *Burdick*, for purposes of distinguishing between an employee and independent contractor, does not apply. Even if it is applicable, the Commission should find Claimant an independent contractor and not an employee of

Headmasters. As a result of the above, Claimant is not entitled to compensation as a "work experience student." Lastly, Defendants argue Claimant failed to timely notify Headmasters she incurred an occupational disease pursuant to Idaho Code §§ 72-448(1) and 72-704. Due to Claimant's untimely notice, Headmasters has been prejudiced and Claimant's Complaint should be dismissed with prejudice.

Claimant did not file a reply brief.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Complaint filed on November 17, 2003;
2. The deposition testimony of Claimant taken April 14, 2004;
3. The testimony of Claimant and Peggy Foster presented at the hearing; and
3. Claimant's Exhibits A - C and Defendants' Exhibits A - N admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. At the time of hearing, Claimant was a twenty-five (25) year old, mother of two children, aged 3 and 5, residing in Craigmont, Idaho. She graduated from Salinas High School in Salinas, California, in 1997. After high school, Claimant attended Hartnell College in Salinas studying physical education. She completed two full semesters.

2. Claimant's past work experience includes working as customer service and baker at a cookie company, as host at an arcade, crewmember and manager at a fast-food restaurant, checker/cashier, stocker and inventory at a grocery store, and probational employee at a juvenile

detention facility. She also briefly worked in customer service at the Lewiston Country Club prior to attending school at Headmasters.

3. Claimant entered into a registration contract with Headmasters on December 19, 2002. Headmasters is a school in the business of educating persons to become cosmetologists and is licensed as such under the Idaho State Board of Cosmetology. Pursuant to state regulations, a school may only accept students under its license. It cannot accept apprentices. A salon may accept apprentices; it cannot accept students. (Hrg. Tr. p. 63, ll. 8 – 11.) The requirements are different for each to train one to become a licensed cosmetologist. (Hrg. Tr. p. 61, l. 21 – p. 64, ll. 1 – 11.) Headmasters is recognized and certified as a post-secondary institution by the U.S. Department of Education, which allows the school's students to receive federal financial aid, including PELL grants and student loans. Headmasters is required to submit a current curriculum annually to the Board of Cosmetology before it will reissue the institution its license for the next year.

4. On December 29, 2002, Claimant notified Health and Welfare she expected her last day at work to be January 3rd and further stated "Jan. 13th I will be attending school full time, not working, starting at Headmasters." (Exhibit I, p. 32). She requested she be added to Idaho's Medicaid program.

5. The school term was scheduled to begin on January 13, 2003, and end on March 13, 2004, after completing 2000 hours of instruction. Effective January 13, 2003, Claimant was officially registered with the Idaho State Board of Cosmetology as a student at Headmasters. Also on this day, she started attending Headmasters and signed a "covenant not to sue."

6. From January through March, Claimant was required to be at Headmasters from 8:30 a.m. to 3:00 p.m., Monday through Friday, in uniform. During this time, she trained in the theory of cosmetology and practiced her technique on mannequins.

7. Prior to her move to training of live models, Claimant noticed her fingers and wrist were sore but the pain subsided. She did not go to a doctor and testified Headmasters told her she "would find muscles she did not know she had or had ever used before."

8. On April 14, 2003, Claimant had met her 300-hour of theory requirement and Headmasters assigned her to a station on the clinic floor and had her begin working with members of the public. Her typical day consisted of 8:30 a.m. roll call in uniform. She provided services to paying members of the public including pedicures, helped with towels, cleaned her station, prepared for upcoming appointments, and worked on licensing requirements. The customers paid Headmasters for the work she performed and, in return, Claimant received training, guidance and assistance in learning the trade of cosmetology. She was allowed to receive tips from the customers who came to Headmasters for service, but received no wages for her work. This continued through June 14, 2003.

9. Claimant only attended 3 days of school during the month of May, based in part on her desire to attend a family reunion and a need to move her residence later that month on May 23, 2003.

10. Claimant returned to school on June 3, 2003.

11. In a letter dated June 4, 2003, by Headmasters to Idaho Department of Health and Welfare, it was reported that Claimant was receiving student loans and had been enrolled as a full time student since January 13, 2003, and would continue to be enrolled as such until April 9, 2004.

12. On June 6, 2003, Claimant missed school to obtain a driver's license.

13. Some time in June, Claimant noticed a lot of throbbing pain in her right hand while giving pedicures, combing and cutting hair and wrapping perms. The pain did not subside. Claimant testified at hearing that she had neither experienced, nor was she ever treated by a doctor for problems in her hands or wrists prior to that which she encountered while at Headmasters. On June 10, Claimant notified her instructor, Connie Lough, she was having pain in her hand, wrist and thumb. The record is unclear whether it was her right or left side.

14. June 14, 2003, was the last day Claimant attended school at Headmasters. After this day, she neither attended class, nor participated at Headmasters as an observer.

15. On June 17, 2003, Claimant told Carrie Parot (Parot) at Headmasters she was going to the doctor. She was seen by Vicky M. Lott, M.D., at Valley Medical Center with right wrist pain from "combing and cutting hair and wrapping perms at Headmasters School of Hair Design." (Exhibit J, p. 2.) Dr. Lott diagnosed Claimant as having DeQuervain's tenosynovitis and it was noted in her chart: "[p]atient does need an excuse from work" [*sic*] and an "[e]xcuse [was] given for her to be excused from school over the next one week." *Id.* Claimant was given a wrist splint and a prescription for Naproxen. She went to Headmasters in person and gave Parot the excuse of absence for her file.

16. Claimant followed-up with Dr. Lott on June 17 and again on June 24 when Dr. Lott referred her to Steven R. Boyea, M.D., orthopaedic surgeon, and set up an appointment for her. Dr. Lott excused Claimant from school until July 23, 2003. Claimant gave the excuse note to Parot at Headmasters.

17. On June 30, 2003, Dr. Lott noted Claimant was going to cosmetology school, receiving student loans and financial aid. She also noted Claimant will no longer be attending school and will "try to find a job."

18. On July 2, 2003, after attending physical therapy, Claimant again followed-up with Dr. Lott with ongoing right wrist pain. She was upset the physical therapist advised her she could not do cosmetology school. Dr. Lott again excused Claimant from school.

19. On July 23, 2003, Dr. Boyea's office called to reschedule Claimant's appointment until July 30, 2003, and to provide Claimant with a written excuse from school through that date.

20. On July 30, 2003, Dr. Boyea saw Claimant, noting: "she is now at school . . . becoming a hair dresser." He diagnosed her with fairly significant symptomatic DeQuervain's tenosynovitis and a second compartment intersection syndrome. He placed her in a thumb spica and took her off school until mid-November 2003.

21. In the meantime, Claimant continued with physical therapy, underwent steroid injections, EMG nerve conduction studies, was given Vioxx, and underwent casting on the right wrist. She was given a release to work by Dr. Boyea on February 2, 2004, with splinting which was subsequently discontinued on April 13, 2004.

22. As late as April 4, 2004, Claimant had never disclosed to Health and Welfare any tips she earned while at Headmasters, but did disclose that she had received \$75 per week in tips working for her "employer," Burger 'N Brew, in Boise. By April 14, 2004, Claimant still had not reported the tips she received while at Headmasters as income to the Internal Revenue Service. (Exhibit H, Claimant's Depo. p. 37, ll. 17-22.)

23. As of the date of hearing, Claimant was not licensed to practice cosmetology by the Idaho State Board of Cosmetology or by a licensing agency of any other state.

CONCLUSIONS OF LAW

According to Idaho Code § 72-102(11), the term

'Employee' is synonymous with 'workman' and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer. It does not include any person engaged in any of the excepted employments enumerated in section 72-212, Idaho Code, unless an election as provided in section 72-213, Idaho Code, has been filed . . .

Claimant fails to address whether she fits under the above definition and, instead, skips to a discussion of the issue of whether Headmasters should be considered an Employer in this case. Defendants do brief the issue along with a discussion regarding the definition of employer. The Commission believes a discussion of this issue is necessary and, as such, will include it as part of a complete analysis of this case.

To be considered an employee for workers' compensation purposes, Claimant must have entered the employment of, or worked under contract of service or apprenticeship with, an Employer. Claimant never consented to enter into employment with Headmasters. She admits, too, she neither filled out a job application, nor did she undergo a job interview like all prospective employees of Headmasters. (Tr. p. 39, l. 19 – p. 40, l. 1; p. 125, ll. 10-15; p. 128, ll. 7-8.) Claimant did not complete the forms required of Headmasters employees, including a W-4 form. (Tr. p. 125, l. 25 – p. 126, l. 2; p. 128, l. 25 – p. 129, l. 1.) In fact, Claimant admitted she enrolled at Headmasters as a student and never applied there for work. (Tr. p. 39, l. 14 – p.40, l. 1.) She also held herself out as an unemployed student to the Idaho Department of Health and Welfare. (Tr. p. 42, l. 1 – p. 44 l. 1; Exhibit I, p. 32.) Claimant stated she paid Headmasters to educate and train her to become a cosmetologist and that she never received "wages" from Headmasters. The money Claimant did receive was federally funded student loans and grants for her tuition, books and tools of the trade and living and educational expenses while a student.

Headmasters testified it never hired Claimant as an employee and, in fact, stated that Claimant did not hold the type of license required of one before they could teach at the school. Claimant was not treated as an actual employee with regard to wages, vacation, time off, and sick time. (Tr. p. 151, l. 18 – p. 152, l. 2.) Headmasters also could not terminate Claimant from school as it could for "at-will" employees. (Tr. p. 130, l. 18 – p. 131 l. 3; p. 132, ll. 4-16.) Claimant could not be and, in fact, was not considered an apprentice at Headmasters because, as provided by state law, Headmasters could not hire apprentices under its license as a school. Only salons may hire those with apprenticeship licenses. Headmasters is licensed as a school, not as a salon. In addition, Claimant held a student's license, not that of an apprentice. Thus, she could not be considered an apprentice for workers' compensation purposes.

Idaho law considers one an employee who enters into a contract of service with an employer. In this case, while Claimant did enter into a contract with Headmasters, she was not the one providing the service, but rather it was Headmasters who was providing her with both the education and training to enable her to sit for the examination required to become a licensed cosmetologist.

Claimant did not enter into the employment of Headmasters. She also did not work under contract of service for Headmasters. Lastly, Claimant could not, under state law, be considered an apprentice under Headmasters' licensure as a school. As a result of the above analysis, the Commission finds Claimant was not an employee of Headmasters.

Employer means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is secured, it means his surety so far as applicable. Idaho Code § 72-102(12)(a).

As stated above, to be considered an employee, one must have entered into the employment of an employer or work under contract of service or apprenticeship of an employer. An employer is defined as one who has expressly or impliedly hired or contracted the services of another. Headmasters does not fit within the definition of employer under Idaho law in this case.

It has been determined above that Claimant was neither an employee, nor an apprentice, and was not working under a contract of service for an employer. Claimant was a student who was gaining training in cosmetology. As a result, the issue of independent contractor is moot.

* * * * *

ORDER

Based upon the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant was not an employee of Headmasters at the time of the accident.
2. The remaining issues are moot.
3. Claimant's Complaint is dismissed with prejudice.
4. Pursuant to Idaho Code § 72-718, this ruling is final as to all matters adjudicated.

DATED this 17th _ day of February, 2005.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

James F. Kile, Commissioner

_____/s/_____
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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