

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

BRANDON L. ROBERTS, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 NEW SCHWEITZER, LLC, dba )  
 SCHWEITZER MOUNTAIN RESORT, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 LIBERTY NORTHWEST )  
 INSURANCE CORPORATION, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 03-003869**

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
AND RECOMMENDATION**

Filed  
June 10, 2005

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Sandpoint on January 24, 2005. Claimant was present in person and represented by Joseph E. Jarzabek of Sandpoint; Defendant Employer, New Schweitzer, LLC, dba Schweitzer Mountain Resort, and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by E. Scott Harmon of Boise. The parties presented oral and documentary evidence. This matter was then continued for the

submission of briefs and subsequently came under advisement on May 25, 2005. All depositions were taken prior to the hearing.

### **ISSUE**

The sole noticed issue to be resolved is whether Claimant was an employee at the time of the accident.

### **ARGUMENTS OF THE PARTIES**

Claimant, a snowboard instructor, argues he injured his right wrist during a period of time he was required to be available by Employer to give lessons, and during a period of time he was given the option to go up on the mountain and improve his riding skills. He further argues the “obligations or conditions” of his employment created “a zone of special danger” in which he was injured.

Defendants counter Claimant was “not on the clock,” and simply engaging in a recreational activity he obviously enjoyed at the time he was injured. They further argue he only carried a pager in hopes of making a little extra money while engaged in the sport, and that he was free to snowboard on any run on the mountain or, in fact, to turn in his pager and leave the facility at the time of his accident. Citing a 2001 Commission case which they maintain is “surprisingly similar” to this one, Defendants further argue Claimant was not in the course and scope of his employment at the time he was injured.

In rebuttal, Claimant argues the case cited by Defendants is not on point since he was expected by Employer to be available throughout the day to give further lessons, whereas in the cited case, no further lessons were scheduled and the individuals that that claimant was skiing with had already completed their lessons.

### **EVIDENCE CONSIDERED**

### **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 2**

The record in this matter consists of the following:

1. The testimony of Claimant and Jodi Taggart taken at the January 24, 2005, hearing in this matter; and,
2. Joint Exhibits 1 through 14 admitted at the hearing.

After having fully considered all of the above evidence, and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant began his second season with Employer as a part-time snowboard instructor on November 26, 2002. Employer is a Sandpoint ski resort; Claimant is an advanced boarder. He was originally hired after attending a job fair. Employer defined part-time work as less than 32 hours per week.

2. As an instructor, Claimant was paid either a 45% commission on the cost of the lessons or \$6.25 per hour, whichever was higher. He was paid an hourly rate while attending meetings, training sessions, or supervising clinics. Commissions were generally more than the hourly rate. Clinics provided instructors opportunities to increase both their knowledge and their technical proficiencies.

3. The amount of time Claimant worked each day was largely dependant on the number of Employer's guests requesting lessons. Employer scheduled Claimant to report for work five days per week; he was to be onsite prior to 9:00 a.m. when the ski lifts opened. He averaged three lessons per day.

4. Employer provided Claimant with a name tag, uniform, season pass, and food discounts. Claimant was required to wear his uniform while instructing; he could not wear it at any

other time.

5. Claimant reported for work as scheduled on Wednesday, March 19, 2003, and put on his uniform. He gave a lesson at 9:00 a.m. and then another at 10:30 a.m. He finished the second lesson at noon. Employer then solicited volunteers to stay onsite and be available for afternoon lessons. None had been scheduled at that time. Claimant offered to stay and was given a pager.

6. Those instructors not needed were excused for the remainder of the day. Noon was generally the earliest an instructor would be excused unless there was little expectation earlier in the day that instructors would be needed later. A normal workday generally ended between 2:00 p.m. and 4:00 p.m.

7. Employer asked those instructors on call to remain onsite and to be available to give lessons or perform other tasks as needed when contacted. Employer expected paged instructors to respond within 20 minutes, the maximum time it calculated it would take an individual to return to the locker room from any point at the facility.

8. Employer encouraged its instructors to improve their technical skills when not teaching.

9. On call instructors were not allowed to drink alcoholic beverages.

10. After a lesson was requested by a guest, a supervisor would page several instructors. An instructor, who best met the needs of the guest, would then be selected out of those who responded to the page by the supervisor.

11. Instructors were not required to answer the pages, but if they did not show after being paged, and a supervisor had to take the lesson, that instructor would be less likely to be given an opportunity to instruct in the future. Employer had adopted the pager policy to alleviate the need for

instructors to physically check-in every hour.

12. Jodi Taggart, a supervisor, testified Employer's "expectation is if you are on the hill and we need you to teach that if we can get in touch with you somehow that you'll come down and help us out with that." (Transcript, pp. 40-41).

13. Supervisors wore their uniforms throughout the day, carried radios, and were paid by the hour.

14. When Employer determined that some or all of the on call instructors were no longer needed, they would be released. Released instructors would turn in their pager. It was possible for instructors to seek a release on their own; these requests would be honored if allowed by the projected work load.

15. After eating lunch in Employer's locker room, Claimant and two others, including Ms. Taggart, went on the mountain to practice techniques taught to Employer's guests. Claimant changed out of his uniform prior to taking a ski lift to the top with the others. The other two were on skis. They then boarded or skied down to the half pipe. Enroute Claimant attempted a jump to warm up for the half pipe. He severely injured his right wrist on landing.

16. Claimant recovered his composure, he joined Ms. Taggart and the other instructor, and continued down the mountain to Employer's locker room. He returned his pager, checked out, took off his snow gear, and saw the ski patrol for an examination. Afterwards he was driven to his residence by a friend.

17. When his condition did not improve, Claimant saw Judy A. Bell, M.D., on Monday, March 24, 2003. X-rays of his right wrist showed a lunate dislocation. She referred Claimant to Michael R. DiBenedetto, M.D., for a surgical consultation.

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 5**

18. On March 25, 2003, Dr. DiBenedetto performed an open reduction and internal fixation of Claimant's wrist dislocation. He characterized the injury as a hyperdorsiflexed wrist with a fuller lunate dislocation.

19. Claimant filled out a Form 1 on March 27, 2003. An attachment to the Form indicated Employer refused to fill it out. The Form 1 was filed with the Commission on March 31, 2003.

20. Employer laid Claimant off due to lack of work on April 10, 2003. Claimant's position was seasonal.

21. In a letter dated May 8, 2003, Surety denied Claimant's claim for compensation.

22. Dr. DiBenedetto released Claimant on July 21, 2003. Claimant apparently had a full recovery.

## **DISCUSSION**

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 6**

It is undisputed Claimant fell while snowboarding at Employer's facility on March 19, 2003, injuring his right wrist. The compensability of his claim for compensation, and the question posed here, is dependant on whether Claimant was an employee at the time of the accident, or in statutory terms, whether the accident arose out of and in the course of employment. The words "out of" have been held to refer to the origin and cause of the accident and the words "in the course of" refer to the time, place, and circumstances under which the accident occurred. *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 990 P.2d 738, 740 (1999). It is the circumstances in question here. Moreover, if there is doubt surrounding whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the employee. *Id.*

Defendants' argument centers on the Commission's holding in *Chris Trujillo v. Pebble Creek Ski Area and Idaho State Insurance Fund*, 2001 IIC 0242, filed April 18, 2001. Trujillo was also a seasonal snowboard instructor at a ski resort. On the morning of January 6, 1999, he taught the third and final lesson to a group of middle school students. The lesson ended at noon. Trujillo later met two of the students from the morning lesson, one of whom he knew from dating the student's sister. Together, the three rode a lift up the mountain and proceeded to board down. Close to the bottom, Trujillo attempted an aerial maneuver, fell, and fractured his elbow. He was not scheduled to give any lessons that afternoon and was not on call for possible lessons; he was off duty. In addition, Pebble Creek's employee handbook specifically stated ski instructors were not covered by workers' compensation while taking a run with students after a class was completed.

Faced with the same issue in *Trujillo* as here, the Referee in that matter, after reviewing a number of Idaho cases, found that in the cited cases, the Idaho Supreme Court addressed whether the employers in those matters received substantial benefit from the claimants involved. Cases went

both ways depending on the facts at hand. In *Trujillo*, the Commission found, that under the facts presented, any benefits Pebble Creek might have received were too slight to impose liability.

In the absence of statutory provisions to the contrary, recreational or social activities are considered within the course of employment when:

(1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or,

(2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or,

(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

2 Larson's Workers' Compensation Law § 22.01 at p. 22-2 (2004).

Focusing on the third element, and Idaho case law, the question presented is whether Employer derived a substantial direct benefit from Claimant's presence on the hill practicing snowboarding techniques. The Referee finds it did. Claimant's practicing, with other instructors, including a supervisor, would make him a better instructor, thus increasing his value to Employer and its guests, and his availability on the hill, gave Employer the ability to accommodate guests who sought lessons on the spur of the moment. Significantly, Ms. Taggart's testimony that Employer expected designated instructors to remain on the premises and respond to requests to teach if needed provides Employer with a substantial direct benefit: they had readily available instructors on site, to employ as needed, at minimal expense.

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In addition, the season pass Claimant received from Employer was a part of his compensation package, an inducement to employment, and its use contemplated by the parties at the time of employment. These recreational opportunities provided Employer with substantial benefits beyond intangible morale improvement.

Defendants misconceive the applicability of the holding in *Trujillo* to the facts of this matter. Thus, the Referee concludes Claimant was an employee of Employer at the time of his snowboarding accident.

**CONCLUSION OF LAW**

Claimant was an employee of Employer at the time of his snowboarding accident.

**RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends the Commission adopt such findings and conclusion as its own, and issue an appropriate final order.

DATED In Boise, Idaho, this 1st day of June, 2005.

INDUSTRIAL COMMISSION

/s/  
Robert D. Barclay  
Chief Referee

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of June, 2005, a true and correct copy of **Findings of Fact, Conclusion of Law, and Recommendation** was served by regular United States Mail upon each of the following:

JOSEPH E JARZABEK  
ELSAESSER JARZABEK ANDERSON MARKS ELLIOTT & McHUGH CHRD  
PO BOX 1049  
SANDPOINT ID 83864-1049

E SCOTT HARMON  
LAW OFFICES OF HARMON WHITTIER & DAY  
PO BOX 6358  
BOISE ID 83707-6358

kk

/s/ \_\_\_\_\_



1. Claimant was an employee of Employer at the time of his snowboarding accident.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to the issue adjudicated.

DATED This 10th day of June, 2005.

INDUSTRIAL COMMISSION

/s/  
Thomas E. Limbaugh, Chairman

/s/  
James F. Kile, Commissioner

/s/  
R. D. Maynard, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of June, 2005, a true and correct copy

**ORDER - 2**

of the foregoing **Order** was served by regular United States Mail upon each of the following:

JOSEPH E JARZABEK  
ELSAESSER JARZABEK ANDERSON MARKS ELLIOTT & McHUGH CHRD  
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/s/ \_\_\_\_\_