

CONTENTIONS OF THE PARTIES

Claimant contends that, although she was a subcontractor, Defendant is still liable for her medical expenses because Defendant's equipment made her sick. Claimant argues that Defendant's faulty surface-to-diver air supply system she used on October 17, 2003 caused her to breath in exhaust fumes, ultimately making her ill and requiring hospitalization. She maintains that Defendant is liable for Claimant's medical bills incurred as a result of her industrial accident.

Defendant contends that Claimant was a subcontractor, not an employee. Claimant signed a subcontractor agreement and to a large extent used her own diving equipment. Although Claimant did use Defendant's equipment on the day she became ill, Defendant is not liable because Claimant cannot prove that the equipment caused the problem. Defendant further claims that none of the people working for him are employees; they are all subcontractors.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Oral testimony at hearing by Claimant, Doug Freeland, and Sherry Cavanaugh;
2. Claimant's Exhibits A-G; and
3. Defendant's Exhibits 1-4.

After having considered all the above evidence and the briefs of the parties, the Commission issues the following findings of fact, conclusions, and order.

FINDINGS OF FACT

1. In the summer of 2003, Claimant filled out an employment application and began diving for Atlantis Aquatics removing milfoil from Hayden Lake. On September

17, 2003, the Hayden Lake milfoil removal project was taken over by Defendant, Ace Diving.

2. Ace Diving is owned and managed by Doug Freeland. Andy Carlson worked for Ace Diving supervising the divers on the Hayden Lake milfoil removal project. Mr. Carlson reported to Mr. Freeland and kept him informed of the milfoil project's progress.

3. On September 26, 2003, Defendant called Claimant and asked if she would begin diving for Ace Diving on September 29, 2003. Claimant agreed, reported to Hayden Lake on September 29, 2003, and took her place on one of the two boats.

4. The process of removing milfoil from Hayden Lake involved three people on each boat. The Hayden Lake project used two boats. On each boat, one person dives in the morning and another person dives in the afternoon. While one person is diving, the other diver might snorkel and pull milfoil in shallow water.

5. Defendant paid Claimant different hourly rates depending on whether she was diving or on the boat. Defendant paid Claimant weekly, but no taxes were withheld from Claimant's pay. Claimant worked five days a week beginning each morning at 6:00 am. Mr. Carlson worked for Defendant and was in charge of maintaining time records for hours worked.

6. Mr. Carlson also handled the daily management of the divers. If Claimant wanted to take a day off, she told Mr. Carlson and arrangements would be made to have another diver fill in.

7. Claimant could have terminated her work for Defendant at any time without penalty. Defendant was also able to terminate Claimant's work at any time. No

set time was given for the completion of the Hayden Lake milfoil project. Claimant was able to continue diving for Defendant as long as Defendant maintained the operation.

8. A subcontractor agreement, prepared by Defendant, was filled out and signed by Claimant. The document admitted into evidence is a photocopy of the original agreement. Defendant's Exhibit 1. The writing on the agreement is photocopied with the exception of the date. The copy has the date of "10-1-03" written in pencil under the Claimant's signature. The subcontractor agreement states that Claimant will be responsible for all taxes and personal insurance.

9. On October 17, 2003 Claimant used the diving equipment provided by Defendant, namely a Hookah surface air supply system. A Hookah air system uses no high pressure air tanks worn by the diver. Instead, a Hookah uses a small compressor which is located on the boat and powered by a portable gasoline motor. Surface air is delivered from the surface to the diver through a floating air hose. Defendant's Exhibit 3. A Hookah diving system creates the potential for carbon monoxide exposure because the air intakes are located relatively near the exhaust emissions. *Id.*

10. Before October 17, 2003 Claimant had only used her personal scuba cylinder and regulator at work. Claimant, as required of all divers, provided her own wet suit, mask, and fins.

11. During the morning of October 17, 2003, Claimant was in the boat while Mr. Carlson dove. In the afternoon, Claimant dove for approximately two and a half hours. During the afternoon Claimant could taste exhaust and felt dizzy, though at the time she thought the dizziness was caused by the cold temperature of the water. When Claimant surfaced after diving for two and a half hours she noticed that she was dizzy,

had tingling in her fingers, and a burning sensation in her lungs. She reported that she was not feeling well. The equipment was loaded into the boat and they returned to shore. Upon returning, Claimant asked Mr. Carlson if she could go home because she was not feeling well.

12. Claimant drove home where she met a friend who drove her to the Kootenai Medical Center Emergency Room. In the emergency room she complained of shortness of breath and extremity tingling. She reported that she thought she had carbon monoxide poisoning. Claimant was immediately placed on oxygen.

13. Claimant saw David R. Barnes, M.D. at the emergency room on October 17, 2003. Dr. Barnes diagnosed dyspnea with abdominal cramping from inhalation exposure. He instructed Claimant to go home, get some fresh air, take in fluids with calories, and recheck for vomiting, bleeding or worsening symptoms. The doctor noted that she could return to regular work on October 20, 2003 with no restrictions.

14. Claimant returned home that evening, called Mr. Carlson, and reported that she went to the hospital. Claimant did not dive again until Tuesday, October 21, 2003. No further treatment was sought by Claimant.

DISCUSSION AND CONCLUSIONS

While Claimant claims to be a subcontractor because of the agreement she signed, the agreement is not dispositive. An analysis of the relationship between Claimant and Defendant is necessary. As such, this analysis will begin with a discussion of the employer/employee relationship.

Idaho Code § 72-102(11) defines an “employee” as any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer. Idaho Code § 72-102(12)(a) defines an “employer” as 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 their 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 or her surety so far as applicable. Idaho Code § 72-102(16) defines “independent contractor” as any person who renders service for a specified recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

Coverage under Idaho’s Workers’ Compensation Law is dependent upon the employer/employee relationship. *Anderson v. Farm Bureau Mutual Ins. Co. of Idaho*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987). The test that establishes the employer/employee relationship is the “right to control” test. *Ledesma v. Bergeson*, 99 Idaho 555, 557, 585 P.2d 965, 967 (1978). The issue of whether an employee/employer relationship exists is to be decided from all the facts and circumstances established by the evidence. *Id.* at 559. When doubt exists as to whether an individual is an employee or an independent contractor, the Idaho Workers’ Compensation Act must be given a liberal construction in favor of finding the relationship of employer and employee. *Olvera v. Del’s Auto Body*, 118 Idaho 163, 165, 795 P.2d 862, 864 (1990).

There is a distinction between the right to control the time, manner and method of

executing the work, and the right to merely require certain definite results. To determine whether a worker is an independent contractor or an employee, we must look at whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work, as distinguished from merely requiring certain results. *Ledesma*, 99 Idaho 555. The four-factor test for determining the right to control is: 1) direct evidence of the right to control, 2) method of payment, 3) furnishing major items of equipment, and 4) the right to terminate the relationship at will. *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 905 P.2d 82 (1995). “When applying the right to control test, the Commission must balance each of the elements present to determine their relative weight and importance, since none of the elements in itself is controlling.” *Id.* at 683, citations omitted.

Where the right to control test is properly applied, the Commission is not bound by an agreement between the parties as to the nature of their relationship. *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985). Idaho Code § 72-318 provides that no agreement by an employee to waive his rights to compensation under this act shall be valid. Accordingly, the Commission will apply the right to control test and, along with all pertinent facts, consider the subcontractor agreement signed by Claimant as one fact in the case.

The right to control or exercise control

In the present case, Claimant was not free to work her own hours or control her time. She was required to contact Defendant if she was not going to be coming in at the regular time. If Claimant wanted a day off work she was to request the time off in advance.

On October 17, 2003, Claimant returned from her afternoon dive and asked Mr. Carlson to find out if she would be permitted to leave for the day. Claimant did not have freedom to set her hours and simply leave when she was not feeling well. Defendant controlled the time she worked and exercised that control.

Further, Mr. Carlson supervised the divers and reported the daily happenings to Mr. Freeland. If Mr. Carlson or Mr. Freeland were not happy with the specific performance of a worker, they could fire the worker or give them detailed instructions as to how they needed to complete the daily tasks. The facts indicate that Defendant not only had the right to control Claimant, but also exercised the right to control Claimant's work. Thus pointing to an employer/employee relationship.

The method of payment

There was no bid made for the work Claimant performed. She was not paid by the job or by the project. There was no chance of profit or loss for Claimant if the project was finished quickly, or under budget. Claimant was simply paid weekly, based on the number of hours she worked that week. Defendant also differentiated between what hours were spent diving and what hours were spent on the boat. Although not conclusive, an hourly wage is typical of an employer/employee relationship.

Some evidence was presented suggesting Claimant was an independent contractor. Defendant did not withhold any taxes for Claimant, and she accepted the responsibility for paying her state and federal taxes. Although Defendant did not withhold taxes from Claimant's pay, the majority of facts regarding the method of payment point to the existence of an employer/employee relationship.

Furnishing major items of equipment

Claimant usually supplied the diving equipment Claimant used in her work, but on October 17, 2003 Claimant used Defendant's diving equipment. Defendant also secured boats for the divers. All divers were responsible for providing their own wet suit, mask, and fins. Defendant's actions in supplying the major pieces of diving equipment for Claimant at the time of her accident point towards an employer/employee relationship.

The right to terminate the relationship at will

Claimant could have terminated her work for Defendant at any time without penalty. Defendant was also able to terminate Claimant's work at any time. Both parties were free to end their relationship without liability. These facts also indicate an employer/employee relationship.

Employer/employee relationship

Defendant controlled the time and manner of Claimant's work. Claimant was paid a flat hourly wage, used Defendant's equipment, and both parties were able to terminate the "at will" employment at any time without penalty. Considering all the facts presented, the Commission finds that Defendant and Claimant shared an employer/employee relationship. Claimant was an employee of Defendant at the time of her accident on October 17, 2003.

The October 17, 2003 accident

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a

possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). “Probable” is defined as “having more evidence for than against.” *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor’s opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001). There are cases in which deposition testimony or oral testimony is necessary to meet Claimant’s burden, but this does not mean that medical reports are inadequate *per se* when there is no contrary medical evidence. *Jones v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000).

On October 17, 2003, Claimant was pulling milfoil from Hayden Lake, as an employee of Employer, and was injured. The accident happened on the job site and during the course and scope of employment. As a result of the accident Claimant suffered a personal injury. The same day Claimant presented to the emergency room and informed Dr. Barnes she was diving that afternoon using a system which intakes air near the exhaust release of a compressor.

Claimant was diagnosed with dyspnea with abdominal cramping from inhalation exposure. Dr. Barnes found it was not likely that Claimant suffered from any pressure related phenomenon, but that Claimant’s injury was more likely related to hydrocarbon exhaust inhalations and anxiety. While Dr. Barnes does not expressly say that he finds

Claimant's injury was caused by Defendant's equipment by a "reasonable degree of medical probability," the doctor uses his own words to convey that the events are casually related.

Claimant stated that she could taste exhaust while diving on October 17, 2003 and Defendant has put forth no evidence disputing Claimant's assertions. No evidence was presented that indicated Claimant inhaled another substance which could make her ill, nor was any medical evidence submitted to contradict the emergency room report.

The Commission finds that the emergency room report coupled with the facts, adequately establish a casual connection between Claimant's accident and the injuries she was treated for later that day. Accordingly, Defendant is liable for Claimant's medical bills incurred as a result of the accident on October 17, 2003.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That:

1. Claimant was an employee of Defendant at the time of her industrial accident on October 17, 2003.
2. Defendant is liable for Claimant's medical bills related to the accident on October 17, 2003.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __12th__ day of October, 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 __12th__ day of October, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS, AND ORDER** was served by regular United States Mail upon each of the following:

LISA M HOYT
P.O. Box 164
Post Falls, ID 83877

DOUGLAS FREELAND
ACE DIVING
P.O. Box 840
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_____/s/_____