



1. Whether Employer is subject to the provisions of the Idaho Workers' Compensation Law;
2. Whether Claimant was an employee of Employer at the time of the accident, or an independent contractor;
3. Whether Claimant is exempted from coverage by the provisions of Idaho Code § 72-212;
4. Whether Claimant suffered an injury from an accident arising out of and in the course of employment;
5. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;
6. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
  - c. Disability in excess of impairment; and
  - d. Attorney fees;
7. Whether Claimant is totally and permanently disabled;
8. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate;
9. Whether the ISIF is liable under Idaho Code § 72-332;
10. Apportionment under the *Carey* formula; and
11. Whether Employer is liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to insure liability.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he was an employee of Employer, and that on April 14, 2002 he sustained an injury to his left knee as a result of an accident that arose out of and within the course of his employment. As a result of his injury, Claimant ultimately underwent arthroscopic surgery on the knee. Claimant recovered but sustained permanent impairment to the left knee, which combined with his pre-existing impairments to render him totally and permanently disabled. Claimant asserts that he is entitled to payment for all of the medical care that he required as a result of his knee injury, time-loss benefits during his period of recovery, an impairment rating for his injured knee, and penalties against Employer who was uninsured and not exempted from coverage by any provision of law. Further, Claimant claims that he is now totally and permanently disabled, and because he had manifest existing impairments when he went to work for Employer, that ISIF is liable for a portion of the benefits to which he is entitled.

The Pughs assert that they were not required to carry workers' compensation insurance because Claimant was an independent contractor, not an employee, because the work Claimant did was exempt from coverage under Idaho Code § 72-212, and because Claimant's work constituted casual labor which is exempt from coverage.

ISIF denies any liability to Claimant because it asserts that Claimant was not an employee, and that Claimant's work for Employer was exempt from workers' compensation coverage under Idaho Code § 72-212, and also as casual labor. Finally, ISIF argues, Claimant was totally and permanently disabled prior to going to work for the Pughs, so his alleged industrial accident did not combine with his pre-existing impairments to render him totally and permanently disabled; there was no regular and continuous employment available to him prior to his work for the Pughs; and the only reason that he was able to work for the Pughs was because

they were sympathetic to his circumstances.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. Claimant's Exhibits 1 through 3, 5 through 12, and 14 admitted at hearing;
3. ISIF's Exhibits A through P admitted at hearing;
4. The pre-hearing deposition of Betty Pugh taken in lieu of her appearance and testimony at the hearing (with exhibits); and
5. The post-hearing deposition of Richard J. Hammond, M.D.

All objections posed in the depositions of Betty Pugh and Dr. Hammond are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

#### ***CLAIMANT***

1. At the time of hearing, Claimant was 44 years of age. He lived in the Hagerman area with his wife and two of his children. Claimant attended Kimberly High School through his sophomore year. Claimant subsequently obtained his GED. During high school, Claimant worked at a local grocery store through an on-the-job-training program. After attaining his GED, Claimant intended to go to work in law enforcement.
2. While waiting to turn 21 so he could pursue his law enforcement education, Claimant worked for South Central Community Action Agency. It was while working for South Central Community Action Agency that Claimant sustained his first industrial injury.
3. Claimant's next job was as a farm hand for Olmstead Cattle Company. In 1985,

Claimant went to work for Wackenhutt Security as a security officer and swing shift supervisor. Claimant left Wackenhutt Security in 1986 to go to work for Larran Security in a similar position.

4. In 1987, Claimant worked for Cactus Pete's as a swing shift supervisor.

5. In 1989, Claimant went to work as a deputy for the Custer County Sheriff. He left in 1990 when he was unable to pass the requirements of the Police Officers Standards and Training Academy (POST) and also began to experience what were later diagnosed as seizures of unknown etiology.

6. In 1990, Claimant moved his family to Idaho Falls so his wife could become certified in a health-related field. While living in Idaho Falls, Claimant worked for Good Samaritan Living Center as a janitor. It was while Claimant was working for Good Samaritan that he injured his low back using a floor buffer. Claimant returned to work at Good Samaritan only briefly before moving his family back to the Magic Valley area in 1991.

7. Upon his return to the Magic Valley, Claimant went to work for Brown Brother Farms in Buhl, Idaho, as an irrigation supervisor. Claimant remained in this position until he voluntarily left Brown Brother Farms due to his on-going seizure disorder.

8. Claimant stopped working in 1993 at the age of 33. In 1995 he began receiving social security disability benefits as a result of his uncontrolled seizure disorder. The Social Security Administration granted Claimant benefits retroactive to 1993, when the seizure disorder forced him to stop working.

9. Claimant's physician, Dr. Hammond, was able to get Claimant's seizure disorder under reasonable control sometime around 1999 or 2000, but worsening back problems made it necessary for Claimant to continue on disability until he recovered from back surgery. Claimant

continued on social security disability through the period of his work for Employer and was receiving those benefits at the time of hearing.

***EMPLOYER***

10. The Pughs had owned a twenty-five acre parcel of property near Hagerman for a number of years. Sometime after they had retired, the Pughs decided to move to Hagerman, where their daughter lived, and build a home on the property. The Pughs moved to Hagerman sometime in the mid-1990s. At the time they moved to Hagerman, Mr. Pugh was disabled.

11. The Hagerman property included five acres on which the house was located, a seventeen-acre parcel that was partially arable, and three acres of unimproved land. The five acres on which the house sat was improved with grass, flowerbeds, and trees. In addition, trees lined the lane leading up to the house.

12. At some time during the seven years that the Pughs lived on the property, alfalfa was planted on the seventeen-acre parcel. The alfalfa was watered with a wheel line. Mrs. Pugh could not recall the circumstances surrounding the planting of the alfalfa. It was her recollection that a neighbor planted, cut, and baled the alfalfa in exchange for some quantity of the finished hay. The alfalfa was cut and baled only three of the seven years that the Pughs lived on the property. In 2001, the hay was poor and only a small amount remained after the neighbor took his share. What was left was sold. The record contains no evidence regarding the amount of hay sold, the amount of money collected, or whether the hay actually produced income that exceeded the cost of production. The Pughs sold no hay in 2002.

13. Also at some time during the years that the Pughs lived on the property, they entered into a non-exclusive lease with a neighbor who wished to use a strip of the property as a landing strip for his private plane. The record contains no evidence regarding the terms of the

lease. No separate business entity was set up to account for either the alfalfa venture, or the lease of the landing strip, and all monies received by the Pughs were deposited in their personal bank account and all of their expenses, including maintenance of the twenty-five acres, were paid out of their personal bank account.

14. Mrs. Pugh initially did most of the landscape maintenance on the five-acre home site, including irrigation of landscaping and watering the trees along the lane. By the spring of 2001, Mrs. Pugh's health was in decline and she needed some assistance in maintaining the landscaping, and they also needed someone to move the wheel line to irrigate the alfalfa.

15. The Pughs did not maintain workers' compensation insurance.

#### ***CLAIMANT'S RELATIONSHIP WITH EMPLOYER***

16. In the spring of 2001, Claimant decided he wanted to try and go back to work, so he put up a flyer in the local post office with his phone number offering to do odd jobs. Mrs. Pugh saw the flyer and called Claimant. Initially, she wanted Claimant to weed her flowerbeds, but he refused that work. Ultimately, Claimant and the Pughs agreed that Claimant would move the Pugh's irrigation wheel line daily, prune trees, cut the weeds along the lane, and perform other odd jobs for \$6.00 per hour.

17. Claimant was not required to work a particular schedule or number of hours per day or week. Sometimes he did work that was assigned and other times he did jobs that he wanted to do. The only hard and fast requirement of Claimant's job was to ensure that the wheel line was moved once each day. At the end of each week, Claimant brought his hours to Mrs. Pugh, who also kept track of his hours and would write him a check for his time at the agreed rate.

18. Claimant worked for the Pughs through the end of the irrigation season in 2001.

The arrangement resumed in the spring of 2002, with Claimant making \$7.00 per hour.

### ***THE ACCIDENT***

19. When the lane to the Pugh's home was constructed, a number of Russian olive trees were removed and piled along side the lane. On April 14, 2002, Claimant was piling the smaller branches in preparation for burning them when a thorn from one of the branches penetrated his knee, almost immediately causing an infection and ultimately necessitating knee surgery. Claimant returned to work for the Pughs briefly following the April 14 accident. Claimant has not worked since he quit working for the Pughs in mid-June, 2002.

### **DISCUSSION AND FURTHER FINDINGS**

#### ***IDAHO CODE § 72-212***

20. Idaho's workers' compensation scheme begins with the premise that all employment, both public and private, is subject to the provisions of the workers' compensation statutes, requiring employers to insure for workers' compensation liability unless specifically exempted under Idaho Code § 72-212. Idaho Code § 72-203. Idaho Code § 72-212 discusses employment situations that are exempted from the general workers' compensation provisions. The parties to this proceeding have identified three provisions of Idaho Code § 72-212 as specifically exempting Claimant's work from the provisions of the workers' compensation law: The household domestic service exemption (Idaho Code § 72-212(1)), the casual employment exemption (Idaho Code § 72-212(2)), and the "not for pecuniary gain" exemption (Idaho Code § 72-212(6)).

21. While Claimant carries the burden of proving that he or she is entitled to benefits in an industrial accident case, *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 939 P.2d 1375, (1997), the burden of proof shifts to the employer when employer claims that an employee is

statutorily exempt from coverage.

***Idaho Code § 72-212(6)***

22. Idaho Code § 72-212(6) states:

None of the provisions of this law shall apply to the following employments unless coverage thereof is elected as provided in section 72-213, Idaho Code.

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(6) Employment which is not carried on by the employer for the sake of pecuniary gain.

This exemption mirrors the language of Idaho Code § 72-204, which describes the private employers who are subject to the workers' compensation law:

The following shall constitute employees in private employment and their employers subject to the provisions of this law:

(1) A person performing service in the course of the trade, profession or occupation of an employer.

\* \* \*

(4) "Employment," in the case of private employers, includes employment *only* in a trade or occupation *which is carried on by the employer for the sake of pecuniary gain . . .*

Emphasis added.

Claimant asserts that sale of some of the hay grown on the premises demonstrates that the Pughs raised hay for the sake of pecuniary gain. Claimant also points to the lease of the landing strip as evidence that the Pughs were receiving pecuniary gain.

The Idaho Supreme Court has had an opportunity to examine the pecuniary gain exemption on several occasions, most recently in *State ex rel. Industrial Commission v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003). *Bible Missionary* was a compliance case, where the Idaho Industrial Commission sought to impose civil penalties against the church for failure to carry workers' compensation insurance on its pastor. It was undisputed that the church was the employer of its pastor, and that the pastor performed services in the

course of the trade, profession or occupation of the church. The Commission contended that the pastor's work was not exempt under Idaho Code § 72-212(6) because the church received donations. The church took the position that it did not offer services for which it expected remuneration and did not offer its services for a business purpose, therefore it did not operate for the sake of pecuniary gain. In its decision affirming the church's position, the court stated:

An employer engages in an occupation or profession "for the sake of pecuniary gain," for purposes of §§ 72-204(4) and -212(6), if the employer supplies a service and receives remuneration for it.

138 Idaho at 849, 70 P.3d at 687 (citations omitted). *Bible Missionary* follows a long line of cases that have held that unless the employer is engaged in the trade or occupation for pecuniary gain, the exemption of Idaho Code § 72-212(6) applies. See, *Dewey v. Merrill*, 124 Idaho 201, 858 P.2d 740 (1993), (worker hired by contractor to build home for owner was statutory employee of owner, but exempt from workers' compensation coverage because owner was not in the business of building homes and was building house for personal family use); *Linskey v. Lind*, 94 Idaho 788, 498 P.2d 1261 (1972), (employee of homeowner hired to supervise building of owner's summer home exempt because homeowner was not in the business of building homes for sale).

23. The record in this proceeding is clear that at the time the Pughs moved to Hagerman and took up residence on their acreage they were not engaged in any trade, business, profession or occupation. Both were retired, and Mr. Pugh was disabled. They were not in the business of raising alfalfa or in the business of leasing property. They, like many residents of the rural west, lived on an acreage that required maintenance, if only by way of weed abatement. Both the planting of alfalfa and the maintenance of the dirt landing strip served this purpose. To the extent that these activities reduced or offset some of the cost of maintaining the twenty-five

acres, so much the better. There is nothing in the record that suggests planting alfalfa and maintaining a landing strip was anything other than a management tool. In fact, it is not even clear whether the alfalfa was planted for the benefit of the Pughs, or for the benefit of the neighbor who actually planted, cut and baled the alfalfa and who took a portion of the hay. Claimant is correct when he claims that Mrs. Pugh admitted that a small amount of money was received for the occasional sale of excess hay. But the fact that the Pughs sold some hay on occasion does not a business make.

24. The Referee finds that the Pughs have carried their burden of proving that they were not engaged in a trade, occupation, or profession, for pecuniary gain; therefore, the work Claimant performed for the Pughs was exempt under Idaho Code § 72-212(6).

#### **CONCLUSIONS OF LAW**

1. Employer is not subject to Idaho workers' compensation laws for the work Claimant performed because of the "not for pecuniary gain" exemption contained in Idaho Code § 72-212(6).

2. All other issues are rendered moot by the above conclusion of law.

#### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 9 day of January, 2006.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Rinda Just, Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23 day of January, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

PATRICK D BROWN  
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W SCOTT WIGLE  
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djb

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

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

OWEN PRESCOTT, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 WILLIAM AND BETTY PUGH, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE OF IDAHO INDUSTRIAL )  
 SPECIAL INDEMNITY FUND )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 02-013694**

**ORDER**

Filed: January 23, 2006

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Employer is not subject to Idaho workers' compensation laws for the work Claimant performed because of the "not for pecuniary gain" exemption contained in Idaho Code § 72-212(6).
2. All other issues are rendered moot by the above conclusion of law.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 23 day of January, 2006.

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 23 day of January, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

PATRICK D BROWN  
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/s/ \_\_\_\_\_