

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

EMERY L. GARRETT, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 NORTHWEST EQUITY, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 DGB MAINTENANCE, LLC, )  
 )  
 Employer, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 04-007016**

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

Filed March 29, 2006

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert Barclay, who conducted many of the pre-hearing proceedings. Upon Referee Barclay's retirement, the matter was reassigned to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on September 13, 2005. Claimant appeared *pro se*. R. Wade Curtis of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing and filed post-hearing briefs. The matter came under advisement on December 14, 2005 and is now ready for decision.

**ISSUES**

By agreement of the parties at hearing, the issues to be decided are:

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

2. Whether Claimant suffered a personal injury arising out of and in the course of employment;
3. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;
4. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;
5. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;
6. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;
7. Whether Claimant is entitled to retraining benefits under Idaho Code § 72-450, and the extent thereof; and,
8. 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 asserts that he was an employee of Defendants from July 2003 through April 19, 2004. On April 19, 2004, Claimant was acting on behalf of Defendants when he picked up materials from a storage unit before reporting to work. After picking up the materials and while enroute to the job site, Claimant's vehicle was struck head-on by another motorist, resulting in injury to Claimant. Claimant was unable to work for several months as a result of the accident, and did not return to work for Defendants. Claimant seeks medical care, income benefits, PPI benefits, retraining, and penalties for Defendants' failure to provide workers' compensation insurance.

Defendants assert that Claimant was an independent contractor, not an employee, and thus Defendants had no obligation to provide workers' compensation insurance, which they admit they did not have on the date of Claimant's accident. Defendants further contend that even if Claimant had been an employee, he was not working on April 19, 2004, so the accident and his injuries did not arise within the course of his employment, relieving Defendants of any liability on the claim. If Claimant was an employee and was working on April 19, he was not acting in the course of his employment at the time of the accident. Finally, Defendants dispute that retraining benefits are appropriate because Claimant is not totally and permanently disabled.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, Becky Garrett, Bill Goehring, Tawnia Blaser, and DaLane Blaser taken at hearing;
2. Claimant's Exhibits 1, 2, 3 through 10a, 11a through 11c, 12, 12a through 19h, 20a through 23, 24a through 24h, 27, 28 through 38, 39a through 40f, 41 through 43d, 44a through 44h, 45, 47, 48a through 48g, and 49 admitted at the hearing; and
3. Defendants' Exhibits A through Y admitted at the hearing.

### ***EVIDENTIARY ISSUES***

Claimant's Exhibit 12 (a map of Knoll Acres), and Exhibits 44a through 44h (Becky Garrett's diary) together with Defendant's Exhibits A through D were provisionally admitted pending testimony that could lay a foundation for their admission. All of these exhibits were admitted at the conclusion of the hearing.

Defendants interposed relevancy or hearsay objections to some of the exhibits proffered by Claimant. As noted by the Referee at hearing:

[P]roceedings before the Commission are to be summary, economical, and as simple as the rules of equity allow. *Kinney v. Tupperware Co.*, 117 Idaho 765, 770, 792 P.2d 330, 335 (1990). As a result, the Commission is not governed by the same rules of evidence as courts of law. *Id.* This Court has stated that "in those areas where the Commission possesses particular expertise, it has the discretionary power to consider reliable, trustworthy evidence having probative value in reaching its decisions . . . even if such evidence would not be ordinarily admissible in a court of law." *Thom v. Callahan*, 97 Idaho 151, 154, 540 P.2d 1330, 1333 (1975).

*Matter of Wilson*, 128 Idaho 161, 165, 911 P.2d 754, 758 (1996).

In particular, Defendants objected to the admission of Claimant's Exhibits 12a through 19h. These documents are all governmental records available to the public; they include property tax rolls showing ownership of various properties, and records of the Secretary of State pertaining to business entities named as parties or otherwise related to Defendants' businesses. The records are maintained by the state and the county in the course of their day-to-day business and are presumptively reliable. In such a circumstance, relevancy is a matter of weight, not admissibility, and as public records prepared by government agencies in the ordinary course of business, the documents are admissible.

Defendants interposed a continuing objection to the admission of Claimant's Exhibits 24a through 24h, which are documents from the Internal Revenue Service concerning its determination of Claimant's taxpayer status. The IRS determination includes a thorough analysis of the many factors that the IRS looks at to make determinations regarding a taxpayer's status as an independent contractor or an employee. Included among the issues discussed in the IRS determination are several factors that are also relevant to determining Claimant's status under the Idaho workers' compensation statutes. The exhibits are relevant to the issue before this Commission and are admissible.

Defendants objected to the admission of Claimant's Exhibits 39a through 40f. These documents were medical records of Michael O'Brien, a neurologist who examined Claimant. Defendants concede that the medical records are admissible without authentication pursuant to J.R.P. Rule 10(G), but contend that the records do not establish a causal relationship between Claimant's problems and the accident of April 19, 2004 and therefore should not be admitted. Claimant sought the consultation with Dr. O'Brien as a direct result of the auto accident. The medical records speak for themselves and are admissible.

Claimant attempted to depose Tawnia Blaser on May 24, 2005, pursuant to a subpoena issued by Referee Barclay on May 16, 2005. On its face, in bold type, the subpoena states:

Pursuant to rule 10.D. of the Judicial Rules Of Practice And Procedure Claimant gives notice to the Witness Tawnia Blaser that the transcript and record of testimony given at this deposition may be submitted to the Industrial Commission in lieu of Witness' testimony.

Defendants interposed a number of objections throughout the course of Ms. Blaser's deposition, beginning with an objection to Claimant's prefatory statement that the deposition could be used as evidence at the hearing. Defendants renewed their objection to the admission of the deposition at hearing. In light of the clear terms of the subpoena, this objection is overruled. Defendants' objections at p. 6, line 19, p. 8, line 4, and p. 12, line 18 are sustained. All other objections are overruled.

Finally, on December 15, 2005, Defendants filed their Motion to Strike Claimant's Response to Defendants' Reply Brief (Motion to Strike). In particular, Defendants sought to strike the first four paragraphs and the last paragraph of Claimant's Response to Defendants' Brief for the reasons that these portions contained statements of fact not made under oath and not part of the record in this proceeding. Claimant filed no response to the Motion to Strike.

In Commission proceedings, the parties are given the opportunity to argue the legal issues in light of the testimonial and documentary evidence adduced at hearing. While briefs are a part of the Commission's file in the case, they are not part of the factual record. Decisions of the Commission are based upon findings of fact drawn from the specific evidence identified as part of the record—exhibits that are admitted into the record, testimony given under oath, depositions, and the like. In light of the difficulty of extracting inappropriate material from Claimant's brief, together with the limited role that briefing plays in Commission proceedings, the Referee declines to strike any portion of Claimant's brief, but does not consider the brief to be evidence, and bases no findings on facts asserted in the brief.

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**

1. At the time of the hearing, Claimant was fifty years old, and resided in Meridian, Idaho, with his wife Becky and their young son, Nicholas. Claimant's medical history included a previous fusion from C5 through C7 that was remote and asymptomatic.

2. The family moved to Meridian from California in 2003. Claimant's wife and child moved into the home they currently occupy in February or March 2003. Claimant was working and going to school in California and joined his family in mid-April 2003.

3. While in California, Claimant attended college at Sacramento State, where he was working on a four-year degree in computer programming. At the time he moved to Meridian, Claimant was one class short of graduating.

4. The family home is next door to DaLane and Tawnia Blaser. The Blasers attended the same church as Claimant's family, and Becky and Tawnia Blaser became acquainted during the time that Claimant remained in California.

5. DaLane and Tawnia Blaser were the principals of DGB Maintenance, LLC (DGB).<sup>1</sup> Tr., p. 312. DGB was a rental property management company. At one time, DGB managed in excess of seventy rental properties. DGB rented the properties, collected rents, and performed repairs and maintenance, and remodeled units when needed.

6. Some of the rental properties that DGB managed were owned by two separate but related business entities. Northwest Equity, Inc., is a general business corporation (and the sole member of Northwest Equities, LLC). The corporation's officers are A. Leon Blaser, Bruce W. Blaser, and James A. Blaser. Knoll Acres Associates, LLC, is a limited liability company with two members, A. Leon Blaser and Bruce Blaser. Other rental properties managed by DGB were owned by various individual members of the Blaser family including A. Leon (and Teresa A.) Blaser, Bruce W. (and AnnaLee) Blaser, James A. Blaser, Wesley B. Blaser, and Annalee Blaser or other family-held business entities. DGB only managed rental properties owned by the Blaser family and the family's various business entities.

7. When Claimant arrived in Meridian, he sought work in the computer-programming field. Several large semi-conductor and computer manufacturers in the Treasure Valley had recently laid off a number of employees, and Claimant found himself competing for entry-level jobs with individuals who had years of experience.

8. As the result of a casual conversation between Becky Garrett and Tawnia Blaser regarding the unfinished installation of floor tile in the Blaser's kitchen, and because Claimant

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<sup>1</sup> In her deposition testimony, Tawnia Blaser disclaimed any knowledge or involvement in DGB Maintenance, LLC.

had some experience installing tile, DaLane Blaser and Claimant agreed that Claimant would complete the Blaser's kitchen tile work for a set price. Claimant completed the work, and was paid the agreed-upon price via a check from DGB.

9. The one-time arrangement between Claimant and DaLane Blaser for completion of the tile work was a transaction separate from and unrelated to the on-going business relationship that subsequently arose between Claimant and DaLane Blaser that is the focus of this proceeding.<sup>2</sup>

10. Not long after the completion of the kitchen tile project, Claimant asked DaLane whether DGB might have regular work available for Claimant doing maintenance and repair on the rental properties DGB managed. Apparently there was such work available and in July 2003 Claimant began working on the rentals managed by DGB.

### ***HOURS AND WAGES***

11. Initially, Claimant was compensated at the rate of \$10.00 per hour. His compensation later increased to \$12.00 per hour, and in January 2004 to \$13.00 per hour. Claimant was making \$13.00 per hour at the time he was injured.

12. Claimant generally worked from 8:00 a.m. until 4:30 p.m. Monday through Friday and every other Saturday. Claimant was paid every other week on Friday. On the Thursday night of payday weeks, Claimant would call DaLane and report the number of hours he had worked for DGB during the pay period. The next day Claimant would have a check from Northwest Equity, Inc., for the hours he had worked.<sup>3</sup> The checks Claimant received did not

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<sup>2</sup> The kitchen tile transaction was exempt from coverage under the Idaho workers' compensation laws, pursuant to Idaho Code §§ 72-212(2) and (6).

<sup>3</sup> The records submitted by Defendants (Ex. A and D) indicate that DaLane compiled the hours reported and jotted them down on a piece of paper along with other bills DGB had received.

reflect any deductions for state and federal taxes or FICA.

13. Defendants' Ex. A and D purport to be DGB's records regarding the number of hours that individuals, including Claimant, performed work for DGB from November 20, 2003 through April 22, 2004. Although Claimant started doing work for DGB in July 2003, neither party submitted any documentation regarding the hours Claimant worked for the months of July, August, September, October, and a portion of November 2003.

14. In the thirteen-week period from November 7, 2003 through January 30, 2004, Claimant received \$5,529.00 from Northwest Equity, Inc. In the thirteen-week period of January 31 through April 22, 2004, Claimant received \$6,848.00 from Northwest Equity, Inc.

15. Claimant did not receive any record of earnings of any kind from Defendants for tax preparation purposes in the early months of 2004. Claimant and his wife estimated Claimant's 2003 earnings from DGB/Northwest Equity, Inc., by working backward from the ten percent tithing that they had made to their church. In October 2004, Claimant received what purported to be an IRS 1099 form for 2003 from Defendants. The document, admitted into evidence as Claimant's Ex. 23, is undated and contains no indicia of who prepared it. There is no evidence that the document was ever filed with the IRS. On February 1, 2005, the Internal Revenue Service issued a determination letter to Claimant regarding his tax status for payments received from Northwest Equity, Inc., in 2003 and 2004. The IRS determined that Claimant was an employee of Northwest Equity, Inc.

#### ***NATURE OF RELATIONSHIP***

16. There was no written agreement between Claimant and DaLane or DGB as to the nature of their relationship. Both Claimant and DaLane testified that the phrase "independent

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This information was transmitted to Jim Blaser, who wrote checks on the Northwest Equity, Inc., account to pay the workers and miscellaneous bills.

contractor” or similar words or phrases may have been used during their initial conversation.

DaLane reported the conversation as follows:

I just told them how this – how we did everything and we talked together about what, you know – an agreement as far as what he wanted to be paid or, you know, what he was going to be, and what he was going to be expected to, you know, earn and that, you know, it was an independent contractor.

Tr., pp. 300-301. Claimant did not dispute DaLane’s version of this conversation, and despite its general lack of clarity, both parties evidently understood each other well enough that their business relationship lasted for nearly a year, ending only as a result of Claimant’s accident and injury.

17. According to Defendants’ Exhibits A and D, several other individuals performed work for DGB and were paid by Northwest Equity, Inc. These individuals included Bill Goehring and Sons, Jose Nunez, Tawnia Blaser, Dave Featherstone, and Eddie Martinez. Claimant’s compensation comprised the largest portion of DGB’s labor costs, followed by Mr. Goehring, with the remaining workers responsible for a relatively small portion of the total. Mr. Goehring and Claimant frequently worked together on projects for DGB.<sup>4</sup>

18. Mr. Goehring and Eddie Martinez performed the same type of work for DGB as did Claimant. Mr. Goehring testified at the hearing regarding his relationship with DGB. He stated that he is self-employed in a business called B & K Home Maintenance (B & K). B & K does odd job and handyman-type work for DGB as well as for other property owners. Mr. Goehring testified that every two weeks he provided DaLane a bill for his services.

19. Either Claimant or DaLane or DGB could terminate their relationship at will and without liability. Claimant testified that he believed he had an obligation to show up for work,

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<sup>4</sup> With the exception of Mr. Goehring, there is nothing in the record regarding the nature of the business relationships that existed between DGB and the other individuals whose names appear on the Defendants’ records.

and failure to do so could result in termination. DaLane testified that either he or Claimant could terminate their business relationship without penalty.

### ***WORK ASSIGNMENTS***

20. Because Claimant worked on a number of properties managed by DGB, he did not have a permanent location where he reported for work; he reported wherever he was directed by either DaLane or Mr. Goehring. Sometimes the information regarding the next day's work was conveyed verbally at the work site. Sometimes the information was relayed to Claimant at his home in the evenings by telephone. Generally the information about where he would be working the next day came via Mr. Goehring.

21. Claimant believed that Mr. Goehring was an employee of DGB, was the on-site manager of some of the apartments DGB managed, and was his supervisor. Given the casual approach to business evidenced by DGB in its dealings with Claimant, other workers, and other Blaser family business entities, and Mr. Goehring's words and actions, Claimant's belief was reasonable.

22. DaLane made all of the decisions about which unit or units Claimant and others would be working on at any given time. DaLane Blaser also made decisions about what particular work was to be done in particular units. It was not unusual for Claimant and other workers to be told to fix some things in a particular unit and defer others.

### ***TOOLS, SUPPLIES, MATERIALS***

23. Neither Claimant nor Mr. Goehring supplied any of the materials or supplies used to repair, maintain or remodel the rental properties DGB managed.

24. DGB did not necessarily purchase, on its own account, the materials and supplies that were needed to maintain and repair the properties it managed. While the precise business

arrangement between the various Blaser family entities is unclear, some or all of the materials and supplies used in DGB's business were purchased by other Blaser family business entities or individuals. At times no one could work because DaLane or other members of the Blaser family were out of town:

When Jim [Blaser] was out of town hunting or in China or they were all on vacation, there were days I couldn't work.

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And so there were lots of times and lots of – I mean a dozen times maybe through that almost a year that Jim [Blaser] would be out of town or unavailable, and DaLane couldn't get a check from him to get the supplies.

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If there were – if there weren't the supplies to do it, the work, then nobody worked.

Tr., p. 188. On occasion the bi-weekly compensation checks were late because Jim Blaser was out of town or unavailable.

25. Claimant provided no tools or equipment of any consequence for his work on DGB-managed properties. Claimant believed that the tools and equipment he and Mr. Goehring used for their work belonged to DGB or DaLane. In fact, some did belong to DaLane or DGB and some belonged to Mr. Goehring. Nothing in the record suggests that Claimant had any reason to know that some of the tools and equipment he used belonged to Mr. Goehring.

### ***THE ACCIDENT***

26. On Friday, April 16, 2004, Claimant was working at DaLane Blaser's home. He, Mr. Goehring, and Eddie Martinez were gutting the bathroom in preparation for installation of new fixtures, cabinets and flooring.

27. After returning home subsequent to finishing work for the day, Claimant received a call from Mr. Goehring. Mr. Goehring told Claimant that before coming to DaLane's house on Monday morning he should go to the DGB rental unit at 10346 W. Flatland St. in Knoll Acres

and pick up some equipment and supplies. In particular, Claimant was to pick up the linoleum roller and get drywall joint tape and drywall compound if there were any at the storage unit.

28. On Monday, April 19, Claimant left his home about 8:00 a.m. to go to the Knoll Acres storage unit. At the storage unit, Claimant picked up a roll of joint tape. There was no joint compound at the unit, and the linoleum roller was already in Claimant's pickup. Enroute from the storage unit to DaLane's home, and while stopped at a stop sign on the corner of Seneca and Five Mile Road, Claimant's vehicle was struck head-on by a vehicle that turned left off of Five Mile into Claimant's lane.

29. According to the sheriff's report, the collision occurred at 8:30. A deputy sheriff was dispatched at 8:32 and arrived on scene at 8:35. Claimant also called his wife who came to the scene. Claimant initially denied injury, but within a short period of time he began to experience pain in his neck and left shoulder. Claimant was concerned because of his history of C5-C7 cervical fusion. The deputy sheriff notified emergency medical services at 8:54 a.m. They arrived on scene at 8:59. Claimant was transported with spinal precautions to St. Luke's Meridian Medical Center.

### ***MEDICAL CARE***

30. Claimant was diagnosed with cervical sprain/strain. He was discharged from St. Luke's at 10:30 a.m. with ice pack, Norco, and Skelaxin and advised to follow up with his personal physician. Nothing in the medical records indicates that he was restricted from work.

31. On April 23, Claimant saw Frank Palmer, M.D., at Primary Health Crossroads because his regular physician, Nancy Mallory, M.D., was not available. Unfortunately, neither party entered the medical record for this visit into the record. There is a record of x-rays taken the same date, which corroborates Claimant's testimony that Dr. Palmer ordered cervical x-rays.

The x-rays showed Claimant's previous fusion and were otherwise unremarkable, showing no acute or bony injury.

32. A note in the Primary Health medical records dated April 30 memorializes a telephone call from Claimant's wife regarding his return to work on May 3. She expressed concern that it was too soon for Claimant to return to work. Mrs. Garrett was advised to have Claimant come in for a re-check, which he did on May 5. At that time, Dr. Palmer ordered Claimant to remain off work until May 24. Dr. Palmer also stated, "[t]he injury is directly caused by the accident of 4-19-04." Claimant's Exhibit 31.<sup>5</sup>

33. Claimant had an MRI of the cervical spine on May 17. It showed his previous fusion from C5 through C7 was solid. The MRI also showed annulus bulging and joint spurring with mild bilateral facet arthropathy at C2-3, C3-4, C4-5 and C7-T1. There was mild ventral thecal sac contour deformity at those levels but central canal diameter was adequate. There was mild foraminal narrowing on the left at C3, C4 and potentially at C5.

34. On June 4, Dr. Mallory wrote:

[Claimant] demonstrates symptoms of C-8 radiculopathy related to herniated disc at the C7-T1 level. His pain is exacerbated by doing light duties around the house. I have recommended that he follow-up [sic] with Barbara Quattrone, physiatrist, for further evaluation. I have also recommended he not return to work at this time, as his job duties require him to lift heavy items, and I feel this may worsen his symptoms.

Claimant's Ex. 34.

35. Claimant saw Dr. Quattrone on June 28. Dr. Quattrone recommended physical therapy and light duty work restrictions for two weeks.

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<sup>5</sup> The numbering on Claimant's Exhibit list is incorrect following Exhibit 24h. The next exhibit admitted is page 3 of the Ada County Paramedic's report. The exhibit list identifies this document as Exhibit 26, but it is actually identified on the document as Exhibit 27. Claimant's Exhibits 27 through 49 will be identified herein by the exhibit number appearing on the document.

36. Claimant was referred to Michael O'Brien, M.D., a neurologist, by his attorney in his related civil case. An intake evaluation was done on July 7. Some treatment was started including ice and heat therapy, continued physical therapy, and medications.

37. Claimant returned to Dr. Quattrone on July 20. He was improved with physical therapy but still had some left cervical paraspinal pain. Dr. Quattrone recommended a trigger point injection for the cervical paraspinal pain, which was done. She recommended Claimant continue with his physical therapy.

38. Claimant also had a neurological consult with Dr. O'Brien on July 20. Dr. O'Brien opined:

This patient presents with a cervical sprain strain with some suggestion of facet involvement on the left side. He also has post-traumatic headaches and may have exacerbated his carpal tunnel syndrome (he has had previous surgery in those areas). He has some suggestion of TMJ joint dysfunction at this point. I relate the problems listed above *with the exception of the original carpal tunnel which was a pre-existing condition, although it may have been worsened by the accident.*<sup>6</sup>

Claimant's Ex. 40e. Emphasis added. Dr. O'Brien also rated Claimant with a total cervical range of motion impairment of 7% based on the *AMA Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Ed. (*AMA Guides*, 4th).

39. Claimant stopped treatment when he reached the \$5,000.00 limit payable through his automobile insurance. On September 15, 2004, Dr. O'Brien noted that "[Claimant] is now stable enough to be seen PRN." Defendants' Ex. Z, p. 21.

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<sup>6</sup> Dr. O'Brien's last "sentence" is incomplete, leading to some confusion as to what event he related "problems listed above . . .". By excluding Claimant's pre-existing carpal tunnel, Dr. O'Brien could only have been relating Claimant's problems to the auto accident.

## ***POST-ACCIDENT EMPLOYMENT***

40. In the fall of 2004, Claimant began working as a substitute teacher in several local school districts. In addition, he did private math tutoring. In 2004, Claimant earned \$162.50 from Joint School District No. 2 (Meridian), \$750.00 from Joint School District No. 3 (Kuna). The record is unclear as to how much Claimant earned for tutoring in 2004.

## **DISCUSSION AND FURTHER FINDINGS**

### ***INDEPENDENT CONTRACTOR/EMPLOYEE***

41. Coverage under the workers' compensation statute is dependent upon an employer/employee relationship. Determining whether an injured worker is an independent contractor or employee is a factual judgment to be made on a case-by-case basis from full consideration of the facts and circumstances. Olvera v. Del's Auto Body, 118 Idaho 163, 795 P.2d 862 (1990). It is helpful to begin this analysis with the statutory definitions of the relevant terms. 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." Idaho Code § 72-102(11). An employer, as a *sine qua non* to an employer/employee relationship is defined as, ". . . any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors." Idaho Code § 72-102(12)(a). Finally, an independent contractor is:

. . . 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.

Idaho Code § 72-102 (16). The Idaho Court has had ample opportunity to address the issue of an employer/employee relationship, and summed up its thinking in Stoica v. Pocol, 136 Idaho 661, 663, 39 P.3d 601, 604 (2001):

The ultimate question in finding an employment relationship is whether the employer assumes the right to control the times, manner and method of executing the work of the employee, as distinguished from the right merely to require definite results in conforming with the agreement. Four factors are traditionally used in determining whether a "right to control" exists, including, (1) direct evidence of the right; (2) payment and method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the employment relationship at will and without liability. The Commission must balance each of the elements present to determine the relative weight and importance of each, since none of the elements in itself is controlling.

*(Citations omitted).* An analysis of these four factors as applied to the facts of this case is discussed below.

### ***Direct Evidence Of Right To Control***

42. There is substantial direct evidence in the record to support a finding that DaLane Blaser had the right to control Claimant's work whether Claimant was working for DGB or Northwest Equity, Inc.

43. DaLane determined where the work was to be done. Out of the many properties that needed work at any given time, it was DaLane who decided the priority of work. Within any given rental unit, it was DaLane who decided what jobs were to be done, and what items in need of attention would be left undone. On some projects, DaLane provided on-site supervision and control of the work that was done. Jacking up a structure to replace the floor is one such example.

44. All materials and supplies were provided by DaLane either through DGB or Northwest Equity, Inc. In fact, Claimant could not work when DaLane was unavailable, when there were no supplies, or when certain other members of the Blaser family were unavailable.

45. Claimant was directed to the next day's project each day or evening. Claimant went to work at the sites where he was directed to go on any particular day, and the location and nature of the work could change as DaLane saw fit. Claimant had no ability to decide which

rental units or tasks he would work on each day. If a project were completed early, and DaLane had not determined what the next project was or if there were no supplies for the next project, Claimant had to work short hours. He could not move on to start work on the next project.

46. Claimant was under the reasonable belief that DaLane determined working hours, generally requiring Claimant to start at 8:00 and end at 4:30. DaLane also specified when Claimant was to start later, as when Claimant was working on DaLane's home. Claimant sought permission from DaLane if he wanted to start work earlier or if he needed to leave during the workday.

### ***Method of Payment***

47. Claimant was paid on a straight hourly basis at an agreed-upon rate. He submitted his hours every two weeks and received a check for the full amount the following day. There were no deductions for state or federal withholding or FICA. On the other hand, Claimant did not submit bids for particular jobs or projects, nor did he prepare material lists for materials and supplies needed for particular projects.

“The ‘method of payment’ test generally refers to whether income and social security taxes are withheld from a person's wages. Withholding is customary in an employer-employee relationship.” *Livingston v. Ireland Bank*, 128 Idaho 66, 69-70, 910 P.2d 738, 741-742 (1995) (Citation omitted). The withholding issue is not dispositive, however. *Stoica v. Pocol*, 136 Idaho 661, 39 P. 3d 601 (2001). Absent other evidence, the method of payment in this case would weigh on the side of Claimant being an independent contractor. However, this proceeding includes more than a hint of what might be termed “under the table” operation by Defendants at

least with regard to their status as an employer.<sup>7</sup> The Referee finds that on this record, the method of payment factor is neutral.

### ***Equipment And Tools***

48. The Referee finds that this third factor of the “right to control” goes in favor of Claimant. Claimant provided no major equipment or tools for the work he did. He may have supplied a hammer or other similar tools found in any ordinary household. Whether the tools that Claimant and the other workers used belonged to DGB or DaLane or to Mr. Goehring is not particularly relevant to the ultimate finding on this issue. The point is that they didn’t belong to Claimant.

Once again, this factor as established by the Idaho case law mirrors the IRS regulation.

The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

Claimant’s Ex. 24f.

### ***Right To Terminate***

49. Under Idaho law, a right by either party to terminate an employment relationship is indicia of an employer/employee relationship. DaLane testified that either he or Claimant could terminate their business relationship without penalty. Claimant testified that he knew that if he didn’t show up for work he wouldn’t have a job, and did not dispute DaLane’s testimony that Claimant could terminate the relationship without penalty at any time. The Referee finds that this factor weighs on the side of an employer/employee relationship.

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<sup>7</sup> Defendants’ casual approach to recordkeeping, failure to provide IRS 1099 forms, and DaLane Blaser’s apparent willingness to manipulate Claimant’s income figures (Tr., p. 110), certainly contribute to this implication.

***Summary—Right to Control***

50. Of the four factors to be considered in determining an employer/employee relationship, three support such a relationship, and the fourth factor—method of payment—is neutral. The Referee finds that the weight of the evidence supports a finding that Claimant was an employee, not an independent contractor.

***INJURY/ACCIDENT IN COURSE OF EMPLOYMENT***

51. Having determined that an employer/employee relationship existed between Claimant and Defendants, the next issue to be addressed is whether Claimant sustained an injury from an accident that occurred in the course of his employment for Defendants.

***Injury/Accident***

52. The burden of proving an injury in an industrial accident case is on the claimant.

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

*Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

There is no dispute that an accident occurred on April 19, 2004. There is ample medical evidence that Claimant sustained injuries to his neck and left shoulder as a result of the accident. Dr. Palmer clearly opined that there was a direct connection in his chart note of May 5, 2004. Dr. O'Brien also opined that Claimant's cervical strain/sprain and its associated left-sided symptoms were the result of the April 19 accident. Dr. O'Brien's written notes in this regard are ungrammatical; however, once the sentence is parsed, there can only be one conclusion—that Dr.

O'Brien found Claimant's injuries, with the exception of a possible exacerbation of a pre-existing carpal tunnel complaint, related to the April 19 auto accident.

Notably, Defendants conducted no independent medical exam (IME), and provided no medical evidence that controverts that of Claimant's treating physicians and Claimant's own IME.

### *Course of Employment*

53. There was conflicting testimony regarding whether Claimant was working on April 19, 2004. DaLane Blaser testified that April 19 was his anniversary and he did not intend to have workers at his home on that day. He could not say, however, if or when he told Claimant that he would not be working on April 19. Mr. Goehring also testified that he knew he would not be working on Monday, April 19, but he was not clear on how he acquired that information. Claimant and his wife both testified that Mr. Goehring called Claimant on Friday, April 16. Mrs. Garrett could not testify as to the conversation, but did indicate that it was not unusual for Mr. Goehring to call Claimant in the evenings with instructions for the following workday. Claimant was quite certain that he was never told he would not be working on Monday, April 19, and equally certain that he was told by Mr. Goehring to pick up supplies at the storage unit before coming to work on Monday.

54. The Referee finds Claimant a more reliable witness than either Mr. Goehring or DaLane. Mr. Goehring, in particular, was not credible. He was unable to recall even the occurrence of significant events and activities, such as the replacement of floors and balconies. He was certain that he did not work on April 16, and denied calling Claimant that evening, yet could not testify as to what he did that day. The witness's inability to recall significant events is not consistent with his ability to recall the details of very specific events that occurred about the

same time. Mr. Goehring conveniently recalls facts and events that might be helpful to Defendants' case while claiming no recollection of events that might corroborate Claimant's version of events.

Mr. Blaser has his own credibility issues. As noted elsewhere, he evidences a casual approach to his businesses that provides him a great deal of flexibility in spinning events for his own benefit. Without business records, without written agreements, he is free to manipulate facts and figures to his best advantage, and apparently does so until he is tripped up by events beyond his control. His testimony, together with Mr. Goehring's, rings of a story pieced together after the fact to exculpate Mr. Blaser from liability for his failure to insure.

The Referee finds that Claimant was working on April 19, 2004 and was acting "within the course" of his employment at the time of his accident. Pursuant to instructions from Mr. Goehring, he traveled from his home to the DGB storage unit at Knoll Acres to retrieve supplies. That Claimant frequently went on errands as a part of his job—sometimes to the storage unit, and sometimes to suppliers to help load supplies—is undisputed. Claimant was "within the course" of his employment once he arrived at the storage unit to do his employer's bidding. He was still "within the course" of his employment as he obtained the requested supplies and began the drive back to DaLane's home. Nothing in the record suggests that Claimant deviated from the most direct route back to DaLane's home for any non-business purpose. Because Claimant was performing duties that were a common part of his job and were for the benefit of his employer at the time of the accident, Claimant was within the course of his employment at the time of the accident.

## ***MEDICAL CARE***

55. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

56. Claimant is entitled to reasonable medical treatment, including the treatment he has received to date, as well as future medical treatment should his treating physicians, Dr. Mallory or Dr. Palmer opine that such treatment is reasonably medically necessary as a result of Claimant's accident. Because Claimant terminated treatment when his auto insurance reached its limits, it is not clear whether Claimant could benefit from additional treatment.

The record before the Commission does not provide adequate information upon which to quantify Claimant's out-of-pocket medical expenses. Defendants shall pay all outstanding medical bills and reimburse Claimant for all out-of-pocket medical expenses for which Claimant can provide an invoice and proof of payment.

Defendants contend that they have no further obligation regarding repayment of previously incurred medical expenses because those expenses were paid by Claimant's uninsured motorist coverage on his automobile insurance policy. The Commission has consistently held that Defendants should not reap the benefits when a secondary insurer steps up to the plate to pay

for what should have been handled through the workers' compensation system. See, *Sangster*, 2004 IIC 0851, *Anderson*, 2005 IIC 0323, and *Rice*, 2005 IIC 0463. Defendants shall compensate Claimant's automobile insurer for the full amount it expended on this claim, not to exceed the policy limits of \$5,000.

### ***TPD/TTDs***

57. Idaho Code § 72-408 provides for income benefits (temporary total and temporary partial disability) for injured workers during the period of recovery. Claimant is entitled to past TTDs based on an average weekly wage of \$526.77,<sup>8</sup> from April 20, 2004, through September 15, 2004 in the amount of \$7,512.58 ( $\$526.77 \times 67\% = \$352.94 \times 21 \text{ weeks } 2 \text{ days}$ ). If Claimant earned income from tutoring or substitute teaching between April 20 and September 15, then income benefits would be reduced accordingly.

### ***PPI***

58. Dr. O'Brien awarded Claimant a 7% permanent impairment of the cervical spine based on range-of-motion deficits and the *AMA Guides*, 4<sup>th</sup> ed. Defendants contend that Claimant should receive no impairment award because Dr. O'Brien used the wrong edition of the *AMA Guides*. In *Urry v Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989), the Idaho Supreme Court ruled that the Commission is the ultimate evaluator of impairment. The Court also noted that "the opinions of an expert, whether given by direct testimony, or by way of written report, are not binding upon the trier of the facts, but are advisory only." *Urry*, 115 Idaho at 756, 769 P.2d at 1128 (quoting *Graves v. American Smelting & Refining Co.*, 87 Idaho 451, 455, 394 P.2d 290, 293 (1964)). The Commission can accept the

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<sup>8</sup> Based on the \$6,848.00 Claimant earned during the 13-week period from January 31 through April 22, 2004 ( $\$6,848.00 \div 13 = \$526.77$ ).

opinion of the physician regarding impairment but is not required to do so. Nelson v. David Hill Logging, 124 Idaho 855, 865 P.2d 946 (1993). The *AMA Guides*, 5<sup>th</sup> ed., is the standard for determining impairment. The use of range of motion to determine impairment is appropriate under the circumstances of this case, where there is documented injury, a history of previous injury, and permanent loss of range of motion. Using Dr. O'Brien's range of motion calculations, Claimant should have received a 4% PPI of the whole person based on Table 15-7, II B, *AMA Guides* 5<sup>th</sup> ed. PPI is calculated to be 20 weeks x \$293.70 (2004 55% ASW) = \$5,874.00.

### ***RETRAINING***

59. Idaho Code § 72-450 provides for retraining under certain circumstances when a claimant has been deemed to be permanently disabled. Defendants contend that Idaho Code § 72-450 is only applicable when a claimant is totally disabled. Such a reading of the statute is not only contrary to the statute's explicit use of the phrase "permanently disabled," but is an oxymoron as well. By definition, retraining cannot help an individual who is totally disabled. An individual with a permanent disability, if receptive to retraining, may be awarded such training to restore earning capacity. In this case, however, Claimant has made no showing that his earning capacity has been permanently decreased. He has a number of other high level skills that he can fall back on for comparable earning, and was only working for Defendants because there was a shortage of employment in his chosen field of computer programming in 2003. The local economy has seen many changes since that time, and there is nothing in the record showing what attempts Claimant has made to find permanent employment. Claimant returned to school of his own volition to get a teaching certificate, a position that is likely to pay substantially less than he could make in computer programming.

On these facts, the Referee finds that Claimant is not entitled to retraining benefits.

**STATUTORY PENALTY**

60. Defendants do not dispute that they were uninsured on the date of Claimant's injury. Claimant is entitled to statutory penalties as set forth in Idaho Code § 72-210 consisting of an additional 10% of the *total* amount of his compensation together with costs. As Claimant appeared *pro se*, he is not entitled to reasonable attorney fees as a part of the penalty.

A *partial* accounting of Claimant's compensation award includes the following liquidated amounts:

Medical care (auto policy)	\$5,000.00
TTDs	7,512.58
PPI	<u>5,874.00</u>
Subtotal	\$18,386.58
Penalty	<u>1,838.66</u>
Total	\$20,225.24

**CONCLUSIONS OF LAW**

1. Claimant was an employee of Defendants on April 19, 2004.
2. Claimant sustained injuries as the result of an accident that occurred while he was acting within the course of his employment on April 19, 2004.
3. Claimant is entitled to medical care for injuries arising from his April 19, 2004 accident. This includes payment of outstanding invoices, compensation to Claimant of his out-of-pocket medical expenses upon proof of amount and payment, reimbursement to Claimant of all amounts paid on this claim, \$5,000, and any additional care deemed reasonably necessary by Claimant's treating physician.
4. Claimant is entitled to a PPI rating of 4% of the whole person based upon his range of motion deficits and the *AMA Guides*, 5<sup>th</sup> ed., in the amount of \$5,874.00.

5. Claimant is not entitled to retraining benefits pursuant to Idaho Code § 72-450.

6. Claimant is entitled to statutory penalties as set forth in Idaho Code § 72-210 consisting of an additional 10% of the total amount of his compensation together with costs.

**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 \_\_8th\_\_ day of March, 2006.

INDUSTRIAL COMMISSION

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

ATTEST:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29\_ day of March, 2006 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

EMERY LEE GARRETT  
6975 N 6000 W  
REXBURG ID 83440

PAUL T CURTIS  
CURTIS AND BROWNING  
598 N CAPITAL AVE  
IDAHO FALLS ID 83402

djb

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



proof of amount and payment, reimbursement to Claimant of all amounts paid on this claim subject to the \$5,000 policy limit, and any additional care deemed reasonably necessary by Claimant's treating physician.

4. Claimant is entitled to a PPI rating of 4% of the whole person based upon his range of motion deficits and the *AMA Guides*, 5<sup>th</sup> ed.

5. Claimant is not entitled to retraining benefits pursuant to Idaho Code § 72-450.

6. Claimant is entitled to statutory penalties as set forth in Idaho Code § 72-210 consisting of an additional 10% of the total amount of his compensation together with costs.

7. Pursuant to Idaho Code § 72-734, all compensation due and payable pursuant to this decision shall accrue interest from the date of the Commission's Order at the statutory rate of 8.375% as set by the State Treasurer effective July 1, 2005.

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

DATED this 29<sup>th</sup> day of March, 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 \_29 day of March, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

EMERY LEE GARRETT  
6975 N 6000 W  
REXBURG ID 83440

PAUL T CURTIS  
CURTIS AND BROWNING  
598 N CAPITAL AVE  
IDAHO FALLS ID 83402

djb

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