

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DOROTEO MIKE HERNANDEZ,)
)
 Claimant,)
 v.)
)
 TRIPLE ELL TRANSPORT, INC.,)
)
 Employer,)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
 and)
)
 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 04-519582

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

September 15, 2006

INTRODUCTION

The Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Twin Falls on March 23, 2006. Kent D. Jensen represented Claimant, M. Jay Meyers represented Defendants Employer and State Insurance Fund, and Monte R. Whittier represented Defendant Liberty Northwest Insurance Corp. The parties submitted oral and documentary evidence at hearing and took no post-hearing depositions. They then submitted briefs and the matter came under advisement on June 27, 2006.

ISSUES

As established by the parties, the issues to be determined at this time are:

- 1) Whether Claimant was an independent contractor on the date alleged in the Complaint.
- 2) Whether Claimant purchased a valid Workers' Compensation Insurance policy from Liberty Northwest Insurance on June 2, 2004.
- 3) If a valid Workers' Compensation Insurance policy was purchased by Claimant, was Claimant excluded from coverage under the policy as an owner/operator.

CONTENTIONS OF THE PARTIES

Claimant contends he was an employee of Triple Ell and not an independent contractor on the date of his alleged accident and injury. He also asserts Defendant Liberty Northwest should be estopped from denying coverage for his injury under the policy it issued in this matter.

Defendants Triple Ell and State Insurance Fund (SIF) contend Claimant was an independent contractor, not an employee, on the date of injury.

Defendant Liberty Northwest (LNW) contends no valid policy was issued in this matter, and even if the policy were found valid, it did not provide coverage for Claimant.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant;
2. Claimant's Exhibits A through F and K through R; Defendants' Triple Ell and SIF Exhibits F through M; and, Defendant's LNW Exhibits A through L admitted at hearing.

After considering the record and briefs of the parties, the Referee submits the following Findings of Fact, Conclusions of Law, and Recommendation for review by the Commission.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

FINDINGS OF FACT

1. Claimant is an owner/operator of a Freightliner truck. On May 4, 2004, he entered into a lease agreement (“Lease Agreement”) with Defendant Triple Ell, which provided among other things that Triple Ell is a “Motor Carrier by motor vehicle holding authority from the Interstate Commerce Commission / U.S. Secretary of Transportation under certificate number MC255506,” and that Claimant “is the owner of certain motor vehicle equipment ... (‘the Tractor’) and is engaged in the business of hauling commodities by motor vehicle pursuant to contracts with motor carriers.” Triple Ell/SIF Exhibit F. In sum, Claimant would use his truck to haul commodities arranged for by Triple Ell contained in trailers provided by Triple Ell. In return, Claimant was paid 72.5% of the gross load revenue. The terms “truck” and “tractor” are used synonymously to describe the vehicle driven by a truck driver.

2. The Lease Agreement explicitly stated it was the intention of the parties that Claimant was and would remain an independent contractor and that he and his employees, agents, or servants would not be considered employees, agents, or servants of Triple Ell. Claimant could furnish his own drivers for the operation of his tractor, in which event, under the Lease Agreement, he agreed to pay all sums due to his drivers and assume full responsibility for payroll, taxes, and workers’ compensation claims. Claimant testified he chose to perform the driving himself and could not afford to hire drivers. The Lease Agreement also established that, with limited exceptions, Claimant was responsible for costs and expenses incidental to the performance of hauling under the Lease Agreement.

3. Regarding workers’ compensation insurance, the Lease Agreement provided:

CONTRACTOR [Claimant] agrees to insure himself with Workman’s Compensation insurance, or to provide an exemption therefrom, and to insure his employees, if any, with Workman’s Compensation. CONTRACTOR agrees to

notify insurer and CARRIER [Triple Ell] of all claims made pursuant to the Workman's Compensation insurance, and further agrees to secure the written consent of the Workman's Compensation insurance company with respect to the waiver of subrogation.

Id. Claimant read the Lease Agreement and signed it.

4. On or about June 2, 2004, Triple Ell initiated an application for workers' compensation insurance through Premier Insurance, with Claimant listed as applicant. The application described Claimant as a sole proprietor/owner hauling for Triple Ell, and it excluded him from coverage. The application is signed in several places as "Doroteo Hernandez," but the signature is not Claimant's (Claimant consistently signed his name as "Mike Hernandez" and there is no resemblance to Claimant's actual signature). Claimant does not recall discussing the application and did not authorize anyone to sign on his behalf. He had not otherwise insured himself, or specifically provided an exemption, for purposes of workers' compensation.

5. The insurance application was assigned to Defendant LNW through the assigned risk pool. Consistent with the application, the policy clearly excluded Claimant, as sole proprietor under the policy, from coverage. However, it covered employees or drivers he may have hired in the operation of his equipment. Triple Ell paid the insurance premium up front and began withdrawing \$30.00 per check from Claimant to recoup the cost. Claimant saw the deduction for workers' compensation coming from his pay, but did not inquire about the policy.

6. On August 7, 2004, Claimant alleges he sustained an injury while making a delivery in California under the Lease Agreement with Triple Ell. He seeks workers' compensation benefits either as an employee of Triple Ell, or under the LNW insurance policy.

DISCUSSION AND FURTHER FINDINGS

1. **Employee/Independent Contractor.** Idaho Code § 72-102(12) 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(13)(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(17) 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 depends 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, 585 P.2d 965 (1978). The issue of whether an employer/employee relationship exists is to be decided from all the facts and circumstances established by the evidence. *Id.*

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, supra. 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).

Claimant emphasizes the following facts stemming from the Lease Agreement as demonstrating an employer/employee relationship: Claimant could not haul loads with his tractor for other companies during the pendency of the lease; Claimant had to operate under the Department of Transportation (DOT) authority of Triple Ell and was required to have Triple Ell's logo and DOT designation on his tractor; Triple Ell's dispatcher arranged for the loads Claimant hauled, designating the destinations and making arrangements for return loads; Triple Ell provided trailers for the loads since Claimant did not own one; and, Triple Ell provided the means for Claimant to purchase gas and other costs up front with Triple Ell being reimbursed from the load revenue (charge-back items).

Claimant also points out Pennsylvania case law that presents significantly similar facts. In the case cited by Claimant, Schneider National Carriers v. Workers' Compensation Appeal Board, 738 A.2d 53 (1999), the Pennsylvania Workers' Compensation Judge (WCJ) performed a right to control test and found the claimant, a truck owner/operator who had entered into an "Independent Contractor Operating Agreement" similar to the Lease Agreement in this case, to be an employee of the motor carrier and not an independent contractor. The Workers' Compensation Appeal Board (WCAB) and Commonwealth Court of Pennsylvania affirmed. What Claimant in this matter has failed to point out, though, is that the Pennsylvania Supreme Court reversed the decision and found Claimant to be an independent contractor. *See Schneider Nat. Carriers v. W.C.A.B (Beardon)*, 567 Pa. 185, 786 A.2d 203 (2001), referencing Universal

Am-Can, Ltd. v. W.C.A.B (Minteer), 563 Pa. 480, 762 A.2d 328 (2000). Claimant also cites a Missouri case, Nunn v. Treasurer of the State of Missouri, 151 S.W.3d 388 (2004), but that case is not particularly instructive because the court found the claimant was not an owner-operator.

The Referee notes that the case at hand, like the Pennsylvania cases listed above, presents unique issues relating to the professional relationship between motor carriers and owners of leased equipment and leases that are extensively regulated by federal law. It does not appear these issues have been previously addressed under Idaho's Workers' Compensation Law. In Pennsylvania, the Court reviewed the WCJ's findings and determined that most of the factors the WCJ identified in concluding the claimant was the motor carrier's employee (i.e., factors demonstrating control over performance of the work), were in fact governed and controlled by federal regulation. The Court noted that neither the carrier, nor the owner/operator, had bargaining power or the ability to control the work to be done when dealing with matters subject to regulation. The Court concluded the obligations imposed by law upon a motor carrier are not probative of the question of whether the motor carrier exercises control over the owner/operator's manner of work and that such regulations reflect control of the government, not the motor carrier. The Referee finds the rationale applied by the Pennsylvania Supreme Court in this regard instructive and persuasive.

In the case at hand, a review of Title 49 of the Code of Federal Regulations (CFR) and United States Code (*see* Triple Ell/SIF Exhibit L) demonstrates that most of the "controls" established by Triple Ell in the Lease Agreement involve subject matter regulated by federal law, including motor carriers' exclusive possession and responsibilities, charge-back items, marking of the vehicles, inspection of vehicles, provision of insurance, compliance with safety requirements, loading and unloading of vehicles, compensation and payment period, and trip

documentation, among other things. One of the most pronounced examples of mandatory control by the motor carrier is seen at 49 CFR § 376.12(c)(1), which states:

(c) *Exclusive possession and responsibilities.* (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

Triple Ell/SIF Exhibit L. However, 49 CFR § 376.12(c)(4) establishes that none of the requirements in paragraph (c)(1) are intended to affect whether the lessor [owner/operator] or driver provided by the lessor is an independent contractor or employee of the authorized carrier. It further explains that an independent contractor relationship may exist when the carrier lessee is complying with federal regulations and attendant administrative requirements. Upon review of the Lease Agreement at issue, it appears that rules and regulations of the DOT (including Federal Motor Carrier Safety Administration), Interstate Commerce Commission, Surface Transportation Board, and other regulatory bodies have shaped the primary requirements set forth therein.

The Referee finds that, in this matter, federal regulation has eliminated many of the traditional factors used in determining employee/independent contractor status and the outcome in the Pennsylvania cases strongly supports a finding that Claimant was an independent contractor. This is not the usual “four-factor test” established by Idaho Law. However, the Referee also identifies the following significant factors in determining Claimant was an independent contractor, not an employee: Claimant had the right to refuse any load Triple Ell offered; he could purchase fuel or maintenance items from private vendors of his choice, not just those vendors with whom Triple Ell contracted/negotiated; he was responsible for the cost of fuel and maintenance items related to his truck; he owned and provided the most important piece of equipment for performing the work – his truck; he could either drive the truck or provide a driver

of his choosing; Triple Ell gave him the destination and delivery date, but for the most part did not otherwise control his route, hours, breaks/meals, or other logistics involved in reaching the destination; Claimant was paid a percentage of each load; no taxes were withheld from his pay and his earnings were reported as non-employee compensation on IRS Form 1099; and, he entered into a written agreement that described him as an independent contractor, such agreements being standard and accepted in the industry. Outside of the extensive federal regulations involved in this case, the above factors satisfy the four-factor test, with factors 1-3 (direct evidence of the right to control, method of payment, and furnishing major items of equipment) weighing in favor of independent contractor status. The Referee finds Claimant was an independent contractor on the date alleged in the Complaint.

2. **Insurance Policy/Coverage.** As to the LNW insurance policy, the initial issue listed by the parties is whether or not Claimant purchased a valid Workers' Compensation Insurance policy. The Referee finds this issue unnecessary to resolve because, even if it could be found that Claimant purchased a valid policy (for instance, by agreeing to provide such insurance under the Lease Agreement and by paying for it out of his trip reimbursements), he was excluded from coverage and would not be entitled to coverage. Exclusion from coverage for sole proprietors/owners is the norm under Idaho's Workers' Compensation Law, and such individuals must affirmatively elect coverage if they are to be covered. Claimant did not make such an election under the LNW policy, or any other. It appears Claimant was free to secure his own insurance under the terms of the Lease Agreement, but did not do so. Moreover, prior to the Lease Agreement with Triple Ell, Claimant had signed a similar insurance policy excluding him from coverage with another company, and he is currently working as the owner/operator of a truck and trailer – admittedly as his “own boss” - and he has still chosen not to insure himself.

CERTIFICATE OF SERVICE

I hereby certify that on the ___15___ day of September, 2006, a true and correct copy of the foregoing **Findings Of Fact, Conclusions Of Law, And Recommendation** was served by regular United States mail upon each of the following persons:

KENT D JENSEN
P O BOX 276
BURLEY ID 83318

M JAY MEYERS
P O BOX 4747
POCATELLO ID 83205

MONTE R WHITTIER
LAW OFFICES OF HARMON, WHITTIER & DAY
P O BOX 7507
BOISE ID 83707

jkc

_____/s/_____

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 Claimant,) **IC 04-519582**
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 TRIPLE ELL TRANSPORT, INC.,)
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 Employer,)
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 and)
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 STATE INSURANCE FUND,)
) **September 15, 2006**
 Surety,)
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 and)
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 LIBERTY NORTHWEST)
 INSURANCE CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen 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 recommendations of the Referee. The Commission concurs with these recommendations. 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. Claimant was an independent contractor on the date alleged in the Complaint.

2. Claimant is excluded from coverage under the Liberty Northwest Insurance policy.
3. The issue related to the validity of the Liberty Northwest Insurance policy is moot.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __15__ day of __September_____, 2006.

INDUSTRIAL COMMISSION

/s/ Thomas E. Limbaugh, Chairman

/s/ James F. Kile, Commissioner

/s/ R. D. Maynard, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

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I hereby certify that on the 15 day of September, 2006, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

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_____/s/_____