

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT D. THORNTON,)
)
 Claimant,)
)
 v.)
)
 FRED TURK, dba)
 TURK CONSTRUCTION,)
)
 Defendant.)
 _____)

IC 2005-003009

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

filed March 2, 2007

INTRODUCTION

The Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Boise on April 25, 2006, and July 7, 2006. Bruce D. Skaug represented Claimant and Scott Rose represented Defendant. 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 October 13, 2006.

ISSUE

The sole issue to be determined at this time is whether an employer-employee relationship existed at the time of the alleged accident. During briefing, Defendant raised for the first time the issue of attorney fees. The Referee will not address this issue, as it was not properly noticed for hearing.

CONTENTIONS OF THE PARTIES

Claimant contends he was an employee of Defendant on the date of his alleged accident and injury, and not an independent contractor. In addition, he was not a casual employee.

Defendant alleges no employer-employee relationship existed between the parties and, instead, Claimant was an independent contractor or employee of the homeowner. Even if an employer-employee relationship existed between Claimant and Defendant, Claimant was at most a casual laborer and therefore not entitled to coverage.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant, Kari Thornton, Todd Freer, Joel Johnson, Darla Alders, Frederick Turk, and Jill Thornton; and,
2. Claimant's Exhibits 1 through 17 and Defendant's Exhibits A, B, and D through G admitted at hearing.

After having considered all of the evidence and the briefs of the parties, the Referee submits the following Findings of Fact and Conclusion of Law for review by the Commission.

FINDINGS OF FACT

1. Claimant is a 23-year old high school graduate who lives in Emmett. Prior to the subject accident, he had worked for Napa Auto Parts stocking shelves and cleaning up; for Thomas Motors washing cars; for Christian Brothers Painting doing prep work and painting; for Merrill's Egg Farm packaging eggs; and, for Artistic Concrete as a laborer. Defendant is a 34-year old college graduate and proprietor of Turk Construction. He lives in Boise and has worked in general construction, primarily finish carpentry and home remodeling, since 1991 or 1992.

2. Todd Freer (Homeowner) began an extensive remodel of his home in July 2004. His occupation is that of a planner for Micron, where he works full time Monday through Friday. He lives in the remodeled home and there is no indication he builds or remodels homes for profit.

3. Homeowner's remodeling project involved drywall work, demolition work,

concrete work, rewiring of the house, new tile, hardwood floor work, new cabinets, and painting of the entire house, among other things. He found and paid numerous individuals to perform the tasks involved; some of these individuals were his friends who worked in the construction industry. The project was flexible and loosely scheduled such that the workers could come and go as they pleased and work their own hours. Homeowner provided them with jobs or tasks, often based on specialized skills, and did not further dictate their schedules. He sometimes requested that jobs be done by a certain date, but had inconsistent results. For the most part, he paid the workers individually by check and considered them independent contractors.

4. Homeowner hired Defendant Fred Turk, a friend he had known for eight years, to work full-time on the project. Turk considered himself to be a sole proprietor/independent contractor. He worked on the remodel project from the outset, performing a variety of tasks.

5. In the fall of 2004¹, Homeowner hired Shaun Patten, whose company is called Artistic Concrete, to perform concrete work. Patten was not a friend of Homeowner, but met him through a mutual friend and then bid the concrete job. Claimant, an essentially unskilled worker and acquaintance of Patten, helped Patten with the project. Patten said he called Claimant in for the job because it was labor-intensive; he considered Claimant to be “his laborer” and paid him by the hour. He did not fill out a W2 form on Claimant because he thought “if you were under \$599, you don’t need to do that.” Patten Depo. (Exhibit 17), p. 13. Claimant considered himself a part-time employee of Patten and received his pay directly from Patten, not Homeowner. Patten and Claimant completed the concrete job after about a week and a half. Claimant also worked occasionally for Patten on other construction projects, but was hoping to find full-time employment.

¹ Homeowner’s records show payments to Shaun Patten on two occasions in October 2004.

6. Claimant met Defendant at Homeowner's project while working for Patten. Although the evidence is conflicting as to how Claimant later began working on Homeowner's property in February 2005, it is clear that Claimant and Defendant discussed the need for additional help on the project. Based on credibility determinations addressed later in this decision, the Referee finds the following facts describe what most likely occurred in this matter.

7. Defendant agreed to do the siding work for the remodel project, but he needed help with the task. Homeowner advised Defendant that if Defendant found someone to assist him, Homeowner would pay for the additional person.

8. After meeting Defendant at Homeowner's home in the fall of 2004, Claimant followed up by contacting Defendant. He called Defendant several times in mid-February 2005, at which time Defendant told him he could use his help on the project and there was a lot of work to be done, so much so that Claimant believed Defendant was offering him full-time work. Claimant and Defendant played "phone tag" throughout the latter half of February. Claimant was excited to find what he believed would be a full-time job.

9. On Friday, February 25, 2005, Claimant called Defendant in the morning. Defendant returned the call at approximately noon and told Claimant he should come in and work a half-day. Claimant arrived on the job site at approximately 1:15 p.m. and called Defendant as he pulled up. Thereafter, Defendant met him and instructed him on the work he was to perform that afternoon, which included loading the old siding into Claimant's truck and taking it to the recycling center. Claimant had never been to the recycling center before and Defendant gave him directions and \$10.00 for gas. Defendant collected the recycling receipt and proceeds from Claimant when he returned. Claimant also helped put vapor barrier onto the

siding. He had never done that kind of work before and described it as similar to hanging wallpaper over the plywood. Defendant showed him how to do it. Claimant completed work that day at about 5:15 p.m. and Defendant told him to return Monday morning. Homeowner, who was at work, did not know Claimant was working at his house that day.

10. On Monday, February 28, Claimant arrived at the house at 9:00 a.m. and called Defendant as he pulled up. Defendant arrived just after Claimant and told him he would be helping hang soffit that day and picking up trash in between. Claimant described the process:

Well, it – to hang soffett [*sic*], I guess, you – around the side of the house is a long stretch, so the boards are 12, 14 feet long. Two people on separate ladders across the room, one on each end of the board. It takes two people and you have to hold it up and, then, I would hold it and he would nail it and, then, we'd work side by side like that all the way until we got around the whole house.

Hearing Transcript, p. 38. Claimant worked exclusively with Defendant and assisted him through the morning and, following a lunch break, into the afternoon. At approximately 2:30 p.m., while hanging soffit, Claimant's ladder slipped out from under him and he fell to the ground sustaining a displaced fracture of his left wrist.

11. Defendant drove Claimant, who was in significant pain, to the hospital and called Claimant's mother. He also called Homeowner and told him about the incident. Only then did Homeowner find out Claimant was working at his home with Defendant.

12. The hospital intake sheet indicated Claimant was unemployed and listed his auto and homeowner's insurance as guarantor. This concerned Claimant's mother when she arrived at the hospital because she knew he had been injured while working and she asked that the information be changed. The intake sheet in Exhibit 2 generally describes Claimant's work information as not available and in one place describes him as unemployed; however, the physician's notes indicate he was injured while at work and brought in by "coworkers." The

physician's notes also describe Claimant as alert and oriented, but "borderline hysterical," and his mother as "a very sensible lady." Exhibit 2. The Referee cannot discern the source(s) of the information contained on the intake sheet and emergency room physician notes, *i.e.*, from Claimant, from his mother, from his wife (who was also at the hospital) and/or from Defendant.

13. Later on the day of the accident, Claimant's mother went to the job site to pick up Claimant's truck and Defendant showed her around the site. On several occasions in the days that followed the accident, Claimant's mother used Claimant's cell phone to call Defendant. At some point she discussed workers' compensation insurance with him and he told her he did not have any. Claimant's mother also spoke by phone on one occasion with Homeowner, who indicated he would try to put it on his homeowner's insurance if he could.

14. Sometime within the week following the accident, Claimant called Defendant to get paid for the hours he worked. Defendant told him to come to the job site to get paid, and then called Homeowner. Homeowner came home during his lunch break and gave Defendant a \$100.00 bill for Claimant's hours. Defendant had written Claimant's hours, totaling ten, on an invoice for Homeowner (see Exhibit 11). It was common practice that general laborers working on the remodel project were paid \$10.00 per hour. Defendant had told Claimant he would be earning \$10.00 per hour in their discussions prior to his coming to work there.

DISCUSSION AND FURTHER FINDINGS

Credibility

At the outset, the Referee notes that witnesses in this matter were excluded from the hearing room, so that none of the witnesses (except the parties) heard the testimony of the other witnesses prior to testifying. At hearing and in post-hearing review of the record, the Referee observed that the factual testimony of the witnesses -- except that of Defendant -- was generally

consistent despite normal lapses of memory and detail, and the combined testimony painted a logical factual picture.² The Referee found the testimony of Claimant, Claimant's mother, and Homeowner particularly credible and helpful despite minor discrepancies.

Defendant's testimony, on the other hand, was comparatively inconsistent and gravitated illogically towards any fact that might relieve him from liability. For instance, Defendant would have the Referee believe that Claimant simply showed up at the job site, without specific invitation, and began doing work, *i.e.*, picking up garbage and loading siding into his truck, with little to no direction from anyone, and that Claimant's role at the project was to basically wander the site and help anyone who needed assistance. Defendant's story is not believable.

Often, inconsistencies can be written off to differences in memory or interpretation. However, based on Defendant's testimony in this matter, the Referee finds herself in the position of having to determine which of two witnesses, Defendant or Claimant's mother, expressly lied at hearing. Defendant testified that Claimant's mother never met him at the job site to pick up Claimant's truck after the accident and he testified specifically that she lied in this regard. Upon reflection and review of the record, the Referee can find no reason why Claimant's mother would lie about such an innocuous fact. There has been no other explanation put forth to explain how Claimant's truck was picked up from the job site and it makes sense that Claimant's mother would do so. Because Defendant testified he returned to the job site from the hospital, it makes sense that he would be there when she arrived. If memory has failed Claimant's mother and it was actually the next day, Defendant was working at the job site all

2. The Referee notes that the testimony of Joel Johnson and Darla Alders was not particularly helpful in evaluating the relationship between Defendant and Claimant.

that day as well. Lastly, Claimant's wife escorted his mother to pick up the truck and she testified Defendant met them and showed Claimant's mother around the site.

Defendant also denied Claimant's mother ever spoke with him on the phone in the days following the accident and, specifically, she did not ever talk with him about workers' compensation insurance; he again indicated Claimant's mother lied. Once again, the Referee finds Defendant's testimony in this regard not credible. Claimant consistently testified that his mother had his phone for a few days after the accident while he was recovering and on medication. Claimant's mother's testimony supports this as well. The cellular phone records show several calls back and forth between Claimant's phone and Defendant's phone from March 1, the date of Claimant's surgery, through March 5. One such call came from Claimant's phone within minutes after his wrist surgery, an open reduction internal fixation with placement of a fixed angle plate, ended. The Referee finds it unlikely Claimant (who the physician had described the day before as nearly hysterical from pain) placed a call so soon after his surgery and Claimant's mother probably did so. It is logical that she would be concerned at that point about payment of the medical bills and her testimony in this regard made absolute sense. Most significantly, Homeowner described at hearing a conversation he had with Defendant wherein Defendant told him he had just spoken with Claimant's mother and she asked him if he had workers' compensation insurance.³ Being put in the position of making such a necessary determination, the Referee finds Defendant, and not Claimant's mother, provided false testimony at hearing.

³ The Referee notes that Homeowner's comment in this regard was made offhandedly in response to an unrelated question by Defendant's attorney and was done prior to Defendant testifying that Claimant's mother lied. Homeowner wasn't trying to prove or disprove anything and the Referee finds that this lends particular credibility to the comment.

While there are other indications that Defendant is not credible, the Referee finds it unnecessary to further evaluate this issue.

Employer/Employee Relationship

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).

Direct Evidence of the Right to Control. Defendant's job was to perform the siding work on Homeowner's remodeling project. He did so admittedly as an independent contractor and he obtained Claimant's assistance to fulfill this task. There exists significant direct evidence of Defendant's right to control the time, manner, and method of Claimant's work. He contacted Claimant, established when he would come to the job site, what he would do there, when he would leave, and when he would return. Claimant had not gone to the recycling center, applied vapor barrier, or hung soffit before and Defendant instructed him on how to do these tasks. Claimant worked exclusively with Defendant on February 25 and 28, performing work related to Defendant's siding job. Although he only worked for two days before being injured, Defendant informed Claimant there was enough work to keep him working full time. The first factor weighs in favor of finding an employer-employee relationship between Defendant and Claimant.

Method of Payment. Claimant was paid \$10.00 per hour for his work performing general labor and siding tasks for Defendant. Following his accident, he received \$100.00 in cash for ten hours of work, with the Defendant providing Homeowner an invoice that showed Claimant's hours and Homeowner giving the money to Defendant to pay Claimant. Although it was a generally known fact that unskilled laborers who had previously worked on the project earned \$10.00 per hour, it was Defendant who told Claimant what he would be making and, according to Homeowner, it was Defendant who ultimately determined how much Claimant would be paid.

Although no taxes were withheld, failure to make provisions for withholding taxes does not destroy the employer-employee relationship. The second factor weighs in favor of finding an employer-employee relationship between Defendant and Claimant.

Furnishing Major Items of Equipment. Claimant testified that Defendant did not ask him to bring any tools to work, but that he brought some basic items like work gloves, a nail bag, and a hammer. Defendant provided Claimant with tools used for siding tasks such as a razor knife to cut paper and a nail gun/stapler to hang soffit. Claimant used his own truck to haul siding to the recycling center, but Defendant provided gas money. Other equipment, like the ladder Claimant fell from, belonged to Homeowner, who allowed the contractors to use equipment that he had at the house. The bottom line is that Claimant was a general laborer who did not know what tasks he would be performing from day to day. By necessity, he relied on Defendant to provide equipment, one way or another, to complete those tasks. The third factor weighs in favor of finding an employer-employee relationship between Defendant and Claimant.

Right to Terminate the Relationship at Will. Defendant essentially hired Claimant to help him with the siding project. It stands to reason, and there is no evidence to the contrary, that Defendant could just as easily have terminated the relationship without liability. Likewise, although Claimant did not feel like he was free to simply come and go from the job site because he was working for Defendant, he was under no contractual obligation to remain and would suffer no liability. Either party could terminate the relationship at will. However, in the final analysis, this factor does not significantly impact the decision herein.

Based on the above, an employer-employee relationship existed between Defendant and Claimant.

Relationship with Homeowner

Defendant asserts that Homeowner, not Defendant, was Claimant's employer. However, Defendant does not adequately describe what theory, facts, and authority support this assertion. Moreover, Homeowner is not a party to this matter. The Referee has determined above that an employer-employee relationship existed between Defendant and Claimant under applicable law. The Referee will not engage in an analysis of other relationships not presently before the Commission.

Casual Employment

Defendant also asserts that, if the Commission finds an employment relationship existed between the parties, Claimant was exempted from coverage as a casual employee. The casual employment exemption applies to employment that is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or to become necessary. It is employment that arises only occasionally or incidentally and is not part of the usual trade or business of the employer. Larson v. Bonneville Pacific Service Co., 117 Idaho 988, 793 P.2d 220 (1990).

Here, the information relayed to Claimant by Defendant supports that regular work was available on the construction project. It appears that Defendant himself had been working full-time on the remodeling project since sometime in 2004, and he sought Claimant's assistance to perform general labor work related to his tasks. It cannot be said that Claimant's employment assisting Defendant on the construction project was not part of Defendant's usual trade or business. Defendant has been involved in remodeling homes since the early 1990's. Claimant was not a casual employee.

CONCLUSION OF LAW

1. Claimant was an employee of Defendant on the date of the alleged accident. Moreover, he was not a casual employee.

RECOMMENDATION

The Referee recommends the Commission adopt the foregoing Findings and Conclusion as its own and issue an appropriate final order.

DATED in Boise, Idaho, on the 23rd day of February 2007.

INDUSTRIAL COMMISSION

/s/ Lora Rainey Breen, Referee

ATTEST :

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of March 2007, a true and correct copy of the foregoing **Findings Of Fact, Conclusion Of Law, And Recommendation** was served by regular United States mail upon each of the following persons:

BRUCE D SKAUG
1226 E KARCHER RD
NAMPA ID 83687-3075

SCOTT ROSE
300 W MAIN ST STE 153
BOISE ID 83702

jkc

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT D. THORNTON,)
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 Claimant,)
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 FRED TURK, dba)
 TURK CONSTRUCTION,)
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 Defendants.)
 _____)

IC 2005-003009

ORDER

filed March 2, 2007

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 employee of Defendant on the date of the alleged accident.

Moreover, he was not a casual employee.

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

DATED this 2 day of March , 2007.

INDUSTRIAL COMMISSION

 /s/
James F. Kile, Chairman

/s/
R. D. Maynard, Commissioner

/s/
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of March , 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

BRUCE D SKAUG
1226 E KARCHER RD
NAMPA ID 83687-3075

SCOTT ROSE
300 W MAIN ST STE 153
BOISE ID 83702

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/s/