

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAVIER ARREGUIN,)	
)	
Claimant,)	IC 2006-000116
)	
v.)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
3P DELIVERY, LLC,)	AND RECOMMENDATION
)	
Employer,)	
)	Filed June 18, 2007
Defendant.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Idaho Falls on November 7, 2006. Claimant, Javier Arreguin, was present in person and represented by Michael R. McBride, of Idaho Falls. Defendant Employer, 3P Delivery, LLC (3P), was represented by Thomas B. High, of Twin Falls. The parties presented oral and documentary evidence. This matter subsequently came under advisement on February 16, 2007.

ISSUE

The sole issue to be resolved is whether Claimant was an employee of 3P at the time of his accident.

ARGUMENTS OF THE PARTIES

Defendant argues Claimant was an independent contractor at the time of his accident as clearly established by written agreements between the parties. Claimant argues that the actual dealings of the parties establish he was an employee of 3P.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Dennis Chad Dineen, and Jeff Brunner taken at the November 7, 2006, hearing;
2. Claimant's Exhibits 1 through 15 admitted at the hearing;
3. Defendant's Exhibits A through K admitted at the hearing; and
4. Claimant's deposition taken May 3, 2006.

After having considered all of the above evidence, and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusion of Law.

FINDINGS OF FACT

1. Claimant was born in Mexico in 1957. He completed the tenth grade in Mexico and came to the United States in 1978 where he worked steadily for a potato processing company for 25 years. Claimant speaks English fairly well, and has completed classes in English, although he testified at hearing through an interpreter. At the time of hearing, Claimant was taking English reading classes and read English at the fourth or fifth grade level. In 2003, Claimant read English at approximately the third grade level. Claimant has been a citizen of the United States since 2004.

2. At all relevant times, Home Depot contracted with 3P for delivery of appliances sold by Home Depot in the Idaho Falls area. Home Depot's contract with 3P required delivery services six days per week by uniformed drivers covered by occupational accident insurance. 3P provided all equipment and personnel necessary to deliver the appliances. Home Depot scheduled the deliveries with its customers and provided 3P with customer addresses, phone numbers, and scheduled delivery times. 3P drivers met at the Home Depot lot in Idaho Falls each morning, Monday through

Saturday, to inspect, sign for, and load the appliances they were to deliver.

3. In June 2003, 3P supervisor Brian Richmond approached Claimant about becoming a delivery driver for 3P. Claimant testified that Richmond interviewed him for the job and Claimant completed what he believed to be an application for employment on June 25, 2003. The document, entitled “Driver Service Agreement,” refers to Claimant repeatedly as “CONTRACTOR,” and designates Claimant as an independent contractor of 3P. The “Attachment to Contract for Services,” which specifies service rates, also refers to Claimant as an “Independent Contractor with 3P Delivery, LLC.” Defendant’s Exhibit A, p. 15. Richmond filled out most of the information. Claimant acknowledged that he signed the contracts, but testified that he did not read nor understand the agreements before signing them. Claimant testified he believed he was signing a contract of employment and that he was an employee of 3P. The agreements provided that Claimant would receive \$1750 each week for up to 36 appliance deliveries, and another \$31 for each delivery thereafter in the same week.

4. On June 25, 2003, Claimant and Richmond also executed a “Motor Vehicle Lease Agreement” by which 3P leased to Claimant an 18-foot delivery truck. 3P deducted the cost of the lease from the weekly contract settlement payments Claimant received from 3P through a third party payroll company. Richmond required Claimant to complete a vision test. Although exhibits indicate Claimant completed a road test, Claimant testified that he never took a road test before he drove the leased truck. Claimant later also signed, without reading, an “Owner Operator Request for Insurance” which certified Claimant was an independent contractor of 3P. Claimant completed an occupational accident insurance form with AIG as required by 3P. This form also described Claimant as an independent contractor.

5. 3P provided a cell phone for Claimant to use to call customers before making deliveries. Richmond recorded a voice greeting on the phone: "This is 3P Delivery." 3P deducted the cost of the cell phone from Claimant's weekly check. 3P gave Claimant a VISA card to use for fuel for the delivery truck. The cost of fuel was then deducted from Claimant's weekly check. Claimant understood that 3P would take deductions from his weekly checks of \$1750 to pay for the truck lease and insurance, workers' compensation coverage, cell phone, and gas. After deductions, Claimant's weekly take home would be \$1075.

6. Claimant reported to work on June 27, 2003, at 8:00 a.m. 3P gave Claimant a 3P uniform and required him to wear it while making deliveries. Richmond instructed Claimant in appliance loading and delivery. Pursuant to the contract, 3P leased a truck to Claimant to use for transporting appliances. The truck sported a 3P logo. Richmond followed Claimant that day to show him where to make deliveries. Richmond advised Claimant he could only deliver appliances for Home Depot. Claimant testified that 3P supervisor, Lee Goldthwaite, told Claimant he could not take the truck for his own personal use. Claimant was required to park the truck in the Home Depot lot each night when finished with deliveries. He took the keys home every night. The truck contained equipment, including blankets, dollies, straps, screwdrivers, and wrenches. There is no indication Claimant owned any such equipment. Claimant took the truck for maintenance where Goldthwaite specified. 3P paid for truck maintenance and tire chains.

7. Richmond told Claimant to get a helper and Claimant hired Victor Hernandez to assist him. Claimant acknowledged that Hernandez did not have to be approved by 3P, although 3P gave Claimant a 3P uniform for Hernandez. Hernandez completed no paperwork with 3P. Claimant paid Hernandez. Hernandez received no payment from 3P. Claimant always drove the truck on

deliveries. 3P did not allow Hernandez to drive the truck.

8. Claimant reported for work Monday through Saturday at 8:00 a.m. at Home Depot and checked with Home Depot delivery coordinator Dennis Chad Dineen about deliveries scheduled. Dineen told Claimant to call ahead to make sure the customers were home. Dineen sometimes told Claimant and Hernandez to go home when they were done by 1:00 p.m., but other times they worked late. Claimant had no time card when delivering for Home Depot. He did not report to anyone at 3P when he started in the morning nor when he quit at night. Claimant provided a report each Monday to 3P of deliveries made the prior week. Claimant made from 20 to more than 36 deliveries each week.

9. Dineen testified that 3P supervisor, Lee Goldthwaite, said Claimant was an employee of 3P. Dineen always called Goldthwaite or Richmond with any issues about Claimant's performance, because Dineen understood that Goldthwaite and Richmond were Claimant's bosses.

10. On one occasion while making a delivery, Claimant inadvertently struck a customer's lamppost with the delivery truck. The customer initially sought \$2,000 in damages, but 3P negotiated the claim down to \$235. 3P then reduced Claimant's check by \$50 per check until he had paid the amount.

11. 3P utilized a third party to pay weekly contractual settlement amounts to Claimant. 3P did not withhold state, federal, or social security taxes. Claimant received a 1099 Form from 3P. Claimant was not familiar with his own taxes, rather he paid an accountant to prepare all his tax documents as he had for many years.

12. 3P deducted insurance costs, truck lease amounts, and gas card amounts from Claimant's \$1750 weekly contractual settlement check according to the parties' agreements. 3P did

not tell Claimant where or when to fill up the truck. Home Depot employee, Dineen, told Claimant what route to take, and gave him a list of deliveries. Except for several days of orientation, no one at 3P told Claimant what route to take. Richmond gave Claimant instructions for the first several days about loading appliances. No one at 3P disciplined Claimant.

13. On November 19, 2003, Claimant slipped on some ice while delivering an appliance and injured his shoulder, ultimately undergoing multiple surgeries. He promptly notified 3P, who assisted Claimant in completing the paperwork to file an occupational accident claim with AIG. Claimant completed an application for benefits with AIG on December 16, 2003. Not long thereafter he began receiving weekly payments of \$277.21 from AIG while he was hurt. This continued for two years. AIG paid some of Claimant's medical bills directly to his doctors. Claimant testified that he believed the AIG benefits were workers' compensation benefits, however he readily acknowledged that no one expressly represented these were workers' compensation benefits. He was surprised when the benefits ended and then brought his present claim against 3P.

14. Having considered the evidence and carefully observed Claimant's demeanor at hearing, the Referee finds that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

15. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

16. **Employee or independent contractor.** Claimant asserts he was an employee of 3P

at the time of his accident. The parties' dealings must be examined to determine the nature of the work relationship involved.

17. Idaho Code § 72-102, defines employee, employer, and independent contractor thus:

(12) "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.

(13)(a) "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors.

(17) "Independent Contractor" means any person who renders service for a specified recompense for a specific 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.

18. "The determination of whether an injured party is an independent contractor or an employee is a factual determination to be made from full consideration of the facts and circumstances which are established by the evidence." Roman v. Horsley, 120 Idaho 136, 138, 814 P.2d 36, 38 (1991). The test for distinguishing an employee from an independent contractor has been stated:

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 certain 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.

Id.; quoting Burdick v. Thornton, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985); see also Stoica v. Pocol, 136 Idaho 661, 39 P.3d 601 (2001).

19. In the present case, the "Driver Service Agreement," "Attachment to Contract for Services," "Owner Operator Request for Insurance," and "Occupational Accident Insurance," all of

which Claimant executed, designate Claimant as an independent contractor. All are written in English—substantially beyond a third or fourth grade level—and Claimant did not read nor understand the agreements before signing them. However, absent fraud, an individual is considered bound by a contract he has executed, even if he was unaware of its particulars:

The rule in Idaho is well established that a party's failure to read a contract will not excuse his performance. Kloppenburg v. Mays, 60 Idaho 19, 88 P.2d 513 (1939); Liebelt v. Liebelt, 118 Idaho 845, 801 P.2d 52 (Ct.App. 1990). “[A] party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents.” J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9-42 at 28-29 (1977). This rule is qualified to the extent that the party's signature was procured by fraud, in which case the party's assent is deemed invalid.

Irwin Rogers Insurance Agency, Inc., v. Murphy, 122 Idaho 270, 273, 833 P.2d 128, 131 (Ct. App. 1992). There is no allegation in the present case that Claimant’s signature on any agreement was procured by fraud. However, Claimant argues that whatever the contracts may label the parties’ relationship is not necessarily conclusive, rather, the actual conduct and dealings of the parties determine whether 3P assumed sufficient control to make Claimant an employee rather than an independent contractor.

20. The question of whether a workers’ compensation claimant is an employee or independent contractor “is determinable not alone from the written contract, but from all the facts and circumstances established by the evidence.” Wilcox v. Swing, 71 Idaho 301, 306, 230 P.2d 995, 998 (1951). Thus a claimant has been determined to be an employee, notwithstanding a written contract designating him as an independent contractor. See Beutler v. MacGregor Triangle Company, 85 Idaho 415, 380 P.2d 1 (1963).

21. Direct evidence of control. The first factor distinguishing an employee from an independent contractor is direct evidence of the right to control the manner and method of

performing the work. If services must be rendered personally, then the right to control is suggested. Control is indicated if set hours of work are established by the person for whom services are performed. If the worker devotes substantially full time to the business of the person for whom services are rendered, then such person has control over the amount of time the worker can work and impliedly restricts the worker from doing other gainful work. If a worker makes his services available to the general public on a regular and consistent basis, this indicates an independent contractor relationship. If the principal uses some competitive means for reducing his own cost in selecting a subcontractor, then the principal may be a prime contractor instead of an employer. A continuing relationship between the worker and the principal indicates a direct employment relationship, even if the work is performed at recurring irregular intervals. Stoica v. Pocol, 1999 IIC 0734.

22. In the present case, the record does not establish that Claimant submitted any bid to 3P for services. There is no indication Claimant worked for any entity other than 3P at the time of the accident or for several months prior. 3P required Claimant to devote substantially full time to deliveries for 3P, beginning at 8:00 a.m., six days per week, every week of the year except on Thanksgiving and Christmas. 3P required Claimant to wear a 3P uniform. There is no indication Claimant made his services available to the general public or that he owned the equipment necessary to do so.

23. While Claimant worked exclusively with 3P regularly and continuously from several months before the accident, he did not personally render all services. Claimant had authority under the agreements to hire assistants. Claimant testified that 3P directed him to hire an assistant and he did so. Claimant hired Victor Hernandez to help him make deliveries. Claimant acknowledged that

Hernandez did not have to be approved by 3P, although Hernandez wore a 3P uniform while making deliveries. Hernandez completed no paperwork with 3P. Claimant paid Hernandez. Hernandez received no payment from 3P. Hernandez was not permitted to drive the leased truck. The hiring of assistants is an indication of an independent contractor. Sines v. Sines, 110 Idaho 776, 718 P.2d 1214 (1986). However, it is not conclusive. Merrill v. Duffy Reed Construction Co., 82 Idaho 410, 417, 353 P.2d 657, 661 (1960); see also Beutler v. MacGregor Triangle Company, 85 Idaho 415, 380 P.2d 1 (1963).

24. The first day Claimant reported to work, 3P instructed him in appliance loading and delivery. Richmond followed Claimant that day to show him where to make deliveries and provided some additional training for the first week. There is no indication Claimant had ever before worked in appliance delivery. Every work day Claimant checked with Dineen for scheduled deliveries. Dineen provided Claimant with addresses, phone numbers, and scheduled delivery times. Dineen sometimes told Claimant to go home when all deliveries were done as early as 1:00 p.m. However, when Claimant finished early, he was required to call Richmond and ascertain whether 3P needed his help making deliveries for the Home Depot in Pocatello.

25. 3P did not tell Claimant where or when to refuel the truck. Except for approximately the first week of orientation, 3P did not specify Claimant's precise delivery route. Claimant had no time card. 3P required Claimant to provide a written report each Monday about deliveries made the prior week.

26. The most significant indications of control are that 3P required Claimant to wear a 3P uniform, make 3P deliveries commencing at 8:00 a.m. six days per week, and only deliver for 3P's customer, Home Depot. Although the "Driver Service Agreement" on its face ostensibly does not

preclude Claimant from also working with other entities, Claimant testified that 3P supervisor Richmond told Claimant he could only make deliveries for 3P's customer, Home Depot. This testimony was not challenged, let alone refuted.

27. Examination of direct evidence of the right to control suggests that during the parties' dealings, 3P assumed substantial control, including control over who Claimant worked for. Although the written agreements and the balance of the evidence indicate less control over the details of Claimant's work, the indicators of direct control, taken as a whole, suggest a direct employment relationship.

28. Method of payment. The next factor in distinguishing an employee from an independent contractor is the method of payment. 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. Where the claimant was paid by the hour, but no income or social security taxes were withheld, the method of payment should be deemed a factor in favor of independent contractor status. Livingston v. Ireland Bank, 128 Idaho 66, 910 P.2d 738 (1995). Payment at regular periodic intervals generally suggests an employer-employee relationship. A worker who can realize a profit or suffer a loss as a result of his services (beyond the profit or loss ordinarily realized by employees) is generally an independent contractor. Stoica v. Pocol, 1999 IIC 0734.

29. In the present case, Defendant paid Claimant weekly, but made no deductions or withholdings from Claimant's check for taxes. The "Driver Service Agreement" indicates that 3P would not withhold state, federal, or social security taxes. Defendant provided Claimant a 1099 statement. 3P deducted insurance costs, truck lease amounts, and gas card amounts from Claimant's

\$1750 weekly contractual settlement check. Claimant received \$1075 each week for up to 36 deliveries. He received another \$31 for each delivery above 36 in a week. Thus there is indication Claimant could have profited beyond the profit ordinarily realized by an employee, but no indication he could have suffered a loss.

30. The manner of payment factor clearly suggests an independent contractor relationship.

31. Furnishing major items of equipment. The next factor in distinguishing an employee from an independent contractor is whether the principal furnishes major items of equipment. If the person for whom services are performed furnishes significant tools, materials, or other equipment, this indicates a direct employment relationship. Hanson v. BCB, Inc., 114 Idaho 131, 754 P.2d 444 (1988).

32. In the present case, 3P provided no equipment to Claimant directly. However, 3P leased to Claimant a truck and all other equipment required to deliver appliances. The delivery truck had a 3P logo on the side. Claimant took the truck for maintenance where Goldthwaite directed. Claimant testified that 3P paid for tire chains, repair, and maintenance of the truck, even though this was Claimant's obligation under the lease agreement. See Exhibit B, p. 6. 3P gave Claimant a VISA card for fuel. 3P also leased Claimant a cell phone. 3P deducted from his weekly checks the cost of the truck, cell phone, and fuel.

33. The most significant discrepancy between the written agreements and the parties' conduct is that the "Driver Service Agreement" and the "Motor Vehicle Lease Agreement" did not, on their face, preclude Claimant from taking the leased truck anywhere after completing Home Depot deliveries. Nevertheless, Claimant testified that 3P supervisor, Lee Goldthwaite, told

Claimant he could not take the truck for his own personal use. It was considered a company vehicle. Claimant was required to park the truck in the Home Depot lot each day when finished with 3P deliveries. The truck lease included all blankets, dollies, straps, screwdrivers, and wrenches necessary to move and deliver appliances.

34. This departure from the terms of the written agreements goes directly to the issue of control and establishes that 3P assumed a degree of control exceeding the written agreements. 3P effectively restricted Claimant's use of the truck to the exclusive benefit of 3P. By restricting Claimant's use of the leased equipment exclusively to 3P, 3P effectively exercised the same degree of control customary of an owner.

35. Given 3P's exercising of control in restricting Claimant's use of the leased equipment beyond the terms of the written agreements, the furnishing of major items of equipment factor suggests a direct employment relationship.

36. Liability upon terminating relationship. The final factor in distinguishing an employee from an independent contractor is liability upon the termination of the work relationship.

The retained right of discharge of the worker, or the right of either party to terminate the relationship without liability to the other party, is construed to be a strong, perhaps the strongest and most cogent, indication of retention of the power to control and direct the activities of the worker, and thus to control detail as to the manner and method of performance of the work.

However, this Court in Beutler and other cases has been careful to distinguish the unqualified right to fire indicative of an employer-employee relationship from the right of a contracting principal to terminate the contract of an independent contractor for bona fide reasons of dissatisfaction.

Ledesma v. Bergeson, 99 Idaho 555, 585 P.2d 965 (1978).

37. In the present case, the "Driver Service Agreement" continued on a month-to-month

basis. It provided six circumstances under which 3P could terminate the relationship, including at any time if 3P ceased or substantially reduced operations, or determined the driver failed to meet 3P's safe driving standards, or determined the driver failed to perform any contractual obligation. The agreement contains no mention of any liability of 3P for terminating the relationship under any circumstances whatsoever. However, it does assess liquidated damages of \$1,000 against the Claimant if he fails to give 3P at least 30 days prior written notice of termination. Claimant testified he believed 3P could fire him.

38. The evidence regarding 3P's liability upon termination of the parties' relationship weighs somewhat in favor of an independent contractor relationship.

39. Considered collectively, the four factors that evaluate the right to control, and distinguish an employee from an independent contractor, are mixed. The parties' written agreements clearly refer to Claimant as an independent contractor. However, 3P assumed considerable control in monopolizing a substantial majority of Claimant's time six days per week, forbidding Claimant from delivering for any other entity, and forbidding Claimant from using the delivery truck he ostensibly leased for any purpose other than 3P deliveries. "When a doubt exists as to whether an individual is an employee or an independent contractor under the worker's compensation act, the act must be given a liberal construction in favor of finding the relationship of employer and employee." Hanson v. BCB, Inc., 114 Idaho 131, 133, 754 P.2d 444, 446 (1988).

40. The Referee finds that Claimant has proven he was a direct employee of 3P at the time of his accident.

CONCLUSION OF LAW

Claimant has proven he was an employee of 3P at the time of his accident.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own, and issue an appropriate final order.

DATED this 13th day of June, 2007.

INDUSTRIAL COMMISSION

/s/
Alan Reed Taylor, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2007, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

MICHAEL R MCBRIDE
1495 EAST 17TH STREET
IDAHO FALLS ID 83404

THOMAS B HIGH
PO BOX 366
TWIN FALLS ID 83303-0366

lbs

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAVIER ARREGUIN,)	
)	
Claimant,)	IC 2006-000116
)	
v.)	ORDER
)	
3P DELIVERY, LLC,)	
)	Filed June 18, 2007
Employer,)	
)	
Defendant.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor submitted the record in the above-entitled matter, together with his proposed Findings of Fact and Conclusion of Law to the members of the 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 Conclusion of Law as its own.

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

1. Claimant has proven he was an employee of 3P at the time of his accident.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to the issue adjudicated.

DATED this 18th day of June, 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 18th day of June, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL R MCBRIDE
1495 EAST 17TH STREET
IDAHO FALLS ID 83404

THOMAS B HIGH
PO BOX 366
TWIN FALLS ID 83303-0366

lbs

/s/