

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LISA FOLTZ-WILSON,)
)
 Claimant,)
)
 v.)
)
 7-HAWK INC., dba HILLTOP)
 RESTAURANT,)
)
 Employer,)
)
 Defendant.)
 _____)

IC 2005-007807

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

Filed April 8, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Lewiston on November 7, 2007. Claimant, Lisa Foltz-Wilson, was present and represented by Thomas W. Callery of Lewiston. Defendant, 7-Hawk, Inc., dba Hilltop Restaurant (“Hilltop”) was represented by Charles L. Graham of Moscow. Oral and documentary evidence was presented. There were no post-hearing depositions taken. The parties submitted post-hearing briefs and this matter came under advisement on January 28, 2008.

ISSUE

By agreement of the parties, the sole issue to be decided by the Commission as the result of the hearing is whether Claimant was an employee of Hilltop at the time of her accident on June 28, 2005.

CONTENTIONS OF THE PARTIES

Claimant contends that either expressly or impliedly, she was an employee of Hilltop at the time of her uncontested accident and knee injury. She asserts that one of the two

shareholders of Hilltop, Juanita (“Nita”) Fox promised to pay her for her help in getting Hilltop started as well as \$3,000 a month once Hilltop opened, but the other shareholder, Nita’s husband Lawrence (“Steve”) vetoed the idea.

Hilltop, through its owners Nita and Steve, contend that Claimant was never an employee but merely “volunteered” her time in helping, as did many others, to open the Hilltop. Nita and Steve never offered Claimant any money for her help and Claimant never asked for any. Also, Claimant has failed to produce any documentation whatsoever that points to an employee/employer relationship. They assert Claimant’s claim that she was to receive \$3,000 a month to be a cook/bookkeeper for the Hilltop is ridiculous, especially in a town the size of Grangeville.¹ Further, the Hilltop was not covered for worker’s compensation purposes at the time of Claimant’s accident because the restaurant was not yet open and it had no employees. While Nita and Steve disagree with Claimant regarding the amount of time Claimant actually spent helping out, they appreciate what she did do and consider the situation as simply “friends helping friends.” In the alternative, Claimant is exempt from coverage as a casual employee.

Claimant did not file a reply brief.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, her husband, her daughter Holley Jensen-Wright, Nita Fox, Steve Fox, Evelyn Sanderson, Frank Kent, Marjorie Smurthwaite, Tracy Cox, Ken Cox, and Carolyn Haning taken at the hearing.
2. Claimant’s Exhibits 1-10 admitted at the hearing.
3. Defendant’s Exhibits A-L admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

¹ Nita testified that the Hilltop lost \$14,000 the first year and she (Nita) had not taken a salary for the first two years of its operation, so she could not have paid Claimant \$3,000 a month and stayed in business.

FINDINGS OF FACT

1. Claimant was 47 years of age, unemployed, and resided with her husband Steve in Grangeville at the time of the hearing. She became acquainted with Nita as the manager of and Steve as a customer at the Depot, a convenience store/café in Grangeville where Claimant used to work. Claimant would assist Nita at times with matters associated with the operation of the Depot and would at other times stop by just to “chat.” Nita paid Claimant for some of her help at the Depot. Claimant was also employed elsewhere at this time.

2. In the early spring of 2005, the Depot was in the process of being sold so Nita decided to open her own restaurant, the Hilltop. Nita had the support of many friends and acquaintances who had known her through the Depot and who thought that Grangeville needed a new “hangout.” Nita found a former restaurant that suited her needs and began the laborious process of creating a menu, locating and purchasing equipment and supplies, and getting the building cleaned and ready for an early July 2005 opening.

3. Claimant, who during this period of time was unemployed, went to Nita’s home on occasion² during June 2005 to help plan the menu, look for equipment on the internet, and help Nita with other activities associated with the opening of the restaurant. On or about June 22, 2005, Nita obtained the keys to the restaurant from the owner and began to clean up the building. Claimant helped with the cleaning and other matters involved in the opening of the restaurant.³

4. Claimant accompanied Nita on two out-of-town trips (one to Ellensburg, Washington, one to Clarkston and Waitsburg, Washington) to look at restaurant equipment and one trip to Lewiston/Clarkston with Steve and her daughter to pick up restaurant equipment and

² There is a serious dispute between Claimant, Nita, and Steve regarding the nature, frequency, and duration of Claimant’s visits to Nita’s home in June 2005. Claimant reports many more and lengthy visits than Nita and Steve recollect and, on many of the days Claimant claims to have visited, Nita and/or Steve were not even there.

³ Again, there is a dispute between the parties regarding the extent and frequency of the help Claimant provided at the restaurant site.

supplies. On the trip to pick up restaurant equipment on June 28, 2005, Claimant injured her left knee while helping Steve load some restaurant equipment into Steve's horse trailer.

5. On the date of Claimant's accident, Hilltop was uninsured for workers' compensation purposes.

DISCUSSION AND FURTHER FINDINGS

It is axiomatic in Idaho that before a workers' compensation claim becomes compensable, an employee/employer relationship must be found to exist. See *Shriner v. Rauch* 141 Idaho 228, 108 P.3d 375 (2005). Idaho Code §§ 72-102(12) and 13(a) provide the statutory framework necessary to begin an analysis of the employee/employer relationship:

Idaho Code § 72-102(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. It does not include any person engaged in any of the excepted employments enumerated in section 72-212, Idaho Code, unless an election as provided in section 72-213, Idaho Code, has been filed. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to his dependents as herein defined, if the context so requires, or, where the employee is a minor or incompetent, to his committee or guardian or next friend.

Idaho Code 72-102(13)(a) "Employer" means 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 being carried on, but who, by reason of there 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 surety so far as applicable.

The issue of whether an employee/employer relationship exists is to be decided from all the facts and circumstances established by the evidence. *Ledesma v. Bergeson*, 99 Idaho 555, 559, 585 P.2d 965, 969 (1978). When doubt exists regarding an employee/employer relationship, the Idaho Workers' Compensation Act must be given a liberal construction in finding such a relationship. *Olvera v. Del's Auto Body*, 118 Idaho 163, 165, 795 P.2d 862, 864 (1990).

However, when the facts are in dispute, as here, the liberal construction rule does not apply. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 393, 843 P.2d 878, 881 (1992).

6. Here, there is no express, written contract of employment, nor does any documentation exist that points toward an employee/employer relationship. There was no application for employment, there was no employment “interview,” and there were no W-2 or other tax forms filled out. Thus, the Referee finds there was no express contract of employment as referenced in Idaho Code § 72-102(12).

Another method of establishing an employee/employer relationship is by way of an implied contract of hire. A contract implied-in-fact is a true contract whose existence and terms are inferred from the conduct of the parties. Such a contract is grounded in the parties’ agreement and tacit understanding. *Kennedy v. Forest*, 129 Idaho 584, 587, 930 P.2d 1026, 1029 (1997) (internal citations omitted).

7. The problem with Claimant’s position in this case is that she admits she was not “employed” at the time of her accident. She contends, and Hilltop disputes, that she was to become employed when the restaurant eventually opened. However, in a board of directors meeting on June 27, 2005, (the day before Claimant’s accident) the board (Nita and Steve) elected to hire five employees; Claimant was not among them. Even had Nita somehow “offered” Claimant employment, it would have taken Steve’s concurrence and he testified that he would not have hired her for various reasons.

8. While other people testified that they volunteered to help Nita open the restaurant by doing some cleaning and expected no payment, Claimant’s involvement was concededly more than just cleaning. Nevertheless, even giving Claimant the benefit of the doubt regarding the frequency, nature, and extent of that involvement, the Referee is not persuaded that such

elevated her relationship with Nita to one of employee/employer. Nita testified that other than loaning Claimant \$100.00 for gas and incidentals, she never paid Claimant for any work she had done, nor did Claimant ever asked to be paid. Claimant filed an unsuccessful claim for wages with the Idaho Department of Commerce and Labor, yet did not ask Nita for any wages prior to filing.

9. It is uncontested that Nita did not set Claimant's hours or other requirements or duties normally associated with an employee/employer relationship. Simply, Claimant was free to come and go as she pleased. While Claimant may have had an expectation of being hired at the time the restaurant opened and being paid for her efforts in that regard, more is required. Although involving a loaned servant situation, *In re Sines*, 82 Idaho 527, 356 P.2d 226 is often cited for the proposition that before one can become an employee of another, the knowledge and consent of the employer, express or implied, is required. That proposition is applicable here in that Nita never intended, whether expressly or impliedly, to hire Claimant, and, in fact, specifically did not do so. As stated in *Kennedy, Id.*, an implied-in-fact contract is grounded in the parties agreement and tacit understanding; not just one party's (in this case Claimant's). Nita accepted Claimant's assistance as a volunteer and whether Nita should have shown her gratitude in a more generous manner is not an issue to be decided in this forum.

10. The Referee finds that Claimant was not an employee of 7-Hawk, Inc., dba Hilltop Restaurant and/or Juanita and Lawrence (Steve) Fox on June 28, 2005.

CONCLUSION OF LAW

Claimant was not an employee of 7-Hawk, Inc., dba Hilltop Restaurant and/or Juanita and Lawrence (Steve) Fox on June 28, 2005.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this __3rd____ day of April, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LISA FOLTZ-WILSON,)	
)	
Claimant,)	IC 2005-007807
)	
v.)	ORDER
)	
7-HAWK, INC., dba HILLTOP)	
RESTAURANT,)	Filed April 8, 2008
)	
)	
Employer,)	
)	
Defendant.)	
_____)	

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

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

1. Claimant was not an employee of 7-Hawk, Inc., dba Hilltop Restaurant and/or Juanita and Lawrence (Steve) Fox on June 28, 2005.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8th day of April , 2008.

INDUSTRIAL COMMISSION

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 ___8th___ day of ___April___ 2008, a true and correct copy of **FINDINGS, CONCLUSION, RECOMMENDATION AND ORDER** were served by regular United States Mail upon each of the following:

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501-0854

CHARLES L GRAHAM
PO BOX 9344
MOSCOW ID 83843

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____/s/_____