

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRACY BARNES,)	IC 2004-010339
)	
Claimant,)	
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND RECOMMENDATION
STEVE NORIYUKI,)	
)	
Employer,)	Filed: July 22, 2008
Defendant.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Twin Falls, Idaho, on January 23, 2008. Keith E. Hutchinson of Twin Falls represented Claimant. Jeffrey E. Rolig of Twin Falls represented Defendant (Noriyuki or Defendant). The parties submitted oral and documentary evidence. The record was closed at the conclusion of the hearing. Claimant filed a post-hearing brief; Noriyuki waived briefing. The matter came under advisement on March 31, 2008, and is now ready for decision.

ISSUES

Pursuant to the Notice of Hearing, the issues to be decided are:

1. Whether Defendant is subject to the provisions of the Idaho Workers' Compensation Law;
2. Whether Claimant was an employee of Defendant or an independent contractor at the time of the accident;
3. Whether Claimant sustained an injury from an accident arising out of and in the

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course of his employment;

4. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

5. Whether and to what extent Claimant is entitled to the following benefits:

A. Medical care;

B. Temporary total or temporary partial disability (TTD/TPD) benefits; and

C. Attorney fees;

6. Whether Defendant is liable to Claimant for the penalties set forth in Idaho Code § 72-210 for failing to properly insure.

CONTENTIONS OF THE PARTIES

Claimant asserts that he was an employee of Noriyuki when he was injured at work on August 12, 2004. He was diagnosed with an incarcerated epigastric hernia and required surgery. Claimant seeks recovery of his medical costs, and time loss benefits that resulted from his injury as well as a penalty for Noriyuki's failure to provide workers' compensation insurance.

Noriyuki claimed that Claimant was an independent contractor, not an employee, and was required by a signed agreement to provide his own workers' compensation insurance.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Steve Noriyuki taken at hearing;
2. Claimant's Exhibits 1 through 7 admitted at hearing; and
3. Defendants Exhibits A and C admitted at hearing.

After having considered all the above evidence and the brief of Claimant, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

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FINDINGS OF FACT

DEFENDANT

1. Noriyuki owned and operated a business he called Zodiac Contractors, Inc. (Zodiac). Zodiac did building construction and remodels.

2. Noriyuki/Zodiac had financial troubles, and Noriyuki dissolved the company in March 2004. The assets and liabilities of Zodiac, including existing contracts, were allegedly acquired by a newly-formed Nevada corporation, ZCI. Noriyuki was an officer of ZCI, and had the authority to bid jobs, sign contracts, and pay subcontractors. Noriyuki held himself out as the person authorized to conduct ZCI's business in the Magic Valley.

3. Defendant admits that there was no workers' compensation policy in force on August 12, 2004.

CLAIMANT

4. Claimant was hired by Intermountain Staffing Service (Intermountain) in the summer of 2003, and was sent to work for Noriyuki/Zodiac. The first time Claimant appeared for work, Noriyuki required that Claimant sign "the book," which purported to be a contract of some sort, and included a term that required Claimant to provide his own workers' compensation insurance. Claimant was unsure what else was in "the book." It was not entered into evidence, and its terms and legal effect remain uncertain. Claimant performed work for Noriyuki/Zodiac through the staffing service for about a month. During this time, Claimant was paid by Intermountain and Intermountain was liable for workers' compensation insurance.

5. In August or September 2003, when Noriyuki/Zodiac was beginning work on a roofing project near Bellevue, Claimant agreed to work for Noriyuki/Zodiac directly for the wage of \$9.00 per hour. Thereafter, Claimant was paid directly by Noriyuki/Zodiac.

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6. During his work for Noriyuki/Zodiac during the remainder of 2003, Claimant was supervised by Noriyuki or his foreman. Claimant used Noriyuki's tools. Claimant kept track of his time by using a time clock provided by Noriyuki. Claimant was told when and where to show up for work, and was assigned tasks each day by Noriyuki or his foreman. Claimant was paid an hourly wage as agreed upon between Claimant and Noriyuki.

7. No federal or state taxes were withheld from Claimant's pay for his work in 2003. Claimant received an IRS 1099 form from Zodiac in early 2004 for the work he performed for Defendant in 2003.

8. Claimant continued to work for Noriyuki in 2004 under the same terms and conditions as when he began working directly for Noriyuki in August or September 2003. Claimant was not cognizant of the dissolution of Zodiac or its reincarnation as ZCI. Claimant was uncertain whether his paychecks were issued by Zodiac or ZCI in the spring and summer of 2004. Claimant did recall seeing something that said ZCI, but he just assumed that ZCI was an abbreviation for Zodiac Contractors, Inc.

9. It is undisputed that Claimant could quit or be fired at any time without penalty or consequence.

10. On August 12, 2004, Claimant was working on one of Noriyuki's projects erecting steel hay sheds. On that date, Noriyuki directed Claimant to salvage 2 by 4's that had been used in making forms for the concrete piers of the storage shed. Claimant was removing the lumber using a pry bar and his hands when he encountered a 2 by 4 that did not easily come off. When he pulled on it, Claimant immediately experienced a burning pain in his abdomen.

11. Claimant finished out the day, working gingerly to accommodate his discomfort. At the end of the day, he told the foreman that he had a pain in his stomach, but thought he

would be all right. Claimant worked the following day, but performed less strenuous work, primarily sawing lumber to build more concrete forms.

12. On August 14, Claimant presented at Magic Valley Regional Medical Center (MVRMC) in Twin Falls. He described the onset of his stomach pain to the physician:

The patient was doing heavy lifting at work early this week when he noticed a large, tender mass. He has been unable to push this down. He denies any nausea or vomiting associated with it.

Ex. 2, p. 1. He was diagnosed with an incarcerated epigastric hernia, and a surgical repair was performed the same day. Claimant had a normal recovery and was taken off work for two weeks to recover from the surgery. No permanent restrictions were imposed and Claimant made a full recovery.

13. Claimant incurred medical expenses for his initial diagnosis and surgical hernia repair as follows:

Initial diagnostic visit:	\$ 152.00
Pharmacy, supplies, recovery room (MVRMC)	\$1,621.97
Operating room (MVRMC)	\$2,541.14
Magic Valley Anesthesiology	\$ 720.00
Mark K. McKain, M.D.	<u>\$ 230.80</u>
Total	\$5,265.91

14. Claimant notified Noriyuki on the following Monday that he would not be able to work for two weeks because of the work-related hernia surgery. Claimant filed a First Report of Injury or Illness on September 7, 2004.

15. According to the record, Claimant earned \$9.00 per hour and worked five days per week. Defendant failed to respond to Claimant's discovery requests, including requests for information on the actual amount of time that Claimant worked each day. Such information would have been useful in calculating Claimant's average weekly wage. Absent information from Defendant, Claimant's average weekly wage is calculated to be \$360.00 (\$9.00 x 40).

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16. Claimant was a credible witness, both as observed by the Referee and as evidenced by the written record. He was not an astute observer of detail, and his memory of some aspects of events had waned over the four-and-a-half years that elapsed between the accident and the hearing. However, Claimant's explanation of how the accident and injury occurred is consistent with the medical records that were created just days after the accident.

17. Noriyuki was not a credible witness. He was evasive throughout the discovery process and again at hearing. He failed to file an Answer to Claimant's Complaint, or to respond to discovery. On the witness stand, he was hard to pin down. His testimony was inconsistent, and when challenged to clarify, his explanations were facile and unconvincing. Noriyuki provided little admissible written documentation, so there is little corroborative evidence to support his testimony where it is at variance from Claimant's testimony.

DISCUSSION AND FURTHER FINDINGS

18. Although a number of issues were identified as areas of dispute in this proceeding, the pivotal issue is whether Claimant was an employee of Noriyuki or an independent contractor. If Claimant was not an employee of Noriyuki, then the remaining issues are moot. For that reason, the independent contractor versus employee issue will be addressed first.

EMPLOYER

19. The relationship between Noriyuki, Zodiac and ZCI is hazy at best. It appears from relevant corporate filings that Noriyuki and Zodiac were one and the same. ZCI was virtually indistinguishable from its predecessor, Zodiac, and Noriyuki was an officer and director of both entities. He had actual and apparent authority to handle ZCI's business operations in Idaho. In either event, Noriyuki had an obligation to assure that the corporate entities of which

he was a part were in compliance with all Idaho statutes, rules, and regulations in the operation of the contracting business. Defendant offered no evidence that would have relieved him of such an obligation.

INDEPENDENT CONTRACTOR/EMPLOYEE

20. 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). In the case at bar, these factors clearly support a finding that Claimant was an employee.

Right to Control

21. Noriyuki or his foreman told Claimant when and where to show up for work. Noriyuki or his foreman told Claimant what jobs to do, providing necessary dimensions for cut lumber, for example. Claimant was a skilled carpenter, but had no experience erecting steel buildings; he could not have worked independently of Defendant. In fact, Defendant exercised his right to control Claimant's work on a daily basis.

Payment and Method of Payment

22. Claimant earned an hourly wage and punched a time clock, both of which are consistent with an employer/employee relationship. On the other hand, no taxes were withheld from Claimant's pay and he received an IRS 1099 form—both facts which are indicative of independent contractor status. In this case, the Referee finds that the evidence leans toward an employer/employee relationship despite the lack of withholding and the filing of an IRS 1099. Noriyuki's method of payment had little to do with the legal form of the relationship and much to do with avoiding responsibilities as an employer. This finding is buttressed by Noriyuki's attempt to foist off the obligation to purchase workers' compensation coverage onto Claimant by means of a purported "contract."

Equipment

23. Claimant testified that he used Noriyuki's equipment to perform his work. Noriyuki testified to the contrary. The Referee finds that Claimant is more credible than

Defendant and concludes that Noriyuki provided most, if not all, of the equipment that Claimant needed in order to do his job.

Termination of Relationship

24. Claimant and Noriyuki both testified that their relationship could be severed at any time without consequence. Under Idaho law, a right by either party to terminate an employment relationship is indicia of an employer/employee relationship.

Conclusion—Right to Control

25. A careful consideration of all four of these factors leads to the inescapable conclusion that Claimant was, in fact, an employee of Noriyuki at the time of the industrial accident.

EMPLOYER EXEMPT FROM COVERAGE

26. In addition to his assertion that he was not an employer, Noriyuki asserted that he was exempt from coverage under the workers' compensation statutes. Noriyuki cited no law that would exempt him and adduced no evidence on the issue. As an affirmative defense, Noriyuki has the burden of proving he was exempted from the coverage of the act. Noriyuki has failed to prove any exemption.

ACCIDENT/INJURY

27. The burden of proof 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). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

28. Medical records admitted into evidence establish the onset of Claimant's incarcerated hernia as related to his work activities of August 12, 2004. This medical evidence is undisputed except by Noriyuki's lay testimony regarding the cause of the hernia. As discussed previously, Noriyuki is not a credible witness, nor is his lay opinion sufficient to contradict the medical evidence. Claimant's testimony is consistent with the medical records as to the onset and cause of his need for a hernia repair. The Referee finds that Claimant sustained an injury as a result of an accident that arose out of and in the course of Claimant's employment for Noriyuki.

BENEFITS

Medical Care

29. 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). Claimant incurred medical bills in the amount of \$5,265.91 for diagnosis and treatment of his hernia. Claimant is entitled to reimbursement from Noriyuki for the full invoiced amount of his medical care. If any of the costs of care were ultimately paid by third parties, Claimant is obligated to provide reimbursement to those third parties from any funds he

recovers pursuant to this proceeding.

TTDs

30. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. Claimant was ordered to stay off of work for two weeks following his surgery. Claimant is entitled to TTD benefits for two weeks, to be paid at the rate of 67% of his average weekly wage, for a total amount due of \$482.40 ($[\$360 \times 67\%] \times 2$).

STATUTORY PENALTY

31. Idaho Code § 72-210 provides for a mandatory statutory penalty of 10% of benefits awarded for an employer's failure to secure workers' compensation insurance. In this case, Noriyuki had no worker's compensation insurance in effect at the time of Claimant's injury. Claimant is entitled to payment of a statutory penalty in the amount of \$574.83 (10% of $\$5,265.91 + \482.40). Claimant is also entitled to an award of attorney fees and costs pursuant to Idaho Code § 72-210.

INTEREST

32. Idaho Code § 72-734 provides that once a decision has been entered by the Commission awarding compensation of any kind to a Claimant, such award:

shall accrue and the employer shall become liable for, and shall pay, interest thereon from the date of such decision pursuant to the rates established and existing as of the date of such decision . . .”.

The section goes on to state that the interest accrues on all compensation then due and payable and on all compensation that becomes due thereafter regardless of whether an appeal of the award is taken. The statutory interest rate, according to the Secretary of State's Office, was set at 7.625% on July 1, 2008, and was the rate in effect at the time the Commission decision was filed.

CONCLUSIONS OF LAW

1. Claimant was an employee of Noriyuki at the time of the industrial accident.
2. Noriyuki failed to prove that he was exempt from the workers' compensation statutes.
3. Claimant sustained an injury from an accident arising out of and in the course of his employment on August 12, 2004.
4. Claimant's incarcerated epigastric hernia was the result of his industrial accident.
5. Claimant is entitled to reimbursement for medical care in the amount of \$5265.91.
6. Claimant is entitled to temporary total disability benefits in the amount of \$482.40.
7. Claimant is entitled to a statutory penalty in the amount of \$574.83.
8. Claimant is entitled to attorney fees and costs incurred in the prosecution of this proceeding.
9. Claimant is entitled to interest accruing at the rate of 7.625% on and after the date this decision is filed.

RECOMMENDATION

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

DATED this 9 day of July, 2008.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRACY BARNES,)	
)	
Claimant,)	IC 2004-010339
)	
v.)	
)	ORDER
STEVE NORIYUKI,)	
)	Filed: July 22, 2008
Employer,)	
Defendant.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Rinda Just 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 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 conclusions of law as its own.

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

1. Claimant was an employee of Noriyuki at the time of the industrial accident.
2. Noriyuki failed to prove that he was exempt from the workers' compensation statutes.
3. Claimant sustained an injury from an accident arising out of and in the course of his employment on August 12, 2004.
4. Claimant's incarcerated epigastric hernia was the result of his industrial accident.
5. Claimant is entitled to reimbursement for medical care in the amount of \$5265.91.
6. Claimant is entitled to temporary total disability benefits in the amount of

\$282.40.

7. Claimant is entitled to a statutory penalty in the amount of \$574.83.

8. Claimant is entitled to attorney fees and costs incurred in the prosecution of this proceeding. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

9. Claimant is entitled to interest accruing at the rate of 7.625% on and after the date this decision is filed.

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

DATED this 22 day of July, 2008.

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 22 day of July, 2008, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

KEITH E HUTCHINSON
PO BOX 207
TWIN FALLS ID 83303-0207

JEFFREY E ROLIG
PO BOX 5455
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djb

/s/_____