

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

HEATH HARRISON, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 ROBERT HANSEN, )  
 )  
 Defendant/Employer. )  
 )  
 )  
 )  
 \_\_\_\_\_ )

**IC 2004-003593**

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

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Idaho Falls, Idaho, on April 7, 2009. Breck Barton of Rexburg represented Claimant. Michael D. Gaffney of Idaho Falls represented Defendant/Employer. The parties submitted oral and documentary evidence. Defendant submitted a post-hearing brief to which Claimant replied. The matter came under advisement on August 4, 2009 and is now ready for decision.

**ISSUE**

By agreement of the parties at hearing, the sole issue to be resolved at this time is whether Employer is subject to the provisions of Idaho workers' compensation law with regard to the claimed injury and whether Claimant is exempt from coverage pursuant to Idaho Code § 72-212. All other issues are expressly reserved.

## **CONTENTIONS OF THE PARTIES**

Claimant contends that he sustained an injury on January 24, 2004 while in the course of his employment with Defendant and that he is entitled to benefits pursuant to Idaho workers' compensation law as set forth in Idaho Code § 72. He asserts that he was hired by Defendant to build a home as part of Defendant's for-profit business venture. Claimant relies on the manner in which Defendant insured the subject property and how Defendant characterized interest expenses for tax purposes to establish that Defendant's intent was to use the subject property in a business capacity.

Defendant contends that he built the house to serve as a residence for his son and not for pecuniary gain. He maintains that he was not in the construction or real estate business and that the subject property was neither intended for business use nor utilized for a business purpose. Defendant maintains that he is exempt from liability for workers' compensation benefits.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Claimant's Exhibits A through G, pages 1 through 14 of Exhibit H, pages 1 through 33 of Exhibit I, and pages 1 through 29 of Exhibit J;
2. Defendant's Exhibits 2 and 4;
3. Claimant's deposition transcript of April 14, 2005;
4. Testimony taken at hearing from Claimant, Defendant, branch manager of Beehive Credit Union Josh Harris, CPA Garth Wilcox, CPA Kendall Brough and Defendant's son Aaron Hansen; and,
5. The Industrial Commission's legal file.

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.

## **FINDINGS OF FACT**

### **Background and Injury**

1. Claimant was 28 years old and resided in Texas at the time of hearing. At the time of injury, he lived in Rexburg and was a student at BYU-Idaho, formerly Ricks College. In Fall 2003, Claimant answered an advertisement in the school newspaper seeking assistance building a log home. Claimant had construction experience. He called the telephone number listed in the advertisement and reached Defendant. After the phone call, Claimant met with Defendant at the construction site and Defendant hired Claimant. Claimant was to work on his days off from school and on Saturdays with Defendant's son, Aaron Hansen (Aaron) to construct the log home.

2. The log home was to be built on a six acre piece of land in Jefferson County with a mailing address of 374 North 3500 East, Lewisville, Idaho 83431 (subject property). The land on which the house was built was owned by Defendant and his wife.

3. Claimant worked for Defendant from October 2003 through January 2004 on an intermittent basis, earning a total of \$640. Claimant was paid \$7.50 per hour with personal checks from a joint account of Defendant and his wife. He received a total of four checks.

4. On January 24, 2004, Claimant was cutting boards for use on the ceiling of the subject property with a circular miter saw when he cut off his thumb and index finger of his left hand. The existence of an injury and its occurrence while Claimant was working on the subject property are not in dispute.

### **Defendant's Usual Trade or Business**

5. Defendant has an undergraduate degree in business administration and an MBA from Utah State University. Defendant taught business courses at Ricks College for eleven years.

6. Defendant's primary occupation for the past 30 years has been insurance sales and financial planning. He sells life insurance, health insurance and disability insurance policies. Defendant obtained a securities license in 1982. He provides estate planning services and sells investment vehicles including annuities, stocks and mutual funds. His insurance/financial planning business operates under the name of Big Sky Financial Resources.

7. Defendant owned a Montana corporation called the Big Kernel, a popcorn distribution company. He has previously held interests in companies involving the sale of vinyl fencing and western wear.

8. Defendant also operates a farming and ranching partnership known as Cedar Enterprises. Cedar Enterprises receives income from the sale of beef cattle, but Defendant's tax returns reflect an annual net loss averaging approximately \$22,125 from 2003 through 2005. Defendant considers farming and ranching as both a business and a hobby. His ranch property is adjacent to his primary residence in Rexburg.

9. Defendant previously obtained a real estate license, but the license has been inactive for the past twenty years. Defendant has never been in the construction/remodeling business, rental property business or property management business.

### **Why Defendant Was Building a House**

10. In early 2003, Defendant's adult son, Aaron, resided with Defendant and his wife

at their home in Rexburg. Aaron developed a substance abuse problem and experienced personal, legal and financial problems associated with drug use. Aaron was charged with possession of methamphetamine and came under the control and supervision of District 7 Drug Court. One of the terms of Aaron's probation and parole was that he establish a residence outside of his parents' home to be located in Jefferson, Madison or Fremont County.

11. Aaron preferred to purchase a residence and build equity rather than pay rent. However, his credit history was such that he could not obtain a mortgage loan or other financing. His parents purchased the land in Jefferson County on which a home could be built. Defendant and Aaron researched log home kits and Defendant purchased one. The plan was that Aaron would participate in the construction of the home. Defendant hired Claimant to assist Aaron. Claimant worked alongside Aaron and took direction from Aaron regarding the various phases of work to be completed. Claimant's construction experience was an asset to the project.

12. Defendant was hopeful that the log home project would benefit Aaron in multiple ways by giving him both a place to live and a focus for his energy while getting off of drugs and putting his life back together.

13. Claimant was aware that the log home was being built to serve as a residence for Aaron. It was Claimant's understanding that Aaron would be renting the residence from Defendant and Aaron gave him the impression that he would have a roommate from whom rent would be collected. Claimant also observed that the pasture had been drilled with grass seed and believed that Defendant planned to bring horses to the property. However, Claimant testified in his deposition that he was not sure of the intent of Defendant or Aaron regarding the property.

14. The land, labor and materials were financed by personal funds of Defendant and his wife and a loan obtained by Defendant from the credit union utilizing his Rexburg residence

as collateral. Once the log home was livable, a separate loan was taken on the subject property and Defendant paid back the original loan against his Rexburg residence.

15. The subject property was not built for business purposes and was not associated with Defendant's business enterprises, including Cedar Enterprises. Specifically, the house did not include a home office and was not intended to be used in conjunction with Defendant's for-profit ventures.

### **Rental Property**

16. Aaron did not have a lease or any type of formal rental agreement with Defendant. However, he made occasional payments directly to the credit union to pay down the loan Defendant took on the property.

17. The subject property was never rented to a third party other than Aaron. Aaron's friend, Josh Lemmon, moved in with Aaron for a period of time as a roommate but did not pay rent to either Aaron or Defendant. Josh was kicked out of his own house during construction of the subject property and had been living with Aaron at Defendant's Rexburg house rent-free before moving into the subject property.

### **Insurance**

18. Defendant insured the subject property under a commercial farm liability policy. The policy was amended on December 23, 2003 to include the log dwelling on an endorsement form titled "Additional Residence Rented to Others" with the dwelling identified as "tenant" occupied. Claimant's Exhibit F, pp. 3-7.

### **Land for Grazing**

19. The six acres on which the subject property was built was not used to graze cattle or otherwise support Cedar Enterprises. Defendant brought four horses to the property at one

point in time but testified that they were hobby horses. Defendant testified that neither Cedar Enterprises nor any of his other business ventures were involved in the raising or sale of horses.

### **Re-Sale of Property**

20. Aaron's drug rehabilitation was successful. He maintained employment in Idaho Falls and got married. Aaron completed his period of probation/parole and was no longer required to live in a specified geographical area. He and his wife moved to the Idaho Falls area to be closer to work and to suit his wife's general preference.

21. On September 26, 2005, Defendant and his wife sold the subject property to a third party for \$144,500. Defendant testified that he gave \$15,000 of the proceeds to Aaron as reimbursement for the work he put into the house. Defendant testified that he sold the property at a loss, factoring in the cost of the land, construction and other expenses.

### **The Tax Issue**

22. From 2003 through 2005, Defendant deducted mortgage interest, property taxes and various bank charges for late fees pertaining to the subject property as business expenses of Cedar Enterprises. When Defendant was confronted with the inconsistency between his assertions that the subject property had nothing to do with Cedar Enterprises and the characterization of the subject property for tax purposes, Defendant deferred to his tax accountant, Kendall Brough.

23. Kendall Brough is a CPA who has handled tax returns for Defendant and his wife for several years. He explained that it was Defendant who characterized the various interest expenses as pertaining to Cedar Enterprises and that he was unaware that Defendant included interest expenses pertaining to the subject property.

24. According to Mr. Brough, interest expenses associated with residential construction are capitalized and not are not deductible expenses. He would not have deducted those expenses if he had known that they were related to the subject property. Mr. Brough assumed the expenses were related to Cedar Enterprises when he prepared the tax returns.

25. Mr. Brough was aware that Defendant was building a house for his son and that the construction project was separate from Cedar Enterprises. Mr. Brough testified that the sale of the subject property in 2005 was not a reportable incident for tax purposes since it was the sale of a personal residence.

26. Garth Wilcox, a CPA hired by Claimant to review Defendant's tax returns, testified that any mortgage interest or property taxes paid on the subject property, if truly residential, should have been taken as deductions against Defendant's personal income as opposed to the partnership income of Cedar Enterprises. Based on the characterization of expenses made by Defendant on his taxes, it appears that loans relating to the construction of the subject property were related to farming expenses associated with Cedar Enterprises.

27. Mr. Wilcox opined that the sale of the subject property in 2005, for either a profit or a loss, should have been reported on a Form 1099 and was not. However, the sale of a personal residence occupied for at least two years would not be reportable.

## **DISCUSSION AND FURTHER FINDINGS**

### **Applicable Law**

28. The general rule in Idaho is that workers' compensation insurance coverage is mandatory for both public and private employers. Idaho Code § 72-203. However, statutory exemptions from coverage are provided for by Idaho Code § 72-212. Further, the definition of "private employment" for purposes of determining the need for coverage is articulated in Idaho

Code § 72-204. Although the claimant bears the burden of establishing the existence of an employer-employee relationship, the burden then shifts to the employer to establish an exemption from coverage. *Manning v. Win Her Stables, Inc.*, 91 Idaho 549, 428 P.2d 55 (1967).

29. The Idaho Legislature amended Idaho Code §§ 72-204 and 72-212 with recodification effective March 30, 2006. In the present case, Claimant's accident and injury occurred on January 24, 2004. There is no statutory provision authorizing retroactive application of the 2006 amendments and recodification. Generally, changes in Idaho workers' compensation law are not retroactively applied and the governing law is what was in existence on the date of injury. See *Cummings v. J.R. Simplot Co.*, 95 Idaho 465, 466, 511 P.2d 282, 283 (1973). Accordingly, the applicable statutory provisions in this case are the following excerpts from the Idaho Code in effect on January 24, 2004:

**72-204. Private employment -- Coverage.** The following shall constitute employees in private employment and their employers subject to the provisions of this law:

- (1) A person performing service in the course of the trade, profession or occupation of an employer.
- (4) "Employment," in the case of private employers, includes employment only in a trade or occupation which is carried on by the employer for the sake of pecuniary gain...

**72-212. Exemptions from coverage.** None of the provisions of this law shall apply to the following employments unless coverage thereof is elected as provided in section 72-213, Idaho Code.

- (2) Casual employment.
- (6) Employment which is not carried on by the employer for the sake of pecuniary gain.

30. The Idaho Supreme Court has consistently defined "for the sake of pecuniary gain" as a situation where the employer supplies a service for which remuneration is received. Factors deemed irrelevant by the Court in this analysis are actual profits/losses and an

employer's not-for-profit tax status. *Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 849-850, 70 P.3d 685, 687-688 (2003).

31. The Court has specifically addressed the situation of an employer who is not engaged in the construction trade but undertakes the task of serving as a general contractor for the building of his or her own house. In doing so, the Court determined that Idaho Code §§ 72-204 and 72-212 must be construed together and that "pecuniary gain" must be considered in the context of "a trade or occupation which is carried on by the employer." *Dewey v. Merrill*, 124 Idaho 201, 204, 858 P.2d 740, 743 (1993).

32. Relevant factors in analyzing pecuniary gain and trade or occupation carried on by the employer include the source of funds used to build the house; the nature of the employer's usual business; whether, upon completion, the house was occupied by the employer and his or her family members; and whether a business purpose such as a home-office or motive to utilize the property for business entertainment existed. *Dewey* at 205; *Lynskey v. Lind*, 94 Idaho 788, 789-790, 498 P.2d 1261, 1262-1263 (1972).

33. The facts of the present case differ from those in *Dewey* and *Lynskey* because the subject property was built for Defendant's adult child and was not intended for Defendant's personal use. However, the analysis regarding pecuniary gain and usual trade or occupation of the employer remain the same under either scenario.

34. "Casual employment" is identified as a separate exemption from coverage but considers similar factors. The Idaho Supreme Court defined "casual employment" as:

...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, 989-990, 793 P.2d 220, 221-222 (1990). The term “casual” applies to the employment and not the employee, and the determination of whether employment is casual must be decided upon the facts of each case. *Manning* at 554.

### **Employer-Employee Relationship**

35. Claimant met his threshold burden to prove the existence of an employer-employee relationship. There was no evidence or argument presented that contradicted Claimant’s description of his employment relationship with Defendant and no assertion was made that Claimant was an independent contractor or an employee of anyone other than Defendant.

### **Exemptions to Coverage**

36. Defendant established that the building of the log house was not associated with any trade, profession or occupation usually carried on by Defendant. Defendant has further established that no business purpose existed for the acquisition of land and building of the subject property. There is no evidence to establish that Defendant built the log home for pecuniary gain. Further, the building of the log home was not a regular endeavor for Defendant and constituted casual employment.

37. However, additional analysis is required because of representations made by Defendant in his income tax filings and characterization of the subject property in insurance policies that are in conflict with Defendant’s assertions that the subject property was unrelated to any business venture.

38. The evidence establishes that Defendant incorrectly characterized interest expenses pertaining to the subject property for multiple years on his income tax returns and that

he may have benefited from an income tax deduction to which he was not entitled. Defendant's credibility was successfully challenged as to his motives and complicity in the mischaracterization of interest expenses. Defendant's explanation that he left the characterization of interest expenses to his accountant was refuted by his accountant and came off as an attempt to pass the buck.

39. The evidence also established that the subject property was insured by Defendant as a log dwelling occupied by a tenant and covered by a farm liability policy as an addendum to a commercial policy. Although the manner in which the subject property was insured is an indication of the property's use, it does not mandate the ultimate characterization of the property's use as a for-profit rental unit. The word "tenant" holds slightly different definitions when used in the common vernacular as opposed to when used as a legal term of art. As defined in *Webster's*, the word "tenant" can refer to someone who has the occupation or temporary possession of land or tenements of another. Under this definition, Aaron was clearly a tenant of Defendant's property. Legal definitions of "tenant" generally imply the existence of a rental agreement and confer certain rights and responsibilities pursuant to landlord/tenant law. In the present case, Aaron occupied Defendant's property pursuant to an informal agreement between father and son. There was no lease and no requirement that Aaron pay rent.

40. Essentially, Defendant financed the property on behalf of his son who was unable to do so himself. The son contributed sweat equity to the construction of the property and sometimes made mortgage payments directly to the credit union. There is no evidence that Defendant engaged in the venture for pecuniary gain or as a business venture and/or that actual pecuniary gain was realized by Defendant.

41. Defendant's explanation that he was unaware of the characterization of the property in his insurance policy and neither requested an amendment to his coverage nor reviewed the written amendments issued by Mutual of Enumclaw Insurance when received was not credible. However, the characterization of the property as being habitated by a tenant does not establish that Defendant was in the property rental business or that pecuniary gain played a role in Defendant's building the home for the benefit of his son.

42. Claimant's assertion in his closing brief that Defendant's building of the log home was a calculated and conscious business venture, undertaken by Defendant through his for-profit partnership is rejected. Rather, Claimant successfully established that Defendant mischaracterized personal expenses as business costs associated with Cedar Enterprises that allowed him to claim personal expenses as business losses for tax purposes. Defendant's mischaracterization of the subject property for tax and insurance purposes negatively impacts his credibility. Although Defendant's mischaracterization of the property may have been for the purpose of reducing his tax liability, Defendant's undertakings with respect to construction of the subject property were personal in nature and not for pecuniary gain or associated with Defendant's for-profit business enterprises.

43. Claimant asserts that Defendant correctly characterized the subject property as part of a for-profit venture as either a rental property or an asset of Cedar Enterprises and that Defendant is now attempting to mislead the Commission by claiming that the characterizations are inaccurate and were made without his knowledge. However, credible aspects of testimony from Claimant, Defendant and Aaron establish that the subject property was unrelated to Defendant's for-profit business ventures and that construction of the subject property was intended for personal use as opposed to pecuniary gain.

44. Claimant's employment by Defendant falls within the exemptions carved out by Idaho Code § 72-212, as the statute existed on Claimant's date of injury.

**CONCLUSION OF LAW**

Defendant is exempt from liability pursuant to Idaho workers' compensation law for Claimant's injury of January 24, 2004.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
Susan Veltman, Referee

ATTEST:

\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

BRECK BARTON  
P O BOX 100  
REXBURG ID 83440

MICHAEL D GAFFNEY  
2105 CORONADO  
IDAHO FALLS ID 83404-7495

jkc \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

HEATH HARRISON, )  
 )  
 Claimant, ) **IC 2004-003593**  
 )  
 v. )  
 ) **ORDER**  
 ROBERT HANSEN, )  
 )  
 Employer, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Pursuant to Idaho Code § 72-717, Referee Susan Veltman 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. Defendant is exempt from liability pursuant to Idaho workers' compensation law for Claimant's injury of January 24, 2004.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
R. D. Maynard, Chairman

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Thomas E. Limbaugh, Commissioner

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Thomas P. Baskin, Commissioner

ATTEST:

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Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

BRECK BARTON  
P O BOX 100  
REXBURG ID 83440

MICHAEL D GAFFNEY  
2105 CORONADO  
IDAHO FALLS ID 83404-7495

jkc

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