BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JONATHAN MOORE, SR., Claimant, v. WILLIAM A. MOORE, SR., dba MOORE ENTERPRISES, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-519121** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED OCTOBER 15 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on August 15, 2008, which resulted in a decision finding Claimant's complaint was timely filed by operation of Idaho Code § 72-604. Another hearing was held May 14, 2009, in Coeur d'Alene on additional issues. John Greenfield represented Claimant. Paul J. Augustine represented Defendants. The parties presented oral and documentary evidence and submitted briefs. The case came under advisement on July 29, 2009. It is now ready for decision.

ISSUES

The issues to be resolved according to the amended notice of hearing are:

1. Determination of Claimant's weekly wage;
2. Whether and to what extent Claimant is entitled to:
    a. Temporary disability (TTD),
    b. Medical care benefits,
    c. Attorney fees;

3. Whether Claimant was an employee of Employer at the time of the accident; and

4. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends a jack handle struck him in the face, breaking several bones and requiring surgery. Claimant had previously been an employee of Employer and had returned to work as an employee of Employer on the date of the accident which occurred arising out of and in the course of employment. His hourly wage was $12.00, and he would have worked full time but for the accident. He was temporarily disabled by the accident and subsequent surgeries. He needs additional surgery and medical care to correct disfigurement and symptoms including headaches. Defendants' actions since the date of the first hearing have been unreasonable, and Claimant is entitled to attorney fees by application of Idaho Code § 72-804.

Defendants contend Claimant was not an employee of Employer at the time of the accident. Before and after the accident he was an independent contractor. The accident may not have occurred as alleged. If found to be an employee, Claimant's wage should be calculated at $7.50 per hour. Defendants are not liable for any benefits. If Defendants are liable for medical benefits, Claimant is entitled to a corneal transplant, but nothing more. If Defendants are liable for TTD benefits, Claimant will be entitled only to TTD for recovery from the corneal transplant surgery. Defendants acted reasonably at all times, and the attorney fee statute is not applicable.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant; his mother Delores Moore; optometrist Robert A. Sorensen, D.O.; neighbor Michael Hop; apartment manager Penelope Poitras; apartment manager Brandy Lee McMillin; and auto insurance adjustor Brian Williams;

2. Claimant's Exhibits 1 – 35(including pages 79A and 79B of exhibit 7);

3. Defendants' Exhibits A – P;

4. The record established at the prior hearing dated August 15, 2008.

After examining the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant's father, Employer, owned and operated a wholesale tire business. (Employer, William A. Moore, Sr., died in March 2008.)

2. On May 17, 2005, Claimant was injured when a jack handle struck him in the face. Claimant broke several bones, suffered a detached retina, and required multiple surgeries to repair his injuries.

3. Claimant's father was present when the accident occurred. He drove Claimant to the hospital.

4. Claimant's father sought advice from the independent insurance agent who sold him several different insurance policies, both business and personal, including a workers' compensation policy. They met and discussed the accident and upon which policy or policies a claim should be filed. Employer made a claim on Claimant's behalf against a policy other than his workers' compensation policy.

5. Multiple medical records state the history of the accident. Many refer to the accident occurring "at work" or "while working."

6. According to a W-2 record, Claimant earned $17,836.30 as an employee

of Employer in 1996. No other W-2 records showing Claimant was an employee of Employer are in evidence.

7. Claimant owned his own tire business, named "Morecedes Tire." He operated it for several years before the May 17, 2005 accident. He also worked as an entertainer, sometimes using the screen name "Morecedes Brown." According to a Screen Actors' Guild (SAG) pension statement, Claimant earned $466.00 working two days on a major motion picture entitled "The Cutter." He performed this work in late 2004/early 2005 and was paid in the first quarter of 2005. Claimant performed in a speaking role. Claimant also provided entertainment services through Big Fish Talent ("Big Fish"). Big Fish records show Claimant worked April 29 and 30, 2005. Big Fish next shows Claimant worked in July 2005.

8. Claimant's mother worked as the bookkeeper for Employer. She was compensated for this work. Taxes were withheld and W-2s were filed.

9. Claimant's mother kept a check ledger for Employer. In it she recorded business expenses paid through two checking accounts. The ledger showed columns for "wages," "tire repair," "tire purchase," and other categories of expenses.

10. The April 2005 ledger shows Employer paid employee Charlie Jarvis wages of $178.00 on March 25. In April, Mr. Jarvis received wages totaling $627.50. Subsequent 2005 monthly ledgers show no wages for Mr. Jarvis. Mr. Jarvis received temporary total disability benefits for a workers' compensation claim from April 18 through June 24, 2005.

11. The May 2005 ledger shows Employer paid Morecedes Tire for a tire repair and a tire purchase. The next ledger entry relevant to Morecedes Tire occurred in July, probably the 7th, for a tire purchase, followed by another tire purchase from Morecedes Tire on July 24.

12. Despite several other entries in the 2005 monthly ledgers identifying "Morecedes Tire" or "Morecedes," no entries identify any payment to Claimant or to his dba business name as a payment for wages.

13. On Employer's behalf, Claimant's mother prepared and filed quarterly federal income tax returns and unemployment insurance wage reports. She identified individuals who earned wages, however small in amount. None of the 2005 quarterly returns nor reports identified Claimant as an employee or wage earner. None recorded any payment made to Claimant personally during any of these quarters – particularly the second quarter, April through June 2005 – as if Claimant had been an employee. Employer's worksheet for the second quarter of 2005 identifies only Mr. Jarvis, a Mr. Jacobsen, and Claimant's mother herself as employees during that period.

14. On Employer's behalf, Claimant's mother prepared W-2s for Employer's employees. One employee, Robert Couch, earned $200.00 working for Employer. His taxes were withheld and reported by W-2. Claimant's mother testified she did not prepare a W-2 for Claimant for the 2005 tax year.

15. Surety took a recorded statement from Employer on September 14, 2006. Claimant's father generally explained Claimant's work relationship. When asked directly, "Is he (Claimant) an employee of your business?" Claimant's father responded:

> "He *has been* an employee of my business, he is, he is also in uh, he does uh, he's got a business um well he sings at different times, and stuff like that, so he's not, um, he hasn't been a, he hasn't been a full time employee."

(Exhibit 15, emphasis added). The interviewer did not ask Claimant's father whether Claimant was an employee on May 17, 2005.

16. Claimant described his own tire business. He owns a regroover. This machine

cuts away material from a worn tire to reestablish tread. Claimant buys regroovable worn tires, regrooves the ones that need it, and sells them. Sometimes he sells them to Employer. Employer's business was similar, as is his brother's.

17. These businesses were separate business entities. Claimant testified, "Everybody is separate. I have my own. Ron has his own. My brother has his own. Ron (Jacobson) and my brother are more affiliated than me and my brother." Ron Jacobson was an employee of Employer. Mr. Jacobson opened his own tire business after Claimant's father died.

18. Over the years, they have helped each other by making sales trips for each other or by accompanying each other on sales trips and by working cooperatively in other ways. Occasionally before the accident, Claimant or his brother regrooved tires for Employer, each as an independent contractor for his own respective business. After the accident, Claimant occasionally regrooved tires for Employer and again worked as an independent contractor.

19. Claimant does not perform accurate bookkeeping for his business.

20. Defendants' Answer filed in August 2007 checked as "Admitted" that "the employer/employee relationship existed." Prior to hearing, Defendants moved to amend their Answer to add issues as to whether Claimant was an employee of Employer and whether the accident occurred as claimed.

21. A note from the office of ear, nose, and throat physician John Hoffman, M.D., states that Claimant's medical records were released to a North Idaho law firm on November 15, 2005. A September 13, 2006 note states that these records were sent to Surety.

DISCUSSION AND FURTHER FINDINGS OF FACT

22. **Credibility – Claimant.** Claimant is a very likeable person. Comparing his demeanor at the first hearing to his demeanor at the second, significant differences were obvious.

Claimant appeared much more subdued and much less animated at the second hearing. Claimant attributed this to a severe headache which lasted all day. He associated his headache with the cloudy weather present on the day of the second hearing.

23. Claimant is a good storyteller. In live testimony and in deposition, he described events and explained his motivations and thought processes entertainingly. However, cross-examination revealed that he often sacrificed accuracy. For example, Claimant described his steadfast commitment to endure hardship to provide for his children. Yet, he described occasions where he refused an offer of pay of $100.00 for singing the national anthem because he considered the amount "insulting" to an entertainer of his stature. Instead he accepted free tickets to the event at which he sang. While this specific example is perhaps tangential to the central questions, it illustrates the embellishment that was rampart in Claimant's testimony.

24. Claimant answered many questions evasively. Instead of giving factual answers to factual questions, he responded by expressing his opinions about related subjects or by challenging how the questioner would have responded in such a situation.

25. Claimant gave inconsistent testimony about how many trips he took after the accident and about how many days he worked. Moreover, his testimony about being unable to work is undercut by Employer's records which show he continued to do business with Employer as an independent contractor as early as one month after the accident.

26. By both demeanor and substance, Claimant's testimony is impeached.

27. **Credibility – Claimant's mother/Employer's bookkeeper.** The testimony of Claimant's mother, on the other hand, was impeccable. She clearly wanted to help her son, but would not give false testimony.

28. Claimant's mother stressed that she had no firsthand knowledge about the accident or Claimant's work status. She vouched for the accuracy of Employer's books. She corrected Claimant's testimony about whether she had performed bookkeeping service for Claimant or for his business.

29. **Credibility – Defendants' witnesses.** Testimony of Defendants' witnesses regarding an alternate explanation – involving a boat – for the cause of the accident is not credible. They may have heard Claimant incorrectly, or misremembered another person's description of another event, which they mistakenly attributed to Claimant. Given the passage of time, any one of several possible reasons for inaccuracy may have occurred. Regardless, that testimony cannot be accepted as accurate.

30. **Employer/Employee relationship.** Claimant's history of dealing with Employer for six or seven years before the accident and at all times after the accident was as an independent businessman, contracting with Employer and with other clients for goods and services as well as engaging in short-term joint ventures with Employer and others for sales trips to other states.

31. **(a.) History of dealing.** Claimant operated an ongoing, separate business which provided regrooved tires to several client/customers, including Employer. Claimant asserts that although he had, in his tire business, acted solely as an independent contractor vis-à-vis Employer and his brother and other clients since the late 1990s, he became an employee of Employer on the morning of the accident. Despite Claimant's testimony about his opinions and reasons why he should have been paid $12.00 per hour, he did not establish that he and Employer actually agreed to a $12.00 per hour wage. Moreover, other evidence indicates no such wage was actually established. In discovery, Claimant asserted his weekly

wage would have been $350.00, an amount inconsistent with a $12.00 wage. When confronted with this inconsistency he testified that the claimed $350.00 figure represented net pay after taxes. Nonsense. Claimant's testimony in this regard is inherently improbable. The credible evidence establishes that Claimant and Employer did not contemplate before the accident the possibility that Claimant would work in any capacity other than as Claimant had in the immediately preceding several years, as an independent contractor.

32. Neither Claimant nor Employer thought about Claimant's status, employee versus independent contractor, when working on May 17, 2005. They did not discuss it. They did not discuss a specific wage. The medical records which describe the history reported by Claimant's father which claim the accident happened "at work" or "while working," without more, do not offer any indication whether Claimant was or was not an employee of Employer.

33. Only long after the accident – when Claimant's father's other insurance policy was exhausted and Claimant needed additional medical care – did either father or son begin to think of reasons why the accident might be covered as a workers' compensation claim.

34. **(b.) Withdrawn admission not binding.** In Defendants' Answer, they admitted the existence of an employer/employee relationship and paid some benefits. Later discovery showed the admission may have been erroneous. Upon proper motion, the admission was withdrawn and the issue of Claimant's work status was properly added without objection by Claimant. The Commission prefers it when – early in litigation – defendants do not raise potential defenses merely based upon lack of knowledge to the contrary. The Commission does not deem admissions in an Answer to be irrevocably binding for much the same reason it does not allow requests for admissions as a discovery tool. This policy allows a Claimant to get benefits when sorely needed. If ultimately discovered that benefits have been erroneously

paid, an adjustment can be made. Defendants' admission of an employer/employee relationship, where properly retracted with notice that such an issue had arisen, does not determine the outcome of the issue. This policy is consistent with statute and case law. *See, Idaho Code* §§ 72-201 ("sure and certain relief"), 72-708 ("summary and simple" process); *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990) (liberal construction).

35. **(c.) Statutes, not parties' state of mind, govern.** Whatever any party may have thought at various times about Claimant's work status, it is immaterial. Idaho Workers' Compensation Law regulates what is and isn't within the employer/employee relationship. *See, Idaho Code* §§ 72-707 (Commission determines all issues), 72-318 (parties may not agree to waive or alter rights.)

36. **(d.) Right-to-control test determines.** Liberality is to be exercised in applying the law toward finding a person to be an employee. *Burdick v. Thornton,* 109 Idaho 869, 712 P.2d 570 (1985). Such liberality should not be exercised when finding facts. *Aldrich v. Lamb-Weston, Inc.,* 122 Idaho 316, 834 P.2d 878 (1992). Whether a person is an employee or an independent contractor is a factual question. *Mortimer v. Riviera Apts.,* 122 Idaho 839, 840 P.2d 383 (1992). The traditional test for determining whether a person is an employee or an independent contractor is the right-to-control test. *Burdick, supra.*

37. The traditional right-to-control test to determine whether a worker is an employee or an independent contractor is articulated as a four-factor test. *Tuma v. Kosterman,* 106 Idaho 728, 682 P.2d 1275 (1984). The test has been applied using as few as three or as many as 15 factors, but these variants generally pertain to specific statutes, IDAPA rules, or areas of inquiry separate from the traditional right-to-control test as applied to an injured worker applying for benefits. *See, Excell Construction, Inc., v. Idaho Dept. of Commerce &*

Labor, 145 Idaho 783, 186 P.3d 639 (2008).

38. Here, Claimant suggested that his father told him which tires to put on in which order. This testimony would suggest that Employer controlled Claimant's work, not merely Claimant's results, but the testimony is inconsistent with Claimant's testimony about his skills and judgment as a businessman. Claimant buttressed his claim for a $12.00 wage by describing how as an independent businessman he did not need to be told how to do things - unlike Employer's employee Charlie Jarvis. Claimant wants it both ways: First, he says should benefit from a finding of a high weekly wage because he was a competent businessman knowledgeable in the tire business; Second, he says he was an employee because his father directed details of his work. This inconsistent reasoning only serves to further call into question Claimant's testimony. The history of dealing between the parties shows Employer did not control the details of Claimant's business before or after the date of the accident.

39. The method of payment *for the day of the accident* remains unclear. Claimant was never actually paid. However, every entry in Employer's books for more than one year both before and after the date of the accident show Claimant was always paid as a separate business. Moreover, Employer's books show another employee was properly identified for tax withholding where that employee earned as little as $200.00 in one year. That fact supports that if there had been a change in Claimant's status from independent contractor to employee, Employer's books would have shown it. This factor strongly indicates Claimant was an independent contractor.

40. The major item of equipment for each business was a regrooving machine. Claimant owned his own. So did Employer. So did Claimant's brother's separate business.

On the date of the accident, Employer owned the truck and the trailer and presumably the jack. Based upon Claimant's description of how expenses on such trips were apportioned among the two or three businesses which sold tires, the actual ownership of the truck, trailer, and jack is of *de minimus* importance. For what little weight it carries, ownership of the equipment actually being used at the time of the accident indicates in favor of Claimant as an employee.

41. Analyzing the right to terminate the business relationship does not help either way. Whether the relationship was employment at will or independent businesses in a joint venture is not solved by the facts of record. There certainly was no written employment or joint venture agreement.

42. **(e.) Record shows Claimant was an independent contractor.** Here, Claimant had been a regular employee of Employer as a very young man, but had ceased to be an employee for at least six or seven years. In the six or more years before the accident, he had conducted business with Employer as an independent contractor. Claimant described sales trips which would properly be characterized as joint ventures – with each business paying its share of expenses and taking profit for its own sales. Before and after the May 17, 2005 accident, Claimant made similar joint venture trips – not only with Employer, but also with his brother who also owned his own tire business. Claimant's father is deceased and cannot now testify. Claimant's testimony is impeached. No competent testimony of weight can contradict the history of dealing as established by Employer's business records which indicate Claimant was an independent contractor on this occasion as well.

43. Ultimately, the record shows that if Claimant had not been injured on May 17, 2005, he and his father probably would have completed the sales trip, apportioned the expenses and profits to each business' separate account, and their businesses would have

continued as they had for at least ten years. Claimant's testimony and his father's unsworn comments to the contrary merely represent hindsight reasoning to attempt to establish Claimant as an eligible employee for workers' compensation benefits. While no significant weight is attached to what Claimant's father and the independent insurance agent may have discussed or decided immediately after the accident, the fact that a claim was filed against Employer's automobile policy and not his workers' compensation policy cannot be entirely ignored.

CONCLUSIONS OF LAW

1. Claimant failed to show he was an employee of Employer at the time of the accident; and

2. All other issues are moot.

RECOMMENDATION

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

DATED this 16TH day of September, 2009.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JONATHAN MOORE, SR., Claimant, v. WILLIAM A. MOORE, SR., dba MOORE ENTERPRISES, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2006-519121** **ORDER** FILED OCT 15 2009

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended 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 failed to show he was an employee of Employer at the time of the accident; and

2. All other issues are moot.

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

DATED this 15TH day of OCTOBER, 2009.

INDUSTRIAL COMMISSION

/S/_____
R. D. Maynard, Chairman

/S/_____
Thomas E. Limbaugh, Commissioner

/S/_____
Thomas P. Baskin, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of OCTOBER, 2009, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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db