

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD CAPRON,

Claimant,

v.

WILLIAM MCNELIS AND EDWARD
MCNELIS, dba RIVERBEND LAND &
LIVESTOCK,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2015-010675

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

Filed September 23, 2016

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 on April 7, 2006 in Boise. Claimant was present and represented by Clinton E. Miner of Middleton. David R. Skinner of Boise represented Employer and its surety. Oral and documentary evidence was presented. The parties submitted post-hearing briefs and this matter is now ready for decision.

ISSUE

The sole issue to be decided is whether Claimant was an employee of Edward and/or William McNelis, dba Riverbend Land and Livestock at the time of the subject accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Edward (Ed) and William (Bill) McNelis taken at the hearing.

2. Defendants' Exhibits 1 (pre-hearing deposition of Claimant) and 2 (pre-hearing deposition of Ed McNelis).

FINDINGS OF FACT

Background:

1. Claimant was 70 years of age at the time of the hearing and resided with his ex-son-in-law between Weiser and Ontario. Claimant has mainly worked at "cowboying" although he has worked in a nursery, at a warehouse, and as a real estate agent. He attended a community college and was just a few hours short of obtaining his associate's degree in ornamental horticulture.

2. Claimant met Ed about 20 or so years ago when Ed bought a ranch through his (Claimant's) efforts; they became friends. In November 2011, Claimant was in Donnelly helping Ed build a fence¹ on property Ed was renting for a cattle operation. While in Donnelly, Claimant slept on a cot in a camp trailer belonging to Ed. Claimant had been in Donnelly building fences for Ed for about three months. Claimant would drive his own car as needed between Donnelly and the house that he was renting in Vale, Oregon.

3. On or about November 1, 2011, Claimant was riding a horse Ed had borrowed that Claimant described as a "little frisky." Claimant ended up being bucked off the horse and was injured.

Employer/Employee relationship:

Claimant's November 10, 2015 deposition testimony:

4. Claimant testified that he has known Ed since he first sold him some real estate: "It's almost like we're related. I don't know. It's a strange relationship." DE-1, p.

¹ Claimant testified at hearing that fence building consisted of cutting fence posts, digging fence post holes, and stringing wire.

17. Claimant was unable to state the date upon which he was hired or who hired him, but it was either Ed or Bill. Claimant was originally hired to irrigate at first, but then spent about a month in Donnelly building fences and tending cattle.

5. Claimant testified that there was no written contract of employment and does not remember if there was an oral contract. For “wages,” Claimant was to get a house to live in in Vale, as well as enough feed for his five horses year round. He never received an actual “paycheck,” but did receive cash on occasion for gas, usually about once a month, and, occasionally, food.

6. Claimant does not remember the amount of time he spent in Donnelly each year. He recalled that he first went to Donnelly at the “direction” of Bill. Claimant does not know the business relationship between Bill and Ed, but believed them to be partners. Claimant thought he first went to Donnelly in 2014 and would come and go at the direction of Ed or Bill.

7. Claimant testified that he did not make enough money to file income tax returns. He never received (or requested) any W-2 or 1099 forms from Ed or Bill.

8. On the day of the subject accident, Claimant was riding a horse belonging to one of Ed’s friends; but he was using his own saddle.

9. While Claimant was in Donnelly, he lived in a camper trailer provided by Ed and Bill. His meals were provided and, generally, Ed and Bill stayed there as well. Ed and/or Bill gave Claimant daily instructions regarding tasks to be performed like whether to cut fence posts or build fences. Claimant would generally work from dawn until dark. Claimant does not know if he received most of his instructions from Ed or Bill. While Claimant did not keep track of the hours he worked, he was not allowed to come and go as he pleased, as he needed to do what he was instructed to do for any given day.

FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 3

10. Claimant did not consider himself to be a volunteer: “Because I was under constant instructions and told what to do and when to do it.” DE-1, p. 28.

Claimant’s hearing testimony:

11. Ed made arrangements with the owners of a house and acreage for Claimant to live in the house located in Vale; Claimant was also able to keep and feed his horses there. Claimant testified that he thought he was working “for the house and the horses.” HT p. 24. Contrary to Claimant’s deposition testimony that he was not sure who “hired” him, at hearing he testified that he was sure it was Ed but he still was not sure when this “hiring” took place. In response to the question, “Did he offer you a job?” Claimant testified: “Yeah. If I’m going to work I’m going to get some compensation.” HT p. 31.

12. The “compensation” Claimant was to receive was the use of a house rented by Ed for Claimant’s use in Vale (the Wilcox place) in exchange for irrigating the surrounding acreage. Claimant testified this “employment” began when he started irrigating and ended when he was injured. He was never interviewed for his “job.” Claimant never filled out any time cards or kept track of his hours. He never received a paycheck, but received two gas cards and some cash on occasion. Claimant never asked to be paid for his alleged employment. As of the date of the hearing, Claimant had no documentary proof that he was an employee of Ed or Bill.

13. Claimant explained his understanding of his “employment contract” with Ed and Bill:

In my own words. Okay. They came over and asked me if I would irrigate I was about to lose the house I was in and on the advice of my lawyer - - they provided a place for my horses and a place for me and they did.

Q. (By Mr. Skinner) So, you’re saying that’s the moment that the employment contract began?

A. Yes.

HT p. 38.

14. Claimant testified that he did not want to go to Donnelly but felt that he had to because: "...it was part of the employment." It was also for that reason that Claimant did not believe he was free to come and go from Donnelly to Vale and back. However, Claimant acknowledged that he could have quit whenever he wanted to but if he did, he would then have to pay for housing and horse feed himself.

Edward James McNelis (Ed):

15. Ed and Bill are brothers. Ed first met Claimant about 20 years ago while Claimant was a realtor helping Ed's brother-in-law find some property in the Vale area; they have been friends ever since. Claimant also became friends with Bill about five years ago and "[i]f Bill was going someplace Dick (Claimant) usually went with him." HT p. 65. Ed owns some cattle and owns/leases property in Oregon and Idaho. Ed testified that he has helped Claimant out at different times over the past 20 years: "...we hunted together and rode together and it was just that type of arrangement." HT p. 66. Ed and Bill never charged Claimant anything for keeping and feeding his horses or anything else, and never asked for anything in return. "He was a friend and he just hung out with us." *Id.*, p. 67. Claimant never asked Ed for a job and he never offered Claimant one; Claimant has never been an employee of Ed's.

16. Ed owns Riverbend Land and Livestock; Ed has no business relationship with Bill. In Donnelly, friends would come and camp out, drink beer, and tell stories, "...it's a guy deal." *Id.*, p. 70. Ed never had any employees in Donnelly and never ordered Claimant to go to Donnelly. However, Claimant always had an open invitation to show up even though Ed did not need his help in running the Donnelly operation. Ed never

considered Claimant to be an employee “...in any way, shape or form.” *Id.*, p. 72. Claimant had his own car and could (and did) come and go as he pleased.

17. Ed never told Claimant that if he (Claimant) did not go to Donnelly he (Ed) would not provide feed for Claimant’s horses, nor did he ever promise Claimant a place to live in exchange for help with irrigating. Ed leased the Wilcox place but not the house Claimant lived in. Ed thought the arrangement for Claimant to live in the house on the Wilcox property was between Claimant and April Wilcox; Ed had nothing to do with it. Claimant was able to feed his horses from hay grown on the acreage that Ed leased. Claimant was to keep the house clean and the yard kept up. Ed had nothing to do with Claimant’s eventual eviction from the Wilcox place.

18. Claimant would show up in Donnelly whenever he chose to do so. Ed had no control or supervision over Claimant while there; he did not give Claimant daily instructions, pay him anything or have him keep track of the time he worked. Ed did not tell Claimant when he was to arrive at or leave from Donnelly. Ed did not provide the horse Claimant was riding when he was injured. The horse was kept at the Donnelly location by a friend and Ed let Claimant ride it. Because Claimant had his own wood cutting business in Donnelly, he would use his own chainsaw to cut fence posts.

19. Claimant first came to Donnelly with Bill. Ed speculated that Claimant came to Donnelly because: “He liked being out like that and he didn’t have a whole bunch going on, probably, and he just was always running around with Bill, so he came.” HT p. 76. In response to a question regarding whether Ed gave Claimant gas money, Ed responded: “In a - - in my relationship with my life with Dick he’s always broke and needing money for clothes or what ever and yeah, we - - I’d help him out. Give him a few bucks ever since I have known him.” *Id.*, pp. 76-77. Ed gave Claimant money before Claimant’s allegation of

employment and never expected anything in return from Claimant. Ed testified that he never would have hired Claimant as an employee because he is a “free spirit” who is a friend that comes and goes as he pleases, “. . . he’s just not the employee type person.” *Id.*, p. 78.

20. Regarding other things Ed has done for Claimant, Ed testified:

Q. (By Mr. Skinner): Tell us about some of the other things you have done for - - for Dick in the past 20 years in terms of what you have given him and done for him.

A. Oh, you know, I bought him boots and hats and clothes and - - and - - he’s just kind of - - we were buds and he went along hunting and just every time we - - when I was around that Vale and Harper country, why I’d stop by and see him or we would connect up and go ride. It was just kind of together and stuff and, then, he went through a period of time where he was incarcerated² and when he came back we didn’t have that close relationship and Bill struck up a relationship. Bill tended to - - he turned his collar around once in a while and helps people and likes them and - - that’s how he - - the relationship.

HT p. 78.

21. Ed testified that Claimant did not irrigate the Wilcox place himself, but would sometimes help Ed or Bill with the irrigation there.

William Joseph McNelis (Bill):

22. Bill is Ed’s brother. He moved to the Vale area about 5 years ago to be near Ed. Bill is retired Air Force. He has no business interests with Ed other than the joint ownership of a race horse. Bill has no interest in Riverbend Land and Livestock.

23. Bill met Claimant about 5 years ago and they became friends. Bill has never had any business dealings with Claimant and has never hired him to do anything in any capacity, nor, to Bill’s knowledge, has Ed. Bill began irrigating the Wilcox place for Ed, but had no experience irrigating so Claimant, an experienced irrigator, helped Bill out. No

² Claimant was convicted of reckless endangerment, a felony, and served one year in a psychiatric facility in Salem, Oregon about 12 years ago.

compensation was paid to Claimant for his assistance and no employer/employee relationship was established.

24. Bill helped Claimant over the years by buying him clothes and boots, paid for some dental work, helped with some fencing for his horses, and helped clean up the house on the Wilcox property.

25. Bill would go to Donnelly to help Ed out. Bill and Ed were able to do what needed to be done in Donnelly by themselves and needed no other help. Claimant basically just showed up at Donnelly; Bill never ordered him to do so. Bill did not exercise any control over or supervise Claimant while in Donnelly and Claimant could come and go as he pleased. Bill never set Claimant's schedule as there was no structure surrounding the activities in Donnelly. Claimant never asked Bill to be paid for anything he did in Donnelly, but Bill would buy Claimant's gas on occasion.

26. Bill socialized with Claimant by stopping by his house and by inviting Claimant to his house for dinners. When asked why he helped Claimant out, Bill responded: "We were friends." HT p. 96.

DISCUSSION AND FURTHER FINDINGS

An employer/employee relationship is prerequisite to a finding of liability under Idaho's worker compensation statutes. *Kennedy v. Forest*, 129 Idaho 584, 930 P.2d 1026 (1997). An "employee" is any person who has entered into the employment of or who works under contract of service with, an employer under Idaho Code § 72-102(12). An "employer" is any person who has expressly or impliedly hired or contracted for the services of another. Idaho Code § 72-102(13)(a).

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.

Idaho Code 72-102(13)(a) “Employer” means any person who has expressly or impliedly hired or contracted the services of another. Here, there is no dispute that Claimant had no express contract of hire with Employer, and the Referee so finds.

27. Having found that no express contract of hire exists, Claimant is left to establish an implied contract. There are two distinct types of implied contracts, those implied-in-law and those implied-in-fact. *Kennedy* at 587. Implied-in-law contracts are quasi contracts based on equitable theories and are insufficient to establish an employment relationship for purposes of workers’ compensation liability.

28. As the *Kennedy* court observed:

In the worker’s compensation context, an implied-in-law contract cannot form the basis for an employment relationship. First of all, an implied-in-law contract is not a contract or agreement at all and is simply a method by which the courts fashion a remedy in cases where there is no binding relationship between the parties. The definition of “employee” in the worker’s compensation statutes clearly contemplates a situation where one person employs another person or contracts to do so - - as opposed to a relationship implied by the courts to do equity. Secondly, quasi-contract originates in the theory of unjust enrichment. The measure of recovery in such an action is limited to the “value of the benefit bestowed upon the defendant which, in equity, would be unjust to retain without recompense to the plaintiff.” (Internal citations omitted). A search of the case law has revealed no instance of a court awarding damages other than these in a quasi-contractual action, and no case in which a court treated a contract implied-in-law as a true contract and sought to apply terms based upon it. Thus, an implied-in-law contract cannot create an employment relationship and cannot expose Forest, as an employer, to worker’s compensation liability or any other liabilities stemming from a true employment contract or agreement to hire.

Kennedy at 587-588.

29. *Kennedy* also held that:

A contract implied-in-fact is a true contract whose existence and terms are inferred by the conduct of the parties. (Internal citation omitted). Such a contract is grounded in the parties' agreement and tacit understanding.

Id., p. 587

30. The issue of whether an employer/employee 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 employer/employee 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).

31. Generally, activities that are purely voluntary or gratuitous do not create an employer/employee relationship and are not covered by workers' compensation. However, Idaho law recognizes that when a person is requested to assist in the furtherance of the business of an employer and the assistance is provided with the knowledge and acquiescence of the employer, the person providing assistance, becomes, in effect, an employee. *Wood v. Barkow*, 2008 IIC 0236.9 (April 16, 2008).

32. Here, Claimant is the only person who believes he was an employee at all relevant times. Ed had no such belief. What Bill may have said or done to shape Claimant's opinion regarding his employment status is irrelevant because Bill had no interest in Ed's business, Riverbend Land and Livestock. Claimant was a volunteer in a "friends helping friends" arrangement.

33. Ed and Bill helped Claimant out with shelter and feed for his horses from time to time. Claimant would occasionally receive gas and food money from Ed and/or Bill. Claimant helped with certain "chores" for Ed such as fence-building, irrigating,

moving horses, and other activities associated with running a ranching operation. Claimant was friends with both Ed and Bill and they would socialize on occasion. Ed never considered Claimant an employee.

34. In support of the above findings regarding lack of an employer/employee relationship, the Referee considered, *inter alia*, the following:

- Claimant never submitted a job application and was never subjected to the interview process.
- Claimant never asked for or received a pay check.
- Claimant never filled out a W-2 form or a 1099 form.
- Claimant never claimed any alleged compensation on his tax returns.
- There was never any income or social security tax withholdings on any alleged compensation.
- There was no written contract of employment or any other written confirmation of an employment contract.
- Claimant was unable to state by whom, Ed or Bill,³ or when he was hired.
- Ed never hired (and never would have hired) Claimant and never considered him to be an employee.

35. Ed had been helping Claimant out long before any allegation of an employment contract was made. It was not until after Claimant's accident and injuries that Claimant contended he was an employee. Ed had no doubts that Claimant was not an employee. Thus, there was certainly no "meeting of the minds" regarding Claimant's employment status. Claimant's subjective view of his status as an employee is not enough. A person's subjective understanding is insufficient to establish an express or an implied

³ Bill could not have hired Claimant, as he had no authority to do so.

agreement. *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003).

36. Ed testified that he and Claimant had been friends for 20 years. They enjoyed hunting and riding horses together. According to Ed, Claimant was always broke. Ed helped Claimant out long before any employee/employer relationship was alleged. Ed kept and fed Claimant's horses and never expected anything in return.

37. Ed never told Claimant that he had to go to Donnelly or risk losing having his horses fed. Ed never planned out Claimant's day in Donnelly and he could (and did) come and go as he pleased.

38. The ultimate inquiry regarding whether a person is an employee or an independent contractor revolves mainly around whether an employer assumes the right to control the time, manner, and method of executing the work of the employee versus the right to merely expect certain results. In *Mortimer v. Riviera Apartments*, 122 Idaho 839, 844, 840 P.2d 383, 388 (1992), citing *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985), the Idaho Supreme Court articulated a four-part test to determine whether a right to control exists: 1) method of payment; 2) furnishing major items of equipment; 3) direct evidence of the right to control; and 4) the right to terminate the relationship at will.

Method of payment:

39. Claimant never received a paycheck from Ed, nor did he ever request one. Ed never promised to pay Claimant for any work he may have performed. Claimant never filled out a W-2 or 1099 tax forms. No income or social security taxes were ever withheld from any "pay check" Claimant may have received. Claimant alleges that Ed's providing a place and feed for his horses as well as a house to live in and a cow constitute "compensation." However, Ed credibly testified that while he leased the property upon

which the house where Claimant lived was located, he (Ed) had no interest in that house and Claimant dealt directly with the owners of the house. Further, Ed was helping Claimant keep and feed his horses long before any employer/employee relationship was being alleged by Claimant. Finally, regarding the cow, Ed testified that he gave the cow to Claimant, who was Claimant's favorite cow, as a gift months after his accident. Claimant supported Ed's testimony: "No. That was my favorite cow, they just gave it to me." HT p. 50.

Major items of equipment:

40. In the summer of 2014, Claimant drove his own vehicle from Vale to Donnelly; he came and went as he pleased. He would also drive his car to get breakfast each morning. He used his own chainsaw to cut wood for his firewood business and to cut fence posts. The horse he was riding at the time of his accident belonged to a friend of Ed's. Claimant provided his own saddle.

Right to control:

41. Claimant never filled out an application for employment and never went through a formal interview process. Claimant never filled out any time cards. Ed never kept track of Claimant's hours; he could (and did) come and go as he pleased. Ed never gave Claimant daily instructions or otherwise exercised any control over Claimant's presence in Donnelly or over his daily activities.

42. Claimant is the only person involved in this matter who believes that he was hired by Ed, although he cannot remember whether it was Ed or Bill who actually hired him. Ed never expressly or impliedly "hired" Claimant. It takes more than just one party's understanding of an employer/employee relationship to create one. See *Kennedy*, supra.

Claimant's activities surrounding his relationship with Ed were provided gratuitously and voluntarily by Claimant and are not covered by Idaho's workers' compensation laws.

Right to terminate employment at will:

43. Because no employment relationship has been found to exist, it is axiomatic that either party could terminate the same without repercussions.

44. The Referee finds, on conflicting evidence, that Claimant has failed to prove he was an employee of Ed and/or Bill McNelis and/or Riverbend Land and Livestock at any time relevant to these proceedings.

CONCLUSION OF LAW

Claimant has failed to prove that he was an employee of Ed and/or Bill McNelis and/or Riverbend Land and Livestock at any time relevant to these proceedings.

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 9th day of September, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

CLINTON E MINER
412 S KINGS AVE STE 105
MIDDLETON ID 83644

DAVID R SKINNER
6098 TONKIN DR
BOISE ID 83704

ge

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD CAPRON,

Claimant,

v.

WILLIAM MCNELIS AND EDWARD
MCNELIS, dba RIVERBEND LAND &
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IC 2015-010675

ORDER

Filed September 23, 2016

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 has failed to prove that he was an employee of Ed and/or Bill McNelis and/or Riverbend Land and Livestock at any time relevant to these proceedings.

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

DATED this 23rd day of September, 2016.

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 23rd day of September, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CLINTON E MINER
412 S KINGS AVE STE 105
MIDDLETON ID 83644

DAVID R SKINNER
6098 TONKIN DR
BOISE ID 83704

ge

_____/s/_____