BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

COLE YOUREN, Claimant, v. PAUL TREASURE, Un-Insured Employer, Defendant.	**IC 2013-024972** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March11, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise, Idaho on September 10, 2015. Claimant, Cole Youren, was present in person and represented by J. Brent Gunnell, of Nampa. Defendant Employer, Paul Treasure, was represented by R. Daniel Bowen, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on October 27, 2015.

ISSUES

The issues to be decided were narrowed by agreement of the parties at hearing and by briefing[1] and are:

1. Whether Claimant was an employee of Defendant or an independent

[1] Claimant's entitlement to permanent disability in excess of impairment was noticed for hearing but not briefed by Claimant and is therefore considered abandoned.

contractor at the time of the accident.

2. Claimant's entitlement to medical care;

3. Claimant's entitlement to temporary disability benefits;

4. Claimant's entitlement to permanent partial impairment; and

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

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant was seriously injured while riding a horse for Defendant on July 17, 2013. Claimant asserts he was an employee of Defendant at the time of the accident and is entitled to medical, temporary disability, and permanent impairment benefits as well as attorney fees, costs, and penalties. Defendant contends that Claimant was an independent contractor at the time of the accident and is estopped from asserting otherwise.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Defendant, Peter Andrews, Nikela Black, Eugene Burns, Lyndsey Burns, and John Green taken at hearing;
3. Claimant's Exhibits A-K admitted at hearing (Exhibit I being the pre-hearing deposition testimony of Defendant Paul Treasure taken on April 7, 2015); and
4. Defendant's Exhibit 1 offered at hearing solely for impeachment purposes (being the pre-hearing deposition testimony of Claimant Cole Youren taken on March 4, 2015).

All objections posed in the pre-hearing depositions are overruled.

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

FINDINGS OF FACT

1. Claimant was born in 1984 and was 30 years old at the time of the hearing. He lived on a ranch in Garden Valley at all relevant times.

2. **Background.** Les Bois Park is a horse racing facility in Boise where horse training starts in March or April and continues through August. At all relevant times, the Les Bois Park track opened during training and racing season at daylight, which varied from approximately 7:15 a.m. early in the season to 6:00 a.m. during most of the season. The track is closed for maintenance from 8:00 until 8:30 a.m. and then reopened for exercising horses from 8:30 a.m. until approximately 10:30 a.m. Monday through Saturday.

3. A number of horse owners and trainers maintained "barns" near the track and utilized the track during training and racing season. Each barn had from four to 30 or more horses. Les Bois Park usually required each trainer maintaining a barn to complete a Stall Application committing the trainer to obey all applicable Rules and Regulations of the Idaho Racing Commission. The 2015 Stall Application expressly provides: "Applicant agrees to comply with all of Idaho Workman's [sic] Compensation requirements and is fully aware of their obligation within the State of Idaho." Claimant's Exhibit J, p. 2. The application did not specifically require that the owner or trainer have workers' compensation insurance coverage. Some owners and trainers with barns at the track carry workers' compensation insurance and some do not.

4. During training season, the daily exercise routine for each horse was determined by the trainer and generally included walking, galloping, or breezing.[2] Only jockeys breezed horses. All jockeys were covered by workers' compensation insurance provided by Les Bois Park. Riders that galloped horses were known as gallop boys or gallopers. The track required, and each galloper generally provided his or her own, helmet, vest, and boots. Jockeys and gallopers regularly came by the barns each morning from Monday through Saturday offering to gallop horses scheduled for exercising that day. Trainers customarily paid the jockeys and gallopers $10.00 per ride by check or cash.

5. Some owners or trainers had standing arrangements with certain jockeys and gallopers to exercise their horses regularly; these were commonly referred to as the trainers' "main gallopers." It was customary for these jockeys and main gallopers to come to the trainer's barn—commonly referred to as the jockey's or galloper's "main barn"—first each morning and give priority to riding the trainer's horses scheduled for exercising that day. A jockey or main galloper could ride between 10 and 15 horses each morning, each horse requiring 15-20 minutes of the rider's time. Barns with more than approximately 10 horses often utilized one or more jockeys or main gallopers to exercise their horses each day. After all scheduled horses from the main barn had been ridden, the jockey or main galloper usually visited other barns, offering to ride their horses. Gallopers had a financial incentive to ride for main barns with more horses to exercise. Main gallopers were customarily paid $10.00 per ride. Some trainers paid main gallopers by check once or twice monthly, others paid by cash regularly. None of the trainers, gallopers, or jockeys who testified at hearing used or received W2 Forms for their business dealings at the track and no withholdings were made. Some trainers provided 1099 Forms to

[2] Breezing is "when you let them run." Transcript, p. 93, l. 7.

their main gallopers, some did not. Some trainers considered the main gallopers they utilized to be their employees and provided workers' compensation insurance for them, others did not.

6. Treasure has been a horse owner and trainer at the track for approximately 25 years. During horse training and racing season, he maintains a barn at the track with 15 to 25 horses. The number of horses in his barn may vary significantly from day to day. Treasure regularly uses two or more gallopers to exercise his horses. Ultimately it is the galloper's decision whether to ride a particular horse. Treasure pays all gallopers and jockeys that ride his horses in cash. In 2013, Treasure had no workers' compensation insurance.

7. Claimant began breaking horses when he was 15 or 16 years old and breaks and trains horses for a living. He keeps some horses on his ranch in Garden Valley. He participates in rodeos and is also a galloper at the track from March through August. He usually does not train horses at his Garden Valley ranch between March and August.

8. **The parties' early business dealings.** Claimant and Treasure have a nine year history of business dealings. In 2004, Claimant met Treasure at the track and started exercising some of his horses for $10.00 per ride. Treasure then had approximately 20 horses at the track and used several gallopers and jockeys to exercise his horses. In 2004, Claimant rode horses from another barn first each morning and then came to Treasure's barn around 7:15 a.m. and offered to ride his horses. Initially, Treasure saddled the horses and Claimant just galloped them. Over time, Treasure gave Claimant more duties than solely riding. Starting in 2005, Claimant gave Treasure's horses first priority each day. Treasure paid him $8.00 per ride. After 2005, Claimant considered Treasure's barn his main barn and started at Treasure's barn and gave priority to riding Treasure's horses before going to ride horses at other barns. Treasure paid Claimant in cash and never provided him a W-2 or 1099 Form.

9. In 2007, Claimant began galloping horses for Eugene Burns as well as Treasure. Burns paid $10.00 per ride and provided 1099 Forms to his gallopers.

10. No later than 2008, Claimant assumed additional duties for Treasure. At Treasure's direction, Claimant drove to Treasure's ranch in Hammett, picked up horses, hauled horses, and did various other tasks at Treasure's ranch, including breaking horses. Claimant testified he worked for Treasure for $400 per week at Treasure's ranch in September, October, November and starting again around January 15 for about a month. Treasure provided housing for Claimant in a trailer at the ranch two nights per week. One winter Claimant started 23 horses for Treasure. Approximately the first of March each year Claimant began galloping Treasure's horses at the track in Boise and continued from March until August. Transcript, pp. 122-123, 135-136. Treasure had "the say" of what Claimant did and considered Claimant his employee at that time. Treasure carried workers' compensation insurance coverage in 2008.

11. On July 2, 2008, Claimant was exercising a horse for Treasure when the horse fell, injuring Claimant's left knee. Claimant underwent left knee surgery, including anterior cruciate ligament reconstruction, and received workers' compensation benefits. Although acknowledging Claimant as his employee at that time, Treasure paid Claimant in cash, made no withholdings, and provided no W-2 Form to Claimant at any time.

12. From approximately 2009 through 2010, the Les Bois track was closed. Claimant continued working with Treasure at his ranch. In approximately 2011, the track reopened. Claimant returned to galloping horses for Treasure at the track again.

13. In 2013, Treasure had from 16-23 horses at the track. Treasure arrived at the track at approximately 5:30 each morning, Monday through Saturday, and prepared a training

chart listing horses to walk, gallop, or breeze that day. The training chart reflected the stall arrangement of the barn and did not designate who was to gallop any particular horse.

14. All parties acknowledge that Claimant galloped horses for Treasure in 2013. However, much of the parties' testimony regarding their specific business dealings in July 2013 is conflicting, as addressed in detail hereafter.

15. **Accident.** On July 17, 2013, Claimant had galloped five or more horses at the track for Treasure, and had just finished galloping a mare for Treasure when the mare reared up, flipped over, and landed on Claimant's right thigh, fracturing his femur. Claimant was taken by ambulance to the hospital where Mark Spelich, M.D., performed open reduction internal fixation with intramedullary rodding of Claimant's displaced right femoral shaft fracture. Claimant incurred substantial medical expenses and was unable to work for several months. He returned to exercising horses at the track in 2014.

16. On August 27, 2014, Dr. Spelich rated Claimant's permanent impairment due to his femur fracture at 3% of the whole person. Dr. Spelich imposed no permanent restrictions.

17. At the time of hearing Claimant continued to live at his Garden Valley ranch where he keeps his own and others' horses. He gallops at the track from March until August earning approximately $10,000. Claimant also has his own horse breaking business and generally starts two-year old horses which he trains one hour per day for 30 days for $600 per horse. He usually trains five horses at a time, thus earning about $3000 per month, during most of the months he is not galloping at the track.

18. **Credibility.** Having observed Claimant, Treasure, and all other witnesses at hearing, and compared their testimony with other evidence in the record, the Referee finds that all are generally credible witnesses except Treasure, as detailed hereafter.

DISCUSSION AND FURTHER FINDINGS

19. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

20. **Nature of the employment relationship.** The threshold issue is whether Claimant was a direct employee of Treasure at the time of the accident on July 17, 2013. Claimant alleges he has been a direct employee of Treasure since 2004. All parties acknowledge that in 2008, Claimant had an accident while working for Treasure, filed a workers' compensation claim, and received benefits. Claimant asserts there has been no change in his employment status with Treasure between the 2008 accident and his 2013 accident. Treasure acknowledges Claimant was his employee in 2008, but asserts the parties' working relationship changed and Claimant was an independent contractor at the time of the 2013 accident.

21. Coverage under the workers' compensation law depends on the existence of an employer-employee relationship. Livingston v. Ireland Bank, 128 Idaho 66, 68, 910 P.2d 738, 740 (1995). The claimant has the burden of establishing the relationship of employee and employer before he can recover workers' compensation benefits. In Re Black, 58 Idaho 803, 80 P.2d 24 (1938). "Whether an injured worker is an independent contractor or employee is a factual determination to be made on a case-by-case basis from full consideration of the facts and circumstances." Stoica v. Pocol, 136 Idaho 661, 663, 39 P.3d 601, 603 (2001). Employee and independent contactor are defined by statute:

> Idaho Code § 72–102 defines "employee" and "independent contractor." I.C. § 72–102(2004). Subsection (11) states that "'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." I.C. § 72–102(11). Subsection (16) states that "independent contractor' means 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 to the means by which such result is accomplished." I.C. § 72-102(16).

Shriner v. Rausch, 141 Idaho 228, 231, 108 P.3d 375, 378 (2005)

22. The Idaho Supreme Court has set forth the test for distinguishing an employee from an independent contractor:

> 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. Roman v. Horsley, 120 Idaho 136, 137, 814 P.2d 36, 37 (1991); I.C. § 72-102(11), (16). 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; **604 *664 (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. Kiele v. Steve Henderson Logging, 127 Idaho 681, 905 P.2d 82 (1995).

Stoica v. Pocol, 136 Idaho at 663-664, 39 P.3d at 603-604 (2001).

23. Direct evidence of control. The first factor distinguishing an employee from an independent contractor is direct evidence of the right to control the time, manner, and method of performing the work.

24. In the present case, Claimant testified that Treasure expected him to be at Treasure's barn everyday, Monday through Saturday, to ride Treasure's horses. Claimant testified he rode Treasure's horses Monday through Saturday and "it has always been a job, Monday through Saturday." Transcript, p. 114, l. 24. He testified that, with very few exceptions, Treasure insisted Claimant ride his horses first everyday. Claimant further testified

that Treasure regularly instructed him when to come to the barn. There is a direct conflict in the testimony concerning this matter as Treasure testified he never told Claimant he had to show up on any particular day or time.

25. Claimant's start time at Treasure's barn was constrained by daylight at the track. Early in the season, the track did not open until 7:00 or 7:15 a.m., later in the spring it opened at 6:00 a.m. However, his start time was dependent upon Treasure's instructions:

> Q. Did Mr. Treasure require that you get there at a certain time?
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> A. It was about frequency of horses. If I were to show up at 8:00 o'clock, there is no way Treasure could get out his horses. He wouldn't be very pleased with that situation. So he would say, "Be there by 6:30. We have a lot of horses tomorrow. Be here by 6:00, we are taking out the whole barn." Vice-versa. Some days he would say, "You know, hey, we have five breezers tomorrow. You don't even need to be here until break. I got them going before."
>
> But he would let you know prior, usually. And on certain days, he even would call me at home towards the end of the season when everything was racing and we were pretty much done galloping, he would say, "You don't even need to come in today. I only have one or two. Take the day off." So I would.

Transcript, p. 115, l. 25 through p. 116, l. 18.

26. In contrast, Treasure testified he did not require Claimant to ride his horses any particular day or start galloping at any set time. Treasure testified that Claimant "would come pretty regular," but denied he came everyday. Claimant's Exhibit I, p. 10 (Deposition of Defendant, p. 29, l. 9). Treasure testified that on several occasions Claimant advised he would not be at the track on a particular day because he would be participating in a rodeo.[3] Treasure asserted that he did not require Claimant to gallop his horses everyday because on most days 20 or more gallopers and jockeys circulated among the barns at the track offering to ride horses.

[3] Treasure's testimony that Claimant notified him if Claimant would not be available on a particular day corroborates Claimant's testimony that he believed he had daily work responsibilities to Treasure.

27. However, in addition to Claimant's testimony, the substantial majority of the evidence indicates that Treasure directed Claimant to be at his barn Monday through Saturday shortly after daylight to gallop Treasure's horses.

28. Peter Andrews, Claimant's friend who groomed horses at the track, testified that Claimant and Andrews worked for Treasure every morning in 2013 until Claimant's injury except for July 4th and those days when the track was too wet from rain to run horses.

29. John Green, a main galloper at the track for Eugene Burns, testified that Claimant worked for Treasure and was at the track everyday. Nikela Black, a jockey and main galloper at the track who was the first person to assist Claimant at the scene of his accident, testified that Claimant galloped everyday for Treasure in 2013 until he got hurt.

30. Lindsay Burns, whose husband Eugene Burns is a horse trainer at the track, testified that in 2013 Claimant was Treasure's main galloper, went to Treasure's barn first each morning, and stayed at Treasure's barn until all his scheduled horses had been ridden.

31. Trainer Eugene Burns testified that in 2013, Claimant started each morning galloping horses for Treasure and stayed at Treasure's barn until he had ridden all of Treasure's horses scheduled for galloping. Burns indicated it is customary for main gallopers to start each morning around 6:00 a.m. galloping horses from their main barn and then, if time allows before the track closes, gallop horses from other barns. Burns testified that relying on a main galloper lets the galloper get to know the trainer's horses, tack up the horses for riding, and provide useful feedback to the trainer about the horses' performance. Burns testified that without main gallopers: "It makes it more difficult. If you're relying on day-to-day help trying to find people, it makes it really hard to get all your horses out. And you're standing there trying to find

people." Transcript, p. 47, ll. 20-24. Burns carries workers' compensation insurance for his main gallopers.

32. Thus, as to whether Claimant rode Treasure' horses first everyday, Treasure's testimony is starkly contrary to that of every other witness. Treasure would only go so far as to admit it was to his benefit to have regular gallopers for his 15-25 horses:

> Q. It was a benefit to you to have a regular galloper that you could rely upon each day, and you relied upon Sammy and Cole every day to be there at 6, 6:30, start the day.
>
> A. That's my job. To benefit, do my best. Yes, it was to my benefit.

Transcript, p. 91, ll. 6-12.

33. The Referee finds the testimony of Claimant, Andrews, Green, Black, and Mr. and Ms. Burns more credible than that of Treasure and concludes that, except on infrequent occasions, Treasure directed Claimant to gallop Treasure's horses every morning Monday through Saturday and that Treasure regularly specified the time Claimant was to begin galloping. This constitutes control over the times for performing the work, indicative of a direct employment relationship.

34. In addition to galloping virtually daily at times regularly specified by Treasure, Claimant asserts that Treasure insisted he gallop all of Treasure's horses first before galloping any other horses at the track. In contrast, Treasure testified he did not require Claimant to ride all of Treasure's horses first. Treasure testified that in 2013, Claimant sometimes went to one or two other barns to ride their horses first before coming to Treasure's barn.

35. As noted above, Lyndsey and Eugene Burns testified Claimant galloped Treasure's horses first each morning. Andrews also testified that Claimant rode Treasure's horses first each morning and after he finished riding Treasure's horses, might ride someone

else's horses. Significantly, Andrews testified that on only one morning in 2013 did Claimant ride someone else's horses before riding all of Treasure's horses. Andrews described that occasion:

> There was one day we went in early, and Cole rode Ron Stevens' horses before Cole even would have been to Paul's. And when he was on Ron Stevens' second horse, which still was before he would have been to Paul's, I went over to go and tack the first horse for Cole and first horse for Sammy. Paul was not very happy about that. Cole came back over his normal time. He jumped on the horse.
>
> Paul was not happy about that.

Transcript, p. 73, ll. 5-14.

36. In his direct examination Claimant described the same occasion and the resulting exchange between Treasure and Ron Stevens:

> At that point we were supposed to be starting at 6:30. And I went over and got two of Ron's [horses] at 6:00 o'clock in the morning.
> ….
>
> He had three horses, asked if I could take the last one. I said no. I went over to Paul's. He followed me over to Paul's and asked Paul if he could borrow me for that last horse, he only had one more and otherwise, I wouldn't be able to get back to him until about 10:15 in the morning. And Paul informed him that when Ron paid him [sic] $500 a week, he could tell him [sic] what to do. Until then, he could wait in line like everybody else. So I was very careful about if I did take horses out in the morning, I tried to get there on time so Paul could get all his horses out.

Transcript p. 118, l. 10 through p. 119, l. 3. Claimant testified he was riding a horse for Treasure and heard about this exchange from Andrews and Stevens, and also from Treasure himself.

37. Treasure denied ever "having words" with Ron Stevens.

38. At hearing, Defendant's counsel asked Claimant to read the following excerpt from Claimant's pre-hearing deposition out loud:

> If I walked down the shed row, and I can pick up horses anywhere along the way, that's—nobody's depending on you, there's no agreement, there's no statement that I will be there and take your horses out, you don't rely on me more

than anybody else. But if at the beginning of the day you say tomorrow you need to be here at 6:00 and I'm taking out 12 head and—that would be the difference.

Transcript, p. 143, ll. 7-15. After reviewing the above deposition testimony, Claimant then responded to Defendant's counsel's further questions:

Q. Now, Cole, Paul Treasure never came and said to you you absolutely have to be here at such and such a time, did he?

A. No. He would walk up and say, "You need to be here at 6:00 tomorrow."

Q. Is that what he would say to you?

A. Yeah. "We're starting at 6:30 tomorrow. I don't need you until 8:00."

Q. Excuse me, Cole, but wouldn't it be more like I got "X" number of horses that have got to go out tomorrow and be galloped?

A. No. If that was the case, if he only had 10, I could show up at 7:30. Paul would not appreciate that. Paul would rather get out long before the end of the track. So Paul was very insistent I take his horses first. He didn't want to sit around and wait for me to be done with everybody else's.

Q. Did you feel that you were free to ride horses for other people?

A. When I was done with Paul, yes.

Transcript, p. 145, l. 8 through p. 146, l. 3.

39. The Referee finds the testimony of Claimant, Andrews, and Lyndsey and Eugene Burns more credible than that of Treasure and concludes that Treasure required Claimant to gallop Treasure's horses first before galloping others' horses. This constitutes control indicative of a direct employment relationship.

40. In addition to controlling the days, times, and priority in which Claimant galloped Treasure's horses, Claimant alleges that Treasure regularly directed him to perform additional tasks not generally expected of gallopers.

41. Treasure himself testified that gallopers simply: "They walk up, you lead a horse out, they get on. When they come back, they got off, take their saddle off, they are done. I mean, there is [sic] people that pick them up right there, put them on the walker." Claimant's Exhibit I, p. 8 (Deposition of Defendant, p. 23, ll. 19-22).

42. Claimant testified that he was strictly a galloper when he first met Treasure in 2004; however Treasure's expectations of Claimant increased over time:

> Well, I would show up. …. So he would have my horses ready. And I would get on, and he would tell me one lap or two. And I would lope them and bring it back and get on the next one and so on and so forth.
>
> In 2004, I was strictly a gallop person. I didn't assist Paul Treasure in anything around the barn. As years went on, my responsibilities or expectations changed. …. And they changed from saddling my own horses, bathing my own horses, putting them on the walker, getting the next one. Consequently, it took a lot more time.
>
> ….
>
> 2005, I went there, pretty much, with Paul Treasure, and I started riding horses. And I've done it ever since. It was a good arrangement for me. All of the horses were in a row, and it was good arrangements for him. He was able to get them all out, and he didn't have to find anybody else to do it. So it was equally convenient for both of us.

Transcript, p. 112, l. 22 through p. 114, l. 16.

43. Claimant testified that after completing the galloping specified by Treasure each day, Claimant returned to Treasure's barn and:

> he would ask, occasionally, you know, just to do a favor here or there, braid some horses' manes, things like that, nothing big. And he would also ask for paddock help in the afternoons when we had a lot of horses racing. He would need help leading them to the races or picking them up from the races or saddling them in the paddock.

Transcript, p. 120, l. 22 through p. 121, l. 4.

44. Treasure acknowledged that he asked Claimant occasionally to braid horses' manes, as did other trainers at the track, and that Claimant helped with cleaning when needed.

Treasure testified that Claimant tacked Treasure's horses, but only one out of a hundred. Treasure admitted that Claimant came some evenings to watch horses run and Treasure would offer to pay him for helping saddle them or lead them to and from the races. Claimant's Exhibit I, p. 8 (Deposition of Defendant, p. 30). Treasure testified that on occasion Claimant would offer to braid horses' manes for him and that Treasure offered to pay him for this.

45. Claimant also testified of occasions when Treasure hauled racehorses out of state and would fill out a training chart for a week or four or five days and "leave the stall group and gallop crew to handle it themselves." Transcript, p. 117, l. 25 through p. 118, l. 1. The stall group included Peter Andrews who worked as a groomer, handling and tacking Treasure's horses Monday through Saturday from 6:00 until 10:30 a.m. at Treasure's barn. Treasure paid Andrews either $100 or $200 each week based on the flip of a coin. Andrews testified that Treasure had three individuals that cleaned stalls: Sam, Duffy, and George and that Claimant and another galloper named Sammy galloped Treasure's horses. Andrews testified that without Andrews, Sam, George, Duffy, Claimant, and Sammy to support his operation, Treasure would not have been able to clean the stalls, care for, and exercise his 20 or more horses. Claimant was Treasure's most often used main galloper at the time and handled Treasure's horses' exercise schedule when Treasure went out of state.

46. From this evidence it appears that Treasure required service beyond that of merely a galloper at the track. Additionally, by the time Claimant galloped for Treasure in 2013, Claimant had worked extensively with Treasure for more than eight years and knew Treasure's horses:

> I started them since they were halter broken when they were babies out at the ranch, started them when they were yearlings, brought them to the track when they were two. There were a lot of the horses that I was the only person that would ride them until they were ridden by jockeys.

Transcript, p. 120, ll. 3-8.

47. Claimant galloped horses for Treasure regularly but only in the mornings from approximately 6:00 until 10:30 a.m. when the track was open. Claimant galloped horses for other barns and trainers after completing all galloping required by Treasure. While Claimant broke and trained some horses on his own ranch, he did not train horses at his ranch from March through August because he galloped at the track. In addition to galloping, as noted above, Claimant braided horses' manes, tacked horses, put them on the walker, and led horses to and from the races on occasion. The evidence overall suggests that Claimant worked primarily, but not full-time, for Treasure at the time of his accident.

48. Examination of direct evidence of the right to control reveals that Treasure generally controlled much of Claimant's work. While the daylight operation of the track itself established the potential hours for galloping horses, Treasure required that Claimant gallop his horses first and regularly specified the hours he expected Claimant to begin galloping. Claimant personally rendered all services to Treasure. While Claimant worked for more than one entity at a time and held himself out as one who galloped, broke, and trained horses for more than just Treasure, Claimant did so only after he galloped Treasure's horses on any given day. In addition to galloping, on occasion Treasure expected Claimant to tack the horses he galloped, bathe them, and put them on the walker. Claimant broke many of Treasure's horses. Treasure requested that Claimant braid horses' manes, saddle horses in the paddock, and lead horses to and from races. Considered as a whole, the record provides substantial direct evidence that Treasure exercised control indicative of a direct employment relationship.

49. Method of payment. The next factor in distinguishing an employee from an independent contractor is the method of payment. In Livingston v. Ireland Bank, 128 Idaho 66,

910 P.2d 738 (1995), the Idaho Supreme Court noted the method of payment test generally refers to whether income and social security taxes are withheld from a person's wages. Withholding is customary in an employer-employee relationship. The Court determined that where the claimant was paid by the hour, but no income or social security taxes were withheld, the method of payment should be deemed a factor in favor of independent contractor status.

50. In the present case, with perhaps two or three exceptions over the course of approximately eight years, Treasure always paid Claimant in cash. There are no written time cards, ledgers, checks, or any written records to prove the amounts or frequency of the parties' financial dealings. Both parties agree Treasure made no deductions or withholdings from Claimant's pay at any time. Claimant was fully aware that no taxes were being withheld. Claimant did not file income tax returns from 2005 through 2013. Treasure never gave Claimant a W-2 or 1099 Form—even in 2008 when Treasure testified Claimant was his employee and received workers' compensation benefits for a knee injury. This factor indicates an independent contractor relationship.

51. Treasure asserts Claimant's failure to file tax returns and acceptance of payment knowing taxes were not withheld, should estop Claimant from now asserting he was an employee.

52. The Commission has previously had occasion to consider estoppel. Allen v. Reynolds, 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). Equitable estoppel and quasi estoppel are equitable doctrines. See Keybank National Association v. PAL I, LLC, 155 Idaho 287, 293, 311 P.3d 299, 305 (2013). Assuming estoppel or quasi estoppel may otherwise be applicable in the instant case, neither party herein has clean hands. Claimant failed to ever demand Treasure withhold taxes or provide W-2 Forms, but now asserts he is an employee. Treasure recognized

Claimant as his employee entitled to workers' compensation benefits in 2008 and never provided Claimant a 1099 Form, but now asserts he is an independent contractor. Neither has followed earnings reporting requirements.

53. The Idaho Supreme Court has observed:

> The clean hands doctrine "stands for the proposition that 'a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' " Gilbert v. Nampa School District No. 131, 104 Idaho 137, 145, 657 P.2d 1, 9 (1983) (citing 27 Am.Jur.2d Equity § 136 (1996)). A trial court's discretion to apply the clean hands [doctrine] has been stated in broad terms:
>
> The clean hands doctrine ... is not one of absolutes and [it] should be applied in the court's discretion, so as to accomplish its purpose of promoting public policy and the integrity of the courts.

Ada Cty. Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 370, 179 P.3d 323, 333 (2008).

54. Treasure's failure to withhold taxes or provide either a W-2 or 1099 Form and Claimant's acquiescence therein, are significant but do not warrant estoppel.

55. Payment at regular intervals is consistent with a direct employment relationship. Daily v. Dentone, 2006 WL 3592567 (Idaho Ind.Com. 2006); Stoica v. Pocol, 1999 WL 634439 (Idaho Ind.Com. 1999). In the present case, $10.00 per ride for galloping was the standard rate at the track. Treasure testified he regularly paid Claimant in cash amounts of $200.00 to $500.00 according to the number of rides he completed. Treasure testified that when Claimant came to his ranch in Hammett to break colts for him, he paid Claimant "$10 a mount, same deal." Claimant's Exhibit I, p. 11 (Deposition of Defendant, p. 33, l. 23). Treasure specifically testified that in 2013 he did not pay Claimant a salary of $500.00 per week, but that he did pay Claimant up to $500.00 at a time for the galloping he had completed.

56. In contrast, Claimant testified that during the off track season, Treasure paid him $400 per week for breaking colts at Treasure's ranch and also provided housing for two nights each week at the ranch. Treasure did not otherwise pay for mileage or travel expenses. Claimant estimated that during the months he galloped for Treasure at the track, he rode 10 horses per day, six days per week, and earned an average of $500 per week. Claimant specifically testified Treasure paid him $500.00 per week while at the track, but also acknowledged that Treasure did not pay him for rained out days. The testimony of main gallopers Green and Black is also consistent with paying main gallopers on a periodic (biweekly or monthly) basis. Claimant described the evolution of Treasure's payments for galloping horses at the track over the years of the parties' dealings:

> Pay dropped in 2005 to $8 a head and didn't go back up to $10 until probably when the track reopened in probably 2011.
>
> And I was paid by the head until probably 2011. And at that point, I was getting on 12 to 15 horses a day, and Paul wasn't handily handing out $750 checks a week. So he did put me on salary of $500 a week. And I stayed there until I dropped below eight horses a day, and then I would drop off salary and go back to on the head.

Transcript, p. 112, l. 22 through p. 114, l. 16. Claimant indicated earnings of $500 per week when he completed the Form 1, and $500 is also the precise amount that Treasure gave Claimant to help him a few weeks after the 2013 accident.

57. Considering the conflicting testimony between Claimant and Treasure regarding whether Treasure generally paid Claimant $500.00 per week in 2013, and noting the inaccuracy of Treasure's testimony in other areas as shown by multiple witnesses, the Referee finds Claimant's testimony more credible than Treasure's and concludes that Treasure generally paid Claimant $500 per week while at the track in 2013.

58. Although weekly payment is consistent with direct employment, the failure to withhold taxes has long been recognized as critical and thus is more significant. See generally Peterson v. Farmore Pump & Irrigation, 119 Idaho 969, 972, 812 P.2d 276, 279 (1991). Overall, the manner of payment factor indicates an independent contractor relationship.

59. Furnishing major items of equipment. The next factor in distinguishing an employee from an independent contractor is whether the principal furnishes major items of equipment. If the person for whom services are performed furnishes significant tools, materials, or other equipment, this indicates a direct employment relationship. Matter of Hanson, 114 Idaho 131, 754 P.2d 444 (1988). The rationale for this test has been explained:

> In applying the test of who furnishes equipment, it is essential to bear in mind the rationale underlying the test. When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business. The owner of a $10,000 truck who entrusts it to a driver is naturally going to dictate details such as speed, maintenance, and the like, in order to protect his investment. Moreover, since he has capital tied up in this piece of equipment, he will also want to ensure that it is kept as productive and busy as possible. .... This being the rationale, the rule should not be applied to items of equipment whose size and value are not so large as to provide this incentive for control and for efficient employment of capital.

1B A. Larson, The Law of Workmen's Compensation, § 44.34(b). Furnishing relatively inexpensive consumable supplies does not provide an incentive for control and is not probative of direct employment. Berg v. Cady, 86 IWCD 27, p. 1045 (1986).

60. In the present case, Claimant emphasizes that Treasure provided all the tack and horses to be galloped, which Claimant asserts are the most important items of equipment needed to exercise horses. While Treasure provided the horses, this is not unlike a car owner providing the car with seats which an independent auto mechanic test drives and repairs. The evidence does not show whether the tack Treasure provided was of sufficient value to constitute major or significant equipment providing an incentive for control. Claimant provided his own helmet and

boots and may have provided his own vest in 2013. Overall, this factor does not suggest a direct employment relationship.

61. Liability upon terminating relationship. The final factor in distinguishing an employee from an independent contractor is whether the principal can terminate the relationship without incurring liability.

62. The parties herein had a long-standing business relationship. Claimant worked with Treasure regularly commencing in 2005. In 2008, Treasure recognized Claimant as his direct employee entitled to workers' compensation benefits. When the track was closed for several seasons, Claimant worked for Treasure at his ranch in Hammett. When the track reopened Claimant resumed galloping horses for Treasure. At the time of the July 17, 2013 accident, Claimant worked first and primarily for Treasure. Claimant believed Treasure could fire him if he did not gallop Treasure's horses first and Claimant affirmed he could quit at any time without liability. Treasure asserts he never hired Claimant for more than ride by ride or day to day contract labor, and could cease using him to gallop horses at any time. Treasure adamantly insisted that no liability arose from either party terminating the business relationship.

63. The record establishes that either party could terminate the business relationship at any time without incurring liability. However, given the circumstances presented in this case, termination without liability is as indicative of day to day or ride by ride contract labor as it is of direct employment. Thus this factor is considered neutral.

64. Weighing the four factors. The key to determining whether a direct employment relationship existed is whether Treasure had the right to control the time, manner, and method of executing the work, as distinguished from the right to merely require the results agreed upon. The workers' compensation law is to be construed liberally in favor of the claimant in order to

promote justice and achieve the objectives of the Act. "When a doubt exists as to whether an individual is an employee or an independent contractor under the worker's compensation act, the act must be given a liberal construction in favor of finding the relationship of employer and employee." Hanson v. BCB, Inc, 114 Idaho 131, 133, 754 P.2d 444, 446 (1988).

65. In the present case, the evidence supporting both parties' positions is closely balanced. Treasure's payment without withholding taxes clearly suggests Claimant was an independent contractor. Treasure did not provide any major equipment suggestive of direct employment. The parties' ability to terminate the relationship at any time is consistent with both direct employment and day to day contract labor. Most persuasive is the direct evidence establishing that Treasure required Claimant to gallop his horses first, regularly specified the time to begin galloping, and expected Claimant to perform additional duties beyond that of a galloper. Considered collectively, the four factors which evaluate the right to control and distinguish an employee from an independent contractor indicate that Claimant was a direct employee of Treasure. From the credible evidence presented in this case, the Referee finds that Claimant was an employee of Treasure at the time of his accident on July 17, 2013.

66. Claimant has proven he was an employee of Treasure at the time of his accident on July 17, 2013.

67. **Medical care.** The next issue is Claimant's entitlement to medical care. Idaho Code § 72-432(1) mandates that 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 reasonably required by the employee's physician or needed immediately after an injury 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) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

68. As a result of his July 17, 2013 industrial accident, Claimant incurred reasonable and necessary medical expenses for medical treatment, including treatment by Dr. Spelich, in the total amount of approximately $54,951.32.

69. Claimant has proven his entitlement to medical benefits due to his industrial accident in the amount of approximately $54,951.32 plus accruing interest.

70. **Temporary disability.** Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a

> reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

71. In the present case, Claimant's average weekly wage at the time of his accident was $500.00. Claimant alleges entitlement to temporary total disability benefits as a seasonal employee at the rate of $260.00 per week. After surgical repair of his fractured femur in July 2013, Claimant started breaking a horse again in November 2013, although he had not yet been released to work by his doctor. Treasure paid Claimant $500.00 in cash a few weeks after the 2013 accident to hold him over. Transcript, p. 125. Claimant requests total temporary disability for at least 12 weeks.

72. Claimant has proven his entitlement to total temporary disability benefits from July 18, 2013, through October 31, 2013. Treasure is entitled to credit for payment of $500.00.

73. **Permanent partial impairment.** The next issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

74. In the present case, Dr. Spelich rated Claimant impairment due to his right femur fracture at 3% of the whole person. Claimant has proven his entitlement to permanent impairment benefits of 3% of the whole person due to his industrial accident.

75. **Idaho Code § 72-210 penalties.** Idaho Code § 72-210 allows Claimant to collect reasonable attorney fees, costs, and a statutory penalty equal to 10% of the compensation awarded from an uninsured employer. At the time of Claimant's industrial accident, Treasure had failed to insure his liability under the Idaho Workers' Compensation Laws. Claimant has proven his entitlement to a 10% penalty, attorney fees and costs pursuant to Idaho Code § 72-210.

CONCLUSIONS OF LAW

1. Claimant has proven he was an employee of Defendant at the time of his accident on July 17, 2013.

2. Claimant has proven his entitlement to medical benefits due to his industrial accident in the amount of approximately $54,951.32 plus accruing interest.

3. Claimant has proven his entitlement to total temporary disability benefits from July 18, 2013, through October 31, 2013. Defendant is entitled to credit for payment of $500.00 already made.

4. Claimant has proven his entitlement to permanent impairment benefits of 3% of the whole person due to his industrial accident.

5. Claimant has proven his entitlement to a 10% penalty, attorney fees and costs pursuant to Idaho Code § 72-210.

RECOMMENDATION

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

DATED this 19th day of February 2016.

INDUSTRIAL COMMISSION

__/s/_____
Alan Reed Taylor, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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__/s/_____