

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL L. JENSEN,

Claimant,

v.

GREAT SALT LAKE ELECTRIC, INC.,

Employer,

and

ZURICH AMERICAN INSURANCE
COMPANY,

Surety,

Defendants.

IC 2011-018477

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

September 4, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing on April 5, 2012 in Idaho Falls, Idaho. Michael R. McBride of Idaho Falls represented Claimant. David P. Gardner of Pocatello represented Defendants. No post-hearing depositions were taken. Both parties submitted post-hearing briefs. The matter came under advisement on August 6, 2012, and is now ready for decision.

ISSUE

By agreement of the parties at the hearing, the sole issue to be decided as a result of the hearing is whether the Industrial Commission of the State of Idaho has jurisdiction of Claimant's work-related injury/accident. The parties specifically reserved the noticed issue of whether

Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804. Defendants raised an additional issue related to the statute of limitations pursuant to Idaho Code § 72-218 for the first time in their post-hearing brief. Claimant addressed the issue insofar as to argue that it was not timely raised. The Referee agrees with Claimant; the statute of limitations issue will not be addressed herein.

CONTENTIONS OF THE PARTIES

Claimant contends that Idaho has jurisdiction over his workers' compensation claim under Idaho Code § 72-217(3) because his contract of hire was made in Idaho, his work was localized in Wyoming, and Employer GSL Electric (GSL) was not subject to workers' compensation laws in that state. Defendants counter that Claimant's contract of hire was made in Wyoming and, therefore, he has failed to meet the requirements of any statute that would confer jurisdiction upon the Idaho Industrial Commission to adjudicate his workers' compensation claim.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Jack Wood taken at the hearing; and
2. Joint Exhibits numbered 1-11, which includes Claimant's prehearing deposition taken on January 24, 2012 (Exhibit 6).

After having considered the stipulated exhibits and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant, an electrician, was at all relevant times domiciled in Idaho Falls, Idaho (Idaho). GSL, an electrical contractor, maintains its principal place of business in Salt Lake City, Utah (Utah) and performs work in several states, including Utah, Idaho and Wyoming.

Many of GSL's jobs are large construction projects which require workers to temporarily relocate. On these jobs, some of which have been located in Idaho, GSL sets up a temporary office in a "Conex" trailer from which it manages operations. However, GSL maintains no permanent physical offices in Idaho.

2. Gale Danielson, a childhood friend of Claimant's, was a supervisor on a job for GSL in Evanston, Wyoming (Wyoming) in August 2008. He encouraged Claimant to call Jack Woods, GSL general supervisor, to see about a job. Mr. Woods was in charge of hiring, firing and placing employees.

3. Claimant made a "cold call" to Mr. Woods at the GSL offices in Sandy, Utah. Mr. Woods confirmed that he needed electricians on the Wyoming job. Claimant's telephone presentation interested Mr. Woods, so on August 8, 2008, Mr. Woods travelled from Utah to Idaho to interview Claimant. Claimant and Mr. Woods met at Chili's Restaurant in Idaho Falls where they discussed potential GSL job sites where Claimant might be employed. Mr. Woods bought lunch and presented Claimant with a job application, which Claimant completed. They discussed Claimant's qualifications, GSL jobs, and Claimant's starting salary, as well as his potential future salary in the event he could pass an electrician's certification test. Claimant left the meeting understanding that he would be hired so long as he passed a drug test.

4. On August 15, 2008, Claimant took a drug test, at GSL's direction and expense, in Idaho Falls. Claimant testified that Mr. Woods (from Utah) called that same day and told Claimant (in Idaho) he had passed the test, and made arrangements to start work on the Wyoming job. Claimant also testified that Mr. Woods told him he would need to travel to Wyoming "on his own dime" to show his interest in the job since Mr. Woods had borne the expense of travelling to Idaho to conduct the interview. Claimant testified persuasively that he

believed Mr. Woods had hired him during the phone call and that he would not have travelled to Wyoming unless he thought he had the job because he could not otherwise afford the expense.

5. Mr. Woods, however, testified that Claimant could not have been hired before he completed orientation in Wyoming because GSL does not consider an employee to be hired until after his work references are confirmed *and* he successfully passes a drug test *and* he completes orientation. Therefore, Mr. Woods reasoned, although he could not recall what he told Claimant to induce him to travel to Wyoming, he did not believe that he told Claimant he was hired.

6. The written report of Claimant's drug test results is dated August 20, 2008. Mr. Woods did not recall being notified earlier than that date that Claimant had passed. He also did not recall whether he checked Claimant's work references. Nevertheless, on August 18, 2008, Claimant *did* travel 3 ½ hours from Idaho to Wyoming to complete the orientation process and start work. In addition, Mr. Woods travelled from Utah to Wyoming (approximately 1 ½ hours) to participate in Claimant's orientation. No other workers participated in orientation; just Claimant. Following Claimant's orientation, Mr. Woods apparently returned to Utah.

7. At orientation, Claimant was advised of GSL's safety policies and procedures and he was required to sign documents acknowledging the same, as well as to complete typical employment documents including an I-9 Employment Eligibility Verification. Claimant did not undergo any testing or other activities that could have potentially disqualified him from employment. He was trained on safety procedures he needed to know before starting work.

8. On January 14, 2009, Claimant was injured on the job in Wyoming. He filed a claim and workers' compensation benefits were administered pursuant to Utah law. GSL did not have workers' compensation insurance in Wyoming.

9. On February 11, 2009, a GSL employee whose basis, if any, for knowing where Claimant was hired is not disclosed in the record, prepared a First Report of Injury (FROI) form indicating Wyoming as Claimant's state of hire. Claimant did not see or sign this document until he received a copy during these proceedings. On August 3, 2011, one day before he filed his Idaho claim, Claimant executed a FROI indicating Idaho as the state of hire. The Referee finds neither of these documents assistive in determining where Claimant was hired.

WITNESS CREDIBILITY

10. The Referee finds both witnesses credible. At the time of the hearing, as well as upon reviewing the hearing transcript, the Referee noted the apparent sincerity of each man. Neither had a crystal-clear memory of the relevant conversations between them, and neither pretended to. However, Claimant's testimony is more persuasive than Mr. Woods' on the question of whether Mr. Woods told him, over the telephone on or about August 15, 2008, that he should go to Wyoming to start work. Mr. Woods did not remember making the call. However, he also did not recall whether he checked Claimant's references, or how (or whether) he learned that had Claimant passed his drug test before Claimant started work on August 18, 2008, two days before the date the test result report was issued. He could not shed any light at all on the actual communications that prompted both him and Claimant to travel to Wyoming on August 18, 2008. All Mr. Woods really knows is that Claimant completed orientation on August 18, 2008 because orientation documents in the record bear that date. It is understandable that after more than three years, Mr. Woods would not remember making a call to Claimant in August 2008. It is also understandable that Claimant would have remembered it because it precipitated an action on his part – it prompted him to travel to Wyoming for a job.

11. Mr. Woods's testimony also lacks sufficient credibility or support in the record to establish that GSL's hiring prerequisites (reference clearance, clean drug test, orientation completion) were applied in Claimant's case. There is insufficient evidence in the record to support Mr. Woods's testimony about prerequisites to hiring, and, in any case, Mr. Woods was unable to verify that he had checked Claimant's references or that he knew Claimant's drug test results were clean before he started work on August 18, 2008. As a result, his testimony that Claimant could not have been hired before he completed orientation is afforded little evidentiary weight.

DISCUSSION AND FURTHER FINDINGS

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, 793 P.2d 187 (1990). The humane purposes that it serves leave no room for narrow technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996). While the workers' compensation statutes are to be liberally construed, the benefit of liberal construction does not apply to the findings of fact. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 834 P.2d 878 (1992).

JURISDICTION

12. I.C. § 72-217 describes the circumstances under which Idaho Workers' Compensation laws may be given extraterritorial effect. That section provides:

Extraterritorial coverage. If an employee, while working outside the territorial limits of this state, suffers an injury or an occupational disease on account of which he, or in the event of death, his dependents, would have been entitled to the benefits provided by this law had such occurred within this state, such employee, or, in the event of his death resulting from such injury or disease, his dependents, shall be entitled to the benefits provided by this law, provided that at the time of the accident causing such injury, or at the time of manifestation of such disease:

(1) His employment is principally localized in this state; or

- (2) He is working under a contract of hire made in this state in employment not principally localized in any state; or
- (3) He is working under a contract of hire made in this state in employment principally localized in another state, the workmen's compensation law of which is not applicable to his employer; or
- (4) He is working under a contract of hire made in this state for employment outside the United States and Canada.

Idaho Code § 72-220 defines when a person's employment is "principally localized" in a particular state:

Locale of employment. (1) A person's employment is principally localized in this or another state when:

(a) His employer has a place of business in this or such other state and he regularly works at or from such place of business; or

(b) He is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

(2) An employee whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or another such state, and, unless such other state refuses jurisdiction, such agreement shall be given effect under this law.

Idaho Code § 72-221 sets forth a presumption that contracts of hire made in Idaho include an agreement that Idaho Workers' Compensation Law shall govern industrial accidents occurring outside Idaho:

An employer who hires workmen within this state to work outside the state may agree with such workmen that the remedies under this act shall be exclusive as to injuries received and occupational diseases contracted outside this state arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement.

13. Pursuant to these provisions, Idaho law may govern an injured worker's right to Workers' Compensation benefits where the injured worker's employment is either "principally localized" in the state or the claimant is working under a contract of hire made in this state where certain other attendant conditions are met. The evidence fails to disclose that Claimant's

employment was principally localized in the state of Idaho. Simply, none of the circumstances set forth at I.C. § 72-220 are implicated in this case, leaving the Referee to conclude that Claimant has failed to establish that his employment is localized in the state of Idaho. Therefore, it must first be determined whether Claimant was working under a contract of hire made in Idaho.

CONTRACT OF HIRE

14. The first inquiry is whether an express contract of hire existed between the parties. An express contract is "...an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing." *Kennedy v. Assoc. Loggers Exchange*, 1995 IIC 1179 citing *Black's Law Dictionary* (emphasis omitted). Here, the record establishes that Claimant and Mr. Woods discussed most of the terms of employment at their lunch meeting in Idaho on August 8, 2008. In addition to the location of the work and the need to pass a drug test, they also discussed Claimant's qualifications, his starting salary and his target salary after obtaining additional certification. They did not discuss a start date, apparently because Claimant had not yet passed a drug test. However, when he did (in Idaho), on August 15, 2008, Mr. Woods called Claimant in Idaho (as determined above) and provided a start date of August 18, 2008, and the parties agreed Claimant would pay the travel expense to Wyoming to signify his interest in the job. All that was left at this point was for each party to perform his or its obligations, which they ultimately did. The orientation process involved no qualification or testing, but merely activities required to prepare a GSL employee to start work. Although Claimant did not report his orientation time on his timecard, there is inadequate evidence to establish that he was, nevertheless, not legally

entitled to payment for the time he spent completing these activities. The parties formed an express contract of hire in Idaho on August 15, 2008.

15. Even if the parties did not enter into an express contract on August 15, 2008, they entered into an implied contract on that date. An implied contract is one:

...inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding.

An implied contract is one inferred from conduct of parties and arises where plaintiff, without being requested to do so, renders services under circumstances indicating that he expects to be paid therefor, and defendant, knowing such circumstances, avails himself of benefit of those services. [Citation omitted]. It is an agreement which legitimately can be inferred from intention of parties as evidenced by circumstances and ordinary course of dealing and common understanding of men.

Kennedy v. Assoc. Loggers Exchange, 1995 IIC 1179. The primary focus of the implied contract inquiry in this case is “whether a true contract of hire can be inferred by the parties [*sic*] conduct, agreement, and tacit understanding” before Claimant left Idaho. *Guntrum v. DSC Corp.*, 2000 IIC 0704.

16. Claimant’s understanding that he was hired as of August 15, 2008 is supported by the weight of the evidence in the record, which establishes:

- a. GSL needed additional workers on the job in Wyoming when Claimant called Mr. Woods in early August 2008;
- b. GSL sent Mr. Woods to interview Claimant in Idaho, signifying its interest in this particular candidate;
- c. At the Idaho interview, the parties discussed and, based upon the notes on the application in the record (*see* Exhibit 1) combined with Claimant’s testimony,

apparently agreed to Claimant's intended work location and salary based upon his qualifications;

- d. Following the Idaho interview, Claimant understood he would be hired if he passed a drug test;
- e. GSL paid for Claimant's drug testing in Idaho, further signifying its interest consistent with Claimant's understanding;
- f. GSL contacted Claimant in Idaho on August 15, 2008 and told him to report to the Wyoming job site on August 18, 2008 for orientation and work;
- g. Mr. Woods travelled from Utah to Wyoming to conduct Claimant's orientation there so that he could start work later that day (as opposed to requiring Claimant to travel to Utah for orientation);
- h. Claimant was put to work in Wyoming without further qualification or testing, all of which had already been done in Idaho, and he was only required to complete administrative and typical first-day-on-the-job activities on arrival in Wyoming; and
- i. GSL failed to adduce sufficient evidence to establish an understanding with Claimant that he would only be hired following completion of orientation.

17. Defendants argue that Claimant's acknowledgement that Mr. Woods wanted him to pay his own way to Wyoming to show his interest in the job evidences an understanding on Claimant's part that he would not have a job *until* he performed this task and, therefore, the contract of hire could not have been formed until Claimant arrived in Wyoming to signify his acceptance. However, the Referee finds the requirement that Claimant pay his own way to Wyoming goes to the consideration for the contract and not to the formation. It is apparent that

an employee must show up at a work site to perform nearly all types of jobs, so to render this a requirement for purposes of contract formation in a case like this one, where the relevant evidence is in dispute, would unfairly favor the foreign jurisdiction to the point of eviscerating the statute. Claimant promised to travel to Wyoming on his own dime and, in return, Mr. Woods assured Claimant that a job would be waiting for him. In the absence of such an agreement, Claimant would not likely have made the long and expensive trip, and Mr. Woods would not likely have travelled to Wyoming to conduct Claimant's orientation so he could start work later that day.

OTHER CONDITIONS

18. It having been determined, above, that Claimant and GSL entered into a contract for hire in Idaho, Claimant next asserts that Idaho has jurisdiction over his workers' compensation claim pursuant to Idaho Code § 72-217(3) because his employment was principally localized in Wyoming, the workers' compensation law of which is not applicable to GSL. It is undisputed that Claimant's employment was principally located in Wyoming. Further, Claimant asserts, and Defendants do not dispute, that GSL did not carry workers' compensation insurance coverage in Wyoming. This does not establish that GSL was not subject to Wyoming workers' compensation coverage, but a review of Wyoming law reveals that workers' compensation coverage in that state is only compulsory for certain employers of workers in ultrahazardous, certain governmental and other occupations which do not resemble the employment relationship between Claimant and GSL. (*See* Wyoming Code § 27-14-102 (a)(viii)).

19. The Referee finds Claimant has established that the laws of the state of Idaho should be given extraterritorial effect under the provisions of Idaho Code § 72-217.

20. In addition, there is no evidence to suggest that the contract between Claimant and GSL contained terms negating the presumption, set forth in Idaho Code § 72-221, that, when a contract for hire is made in Idaho, workplace injuries and occupational diseases incurred in the performance of that contract, even when occurring outside of Idaho, are subject exclusively to the remedies provided under Idaho Workers' Compensation Law. Therefore, Claimant has also established that Idaho law should be given extraterritorial effect under the provisions of Idaho Code § 72-221.

CONCLUSION OF LAW

Claimant has proven that Idaho has jurisdiction over his workers' compensation claim.

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 23rd day of August, 2012.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2012, 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:

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/s/ _____

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ORDER

September 4, 2012

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 has proven that Idaho has jurisdiction over his workers' compensation claim.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 4th day of September, 2012.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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sjw

/s/