BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CAMERON DEMOTT TYLER, Claimant, v. MASTERPIECE FLOORS, INC., Employer, and NORGUARD INSURANCE COMPANY, Surety, Defendants.	**IC 2019-028028** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** FILED SEP 15 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-712, this matter came to hearing before the Idaho Industrial Commission on May 1, 2023. Sam Johnson represented Claimant. Chad Walker represented Defendants. The parties produced oral and documentary evidence at hearing held before the full Idaho Industrial Commission and submitted post-hearing briefs. No post-hearing depositions were taken. The matter came under advisement on July 25, 2023.

ISSUES

1. Whether the Idaho Industrial Commission has jurisdiction to determine if Claimant's injury was proximately caused by the willful or unprovoked physical aggression of Masterpiece Floors under I.C. § 72-209(3).

2. Whether Claimant's Industrial injury was proximately caused by the willful or unprovoked physical aggression of Masterpiece Floors under I.C. § 72-209(3).

CONTENTIONS OF THE PARTIES

Claimant contends that the District Court erred when it determined that the issue of jurisdiction under I.C. § 72-209(3) must be determined by the Industrial Commission per the first to file rule. Under *Dominguez v. Evergreen Resources, Inc.*, 121 P.3d 938, 942-43,142 Idaho 7 (Idaho 2005), the Industrial Commission and the District Court have concurrent jurisdiction to determine whether I.C. § 72-209(3) applies to a case until a determination is issued by one tribunal or the other. As the District Court determined Claimant's tort action prior to any determination being issued or adjudicated by the Commission, the District Court had the right to determine jurisdiction and issue the default judgment. Claimant also contends that I.C. § 72-209(3) provides the District Court with jurisdiction for a tort claim in this case, as the amputation of his finger when operating the table saw was proximately caused by employer's willful or unprovoked physical aggression. Employer was aware of Claimant's lack of experience and training, put him on a job site with two other apprentices, no supervisor on site, and instructed Claimant to operate the saw with no protective guard.

Employer/Surety contends that under *Dominguez v. Evergreen Resources, Inc.*, 121 P.3d 938, 942-43,142 Idaho 7 (Idaho 2005), jurisdiction to determine whether I.C. § 72-209(3) applies to a case belongs to the tribunal where the case was first filed. As the workers compensation claim was filed months before the District Court action, the Idaho Industrial Commission had sole jurisdiction to determine the issue. The default judgment was untimely entered for lack of jurisdiction, and further proceedings on that judgment were properly stayed for the Industrial Commission to determine jurisdiction. Due to the factual nature of I.C. § 72-209(3), determination of jurisdiction will also resolve the question of whether Employer's conduct constituted willful unprovoked physical aggression. The facts of this case do not support a finding that employer's

conduct constituted willful unprovoked physical aggression. Therefore, I.C. § 72-209(3) does not grant an exception to the worker's compensation exclusive remedy rule.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Idaho Industrial Commission legal file,
2. Hearing Testimony of Tyler Cameron,
3. Hearing Testimony of Paul Wilke,
4. Joint Exhibits 1-14 as stipulated by the parties prior to the hearing
5. Joint Exhibit 15 as admitted at hearing, consisting of still shots taken from Exhibit 3, but excluding the proposed demonstrative exhibit.

All outstanding objections are OVERRULED.

FINDINGS OF FACT

I. History of the Injury

1. On September 13, 2019, Claimant Cameron Tyler was working for Masterpiece Floors, Inc. when he initiated a rip cut on a table saw without utilizing a push stick or rip fence, and the safety guard was not provided. The board spun out of control, and the saw amputated the majority of his right index finger and lacerated or fractured the remainder of his fingers. Joint Hearing Exhibit ("JE") 1:1, 4:32, 5:96; Hearing Transcript ("Tr.") 40:16-20.

2. The Claimant was attempting to make a rip cut using a DeWalt ten-inch table saw (JE 8:153-154, 156, 166) to cut a piece of flooring to size in order to fill the gap between a wall and the nearest floorboard. JE 8:153, 175. Due to the known risk of kickbacks, this process is particularly dangerous. Kickbacks throw the wood back towards the operator, potentially dragging the operator's hand into the blade, causing injury to the fingers or hand. JE 8:175. The DeWalt saw manual lists twelve specific preventative measures to avoid kickback injuries. JE 8:169. To

correctly and safely make a rip cut, one should utilize a push stick, blade guard, splitter, anti-kickback teeth, and the rip fence. JE 8:169, 175. A cutting operation should most emphatically not be done freehand. JE 8:167, 175. As acknowledged by Employer, making a cut without the guard runs the risk of kickbacks. JE 9:182. Employer reviewed the saw manual and it was standard to review it with the people who used the saw. JE 10:211. However, Claimant had not received training covering these concerns. He did not use a push stick, rip fence or guard; he used the saw freehand. JE 8:153; Tr. 45-47.

3. Claimant had just begun working for employer six weeks prior to the injury and had no prior knowledge of the flooring or construction industry. JE 1:1, 5:85-86, 89, 11:244; Tr. 30-31. He had no instruction or training beyond what happened on the job under his supervisor. JE:9181; Tr. 60-61. At deposition Claimant's supervisor could not recall if he had ever been on a job site with Claimant. JE 9:189-90. Claimant's supervisor was also the district and installation manager and supervised multiple crews. JE 9:181-83, 10:202. Employer had high turnover. JE 9:183.

4. Claimant's supervisor had previously shown him how to turn the saw on, raise and lower the blade, turn it off and to properly put the saw away, but had not provided any other instruction, training, or warning regarding the saw. Tr. 35, 47, 116. Claimant had previously been told how to measure the wood and install it, but had not been shown how to actually make the rip cut. JE 8:153; Tr. 47. The saw manual was not on site, and had never been available to the Claimant. Tr. 45.

5. While it was Employer's stated policy to have weekly safety meetings, Employer's assertion that a standardized robust regime of training occurred or was thought to have occurred with Claimant is unsupported by the evidence. Despite Employer's testimony that it is a detailed

record keeper, there are no records that document any such training. JE 9:181, 9:186, 10:210; Tr. 70, 72, 90, 91. Employer's testimony is inconsistent regarding the timing of the safety meetings and Claimant's timesheets indicate he often arrived after the meeting would have been held, even if his general 7:00 AM to 5:00 PM schedule would cover any of the possible meeting times. JE 8:156, 9:181-82, 10:204, 10:227; Tr. 64. Claimant recalled attending one safety meeting while employed by Employer and was not aware of any missed meetings (Tr. 114-115) or of any broader safety program. JE 8:155. Employer also references the employee handbook safety requirements and a separate safety checklist as safety training, (JE 10:204; Tr. 60), yet neither document addresses precautions beyond eyeglasses, ear protection, knee pads, dust masks, shoes, boots, hardhats, and gloves. JE 10:240-43. While Employer originally had a "guy we dedicated to training", this individual "quit and went and stole some of our work." JE 9:190. Being solely responsible for Claimant's training, Employer was aware of Claimant's lack of knowledge and minimal experience relating to the table saw.

6. The injury occurred after Claimant, two other apprentice workers, (JE 9:183; Tr. 49, 116), and possibly an unidentified third worker who was not a manager or supervisor, (JE 8:156; Tr. 48), were left at the job site without their supervisor or any lead worker, (JE 1:1, 5:96, 8:157; Tr. 49, 116), and with the responsibility of flooring the residence as they had done at other sites. The workers also had the responsibility of assembling the table saw and reinstalling the safety equipment – presumably meaning the blade guard, but the witness did not specify. JE 9:184. Per the supervisor, workers could call him for tasks they were uncomfortable with. JE 9:183. However, the supervisor was also the district manager and handling three to four crews in the neighborhood of Claimant's work site, as well as probably two other jobs the day of the injury. JE 9:183, 189. He was not present at the work site and had given the workers their instructions via text. JE 8:157-

158; Tr. 116-17.

7. There was no blade guard on the saw at the time of injury. JE 9:183. Per manufacturer's instructions, the blade guard was removable, but should have been used whenever possible. JE 8:169. It is disputed whether a guard was available for use. Claimant testified he had never seen one on the job site where the accident occurred, nor on any other saw or at any other site. JE 8:154; Tr. 35, 44-45. Claimant's supervisor testified that a guard was available and had been present in his inspection of equipment after the accident. JE 9:182-83. However, no photos show the area where the guard is stored. Tr. 68-69. Despite conducting an inspection after the injury, (JE 9:183), Employer has not provided any pictures or videos documenting the guard's presence or indeed anything documenting an investigation. While the Commission finds the guard was not available for Claimant's use, Employer did not receive any warning or have information indicating that the guard was missing.

8. Claimant self-initiated the task of making the rip cut. Tr. 50-51. There is no indication Claimant was pressured into using the saw, other than the general understanding he was expected to work and complete the job. His job description did not include operation of a table saw. JE 11:249; Tr. 33. While Claimant had previously used the saw five to six times, (Tr. 50), the supervisor did not let employees actually make cuts until they were comfortable using the saw and he had observed them using the saw. JE 9:181, 190. Claimant acknowledged he was not specifically approved to use a table saw. Tr. 33. The evidence does not suggest that Claimant's supervisor was aware Claimant had taken to using the saw independently. Work crews were generally instructed by the supervisor that they were allowed to cut on the table saw to get floors finished on site. Tr. 54. Claimant had observed other apprentices using the saw who were also performing the same tasks as himself. Tr. 111. However, apprentices progressed in their tasks and

responsibilities after receiving instruction from the supervisor and then demonstrating competency. Tr. 77-78.

9. There was no direct or implied instruction from Employer to use the saw without safety equipment. Claimant's only testimony supporting that assertion is his own deduction that removing the guard would make production faster. JE 8:154; Tr. 35, 44-45. And to the contrary, Claimant's supervisor testified he always told workers to use the guard and would correct it if he saw someone using the saw without a guard. JE 9:182.

10. When Claimant made the cut, operating the saw without knowing of the required safety precautions, the board spun and his hand was dragged into the blade path, resulting in the amputation and other injuries. While the index finger was cleanly amputated, the laceration cut the entire length of the finger and damaged the ulnar neurovascular structures. It could not be replanted. JE 4:33. Claimant later underwent a surgical amputation of his index finger above the second ray. JE 4:75.

II. Procedural History

11. Employer did not file an OSHA report for the incident. Tr. 105.

12. A worker's compensation notice of injury was submitted on September 19, 2019. JE 1:1. A complaint was filed with the Commission on July 8, 2020. JE 14:298, 350. Claimant received worker's compensation benefits including payment for a 22% upper extremity impairment, temporary disability, permanent partial disability, and medical benefits. JE 7:139, 14:296.

13. On April 5, 2021, Claimant filed a civil tort action against Employer in district court. JE 14:304. The complaint summarized the facts of the injury, alleged jurisdictional grounds under I.C. § 72-209(3), and alleged simple negligence as grounds for relief. JE 14:306-07. In a

default judgment served on November 10, 2021, Claimant was awarded $380,159.09. JE 14:329-30. Employer moved to set aside the default judgment on the grounds it was void for lack of jurisdiction, arguing that the Idaho Industrial Commission had the first right to determine jurisdiction under *Anderson v. Gailey* and the first to file rule. JE 14:336. The District Court held that the question of whether jurisdiction existed was properly determined by the Idaho Industrial Commission, and stayed the proceedings. JE 14:374.

14. The parties presented a stipulation for declaratory judgment to the Commission requesting a finding on jurisdiction. The Commission held that the correct motion was one for hearing on the issue of jurisdiction and the motion was made. On May 1, 2023, the matter came to hearing. Claimant continues to argue that the District Court had jurisdiction to enter default and has preserved that objection for appeal.

DISCUSSION

15. Under the exclusive remedy rule, an injury caused by an accident arising out of and in the course of employment is generally compensable exclusively through the Idaho Worker's Compensation Act. I.C. §§ 72-201, 72-209, and 72-211; *Richardson v. Z & H Constr., LLC*, 167 Idaho 345, 349, 470 P.3d 1154, 1158 (2020). Nevertheless, under I.C. § 72-209(3) an employer may be held liable in district court where the employee's injury is proximately caused by the willful or unprovoked physical aggression of employer. The Idaho Industrial Commission and the district court have concurrent jurisdiction to determine whether they have jurisdiction to consider a claim. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976). As discussed below, when the District Court declined to exercise its concurrent jurisdiction in favor of the Industrial Commission under the first-to-file rule, the determination of whether I.C. § 72-209(3) entitles the Claimant to pursue a tort action properly came before the Idaho Industrial Commission. Under I.C. § 72-209(3) as written at the time of injury in 2019, the facts of this case do not support a finding of jurisdiction

subjecting employer to tort liability.

I. Jurisdiction of the Idaho Industrial Commission

16. The first issue is whether the Idaho Industrial Commission or District Court has jurisdiction to determine whether Claimant may pursue a civil action under I.C. § 72-209(3).

17. In most cases, Workers' Compensation is the exclusive remedy for workplace injuries. I.C. §§ 72-201, 72-209, and 72-211; *Richardson v. Z & H Constr., LLC*, 167 Idaho 345, 349, 470 P.3d 1154, 1158 (2020). A determination that an injured worker has suffered a compensable injury typically proves that Industrial Commission jurisdiction over the claim is appropriate, and that claimant's injuries are only compensable under the workers' compensation laws. For example, a worker may suffer an injury while working for an another. If he files a claim with the Commission he must prove that he is an employee versus an independent contractor. A determination by the Commission that an injured worker is an employee would vest the Industrial Commission with jurisdiction over the claim, and workers' compensation would be the worker's exclusive remedy for his injuries. On the other hand, claimant may claim to be an independent contractor and file a claim against his principal in district court. A finding by the court that claimant is an independent contractor would vest the court with jurisdiction over the claim, and limit the worker to his common law remedy. In cases such as this, the Commission and the district court have concurrent jurisdiction to determine whether they have jurisdiction to consider a claim. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976). However, at the end of the day, the decision of one is binding on the other, and it is the entity with whom the claim is first initiated that has the first right to rule on the jurisdictional question.

> [I]f the notice of injury was filed with the Industrial Commission before the plaintiffs filed their original complaint with the district court, then the Industrial Commission has the first right to determine the jurisdictional issue, and its determination is res judicata upon the question of jurisdiction and the factual

questions upon which the determination of jurisdiction must necessarily turn.

Id. at 825, 156.

18. Here, applying the first-to-file rule per *Anderson* places the question of jurisdiction in the purview of the Idaho Industrial Commission. The worker's compensation claim was filed with the Commission on July 8, 2020. The civil complaint was filed in District Court on April 5, 2021. Therefore, the Commission has first right to determine the status of the claim regarding the application of I.C. § 72-209(3).

19. However, the Claimant has argued the winner of the "race to file" for purposes of I.C. § 72-209(3) is not determined by the timing of the filing of the claim or complaint as articulated in *Anderson*, but by whether a final jurisdictional determination has been made in one tribunal or the other as was analyzed in *Dominguez v. Evergreen Resources, Inc.*, 121 P.3d 938, 142 Idaho 7 (Idaho 2005). Claimant posits that while the Commission may have had the first right to rule on the jurisdictional question, the fact that no party invited the Commission's review of the issue before the entry of default in district court now renders the Commission's first right to consider the question moot.

20. A full discussion of *Dominguez* is necessary to weigh this argument. In *Dominguez*, Claimant suffered a debilitating brain injury after being sent into a toxic enclosed vessel by his employer, under circumstances implicating an act of willful or unprovoked physical aggression. The incident was reported to the employer's workers' compensation carrier, a claim was made on employee's behalf and the payment of benefits was initiated. An action was also filed by the injured worker in district court against Evergreen and its owner, Elias, alleging that claimant's injuries were caused by the willful or unprovoked physical aggression of his employer. Although the decision does not so state, it appears that the workers' compensation claim was made prior to

the filing of the district court action. Default judgement against Evergreen and Elias was eventually taken. On appeal, the employer first argued that the district court was without jurisdiction to hear the case because worker's compensation was claimant's only remedy. The employer argued that the claimant was entitled to either workers' compensation benefits for an accident/injury or civil damages for an intentional tort, not both. Since Dominguez had been receiving workers' compensation benefits, he was therefore foreclosed from pursuing his claim in district court. The Court rejected this argument, observing that an injured worker may be entitled to pursue a civil action for an act of willful or unprovoked physical aggression of employer while also receiving workers' compensation benefits. Workers' Compensation would be payable for a worker's injuries since, *vis a vis* the worker, the injuries were "accidental", notwithstanding that they may have been caused by a willful or unprovoked act of physical aggression of another. In these cases, either tribunal has jurisdiction to determine whether willful or unprovoked physical aggression took place, and such determination is binding on the other tribunal. *Id.* Moreover, citing *Anderson*, the Court noted that it is the jurisdiction in which a claim is first filed that has the first right to make the determination as to whether the worker's injuries were caused by an act of willful or unprovoked physical aggression. However, while the Industrial Commission may have had the first right to make the I.C. § 72-209(3) determination in *Dominguez*, it was never asked to do so by the parties. The parties appear to have chosen to forego the opportunity to ask the Commission to consider I.C. § 72-209(3):

> A decision by the Industrial Commission has *res judicata* effect only for those issues the Commission actually decides. Even if the Industrial Commission had determined Dominguez was entitled to worker's compensation, this would not be equal to a determination regarding whether he was the victim of willful or unprovoked physical aggression. Either issue is within the competence of the Industrial Commission, but in this case neither was subjected to a determination by

> that body. [...] Consequently, the district court was acting within its jurisdiction when issuing a judgment in this case.

Id. at 944 (internal citations omitted).

21. *Anderson* did not require the Commission to exercise its first right to consider the Idaho Code § 72-209(3) issue. It must be asked to do so, and in *Dominguez* that request never materialized. Instead, default was taken in the district court action, and the question of the Court's jurisdiction subsumed within that judgment.

22. The instant matter differs from *Dominguez* in several respects. First, the default judgment entered in *Dominguez* was not challenged at the district court level, as it was here. Here, following the entry of default judgment in the amount of $380,159.09, Employer moved to set aside the default judgment on the grounds it is void for lack of jurisdiction, arguing that the Commission had the first right to determine jurisdiction under the rule of *Anderson v. Gailey.* The district court has stayed further proceedings before it pending a decision from the Commission on the jurisdictional issue, and therefore there is no final judgment. Second, in *Dominguez*, the Commission was never asked to consider the question of whether claimant's injury was due to an act of willful or unprovoked physical aggression. Here, both the district court and the Commission have been asked to consider the question. The district court has declined to entertain the issue, but the Commission is also vested with jurisdiction to address the matter, and its decision will be res judicata of the question of whether there has been an act of willful or unprovoked physical aggression. Finally, where the question is before both jurisdictions, as it now is, under *Anderson,* the Commission has the first right to rule on the question of whether Claimant's injuries are the result of an act of willful or unprovoked physical aggression.

23. We conclude that the matter is properly before the Commission, and that the Commission may exercise jurisdiction over the question of whether claimant's injuries resulted

from the willful or unprovoked physical aggression of another.

II. Willful Or Unprovoked Physical Aggression Of The Employer Under I.C. § 72-209(3)

24. The next question is whether Claimant's injury was proximately caused by the willful or unprovoked physical aggression of the employer such that Claimant is entitled to pursue a cause of action in District Court under I.C. § 72-209(3).

25. As a preliminary matter, I.C. § 72-209(3) shall be applied as it existed on the date of injury. "Unless expressly stated, statutes should not be construed to be retroactive." *Stonecipher v. Stonecipher*, 131 Idaho 731, 735, 963 P.2d 1168, 1172 (1998). Here, Claimant's cause of action accrued at the time of the injury on September 13, 2019, and application of the current version of the statute – which came into effect on July 1, 2020 – would be retroactive. As the version of I.C. § 72-209(3) enacted in 2020 is not expressly retroactive, the 2019 version of the statute applies.

26. As written in 2019, I.C. § 72-209(3) provides an exemption from the exclusive remedy rule as follows:

> The exemption from liability given an employer by this section shall also extend to the employer's surety and to all officers, agents, servants and employees of the employer or surety, provided that such exemptions from liability shall not apply in any case where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer, its officers, agents, servants or employees, the loss of such exemption applying only to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto.

I.C. § 72-209(3) (2019). There are two ways the exception in I.C. § 72-209(3)(2019) may be met.

27. First, an injured worker may satisfy the exception by showing a willful act of physical aggression, meaning "the employer wished a specific individual employee harm and then effectuated some means appropriate to that end." *Gomez v. Crookham Co.*, 166 Idaho 249, 258, 457 P.3d 901, 910 (2020)(citing *Marek v. Hecla, Ltd.*, 161 Idaho 211, 220, 384 P.3d 975, 984 (2016)). This first path is not at issue here; the parties have not raised arguments pertaining to the

first path and the evidence does not support it.

28. Second, the injured worker may satisfy the exception by showing that his or her injuries were the result of employer's unprovoked physical aggression, i.e. that employer actually knew or consciously disregarded knowledge that employee injury would result from the employer's action." *Id.* at 258, 910. "Consciously disregarded" is further defined as "where it would be unreasonable to assume the employer was completely unaware of an obvious and grave risk to an employee's life and limb." *Id.* at 258, 910. The employer could be seen as "attempting to insulate themselves from liability through feigned ignorance." *Id.* at 259, 911. It remains that "negligence - no matter how gross - is insufficient to trigger the exclusivity exception under section 72-209(3)." *Id.* at 257-58, 909; *also see Fulfer v. Sorrento Lactalis*, Inc., 520 P.3d 708 (2022). The practical application of this standard is illustrated by the following cases.

29. In *Gomez*, the Idaho Supreme Court found that the conduct of employer warranted consideration under the standard of "consciously disregarded knowledge." *Gomez v. Crookham Co.*, 166 Idaho 249, 258, 457 P.3d 901, 910 (2020). In *Gomez*, the employee had been cleaning a seed sorting machine when the exposed drive shaft caught her hair and pulled her into the machine, killing her. Cleaning had been done by blowing seeds upward from beneath the table using an air wand while the machine was operating. *Id.* at 253, 905. Crookham had developed the new picking table without a fully guarded drive shaft; "it did not adhere to required lockout-tag procedures, even though OSHA had previously cited Crookham for violating machine guard safety standards and lockout tagout protocol." *Id.* at 252, 904. After the accident OSHA cited Crookham with "serious" violations for the death based on the violation of safety protocols. *Id.* at 259, 911. An expert witness testified that it was a foregone conclusion that this conduct would result in injury. *Id.* at 259, 911(?). The district court denied employee's tort claim on the grounds that the

employer's conduct did not constitute willful or unprovoked physical aggression against the employee, reasoning there was no actual knowledge of the danger. *Id.* at 259, 911.

30. The Idaho Supreme Court reversed and remanded for consideration on the legal standard of whether the employer "consciously disregarded knowledge of a serious risk to Mrs. Gomez." *Id.* at 260, 912. To support its decision, the Court stated that "just as an employer would be liable if it knowingly ordered an unwitting employee into a tank of sharks, it would likewise be liable if it consciously disregarded reports that sharks were in the tank yet ordered its employee into the tank anyway." *Id.* at 259, 911. Consciously disregarding a knowledge of a risk turns a blind eye to known dangers. *Id.* "[T]hey are attempting to insulate themselves from liability through feigned ignorance, thereby engaging in a perverse form of plausible deniability—if they claim they 'saw no evil,' then there is no evil." *Id.*

31. In the case of *Marek v. Hecla, Ltd.*, the employer's conduct was found not to constitute willful or unprovoked physical aggression. 161 Idaho 211, 384 P.3d 975 (2016). The employer, a mining company, took down a waste pillar supporting a certain slope. The employee was instructed to work in a spray room, but instead went and watered down the slope. He was killed when it collapsed. *Id.* at 213-14, 977-78. The company received three citations from the U.S. Mine Safety & Health Administration for conduct beyond ordinary negligence. *Id.* at 214, 978. The Supreme Court ultimately held that the conduct of employer did not meet the standard of willful or unprovoked physical aggression. "[F]ailure to adhere to industry safety standards and its failure to heed warnings from experienced employees was negligent—even grossly so —but there is no evidence in the record that would support a finding that Hecla had actual knowledge the slope would collapse." *Id.* at 982-83, 218-219. The evidence tended to show that Hecla thought the slope was safe. The court rejected an argument that "recklessly directing an employee to work in a highly

dangerous and unsafe environment" was tantamount to "willful or unprovoked physical aggression." *Id.* at 982, 218.

32. In the case of *Dominguez v. Evergreen Resources, Inc.*, 121 P.3d 938, 142 Idaho 7 (2005), the employer's conduct was found to be willful or unprovoked physical aggression. An employer directed an employee to clean out a steel tank. However, the tank held cyanide laced sludge. Contrary to federal regulations, no confined space entry permit had been prepared, there had been no special employee training, appropriate safety equipment was not provided, and no attendant was standing by. *Id.* at 940. The employee lost consciousness breathing poisonous hydrogen cyanide gas in the tank and suffered severe and irreversible brain damage. *Id.* at 941. On a standard of default, with the allegations taken as true, the district court held the evidence met the standard of willful or unprovoked physical aggression. *Id.* at 941. The employer appealed on jurisdictional grounds, and the District Court's decision was ultimately upheld by the Supreme Court. *Id.* at 945.

33. The facts of the present case are most analogous to those in *Marek*. The evidence shows negligence, perhaps even gross negligence, on the part of Employer. Looking at the work set-up prior to the injury, Employer's organization was problematic. There was no one providing supervision on the job site. Claimant's training was the responsibility of a supervisor who can barely remember if he met the Claimant. There was high employee turnover, the supervisor was managing multiple sites, and only apprentice workers were installing the flooring at the residence. The only instructions given to Claimant and the other apprentices were delivered by text to the effect that the flooring should be installed the same as at other residences. These apprentices were expected to assemble the saw and reinstall its safety equipment before use. Yet Claimant had never even seen a safety guard on site. Although the degree and extent of Employer's conduct may differ

from *Marek*, the essence of creating a hazardous environment is the same.

34. Scrutiny of testimony from Employer's witnesses' casts doubt on any general commitment to worker safety. Employer's account of standard training and safety meetings is dubious. When subjected to cross examination regarding any training records, Employer's president gave carefully couched answers – taking nearly two pages of transcript – before admitting that he believed he provided everything that remained in existence about safety meetings and sign in sheets related to Claimant. Tr. 72. A review of the exhibits turns up no such documentation despite the fact that these meetings purportedly were mandatory, were compensated as paid-time, had agendas kept in two places, and had sign-in sheets. Tr. 63-64, 70; JE 9:181-82, 187; JE 10:210. Curiously, the supervisor's investigation of the accident – purported to include photographs – was not included in the exhibits. Logically, this would contain a photograph of the guard that the supervisor testified to seeing at the site after the accident, yet there is no explanation for its absence. Perhaps even more disturbing is the fact that despite Claimant's finger being amputated, no report was filed with OSHA. This appears to have had the practical effect of avoiding any external investigation. However, despite these concerns, creating a dangerous environment and negligence alone are not enough to support jurisdiction for a tort claim under I.C. § 72-209(3).

35. The facts of this case do not rise to the egregious level of conduct observed in *Dominguez* and *Gomez*. In *Gomez*, the employer utilized the picking table after being specifically cited and warned for the same hazards its custom-designed machinery posed. In *Dominguez*, the employer ordered the employee into a tank filled with cyanide-laced sludge in violation of federal law to perform a task that is known to require specific precautions. In contrast, the table saw involved in the instant matter was not inherently defective. Other than the missing safety guard,

there has been no argument the saw presented any unusual danger, nor is any particular hazard apparent from the saw manual or testimony of the witnesses. Although the absent safety guard is problematic, Employer did not remove the safety guard intentionally or know it was missing. Claimant alleges the guard was purposefully removed to speed production. However, this assertion lacks supporting evidence. The facts presented also do not support a finding that Employer was told or had warning or otherwise had access to knowledge that would lead to the conclusion that the guard was missing. As far as the evidence presented in this case demonstrates, Employer thought the guard was available for use.

36. Additionally, unlike *Dominguez* and *Gomez*, Employer here did not consciously disregard the risk of injury regarding the table saw as it related to Claimant. The *Gomez* employer, as well as the employer in *Dominguez*, was aware of exactly what the employee's job involved and how the tasks would put the employee in harm's way. In contrast, Employer here was not in a position to know that Claimant was going to operate the saw. Employer had generally instructed Claimant's work crew that they could use the saw, and this broad instruction was easily misinterpreted as permission for Claimant specifically. Still, Claimant had not yet been approved for use of the saw. Claimant's job description did not include use of the saw, and Claimant testified that he only used the saw five to six times during his six weeks of employment. It does not appear Employer was aware or had access to knowledge that Claimant was using the saw without supervision. Meanwhile, the general grant of permission was understandably directed at others in the work crew who did use the saw. While all workers on site were apprentices, workers gained additional responsibilities as their skills progressed as measured on an individual level. Employer's negligent supervision and careless wording does not equate to knowledge that Claimant was using the saw, nor was it a conscious disregard of a risk that Claimant was exposed to the risks of

improper saw operation.

37. In sum, the facts of this case do not rise to the level of conscious disregard of a known risk as articulated in *Gomez*, and Employer's conduct does not constitute willful or unprovoked physical aggression under I.C. § 72-209(3).

CONCLUSIONS OF LAW AND ORDER

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. The Idaho Industrial Commission has jurisdiction to determine if Claimant's injury was proximately caused by the willful or unprovoked physical aggression of Masterpiece Floors under I.C. § 72-209(3).

2. Claimant's industrial injury was not proximately caused by the willful or unprovoked physical aggression of Masterpiece Floors under I.C. § 72-209(3).

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

DATED this 15th day of September, 2023.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Christina Nelson
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by *E-mail transmission* and regular United States Mail upon each of the following:

Chad Walker
Bowen & Bailey, LLP
PO Box 1007
Boise, ID 83701-1007
robar@bowen-bailey.com
cwalker@bowen-bailey.com

Samuel Dwight Johnson
Johnson & Monteleone, LLP
350 N. 9th Street, Ste. 500
Boise, ID 83702
sam@treasurevalleylawyers.com

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Mary McMenomey