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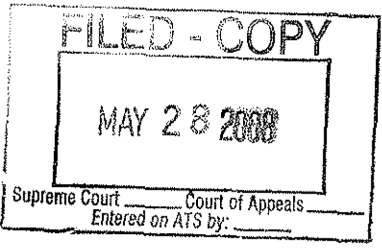
IN THE SUPREME COURT OF THE STATE OF IDAHO

BARRY BRADFORD, Plaintiff, Appellant, vs. ROCHE MOVING & STORAGE, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORTATION, Surety, and FRONTIER MOVING & STORAGE, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants/Respondents.	)	Supreme Court No. 34854 APPELLANT'S OPENING BRIEF



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APPELLANT'S OPENING BRIEF

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APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO
Chairman James F. Kile, Presiding

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STATEMENT OF THE CASE

1. Nature of the Case:

This is an appeal from an order by the Honorable Alan Reed Taylor, Referee with the Idaho Industrial Commission denying liability of either Respondent for Barry Bradford's injuries, ruling, in essence, that Claimant was a "volunteer" and not an employee when he was injured.

Claimant/Appellant, Barry Bradford, (hereinafter "Claimant") has a long history of working in the moving business. On August 9, 2006, he was seriously injured while helping free a stuck commercial garage door on defendants' premises. At the time of the accident, Defendant Roche Moving and Storage, Inc. was in the process of, or had been sold to, Defendant Frontier Moving & Storage ("Frontier").

Claimant had worked for Respondent Roche Moving and Storage, Inc. (hereinafter "Roche") on an off-and-on basis for many years both as a salaried employee and an hourly worker, and was well-known by Roche's owner – Dean Cook. The transfer of ownership between Roche and Frontier was to take place on August 1, 2006. On August 3 and 4, 2006, Claimant worked at the warehouse and was paid on an hourly basis.

On the morning of August 9, 2006, Claimant was at the Roche/Frontier warehouse after being called in the night before by Roche/Frontier to work as a "lumper" for an out-of-state truck driver ("Swans") for the next day. Another lumper did not show up on time, so, while waiting for the other lumper to show up, the Claimant, with the permission of the out-of-state truck driver and the Roche/Frontier staff, helped Roche/Frontier with a stuck commercial garage door. While helping, Claimant was seriously injured.

No employer stepped up to help Claimant with his medical bills and lost wages as a result of this accident. Claimant went to an emergency hearing against Defendants Roche and Frontier – hence the referee's decision that resulted in this appeal.

The issue at hearing was "Who was claimant's employer or was claimant an independent contractor on August 9, 2006?" Tr. p. 7, L. 7-10.

2. Course of Proceedings and Disposition:

On November 16, 2006, Claimant filed a complaint with the IC against Roche. On November 30, 2006, Claimant filed a complaint with the IC against Frontier.

The matters were consolidated, and an emergency hearing held on May 3 – 4, 2007. Referee Taylor's Decision was issued November 9, 2007, and this appeal followed.

3. *Statement of Facts*:

The Claimant is a 45 year-old male who resides in Idaho Falls, Idaho. Tr. p. 360, 361. He has a ninth grade education, and received a HSE, or High School Equivalency award in the year 2003. Tr. at 361. He was raised on a farm in Swan Valley, Idaho, and, for the past 25 years or so, worked in the moving business for various employers. Tr. at 362. His work involved loading and unloading trucks, packing and unpacking trucks and overseas shipments. Tr. at 362, 363. Prior to this accident, his health was "real good" and he was able to do the very heavy, physical work required in the moving business, as well as hunt, fish, hike, and ride horses without any problems. Tr. at 363, 364.

The Claimant first worked for Dean Cook, i.e., Roche, in the early 1990's at the same location where this accident happened. Tr. p. 364, 365. In the mid-90's the Claimant moved to Arizona for a few years where he worked in the moving business, but

returned to Idaho Falls in 1998 or 1999, when he started back working for Roche. Tr. at 366. In 1999 he became incarcerated for five years for DUI, and in 2004, after being released, he went back to work for Roche. Tr. at 366, 367.

In 2005, the Claimant was placed on the regular payroll at Roche, where he was able to get $9.00 per hour, and taxes were taken out of his checks. Tr. at 367. In fact, during 2005, per Claimant's W-2 [Exhibit II and Tr. at 368] he earned $15,071.64 in wages from Roche. At that time he did the same work he had done in the past, including packing and loading, as well as warehouse work. Tr. at 367, 54. "Warehouse work" included sweeping, cleaning, and repair and maintenance – just what needed to be done to keep the business going. Exhibit K, page 764 (deposition of Brenda Hill, p. 44). He was told by his employer when to show up for work. Tr. at 367, 368. His supervisor in 2005 would have been either Dean Cook, Brenda Hill or Scott Lancaster. Tr. at 55, 213 - 214. The Claimant was seldom, if ever, a lead man on a job, and did not have a driver's license. Tr. at 56. The Claimant did not provide any tools for his job. Tr. at 56. Hourly workers could have been fired at any time without liability to Roche. Tr. 207.

On occasion, "for the industry to survive" moving companies provide what are called "lumpers" to outside truck drivers to assist them in loading or unloading their trucks. Tr. at 350. According to Darren Smith, owner of Frontier, the lumpers provided by movers to outside drivers were "a key for the industry to survive." Tr. at 350. They were "an important part of the moving business" according to Brenda Hill and Darren Smith. Exhibit K, page 764; Tr. at 350, 72 – 74. Industry wide, it is the course of dealing that moving companies provide lumpers for outside drivers. Exhibit K, page 764, Tr. at 350, 72-73. Lumping work was also provided as a benefit to the workers because

they could work for cash. Tr. at 375. Roche attempted to provide the lumping work, first to the regular employees, if available, then to person's from a "lumper list." Exhibit K, page 764 (deposition of Brenda Hill, p. 41). On occasion, Roche would pay the lumper rather than the driver. Tr. at 206. On occasion "lumpers" would also perform warehouse work. Exhibit K, page 764, (p. 43 of deposition of Brenda Hill). Occasionally, a worker would be called in to lump for an outside driver, and end up changing with another worker and working hourly for Roche. Tr. at 74 – 76; 381 – 383; 207 - 209. Lumpers called in by Roche were required to arrive at the time requested and wear a uniform – albeit an "Allied" (Roche) t-shirt. Tr. at 234. The Claimant was wearing the required t-shirt that said "Roche Moving and Storage" on the back when this accident happened. Tr. at 384. Lumpers were considered "employees" and not "independent contractors" by Roche prior to this accident as Roche was required to maintain a supplemental worker's compensation insurance policy for lumpers used by his drivers when they needed help out-of-state. Tr. at 251 – 252. In his opening statement defense counsel for Frontier admitted that lumpers are employees of the outside drivers. Tr. at 31.

Barry Bradford had a reputation of being a good worker prior to this accident. Tr. at 77, 211; Exhibit K, page 764 (deposition of Brenda Hill, p. 43). In fact, it was not unusual for the Claimant to occasionally stay after he had completed a lumping job and help around the warehouse. Exhibit K, page 764 (deposition of Brenda Hill, p. 43); Tr. 381 – 382. Although he did not always turn in a time sheet for extra work done, he could have. Tr. 382 – 383.

In late 2005 or early 2006, Dean Cook was getting ill with cancer, and, combined with the usual winter slowdown, business at Roche became especially slow. Tr. at 368,

199-202. As a result, the Claimant left Roche and got a job at Atlas moving company. Tr. at 369. Mr. Cook apparently also started considering either selling or shutting down the company. Tr. at 239.

In the spring of 2006, the Claimant was not content with Atlas, and heard that Frontier was a good company that might be taking over Roche. Tr. at 370. So the Claimant went back and told Brenda Hill that he wanted to be on the helper/lumper list for Roche and if she needed him to call him. Tr. p. 371. Brenda began calling the Claimant for work. Tr. at 371. During June, July and August of 2006 (before the accident) the Claimant worked as an hourly employee for Roche (or Frontier.) Tr. at 65 – 66. When the Claimant returned to work for Roche in the spring/summer of 2006, the work he performed was the same hourly-type work he had done before while a "payroll employee", with the exception that he did not get regular hours as before, and taxes were not taken out of his checks. Tr. at 66 – 68. Clearly in 2006, when the Claimant worked for Roche he was considered an employee. Tr. at 225; 232.

Prior to this accident, during the two months of June and July (and early August) of 2006, the Claimant received $1,565.00 from Roche (Frontier), for hourly work [Exhibits p. 627, 615, 504, 523, 531, 540, 553, 558, 602, and 610]. The Claimant was not on a number of "lumping" lists for movers around town at the time of his accident. Roche (Frontier) was his exclusive employer and he was relying only on defendants for his sole source of income at the time of this accident. Tr. at 372, 373.

Ever since Brenda Hill started working for Roche, eight to ten years ago, the garage door had problems jamming. Tr. at 35, 57; 215. As part of his work, the Claimant needed to know how to "un-jam" the door, and had worked on it as part of his

job on numerous occasions before this accident. Tr. at 58, 216, 378 – 379. "Un-sticking" the garage door was considered to be included in the 'warehouse work' the Claimant did for Roche in 2005/2006. Tr. at 227 – 228. Although he generally worked under a lead person or supervisor, the Claimant had authority from Roche to take the initiative and help on his own without being told what to do. Tr. at 228.

As of August 1, 2006, Dean Cook had apparently intended to sell his moving business to Defendant Frontier. Tr. at 239 – 243. Chad Rose was hired by Frontier to be the general manager of the moving business purchased from Dean Cook and was on scene when this accident occurred. Tr. at 109; 120; 122; 155.

On August 2, 2006, two lumpers who were assisting Scott Lancaster (a Roche/Frontier employee) on a job in Pocatello, were injured when a cable snapped on a tow truck. Their claims were turned in to Roche's workers' compensation carrier and they received benefits. Tr. at 48 – 50; 235 – 236.

On August 9, 2006, the Claimant showed up at the Roche business premises a little before 8:00 to work for an outside truck driver that he had been called in by Brenda Hill to lump for that day. Tr. at 69, 384. He stuck his head in the office and let Brenda know he was there. Tr. at 384. He was advised the driver was there and went over and introduced himself. Tr. at 385. The driver advised him that he was waiting around for the other lumper who hadn't shown up yet. Tr. at 385. The Claimant then noticed that Scott Lancaster and Chad Rose were having trouble opening the garage door that they had a history of having problems with. Tr. at 385. The Claimant asked the driver if it would be all right if he helped them with the door. Tr. at 385. The driver said OK and he went over to help with the door. Tr. at 385.

Prior to the Claimant showing up, Scott Lancaster and Chad Rose had tried to pry the door loose with a crowbar and Scott tried kicking the door "quite a few times to see if that would bust it loose." Exhibit 683 (deposition of Scott Lancaster, p. 12); Tr. at 148. The Claimant asked Chad if he needed a hand. Tr. at 385. Scott Lancaster asked the Claimant to help him. Exhibit 683 (deposition of Scott Lancaster, p. 12). With the express permission of Scott Lancaster, and the implied permission of Chad Rose[1], the Claimant kicked the door, trying to loose the jam. Tr. at 149 – 150; 414 - 415; Exhibit 683 (deposition of Scott Lancaster, p. 12); Tr. at 385 – 386. At that point the garage door let loose, catching the Claimant's leg and lifting him up to the ceiling, and dropping him to the ground. Tr. at 148, 385 – 386.

The only reason an "Employers First Notice of Injury" was not filed regarding this accident is because Brenda Hill, who had completed such reports for Roche and was now working for Frontier on the day of the accident, thought that the new person in charge, Chad Rose, with Frontier, was going to fill it out. Tr. p. 79 L. 3-14. Chad Rose was responsible for reporting injuries for Frontier at the time of this accident. Tr. p. 157, L. 15 to p. 161, L. 3]

ISSUE PRESENTED ON APPEAL

1. WHETHER OR NOT IT WAS ERROR FOR THE COMMISSION TO RULE THAT CLAIMANT WAS A "VOLUNTEER" AND NOT AN EMPLOYEE WHEN HE WAS INJURED.

ATTORNEY FEES ON APPEAL

Attorney's fees are requested per I.C. §72-313.

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[1] At the hearing, beginning on page 155 of the hearing transcript, it was Mr. Rose's testimony that he was the general manager of the business on the day of the accident. He was in charge of the operation and he knew the door had problems. He further allowed The Claimant to work on the door despite the fact that he had the power to stop him.

ARGUMENT

LEGAL SUMMARY:

Workers' compensation law is to be liberally construed in favor of the injured worker, and any doubts are to be resolved in favor of the worker. *Dinius v. Loving Care and More Inc.* 133 Idaho 572, 573, 990 P.2d 738 (citations omitted). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996). The Act is to be construed broadly to bring as many workers within its coverage as possible and the Act should be construed liberally in order to effectuate its beneficent purposes. *Yount v. Boundary County*, 118 Idaho 307, 796 P.2d 516 (1990).

Generally, activities that are *purely* voluntary and gratuitous do not create an employer/employee relationship and are not covered by workers' compensation. *Parker v. Engle,* 115 Idaho 860 (1989); *Seward v. State Brand Division,* 75 Idaho 467, 274 P.2d 993 (1954) (emphasis added).

I.C. §72-102 (11) defines "employee" as being 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. "Employer" is defined as "any person who has expressly or *impliedly* hired or contracted the services of another." I.C. §72-102 (12) (emphasis added).

A contract of employment may be implied. There are two distinct types of implied contract, those implied-in-law and those implied-in-fact. *Kennedy v. Forest*, 129 Idaho 587, 930 P.2d 1026 (1997). Implied-in-law contracts are quasi-contracts based on equitable theories and are insufficient to establish an employment relationship for

purposes of workers' compensation liability. *Kennedy* at 588. However, an implied-in-fact contract is a true contract whose existence and terms are inferred from the conduct of the parties and is sufficient to trigger workers' compensation liability. *Id.*

It is well-recognized that Idaho law provides that when a person is requested to assist in the furtherance of the business of an employer and the assistance is provided with the knowledge and acquiescence of the employer, the person providing assistance becomes, in effect, an employee. *Wise v. Arnold Transfer & Storage*, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985) (citing *Larson v. Independent School Dist. No. 11J*, 53 Idaho 49, 56, 22 P.2d. 299, 301 (1933)).

It is well established that a person who is asked for help in an emergency which threatens the employer's interest becomes an employee under an implied contract of hire. *1 Larsen, Workmen's Compensation Law*, §65.02[3], p. 65-15.

Employment may be "dual," in the sense that, while the employee is under contract of hire with two different employers, his or her activities on behalf of each employer are separate and can be identified with one employer or the other. When this separate identification can clearly be made, the particular employer whose work was being done at the time of the injury will be held exclusively liable. *1 Larsen, Workmen's Compensation Law*, §68, p. 68-1.

ANALYSIS:

The issue at the hearing held on May 3 and 4, 2007, was defined as follows: "Who was claimant's employer or was claimant an independent contractor on August 9, 2007?" Tr. p. 7, L. 9 –10.

Although the Referee, in his report, discussed "right to control" issues as they pertain to the facts of this case, it is virtually undisputed by the parties that "lumpers" were considered employees of the company of the truck driver, and "hourly" or "day labor" and warehouse workers were also employees in the legal sense of the word.

It is clearly the industry standard that trucking companies in the moving business maintain workers' compensation coverage for "lumpers" for the precise reason that they are employees. The owner of Roche testified he had a separate insurance policy to cover lumpers when his drivers had loads to deliver out-of-state. Tr. p. 251, L. 17 – 24. Opposing counsel for Frontier admitted that plaintiff was an employee at the time of the accident, albeit for the truck driver for whom he was called in to help unload. Tr. p. 31, L. 13 – 21. Workers' compensation benefits had been paid for "lumpers" who were loading/unloading for Roche. Tr. at 48 – 50; 235 – 236, 264 – 265. Finally, in *Wise v. Arnold Transfer &* Storage, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985), the appellate court ruled as a matter of law that a lumper was in fact an employee and not an independent contractor. Hourly workers at the warehouse of Roche (Frontier) were also undeniably employees. Tr. p. 185 – 186, 224 – 225, 269. There is no evidence that defendants ever hired independent contractors for loading/unloading (lumping) or as day laborers who were paid hourly, which are the only two activities Claimant was ever involved in for defendants.

As such, when claimant arrived at work on the morning of this accident, *he had to be someone's employee*. He was either an employee of the trucker for whom he was called in to help unload, or of Roche (Frontier). In any event, in no way was he an independent contractor.

Rather than try to determine *who* Claimant's employer was on the day of the accident as framed in the issue for the hearing, the Referee made the following conclusions in his Findings of Fact:

> "On occasion, lumpers who were waiting at the Roche warehouse helped regular Roche employees with warehouse duties for a few minutes until the lumper's out-of-town driver arrived. This assistance was provided voluntarily and gratuitously. Roche did not expect or require such assistance as a prerequisite to placing an individual on the lumper list. As a lumper, Claimant usually helped in such situations. On those occasions, Claimant *donated* his time and did not expect or request payment for a few minutes of service." (emphasis added) R. p. 30.

Based on this finding, the Referee found that Claimant is not entitled to benefits because he was a "volunteer" and not an employee due to the absence of an employer/employee relationship. R. p. 41.

Claimant contends the Referee's finding misrepresents the context of what really happened and results in a decision that is not supported by the facts and defeats the purposes for which the Workers' Compensation Act was intended. Furthermore, Claimant contends such a finding inappropriately lumps Claimant and his activities that day with true volunteers, i.e. one performing public service or charitable duties (like a carpenter donating his service to the Red Cross); family members helping each other; or persons advancing their own interests (for example, the case of a man who helped his friend complete deliveries so that the friend could get away and go hunting with him). *1 Larsen, Workmen's Compensation Law*, §65.

Such a finding also does not consider the long-standing rule regarding emergencies at the work place, sometimes called the "emergency doctrine." Although apparently not addressed to date in case law in Idaho, this well-established doctrine in workers compensation law provides that "the scope of an employee's employment is

impliedly extended in an emergency to include the performance of any act designed to save life *or property* in which the employer has an interest. *1 Larsen, Workmen's Compensation Law*, §28.01[1], p. 28-2 (emphasis added). "It is too obvious for discussion that emergency efforts to save the employer's property from fire, theft, runaway horses, destruction by strikers, or other hazards are within the course of employment. The fact that the rescue effort takes place outside of working hours does not detract from its work-related status." *Id.* (emphasis added) The doctrine further provides that "It is a well-established principle, even at common law, that the actor's judgment about the existence of an emergency and how to meet it should not be too severely judged in retrospect. This person may get the benefit of the emergency doctrine even if the only emergency was imaginary, if the employee acted in good faith. *Id. p. 28-8.*

In the present case, it is undisputed that the Claimant worked as an hourly employee for defendants after August 1, 2007, and before the accident. He was paid $200 by Roche, who was reimbursed thereafter by Frontier.[2] Tr. p. 246, L. 5 – 19. On the day of the accident, the large commercial garage door into Roche's (Frontier's) warehouse had jammed, partially open. According to Chad Rose, General Manager at the time, it was important to the business that day to get the door open because they had a shipment going out, ready to be loaded onto a truck. Tr. p. 150. Claimant also understood that the door needed to get opened. Tr. p. 390. Chad Rose testified that one of the reasons he allowed Claimant to work on the door and try to un-jam it was "because

[2] This undisputed fact demonstrates that even after Frontier allegedly took over operations, the Claimant was allowed to work for the new owners on an hourly basis. This fact distinguishes this case from the Claimant in *Parker v. Engle*, 115 Idaho 860, 771 P.2d 524 (1989) where the Claimant's employment had been terminated prior to the his accident.

maybe he [Claimant] knew something that you [Chad Rose] or Scott didn't know." Tr. p. 152.

Claimant was also on the "lumping list" to be called when defendants needed someone to lump for an outside driver.

The facts that the Claimant worked on an hourly basis "as needed" for Roche (Frontier) and was asked (or allowed) to work on the jammed garage door, and also had been called in to work for an outside driver at the same time, calls into play the issues of "Joint and Dual Employment", also not addressed by the Referee.

"Joint and Dual Employment" provides that employment may be "dual," in the sense that, while the employee is under contract of hire with two different employers, his or her activities on behalf of each employer are separate and can be identified with one employer or the other. When this separate identification can clearly be made, the particular employer whose work was being done at the time of injury will be held exclusively liable." *1 Larsen, Workmen's Compensation Law*, §68, p. 68-1. When there is a true dual employment, and the particular industry in which the injury occurs can be clearly identified, it appears logical, under compensation theory, that that industry should bear the compensation cost. *Id. at 68-7.*

This explains the situation Claimant was in on the day he was injured. He had been called in to assist Roche (Frontier) to be a lumper for an outside driver. While waiting for another lumper to arrive, Claimant became aware of an emergency situation with Roche (Frontier) at the warehouse. With the permission of the outside driver, and at the express request of Scott Lancaster, an employee of Roche (Frontier) (See Exhibit 683 (deposition of Scott Lancaster, p. 12, L. 12 -13), and the implied permission of Chad

Rose (who certainly had the power/control to stop the Claimant from helping, but didn't – Tr. p. 155, L. 9 – 23), the Claimant attempted to help the situation, and do what he had done many times over the years – that is, try to un-jam the garage door. After explaining to the Referee that day laborers were usually hired for a 4-hour minimum, Mr. Dean Cook, the owner of Roche, and Claimant's boss for many, many years prior to the accident, when asked if he believed it was unreasonable for Claimant to offer to help fix the garage door on the day of the accident, stated that he believed it was not unreasonable for the Claimant to have offered to help under the circumstances. Tr. p. 311 – 313. There is no dispute that the Claimant acted in good faith in trying to help.

Defendant's are expected to argue that Claimant's actions were "voluntary and gratuitous" and performed solely to advance his own purposes, and should not be covered.

The Claimant did testify that he wanted to make a good impression and maybe get on the regular payroll with Frontier – that he was willing to help. Tr. p. 410. But this was a situation that involved more than just a willingness to help. Obviously all good employees are expected to help in situations when their employers are in distress, whether or not they are officially "on the clock". Penalizing a workman for helping in an unusual circumstance such as this one may have a "chilling effect" on employees being willing to help their employers in such circumstances.

Regarding emergency services, Larsen, on Workerman's Compensation Law, states that:

> "It is well established that a person who is asked for help in an emergency which threatens the employer's interest becomes an employee under an implied contract of hire. The most familiar example is that of the farmer or bystander who is called upon by an employed trucker to help get

> the truck out of the mire in which it is stuck. In such a case it is possible to say that the employee, although ordinarily without power to make contracts binding his employer, has implied authority to employ an assistant, since the employer must be presumed to intend that necessary measures be taken to set the employer's business again in motion." *1 Larsen, Workmen's Compensation Law*, §65[3], p. 65-15.

This case is similar to that of helping to get a truck out of the mire. However, Claimant was not a "mere bystander" as in the above-referenced situation where benefits were awarded. Furthermore, not only did Scott Lancaster ask Claimant to help, but the General Manager, Chad Rose, could have easily stopped the Claimant and testified that he thought the Claimant could help the situation. Tr. p. 152. Claimant was an hourly employee with a long work history for Roche, at the warehouse location at Roche's (Frontier's) direction, there to provide a common benefit to the outside trucker as well as Roche (Frontier)[3], was experienced in working on the jammed door, and even had on the company uniform – a company shirt – complete with the company logo, and clean jeans, as required by Roche (Frontier). He was an "on call" hourly employee who was in an emergency situation regarding the employer's business trying to help "set the employer's business again in motion."

The Claimant testified that he could have turned in a time sheet – he merely chose not to. Tr. p. 418. Although the accident occurred within a few minutes or so after trying to help, the shortness of time should not be a factor in determining whether or not an employer/employee relationship existed. The work on the door could not have been predicted and could have lasted well over four hours, or could have been finished in minutes. The actual amount of time spent at the job prior to the accident should not

[3] It should be noted here that by providing lumpers for outside truckers, Roche/Frontier could expect the associated companies to return the favor when it's trucks are outside the local area. As mentioned above, according to Frontier's owner, providing lumpers was "a key for the industry to survive." Tr. p. 350.

dictate whether or not an implied-in-fact contract of hire existed. Claimant should be given the benefit of any doubt.

As stated above, it is further well-recognized that Idaho law provides that when a person is requested to assist in the furtherance of the business of an employer and the assistance is provided with the knowledge and acquiescence of the employer, the person providing assistance becomes, in effect, an employee. *Wise v. Transfer & Storage*, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985) (citing *Larson v. Independent School Dist. No. 11J*, 53 Idaho 49, 56, 22 P.2d. 299, 301 (1933)). Such a rule of law provides additional grounds to find an implied-in-fact contract of hire in this instance. Again, the facts of this case fit squarely into the rule of law in Idaho, and Claimant respectfully contends that coverage should not have been denied and it was error for the Commission to deny benefits on the basis that Claimant was a "volunteer."

CONCLUSION

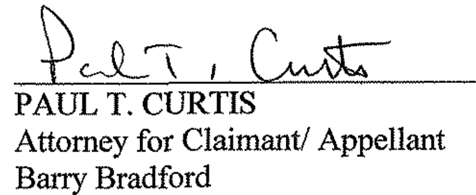
At the time of this accident, Claimant respectfully contends that the undisputed facts show he was neither an independent contractor nor a volunteer in any legal sense of the word. The clear facts show that at the time of this accident, the Claimant was "dually employed." He was directly employed by the outside driver who expressly gave him permission to help defendants attempt to fix the jammed garage door. He was employed by Roche/Frontier via an implied-in-fact contract on an emergency basis, engaged to help fix the garage door to help "set the employer's business again in motion."

As such, the facts clearly show that an employer/employee relationship did exist at the time of the accident and it was error for the Commission to conclude Claimant was a "volunteer" for purposes of awarding benefits.

Claimant respectfully requests the Court to find that the Claimant was an employee when he was injured on August 9, 2006, and is entitled to both medical and income benefits.

Should the Court agree with Claimant, Claimant respectfully suggests that the Court may choose to send the matter back to the Commission for a determination of *who* is the employer liable to pay his medical and income benefits.

Dated: May 28, 2005

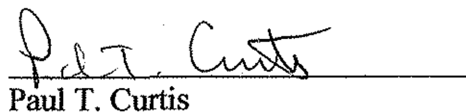


PAUL T. CURTIS
Attorney for Claimant/ Appellant
Barry Bradford

Certificate of Service

I hereby certify that on the 28th day of May, 2008, two copies of the foregoing **APPELLANT'S OPENING BRIEF** were served upon the following attorneys of record by the method indicated:

Scott R. Hall ANDERSON, NELSON, HALL 490 Memorial Drive Idaho Falls, ID 83405-1630	[ ]US Mail, postage pre-paid [X] Hand Delivery [ ] Facsimile [ ] Overnight Mail
Monte R. Whittier HARMON, WHITTIER & DAY P.O. Box 6358 Boise, ID 83707-6358	[X] US Mail, postage pre-paid [ ] Hand Delivery [ ] Facsimile [ ] Overnight Mail



Paul T. Curtis