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Bradford v. Roche Moving & Storage, Inc. Respondent's Brief 1 Dckt. 34854

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BARRY BRADFORD,

Claimant/Appellant,

v.

ROCHE MOVING & STORAGE, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety,

and

FRONTIER MOVING & STORAGE, INC., Employer, and STATE INSURANCE FUND, Surety.

Defendants/Respondents.

I.C. No: 06-524422
06-523989

RESPONDENT'S BRIEF FOR FRONTIER MOVING & STORAGE, INC. and STATE INSURANCE FUND

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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ISSUES PRESENTED

1) The Industrial Commission used substantial and competent evidence to draw its conclusion and therefore did not clearly error in the exercise of its discretion that Appellant was not an employee of Respondent.

2) Appellant has improperly brought a new issue before this Court on appeal, which was not addressed with the Industrial Commission.

3) Attorneys fees on appeal should appropriately be granted to respondent.

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STATEMENT OF THE CASE

This appeal is from an order entered by the Idaho Industrial Commission on November 9, 2007, together with Findings of Fact, Conclusions of Law, and Recommendation of the same date. Notice of Appeal was filed on December 13, 2007. Hearing was held on May 3 - 4, 2007 before Referee, Alan Taylor.

The sole issue at hearing was: "Who was Claimant's employer or was Claimant an independent contractor on August 9, 2006." Tr., Vol. I, p. 7 (May 3, 2007).

The Industrial Commission found: "Claimant has not proven he was a direct employee of Roche or Frontier on August 9, 2006." Conclusion of Law, (R. 43).

Claimant's statement of the nature of the case is not correct. Claimant was a previous employee of Respondent Roche Moving & Storage, Inc. (Roche) but had never been an employee of Respondent Frontier Moving & Storage, Inc. (Frontier). During the summer of 2006, Roche began negotiations with Frontier for the purchase of the Roche business. The parties began to explore the purchase with an original target purchase date of August 1, 2006. Tr., Vol. II, pp. 336-337 (May 4, 2007). The purchase was actually completed on November 21, 2006. Tr., Vol. I, Exhibit "B". Although the purchase agreement was not completed until November 21, 2006, the agreement was back dated to the original target date of August 1, 2006. *Id.*

At approximately 8 a.m. on August 9, 2006, Claimant came to the Roche facility for the specific and sole purpose of meeting with a truck driver from Swan's Moving & Storage

(Swan's) from Washington to "lump" (unload) household products into a private residence in Idaho Falls. Tr. Vol. I, p. 98. Upon arriving at the Roche facility, Claimant reported to Swan's truck driver. Tr., Vol. II, p. 384. The sole reason for the Claimant coming to the Roche facility on August 9 was to meet Swan's truck driver and to lump for the Swan's driver. *Id.* at 410; Hrg Tr. Vol. I, Exhibit "K", Bates 762 (Depo. Brenda Hill p. 36, Jan. 9, 2007); Tr., Vol. I, pp. 97, 107.

After arriving at the Roche facility, and reporting in to the Swan's driver, Claimant noticed that the overhead garage door on the Roche warehouse facility was stuck. Claimant asked the Swan's driver if he could assist with the garage door. Tr., Vol. II, pp. 384-386. The Swan's truck driver granted permission for the Claimant to assist with the garage door. *Id.* at 414. Claimant proceeded into the warehouse where he climbed onto a wall-mounted ladder, kicked the overhead door, and was injured.

STATEMENT OF FACTS

Barry Bradford (Appellant/Claimant) is 43 years of age. In 2003, he obtained a high school equivalency. Tr., Vol. II, p. 161. Claimant was raised in eastern Idaho and has been involved in the moving and storage business since approximately age 20. *Id.* at 362.

Claimant first worked for Dean Cook, the owner of Roche, in the early 1990's. *Id.* at 264. After a few years of work at Roche, Claimant and his wife moved to Arizona and then eventually moved back to eastern Idaho in 1998 or 1999. *Id.* at 265. Thereafter, Claimant was convicted of

a DUI and spent five years in the Idaho State Penitentiary. He was released from prison in 2004. *Id.* at 265-267. Sometime in 2005, Claimant obtained a job with Roche, where he earned $15,071.64 during 2005. *Id.* at 268-269; Tr., Vol. I, Exhibit "L", Bates 798.

Claimant received two employee wage paychecks from Roche in 2006 totaling $468.00, as reflected in Claimant's 2006 W-2 federal tax form. *See* Tr., Vol. I, Exhibit "E", Bates 957 and Exhibit "G", Bates 213, 230. Claimant then left the employment with Roche and went to work for Gellings Moving & Storage (Gellings) in Idaho Falls earning $12.00 per hour. Tr., Vol. II, p. 369. *See also* Tr., Vol. I, Exhibit "V", Bates 980-981. Claimant left the employment of Gellings some time in late May 2006. *Id.* In late May 2006, Claimant contacted Brenda Hill at Roche requesting that he be placed on Roche's lumper list. Tr., Vol. II, p. 371.

Lumpers are not required to turn time sheets into Roche, only employees and day laborers were required to do so. Tr. Vol. I, pp. 43, 68. This is because Lumpers are paid by the truck driver they work for, and not by Roche. Tr. Vol. II, p. 326, 375, Tr. Vol I, Exhibit "J" (Depo. Bradford pp. 25-26), Bates 734. Lumpers produce no revenue for the local company. Tr. Vol. II, pp. 295-296, 324. Lumpers are not on a local company's work schedule and have no expectation of any specific times they might work. Tr. Vol II, p. 145. They are only called in when an outside truck driver calls in for help. Lumpers go on the clock with a truck driver when they report to the designate contact location even if the truck driver has not yet arrived and they receive a minimum of four hours pay from the truck driver. Tr., Vol. II, pp. 408-409; Tr., Vol. I,

Exhibit "J", (Depo. Barry Bradford at 35-36), Bates 734.

Roche paid regular employees $9.00 per hour and withheld taxes from their wages. Further, regular employees were given sick and vacation days. Day labor workers were paid $10 per hour by Roche from which no taxes were deducted and no sick or vacation days accrued. *Id.* at 210-212, 272, 373. Lumpers are paid $12.00 - $15.00 an hour and are paid directly by the truck driver in cash with no withholdings. Tr. Vol. II, p. 326, 375, Tr. Vol I, Exhibit "J" (Depo. Bradford pp. 25-26), Bates 734.

After being placed on the lumper list, Claimant was periodically and randomly called by Brenda Hill to come and work either as day labor for Roche or he was called and notified that a truck driver was coming in from outside the area who needed to hire a lumper for the day. *Id.* at 372-373.

During June, July, and August 2006, Claimant received checks from Roche's day labor account (Account 5400) totaling $1,475.00. Claimant also received an additional check which was not posted to the 5400 day labor account in the amount of $90.00. *Id.* at 278-280; *See also*, Tr., Vol. I Exhibit "G", Bates 504, 523, 540, 553, 558, 602, 610, 615 and 627. Dean Cook (Roche) acknowledged the day labor wages ($1,475) that he paid to Claimant from June 2006 through August 8, 2006 when Roche issued Claimant his 1099-MISC federal tax form for 2006. *Id.* at Exhibit "U", Bates 956. No tax forms were issued to Claimant by Frontier.

During the summer of 2006, Roche began to talk with Frontier about purchasing the

Roche business. The parties began to explore the purchase and originally aimed for a target purchase date of August 1, 2006. Tr., Vol. II, pp. 336-337. Roche and Frontier were not able to meet that date and the purchase was eventually completed November 21, 2006–two and a half months after the accident. Tr., Vol. I, Exhibit "B".

On August 8, 2006, Brenda Hill notified Claimant that there was a truck driver from another company (Swan's) coming into Idaho Falls who was looking for lumper's to work for him. Brenda said Claimant could meet the driver the next morning at 8:00 a.m. at the Roche facility if he wanted to lump for Swan's. Tr., Vol. II, p. 384; Tr., Vol. I, pp. 69, 83-84. Claimant acknowledged that he would lump for Swan's and Brenda placed his name on the calendar with another individual by the name of Derrick. *See* Tr., Vol. I, Exhibit "S", Bates 951; *Id.* at 95-97.

Claimant understood and expected he would be paid by the Swan's driver. *Id.* at 375; Tr., Vol. I, Exhibit "J", (Depo. Bradford pp. 32-34), Bates 735-736; Tr., Vol. II, p. 410; Tr., Vol. I, Exhibit "K", Bates 762 (Depo. Brenda Hill p. 36); Tr., Vol. I, pp. 97, 107.

At approximately 8 a.m. on August 9, 2006, Claimant came to the Roche facility for the specific and sole purpose of meeting Swan's truck driver who had arrived in Idaho Falls from Washington. *Id.* at 98. Upon arriving at the Roche facility, Claimant reported to Swan's truck driver. Tr., Vol. II, p. 384. The other lumper never showed up. Claimant and the Swan's driver waited while Brenda Hill attempted to find another lumper. Tr., Vol. I, pp. 70-71. The Swan's driver told Claimant they were still waiting for another lumper but that he would consider going without the other lumper if one could not be found quickly. *Id.* at Exhibit "J" (Depo. Barry Bradford p. 17), Bates 732. At that point, Claimant noticed that the overhead garage door on the

Roche warehouse facility had become stuck and asked the driver if he could assist in raising the garage door. Tr., Vol. II, pp. 384-386. The Swan's truck driver granted Claimant permission to go and assist with the garage door. *Id.* at 414. Claimant proceeded into the warehouse where he climbed onto a wall-mounted ladder, kicked the overhead door, and was injured.

Claimant had never been hired at any time by Frontier. Claimant never received a paycheck from Frontier. *Id.* at 410. Claimant never presented his social security card, driver's license, filled out a W-4 or completed an I-9 or received any paycheck from Frontier. *Id.* at 167-168, 315-317. Frontier never issued tax earnings forms to Claimant.

The sole reason the Claimant went into the warehouse on the morning of August 9, 2006 was to make an impression on Frontier so that at a future time he could ask Frontier to consider hiring him as an employee. *Id.* at 410-411; Tr., Vol. I, Exhibit "J" (Bradford Depo. Tr., pp. 30-31), Bates 735. Claimant had no obligation whatsoever to go into the warehouse.

STANDARD OF REVIEW

In reviewing decisions from the Industrial Commission, the appellate court is free to review questions of law, "but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings." *McCabe v. Jo-Ann Stores, Inc.*, 145 Idaho 91, 175 P.3d 780, 784 (2007), citing *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 735, 40 P.3d 91, 93 (2002).

> Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.* Because the Commission is the fact finder,

> its conclusions on the credibility and weight of the evidence will not be disturbed on appeal unless they are clearly erroneous. *Id.* This Court does not weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Id.* Whether a claimant has an impairment and the degree of permanent disability resulting from an industrial injury are questions of fact. *Anderson v. Harper's, Inc.*, 143 Idaho 193, 195, 141 P.3d 1062, 1064 (2006). In reviewing a decision of the Commission, the Court views all the facts and inferences in the light most favorable to the party who prevailed before the Commission. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 941, 908 P.2d 1244, 1248 (1996).

Id.

In *Hernandez v. Triple Ell Transport, Inc.*, the Supreme Court of Idaho stated the standard for review as follows:

> Idaho Code § 72-732 contains the standard under which we review the Commission's orders and awards: The Court may set aside an order or award when the Commission's findings of fact "are not based on any substantial competent evidence." So, if the Industrial Commission's findings of fact are supported by substantial competent evidence, they will not be disturbed by the Court on appeal. *Levesque v. Hi-Boy Meats, Inc.*, 95 Idaho 808, 520 P.2d 549 (1974); *Gradwohl, v. J.R. Simplot Co.*, 96 Idaho 655, 534 P.2d 775 (1975); *Dean v. Dravo Corp.*, 97 Idaho 158, 540 P.2d 1337 (1975). In the presence of conflicting evidence in worker's compensation proceedings, the Supreme Court continues to recognize the Industrial Commission as the arbiter, and acknowledges that the weight to be accorded evidence is within their [sic] particular province. *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983). However, the Supreme Court is not bound by the conclusions of law which are drawn by the Industrial Commission; in other words, the Supreme Court must set aside the order of the commission where it failed to make a proper application of the law to the evidence. *Blayney v. City of Boise*, 110 Idaho 302, 715 P.2d 972 (1986).

145 Idaho 37, 175 P.3d 199, 201 (2007). In this case, the Commission made its finding on clear and substantial evidence.

ADDITIONAL ISSUES PRESENTED ON APPEAL

The following issues are also presented on appeal which shall be discussed below:

1) Whether Appellant can raise a new issue on appeal that Appellant did not raise below, and

2) Whether Respondent is entitled to attorneys fees under I.A.R. 11 and I.C. § 12-121.

ARGUMENT

The issue at hearing in this case was singular: "Who is the Claimant's employer or was Claimant an independent contractor on August 9, 2006." Tr., Vol. I, p. 7. As will be shown below, the Industrial Commission's decision finding Claimant was not an employee was based on substantial and competent evidence, and therefore the Industrial Commission did not clearly error in its finding that Claimant was not an employee of Frontier or Roche on August 9, 2006. Appellant fails to point to any error committed by the Commission in the application of the facts to the law and Appellant's appeal should therefore be denied.

Additionally, Claimant's attempt to raise a new issue on appeal is prohibited and is without foundation even if the issue were presented below.

Claimant's appeal is simply an attempt to ask this Court to re-weigh the facts and as such, Respondent Frontier is entitled to attorneys fees in response to this appeal.

I. THE COMMISSION'S FINDINGS WERE BASED UPON SUBSTANTIAL AND COMPETENT EVIDENCE AND CLAIMANT'S APPEAL MUST BE DENIED.

A. General Definitions

In understanding this case there are a number of general definitions that are helpful to the understanding this case and the moving and storage industry.

i. Employee. "Employee" is synonymous with "workmen" and means any person who has entered into the employment of, or who workers under the contract of services or apprenticeship with, an employer. . . ." Idaho Code § 72-102(12) (West 2008).

ii. Employer. "Employer" means any person who has expressly or implicitly hired or contracted the services of another. It includes contractors or subcontractors. It includes the owners or lessees of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of their being an independent contractor or for other reasons, is not the direct employer of the workmen there employed. . . ." Idaho Code § 72-102(13)(a) (West 2008).

iii. Lumper. The term lumper is not defined by statute, but by Idaho case law: "A lumper is a person who is hired at the point of destination to help load or unload a truck." *Thompson v. Willis Shaw Express Inc.*, 1993 IIC 0597, 93 IWCD 62, 85; *Burnardo Chaparro v. A-Plus Benefits Inc. and Credit General Insurance Company*, 1999 IIC 1213, 99 IWCD 12431.

iv. Day Labor. The term day labor is not defined by statute. The dictionary

gives the following definition for day labor. "Workers hired on a daily basis only. . . ." *The Random House Dictionary of the English Language*, unabridged edition, 1981.

B. The Industrial Commission's specific finding that Claimant was not an employee of Frontier or Roche was based on substantial and competence evidence and was found in accordance with Idaho law; because no clear error exists, Claimant's Appeal must be denied.

"It is clear beyond dispute that coverage under workers compensation law is dependent upon the existence of an employer/employee relationship." *Anderson v. Farm Bureau Mutual Insurance Company of Idaho*, 112 Idaho 461, 466, 732 P.2d 699, 704 (Ct. App. 1987), *abrogated on other grounds*, 116 Idaho 622 (1989); citing *In Re Sines,* 82 Idaho 527, 365 P.2d 226 (1960), *superceded by statute as stated in* 118 Idaho 307 (1990); *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985); *Burns v. Nyberg,* 108 Idaho 151, 697 P.2d 1165 (1985); *Kennedy v. Forest,* 129 Idaho 584, 930 P.2d 1026 (1997); *Freda*, 2003 IIC 0681.

"Generally the question is whether an individual is an employee or an independent contractor. The issue of whether an individual is an employee or an independent contractor is a question of fact to be decided by the Commission." *Freeman v. Twin Falls Clinic and Hospital*, 135 Idaho 36, 38, 13 P.3d 867, 869 (2000), citing *Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997); *Casey v. Sevy*, 129 Idaho 13, 921 P.2d 190 (Ct. App. 1996); *Mortimer v. Rivera Apartments*, 122 Idaho 839, 840 P.2d 383 (1992). The burden of proving an employer/employee relationship is on the Claimant. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 939 P.2d 1375 (1997); *Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 953 P.2d 989 (1998).

In this case, the Commission correctly found that "[b]efore one can become the employee of another, the knowledge and consent of the employer, express or implied, is required. . . . Under the workers compensation law the relationship of the employer and employee depends upon a contract of hire which may be either express or implied." Finding of Fact #44, R. p. 38. citing *In re Sines'*, 82 Idaho at 532, 356 P.2d at 230. The premise is that employees cannot choose their employers–the employers must choose their employees. Here, there were not sufficient contacts to establish a relationship of employment.

"The integral test in Idaho for determining whether a person is an employee or an independent contractor is whether a contract gives, or the "employer" assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain results." *Anderson v. Farm Bureau,* 112 Idaho at 464, 732 P.2d at 703; citing *Burdick*, 109 Idaho at 871, 712 P.2d at 572; *Burns v. Nyberg*, 108 Idaho at 154, 697 P.2d at 1168; *Ledesma v. Bergeson*, 99 Idaho 555, 588, 585 P.2d 965, 968 (1978); *Merrill v. Duffy Reed Const. Co.*, 82 Idaho 410, 415, 355 P.2d 657, 659 (1960); *Olvera v. Del's Autobody*, 118 Idaho 163, 165, 765 P.2d 862, 864 (1990); *Casey*, 129 Idaho at 15, 921 P.2d at 192.

This Court has established a four (4) part test to determine the right to control, commonly known as the "Right to Control" test. *Sines v. Sines*, 110 Idaho 776, 777, 718 P.2d 1214, 1215 (1986). This four-part test requires analysis of: (1) direct evidence of the right to control; (2) method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the

employment relationship at will and without liability. *See also Casey*, 129 Idaho at 16, 921 P.2d at 193; *Burdick*, 109 Idaho at 872, 712 P.2d at 573. Employment exists when the arbitrating body finds the four factors exist. Where the factors are not found, employment does not exist. In this case, the Commission correctly acknowledged from the evidence that all four factors used to establish control did not exist and that Claimant was not an employee of Roche or Frontier:

i. There is no direct evidence of the Respondent's right to control.

The Commission citing *Seward v. State Brand Division*, 75 Idaho 467, 471, 274 P.2d 993, 995 (1954) correctly acknowledged that "services gratuitously and voluntarily performed for another or for the employee of an employer are, subject to certain exceptions not pertinent here, not covered by the Workmen's Compensation Act. . . . Before one can become the employee of another, knowledge and consent of the employer, expressed or implied, is required." Finding of Fact #44, R. p. 38. In other words, voluntary acts by an individual do not establish an employment relationship and they do not evidence control by an employer. Instead, an employer must accept the employee relationship and exercise control over the individual. Here, the Commission found that claimant's actions were voluntary and that Respondents did not exercise control over claimant.

This was supported by the Commission's specific finding that on August 9, 2006, Claimant reported to work for an out-of-town driver (Swan's). Finding of Fact # 24, 39, R. p. 32 and 37. That conclusion was supported by multiple testimonies, including the Claimant. Tr.,

Vol. II, pp. 381-382. Brenda Hill also testified that Claimant showed up and reported to the truck driver. Tr., Vol. I, p. 69. Various testimony support this position. When individuals are called into lump, they are paid directly by the driver who controls their work efforts for the day. Tr., Vol. II, pp. 293, 294, 326, 375, 408. The truck driver decides when the lumpers will take lunch and controls the timing of all the work for the day. Tr., Vol. II, pp. 177, 376-377. While regular employees and day laborers are required to fill out time cards when they show up to the employer's premises, lumpers are not because they act under the control of a truck driver and are on the driver's clock. Tr., Vol. I, p. 42. The lumper is not required to and does not report to the local affiliate, he reports to the driver. Tr., Vol. II, pp. 381-382. Thus, the driver is in control of a lumper.

The local affiliates, such as Respondents never have the obligation of providing the actual workers for the out-of-town truck driver. They simply provide a courtesy to drivers by notifying lumpers that there will be a truck driver coming into town who is looking for lumping help–the lumper chooses whether or not he or she will work. Tr., Vol. I, p. 90. The local affiliate does not exercise control over a lumper's work schedule.

In this case, Claimant's only reason to show up at the Roche facility on August 9, 2006 was to meet the Swan's truck driver. Tr., Vol. II, p. 410; Tr., Vol. I, Exhibit "H" (Depo. Lancaster p. 11-12), Bates 683. Claimant asked the driver for permission to assist with the overhead door. Finding of Fact # 24, R. p. 32. The very fact that Claimant felt he had to ask the

driver for permission to help with the overhead warehouse door is direct evidence of the driver's right to control the Claimant, not Roche's or Frontier's. Tr., Vol. II, p. 414. Claimant stated he looked the driver directly in the eye to ask for permission to go help with the door because he was assigned to the driver that day and knew he had to seek permission to go help. *Id.* He understood that if the driver said "no, hop in the truck, we're leaving," then he would have to obey. *Id.* Claimant was under the control of the truck driver even to the extent that he had to seek the truck driver's permission to go near the warehouse. Tr., Vol. I, pp. 136, 387, 414; Tr., Vol. I, Exhibit "J" (Depo. Bradford pp. 32-34), Bates 735- 736. Such facts sufficiently indicate the Claimant was not under the control or employment of Roche or Frontier, but that Claimant was under the control of the Swan's truck driver.

Claimant had never been employed by Frontier and, on the day in question, Claimant admitted his sole purpose in going into the warehouse was to make an impression upon Frontier so he could seek employment in the future. Tr., Vol. II, pp. 410-411; Tr., Vol. I, Exhibit "J" (Depo. Bradford pp. 30-31), Bates 735. Claimant was not solicited by either Chad Rose or Scott Lancaster, to help on the morning of August 9, 2006. Tr., Vol. II, pp. 149-150, 172, 174, 178, 375-376. The only involvement between Respondent and Claimant was Respondent's supply of information of where to meet Swan's truck driver. He was given no further direction by either Roche or Frontier. Tr., Vol. I, pp. 102-103. There was no direction given or control asserted by Frontier to Claimant on August 9, 2006. Tr., Vol. II, pp. 170-180.

Claimant's actions also clearly show that he was not acting under Roche's or Frontier's direction. Claimant came into the premises and gave directions to Chad Rose and to Scott Lancaster to stand back and allow him to show them how to release the door. Finding of Fact # 39, R. p. 36. Thus, Claimant was not under the control of respondents, but rather, he voluntarily assumed the risk of helping with the door. As the Commission held, a voluntary act does not establish an employment relationship–an employer's acceptance of an employment relationship and the employer's control over the individual does. Finding of Fact #51, R. p. 40. Thus, the Commission's finding were based on substantial and competent evidence.

It is important to separate the Respondents at this point for purposes of any potential liability or connection of employment to Frontier. While Claimant's acts were voluntary, he argues that he was doing what he had done many times before for *Roche* and that Dean Cook did not believe it was unreasonable for Claimant to assist with the door. However, by making this argument, Claimant illogically implies that what may have been reasonable and permissible for *Roche*, would likewise have been reasonable and permissible for *Frontier*, and that Frontier expressly or implicitly ratified and assumed any obligation that may have accrued to Roche by Frontier's purchase of the company after the fact. What may have been Roche's policy was not the policy or authority of Frontier. Although Claimant was wearing the Roche logo and t-shirt on the date of the injury, he was not wearing anything belonging to or representing Frontier. Although he could have turned in a time sheet to Roche, he had no ability or right to turn in a

time sheet to Frontier. As has been shown above, Claimant knew he had never worked for Frontier. As he stated, he decided to help because he wished to make an impression and seek employment in the future. Because an employment relationship did not exist between Frontier and Claimant, Frontier could not have exercised control over Claimant.

The Commission correctly applied the facts to the law and rationally concluded: "The complete absence of control over Clamant by Roche or Frontier on August 9, 2006, emphasizes that fact that Claimant's actions were entirely voluntary." Finding of Fact # 39, R. p. 36. Claimant failed to establish his burden that Frontier had the right to control his activities on August 9, 2006. Claimant's coming into the warehouse was gratuitous and voluntary and at best, aimed as seeking *future* employment and evidences he did not consider himself as Respondent's employee *at the time* of the accident.

ii. Neither Roche nor Frontier was paying Claimant at the time of the accident.

The second of the four factors under the right to control test in determining whether an individual is an employee is the method of payment. "The method of payment test generally refers to whether income and social security taxes are withheld from a person wages." *Casey*, 129 Idaho at 17, 921 P.2d at 194, citing *Livingston v. Ireland Bank,* 128 Idaho 66, 69, 910 P.2d 738, 741 (1995). Withholding taxes is customary in an employer-employee relationship. *Casey*, *supra* citing *Peterson v. Farmore Pump and Irr.*, 119 Idaho 969, 972, 812 P.2d 276, 279 (1991). In addition, paying an hourly wage or a salary indicates an employer-employee relationship.

Casey, *supra* citing *Kiele v. Henderson Logging*, 127 Idaho 681, 684, 905 P.2d 82, 85 (1995); *Mortimer*, 122 Idaho at 844, 840 P.2d at 388.

The pertinent components of the method of payment are also identified in *Stocia v. Pocol*, 199 IIC 0734 and *Daily* 2006 IIC 0551:

> The method of payment generally refers to whether income and social security taxes are withheld from a person's wages. Withholding is customary in an employer/employee relationship. Where the claimant was paid by the hour, but no income or social security taxes are withheld, the method of payment should be deemed a factor in favor of independent contractor status.

Livingston, 128 Idaho at 70, 910 P.2d at 742.

In this case, the only payments which Claimant received after his two initial Roche paychecks in 2006 were payments made under Roche employment 5400 account, which was a day labor account for which there were no social security taxes withheld, nor were there any other withholdings. Finding of Fact #40, R. p. 37. Payment was strictly a Roche hourly wage payment. Claimant has failed to establish any form of payment pay from Frontier whatsoever, or that any pay from Roche was for something other than as day labor. Finding of Fact #40, R. p.37.

In the present action, Claimant acknowledges that on August 9, 2006 he would have been paid by the driver. Tr., Vol. II, p. 375; Tr., Vol. I, Exhibit "J" (Depo. Bradford p. 33-34), Bates 736. He also understood that he went on the clock with the driver when he showed up, even though he and the driver were waiting for the other lumper to arrive. Tr., Vol. I, p. 308.

Claimant had never received payment or a paycheck from Frontier. Tr., Vol. II, pp. 333, 410. Further, Frontier never signed a check on behalf of Roche or Dean Cook for the Claimant or for any other purpose. Tr., Vol. II, p. 339.

The Industrial Commission correctly found that the Claimant failed to meet his burden under the method of payment test. Finding of Fact #40, R. p. 37. Claimant did not expect to be paid by Frontier on the date of his injury. He simply wanted to make an impression and seek employment at a later date.

iii. Neither Roche nor Frontier furnished Claimant with equipment to complete his work on the day of the accident.

The third factor in determining employment under the right to control test is were the employer furnishes major items of equipment or tools.

As previously established, Claimant was present at the Roche facility to meet a driver for a lumping job. Tr., Vol. II, p. 410; Tr., Vol. I, Exhibit "H" (Depo. Lancaster p. 11-12), Bates 683. The items of tools which would have been used by the Claimant on August 9, 2006 to move, would have been tools such as dollies, rollers, ramps, pads, hand trucks, etcetera. All such items would have been provided by Swan's. No tools had ever been supplied or provided to the Claimant by Frontier. The Commission correctly concluded that no significant tools were provided by anyone on August 9, 2008. Finding of Fact # 41, R. p. 37.

iv. Neither Roche nor Frontier had the ability to terminate Claimant's employment on the day of the accident.

The fourth element under the right to control test is whether the employment has the right to terminate the employment relationship at will. Claimant on August 9, 2006 was a lumper called to come and meet the Swan's driver. Tr., Vol. II, p. 410; Tr., Vol. I, Exhibit "H" (Depo. Lancaster pp. 11-12), Bates 683. He did not have to show up for work that day. Tr., Vol. I, p. 90. The other lumper did not show. If he did show-up, he would be paid by the driver for Swan's. The Industrial Commission found properly that only Swan's had the ability to terminate the Claimant from employment on August 9, 2006 because he was under Swan's control. Finding of Fact #42, R. p. 37. Claimant failed to meet his burden on this issue.

The Commission correctly concluded that "Voluntary activities will not suffice; an award of compensation depends on the existence of an employer/employee relationship." *Parker v. Engle*, 115 Idaho 860, 865, 771 P.2d 524, 529 (1989). Finding of Fact # 51, R. p. 40. Claimant had never been employed by Frontier–his acts were voluntary and therefore Frontier did not have the ability to terminate an non-employee.

v. The finding of an employment relationship in the *Wise* case, is inapplicable to this case.

Finally, Claimant attempts to argue that *Wise v. Arnold Transfer & Storage*, 109 Idaho 20, 23 - 24, 704 P.2d 352, 355 - 356 (Ct. App. 1985), stands for the proposition that because

Claimant was a lumper on the date of his injury he was an employee of Roche or Frontier.

However, in *Wise*, the Court held:

> . . . Wise was an employee of Armold at the time of the accident. Moore, as an employee of Armold, hired Wise, instructed him on what to do and how and when to do it and determined the rate of pay. Wise was riding in the truck supplied by Armold, with the actual knowledge of Armold. Before the accident Armold had begun to put Wise on Armold's records as an employee for purposes of taxes and workmen's compensation as of September 1975. The president of Armold stated in her deposition that after discussions with the insurance company, the Internal Revenue Service and the labor boards, "if he [Moore] was going to have anybody on that van then we had to know about it, and we had to treat them as an employee." Wise had a duty to perform for Armold subject to Moore's right to control his work and Wise's right to receive compensation. We hold that as a matter of law, Wise was an employee of Armold, rather than an independent contractor, at the time of the accident.
>
> . . . He points to the fact that he was not getting paid to ride in the truck, contending that he rode in the truck for his own personal purpose to gain experience in the trucking business. Further, Wise contends that his being in the truck was of no advantage to Armold. The record, even when construed most favorably to Wise, does not support that view.
>
> Having Wise ride in the truck with Moore was of mutual advantage to Armold and Wise. It was more efficient for Armold and Moore that Moore had a person to load and unload the truck riding with him. Moore no longer had to stop and take time to look for someone to hire for the day at each stop he made. Further, as Wise rode along with Moore, he became more skilled and required less supervision. It is apparent from the record that the trip Wise was making at the time of the accident was at least in part devoted to the service of Armold. It was not wholly devoted to the personal purposes of Wise, as his job obviously required his presence at each loading site.
>
> . . . The facts of this case indicate that Wise was in the course and scope of his employment at the time of the accident. Hazards of highway accidents are related to long haul trucking operations. The employer received a benefit from having Wise accompany Moore from job to job. Wise was hired to load and unload goods from

> the truck at various locations. In order to accomplish that task, it was necessary that he travel with the truck across country from loading site to unloading site.

Wise v. Arnold Transfer & Storage Co., Inc., 109 Idaho 20, 23 - 24, 704 P.2d 352, 355 - 356 (Ct. App. 1985).

The facts of the Wise case are strikingly dissimilar to those of this case, as Wise rode in the company truck, had to be at certain locations at certain times to maintain his employment, was on payroll, had taxes withheld, and was not wholly devoted to himself and his own interests. In other words, Wise, while not being paid by Armold at the time of the accident, was in the vehicle under the course and scope of his employment. The Court found the four part control test to have been met.

In this case, however, Claimant's action to help Roche was entirely out of the scope of his purpose for being present on the date of the accident. The morning of the accident, Claimant reported to the Swan's truck driver to lump, felt he had to ask the Swan's driver for permission to help with the door, claimed his entitlement to pay from the Swan's driver would have began at the time he arrived at the meeting point, and was not required by Roche or Frontier to be present to fill the lumping position. Claimant's presence at the Roche facility was simply for the purpose of meeting the Swan's driver. They were going elsewhere to unload the truck. Any efforts Claimant expended to help Roche were completely voluntary and were completely unrelated to Claimant's purpose in being at the Roche facility that morning.

Because this case is not like *Wise,* and because the finding by the Commission is supported by substantial and competent evidence, Claimant's appeal should be denied.

C. The Industrial Commission did not find Claimant to be a credible witness.

Central to the conclusions drawn by the Industrial Commission is Finding of Fact # 33, R. p. 35. Therein the Commission specifically found that the Claimant's blood alcohol level at the time of the accident was 0.197 (two and one half times the legal limit to operate a motor vehicle). Finding of Fact # 33, R. p. 35. The Commission correctly found that such level of intoxication impaired Claimant's perception, judgment, and recollection of the events surrounding the accident. Finding of Fact # 33, R. p. 35. The Commission specifically determined the testimony of Chad Rose and Darren Smith was more reliable than that of the Claimant. Finding of Fact # 33, R. p. 35. The Commission correctly understood that the Claimant's level of intoxication caused his perception and recollection of the facts to be unreliable. Claimant testified that, and attempted to have the Commission believe, that he did not drink after 10 p.m. on August 8, 2006. Tr., Vol. II, pp. 263 - 264. His blood was drawn at almost 9:00 a.m. Exhibit X. The Commission took notice that for the Claimant to have an alcohol content level of 0.197 would have required a substantially higher alcohol content level some eleven hours earlier at 10 p.m. on August 8, 2006. Claimant's testimony as to what he had to drink on August 8 or even what he likely had to drink on the morning of August 9 was not credible. Tr., Vol. II, pp. 407-408. Claimant's memory of what and when he drank and the subsequent events at the facility were grossly impaired.

Claimant's credibility was further called into question by the fact that he has not filed tax returns for a number of years thus evading the tax laws of the State of Idaho and the United States of America. Tr., Vol. II, p. 409. Claimant was not able to give a credible reason for his evasion of the tax laws. *Id.* His testimony added to his credibility problems.

Claimant testified that on August 9, 2006 he had to climb over a forklift to get to the ladder next to the garage door. Tr., Vol. II, pp. 384-386. The facts established that there was no forklift at or near the overhead door. Claimant is the only one who testified about having to climb over the forklift. Both Scott Lancaster and Chad Rose acknowledged that there was no forklift in the area. Tr., Vol. II, p. 170. Further, Claimant's recollections of what Chad Rose or Scott Lancaster may have said on the morning of the accident was not credible as he was intoxicated at such a level that his testimony was appropriately rejected.

To the extent Claimant offered differing testimony, the finding that he was not a credible witness, certainly shows that based upon the credible evidence placed before it, the Commission came to a conclusion based on the competent evidence. Therefore, Claimant's appeal should be denied as no clear error by the arbiter exists.

II. CLAIMANT/APPELLANT CANNOT RAISE A NEW ISSUE ON APPEAL NOT ARGUED BELOW.

Appellant argues in its Opening Brief that the Court should review and apply the "emergency doctrine." This doctrine was not argued below. "This Court will not consider arguments raised for the first time on appeal. *Allen v. Reynolds* ____ P.3d ____, 2008 WL

2313468 (*unpublished*); *Obenchain v. McAlvain Constr., Inc.*, 143 Idaho 56, 57, 137 P.3d 443, 444 (2006). When arguments are not made below, they will not be considered for the first time on appeal. *Youngblood v. Higbee*, 145 Idaho 665, 182 P.3d 1199, 1202 (2008) citing, *Kirkman v. Stoker*, 134 Idaho 542, 544, P.3d 397, 400 (2000). Accordingly, the Court must deny Claimant's argument to review and adopt the emergency doctrine as it is improperly raised for the first time on appeal.

In the event this Court determines to examine the Appellant's contention to apply the "emergency doctrine", despite Appellant's failure to present the argument below, the Court should be aware there is no Idaho precedent for application of this doctrine in the workers compensation arena. Claimant does not cite any case in Idaho that adopts or espouses the emergency doctrine in this area; this doctrine has only been applied in civil tort litigation cases.

The Idaho Supreme Court has held that the emergency doctrine applies in civil tort litigation when

> one who, without fault on his part, is suddenly and unexpectedly placed in a perilous situation, so as to be compelled to act instantly and without an opportunity to exercise deliberate judgment. Under such circumstances he is not chargeable with negligence if in attempting to escape from the peril or to avoid or minimize the threatened injury he acts as a person of reasonable prudence would or might have acted in the same or similar situation.

Dewey v. Keller, 86 Idaho 506, 513, 388 P.2d 988, 992 (1964). In order for the emergency doctrine to apply in civil tort litigation, there must be an immediate attempt to escape a peril or a sudden emergency exists. *Id.* The doctrine does not apply where the person claiming application

of the doctrine appeared on the scene and took command of the situation for an appreciable period of time before the accident occurred and had time for reflection, deliberation, and thought. *Id.* at 514, 993.

While the emergency doctrine has never been adopted in an Idaho workers compensation situation, the doctrine has been applied in other states in a workers compensation setting where there is both an existing employment relationship and a rescue effort beyond one's normal course of employment. 1A Larson, Workers Compensation Law §28.11. States that have adopted the doctrine define it as extending the "scope of an employee's employment beyond the normal working hours and/or normal work-related tasks when an employee is confronted with an emergency that threatens the employer's property" or a co-employee. *Rohlck v. J & L Rainbow, Inc.*, 1996 SD 115, 553 N.W. 2d 521 (1996); *Martinez v. Workers' Compensation Appeals Bd., Roman Catholic Bishop of San Diego et al.*, 15 Cal. 3d 982, 544 P.2d 1350, 127 Cal. Rptr. 150 (1976). Sometimes this rule is referred to as the positional-risk test. Susan Yarborough Noe, *B. Roberts v. Burlington Industries- Workers Compensation for the Death of a Good Samaritan*, 66 N.C.L. Rev. 1377, 1381 (1988). This test requires an injury arising out of the *employment* which would not have occurred but for the fact that the conditions and obligations of the employment placed the injured worker in a position where he was injured. 1A Larson, Workers Compensation Law §6.50, at 3-6. (Emphasis added)

This doctrine is essentially a deviation rule for those situations where the employee steps aside from his employer's business to do some act in an emergency situation of his own but which the reasonable employee would have done. *Olde South Custom Landscaping v. Mathis*, 229 Ga. App. 316, 494 S.E.2d 14 (1977). The State of Georgia has broken down the embodiment of this doctrine into a four part test: (1) existence of employment, (2) the existence of an emergency, (3) the rescue of another person or property, and (4) employment which brought the employee to the place where he observed the situation calling for the rescue attempt. *Id.* The facts of this case do not amount to the proper application of the "emergency doctrine" and Respondent will explore each point of the Georgia analysis individually.

First, in the present action, the Commission found that employment did not exist. Conclusion of Law, R. p. 41. The emergency doctrine therefore does not apply here, because an employment relationship does not exist.

Second, the emergency doctrine requires the existence of an emergency. "There must be a true emergency as distinguished from a mere benefit to the employer through assistance to someone in trouble." *Rohlck, supra*, citing 1A Larson, Workmen's Compensation Law §28.13, at 5-451, *See also Rockhaulers, Inc., v. Davis*, 554 So.2d 654 (Fla. 1989). An emergency requires the finding of an immediate situation. *Martinez v. Workers', supra.* A true emergency requires a rescue attempt. *Cullifer and Son, Inc. v. Martinez*, 572 So.2d 1360 (Fla. 1990).

For example, a court has found an emergency exists where an employee was the first person on the scene of a head on collision and that employee was attempting to help those in distress when the employee was struck and killed by a passing car. *Rockhaulers, supra.* In that circumstance, the application of the doctrine was proper. However, that type of case is different than one where an employee is injured while helping a truck driver whose brakes are failing on an incline. *Murphy v. Peninsular Life Insurance Co.*, 299 So.2d 3 (Fla. 1974). The court there held that a true emergency did not exist because an employer could not have expected an employee to stop to help under those circumstances. *Id.* In that case, the employee had time to take deliberate action as opposed to acting in the midst of a true emergency situation. These applications of an emergency are consistent with the Idaho ruling in *Dewey v. Keller* where this Court held that there is no emergency where the situation allows command, reflection, deliberation, and thought. 86 Idaho at 513, 388 P.2d at 992.

In the present action, there was no emergency. The overhead door became stuck at about 7:30 a.m. Finding of Fact #22, R. p. 32. When the Claimant arrived at the Roche property, the door was already stuck. Finding of Fact #24, R. p. 32. The Claimant met the out of town driver and had a brief conversation about waiting for another lumper to arrive all while the door was stuck. Finding of Fact #24, R. p. 32. Claimant then took the time to ask the Swan's driver if he could help raise the warehouse door and waited for the driver's consent. Finding of Fact #24, R. p. 32. Here, there was no emergency, no one was in danger, immediate loss of property was not

at risk, Claimant was not making any attempt to rescue an individual from peril or to protect threats against the employer's property. In fact, Claimant admitted his sole purpose in going into the warehouse was to make an impression upon Frontier so he could seek employment in the future. . Tr., Vol. II, pp. 410-411; Tr., Vol. I, Exhibit "J" (Depo. Bradford pp. 30-31), Bates 735.

Third, as discussed above, Claimant did not react in an attempt to rescue an individual or property. In this case, Claimant was merely attempting to make an impression by releasing the stuck door.

Fourth, while employment did bring Claimant to the place where he observed the stuck door, the stuck door never rose to the level of an emergency. Moreover, it was Claimant's employment with the Swan's driver than brought him to the place of the incident, not any employment related to Roche or Frontier.

Thus, the Court should deny appellant's attempt to invoke the emergency doctrine on appeal first because this issue was not raised below, and second because the emergency doctrine itself is be inapplicable to the facts of this case.

III. RESPONDENT IS ENTITLED TO ATTORNEY'S FEES ON APPEAL

Respondents are entitled to an award of attorney fees in this matter pursuant to both Idaho Code § 12-121 and under I.A.R. 11.

> Under IAR Rule 11.1, sanctions will be awarded on appeal if the party requesting them proves: (1) the other party's arguments are not well grounded in fact, warranted by existing law, or made in good faith, and (2) the claims were brought for an improper purpose, such as unnecessary delay or increase in the costs of litigation."

> *Frank v. Bunker Hill Co.*, 142 Idaho 126, 124 P.3d 1002, 1008 (2005) (citing *Painter v. Potlatch Corp.*, 138 Idaho 309, 315, 63 P.3d 435, 441 (2003)).
>
> This Court has awarded attorney's fees when the appealing party is simply asking the Court to reweigh the evidence and credibility determinations. *Talbot v. Ames Construction*, 127 Idaho 648, 653, 904 P.2d 560, 563 (1995). In *Talbot*, this Court imposed personal sanctions against the attorney who brought the appeal pursuant to I.A.R. 11.1, finding that he had acted in bad faith. The Court stated that he had no basis in fact for his appeal, because he admitted that substantial, competent evidence supported the Commission's findings. Further, the Court found that he presented no legal arguments as a basis for his appeal; thus, he wasted judicial resources and acted in bad faith.

Stole v. Bennett, SC2 IIC1086 (2007). Such is the case here.

In this appeal, the Claimant has not raised any new interpretation of the facts nor has he met his burden stated in the Standard of Review to show that the Commission committed clear error in its findings by failing to use substantial and competent evidence to reach its conclusions. Instead, he has simply argued the same facts in the hope this Court would come to a different conclusion.

The Commission recognized the testimony of the witnesses was partially conflicting regarding the occurrence or content of any conversations occurring, when Claimant entered the Roche warehouse. Findings of Fact # 25 - 27, R. p. 33. Ultimately, the Commission found the testimony of Claimant to be less reliable for a number or reasons, including his intoxication. Finding of Fact # 33, R. p. 35. Claimant has failed to point to any error by the Commission in its interpretation of facts or a misapplication of law. Instead, as shown above, the Commission used substantial and competent evidence to conclude that Claimant volunteered to help with the

situation and that such action did not create an employment relationship. Finding of Fact # 51, R. p. 40. Claimant further frivolously argues that what may have been his history and course of dealings with Roche should somehow be imputed upon Frontier, a company that had not purchased the business until after the time of the accident and who had never employed the Claimant.

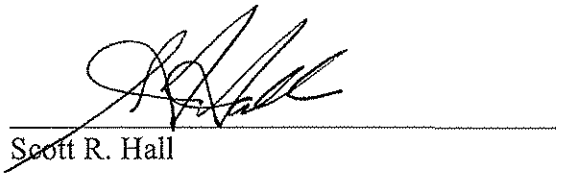
Appellant improperly urges this Court to apply the emergency doctrine–an issue which was not argued below and is clearly without legitimate application in the instant case, where Claimant admits he only helped for the sole purpose of making a good impression for future employment. Claimant has therefore brought this appeal frivolously before this Court and has also done so against the well established principle that new issues may not be argued on appeal.

There was ample, substantial, and competent facts and evidence to support the conclusion reached by the Commission and an award of attorneys fees is therefore appropriate.

CONCLUSION

Respondent Frontier respectfully requests that the Court affirm the decision of the Industrial Commission and award its attorney fees on appeal.

Respectfully Submitted this 23 day of June, 2008.



Scott R. Hall

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 23 day of June, 2008, by hand delivery, mailing, or facsimile with the necessary postage affixed thereto.

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