6-25-2008

Bradford v. Roche Moving & Storage, Inc. Respondent's Brief 2 Dckt. 34854

IN THE SUPREME COURT FOR THE STATE OF IDAHO

BARRY BRADFORD Claimant, Appellant, vs. ROCHE MOVING & STORAGE, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, and FRONTIER MOVING AND STORAGE, Employer, and STATE INSURANCE FUND, Surety, Defendants, Respondents.	)	Supreme Court No. 34854 **RESPONDENT RESPONSE BRIEF (Roche/Liberty)**

RESPONDENT LIBERTY NORTHWEST'S BRIEF

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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STATEMENT OF THE CASE

Barry Bradford ("Claimant") is represented by Paul Curtis of Idaho Falls, Idaho; Defendants, Roche Moving and Storage, Inc. ("Roche") and Liberty Northwest Insurance Co. ("LNW"), are represented by Monte R. Whittier of Boise, Idaho; Defendants, Frontier Moving and Storage ("Frontier") and State Insurance Fund ("SIF"), are represented by Scott Hall of Idaho Falls, Idaho.

Findings of Fact, Conclusions of Law and Recommendations were entered by Referee Alan R. Taylor on November 2, 2007 and an Order adopting the findings of Referee Taylor was entered and signed by all three Commissioners of the Idaho Industrial Commission on November 9, 2007.

The Idaho Industrial Commission ("Commission") specifically found that Claimant had not shown he was an employee of Roche or Frontier. The Commission did not address the issue of whether Claimant was an employee of the truck driver as Claimant chose not to make the truck driver a party to the action.

A. ADDITIONAL STATEMENT OF FACTS NOT PRESENTED BY APPELLANT

It is undisputed that Claimant was injured on the premises located at 857 Lindsey Blvd., in Idaho Falls, Idaho on August 9, 2006, a business operated under the name of Roche Moving and Storage, and that Claimant worked most of his adult life as a "Lumper" as set out in Claimant's brief.

A Lumper is an individual who helps truck drivers ("Driver") load and unload trucks at various locations designated by the Driver or the company for whom the Driver

works. As related to this case, and the moving and storage industry, Lumpers generally help Drivers load and unload furniture at various locations. These locations could be homes, businesses or storage facilities. Lumpers work at the sole direction of the Driver, and, therefore, the company for whom the Driver works. Lumpers are usually paid in cash by the Driver upon the completion of the job. The Driver has direct control over the Lumper and designates the time, place and hours worked. The Driver can retain or fire the Lumper at his total discretion. (Tr. p. 105, l. 23 – 106, l.5; p. 297, l. 14 – p. 298, l. 12; p. 414 ll. 3 – 13)

When a Lumper is needed by a Driver, the usual practice is for the Driver, or the company he works for, to call the moving company in the town where he will load or deliver to. That company will call individuals they have identified as willing to work as Lumpers to arrange for the Lumper to meet the Driver at the location designated by the Driver. The company arranging for the Lumper receives no remuneration for arranging for a Lumper. It does so as an accommodation for the Driver or other moving companies. (Tr. p. 107, ll. 2 – 23; p. 295, ll. 22 – 25) The use of Lumpers is not "on occasion" as stated by Claimant (Claimant Brief p. 3) but is an integral part of the moving and storage industry.

Prior to August 1, 2006, Claimant also worked as a Day Laborer for Roche. As a Day Laborer, Claimant essentially did the same work as a Lumper, and on occasion some additional warehouse work. As a Day Laborer Claimant worked directly for Roche rather than a driver. When working as a Day Laborer, Claimant would be involved with local or regional moves that Roche obtained through a moving contract for a local business or homeowner. Local moves do not require service of a long haul truck driver and such

moves did not involve an affiliated moving company. In those instances, Claimant would help with the local move and then at the end of the move, he would be paid by check with no withholding or other deductions. Because the Day Labor work was sporadic, just as the Lumper work was, there was no set payroll period as with full or part-time employees. (Tr. p. 202, l. 16 – p. 203, l. 10)

The Lumper and Day Labor work were also similar in that if work was offered, Claimant was under no obligation to take the work and Roche was under no obligation to offer work. When work was offered, it was for one project with no obligation to offer more work in the future and the Lumper or Day Laborer worked until the job was completed.

The work history of the Claimant with Roche has, for the most part, been set out in Claimant's brief beginning at page 2. However to clarify, Claimant was hired as a full-time employee in 2005 after getting out of prison. (Tr. p. 53, l. 6 – p. 55, l. 5) Even as a full-time employee, Claimant did not work, and was not guaranteed, a 40-hour week, but was only called in as needed. (Tr. p. 55, ll. 6 – 8) Due to the ill health of the owner of Roche, Dean Cook, and the subsequent decline in business, Claimant was laid off in December 2005. The last payroll check received by Claimant was on January 9, 2006 for the payroll period December 16 through December 31, 2005. (Exhibit G, p. 213) Claimant received another paycheck on January 25, 2006 that appears as a paycheck (Exhibit G, p. 230), however, that check was for earned vacation pay and not for work performed in 2006.

After being laid off in December 2005, Claimant went to work for another moving company in Idaho Falls. (Tr. p. 369, ll. 7 – 11; Exhibit D and V) When business

picked up for Roche in the spring and summer of 2006, Claimant returned and began working again as a Lumper and on occasion as a Day Laborer. After being laid off in 2005, Claimant was never rehired by Roche as a full-time employee. (Tr. p. 370, ll. 13 – 25; p. 401, l. ll – p. 402, l. 8; p. 381, ll. 7 – 10)

The first record of Claimant returning to work as a Day Laborer for Roche is a check written on May 9, 2006. (Exhibit G, p. 504) Between June 9, 2006 and the day of Claimant's accident, August 9, 2006, it appears that Claimant worked as a Day Laborer for Roche on the following days, or the days prior to the day the checks were written:

Date:	Exhibit G page number
June 13	523
June 20	531
June 23	540
June 29	553
July 7	558
July 24	602
July 31	610

Claimant was also paid on August 3, 2006 (Exhibit G, p. 615), for work which was for either Frontier or Roche. It is not clear what work was done or when, but was paid by Roche. Claimant was also paid on August 8, 2006, for work done on August 3 and 4, 2006, which was initially paid by Roche and reimbursed by Frontier on a later date. (Tr. p. 246, ll. 5 – 19)

Prior to August 1, 2006, the owner of Roche, Dean Cook, entered into negotiations with the owners of Frontier, and particularly Darin Smith, for the sale of the Roche business to Frontier. A contract was drawn up prior to August 1, 2006, indicating a closing date of August 1, 2006. For various reasons, the actual contract was not signed

by all parties until November 21, 2006. (Exhibit B) However, the closing date was never changed.

As of August 1, 2006, Frontier paid Dean Cook $10,000.00 as a down payment on the purchase of the business and took over all operations of Roche, (Tr. p. 242, ll. 11 – 20) including, but not limited to, bidding of contracts, payment of bills incurred on or after August 1, 2006, arranging for Lumpers, hiring employees, directing operations, etc. Dean Cook had nothing to do with the operations of the business after July 31, 2006.

After Frontier took over operations on August 1, 2006, some bills and expenses that needed to be paid for ongoing operations were paid by Dean Cook because Frontier had not had enough time to set up its own banking account for the Idaho Falls operations. These expenses were later reimbursed to Dean Cook upon the final accounting after the final contracts were signed.

Specifically, the payments made to Barry Bradford for work done on August 3 and 4, 2006, were reimbursed by Frontier to Dean Cook. Further, all income generated by Frontier, at the Idaho Falls location, on or after August 1, 2006 was retained by Frontier. Dean Cook was only paid for income that was earned prior to August 1, 2006, but received on or after August 1, 2006. (Tr. 240, ll. 8 – 12; p. 343, ll. 6 – 9; p. 344, l. 9 – p. 245, l. 10; Tr. p. 244, ll. 5 – 19; p. 246, l. 5 – p. 265, l. 15; p. 337, l. 22 – p. 338, l. 7; p. 343, l. 23 – p. 344, l. 2; p. 345, ll. 11 – 16.)

On August 1, 2006, the former employees of Roche, who were retained by Frontier, were placed on the payroll of Frontier. Specifically, two of the former Roche employees retained by Frontier were Brenda Hill ("Hill"), who was an office manager/secretary, and D. Scott Lancaster ("Lancaster"), who was a driver. (Tr. p. 41, ll.

4-7; p. 137, ll. 16 – 21) After August 1, 2006, Hill never took directions from Cook and never received a paycheck from Roche. (Tr. p. 80, ll. 11 -24)

One of Hill's duties was to arrange for Lumpers when a Driver would call in and indicate that one was needed for a particular job. (Tr. p. 36, ll. 1 – 3; p. 37, l. 18 – p. 38, l. 3) These duties did not change after Frontier took over the operations on August 1, 2006. (Tr. p. 41, ll. 8 – 12) Even though her duties did not change, her supervisors did. Prior to August 1, 2006 her supervisor was Dean Cook. As of August 1, 2006, her supervisor was either Darin Smith or Chad Rose. (Tr. p. 41, l. 13, - p. 42, l. 1; p. 109, ll. 3 – 19; p. 122, ll. 7 – 21)

By August 7, 2006, Frontier had placed Chad Rose ("Rose") as manager of the Idaho Falls operation. (Tr. p. 119, l. 23 – p. 120, l. 8) Although Rose had no experience in the moving industry, he was placed in charge of the Idaho Falls operation for what seems to amount to "on the job training." Rose readily admits that he relied on Roche's former workers for some guidance for the ongoing operations.

On August 8, 2006 Hill arranged for two Lumpers. These Lumpers were told to meet the Driver at the Roche location on the morning of August 9, 2006. Claimant was one of those Lumpers. (Tr. p. 69, ll. 2 – 20; p. 384, ll. 11 – 15; p. 403, ll. 1 – 10) Claimant testified that he checked in with the Driver upon his arrival. Claimant also acknowledged that once he checked in with the Driver at 8:00 a.m., he was "on the clock" for the Driver and not with Frontier or Roche. (Tr. p. 408, ll. 3 – 17; p. 409, ll. 4 – 7) Because the other Lumper had not arrived, Claimant asked the Driver for permission to go to the warehouse because Claimant could see that there was something wrong with

the overhead door leading into the warehouse. Claimant then, on his own accord, went to see if he could be of assistance. (Tr. p. 384, l. 18 – p. 385, l. 17; p. 414, l. 3 – 15)

It is clear that no one asked for Claimant's assistance prior to him entering the warehouse, but the "stories" vary as to whether Claimant asked if he could help, who he may have asked to help, and whether anyone really acknowledged that they needed him to help with the overhead door.[1] In any event, when Claimant entered the warehouse by walking under the broken overhead door, he saw Lancaster and Rose working on the door. By whatever conversation that occurred between Claimant and Lancaster and/or Rose, Claimant went over to where the overhead door was jammed and attempted to force the door back onto its tracks by jumping up and down on it, which resulted in the injuries to the Claimant. It appears that everyone agrees that Rose or Lancaster, employees of Frontier, had the authority to tell Claimant he could not help. If he had been told that he could not help and not to take any action, he would not have assisted. (Tr. p. 150, ll. 2 – 5; p. 155, ll. 3 – 24; p. 181, l. 13 – p. 182, l.3)

Claimant testified that he went in as a volunteer, did not expect to get paid for helping out on the door, and did so in order to show Frontier that he was a good worker in hopes of being hired back with Frontier in the future. (Tr. p. 410, ll. 18 – 25; p. 417, l. 25 – p. 18, l. 9; Bradford Deposition p. 17, ll. 15 – 22)

The Commission found Claimant was not an employee of either Roche or Frontier on August 9, 2006 and that Claimant's act of coming into the warehouse to try and help

[1] Tr.p. 147, l. 21 – p. 148, l.9; p. 149, l. 14 – 24; p. 150, ll. 11 -13; p. 175, ll. 18 – 23; p. 384, l. 18 – p. 386, l. 14; p. 287, ll. 8 – 23; p. 389, l. 25 – p. 390, l. 7; p. 391, ll. 11 – 16; p. 411, l. 23 – p. 412, l. 3; p. 413, ll. 16 – 25.

was as a volunteer, and not as an employee or independent contractor for either Roche or Frontier.

ADDITIONAL ISSUES ON APPEAL

Is there substantial and competent evidence to support the decision of the Idaho Industrial Commission holding the Claimant was not an employee of Respondent Roche?

A. ATTORNEY FEES ON APPEAL

Are Respondents Roche/Liberty entitled to attorney fees on appeal under Rule 11.1 of the Idaho Rules of Civil Procedure?

ARGUMENT

A. CLAIMANT WAS NOT AN INDEPENDANT CONTRACTOR OR AN EMPLOYEE OF ROCHE AT THE TIME OF INJURY

Even with all the undisputed and overwhelming evidence that Roche had no say in the operations of the moving business and had no employees after August 1, 2006 Claimant continues to insist he was an employee of Roche and continues to press the issue against Roche. In essence, Claimant is asking this Court to summarily override the Findings of Fact and the Conclusions of Law of the Commission, simply to obtain a favorable decision, but does not argue the Commission did not have substantial and competent evidence to reach the decision, but merely they misinterpreted the evidence.

On appeal from a decision of the Idaho Industrial Commission, the Supreme Court is to give great deference to the Commission's Findings of Facts and Conclusions of Law. This Court does exercise free review over questions of law, but not over the

questions of fact. As stated in the case of *Sunquist v. Precision Steel & Gypsum, Inc.*,

141 Idaho 450, 111 P.3d 135 (2005)

> When reviewing a decision of the Industrial Commission, this Court exercises free review over questions of law. *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). The question of when a claimant's medical condition becomes "manifest" and "preexisting" relative to later events is a question of fact. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). The factual findings of the Industrial Commission will be upheld provided they are supported by substantial and competent evidence. *Uhl*, 138 Idaho at 657, 67 P.3d at 1269. "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id.* The conclusions reached by the Industrial Commission regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. *Hughen v. Highland Estates*, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002). We will not re-weigh the evidence or consider whether we would have drawn a different conclusion from the evidence presented. *Id.*

This Court has also stated:

> The Industrial Commission's legal conclusions are freely reviewable by this Court; however, its factual findings will not be disturbed on appeal so long as they are supported by substantial and competent evidence. Idaho Const. Art. V, §9; I.C. §72-732; *Obenchain v. McAlvain Constr., Inc.*, 143 Idaho, 56, 57, 137 P.3rd 443, 444 (2006). The Court construes the record most favorably to the party prevailing below, and does not try the matter anew. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997).

Wichterman v J.H. Kelly, Inc. 144 Idaho 138, 158 P.3d 301, 303 (2007)

> "Unless clearly erroneous, this Court will not disturb the Commission's conclusions on the credibility and weight of evidence." *Painter v. Potlatch Corp.*, 138 Idaho 309, 312; 63 P.3d 435, 438 (203) ... This Court will not "re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented." *Id.* (citing *Warden v. Idaho Timber Corp.*, 132 Idaho 454, 457, 974 P.2d 506, 509 (1999)).

Stolle v. Bennett, 144 Idaho 44, 156 p.3D 545, 550 (2007)

Claimant has not made an argument that the Commission did not have sufficient evidence to reach the decision that they did, but simply wishes this Court to reweigh and reapply the evidence, in defiance of *Sunquist, Wichterman* and *Stolle.*

Claimant attempts to cloud the issues by trying to put Claimant into the category of a day laborer and, therefore, the Commission simply got it wrong. (Claimant's brief page 10). Again, Claimant is simply asking this Court to come to a different conclusion based on the same facts. As Claimant repeatedly points out, the facts are not in dispute. Because the Claimant was hired on a intermittent basis to do day labor, the Claimant attempts to make the illogical jump he must have been acting as a day laborer at the time he was injured. By doing so, Claimant ignores the undisputed facts that he was not hired that day by Roche to do any work. He was hired to be a lumper by a truck driver and chose to go to the warehouse to be a "good employee" with hopes of being hired by Frontier, not Roche.

It is undisputed that on August 9, 2006, Claimant had been notified by Brenda Hill, an employee of Frontier, to meet with a Driver at 8:00 a.m. in the parking lot of the warehouse located on Lindsay Blvd., in Idaho Falls. (Tr. p. 97, ll. 8 – 20) At no time was Claimant notified that he was to come into work for Frontier/Roche on that day. When Claimant came to the premises on August 9, 2006 to work as a Lumper, he did not check in with Hill, but rather proceeded directly to the Driver. (Tr. p. 69, ll 22 -23; p. 83, l. 2 – p. 84, l. 2; p. 97, ll. 8 – 20; p. 104, ll. 1 – 4) Having been called as a Lumper, Claimant had no reason to come to the warehouse for work. (Tr. p. 176, ll. 11 – 14; p. 178, ll. 5 – 13; p. 182, ll. 21 – 24) As noted, the call to Claimant to be a Lumper was merely an accommodation for the Driver to have someone assist in the unloading of the truck.

As required, Claimant checked in with the Driver upon his arrival at the warehouse, expecting to work and to be paid for his services as a Lumper, with payment

to come from the Driver. Because the other Lumper had not arrived, Claimant asked permission from the Driver to leave the truck and go to the warehouse, which permission was granted. Claimant acknowledges that if the Driver had told him no, then he would not have gone to the warehouse. (Tr. p. 414, ll. 3 – 13) Therefore, the Driver at this point in time had established either an employer/employee relationship or a contractor/independent contractor with Claimant .

It is also undisputed that Claimant was not asked by anyone working for Roche to come to the warehouse to work on August 9, 2006 (Tr. p. 403, ll. 1 – 10) and in going to the warehouse, Claimant had no expectation of doing any work for Roche or receiving any remuneration from Roche. Claimant was simply trying to make a good impression in hopes of landing a job with Frontier. (Tr. p. 379, l. 23 – p. 378, l. 9)

Under these undisputed facts, Claimant was clearly not an employee of Roche on August 9, 2006.

The test that establishes the employer/employee relationship was recently addressed in *Hernandez v. Triple Ell Transport, Inc.* 145 Idaho 37, 175 P3d 199, 202 (2007) where in this court stated:

> An "employee" is "any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer." I.C. § 72-102(12).
> ...
>
> An "independent contractor" is "any person who renders service for a specified recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished." I.C. § 72-102(17).
>
> Whether someone is an employee versus an independent contractor is determined factually. *Mortimer v. Riviera Apartments*, 122 Idaho 839, 845, 840 P.2d 383, 389 (1992). "The test in determining whether a worker is an independent contractor or

an employee is whether the 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 definite results." *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 683, 905 P.2d 82, 84 (1995). "Unlike control over the manner, method or mode by which a task is performed, merely exerting control over the results of the work does not suggest an employment relationship." *Excell Construction, Inc. v. State Department of Labor*, 141 Idaho 688, 695, 116 P.3d 18, 25 (2005).

"Four factors are traditionally used in determining whether a 'right to control' exists, including, (1) direct evidence of the right; (2) the method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the employment relationship at will and without liability." *Burdick v. Thornton*, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985). None of these factors is controlling, *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 683, 905 P.2d 82, 84 (1995), and "when a doubt exists as to whether an individual is an employee or an independent contractor under the Workmen's Compensation Act, the Act must be given a liberal construction in favor of finding the relationship of employer and employee." *Burdick v. Thornton*, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985).

On August 9, 2006, Roche had no control whatsoever over Claimant or any other employee. Roche was out of business as of July 31, 2006.

Even if this Court were to determine Dean Cook to still have some control over the business operations on or after July 31, 2006, it is still undisputed that Brenda Hill, who had been running the business for him while he was undergoing cancer treatment, had begun working for Frontier on August 1, 2006. Frontier had assumed all operations of Roche Moving and Storage as of August 1, 2006 and had exercised all control over the employees it put on its payroll as of August 1, 2006.

In an attempt to try and blur the line between Lumper and Day Laborer, Claimant relies on the fact that Roche may have paid a Lumper for a Driver. (Claimant's Brief page 14) It appears that Claimant is attempting to portray this as a common occurrence, when in fact Cook could only recall this happening a "time or two" over the many years

he operated Roche. (Cook Deposition p. 14, ll. 4 – 20) Even if it were a common occurrence, such payments would be nothing more than a loan to the Driver, or the company for which the Driver works, and the money would then be reimbursed by the company that the Driver worked for. (Tr. p. 206, ll. 0 – 17) It does not mean that the Lumper became the employee of Roche. This argument is a "red herring."

Similarly, Claimant's argument that because Roche maintained insurance to cover Lumpers on those occasions when Roche was making a "local move," using its own equipment and Driver, that these types of situations somehow makes all Lumpers arranged by Roche/Frontier the employees of Roche/Frontier (Claimant's Brief page 10) is simply misplaced. Rather this is consistent with the stance of Roche/Frontier that Lumpers are temporary workers performing work at the direction of Drivers. In the instances of local moves, Drivers are the employees of Roche/Frontier and if any action is taken by the Driver, under agency law, it is as if the company has taken that action. The fact that Roche/Frontier maintained insurance to cover Lumpers for its Drivers on local moves, albeit out of state, simply confirms their position that Lumpers are under the control of the Drivers.

Similarly, the fact that Lumpers were supposed to wear an Allied T-shirt was a requirement of Allied Van Lines for Lumpers working for associated Allied moving companies. This was not a requirement of Roche. (Tr. p. 234, ll. 2 – 216; 300, ll. 14 – 18) This was not a control issue.

Again the Claimant's position that if a Lumper was called, and for some reason ended up doing day labor, the individual was then considered an employee of Roche/Frontier for all purposes under the joint and dual employment theory is also

misguided. (Claimant's Brief page 13) Even when this did happen on a rare occasion, there was still a distinct split between the two different employments. Work done as a Lumper was paid for by the Driver, and work done for Roche was paid for by Roche. (Tr. p. 207, l. 22 – p. 209, l. 23; p. 269, ll. 10 – 21) There is no showing that the work done for one or the other, i.e. the driver or the moving company, ever benefited the other. More importantly, Claimant acknowledges that he was never asked to switch from Lumper to Day Laborer on August 9, 2006. (Tr. p. 403 1 – 10)

Finally, even if this Court were to reverse the Commission and find that Claimant was an employee, even the Claimant thought he was working for, and it was his intent to work for, Frontier, not Roche. Any Day Labor performed after August 1, 2006 was for Frontier. (Bradford Deposition p. 23, l. 16 – p. 24, l. 1)

B. CLAIMANT DID NOT ESTABLISH AN EMPLOYER/EMPLOYEE RELATIONSHIP BY ENTERING INTO THE WAREHOUSE AND HIS ACTIONS ARE DEEMED TO BE THAT OF A VOLUNTEER

The question then arises as to whether the actions taken by Claimant by going into the warehouse establishes a working relationship when he volunteers to help in trying to dislodge the overhead door.

Again, no relationship was ever established between Claimant and Roche on August 9, 2006, because Roche was no longer running the business and had no employees or business operations at that time. Therefore, it would have been impossible for Claimant to establish any type of employment situation with Roche. There was no work to give, direct, or control as far as Roche is concerned. Further, in entering the warehouse, under the dislodged overhead door, Claimant testified that he asked either Lancaster or Rose, both employees of Frontier, if they needed help. Claimant argues that

in some way he was told that his help was needed or allowed, either by a nod of the head or verbal response. Therefore, even if the acts of Claimant did establish an employer/employee relationship, it was with employees of Frontier, not Roche.

Even if the facts are viewed in a light most favorable to Claimant, he has not proved/established an employer/employee relationship. Again, Claimant came into the warehouse with no expectation of working for remuneration (Tr. p. 418, ll. 4 – 9) and was simply offering to help because of a delay in his work for the Driver. He simply volunteered his help in order to make a good impression. Under these facts, it is clear there was no right of control to direct Claimant by Frontier, with the right of control the main focus point in determining whether an employer/employee relationship exists.

Claimant attempts to rely on the fact that he had "repaired" the door on many occasions and, therefore, could be expected to do so on the day he was injured. (Claimant's Brief page 14) The problem with this position is that it is simply not true. When the facts are reviewed, the overhead door simply had a defect in the railing that would cause the door to hang up. In order to open the door, one simply had to manipulate the rail and the door opened. The door had operated this way for as long as anyone could remember and anyone who worked there knew how to get the door open. Yet, over all these years, no one ever "fixed" the door. Claimant uses this to try and persuade this Court that he had the right to make repairs. In contrast to the every day situation is the fact that on the day he was injured, the door was truly broken and broke in a way that had never happened before. (Lancaster Deposition p. 13, l. 25 – p. 14, l. 25) Since the door was broken in a way that had never happened before, Claimant's position

that the actions he took to effectuate repairs because he had done so many times before, is at best misplaced and at worse a serious attempt to mislead this Court.

It is true that Rose could have told him not to come into the warehouse or not to help, or perhaps even told him to stop jumping up and down on the overhead door. But that does not take away from the fact that Claimant was not directed to do it in the first place and, secondly, all actions taken by Claimant were done of his own volition and not at the direction of anyone else. As Rose testified, he was new. He knew they had problems with the overhead door before and he assumed that Claimant knew what he was doing. Even under those circumstances it does not meet the requirements of employment.

Idaho Code §72-102(12) defines an "employee" as any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer. In this instance there is no contract for service, either expressed or implied. Further, Idaho Code §72-102(13)(a) defines an "employer" as any person who has expressly or impliedly hired or contracted the services of another. The only argument available to Claimant here is that there was some implied hiring of Claimant to help fix the overhead door. The facts simply do not back up that position, even though Claimant attempts to elevate these facts to those of "expressed permission."

Since Claimant has not established himself as an employee, his acts would be deemed those of a volunteer. As a volunteer, his acts, and injuries, would not be covered or come under the auspices of Idaho Code Title 72.

As stated in *Parker v. Engle,*115 Idaho 860, 864, 771 P2d 524, 528 (1989) "Voluntary activities will not suffice; an award of compensation depends on the existence

of an employer/employee relationship." As stated in *Seward v. State of Idaho Brand Division,* 75 Idaho 467, 471, 274 P.2d 993, 995 (1954) "Services gratuitously and voluntarily performed for another or for the employee of an employer are ... not covered by the Workmen's Compensation Act."

In this case, Claimant was the employee of the Driver, and he voluntarily went into the warehouse to see if he could help, as a volunteer, not as an employee. Any attempt to argue to the contrary ignores the testimony of the Claimant himself that he had no intention or expectation of being paid for his volunteer activity. (Tr. p. 410, l. 18 – p. 411, l. 11)

Clearly there is substantial and competent evidence to support the decision of the Idaho Industrial Commission in finding that Claimant did not establish an employer/employee relationship with Roche.

C. EMERGENCY

For the first time, Claimant raises the issue/doctrine of emergency and that his acts somehow came under the guise that Frontier was under an emergency situation which demanded his immediate help. Having been raised for the first time on appeal, this issue should not be considered. However, even if considered, Claimant has failed to demonstrate that there was any type of emergency. As noted by Claimant (Claimant's brief page 12) "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." (1 *Larsen, Workmen's Compensation Law,* §28.01[1], p. 28-2) Clearly those items described by *Larsen* are situations that require immediate assistance. That is not the case here. Frontier simply had a stuck

garage door. Although it may have interfered with business operations, it does not arise to the point of emergency. No allegations are alleged that anyone was in danger, that there was some immediate threat or any property was being threatened. Simply, no emergency existed.

Again, even if this Court finds that an emergency existed, it did not exist as far as Roche is concerned, as Roche had nothing to do with the business operations on August 9, 2006.

D. THE BUSINESS OPERATED AS ROCHE MOVING AND STORAGE WAS UNDER THE OWNERSHIP/DIRECTION OF FRONTIER ON AUGUST 9, 2006

The more problematic argument of Claimant is he can't decide who he was an employee of and, therefore, simply lumps all the possible employers together and now has become a dual employee of all three entities, i.e. the truck driver, Frontier and Roche. Somehow, he continues to argue that he is an employee of Roche, when there is absolutely no evidence to tie his work on August 9, 2006 to Roche.

Even though Frontier argued vehemently at hearing that it did not own the business which continued to be operated as Roche Moving and Storage on August 9, 2006, the facts point in only one direction: Frontier was running the business as of August 1, 2006.

The facts are undisputed: Frontier gave Dean Cook a $10,000.00 down payment on or about August 1, 2006. (Tr. p. 242, ll. 11 – 20) On August 1, 2006 Frontier took over all operations at Roche Moving and Storage. Frontier was in charge of hiring and firing employees and had *its* employees in place on August 1, 2006, hiring some of the former employees of Roche Moving and Storage and placing them on the Frontier payroll

as of August 1, 2006. [2] Frontier was benefiting from the operation of Roche Moving and Storage as any income generated on or after August 1, 2006 was kept by Frontier. [3] Frontier took over the responsibility of all bills generated on or after August 1, 2006, even though Cook had to front some of those expenses for continuing operations and was reimbursed for those expenses at the final reconciliation. [4] Frontier hired Chad Rose to be the manager of the Idaho Falls operation and Chad Rose was on site, managing, on August 9, 2006. (Tr. p. 318, 4 – 10) Frontier set up its own bookkeeping and computer systems immediately after August 1, 2006. (Tr. p. 163, l. 23 – p. 164, l. 3) After August 1, 2006, Dean Cook had no authority to direct employees or give directions regarding operations. (Tr. p. 164, ll. 15 – 20) Frontier assumed all responsibilities to call Lumpers or Day Labor employees. (Tr. p. 186, l. 20 – p. 187, l. 5) After Claimant was injured, no one notified Dean Cook that Claimant had been injured or requested he take any action because of the injuries to Claimant. (Tr. p. 229, l. 23 – p. 230, l. 12)

For Frontier to take the position that they were only operating the business in Idaho Falls to "help" Dean Cook is disingenuous at best. The only facts that Frontier can point to, in order to back up this position, is that the paperwork was not signed until November, 2006. The fact that the paperwork was not signed until later is irrelevant. The questions are: Who was operating the business? Who was hiring and firing employees? Who had the power to direct the employees or contractors in their duties? The one and only answer to all these questions is: Frontier. Further, it is undisputed that

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[2] Tr. p. 163, ll. 8 – 18; p. 320, l. 17 – p. 322, l. 10; p. 322, ll. 10 – 18; p. 333, ll. 4 – 11; p. 344, ll. 3 – 8; p. 345, ll. 20 -24; p. 359, ll. 6 – 15.
[3] Tr. 240, ll. 8 – 12; p. 343, ll. 6 – 9; p. 344, l. 9 – p. 245, l. 10
[4] Tr. p. 244, ll. 5 – 19; p. 246, l. 5 – p. 265, l. 15; p. 337, l. 22 – p. 338, l. 7; p. 343, l. 23 – p. 344, l. 2; p. 345, ll. 11 – 16.

if Frontier had not taken over on August 1, 2006, Cook would have closed the doors on the business and ceased operations. (Tr. p. 289, l. 20 – 290, l. 8)

The other justification which Frontier points to at hearing is that in their minds they could have backed out of the agreement at any time prior to signing the papers. Whether this is true or not is again irrelevant as Frontier never backed out of the purchase. Assuming that they could have backed out of the purchase, one would have to acknowledge and concede that they were operating and controlling the business with the goal of finalizing the purchase of the business.

The fact remains, Frontier was in charge, "calling the shots," and operating and running Roche Moving and Storage. Frontier had the absolute right to control all of the employees from August 1, 2006 forward. Bottom line: Frontier was the employer/operator of Roche Moving and Storage as of August 1, 2006. The only reason for Frontier to take any other position is simply the fact that they are trying to avoid liability for the injuries of the Claimant if it is found the Claimant was an employee on August 9, 2006.

E. ATTORNEY FEES

Rule 11.1 of the Idaho Appellate Rules directs the Court to award expenses, including attorney fees, incurred because of an appeal not reasonably grounded in fact or law and filed for an improper purpose. (*Wichterman v J.H. Kelly, Inc.* 144 Idaho 138, 158 P.3d 301) Rule 11.1 states:

> ...The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge, information, and belief after reasonable

> inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule,...

In applying Rule 11.1 to workers compensation cases, this Court held:

> This Court has awarded attorney's fees when the appealing party is simply asking the Court to reweight 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.

Stolle v. Bennett, 141 Idaho 44, 156 P.3d 545, 552 (2007)

In this case, it cannot be argued otherwise that Claimant has appealed simply to try and get this Court to reinterpret the facts and come to a different conclusion. The Claimant does not argue that there is no competent and substantial evidence to sustain the findings and order of the Idaho Industrial Commission. Claimant simply requests this court to come to a different conclusion based on the same facts. Attorney fees and costs should be awarded to Roche.

CONCLUSION

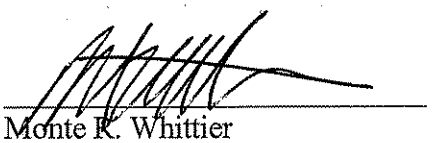
It is respectfully submitted that Claimant has failed to carry his burden of proof in establishing that on August 9, 2006 he was in the employment of Roche. Claimant's acts on August 9, 2006 were that of a volunteer and such acts are not to be covered by Idaho Workers' Compensation Act and the Commissions decision should be affirmed on all counts.

Even if this Court were to find that the Commission erred in finding Claimant had not established an employer/employee relationship, it is submitted that any such relationship would be between Claimant and Frontier. This Court should then enter a specific finding that all operations conducted on or after August 1, 2006, were that of Frontier.

Roche should further be awarded attorney fees and costs on appeal and a finding entered that the appeal taken by Claimant was frivolous as it relates to Roche.

Respectfully submitted this 25th day of June 2008.

LAW OFFICES OF HARMON,
WHITTIER & DAY



Monte R. Whittier
Attorney for Defendants-Roche/Liberty

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 25th day of June, 2008, a true and correct copy of the foregoing document was served upon the following by the method indicated:

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☒ First class mail, postage prepaid
☐ Hand delivery
☐ Express mail
☐ Fax transmission

Monte R. Whittier