BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH DIXON, IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IVAN DIXON, Claimant, v. DEOLE PRIDDY, d/b/a DE'S TREE & STUMP SERVICE, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2017-053323** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER, AND CONCURRENCE IN PART, DISSENT IN PART** Filed, May 12, 2020

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on December 5, 2019. Jason Thompson represented Claimant. Paul Augustine represented Defendants Employer and Surety (hereafter "Defendants," or when discussed individually Employer will be designated as "Defendant" and Surety as "Surety"). The parties produced oral and documentary evidence at the hearing.[1] No post-hearing depositions were taken. The parties submitted briefs. The case

[1] Ivan Dixon, an individual at the center of this controversy, died as a result of complications from injuries he sustained while assisting an employee of Defendant Employer. Joseph Dixon is Ivan Dixon's father, and the personal

came under advisement on February 11, 2020. The undersigned Commissioners agree with the Referee's analysis and conclusion. The Commission issues this decision to explain how the narrow issue considered came before it.

ISSUE

The narrow issue for resolution, as defined by the parties in their briefing, is whether Ivan Dixon (deceased) was an employee of Defendant Employer pursuant to the provisions of Idaho Code § 72-204(2) at the time of his injury on October 26, 2017.[2]

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representative of Ivan Dixon's estate. Joseph Dixon was not present at hearing, and Claimant presented no direct hearing testimony, although he did elicit testimony from Defendant Deole Priddy during cross examination.

[2] In his May 8, 2019 Request for Calendaring, Claimant described one of the issues to be heard by the Commission as follows:

> "Whether Ivan Dixon, Deceased, was an employee of Deole Priddy d/b/a De's Tree and Stump Service at the time of the industrial accident, as defined by Title 72 and applicable case law ..... "

In their May 22, 2019 response to the Request for Calendaring, Defendants described this issue as follows:

> "Whether Claimant was an employee of Defendant Employer pursuant to Idaho Code § 72-204....."

The Commission's May 29, 2019 Notice of Hearing identified a number of issues, among them, the following:

> "Whether Claimant was an employee of Defendant Employer pursuant to Idaho Code § 72-204;"

Following an October 28, 2019 prehearing telephone conference, the issues were further refined, leaving only one issue to be heard on December 5, 2019: "Whether Claimant was an employee of Defendant Employer pursuant to Idaho Code § 72-204."

At hearing, Referee Harper identified the sole issue for hearing as whether Claimant was an employee of Defendant Employer under Idaho Code § 72-204. Hr'g Tr. at 5:23-6:1. In response, Claimant's counsel stated that the issue is whether Ivan Dixon was an employee at the time of the accident. Hr'g Tr. at 6:3-8. Reiterating the issue to be heard, Referee Harper stated that the sole issue to be decided is whether or not Dixon "was an employee of the Defendant Employer under - under the code provision." Both parties expressed their assent to this description of the issue before the Commission. Hr'g Tr. at 6:16-21. The post-hearing briefing of the parties is limited to addressing whether decedent was an employee of Defendant Employer pursuant to the provisions of Idaho Code § 72-204(2) and, specifically, whether Employer's principal, Deole Priddy, had actual or constructive knowledge of Windmiller's ostensible employment of decedent as a helper or assistant. Therefore, while Claimant's request for calendaring, and certain comments made at hearing by Claimant's counsel, arguably invites a broader inquiry of whether Claimant's status was that of employee, by their briefing the parties have narrowed the issue to whether decedent was an employee of Defendant Employer pursuant to Idaho Code § 72-204, and, in particular, whether the evidence establishes that

CONTENTIONS OF THE PARTIES

Claimant contends Ivan Dixon (hereafter "Dixon") was an employee of Defendant on October 26, 2017 and was injured while in the course and scope of such employment. Specifically, Claimant argues Dixon was employed in the service of Defendant as a paid helper or assistant to an employee of Defendant and Defendant knew of such arrangement. As such, Dixon fit within the definition of an employee under Idaho Code § 72-204(2), which provides that helpers and assistants of employees, even those paid by such employee (and not directly by the employer) are employees of the employer if the employer had actual or constructive knowledge of the arrangement. Claimant asserts Defendant had at least constructive if not actual knowledge that Dixon was working for, and paid by, Defendant's employee at the time Dixon was gravely injured while "on the job" for Defendant.

Defendants argue Claimant was not an employee. Defendant did not have actual or constructive notice that Dixon was again working at the job site even after Defendant specifically and directly told his employee not to use Dixon on the job and further threatened the employee with termination if he again permitted Dixon back on site. Defendant was not at the site when the accident occurred and had no knowledge his employee defied Defendant's direct order and again allowed Dixon to assist the employee. Since Defendant lacked the knowledge required under Idaho Code § 72-204, Dixon was not an employee of Defendant when injured, and Claimant has no worker's compensation claim against Defendants as the result of the accident in question.

Deole Priddy had actual or constructive knowledge of Windmiller's retention of decedent as a helper or assistant as of the date of the subject accident. No other theories of employment are considered in this decision.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Defendant Deole Priddy taken at hearing;

2. Joint Exhibits 1 through 24, admitted at hearing;

All objections preserved through the depositions (Exhibits 19, 20, and 24) are overruled.

FINDINGS OF FACT

The following finding of facts are supported by the weight of the evidence. Details not material to the issue at bar are not included herein. Contrary assertions were considered and rejected as being inconsistent with the weight of the evidence. To the extent such assertions are relevant to the issue to be decided they will be discussed hereinafter under the heading "Discussion and Further Findings." The Commission finds no reason to disturb the Referee's findings and observations of the presentation and credibility of the witnesses.

1. Defendant Deole Priddy operated a seasonal (spring, summer, and fall) tree removal business out of New Meadows, Idaho as a sole proprietor under the assumed name De's Tree and Stump Service. Equipment periodically used in his operation included, among other things, a bucket truck for overhead work, and a chipper for limb clean up.

2. Defendant hired part-time workers as needed. When hired, the employees signed a W-4 and were placed on the payroll. Work was sporadic and dependent upon the tree removal jobs Defendant lined up. Employees were paid by check for the jobs they worked.

3. Ivan Dixon worked as an employee for Defendant from May 1 through July 15, 2016. The work included climbing trees to cut limbs which Defendant could not reach with the bucket truck. Defendant had concerns over Dixon's unsafe practices while doing

aerial work. Dixon's continued unsafe climbing practices led Defendant to fire Dixon in mid-July 2016. Thereafter Dixon left the area for a time.

4. In or around August 2017, an individual by the name of Brandon Windmiller introduced himself to Defendant. Windmiller claimed he was experienced in tree removal, including tree climbing, had a business license and insurance, and would like to work for Defendant as an independent contractor. Defendant hired Windmiller on a piece-meal basis as an independent contractor. Windmiller's first job entailed repairing a pony motor on the bucket truck. He was paid by check on August 28, 2017 for that work.

5. Windmiller and Dixon were good friends. During the summer of 2017, Dixon returned to the New Meadows area and periodically stayed with Windmiller at Windmiller's residence.

6. In September 2017, Windmiller began doing tree removal work for Defendant. Windmiller took Dixon on tree removal jobs while Windmiller was working as an independent contractor for Defendant. Defendant saw Dixon working with Windmiller but said nothing because Windmiller was free to hire whomever he wanted while working as an independent contractor.

7. Eventually, Defendant learned that Windmiller did not have a business license or insurance. As a result, Defendant required Windmiller to sign a W-4 andbecome an employee, which he did on or about October 2, 2017.

8. In late September Defendant injured his low back and had difficulty working. After Windmiller became an employee, Defendant instructed Windmiller on the safe use of the bucket truck and thereafter allowed Windmiller to begin operating it.

9. Defendant had hired a part time employee by the name of Derrick Doty in mid-September 2017 as a "ground man" whose job it was to clean up the limbs, brush, and debris after a tree was brought down. Doty worked with Defendant in September before Defendant hurt his back.

10. In October, Defendant instructed Windmiller to use Doty as his ground man. It appears from the payment records that at least on some occasions during October Windmiller did use Doty as his ground man; however, twice in October Defendant arrived at a job site where Windmiller was working and saw Dixon, not Doty, working with Windmiller.

11. The first occasion was on a job in McCall. Defendant had been at an appointment out of the area and upon his return went to the job site to check on Windmiller. Dixon was there picking up limbs. Upon seeing Dixon, Defendant told Windmiller that he was not allowed to use Dixon on any job. He stressed that Dixon was not an employee and Defendant would not rehire him, and Windmiller was not to allow him on the job site. Windmiller acknowledged Defendant's admonition.

12. On October 24, 2017, Defendant was scheduled go elk hunting but instead went to the job site near Cambridge where three tree removal jobs were ongoing or scheduled. Defendant again observed Dixon working with Windmiller. Defendant had expected to see Doty there with Windmiller. Defendant asked Dixon what he was doing, and Dixon said he was helping Windmiller. Defendant then confronted Windmiller "emphatically this time." Hr'g Tr. at 59:23-24. Defendant reiterated that Dixon was not an employee, was not supposed to be on the job site Doty was the employee Windmiller should be using. Defendant told Windmiller that if he used Dixon again, he would be fired.

13. Defendant was admittedly upset with Windmiller on this occasion. Defendant felt he had adequately addressed the seriousness of the issue by threatening to fire Windmiller if he ever again took Dixon to a job. He also made it clear that in the future, only Doty was to accompany Windmiller. Defendant went hunting the following day.

14. On October 26, 2017, Dixon again accompanied Windmiller to the job-site. While Windmiller was gassing up his chainsaw, Dixon got into the bucket without permission and raised it a distance off the ground to trim branches. The bucket tipped and Dixon fell to the ground, severely injuring himself. The accident left him paralyzed from the shoulders down. He was hospitalized in Boise for a time, and in February 2018 he died from blood clotting complications resulting from his injury. His estate seeks a ruling as to whether he was an employee of Defendant at the time of this accident.

DISCUSSION AND FURTHER FINDINGS

15. Claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.,* 123 Idaho 473, 479, 849 P.2d 934, 940 (1993). The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438,

447−48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626−27, 603 P.2d 575, 581−82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

16. Idaho Code § 72-204's definition of employees includes "all helpers and assistants of employees whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer." Idaho Code § 72-204(2). It is undisputed that Ivan Dixon was acting as a helper or assistant of Defendant's employee Brandon Windmiller at the time of the accident in question. Further, there is no dispute that employee Windmiller paid Dixon to assist him while working for Employer. The sole area of dispute is whether Defendant had actual or constructive knowledge that Dixon was assisting Windmiller at the time of the accident.

17. Claimant asserts that Defendant had, at a minimum, constructive knowledge – if not actual knowledge – of Dixon's continuing presence at the job site working as an assistant to employee Windmiller on the day Dixon was injured. Claimant acknowledges that his case hinges largely on the statements of Windmiller and Dixon and is materially contradicted by Defendant.[3]

ACTUAL KNOWLEDGE

Windmiller's Statements and Testimony

18. Brandon Windmiller gave recorded statements in this case to Surety, and to Farm Bureau, the insurance company for Defendant's business. Therein, he indicated that Defendant did not know Dixon was working with Windmiller on the day in question.[4] Windmiller also acknowledged that Defendant specifically told him not to take Dixon to the job site after

[3] Claimant also relies on testimony of Derrich Doty to support a constructive knowledge argument, which will be discussed below.

[4] Windmiller also gave a statement to an OSHA representative in which he "probably" indicated Defendant had no knowledge Dixon was on site on the day of the accident. That statement was not produced as an exhibit, although it was discussed during Windmiller's deposition.

having seen him there a few days previously and would have had a problem with Windmiller had Defendant known he disregarded Defendant's admonition by allowing Dixon back on the site. Windmiller also indicated he took Dixon because Dixon was staying with Windmiller at the time and nothing else to do. Windmiller also acknowledged that he paid Dixon for his assistance.

19. After Windmiller gave these statements he and Defendant had a falling out. Thereafter, at his deposition Windmiller changed his testimony. He testified that by the time of the accident Defendant had come to accept Dixon working with Windmiller, and that Defendant knew Dixon was being paid by Windmiller. During that deposition Windmiller acknowledged he had told a different story to the insurance companies. He claimed he did so in order to prevent Defendant from getting into trouble, but by the time of his deposition Windmiller said he was through making up stories.

20. Claimant argues Windmiller's deposition testimony should carry more weight as he was under oath and had previously been trying to protect Defendant when he lied during his statements to the insurance companies and OSHA. Defendant argues Windmiller changed his story at his deposition in retribution for Defendant choosing not to rehire Windmiller after this accident.

21. It is a difficult proposition for either party to successfully argue that the Commission should rely on an acknowledged liar's version of facts on one occasion but not on another. There is nothing in the record to definitively determine whether Windmiller initially told the truth and subsequently lied or vice versa.[5] However, the record as a whole

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[5] There was an odd text from Windmiller to Defendant sent shortly before Windmiller's deposition. Both parties rely on it to support their respective positions. It states in material part "After all the work and effort I put into making things work for you … you show up at my house …acting like I stole your shit or whatever. I worked on skid steer

does paint a picture of Windmiller as being prone to exaggerate, vague on details, and at times internally inconsistent with his testimony. In contrast, Defendant, both in his deposition and at hearing, presented a consistent logical and coherent version of the facts which were supported by documentary evidence such as canceled checks and W-4 statements. Furthermore, Defendant testified at hearing that soon after the accident he spoke with Claimant Joseph Dixon to offer condolences. During that conversation Claimant asked Defendant if he had rehired Dixon. Defendant indicated that he had not rehired Dixon to which Claimant responded if Defendant would say he had rehired Dixon it would "go a long way" in paying Dixon's medical expenses from the accident. Defendant reiterated that Dixon was not his employee and further was not supposed to be at the job site. Defendant told Claimant he was unaware Dixon was at the job site on the day of the accident.

22. Windmiller's testimony regarding Defendant's knowledge that Dixon was working with Windmiller is afforded no weight given his acknowledged inconsistent and untruthful rendition of facts, which makes such testimony unreliable and highly suspect.

Dixon's Statement

23. Ivan Dixon also gave an insurance statement to an adjuster with Surety on December 20, 2017. At the time of his recorded statement Dixon had already retained

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multiple times fix grinder parts for Toyota never asked for a dime just trying to be a good partner persay [sic]. That being said I have an opportunity for you to make it right with or I can SERIOUSLY put a lot of perspective on the lawyers table this afternoon both your and Joe's [Ivan's father] so let me know what you want to do. Defendants argue it was an extortion threat. Claimant argues it was an indication that Windmiller was going to stop covering up for Defendant. Perhaps either explanation is equally valid although the text does not mention anything about Windmiller's intention to tell the truth at his upcoming deposition. At his deposition Windmiller did not explain this vague text; instead his answer to the meaning of the text was likewise vague and elusive, which lends some support to the idea the text was meant as a threat to Defendant as opposed to Windmiller declaring his intention to be honest and candid at his deposition.

an attorney to represent him, and his attorney was present for the statement. It does not appear from the record that Dixon was in imminent danger of death at the time.

24. Dixon made several claims unsupported by any other evidence or testimony in the record. For example, he claimed Defendant actually approached him in June 2017 requesting Dixon return to work for Defendant. (Both Defendant and Windmiller acknowledged that Defendant specifically did not want Dixon working for Defendant in 2017.) Dixon acknowledged he was paid by Windmiller but claims Defendant would reimburse Windmiller for Dixon's payments on a monthly basis. Dixon claimed he was paid $200 for a full day's work, and $100 for a half day's work. (Windmiller claimed he paid Dixon varying amounts at his discretion, not a set amount, and did not testify that Defendant reimbursed him monthly for such payments.) Dixon claimed Defendant knew he was working for Windmiller, which is uncontroverted during the period of time Windmiller was acting as an independent contractor for Defendant, but not after Windmiller became an employee of Defendant. Dixon also indicated that from time to time he would work in the bucket. Defendant and Windmiller both testified Dixon was not allowed in the bucket and in fact was in the bucket at the time he was injured only because Windmiller had stepped away.

25. In reading the entire statement it appears Dixon often spoke in generalities or failed to distinguish the time he worked for Defendant in 2016, or for Windmiller as an independent contractor and the time frame of late October 2017, when Windmiller was an employee of Defendant. For example, Dixon stated that on the day of the accident, Windmiller called Dixon to see if he was ready for work and then picked Dixon up (perhaps from Dixon's house?) and drove them both to the job site. Windmiller testified that on the day of the accident Dixon was staying with Windmiller at his residence.

26. Dixon stated that on October 24, 2017 Defendant came to the job site and informed Windmiller and Dixon that Defendant had lined up another job for Dixon and Windmiller in the Cambridge area and that *they* should go to that job on October 26. No other testimony supports this version of events. Dixon also stated that on October 24 Defendant helped Dixon shove branches into the woodchipper. Defendant testified there was no woodchipper at that particular job site on that date.

27. Other than a self-serving statement that Defendant knew Dixon was working with Windmiller on the date of the accident, and a memory of events which are clearly at odds with the testimony of both Windmiller and Defendant, nothing in Dixon's statement lends objective support to the idea that Defendant had actual knowledge Dixon was on the job site working with Windmiller at the time of his accident. His statement is afforded no weight when determining whether Defendant had knowledge that Dixon was working on the job site on October 26, 2017.

28. When the totality of the record is considered, including Defendant's testimony, which is afforded definitive weight on the subject of his lack of actual knowledge, the weight of the evidence supports the finding that Defendant did not have actual knowledge as contemplated under Idaho Code § 72-204 that Dixon was acting as an assistant to Defendant's employee Brandon Windmiller at the time of the accident in question.

CONSTRUCTIVE KNOWLEDGE

29. Constructive knowledge is that knowledge which the exercise of reasonable care or diligence would have revealed. *See Brooks v. Wal-Mart Stores Inc.*, 164 Idaho 22, 423 P.3d 443, (2018); *Johnson v. Wal-Mart Stores, Inc.*, 164 Idaho 53, 423 P.3d 1005 (2018). In this case, the issue for resolution is whether with the exercise of reasonable care Defendant should have known Dixon would be working with Windmiller on October 26, 2017.

30. Claimant argues Defendant had constructive knowledge because there was a "clear pattern" of Defendant observing Dixon assisting Windmiller, which would "lead a reasonable person to assume that pattern would continue," especially in light of the fact Defendant supposedly "did not take any affirmative steps to ensure any other individuals accompanied Windmiller." Cl. Opening Brief, p. 19.

31. It is true that while acting as an independent contractor for Defendant in September 2017, Windmiller often used Dixon as his assistant. Defendant was aware of this fact because he saw Dixon on those jobs. Defendant testified he said nothing to Windmiller because he was an independent contractor at the time and could hire whomever he wanted. However, Defendant also testified that once Windmiller became an employee in early October 2017, Defendant specifically instructed him not to use Dixon on any of Defendant's jobs.

32. Claimant's "clear pattern" of Defendant observing Dixon with Windmiller was actually limited to two occasions in October. On the first occasion Defendant testified he told Windmiller that Dixon was not an employee, that Defendant had no intention of rehiring Dixon, and that Windmiller was not to use Dixon on any of Defendant's jobs. The second occurrence took place on October 24. Defendant testified he "emphatically" confronted Windmiller on that day and made it clear to Windmiller that if he took Dixon on any more jobs he would be fired. Defendant felt he had adequately made his point.

33. Defendant's conduct was reasonable. He told Windmiller not to use Dixon on any jobs when he first saw Dixon on the job site in October. Defendant escalated his admonition to Windmiller at the time of the second infraction, including threatening Windmiller with his job if he continued disobey Defendant's directive.

34. Employers should have the right to assume their employees will follow directives. A reasonable person would not assume an employee would continue to disobey his employer even at the risk of losing his job. Indeed, many organizations use a progressive discipline scale for job infractions, ultimately culminating in termination. Defendant's affirmative conduct was in line with this standard. It is not reasonable to assume Defendant would have expected Windmiller to continue using Dixon after October 24, 2017.

35. Claimant argues there is circumstantial evidence pointing to the fact that Defendant knew or assumed that Windmiller would continue using Dixon after October 24. Claimant's argument stems from testimony provided by Derrich Doty in his deposition. Therein, Doty testified Defendant himself would personally call or speak directly with Doty the night before a job began to make sure he was available. Doty testified that it was always Defendant himself, and never Windmiller who would contact Doty before the job. Doty did not hear from anyone including Defendant on October 24 or 25 concerning the Cambridge job on October 26. He testified he was waiting for a call because he knew the job was upcoming, but no one contacted him.

36. Claimant argues this is telling evidence because Defendant testified that when he confronted Windmiller on October 24 he specifically told Windmiller to get ahold of Doty and make sure that Doty accompanied Windmiller to the Cambridge job thereafter. The fact that Defendant did not call Doty that day or on the 25 to inform him of the job starting on October 26 purportedly supports the conclusion Defendant did not really expect Doty to accompany Windmiller on October 26, or he would have called Doty to make sure he was available and ready to work. The implication is that Defendant knew or believed Windmiller would continue to use Dixon.

37. This argument does not rise above speculation. To begin with, the record shows that Doty was first employed by Defendant in mid-September 2017 and therefore at the time of the accident and only worked for Defendant for about six weeks. Even if Defendant had traditionally spoken with Doty directly about work it does not follow that Defendant would not have instructed Windmiller to contact Doty in his stead on this occasion. This is especially true where Defendant was heading out of town to go elk hunting. Defendant's testimony that he told Windmiller to contact Doty is not inherently improbable under the circumstances in this case. As such the fact that Defendant did not personally contact Doty on October 24 or 25 does not create or even support an inference that Defendant had constructive knowledge concerning Windmiller's intention to continue using Dixon as his assistant on Defendant's job.

38. When the record is examined there were no specific reasonable actions Defendant should have taken, but did not, to ensure that Windmiller would not continue to use Dixon as his assistant. Arguments to the contrary go well beyond what is reasonable. For example, Defendant could have canceled his elk hunting trip and accompanied Windmiller to the job site each day until all the projects were completed. That is too high a burden to place on Defendant. Employers hire competent employees so the employers do not have to personally watch over all work being done. Furthermore, employers have a right to assume their employees will follow directions and directives. Likewise, Defendant could have called Doty and required him to drive to Cambridge to meet Windmiller at the job site. Defendant told Windmiller to contact Doty. He had a right to assume Windmiller would follow that direction. In short, Defendant took reasonable steps to enforce his directives, and record does not support an allegation that Defendant failed to use reasonable care and diligence such that he should be deemed to have had constructive knowledge of the fact that Dixon would be assisting Windmiller on the day of the accident.

39. Claimant has failed to prove that Ivan Dixon was an employee of Defendant under the provisions of Idaho Code § 72-204(2) at the time of his injury on October 26, 2017.

CONCLUSION OF LAW AND ORDER

1. Claimant has failed to prove by a preponderance of the evidence that Ivan Dixon was an employee of Defendant under the provisions of Idaho Code § 72-204(2) at the time of his injury on October 26, 2017.

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

DATED this 12th day of May, 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Monroe
Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

For the following reasons, I respectfully concur in part and dissent in part.

After reviewing the record and applicable case law, I respectfully concur in part and dissent in part. To the narrow conclusion that Claimant failed to prove by a preponderance of the evidence that Ivan Dixon was an employee of Defendant on October 26, 2017, under the provision of Idaho Code § 72-204(2), I concur. However, I dissent to the issue statement to which the majority adopts. Evidenced by the record and all the proceedings related to Dixon's injuries on October 26, 2017, to determine the ultimate question of Defendant's liability on the Workers' Compensation Complaint and continue the District Court case, the Commission must determine if an employer-employee relationship existed between Ivan Dixon and Defendant Deole Priddy, at the time of injury on October 26, 2017, under all of Title 72 and applicable law.

The employer-employee relationship question has been an issue from the inception of this matter. Complaint[6]; Answer[7]; Ex. 1, p. 3; and Ex. 2, p. 12. The November 7, 2019, Notice of Hearing on May 29, 2019, included these issues:

1. Whether Claimant was an employee of Defendant Employer pursuant to Idaho Code § 72-204;

2. Whether Claimant's accident arose out of and in the course of his employment with Employer; and

3. Whether and to what extent Claimant is entitled to medical care.

However, an October 18, 2019 telephonic pre-hearing to discuss, among other things, "[r]eview and possible simplification of issues," resulted with an agreement to bifurcate the issues and an

[6] Complaint refers to Ivan Dixon's Workers' Compensation Complaint filed March 12, 2018.
[7] Answer refers to the Answer to Complaint on behalf of Defendants filed March 30, 2018.

order to reset the hearing for December 2, 2019. The sole issue for hearing would be "[w]hether Claimant was an employee of Defendant Employer pursuant to Idaho Code § 72-204."

At hearing, the parties put forth arguments, and Defendant testified that even though Ivan Dixon was an employee for a period in 2016, there was not an employer-employee relationship on October 26, 2017. Hr'g Tr. at 28:4-6, 44:17-21. Throughout the proceedings, Claimant's attorney maintained that the employer-employee determination must be made under all of Title 72 and applicable cases. Cl Request for Calendaring, p. 2.; Hr'g Tr. at 6:7-8; Cl Opening Brief, p. 2-3. However, the assertion that the relationship existed centered on Idaho Code § 72-204; specifically subsection two. Hr'g Tr. at 12:16-17; Cl Opening Brief; Cl Reply Brief.

Although Idaho Code § 72-713 requires the Commission's hearing notice to include "the issues to be heard," over time, the Court has provided guidance as to what specific notice is required. *See Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 272 P.3d 569 (2012); *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006); *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005); *Mortimer v. Riviera Apt.*, 122 Idaho 839, 847, 840 P.2d 383, 391 (1992). As the Referee noted at hearing, it is widely accepted that notice of causation is not required "when causation is an element of the ultimate goal of entitlement to benefits." *Gomez*, 152 Idaho at 602, 272 P.3d at 574. In *Gomez* and *Henderson*, where causation was not a noticed issue, the Commission adopted conclusions denying benefits based on the Referee's determination that the injuries were not caused by compensable industrial accidents. *Id.*; *Henderson*, 142 Idaho 559, 130 P.3d 1097. In both cases, the Court upheld the Commission's decision. *Id.* There, the Court's reasoning centered around the idea that parties were effectively on notice because prior decisions made it clear that a causal relationship is necessary to show entitlement to claimed benefits. *Id.*

Similarly, in *Hernandez*, the Commission adopted a referee's opinion that made an MMI determination based on the evidence presented at hearing, even though "the specific question of MMI (or medical stability) was not specifically stated in the text of the issues statement." *Hernandez*, 141 Idaho at 781, 118 P.3d at 113. There, the surety stopped paying temporary income benefits and Hernandez claimed entitlement to additional temporary income benefits. *Id.* The Court held that "the MMI question was necessarily at issue by virtue of his claim for additional temporary income benefits." *Id.* In making this decision, the Court reasoned that Idaho Code § 72-408 entitles injured workers to temporary income benefits during the period of recovery and based on prior decisions, that period ends when a worker is medically stable. *Id.* Therefore, "the issue of MMI was properly before the referee." *Id.* Additionally, in *Mortimer*, the hearing notice simply stated, "the purpose of the hearing was to determine the amount of benefits to which Claimant is entitled." *Mortimer*, 122 Idaho at 847, 840 P.2d at 391. The Commission ordered benefits under Idaho Code § 72-210 even though there was no specific claim for these benefits. *Id.* The Court held the use of "benefits" sufficiently noticed the parties that "the applicability of I.C. § 72-210 was at issue." *Id.*

Here, it is evident that the December 5, 2019 Hearing Notice stated the only "bifurcated issue" to be heard was, "[w]hether Claimant was an employee of Defendant Employer pursuant to Idaho Code § 72-204." Nevertheless, by following the guiding principles for applying worker's compensation laws, and the Court's rationale in the aforementioned cases, the Commission may make findings on issues necessarily at issue by virtue of a claim for benefits. The case before us is ripe for such action.

There is no question that a claimant must prove the claimed injuries were caused by a compensable accident arising out of and in the course of employment. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982). As a result, in any workers' compensation claim, the first question that must be answered before any benefits can be determined, is if a claimant is an employee of named defendants at the time of injury. The Answer to Complaint provides an opportunity for the named defendants to deny that existence, and that is precisely what happened here. By reading the Act as a whole and considering the record, one can generalize that if an employer-employee relationship did exist, § 72-204 would apply over § 72-705. However, those statutes do not define all employer-employee relationships for the Act.

Originally the case was scheduled for a full day to hear multiple issues. Of which, all but the first, would require a full determination as to an employer-employee relationship between Ivan Dixon and Defendant Deole Priddy at the time of injury on October 26, 2017. The hearing was ultimately rescheduled for only one-half day to hear only the first issue; the existence of an employer-employee relationship within § 72-204. Without being a party to that call, one can only speculate as to the reasoning and intentions for bifurcating the issues and rescheduling the issues. However, keeping in mind that the previously noted issues required an employer-employee relationship, one can speculate that the parties wanted to save time, money, and effort implying that the answer to the first issue is needed to address the remaining issues.

Although only a speculation, that implication would be true if that was the only answer necessary to address the remaining issues. As stated throughout, to complete this claim, the determination of an employer-employee relationship under all of Title 72 and applicable law is

necessary. The record does not include an approved agreement or stipulation addressing that determination. Therefore, that question is still in front of the Commission.

To achieve the purpose of the Workers' Compensation Act, under the circumstances of this case the Commission should currently address this determination. With this lack of action, the parties and the Commission will delay the process while wasting time and resources. The current record provides ample evidence and testimony to address the issue of employer-employee relationship under all of Title 72 and applicable law. Every additional hearing to solve this issue will produce minimal additional and effective evidence. At the very least, the Commission has a responsibility to expand the discussion to address the full noticed issue of § 72-704. By limiting the determination to § 72-704(2) we are paving a cumbersome path filled with technicalities.

For these reasons I concur in part and dissent in part.

DATED this 12th day of May, 2020.

INDUSTRIAL COMMISSION

Aaron White, Commissioner

ATTEST:

Kamerron Monroe
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER, AND CONCURRENCE IN PART, DISSENT IN PART were served by regular United States Mail or email, as indicated below, upon each of the following:**

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