BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JORDAN DAILY,	)	
	)	
Claimant,	)	**IC 04-010051**
	)	
v.	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW,**
JOHN DENTONE d/b/a CURBS 4 LESS,	)	**AND RECOMMENDATION**
	)	
Employer,	)	Filed August 29, 2006
Defendant.	)	
_____	)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on April 27, 2006. Claimant, Jordan Daily, was present in person and represented by Eric R. Sloan of Boise; Defendant Employer, John Dentone d/b/a Curbs 4 Less, was represented by Shane O. Bengoechea, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the submission of briefs, and subsequently came under advisement on June 19, 2006.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant was an employee of Employer at the time of the accident;

2. Whether Claimant suffered an injury from an accident arising out of and in the course of employment; and,

3. Whether and to what extent Claimant is entitled to:

   a. Medical care, and

   b. Temporary partial and/or temporary total disability.

At hearing and in subsequent briefing, Defendant also raised, and the parties have exhaustively addressed, the issue of whether Claimant provided notice of his alleged accident. Thus this issue is also before the Commission to be resolved.

ARGUMENTS OF THE PARTIES

Claimant argues he was a direct employee of Curbs 4 Less and suffered a spinal injury while at work on August 10, 2004, for which he is entitled to medical and temporary disability benefits.

Defendant Employer maintains that Claimant was an independent contractor in all of his dealings with Curbs 4 Less, that Claimant has not demonstrated he suffered an accident causing injury at work, that Claimant did not give notice of any accident, and that Claimant is entitled to no benefits whatsoever.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Pamela Daily, Jack Daily, Alvaro Garrido, John Sears, Lee Hildreth, and John Dentone taken at the April 27, 2006, hearing;

2. Claimant's Exhibits 1 through 6 admitted at the hearing; and,

3. Defendant's Exhibits 1, 3-6, 8-15, and 17-22 admitted at the hearing;

After having fully considered all of the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Defendant John Dentone, together with his son-in-law Lee Hildreth, owned and operated Curbs 4 Less, a curb laying enterprise. Dentone is an entrepreneur operating other businesses, who established Curbs 4 Less to teach Hildreth about business ownership and operations. Dentone provided the necessary equipment for the start up of Curbs 4 Less but left

nearly all of the daily operations to Hildreth. Curbs 4 Less owned concrete curbing equipment including a truck for hauling materials and tools, a wheelbarrow, a cement mixer, and a curb forming machine. At all relevant times Dentone and Hildreth had no workers' compensation insurance coverage for Curbs 4 Less.

2. Claimant graduated from high school in 2001 and was 23 years old at the time of the hearing. He worked laying cement curbing for another entity prior to May 2004.

3. On May 10, 2004, Claimant started working with Curbs 4 Less as a "mixer." His principal duty was to mix cement and transport it to the curbing machine. Dentone hired Claimant without any written contract. Curbs 4 Less initially paid Claimant $10.00 per hour. He did not keep track of his own hours. Claimant initially reported each morning to Dentone's residence where the curbing equipment was kept. The equipment was later moved to Dentone's father's residence where Claimant reported for work each morning. Dentone also hired Alvaro Garrido to work with Curbs 4 Less. Shortly after starting work with Curbs 4 Less, Claimant agreed to work for $.22 per foot of curbing laid. By August 2004 he was earning $.30 per foot. Curbs 4 Less paid Claimant every other week, withholding no taxes. Claimant worked for no other entity during his association with Curbs 4 Less. Claimant did not own curb laying equipment and did not hold himself out to the general public as an independent curb layer.

4. Claimant, Hildreth, and Garrido generally worked together on curb laying projects. Dentone rarely visited project sites. Hildreth was the least experienced in curb laying. He bid residential curb laying jobs and received payment from customers. Each day Hildreth unlocked the gate securing the Curbs 4 Less equipment. He told Claimant and Garrido where and how much curbing to lay and whether to proceed with any project modifications. Hildreth was present on job sites approximately 60 to 70% of the time while work was performed. He prepared the area for curb

laying by removing sod and leveling the ground. Both Claimant and Garrido believed Hildreth, as the son-in-law of Dentone, had authority to fire them. Claimant was more experienced than Hildreth in curb laying. Claimant mixed cement and carried it via wheelbarrow to the curbing machine. Garrido was the most experienced in curb laying. He ran the curbing machine and also finished the formed curbing. Curbs 4 Less provided Garrido a company cell phone.

5. At the end of each work day Hildreth, Garrido, and Claimant agreed upon the time they would start work the following day. They generally met at 7:00 each morning at Dentone's father's residence where the Curbs 4 Less equipment was secured and traveled in the Curbs 4 Less truck to purchase construction materials and then to the day's job sites. Hildreth purchased materials with a Curbs 4 Less credit card. Claimant provided his own work gloves and boots. Curbs 4 Less provided all other equipment and tools necessary for the curb laying jobs including a truck, wheelbarrow, cement mixer, and curb forming machine. They generally scheduled two curb laying jobs per day and laid approximately 175 feet of curbing in an average job.

6. While working on August 2, 2004, Claimant noticed back pain which he considered just sore muscles from hard work. He finished the job and asked permission from Hildreth to leave the job site early. Claimant rested over the weekend and returned to his usual work the next week without incident or complaint.

7. On August 10, 2004, Hildreth advised Claimant and Garrido that Curbs 4 Less had a 500 foot curb laying job which needed to be completed that day. Claimant and Garrido drove the Curbs 4 Less truck and met Hildreth that morning at a construction supply store where Hildreth used the Curbs 4 Less credit card to purchase sand and cement. Claimant loaded approximately twenty 96 pound bags of cement onto the truck. Claimant and Garrido drove to the job site in the truck. Hildreth drove another vehicle. At the job site, Hildreth prepared the area for curb laying. Claimant

and Garrido unloaded equipment. Claimant then commenced mixing cement in a three-to-one ratio. For each batch, Claimant mixed one 96 pound bag of cement with three times that quantity of sand, and then added sufficient water to obtain an acceptable consistency. Once mixed, Claimant transported the entire batch in one wheelbarrow load to the curb laying machine which Garrido operated. Each wheelbarrow load weighed in excess of 400 pounds. Claimant brought a new load via wheelbarrow every 15 to 20 minutes to feed the curb laying machine. Claimant, Garrido, and Hildreth worked until approximately noon and then stopped for a 30-minute lunch break. Claimant's back was sore and he took some ibuprofen. They then resumed laying curbing.

8. After lunch as the curb laying progressed, Claimant was required to push wheelbarrow loads of cement greater distances—perhaps as much as 250 feet—across a lawn, and perhaps across some pea-gravel, to feed the curb laying machine as Garrido operated it. Claimant's back pain increased. The parties offered conflicting testimony at hearing of a conversation between Claimant and Hildreth which ensued at approximately 2:00 p.m. that day.

9. Hildreth testified that Claimant said that his back hurt, that he could not finish the job, and asked whether another individual, named Yrio, could finish the job. Hildreth also testified that he told Claimant he could not arrange for anyone else to replace Claimant that afternoon, but that it was "okay" for Claimant to leave the job unfinished. In contrast, Claimant testified that he told Hildreth that he hurt his back and could not complete the job. Claimant further testified that Hildreth taunted him and threatened to replace him saying: "that's too bad, sorry you're injured, do I need to call Yrio to have him replace you?" Transcript, p. 133, Ll. 3-5. Claimant testified that Hildreth threatened to fire him if Claimant did not complete the job. Hildreth left the job site in his vehicle shortly thereafter to dump a load of sod.

10. Claimant was angry with Hildreth's response but tried to continue working.

However, while attempting to deliver another load of cement shortly after 2:00 p.m., Claimant experienced such severe back and leg pain that he could no longer push the wheelbarrow. By this time Claimant and Garrido had already laid 200 to 250 feet of curbing that day.

11. Shortly after 2:00 p.m., Garrido noticed that Claimant delayed in bringing another wheelbarrow load of cement for the curb laying machine. Garrido returned to the truck where he found Claimant not doing anything. Claimant told Garrido that he was hurt and could not do anything else. Claimant also told Garrido he was feeling pain in his back and that he needed a ride from the job site back to his car because he could not continue working. Garrido called Hildreth on the Curbs 4 Less cell phone and told him Claimant needed a ride. Garrido passed the phone to Claimant who then conversed with Hildreth. Again, there is conflicting testimony regarding their conversation. Hildreth maintained that Claimant only indicated his back was sore. Claimant asserted that he told Hildreth he had hurt his back working and could not continue. As a result of that exchange, Claimant called his girlfriend for a ride, while Hildreth called Dentone stating that Claimant had a sore back and asking that Dentone give Claimant a ride to his vehicle.

12. Claimant left the job site on foot and very shortly thereafter encountered his girlfriend who gave him a ride to his vehicle. Claimant drove to her home.

13. Dentone arrived at the job site and found Garrido loading the truck but could not find Claimant. Garrido told Dentone that Claimant was hurt and angry.

14. Claimant called Dentone at approximately 4:00 p.m. that same afternoon. Claimant testified that he told Dentone he hurt his back at work. Dentone testified that Claimant merely advised him that his back hurt, although Dentone acknowledged telling Claimant he should rest his back and not work for a few days. Claimant never returned to work with Curbs 4 Less.

15. Claimant was largely immobilized by intense back pain for several days after August

10, 2004, but did not seek medical attention. He had no health insurance and limited financial means. After approximately a week of icing his back and resting, Claimant's back pain decreased and he was able to ambulate independently. Within a few weeks he resumed many of his normal activities.

16. On August 25, 2004, Claimant filed a Workers Compensation – First Report of Injury or Illness with the Idaho Industrial Commission. The Commission subsequently investigated Curbs 4 Less and advised Dentone that Curbs 4 Less was required to carry workers' compensation insurance.

17. Although Claimant continued to experience back pain after August 2004, he was able to perform lighter work. He worked for Smoke Guard from September 2004 through January 2005 performing light assembly work ten hours per day, four days per week. He was able to sit or stand at his discretion and was not required to lift more than 25 pounds.

18. Claimant then worked as a host at Smokey Mountain Pizza for four weeks. He was unable to continue because he was assigned to clear off tables—a task which aggravated his back pain. Thereafter Claimant worked at Chicago Connections from approximately August 2005 through March 2006 working 28 hours per week at $6.00 per hour. Claimant had been unemployed since approximately three weeks prior to hearing.

19. Michael Thiry, D.C., treated Claimant's low back condition from December 2005 through at least February 2006.

20. On March 10, 2006, Michael Henze, D.C., examined Claimant and diagnosed unresolved lumbosacral sprain/strain with possible mild to moderate disc herniations at L3, L4 and/or L5. He prescribed a course of rehabilitative therapeutic treatment and exercise. Dr. Henze opined that Claimant's back problems are causally related to the August 10, 2004, workplace injury.

21. At the time of hearing, Claimant continued to have back pain which limited his ability to lift more than 30 pounds, or to sit or stand for long periods.

22. Having carefully examined the record herein and observed the witnesses at hearing, the Referee finds the testimony of Claimant and Garrido more credible than that of Hildreth and Dentone.

DISCUSSION AND FURTHER FINDINGS

23. **Nature of the employment relationship.** The provisions of the 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).

24. The first issue is whether Claimant was an employee or an independent contractor. Coverage under the workers' compensation law depends upon the existence of an employer-employee relationship. Anderson v. Gailey, 97 Idaho 813, 555 P.2d 144 (1976). Claimant has the burden of proving this relationship to recover workers' compensation benefits. Whether Claimant was a direct employee of Curbs 4 Less is a factual issue.

25. Idaho Code § 72-102, defines employee, employer, and independent contractor thus:

> (11) "Employee" is synonymous with "workman" and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer.
> ....
> (12)(a) "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. ….
> ....
> (16) "Independent Contractor" means any person who renders service for a specified recompense for a specific 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. ….

26. The Idaho Supreme Court has set forth the test for distinguishing an employee from an independent contractor:

> The ultimate question in finding an employment relationship is whether the employer assumes the right to control the times, manner and method of executing the work of the employee, as distinguished from the right merely to require certain definite results in conforming with the agreement. Four factors are traditionally used in determining whether a 'right to control' exists, including, (1) direct evidence of the right; (2) payment and method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the employment relationship at will and without liability.

Roman v. Horsley, 120 Idaho 136, 137, 814 P.2d 36, 37 (1991); quoting Burdick v. Thornton, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985); see also Stoica v. Pocol, 136 Idaho 661, 39 P.3d 601 (2001).

1. Direct evidence of control.

27. The first factor distinguishing an employee from an independent contractor is direct evidence of the right to control the manner and method of performing the work. Significant indicators of direct evidence of the right to control were identified in the Commission's decision in Stoica v. Pocol, 1999 IIC 0734. They are examined below.

28. Control is present if the person for whom the services are performed has the right to require compliance with instructions. In the present case, Hildreth determined where Claimant and Garrido would lay curbing. Curbs 4 Less provided all items of equipment and impliedly controlled their use. Hildreth determined when job modifications would be made. Per Dentone and Hildreth's directions, Claimant was responsible for mixing and transporting cement. Hildreth determined that the 500 foot curbing job had to be completed on August 10, 2004, and threatened to replace Claimant if he did not finish the job that afternoon. Hildreth decided when it was time to stop working on the job site.

29. Training through apprenticeship with a more experienced worker indicates the right to control. In the present case, Claimant and Garrido were both more experienced than Hildreth in curb laying.

30. Integration of the worker's services into the principal's business operations shows that the worker is subject to direction and control. As far as the record reveals, Hildreth's major business was curb laying. Such was not true for Dentone.

31. If the services must be rendered personally, then the right to control is suggested. If a worker engages his own assistants, he may be an independent contractor. Here, Dentone hired Claimant to work on Curbs 4 Less projects. Claimant hired no helpers and did not believe he could have hired any helpers.

32. If the person for whom services are rendered hires, discharges and pays other workers, then that factor tends to show control over all workers. In this case it is clear that Hildreth paid Claimant and Garrido to assist with curb laying. Claimant and Garrido believed Hildreth and Dentone could fire them. Claimant became so angry on August 10, 2004, that he walked off the job site precisely because Hildreth threatened to fire him if he could not complete the job.

33. Control is indicated if set hours of work are established by the person for whom services are performed. Claimant, Garrido, and Hildreth discussed when they would stop and start work. They generally met at Dentone's father's residence at 7:00 a.m. to start each day. Claimant asked Hildreth if he could leave early on August 2, 2004, when his back was sore. Hildreth determined that the 500 foot curbing had to be completed on August 10, 2004, and threatened to replace Claimant if he did not finish the job that afternoon.

34. If the worker devotes substantially full time to the business of the person for whom services are rendered, then such person has control over the amount of time the worker can work and

impliedly restricts the worker from doing other gainful work. Claimant worked with Curbs 4 Less essentially full-time from May 2004 through August 10, 2004.

35. If a worker performs service for several unrelated persons or firms at a time, this is indicative of an independent contractor relationship. From May 2004 until August 10, 2004, Claimant did not work for anyone other than Dentone and Hildreth at Curbs 4 Less.

36. If a worker makes his services available to the general public on a regular and consistent basis this indicates an independent contractor relationship. There is no indication Claimant made his services available to the general public. Claimant lacked the equipment necessary to make his services available to the general public on a regular and consistent basis. He had no truck, cement mixer, or curb laying machine.

37. If the worker performs services in the order or sequence determined by the person for whom the services are performed, the worker is likely an employee. In the present case, the weight of evidence indicates that Hildreth determined the sequence of jobs and the deadline for completion of each. Hildreth was present on the job sites 60-70% of the time. Claimant never went on a job alone. As already noted, Hildreth required that the 500 foot curb laying job be completed on August 10, 2004.

38. A requirement that the worker submit regular oral or written reports to the principal indicates control. There is no evidence that Curbs 4 Less required any such reports from Claimant.

39. If the principal ordinarily pays the worker's business or traveling expenses, then the worker is usually considered an employee. There is no evidence concerning such expenses or payment thereof, however, it is undisputed that Claimant and Garrido drove the Curbs 4 Less truck to job sites rather than their own vehicles. Claimant did not have immediate access to his own vehicle on the job site on August 10, 2004.

40. If the principal uses some competitive means for reducing his own cost in selecting a subcontractor, then the principal may be a prime contractor instead of an employer. The present record does not establish that Claimant submitted any bid to Curbs 4 Less for his curb laying services.

41. Examination of direct evidence of the right to control suggests that Curbs 4 Less generally controlled Claimant's work. Curbs 4 Less allowed Claimant some flexibility in his work. However, Claimant personally rendered all services. He did not work for more than one firm at a time and worked only for Curbs 4 Less. Curbs 4 Less never sent Claimant on a job alone. Claimant did not hold himself out publicly as available for hire as an independent contractor. Hildreth determined the manner and methods of the work. These indicators of direct control, taken as a whole, strongly suggest a direct employment relationship.

2. Method of payment.

42. The next factor in distinguishing an employee from an independent contractor is the method of payment. Some pertinent components of this factor were identified in Stoica v. Pocol, 1999 IIC 0734, and are examined below.

43. Payment by the hour, week, day, month or other regular periodic interval generally suggests an employer-employee relationship. In the present case, Curbs 4 Less initially paid Claimant $10.00 per hour for curb laying. Later Curbs 4 Less offered Claimant $.22 per foot for curbing laid. Payment was generally made every other week.

44. The method of payment test 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 were withheld, the method of payment should be deemed a factor in favor of independent contractor

status. Livingston v. Ireland Bank, 128 Idaho 66, 910 P.2d 738 (1995). In the present case, Curbs 4 Less made no deductions or withholdings from Claimant's pay at any time. This factor weighs in favor of an independent contractor relationship.

45. A worker who can realize a profit or suffer a loss as a result of his services (beyond the profit or loss ordinarily realized by employees), is generally an independent contractor. In the present case there is no evidence Claimant could have so profited.

46. Overall, the manner of payment factor weighs in favor of an independent contractor relationship.

3. Furnishing major items of equipment.

47. The next factor in distinguishing an employee from an independent contractor is whether the principal furnishes major items of equipment. Pertinent elements of this factor were identified in Stoica v. Pocol, 1999 IIC 0734, and are examined below.

48. If the work is done on the premises of the person for whom the services are performed, this shows control over the worker, especially if the work could be done somewhere else. In the present case, all curb laying was done away from the premises of Curbs 4 Less but could not have been done elsewhere.

49. If the person for whom services are performed furnishes significant tools, materials, or other equipment, this indicates a direct employment relationship. Hanson v. BCB, Inc, 114 Idaho 131, 754 P.2d 444 (1988). Curbs 4 Less provided the truck, cement mixer, curb laying machine, wheelbarrow, shovel, and various curb laying hand tools. Hildreth obtained the curb laying jobs, made arrangements for and paid for materials, including sand and cement. Claimant rode to jobs with Garrido in the Curbs 4 Less truck. Claimant furnished no tools of his own.

50. If the worker invests in facilities that are used in performing services and that are not

typically maintained by employees, this indicates an independent contractor relationship. Claimant did not invest in any facilities used to perform the work.

51. Curbs 4 Less clearly furnished all equipment which strongly suggests a direct employment relationship.

4. Liability upon terminating relationship.

52. The final factor in distinguishing an employee from an independent contractor is whether the principal can terminate the relationship without incurring liability. Various elements of this factor were identified in Stoica v. Pocol, 1999 IIC 0734, and are examined below.

53. A continuing relationship between the worker and the principal indicates a direct employment relationship, even if the work is performed at recurring irregular intervals. Here Claimant worked exclusively with Curbs 4 Less regularly and continuously from May 2004 until August 10, 2004.

54. The principal's right to discharge the worker without liability indicates a direct employment relationship. In the present case, Claimant believed Curbs 4 Less could fire him whenever it wanted. Indeed, Claimant on August 10, 2004, was angry because Hildreth threatened to terminate and replace him if Claimant was not able to continue working. There is no indication Claimant incurred any liability for failing to complete the August 10, 2004, job.

55. The absence of liability upon termination weighs in favor of a direct employment relationship.

56. The fundamental key to determining whether a direct employment relationship existed is whether Curbs 4 Less had the right to control the time, manner, and method of executing the work, as distinguished from the right to merely require the results agreed upon. "When a doubt exists as to whether an individual is an employee or an independent contractor under the worker's

compensation act, the act must be given a liberal construction in favor of finding the relationship of employer and employee." Hanson v. BCB, Inc., 114 Idaho 131, 133, 754 P.2d 444, 446 (1988).

57. Considered collectively, the four factors which evaluate the right to control and distinguish an employee from an independent contractor clearly indicate that Claimant was a direct employee of John Dentone d/b/a Curbs 4 Less on August 10, 2004.

58. **Occurrence of an accident.** A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. Seamans v. Maaco Auto Painting, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Idaho Code § 72-102(17)(b) defines accident as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(17)(a).

59. In the present case, Claimant asserts that he suffered an industrial accident on August 10, 2004. Defendant maintains that Claimant has failed to prove an accident, but only alleges that his back hurt while at work. Defendant apparently believes that Claimant has not proven a work accident because he has not identified a precise moment that he experienced debilitating back pain after he slipped, tripped or fell while working.

60. "To constitute an 'accident' it is not necessary that the workman slip or fall or that the machinery fail. An 'accident' occurs in doing what the workman habitually does if any unexpected,

undesigned, unlooked-for or untoward event or mishap, connected with or growing out of the employment, takes place." Hammond v. Kootenai County, 91 Idaho 208, 209, 419 P.2d 209, 210 (1966), quoting Pinson v. Minidoka Highway Dist., 61 Idaho 731, 106 P.2d 1020 (1940). "If the claimant be engaged in his ordinary usual work and the strain of such labor becomes sufficient to overcome the resistance of the claimant's body and causes an injury, the injury is compensable." Wynn v. J.R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

61. In Perez v. J.R. Simplot Co., 120 Idaho 435, 816 P.2d 992 (1991), an employee failed to prove an accident when she developed hip pain after standing for long periods. The Commission and the Idaho Supreme Court concluded that the onset of pain while at work was not sufficient to establish an injury arising from an accident. In contrast, the accident requirement was satisfied in Spivey v. Novartis Seed Inc., 137 Idaho 29, 33, 43 P.3d 788, 792 (2002), when an employee felt a pop and burning in her shoulder while performing her normal work duties reaching across a conveyor belt.

62. In the present case, the occurrence of an accident is not assumed merely with the onset of pain at work. However, the sudden onset of intense back pain shortly after 2:00 p.m. on August 10, 2004, while Claimant pushed a wheelbarrow weighing in excess of 400 pounds, is similar to the circumstances in Spivey, and satisfies the definition of an accident pursuant to Idaho Code § 72-102(17)(b). Dr. Henze convincingly opined that Claimant's work that day caused his back injury.

63. Claimant has proven that he suffered an accident causing injury to his back while working for John Dentone d/b/a Curbs 4 Less on August 10, 2004.

64. **Notice**. Claimant filed a notice of injury with the Industrial Commission on August 25, 2004, setting forth the circumstances of his accident and injury at Curbs 4 Less. Dentone

admitted that Claimant told him on August 10, 2004, that he had a sore back and that he had to quit work for the day because of a sore back. Hildreth and Dentone knew Claimant had worked up until that time that day pushing a heavily loaded wheelbarrow. Dentone even admitted he suggested Claimant take a few days off to rest his sore back. For Dentone to now deny knowledge that Claimant's sore back related to his work for Curbs 4 Less on August 10, 2004, is unreasonable and unpersuasive.

65. Although Hildreth denied knowledge that Claimant's back problems arose from a work injury, his testimony on this issue is very suspect. Claimant and Hildreth had a conversation wherein Claimant told Hildreth that his back hurt and Hildreth goaded Claimant by saying if he couldn't finish the job, Hildreth would fire Claimant and bring in someone who could. As noted previously, Claimant's testimony is more credible than both Dentone's and Hildreth's testimony.

66. The Referee finds Claimant told Hildreth of his August 10, 2004, accident and that Dentone and Hildreth had actual knowledge of Claimant's work accident and injury at Curbs 4 Less on August 10, 2004.

67. **Medical care**. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). For the purposes of Idaho Code § 72-432(1), medical treatment is reasonable if the employee's physician

requires the treatment and it is for the physician to decide whether the treatment is required. Mulder v. Liberty Northwest Insurance Company, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

68. Claimant herein received medical treatment for his industrial injury from Drs. Thiry and Henze. Defendant is responsible for payment of their bills and for further reasonable medical treatment as required by Claimant's treating physician.

69. **Temporary Disability Benefits.** Idaho Code § 72-102 (10) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C. P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Furthermore,

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

70. Claimant herein has worked from time to time since his industrial accident. Dr. Henze's records establish that Claimant needs further medical care and is restricted to lifting 30

pounds because of the industrial accident he suffered while working for Defendant. There is no indication Curbs 4 Less at any time after August 10, 2004, offered Claimant modified duty work. Pursuant to Malueg, Claimant is entitled to temporary total disability benefits from the day of his work accident through the date of hearing and continuing until Claimant is medically stable. Defendant is entitled to deduct from his responsibility Claimant's actual earnings since August 10, 2004.

CONCLUSIONS OF LAW

1. Claimant has proven he was a direct employee of John Dentone d/b/a Curbs 4 Less on August 10, 2004.

2. Claimant has proven he suffered an accident at work on August 10, 2004.

3. Claimant has proven he gave notice to Employer or that Employer had actual timely knowledge of Claimant's injury.

4. Claimant has proven that he is entitled to medical benefits.

5. Claimant has proven that he is entitled to temporary disability benefits from the time of his industrial accident through the time of hearing. Defendant is entitled to deduct from his obligations an amount equal to all of Claimant's earnings since August 10, 2004.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this __8th___day of August, 2006.

INDUSTRIAL COMMISSION

__/s/_____
Alan Reed Taylor, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __29th__ day of __August_____, 2006, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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cjh __/s/_____