11-9-2012

Stringer v. Robinson Appellant's Brief Dckt. 40087

IN THE SUPREME COURT OF THE STATE OF IDAHO

GEFF STRINGER,

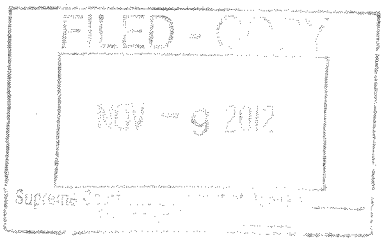
Claimant/Appellant,

vs.

WILLIAM BRYAN ROBINSON, dba HIGHMARK CONSTRUCTION, Employer and RUSSELL G. GRIFFETH, dba TETON PHYSICAL THERAPY, P.A., Employer and STATE INSURANCE FUND, Surety,

Defendants/Respondents,

SUPREME COURT NO. 40087



APPELLANT'S BRIEF

Appeal from the Industrial Commission of the State of Idaho

Chairman Thomas E. Limbaugh Presiding

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STATEMENT OF THE CASE

A. The Nature of the Case

This is an appeal from the Industrial Commission Order that Defendant Russell G. Griffith, dba Teton Physical Therapy, P.A. was not a category 1 statutory employer and that Claimant's employment with Defendant Russell G. Griffeth, dba Teton Physical Therapy, P.A is casual employment.

B. The Course of Proceedings

A Worker's Compensation Complaint was filed by the Claimant, Geff Stringer, pro se, against William Bryan Robinson, dba Highmark Construction, on October 5, 2009. Defendant, William Bryan Robinson, dba Highmark Construction filed an answer on or about November 3, 2009. Claimant, Geff Stringer, filed a Complaint against Russell G. Griffith, dba Teton Physical Therapy, P.A. on May 12, 2010 and an Amended Complaint against Highmark Construction and Russell G. Griffith, dba Teton Physical Therapy, P.A on May 21, 2010 and May 24, 2010. Russell G. Griffith, dba Teton Physical Therapy, P.A filed an Answer on May 26, 2010. The cases were subsequently consolidated. A Hearing was held on September 12, 2011 before Referee Alan Taylor. The Industrial Commission's Findings of Fact, Conclusions of Law and Order was filed on May 24, 2012. A Notice of Appeal was filed on June 25, 2012.

C. Statement of Facts

1. Claimant's Testimony

On August 19, 2009, Claimant saw an advertisement on Craigslist for a qualified

carpenter who could work without supervision. That evening, Claimant left a message for William Bryan Robinson (hereinafter "Robinson"). On August 20, 2009, Robinson retuned the Claimant's call and it was agreed that they would meet at Robinson's mother-in-law's house. During the meeting, Robinson indicated that he needed someone with experience who could do trim work at an addition at Teton Physical Therapy without supervision. After a discussion regarding pay, it was agreed that Claimant would do the trim work at Teton Physical Therapy and be paid $13.50 per hour. Claimant testified that at that first meeting with Robinson, there was no discussion regarding tax withholding. (Tr. p. 28, l. 5 through p. 31, l. 18)

Claimant testified that he began work on Friday, August 21, 2000. He met Robinson at Teton Physical Therapy and the two of them took Robinson's trailer to his home to pick up more tools. They then drove to a job site at a residence in Ririe (later changed to Shelley) where Robinson had to check on a job. Claimant testified that they took some measurements but did not work there. Following that, they returned to Teton Physical Therapy and Robinson reviewed with Claimant what he wanted done and the two of them started working. At the end of the day, Robinson paid Claimant for working that day by way of a personal check (Tr. p. 31, l. 19 through p. 35, l. 9)

On Monday, August 24, 2000, Robinson instructed Claimant and the others to work on a job site in Shelley where they worked for two hours. They then returned to Teton Physical Therapy where Claimant resumed installation of the trim on the addition. Claimant testified that Robinson was there and showed Claimant what he wanted done. Claimant testified that he did not recall what time Robinson left that day as Robinson was in and out throughout the whole job.

Claimant worked a total of 9.5 hours that day. (Tr. p. 37, l. 1 though l. 13) (Tr. p. 40, l. 1 through l. 15) (Tr. p. 62, l. 25 through p. 63, l. 20)

On Tuesday, August 25, 2000, Claimant arrived at Teton Physical Therapy and continued working on the trim. Claimant testified that on either August 24, 2000, or August 25, 2000, Russell Griffeth (hereinafter "Griffeth") came out of the existing building to where Claimant was working and told Claimant that he did not like how Claimant was installing the trim because he could see gaps between the wall and the trim. Claimant did not feel comfortable discussing how he was doing his job with Griffeth because he believed Robinson was his boss. (Tr. p. 37, l. 16 through p. 38, l. 25) (Tr. p. 40, l. 16 through l. 19)

On Wednesday, August 26, 2009, and Thursday, August 27, 2009, Claimant continued installing trim. Also, on August 27, 2009, Claimant began working in the ceiling and attic of the addition in preparation of the placement of beams. Claimant testified that Robinson and Griffeth told him he was to keep track of his time separate for the work done on the trim versus the work done on the attic and ceiling. (Tr. p. 39, l. 19 through p. 42, l. 15)

On Friday, August 28, 2000, Robinson instructed Claimant to go to a house in Shelley and replace a door and several windows. Robinson arrived at the house in Shelley as Claimant and two other individuals hired by Robinson, Roberto, and Mario, completed the assigned work. Roberto told Claimant that he had worked for Robinson for three years. Mario started working for Robinson the week before Claimant began working on the addition. Claimant then returned to Teton Physical Therapy and continued working on the trim. Claimant did not work on August 29 or 30, 2009. (Tr. p. 42, l. 16 to p. 43, l. 23)

On Monday, August 31, 2009, Claimant worked at Teton Physical Therapy on the trim and assisted with the beams. On Tuesday, September 1, 2000, Claimant worked at Teton Physical Therapy on the trim installing a chair rail and placing rafters in the attic. Pursuant to the instructions of Robinson and Griffeth, Claimant kept track of his hours working in each area separately. On Wednesday, September 2, 2000, Claimant worked at Teton Physical Therapy for 1.5 hours in the attic removing insulation and three hours on framing a door. It was Claimant's understanding that he was being paid the same rate for work he did in the ceiling as he was working on the trim. On Thursday, September 3, 2000, Claimant worked 3.5 hours finishing the trim on the addition. (Tr. p. 43, l. 24 through p. 46, 1. 15)

On Friday, September 4, 2009, Claimant arrived at Teton Physical Therapy at 4:30 p.m. so that they could start working on the connection between the addition and the existing building after the clients/patients had left. Present to do the ceiling work was Claimant, Robinson, Griffeth, Roberto, Mario, and some of the physical therapy staff. It is Claimant's recollection that Robinson cut the beams to length while the others set up stages on the floor. Then, Robinson, Griffeth, Claimant, Roberto and the physical therapy staff lifted a 14-foot beam up into the attic area and then everyone that was in the attic except Robinson, Roberto and Claimant went back down to the floor. Robinson was then positioned at the center of the beam with Roberto at the top and Claimant at the bottom as they were attempting to lift the beam high enough to attach it to a chain hoist which was attached to one of the rafters of the roof. Before they could get the beam attached to the chain hoist, the ceiling collapsed and the three of them and the beam fell to the ground. The beam landed on Claimant's left lower extremity and he

suffered a broken ankle. (Tr. p. 50. L. 16 to p. 54, l. 18)

Claimant testified that while he was lying on the floor after the accident, Griffeth asked Robinson if his workers' compensation insurance was in force and Robinson replied that he was not sure. Following that, Robinson, Griffeth and the electrician helped Claimant to Griffeth's truck and Griffeth drove Claimant to the hospital. (Tr. p. 56, l. 5 to l. 22)

2. Griffeth's Testimony

Griffeth is the owner of Teton Physical Therapy, which is an S Corporation. Griffeth owns half of the premises of 2037 East 17th Street, Idaho Falls, Idaho, with Dr. John Andary. Griffeth testified that in early 2009, he decided to do an addition to his portion of the above described premises. He contracted an architect, Rulon Nielson, who did the plans for the addition. (Tr. p. 122, l. 2, through p. 126, l. 1)

Griffeth testified that he got bids from several contractors, including Robinson. Robinson's bid was a little less formal as he had helped Griffeth on his home, not as a contractor, but just a helper. Griffeth testified that if he could have he would have been his own contractor, but that the City of Idaho Falls would not allow him to do so. He asked Robinson to get a contractor's license so Griffeth could do the addition. There was no written contract between Robinson and Griffeth. (Tr. p. 134, l. 10 through p. 141, l. 14)

Griffeth testified that he hired some of the sub-contractors and Robinson hired other sub-contractors, but that the bills were sent directly to him. In addition, he testified that Robinson was bidding some of the work himself, such as the trim work. (Tr. p. 134, l. 10 through p. 141, l. 50)

Griffeth testified that he first met Claimant when he was doing the trim work and that he understood Claimant was to be working for Robinson. He further testified that he would look at the trim work every day to be sure it was being done as he wanted, but that he was not telling Claimant how to do it, only how he wanted it to look. When questioned whether he talked to Claimant regarding keeping his hours separate from the attic and trim work, he agreed that he might have. (Tr. p. 144, l. 19 through p. 148, l. 8)

Griffeth was questioned regarding whether he had paid any money to Robinson the night of September 4, 2009, and he had no recollection of doing so. He did testify that on occasion he would pay Mario and Roberto directly when Robinson asked him to do so. He estimated that he had done this on four or five occasions. (Tr. p. 155, l. 16 through p. 157, l. 25)

Griffeth testified that he did not recall specifically that he asked Claimant to work on the ceiling as he thought he was part of Robinson's crew. However, he did admit that he asked if Claimant would be there on September 4, 2000, and over the weekend, in order to get the job done. (Tr. p. 158, l. 10 through p. 158, l. 2)

3. Robinson's Testimony

Robinson testified that the last time he did any construction work was in September of 2009, when he finished the Teton Physical Therapy addition. He testified that he first contacted Griffeth in February of 2009 as he had heard a rumor the Griffeth was going to build an addition onto Teton Physical Therapy. Griffeth testified that in March of 2009, Griffeth and Robinson went over the blueprints to come up with a price range for the project. Robinson testified that he had contacted Griffeth because he wanted to do the framing on the addition. He further testified

that Griffeth wanted to be his own contractor but the City of Idaho Falls would not let the owner of a commercial building be the contractor. (Tr. p. 178, l. 7 through p. 186, l. 19)

Robinson testified that at that time he was a licensed residential contractor but did not have a commercial contractor's license. Robinson went to Utah to take the required test to obtain his commercial license and that he considered himself to be a "contractor." Robinson testified that pursuant to the terms of the contract he entered into with Griffeth, Robinson would assist Griffeth during construction of the addition when he was available as Robinson would be working on another project for a period of 5 to 6 weeks during that time. (Tr. p. 190, l. 21 through p. 191, l. 11)

Robinson testified that Griffeth hired most of the subcontractors himself. He also testified at times that he would not see any of the subcontractors as he was not on the project all of the time. He testified that he was gone almost the whole month of July and into August as he was working on a remodel of his mother-in-law's house. He further testified that he did not supervise any of the subcontractors. (Tr. p. 196, l. 6 through p. 200, l. 17)

Robinson testified that Griffeth had changed the plans for the addition by vaulting the ceiling which would require more help than originally planned. Robinson placed an ad on Craigslist looking for a skilled carpenter who could do trim and beam work. At the time Robinson hired Claimant, he had just torn the roof off of his mother-in-law's house and needed additional help to do the trim work at Teton Physical Therapy. (Tr. p. 201, l. 11 through p. 206, l. 21)

Robinson met Claimant on Friday, August 21, 2000, and stated that they first went to

Shelley, (not Ririe), and took some measurements and then picked up tools to be used at Teton Physical Therapy. Robinson paid Claimant on August 21, 2000, with a personal check as he did not have a business account. Robinson testified that at times he did not have enough cash flow to pay Claimant, Roberto or Mario without submitting a bill to Griffeth who would pay Robinson within a day or two so that he could pay the workers. In fact, on August 21, 2000, he had gotten a draw from Griffeth which he used to pay Claimant. (Tr. p. 207, l. 13, through p. 211, l. 12)

On Monday, August 24, 2000, Claimant started working at Teton Physical Therapy and Robinson testified that he watched him work for a while to be sure he knew what he was doing. Robinson testified that he did not work that much with Claimant during the week of August 24, 2000, because he was working on the roof of his mother-in-law's house. (Tr. 208, l. 16, through p. 212, l. 10)

Robinson testified that when he hired Claimant, Robinson told him that he needed him for both trim work and beam work. At a later time, Robinson told Claimant that he had to keep his time working on the trim and beams separate as Robinson had a bid on the trim but not on the beam work. Robinson explained that Claimant's Exhibit 22, p. 32, was a bill submitted to Griffeth that included 29 hours of Claimant working on the ceiling. Robinson testified that he went to the bank and got cash to pay Roberto, Mario, and Claimant. It is interesting that the bill also shows Robinson working 17 hours during that time period in the attic which was separate from the trim work. (Tr. p. 213, l. 4 through p. 217, l. 6)

Robinson admitted that he did not have workers' compensation insurance and that Griffeth had not inquired about workers' compensation insurance until after the accident. He

also stated that at times Griffeth paid Roberto and Mario directly because Robinson did not have time to type up an invoice and Roberto and Mario needed to be paid. (Tr. p. 217, l. 7 through p. 219, l. 24)

On Monday night, September 4, 2009, everyone was working to get the beams up so the building would be usable on Tuesday. At the time of the accident, Claimant, Robinson and Roberto were in the attic when the roof caved in and Claimant fell and fractured his ankle. (Tr. p. 221, l. 13, to p. 226, l. 6)

ISSUES PRESENTED ON APPEAL

1. Whether the Defendant, Russell G. Griffeth, dba Teton Physical Therapy, P.A., was a category 1 statutory employer of Claimant.

2. Whether Claimant's employment relationship with Defendant, Russell G. Griffeth, dba Teton Physical Therapy, P.A. was casual employment.

STANDARD OF REVIEW

When the Court reviews a decision from the Industrial Commission, it exercises free review over questions of law but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. "Spencer v. Allpress Logging, Inc., 134 Idaho 857, 859, 11 P.3d 475, 478 (2000) (citing Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996)). "Whether the Commission correctly applied the law to the facts is an issue of law over which we exercise free review." Konvalinka v. Bonneville County, 140 Idaho 477, 478, 95 P.3d 628, 629 (2004) (citing Combes vs. State, Indus. Special Indem. Fund, 130 Idaho 430, 942 P.2d 554 (1997)).

ARGUMENT

The Industrial Commission found as follows:

1. That Claimant was not an independent contractor in his relationship with Robinson. Claimant agrees.

2. That Claimant was an employee of Robinson. That Claimant was not an employee of Griffeth. Claimant agrees.

3. That Griffeth is not a statutory 2 employer. Claimant agrees.

4. The Industrial Commission concluded that while Griffeth initially qualified as a category 1 statutory employer, he was not liable as a statutory employer because Claimant's employment was casual with Griffeth. Claimant disagrees. Griffeth is a category 1 statutory employer and Claimant's employment with Griffeth was not casual.

1. Statutory Employer

This Court has continuously stated that the statutory definition of employer is an expanded definition designed to prevent an employer from avoiding liability under the workers' compensation statutes by subcontracting the work to others who may be irresponsible and not insure their employees. Runcorn v. Shearer Lumber Prod., Inc., 107 Idaho 389, 392-93, 690 P.2d 324, 327-28 (1984) (citing Adam v. Titan Equip. Supply Corp., 93 Idaho 644, 646, 470 P.2d 409, 411 (1970))

This Court, in Robison v. Bateman-Hall, Inc., 139 Idaho 207, 76 P.3d 951 (2003), interpreted Idaho Code Section 72-223 (1) to include category 1 and category 2 statutory employers. The Court in Kolar v. Cassia County Idaho, 142 Idaho 347, 127 P.3d 962 (2005)

stated as follows regarding the two categories of employers:

> "As noted above, I.C. § 72-223(1) identifies two categories of employers who are not third parties: (1) "those employers described in Section 72-216, Idaho Code, having under them contractors or subcontractors who have in fact complied with the provisions of Section 72-301, Idaho Code" (which will be referred to herein as a category one employer); and (2) "the owner or lessee of premises, or other person which is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed" (a category two employer). Thus, if the respondent meets either of these categories, they were Mr. Kolar's statutory employers and cannot be sued.". 142 Idaho at 352

In Kolar, the appellant was employed by an engineering firm that had contracted with Burley Highway District to do engineering services to improve a road in Cassia County. Cassia County had entered into an agreement with Albion Highway District and Burley Highway District to provide funds to maintain that road. The parties all agreed to be jointly and severally liable for damages to persons or property occurring in the course of maintaining the road. While working on the construction site, Kolar was run over by a dump truck driven by an employee of Burley Highway District. Kolar sued Defendants for negligence. Defendants responded that they were immune from suit pursuant to Idaho Code §72-223 in that they were statutory employers of Kolar. The Court agreed and found that the Defendants were a category 1 statutory employers and therefore, immune from liability.

In the case of Venters v. Sorrento Deleware, Inc., 141 Idaho 245, 108 P.3d 392 (2005), this Court found that Sorrento was a category 1 statutory employer. Sorrrento operated a cheese factory in Nampa, Idaho, and as part of the cheese making process a large amount of wastewater

was discharged into holding ponds. Sorrento contracted with 3-C Trucking to haul waste water from the facility to various farms. Sorrento did not maintain trucks to enable them to transport waste water. Stanley Venters was employed as a truck driver by 3-C trucking and while waiting to unload his waste water at a farm, he was struck by another driver from 3-C Trucking and was injured. Venters filed suit against Sorrento and the company who owned the farm where the accident occurred.

Sorrento argued that it was a statutory employer and was therefore protected from the personal injury action of Mr. Venters. The District Court granted Sorrento's Motion for Summary Judgment. This Court agreed and found that Sorrento was a category 1 statutory employer. The Court stated as follows:

> "As stated above, the legislature has separated two classes of statutory employers under I. C. §§ 72-102 and 72-223: [1] employers who make use of contractor's or subcontractor's employees, and [2] owners, lessees of the premises, or other persons, who are also the virtual proprietor or operator of the business there carried on. See also Harpole v. State, 131 Idaho at 440, 958 P.2d at 597. While Sorrento probably qualifies as a statutory employer under either test, and the district court so found, we will focus our analysis only on the first prong.
>
> Sorrento qualifies as a statutory employer of Mr. Venters simply because of its contractual relationship with 3-C Trucking. As an employer of a contractor, Sorrento would not have been permitted to avoid liability to Mr. Venters under the Idaho worker's compensation statutes should 3-C Trucking have failed to comply with the worker's compensation statutes. See Spencer vs. Allpress Logging, Inc., 134 Idaho 856, 11 P3d 475 (2000). As it happens, here, 3-C provided worker's compensation coverage to Mr. Venters and benefits to the Venters, obviating the need for Sorrento's workers' compensation coverage to come into play in this particular case. The district court correctly determined that

> Sorrento's Nampa facility as part of the day to day operations of that facility. Therefore, Sorrento enjoys the immunities provided by the Act from third-party tort liability.". 141 Idaho at 398

In Pierce v. School Dist. #21, 144 Idaho 537, 164 P.3d 817 (2007) Jerry Kelly, d/b/a Top Roofing, contracted with School Dist. #21 to repair the roofs of various school buildings. Jerry Kelly employed Joey Pierce as a roofer. While repairing a roof, Pierce fell and was injured. Jerry Kelly did not have workers' compensation coverage. Pierce sought workers' compensation coverage from the school district as a statutory employer. The Court affirmed the decision of the Industrial Commission that School Dist. #21 was not a category 2 statutory employer. It was not argued in the Industrial Commission whether School Dist. #21 was a category 1 statutory employer. The Supreme Court therefore did not address whether School Dist. #21 was a category 1 employer. The Court intimated though, that School Dist. #21 may have qualified as a category 1 employee because of the contractual relationship between the School Dist., Kelly and the Claimant.

In this matter, Griffeth entered into a contract with Robinson, a contractor, who in turn employed Claimant. A contractual chain links Griffeth to Claimant and based upon the above cited cases, Griffeth is a category 1 statutory employer.

2. Casual Employment

In Kolar, Venters and Pierce, the issue of casual employment was never raised. The Industrial Commission relying on Idaho Code § 216 (1) and concluded that even though Griffeth was a category 1 statutory employer, he did not have liability to Claimant because Claimant's

employment was casual employment. Idaho Code § 216 (1) states as follows:

> "Liability of employer to employees of contractor and subcontractors. An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.". *(Emphasis added by the Industrial Commission)*

Relying on the emphasized language, the Industrial Commission found that Griffeth would not be liable even though he was a category 1 statutory employer because had he been the direct employer of Claimant, Claimant's employment would have been casual.

Idaho Code §72-212(2) exempts from coverage casual employment. In Larson v. Bonneville Pacific Service Co., 117 Idaho 988, 793 P.2d 220 (1990), Dawson v. Joe Chester Artificial Limb Company, 62 Idaho 508, 112 P.2d 494 (1941) and Bigley v Smith, 64 Idaho 185, 129 P.2d 658 (1942), the Court has defined casual employment as employment that is occasional, or comes at uncertain times or irregular intervals, and whose happenings cannot be reasonably anticipated as certain, likely to occur or necessary. In some cases, the Court also looked at the fact as to whether the employment was part of the usual trade or business of the employer.

This Court has consistently found that it is the employment that is casual not the employee, and that there is no hard or fast definition of casual employment and each case must be decided largely on its' own facts. Rabideau v. Cramer, 59 Idaho 154, 81 P.2d 402 (1938); Wachtler v. Calnon, 90 Idaho 468, 413 P.2d 449 (1966)

This definition of casual employment would apply to almost any instance where there is a statutory employer involved. If we take the case of Pierce, the employment of Pierce by the school district would clearly be casual employment as the employment would be occasional, or at uncertain times or irregular intervals, and therefore could not be reasonably anticipated or likely to occur in the future, therefore, no statutory employer.

In Kolar, the Court found that the Defendants were category 1 statutory employers. If we follow the reasoning of the Industrial Commission, the Defendants in Kolar would not have been shielded by Idaho Code §72-223 (1). As Kolar would have been a casual employee of the Defendants as his employment would have been occasional, or at uncertain times or at irregular intervals, and could not be reasonably anticipated or likely to occur in the future

Casual employment would then be used as a sword against statutory employers such as the Defendants in the Kolar case or School Dist. #21 to wipe away their immunity for third party claims under Idaho Code §72-223. Casual employment would then be used as in this case as a shield to prevent Claimants from receiving the appropriate workers' compensation benefits. That was not the intention of the legislature when they amended Idaho Code § 72-223 in 1996 to expand statutory employers liability and protections.

The evidence is clear that both Robinson and Griffeth hired subcontractors. Robinson has testified that he was away from the project for at least five to six weeks. If during that time Robinson was away from the project, Griffeth had hired a plumber and an employee of the plumber had been injured, and the plumber did not have worker's compensation insurance, would Griffeth have been liable as a statutory employer? The answer is clearly yes, as that is the

purpose of Idaho Code §72-216 and Idaho Code §72-223 regarding statutory employer liability.

The Industrial Commission in this matter has found Claimant's employment to be casual in regards to Griffeth. Claimant's employment is not any different than the employment of the plumber's employee. It is not casual employment pursuant to Idaho Code §72-216 and Idaho Code §72-223. As stated above, there is a contractual link between Griffeth, Robinson and Claimant. Griffeth, as a statutory employer, steps into the shoes of Robinson. Griffeth is a category 1 statutory employer of Claimant and is responsible for the workers' compensation benefits that may be owed to Claimant since Robinson, Claimant's employer, did not have workers' compensation insurance.

CONCLUSION

For the reasons set forth in this brief, Claimant respectfully requests that this court reverse the Order of the Industrial Commission entered on May 24, 2012 and find that Griffeth is a category 1 statutory employer and is responsible for the workers' compensation benefits that may be owed to Claimant.

DATED this 9th day of November, 2012.

Petersen Parkinson & Arnold, PLLC

Dennis R. Petersen
Attorney for Claimant/Appellant

CERTIFICATE OF MAILING

The undersigned hereby certifies that a copy of the foregoing APPELLANT'S BRIEF has been served upon Respondent/Defendants in the manner indicated below this 9th day of November, 2012.

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Attorney for Russell G. Griffeth, d/b/a Teton Phsycial Therapy and the Idaho State Insurance Fund

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- ❑ Hand- Delivered
- ❑ Express Mail

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