

IADC NEWS

Summer 2006

Number 1

RECENT SUPREME COURT CASES TREATING THE I.C. 72-223 CATEGORY 1 EMPLOYER

I.C. § 72-223 creates an exception to the general rule that workers' compensation is the exclusive remedy of an injured worker. The statute allows an injured worker to bring a civil action against a "third party" who caused the worker's injuries. In 1996 the statute was amended to narrow the class of entities who can be considered "third parties" for purposes of the statute. In this regard, the 1996 amendment is but a return to Idaho law as it existed prior to 1971. The current I.C. § 72-223(1) identifies two categories of employers who are not third parties subject to suit: (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 (Category 1), and (2) the owner or lessee of premises, or other person, who is virtually the proprietor or operator of the business there carried on, but who, by reason of their being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed (Category 2). Because the amended I.C. § 72-223(1) creates a possible defense to certain third party actions, it is no surprise that its meaning has been the subject of vigorous debate.

In 2003, the Idaho Supreme Court issued the first in a series of opinions interpreting the 1996 amendments to I.C. § 72-223. In *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003), Fred Meyer was the owner of a vacated strip mall. It contracted with Bateman-Hall to construct a building on the site. Bateman-Hall, in turn, contracted with Robison Roofing to perform roofing work on the project. Robison Roofing was appropriately insured under the workers' compensation laws of the State. One of its employees suffered a work related injury and brought suit against both Fred Meyer and Bateman-Hall, alleging that they were third parties subject to suit under I.C. § 72-223. In *Robison*, the Court ruled that Bateman-Hall was immune from suit under Category 1, since it was an employer who had under it a subcontractor (Robison Roofing) who was appropriately insured under the workers' compensation laws. However, the Court ruled that Fred Meyer was not immune from suit, since it was not the virtual proprietor or operator of the business there carried on. Fred Meyer failed to show that the work being done by Plaintiff was a part of the trade, business or occupation of Fred Meyer. Since Fred Meyer was not in the business of construction or roof installation, Fred Meyer was not the virtual proprietor of the business being conducted by claimant's direct employer, and was therefore not immune from suit as a Category 2 employer.

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PLAN TO ATTEND IADC'S ANNUAL MEETING IN SUN VALLEY

In keeping with the general consensus to alternate the site of the annual meeting between McCall and Sun Valley, this year's meeting will be held at Sun Valley, Idaho on September 22nd through 23rd. A block of rooms is reserved for IADC members. Please contact the Sun Valley Resort, (800) 786-8259, to reserve your room as soon as possible. Ask for the "Idaho Association of Defense Counsel room block." Speakers this year include Steven Bennett, a nationally recognized expert on issues relating to E-Discovery. The Honorable B. Lynn Winmill, and the Honorable Mickel H. Williams, will also speak to current issues involving electronic filing, and changes in the Federal rules relating to E-Discovery. Golf, tennis and shrimp, will be on the menu as usual. Our business meeting will include discussion of whether or not our organization should become more active in appearing as amicus in cases of interest to the defense bar.



**WE'RE CELEBRATING
THE LAUNCH OF IADC'S
NEW WEBSITE!**

www.idahodefense.org

DRI ANNUAL MEETING & SLDO INCENTIVE PROGRAM

The 2006 DRI Annual Meeting will take place October 11-15, 2006, at the San Francisco Marriott. This year, political insider and journalist Pat Buchanan will kick off the meeting on Thursday. Donna Brazile, author and political strategist, will be the speaker at Thursday's award luncheon. On Saturday, renowned trial practice expert Larry Pozner will speak on cross-examination techniques. Other events include a special evening planned at AT&T Park on Thursday. During this event, you will be able to explore the Giant's dugout, the player's clubhouse, the press box and much more. The evening will provide an opportunity to enjoy great food and beverage and network with colleagues, while enjoying the music of the Dick Bright band. You can save \$100.00 when you register for the Annual Meeting before September 13, 2006.

DRI is also offering an incentive program for state and local defense organizations. This program is based on the percentage increase in each state's attendance as compared to prior years. For the last three years, Idaho has averaged three attendees. If we are able to double the attendance at this year's Annual Meeting, for a total of six, the IADC will receive \$1,000 in cash from DRI. The IADC can earn additional money for each person over six who attend this year's Annual Meeting to a total of \$3,000, which amount will be paid if eight members from Idaho attend the Annual Meeting. This incentive program provides an excellent opportunity for the IADC to realize a direct cash benefit from DRI which will be of benefit to all IADC members.

Visit www.dri.org or call (312) 795-1101 to register or for more information.



MEMBERSHIP DRIVE

Membership in IADC is a great opportunity for learning, for sharing ideas and concerns, and for association with others whose practice is similar to yours. We all benefit from new members who bring their talents and abilities into this group. We should all be active in recruiting new members. Please look around you and encourage new membership.

Applications are available from any board member or the IADC Office.

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In reviewing *Robison*, however, one must wonder why Fred Meyer would not also qualify as a Category 1 employer, since it, too, had "under it" a subcontractor (Robison Roofing) who was appropriately insured under the workers' compensation laws. In three subsequent opinions the Court provided further elaboration on the scope of Category 1.

In *Venters v. Sorrento Delaware*, 141 Idaho, 245, 108 P.3d 392 (2005), Sorrento was the operator of a cheese factory in Nampa. It entered into a number of agreements with area farmers, under the terms of which Sorrento hauled the waste water to large storage tanks located on the property of area farmers. The farmers, in turn, used the waste water to irrigate their fields. Sorrento contracted with 3-C Trucking to haul the waste water from the plant to the off site storage tanks. Montierth Farms was one of the local area farmers on whose property a waste water tank was located. Venters was employed as a truck driver by 3-C. He was struck and killed by another 3-C driver in the unlit staging area on the Montierth site.

Writing for a unanimous Court, Justice Trout initially commented that Sorrento would qualify for immunity under I.C. § 72-223 as both a Category 1 and Category 2 employer. However, since the District Court granted summary judgment only under Category 1, the Court restricted its analysis to this issue.

The Court ruled that Sorrento qualified for immunity 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 Venters under the workers' compensation laws had 3-C Trucking failed to obtain workers' compensation insurance. Here, Sorrento, as the primary contractor, was ultimately liable for the payment of workers' compensation benefits as a statutory employer in the event that 3-C Trucking did not obtain coverage. Therefore, Sorrento met all of the requirements for immunity as a Category 1 employer.

Next, in *Gonzalez v. Lamb-Weston, Inc.*, 142 Idaho 120, 124 P.3d 996 (2005), Lamb-Weston operated a potato processing facility in Twin Falls. Plant operations generated a certain amount of non-recyclable waste. Lamb-Weston contracted with PSI to haul waste from the plant to a transfer station. Under its contract with PSI, Lamb-Weston was obligated to provide a garbage bin which could be loaded onto the PSI truck. A compactor was used at the Lamb-Weston plant to compact trash into the bin. When full, the bin was transported to a transfer station by PSI.

Plaintiff was employed by PSI to transport trash bins to and from the Lamb-Weston facility. He was injured while attempting to open and empty a full bin at the transfer station. He claimed that his injuries were the result of the negligent filling of the bin by Lamb-Weston.

The Court evaluated Lamb-Weston's immunity under Category 1, and recognized that Lamb-Weston was a statutory employer, having under it, a subcontractor, who had obtained workers' compensation coverage. The Court noted that in determining whether an entity is a statutory employer under I.C. § 72-216, the terms "contractor" and "subcontractor" should be construed as meaning an independent contractor.

Gonzalez argued that the Legislature expanded the definition of employer in I.C. § 72-216 in order to prevent employers from avoiding their obligations under the workers' compensation laws.

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If you are not already subscribed to IADC's new members-only listserv, you should be! Here are some of the discussion topics and announcements that you are missing:

Local mediators

Job announcement for local law firm

Juror questions for witnesses

Video/audio taping an IME

Report on State & Local Defense Organization Meeting

New cause of action against attorneys for abuse of process

Announcement on two upcoming Bar events

Survey on aspects of IADC Annual Meeting

Recent Idaho Supreme Court opinions on attorney fees

Plaintiff refusing IME without own physician present

Worker's compensation issue

Awards in personal injury cases

Possible sanctions for an IME no show

Requests for professionals (incl. biomechanical engineer, psychiatrist, orthopedists, neurologists, physicians, etc.)

Instructions for subscribing to this useful resource are listed in the upper right corner of this page.

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HOW TO SUBSCRIBE TO IADC'S MEMBERS-ONLY LISTSERVE

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Within a few hours, you will receive a message from Yahoo Groups asking for confirmation of your request. Respond to that message by pressing "reply" and "send." Later, you will receive a "Welcome" message finalizing the process.

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According to *Gonzalez*, an employer should not be allowed immunity under I.C. § 72-223 unless it is demonstrated that it retained a contractor or subcontractor in order to avoid liability under the workers' compensation laws. The Court rejected this argument, noting that the Legislature did not require of employers an element of intent before they could be categorized as "statutory" employers.

In *Kolar v. Burley Highway District, et. al*, 142 Idaho 346, 127 P.3d 962, (2005), Burley Highway District contracted with JUB Engineers to provide engineering services on a highway reconstruction project in Cassia County, Idaho on United States Forest Service land. Kolar was employed as an engineering technician by JUB. Kolar was injured when he was run over by a dump truck operated by a Burley Highway District employee on the project site. JUB was appropriately insured under the workers' compensation laws, and Kolar received workers' compensation benefits for his injuries. Kolar filed suit against the Burley Highway District, arguing that since the Highway District was statutorily obligated to retain the services of an independent professional engineer under I.C. § 54-1218, JUB was not a contractor "under" the Burley Highway District, for purposes of Category 1. Kolar argued that JUB was neither a contractor, nor subcontractor, but was, instead, retained to provide professional services as required by statute. The Court rejected this argument, and recognized that the Burley Highway District fell within the broad definition of employer set forth at I.C. § 72-102. Moreover, it was clear that the Burley Highway District expressly contracted the services of another, in this case, JUB Engineers. Under I.C. § 72-216, the Burley Highway District would have been liable to Kolar for the payment of workers' compensation benefits, had JUB failed to obtain coverage. Nothing in the workers' compensation laws creates an exception for contractors who provide professional services. Therefore, the Burley Highway District did qualify for immunity as a Category 1 employer.

In *Robison*, Fred Meyer was found to be a "third party" subject to suit. However, the Court's subsequent decisions in *Venters*, *Gonzalez* and *Kolar* strongly suggest that Fred Meyer would qualify for Category 1 immunity since it had "under it" an independent subcontractor (Robinson Roofing), who was, itself, insured. If Category 1 encompasses as broad a swath of employers as might be suggested by these recent cases, then how is one to explain the Court's apparent rejection of the Category 1 defense for Fred Meyer? A number of other I.C. § 72-223 cases are currently before the Court, pending decision. Look for *Fuhriman v. State of Idaho Department of Transportation*.