

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RONNIE GARDNER,

Claimant,

v.

BARRETT BUSINESS SERVICES, INC., and STATE
INSURANCE FUND, Surety,

Employer,

and

TOM FLOYD, CASEY FLOYD and EVELYN FLOYD,
dba ACTION AG, LLC; CLOVERDALE FARMS,
LLC; ACTION AG TRANSPORT, LLC; ACTION
MILLING, INC.; WILDER FEEDLOT, LLC, and
WESTERN STATES DUST CONTROL, LLC,

Uninsured Employers,
Defendants.

IC 2010-028770

IC 2011-001088

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed June 19, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on November 16 & 17, 2011. Claimant was present and represented by Richard Owen. Defendants Barrett Business Services, Inc. (“BBSI”), “Employer,” and State Insurance Fund, “Surety,” were represented by Bridget Vaughan. Defendants Tom Floyd et. al., “Uninsured Employers,” were represented by Richard Eismann. The parties presented oral and documentary evidence and later submitted briefs. Briefing was ordered to allow the competing Defendants to respond simultaneously, first to Claimant’s brief, and second, to the brief the other Defendant had filed before Claimant’s reply brief was due. Post-hearing motions were also made. The case is now ready for decision. The

FINDINGS, CONCLUSIONS, AND ORDER - 1

undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

By agreement of the parties, the following matters are deemed to be at issue:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Determination of Claimant's average weekly wage;
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Temporary Partial and/or Temporary Total Disability benefits (TPD/TTD);
 - b. Permanent Partial Impairment (PPI);
 - c. Disability in excess of impairment;
 - d. Medical care;
 - e. Attorney fees;
4. Whether any party or parties to this action was an employer of Claimant on or about the alleged date of accident; and
5. Whether any party or parties to this action was a statutory employer of Claimant on or about the alleged date of accident.

At hearing, Claimant withdrew previously noticed issues of Claimant's entitlement to retraining benefits, and whether the Industrial Commission should retain jurisdiction of the case on behalf of Claimant. (Tr. 7/1 – 6).

CONTENTIONS OF THE PARTIES

Claimant contends that on or about November 18, 2010, he suffered a compensable work accident. Claimant contends that at the time of the accident, he was an employee of Action Ag, LLC (hereinafter AA). Claimant acknowledges that at the time of his accident, Action Milling, Inc. (hereinafter AM) had a professional employer arrangement with Barrett Business Services,

Inc. (hereinafter Barrett) under the terms of which AM workers became employees of Barrett, and Barrett provided, among other things, workers' compensation coverage for AM employees. Though identified by AM as one of its employees, Claimant contends that he was actually an employee of AA at the time of the accident, and is entitled to workers' compensation benefits from AA, an entity that did not have a professional employer arrangement with Barrett. Further, Claimant contends that because AA did not appropriately insure its risks under the Idaho Workers' Compensation law as required by Idaho Code § 72-301, Claimant is entitled to recover, in addition to workers' compensation benefits, reasonable attorney fees incurred in connection with prosecuting the claim, as well as a penalty in an amount equal to 10% of the total amount of the compensation to which he is entitled, together with costs, as anticipated by Idaho Code § 72-210. Claimant contends that he has suffered permanent physical impairment in the range of 4% of the lower extremity, and that because he has suffered certain permanent limitations/restrictions as a consequence of his lower extremity injury, he is entitled to disability in the range of 15% of the whole person, inclusive of the lower extremity impairment. Relatedly, Claimant contends that he is entitled to time loss benefits and medical benefits.

Defendants Barrett and SIF join Claimant in contending that Claimant was an employee of AA at the time of the accident giving rise to this claim. Barrett contends that although it did have a professional employer arrangement with AM, it did not have such an arrangement with AA, and that if Claimant was an employee of AA, and if Claimant was performing the work of AA at the time of the accident, neither Barrett nor AM has liability for the payment of workers' compensation benefits to Claimant. Barrett acknowledges that if Claimant was an employee of AM, and if Claimant was performing the work of AM at the time of the accident, then it is liable for the payment of workers' compensation benefits to Claimant.

FINDINGS, CONCLUSIONS, AND ORDER - 3

Tom Floyd is the principal of a number of business entities performing agricultural and related work in southern Idaho, including AM and AA. Floyd does not dispute the occurrence of the subject accident, and agrees that it was industrial in nature. He acknowledges that Claimant is entitled to the payment of his medical expenses, TTD benefits from November 18, 2010 through June 1, 2011, and a 4% lower extremity impairment. He concedes that Claimant's average weekly wage is \$860.00. Floyd denies that Claimant is entitled to disability in excess of the 4% lower extremity rating. Finally, and most importantly, Floyd denies that Claimant was anything but an employee of AM at the time of the accident giving rise to this claim. Specifically, Floyd contends that on the morning of the accident, Claimant was dispatched to transport a load of corn to the AM facility located at the Wilder feed lot to be milled. Therefore, AM/Barrett is the employer responsible for the payment of workers' compensation benefits through Barrett's surety, the State Insurance Fund. Floyd contends that all entities except AM should be dismissed and that he should receive an award of attorney fees under Idaho Code § 12-120, 121 and I.R.C.P. 54(e)(1). Floyd contends that Barrett's November 22, 2010 letter canceling the professional employer arrangement retroactive to November 14, 2010, is legally ineffective to terminate workers' compensation coverage pursuant to the provisions of Idaho Code § 72-214.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. The legal file of the Commission;
2. The hearing testimony of Claimant, Tom Floyd, BBSI's area manager Keith Allred, BBSI's risk manager Ronald Collins, and BBSI's HR benefits coordinator Lorna Thorpe-West;
3. Claimant's exhibits 1-14 admitted at hearing;

4. Employer's and Surety's exhibits "BBSI" A-N;
5. Uninsured Employers' exhibits A-U, including F1; and
6. BBSI prior claims, exhibit V, produced post-hearing by Order of Referee.

During post-hearing briefing, Claimant submitted three proposed exhibits with his reply brief. Uninsured Employers moved to reopen briefing to counter this information. Claimant responded in opposition to that motion. On March 15, 2012, the Referee denied Defendants' motion to reopen briefing. The Commission finds no reason to disturb the Referee's order on briefing reopening.

Claimant's three proposed exhibits were not timely identified as required by JRP 10. Claimant's stated basis for submitting them, that credibility was a new issue raised by Defendants' in briefing, is not well taken. Claimant's suggestion that the Referee may take judicial notice of foreign newspapers and extrajudicial news articles and internet sources is not well taken as an alternative for accepting otherwise untimely proposed exhibits. These proposed exhibits are not admitted and are stricken from the record. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

FINDINGS OF FACT

1. In the fall of 2010, Tom Floyd was the operator of a number of businesses doing business in southwestern Idaho. These included Action Ag, LLC, Action Sales, LLC, Action Ag Transport, LLC, Western States Dust Control, LLC, Cloverdale Farms, LLC, and Wilder Feed Lot, LLC. (*See* Tr. 117/3 - 13; C. Ex. 10a - 10g). Floyd described the business of AA in the following exchange:

(By Mr. Owen)

Q Why did you make a separate business for Action Ag, LLC? What do you do? What does that business accomplish?

A Action Ag, LLC is in the farming business. We farm a couple thousand acres. We raise some dairy heifer replacements. We buy and sell culled feed products, a few things like that.

Q Do you haul agricultural products?

A. Yes, we have trucks and we haul products.

Tr. 117/25 – 118/9.

In addition to performing this work, it appears that AA was also responsible for paying all wages owed to employees of Floyd's other businesses. These payments are not identified as wages on tax documents. Rather, they show up as expenses for contract labor or payments to professional employer organizations. However characterized, the money to pay employees of Floyd's diverse businesses came from AA.

2. Floyd testified as follows concerning the business of AM:

(By Mr. Owen)

Q Okay, and what is the business of Action Milling, Inc.?

A Action Milling, Inc. does several things. One thing is we mill grain in the State of Idaho and in 2010 we also had a milling operation in Washington and we did some milling in Fallon, Nevada. Since then we've discontinued the Washington operation. We've discontinued the Fallon, Nevada operation. We are still milling grain here in Idaho.

Tr. 121/24 – 122/7.

3. Ronald Collins, an employee of Barrett, testified that in 2006 he performed an audit of AM in order to understand whether AM was properly classified for workers' compensation purposes by Barrett. In the course of this audit, he ascertained that AM was in the business of milling corn at a permanent location at the Wilder feed lot. However, AM also performed mobile milling services. The business owned portable milling machines that could be

transported to a remote farm or dairy for the purpose of “milling off” corn at that particular location. Employing a tractor trailer, AM employees transported the portable mill to the site, assisted in milling the grain on site, and then transported the portable mill back to the Wilder feed lot or some other location. (Tr. 230/17 – 232/11). There is no evidence that, other than the transport of the portable mill, AM was in the business of general agricultural transport or haulage.

4. In approximately 2007, AM entered into a professional employer arrangement with Barrett, as contemplated by Idaho Code § 44-2401, *et seq.* The evidence establishes that Barrett meets the definition of a professional employer under Idaho Code § 44-2403. As well, Barrett established a professional employer arrangement with AM, who meets the definition of “client” under Idaho Code § 44-2403(3). (*See Barrett Ex. A*). Finally, the testimony of Keith Allred and Claimant, establishes that Barrett had an arrangement with Claimant such that Claimant qualifies as an “assigned worker” pursuant to Idaho Code § 44-2403(2). (*See Floyd Ex. K*).

5. Pursuant to the written agreement between Barrett and AM, it is clear that Barrett assumed the responsibility to procure workers’ compensation coverage for the employees assigned to AM. Idaho Code § 72-103 allows the parties to such an agreement the option of determining who, as between the work site employer and the professional employer, shall obtain workers’ compensation coverage for the assigned workers. The instant agreement clearly demonstrates that Barrett assumed this responsibility.

6. Although Barrett did enter into a professional employer arrangement with AM, and although Barrett was aware that Floyd had a number of other separate businesses, Barrett did not have an agreement with Floyd to provide services for any of Floyd’s other businesses.

7. However, consistent with Floyd's testimony, Allred acknowledged that the payments he received to cover AM payroll, withholding, workers' compensation premiums, etc., came from AA. Allred explained that it was not unusual for his business to receive such payments from entities other than the actual work site employer.

8. As of the date of hearing, Claimant was 59 years old. He is married, and has no children. Claimant was born in Klamath Falls, Oregon, but raised in Boise. In Boise, he completed the tenth grade at Capital High School. He testified that he suffers from dyslexia, and had considerable difficulty in school with reading and writing. After completing the tenth grade, he dropped out of high school and joined the Navy, where he served as a bosun's mate. Following his honorable discharge, he returned to Idaho where he worked at manual labor jobs including fork lift operation, small engine repair, etc. For about twenty years, Claimant was employed as a copy machine repairman. He received some factory training in this regard, and was qualified to work on Sharp and Canon copiers. Thereafter, he pursued truck driving as a career, and performed this work for various employers to the date of the subject accident. He has operated all kinds of vehicles, and has a current CDL.

9. In August 2010, Claimant was unemployed. On a day, he happened to drive by the location of AA in Caldwell, Idaho, and noted the presence of a number of trucks with AA logos painted on their sides. He stopped in to inquire as to potential opportunities for employment as a driver. Claimant was interviewed by Dan Boschma and Tom Floyd. He was eventually hired at a starting wage of \$10 per hour, with a 60-day probationary period. Although Floyd testified that in his view Claimant was employed as an "independent contractor" during his 60-day probationary period, the record tends to reflect that Floyd and/or Boschma retained the

right to direct and control the activities of Claimant as to time when and place where his work was performed such as to implicate the creation of an employer/employee relationship.

10. As to which of Floyd's diverse businesses actually employed Claimant there is considerable dispute, and it is the resolution of this dispute which largely determines who bears responsibility for workers' compensation benefits owed to Claimant.

11. Following the successful completion of his 60-day probationary period, Claimant was invited to execute a contract with Barrett, under the terms of which, he became a Barrett employee assigned to work for AM. Claimant understood this as a "co-employer" relationship. Although he assuredly understood that one of his co-employers was Barrett, he was less certain which of Floyd's various businesses was his work site employer under the Barrett contract.

12. Claimant testified that most of his work was driving work, and most of this driving work involved hauling agricultural product, primarily corn, to the AM milling site at the Wilder feed lot. However, he also testified that he did other types of driving, including transporting vehicles purchased by Floyd from the point of purchase to Idaho, driving flatbeds, bearcats, and spreader trucks, as well as transporting the portable milling machines employed in the business of AM. In October 2010, he spent nearly three weeks hauling silage on a farm owned by Floyd, and on other properties.

13. Claimant testified that when he was initially hired in August 2010, he thought that he was hired by AA simply because the location he stopped at in Caldwell was identified and signed as AA, as were the trucks parked at the facility. Claimant testified, and the record reflects, that during his probationary period he was also paid on checks issued by AA.

14. Although Claimant testified to his belief that he was an employee of AA, his testimony also reflects that he does not really know what the business of AA is, nor does he have

a grasp the business of AM. Claimant's belief that he was an employee of AA is informed by his conclusion that he must be an employee of AA due to the name on the location from which he was dispatched, the name on the trucks he drove, and the name on his paychecks. However, his testimony reflects that he really has no understanding of whose work he was doing at a particular point in time because he has no actual understanding of the scope of business of each of the various entities operated by Mr. Floyd:

(By Mr. Eismann)

Q Did you do any work for Action Milling, Inc.?

A I don't know for sure.

Q Can you explain your answer?

A I'm not sure exactly what Action Milling, Inc. does or owns.

Q When you say you don't know for sure, do you have an understanding of what business they're in?

A I know that I operated various equipment. I operated a mill machine for milling corn down into a powder and I drove flat bed and I drove grain trains and farm trucks.

Q Were they used for Action Milling?

A I don't know. I could not tell you that.

Q Well, did you know that corn was being milled?

A Yes, I knew corn was being milled and I actually ran a mill to mill corn.

Q And was it your understanding that Action Milling, Inc. was the operator of that business?

A All of the paperwork I ever filled out referred to Action Ag.

Q See, that's not the question I asked you. Was it your understanding that Action Milling operated the milling business?

A No.

Q You had no information on that at all?

A No information on that at all.

Tr. 75/12 – 76/15.

...

A The claim is that there is a question of who I was actually working for at the time of the injury.

Q (by Mr. Eismann) And what was that question?

A The question of who I was working for.

Q Yeah, you were working; right?

A Yes, I was working.

Q Now, that was the question about who you were working for? Was there some alternatives that you could have been working for or what?

A I don't know how the business operated, so I don't know who I would have been working for at any specific time.

Q You don't know that?

A I don't know that today, no, and I didn't know that then.

Q So if I understand your answer, you're telling us that you don't know who you were working for on November 18th, 2010?

A I understand I was driving a truck for Action Ag.

Q So then you do know – are you saying that you're saying – is your testimony that you were in fact employed by Action Ag on November 18th, 2010?

A The only paperwork I ever filled out and the only equipment I ever operated had the name Action Ag on the side of it and all the paperwork was filled out to Action Ag.

Q And so that is the basis on which you gained the impression that you were working for Action Ag?

A I don't know how to answer that.

Q Well, let me start again. Do you know for sure who you were working for on November 18th, 2010, when you were injured?

A No, I don't.

Tr. 84/17 – 86/2. Therefore, on the question of who, as between AA and AM Claimant was working for at the time of the subject accident, Claimant's beliefs are of little value at arriving at the truth, since his beliefs are foundationally inadequate.

15. What is more surprising, is that neither does Tom Floyd's testimony provide unambiguous guidance on the question of whose work was being performed by Claimant on the day of injury. Floyd, as the manager/operator of both AM and AA should be expected to know, of a certainty, whose work was being performed by Claimant on a given day.

16. First, the Commission is persuaded that contrary to the initial testimony of Floyd, it is clear that Claimant performed work for entities other than AM after the Claimant's successful completion of his probationary period.

17. From Floyd's November 23, 2010 email to Allred, it is made clear that during the period of his employment, Claimant performed work for entities other than AM:

I own 6 companies out right, I am partners one others [sic]. I never agreed to have all my companies tied to BBSI, nor agreed to have all my employees work for just one company. I assumed that anyone [sic] of my employees could work some for one company and some for another company and receive seperate [sic] checks and all was good.

Because of some of my employees work for Western Sates [sic] Dust Control, LLC or for Wilder Feedlot, LLC or for Action Milling, Inc., or for Action AG, LLC or for Cloverdale Farms, LLC or for Action AG Sales, LLC or for Action AG Transport, LLC that can not [sic] be on BBSI payroll for any part unless BBSI has copies of the workman's [sic] comp or something?

I have employees working for other companies that I have no ownership in, would you also need copies of thier [sic] workman's [sic] as well?

Ronnie was a new hire and most likely did not understand who he was working for each day. He drove spray truck for Western States Dust Control, LLC, hauled silage for Action AG, LLC, drove truck to Washington and back for Action AG Trasnport, LLC, flew to Las Vegas and drove back a truck for Action AG Sales, LLC and son [sic] on. So he only worked on BBSI payroll part of that time.

10 years and some new hire, who has only been on the job a few weeks, tells you something and we get the boot. No warning, no questions, nothing, just the boot. Then write and tell me after you receive the final payment will you put together the info so we can find another company to take over for you, puts an even worst [sic] taste in my mouth for BBSI, just helped you get my brother and nephews [sic] account as I thought we had a working relationship. Now I find out if a new hire that most likely does not understand, tells you something you don't understand either and boom we are done.

C. Ex. 11. This email nevertheless admits the possibility that the work for entities other than AM was done after Claimant had completed the 80 hours per pay period for which he was paid by Barrett/AM. However, even this possibility is belied by Floyd's testimony at hearing:

(By Ms. Vaughan)

Q Again, Mr. Floyd, I apologize if I'm asking you to repeat yourself, but your testimony was going quicker than I could write, did you indicate that it was your belief that your – that Action Ag, LLC was covered under the service agreement that Action Milling, Incorporated had with BBSI?

A All employees went through Action Ag. The first 40 hours of each week were covered through BBSI. The rest of the hours were not. That was my full intention on everything.

Q Was that a decision that you unilaterally made?

A That was one that just developed over time, that we started out in the beginning that everybody was on salary, and then later we hired hourly employees, and then as business continued to grow, employees worked more and more hours, so we started paying them not thinking it was going to last forever. Business kept growing and growing and growing.

Q So you reported the first 40 hours every one of your employees worked regardless of which of your enterprises on your payroll reports to BBSI?

A Yes.

Tr. 150/21 – 151/18.

...

(By Mr. Owen)

Q Is it your testimony, Mr. Floyd, that after BBSI came on, Mr. Gardner was employed by Action Milling, Inc. for the first 40 hours every week?

A Yes.

Q Does that matter what he was doing?

A He was working for Action Milling the first 40 hours of every week. If he was – whichever job we did in-house work on the other from that, but every 40 hours of every week, that's what he did. That's the way we turned it in, submitted it forever.

Q The question was, Mr. Floyd, did it matter –

A No.

Q -- during that same period of time what duties Mr. Gardner was performing?

A Not really, it was all Action Milling work.

Tr. 172/11 – 173/2.

Accordingly, although Barrett/AM paid Claimant for the first 80 hours of every two week pay-period, the record establishes that during this time, Claimant could have been performing work for AA, AM, or one of Floyd's other business interests. Indeed, it was the suggestion of such activities that led Barrett to eventually cancel its contract with AM following the investigation into Claimant's accident. Specifically, Barrett questioned whose work was being performed by Claimant at the time of the accident.

18. On November 15, 2010, AA contracted with an area farmer, Roger Rosedahl, for AA's purchase of approximately ninety tons of dry shell corn, price depending on moisture content. (*See* C. Ex. 14, p. 2). On November 18, 2010, Claimant was dispatched by Boschma to the Rosedahl farm to pick up the corn in a ten-wheeled dump truck and transport the same to the mill at the Wilder feed lot, where the moisture content of the corn was to be tested. According to Claimant, had the corn tested to moisture content of less than 18%, it would have been taken to storage at the Wilder feed lot for subsequent delivery to a private buyer in

Gooding. However, if testing demonstrated a moisture content greater than 18%, it would be necessary to immediately “mill off” the corn at the Wilder mill in order to prevent spoilage. Claimant’s work in this regard is memorialized in an invoice dated November 18, 2010, reflecting that on that date he transported 15.41 tons of corn from the Rosedahl farm to Wilder feed lot. Invoice no. 15391 also confirms Claimant’s testimony that on arriving at the Wilder feed lot, the corn tested at 19.1% moisture content, thus making it inappropriate for long term storage. The corn was immediately milled off at the AM mill located at the Wilder feed lot.

19. Other records offered into evidence reflect that AA later paid Rosedahl for the corn that was picked up by Claimant and delivered to AM on November 18.

20. It was while performing this pick up and delivery that Claimant suffered the subject accident. While exiting the truck to tend to an overheated engine, Claimant twisted his left ankle. A subsequent evaluation by Daryn Barns, P.A. on November 18, 2010, demonstrated a suspected ankle fracture. Claimant was referred to West Idaho Orthopedics, where he was seen by John Smith, M.D. on November 22, 2010. X-rays demonstrated a non-displaced distal fibula fracture, with an intact ankle mortis. Claimant was treated conservatively by Dr. Smith. By January 14, 2011, x-rays were thought to show a healed fracture. Claimant was encouraged to wean himself from his air cast and work on ankle strengthening. On March 14, 2011, physical therapy was recommended for Claimant. However, due to Surety’s denial of the claim, Claimant was not able to obtain this care.

21. On April 18, 2011, Dr. Smith noted that Claimant’s left ankle fracture had healed, and that the focus of treatment was rehabilitation, made more difficult by the Surety’s denial of responsibility for physical therapy. Dr. Smith recommended self-directed therapy using a “thera-band.” He stated his plan to keep Claimant off work with no driving until May 15, 2011. At that

point, he speculated that Claimant would be able to return to normal work “without any sort of restrictions and limitations.”

22. Claimant returned to Dr. Smith on May 18, 2011 with concerns about being able to operate a heavy truck clutch. He also noted that mowing his lawn had caused significant ankle fatigue. X-rays showed a well-consolidated and healed ankle fracture. Dr. Smith and Claimant had a long discussion about return to work. Claimant expressed his concern about his residual symptoms, and Smith reassured Claimant that his symptoms were not of concern. Concerning return to work and restrictions, Smith stated:

We will allow him to return to work duty on May 23, 2011. This gives him another week to work on mobility and strengthening, but still will be unable to walking [sic] on uneven and non-level ground and no climbing or working at heights. This does not include climbing into the cab of his truck. As of June 1, 2011, we will consider him at fixed and a stable state with 4% lower extremity impairment based on a nondisplaced minimal finding healed fracture of his left distal fibula.

C. Ex. 2, p. 6.

From this May 18, 2011 note, it is unclear whether Dr. Smith intended the restrictions above referenced to be permanent, or rather, whether they would merely be temporary until the anticipated June 1, 2011 date of medical stability. However, on May 18, 2011, Dr. Smith also authored a “Return to Work Report.” On that form, Dr. Smith was invited to identify a date on which Claimant could be released to full duty work without restriction. He did not identify such a date on this form. Rather, he specified that Claimant could return to light duty work with restrictions on May 23, 2011, such restrictions to include no walking on uneven or non-level ground and no climbing. One might suppose that had it been Dr. Smith’s intention to release Claimant to return to full duty work without restrictions on June 1, 2011, he might have filled out the form accordingly. Still, not even the return to work report sheds a great deal more light on

whether it was Dr. Smith's intention that Claimant had permanent limitations against walking on uneven or non-level ground and climbing ladders. Unfortunately, Dr. Smith's deposition was not taken, making it difficult to understand his true convictions concerning the important question of whether the subject accident left Claimant with permanent limitations/restrictions. For his part, Claimant offered the following testimony at hearing concerning the status of his left ankle as of the date of hearing:

(By Mr. Owen)

Q Mr. Gardner, are there kinds of work now that you used to do that you don't think you could do now?

A I cannot really tell you for certain. One of the reasons that I was told that they wanted me to get into physical therapy was strictly to find out what the limitations were on my ankle. I do still have problems with it.

Q Give me some ideas about when you experience problems with that ankle now.

A I still have trouble walking on uneven ground. If I go out to mow my lawn, which is like walking over corn fields that have been plowed, I generally can hardly walk on my ankle for awhile after I'm done.

Q How big a yard do you have?

A It's not that big. Probably only maybe 2,600 square feet.

Q Do you live in town?

A Yes, I do.

Q Okay. How about going up and down stairs?

A I don't have as much problems going up stairs, but I have a lot of problems going down stairs.

Q If you were in a job that required you go up and down stairs all day, would you have trouble with that?

A I'm thinking I probably would, yes.

Q It's hard to tell, isn't it?

A It really is.

Tr. 71/6 – 72/10.

DISCUSSION AND FURTHER FINDINGS OF FACT

23. 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).

Responsible Party

24. As developed above, the relationship between AM and Barrett is best described as a professional employer arrangement, as contemplated by Idaho Code § 44-2401, *et seq.* Barrett entered into an agreement with Claimant, such that Claimant qualifies as an "assigned worker" pursuant to Idaho Code § 44-2403(2). Barrett and AM made a determination, as authorized by Idaho Code § 72-103, that Barrett obtain the policy of workers' compensation insurance covering the workers assigned to AM. This, Barrett did by obtaining a policy with the State Insurance Fund. However, it is clear that Barrett had a contractual relationship only with AM. Further, it is clear that Claimant performed work for entities other than AM during the first 80 hours of his two-week pay period.

25. Before addressing the question of who Claimant was employed by the time of the accident, it is necessary to characterize the relationship between Claimant and the various businesses for whom he provided services following the end of his probationary period. Claimant and Barrett have suggested that this case should be evaluated somewhat in the same

fashion as the Commission evaluates the question of whether an individual is an employee versus an independent contractor, with the focus being on who has retained the right to direct and control the activities of the injured worker as to time when and place where the work is done.

26. On the other hand, and citing *Goodson v. L.W. Hult Produce Company*, 97 Idaho 264, 543 P.2d 167 (1975), Floyd argues that the test for determining who was Claimant's employer at the time of the accident depends on whose work was being performed by the employee at the time accident occurred. The Commission believes that attention to whose work was being done by Claimant at the time of the accident, or who benefitted from that work, is more useful in evaluating the relationship between Claimant, AA and AM, than to allow the determination to be driven by who, as between AM and AA, had the right to direct and control Claimant's activities.

27. Since Floyd was the principal of both AA and AM, an analysis of who retained the right to direct and control the activities of Claimant on the day of the accident would not be particularly instructive in identifying Claimant's employer where both employers are managed, if not owned outright, by the same person. However, we believe the evidence establishes that Claimant was subject to direction and control by Floyd at all times in his capacity as operator of both AA and AM. It is much more instructive to focus on what work was being performed by Claimant at the time of the accident, and in this regard, *Goodson* provides a more helpful test than the right to control test developed in a long line of employee/independent contractor cases.

28. In *Goodson*, claimant was employed by L.W. Hult, doing business as L.W. Hult Produce Company. Hult was engaged in growing and marketing certified seed potatoes on approximately 350 acres of farm land near Moore, Idaho. Most of the potatoes he grew were marketed and sold as seed potatoes. However, a small percentage of the crop was unsuitable for

sale as seed potato. Some growers faced with this pile of rejects, simply discarded the same. Hult decided to cut his losses by marketing the reject potatoes for commercial sale. The rejected seed potatoes were transported to a different facility, washed and packaged for transport by rail to commercial customers. Claimant, an employee of Hult, was injured while lifting a sack of rejected seed potatoes at the remote facility. Hult took the position that Claimant was not entitled to workers' compensation benefits because of the then extant agricultural exemption. Claimant argued that notwithstanding Hult's business as a grower of certified seed potato, Claimant was not employed in an agricultural pursuit at the time of the accident. Citing *Hubble v. Perrault*, 78 Idaho 448, 304 P.2d 1092 (1956), the Court stated that the general character of the work for which the employee was hired or is required to perform is the test of whether the labor was performed in a covered employment or in an exempt employment. The Court determined that Hult's solution to extract more value from his crop by processing rejected seed potatoes for commercial use constituted a separate and special occupation removed from his general business as a farmer, such as to entitled claimant to the receipt of workers' compensation benefits as a nonexempt worker.

29. Of course, as Claimant has pointed out, there was only one legal entity involved in the *Goodson* case. Hult was a farmer doing business as L.W. Hult Produce Company, who engaged in a sideline of marketing for commercial consumption, rejected seed potatoes. In this case, the evidence establishes that Floyd operated a number of distinct legal entities and that Claimant performed work for these entities, or some of them, as directed by Floyd. More analogous to the peculiar facts of this case than the facts of *Goodson*, are the doctrines of joint and dual employment.

30. In *Basin Land Irrigation Company v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (1988), the seminal Idaho case recognizing the concepts of joint and dual employment, the Court distinguished joint and dual employment as follows:

Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.

Dual employment occurs when a single employee, under contract with two employers, and under the separate control of each, performs services for the most part for each employer separately, and when the service for each employer is largely unrelated to that for the other. In such a case, the employers may be held liable for workmen's compensation separately or jointly, depending on the severability of the employee's activity at the time of injury.

31. In order to consider whether the concepts of joint and/or dual employment can be applied to the facts of this case, it is first necessary to understand whether Claimant can be said to have entered into a contract of hire, express or implied, with two or more of the entities operated by Floyd. Certainly, the evidence establishes the existence of an express contract of hire as between Claimant and AM/Barrett. The evidence also establishes that, at the very least, Claimant had an implied-in-fact contract of hire with AA. A contract implied-in-fact is a true contract whose existence and terms are inferred from the conduct of the parties. Such a contract is grounded in the parties' agreement and tacit understanding. *See Kennedy v. Forest*, 129 Idaho 584, 930 P.2d 1026 (1997). In *Seward v. State Brand Division*, 75 Idaho 467, 274 P.2d 993 (1954), Seward was injured after gratuitously offering to help a state brand inspector examine brands at the request of a deputy inspector. The Commission found the accident to be compensable. The Idaho Supreme Court reversed noting that there was no evidence that the state brand inspector was aware of the deputy's actions. The Court held that before one can become the employee of another, knowledge and consent of the employer, express or implied, is

required. Claimant's relationship with AA is unlike the relationship between Seward and the state brand inspector. Floyd did have authority to hire, and did use Claimant to perform the work of AA. Claimant performed this work, not gratuitously, but with the expectation of being paid. Claimant, too, knew that he was doing the work of AA and AM, although he did not know precisely how Floyd characterized his work from day to day.

32. In summary, we conclude that the conduct of the parties establishes, at the very least, the existence of an implied-in-fact contract of hire between Claimant and AA.

33. As to whether the relationship of Claimant to AA and AM is best characterized as joint versus dual employment, the Commission believes that dual employment best describes the general nature of the relationship between Claimant, AA, and AM.

34. There were assuredly times when the work Claimant was doing was altogether distinct from the interests or business of AM. For example, Claimant testified that in October 2010, he spent approximately three weeks hauling silage on farmland owned by Floyd or other farmers. The business of AM was to mill corn either at the Wilder feed lot or on site using one of the portable mills operated by the business. It cannot reasonably be posited that any work of AM was being done by hauling silage on Floyd's farm. Therefore, the Commission concludes that the employment at issue is probably better described as dual instead of joint employment. Even so, in order for a particular employer to be held liable for the injuries of a worker in a dual employment situation, it must be demonstrated that the actions of the injured worker at the time of the injury are severable, and clearly related to only one employer. *Basin Land Irrigation Company v. Hat Butte Canal Co.*, *supra*. Otherwise, both employers in a dual employment relationship can be held jointly liable for the payment of workers' compensation benefits.

35. This brings us to the peculiar facts of the instant matter, and in particular, an examination of Claimant's activities on the day of injury.

36. First, as noted above, the right to control test is of limited utility in identifying the employer or employers who should be held liable for the payment of workers' compensation benefits because both entities in question were managed/operated by the same individual, i.e. Tom Floyd. More pertinent to the resolution of the instant matter is an examination of whose work was being performed by Claimant at the time of injury. In other words, the Commission must consider whether Claimant's employment is clearly identifiable to only one of Claimant's employers.

37. Claimant urges the Commission to conclude that Claimant was in fact working only for AA at the time of the accident. He notes that the evidence establishes that as between AA and AM, only AA's business includes agricultural hauling of the type Claimant was performing at the time of injury. Though the business of AM includes hauling portable milling machines to various work sites, Claimant was not engaged in this particular activity at the time of the accident. Rather, he was hauling grain that had been purchased by AA from a local farmer. It is clear that Claimant's activity was in furtherance of the business of AA, and was done for the benefit of AA.

38. However, it is equally clear that Claimant's activities of November 18, 2010 also had something to do with the business of AM. Although AA purchased the corn and undertook to transport the same, the facts also demonstrate that Floyd intended the corn to be delivered to AM where it was to be tested for moisture content and either held in storage for eventual sale and transport to a third party purchaser, or immediately milled off for local sale.

39. Therefore, at the time of the accident giving rise to this claim, it seems clear that the activities of Claimant benefitted not only AA, but also AM. The evidence does not establish that Claimant's activity at the time of injury was so tied to one employer that the employment relationship could be considered severable and attributable only to one employer.

40. Based on the foregoing, and except as qualified below, the Commission concludes that Claimant has met his burden of establishing that AA and AM are equally, and jointly and severally, liable to Claimant for the payment of the benefits to which Claimant is entitled.

Idaho Code § 72-210 Penalty

41. Pursuant to Idaho Code § 72-210, Claimant is entitled to recover solely from AA his reasonable attorney fees incurred in prosecution of the claim, along with a penalty equal to 10% of the benefits awarded in this decision.

TTD

42. The parties do not dispute that the accident occurred as alleged. The parties are in agreement that Claimant suffered a fibular fracture as a consequence of the accident. Further, the parties concede that Claimant was in a period of recovery and is entitled to temporary total disability benefits for the period of November 18, 2010 through June 1, 2011. Claimant contends that his average weekly wage is \$638.79, whereas Floyd concedes that Claimant's average weekly wage is \$860.00. AM/Barrett has not taken a position on Claimant's average weekly wage. In resolving the discrepancy between Claimant and Floyd concerning Claimant's average weekly wage, it is notable that although Floyd concedes an average weekly wage of \$860.00, he provides no backup for this figure. Claimant, however, has reached his \$638.79 average weekly wage figure by considering the gross wages paid to Claimant by AA and Barrett during the period prior to the subject accident of November 18, 2010. (*See C. Ex. 5*)

& 6). Under Idaho Code § 72-419(4) Claimant's average weekly wage is computed by taking the most favorable quarter to Claimant in the 52 weeks preceding the subject accident and dividing by thirteen. This will yield Claimant's average weekly wage. Here, Claimant worked only one full quarter prior to the subject accident. The check stubs contained at Exhibits 5 and 6 demonstrate that Claimant was paid every two weeks by both AA and AM/Barrett. The thirteen week period prior to the subject accident runs from August 19, 2010 through November 17, 2010. On August 27, 2010, Claimant received a check for \$714.75 from AA, representing wages from August 14, 2010 to August 27, 2010. Since the thirteen week period begins approximately halfway through the pay period represented by the check of August 27, 2010, the Commission concludes that Claimant's calculation includes compensation earned outside that thirteen week period. Also, the AA check issued November 19, 2010 includes payment for two days that would not ordinarily be included in the average weekly wage calculation. Unfortunately, the record does not contain any information which would allow the Commission to draw any conclusions about the number of hours Claimant worked on a particular day during a particular pay period. The approach taken by Claimant undeniably inflates his average weekly wage, since the calculation includes 14 weeks of earnings (August 14, 2010 to November 19, 2010). The best solution, and the one consonant with the intent of Idaho Code § 72-419(4), is to divide Claimant's earnings during this period (\$8,304.25) by 14, to arrive at an average weekly wage of \$593.16.

Medical

43. The parties concede that following the subject accident, Claimant reasonably incurred the medical bills identified in Claimant's Exhibit 3. Per *Neel v. Western Construction*,

Inc., 147 Idaho 146, 206 P.3d 852 (2009), Claimant is entitled to recover 100% of the invoiced amount of those bills.

PPI

44. The parties acknowledge that Claimant has suffered a 4% lower extremity rating as a consequence of the subject accident.

PPD

45. Aside from the threshold issue of responsibility for the payment of benefits, Floyd's only significant dispute with Claimant is over Claimant's claim for disability inclusive of impairment of 15% of the whole person. Although Floyd has decried the claim for a 15% disability award, neither evidence nor argument countering Claimant's request is before the Commission. However, it is Claimant who bears the burden of proof in this regard, and in order to support an award of disability it must appear to the Commission that the evidence of record establishes that Claimant's present and probable future ability to engage in gainful activity has been impaired as a consequence of his permanent physical impairment and relevant nonmedical factors. *See* Idaho Code §§ 72-425 and 72-430.

46. In evaluating Claimant's entitlement to disability benefits, it is first necessary to understand whether, as a consequence of the subject accident, Claimant has any residual permanent limitations/restrictions that impede his functional ability. Here, the evidence is not without some ambiguity. Dr. Smith has reported that Claimant suffered a nondisplaced fibular fracture, which was well healed by April 18, 2011. As of that date, Dr. Smith also noted that by May 15, 2011, he would expect Claimant to be able to return to normal employment "without any sort of restrictions and limitations." However, when Claimant was seen on May 18, 2011, he

reported on-going symptomatology. At that time, Dr. Smith gave the following, somewhat cryptic, directions to Claimant:

We will allow him to return to work duty on May 23, 2011. This gives him another week to work on mobility and strengthening, but still will be unable to walking [sic] on uneven and non-level ground and no climbing or working at heights. This does not include climbing into the cab of his truck. As of June 1, 2011, we will consider him at fixed and a stable state with 4% lower extremity impairment based on a nondisplaced minimal finding healed fracture of his left distal fibula.

C. Ex. 2, p. 6.

47. From this, it is unclear whether the limitations/restrictions referenced by Dr. Smith are intended by him to be temporary and imposed only through June 1, 2011, or instead, were intended to be permanent. The contemporaneous Return to Work Report dated May 18, 2011 afforded Dr. Smith an opportunity to provide a date on which Claimant would be released to return to full duty work without restriction. Dr. Smith declined to make such an entry, preferring instead to note that Claimant could return to light duty work on May 23, 2011, with restrictions against walking on uneven ground and climbing.

48. For his part, Claimant described ongoing problems as of the date of hearing consistent with those he described to Dr. Smith on May 18, 2011. Based on the foregoing, we find that the limitations/restrictions imposed by Dr. Smith on May 18, 2011 are permanent in nature. Again, no party to these proceedings controverted Claimant's assertions in this regard.

49. Claimant has no formal education past the tenth grade. Reportedly, he suffers from a learning disability. Claimant has work history as a copy machine repairman, which suggests that he possesses good fine motor skills and has a mechanical aptitude. However, he last worked in this industry many years ago, and there is no showing that he could re-enter this part of the labor market. Claimant's most recent employment has been as a truck driver. He

possesses a current CDL, and has certifications to operate tankers, doubles, and triples. He was evidently very proficient in his profession prior to the subject accident. It is notable that in imposing limitations/restrictions on May 18, 2011, Dr. Smith pointed out that the restrictions he gave were not intended to prevent Claimant from climbing into and out of the cab of his vehicle. Still, the admonishment to avoid walking on uneven or non-level ground, and to avoid climbing and working at heights might reasonably be expected to impact Claimant's ability to perform the type of agricultural driving work he was performing at the time of injury. Moreover, for an individual with Claimant's educational background and transferable job skills, the limitations imposed by Dr. Smith reasonably limit his access to other manual labor jobs for which he could have competed prior to the work accident.

50. Based on the foregoing, the Commission concluded that Claimant has met his burden of demonstrating that he has suffered disability of 15% of the whole person, inclusive of impairment.

Attorney Fees Against Claimant

51. Attorney fees requested pursuant to Idaho Code § 72-120, 121, and IRCP 54(e)(1) by Uninsured Defendants are outside the scope of Commission jurisdiction by statute and are not awardable. *See*, Idaho Code § 72-201; *Swanson v. Kraft, Inc.*, 115 Idaho 315, 322, 775 P.2d 629, 636 (1989).

CONCLUSIONS

1. Claimant suffered a compensable accident/injury on November 18, 2010;
2. Claimant was a dual employee of AA and AM/Barrett;
3. At the time of the accident giving rise to this claim, Claimant's actions benefitted both AA and AM/Barrett, such that his employment is not severable and tied to one employer in

particular, leaving both employers equally, and jointly and severally, liable for the payment of workers' compensation benefits;

4. Claimant's average weekly wage is \$593.16;

5. Claimant is entitled to temporary total disability benefits from November 18, 2010 through June 1, 2011;

6. Claimant is entitled to recover 100% of the invoiced amount of medical bills identified at Claimant's Exhibit 3;

7. Claimant is entitled to a 4% lower extremity rating;

8. Claimant is entitled to an award of disability of 15% of the whole person, inclusive of impairment;

9. From AA, Claimant is entitled to recover his reasonable attorney fees incurred in connection with the prosecution of this case, along with a penalty equal to 10% of the benefits awarded in these proceedings;

10. Floyd is not entitled to an award of attorney fees;

ORDER

Based on the foregoing, it is HEREBY ORDERED that:

1. Claimant suffered a compensable accident/injury on November 18, 2010;

2. Claimant was a dual employee of AA and AM/Barrett;

3. At the time of the accident giving rise to this claim, Claimant's actions benefitted both AA and AM/Barrett, such that his employment is not severable and tied to one employer in particular, leaving both employers equally, and jointly and severally, liable for the payment of workers' compensation benefits;

4. Claimant's average weekly wage is \$593.16;

5. Claimant is entitled to temporary total disability benefits from November 18, 2010 through June 1, 2011;

6. Claimant is entitled to recover 100% of the invoiced amount of medical bills identified at Claimant's Exhibit 3;

7. Claimant is entitled to a 4% lower extremity rating;

8. Claimant is entitled to an award of disability of 15% of the whole person, inclusive of impairment;

9. From AA, Claimant is entitled to recover his reasonable attorney fees incurred in connection with the prosecution of this case, along with a penalty equal to 10% of the benefits awarded in these proceedings;

10. Floyd is not entitled to an award of attorney fees;

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

DATED this __19th____ day of June, 2012.

INDUSTRIAL COMMISSION

/s/ Thomas E. Limbaugh, Chairman

/s/ Thomas P. Baskin, Commissioner

/s/ R. D. Maynard, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2012, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

RICHARD S. OWEN
P.O. BOX 278
NAMPA, ID 83653

BRIDGET A. VAUGHAN
1001 NORTH 22ND ST.
BOISE, ID 83702

RICHARD B. EISMANN
3016 CALDWELL BLVD.
NAMPA, ID 83651-6416

cs-m/

/s/ _____