**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| JASON S. ELDRIDGE,<br><br>Claimant,<br>v.<br><br>MEISSEN TRUCKING,<br><br>Uninsured Employer,<br><br>AGAR LIVESTOCK, LLC,<br><br>Employer,<br><br>SNAKE RIVER CATTLE FEEDERS, LLC, Employer, LIBERTY NORTHWEST INSURANCE CORP., Surety,<br><br>and<br><br>OUTWEST LIVESTOCK, LLC, Employer, LIBERTY NORTHWEST INSURANCE CORP., Surety<br><br>Defendants. | **IC 2018-002756**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**<br><br>**FILED January 21, 2022** |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission conducted a bifurcated hearing via ZOOM videoconferencing on April 6, 2021. The matter was heard before Chairman Aaron White, Commissioner Thomas E. Limbaugh, and Commissioner Thomas P. Baskin. Claimant, Jason S. Eldridge, was present and represented by Joseph M. Wager. Default was previously taken against Defendant Meissen Trucking, Inc. ("Meissen"), and it did not participate at hearing. Defendant Agar Livestock, LLC ("Agar") was represented by Amber Dina. Defendants Out West Livestock, LLC ("OWL") and its surety were represented by Neil D. McFeeley.

Defendants Snake River Cattle Feeders, LLC ("Snake River") and its surety were represented by Mark Sebastian. The parties presented oral and documentary evidence and briefing was submitted. The matter came under advisement on August 20, 2021 and is ready for decision.

## ISSUES

Per the February 8, 2021 Notice of Hearing, the issues to be decided at this bifurcated hearing are:

1. Whether Claimant was an employee of Meissen Trucking, as opposed to an independent contractor, at the time of the subject accident;
2. If Claimant was an employee of Meissen Trucking, who, amongst the other named Defendants, is Claimant's statutory employer under Idaho Code § 72-216;
3. If Claimant was an employee of Meissen Trucking, whether any of the above-named Employers are liable to Claimant for penalties set forth in Idaho Code § 72-210 for failing to insure liability.

All other issues are reserved.

## PROCEDURAL BACKGROUND

Claimant filed a complaint against Meissen on January 31, 2018. Claimant subsequently amended his complaint to add Agar, OWL, Snake River and their respective sureties as parties to the case. Agar's Surety, Travelers Property Casualty Company of America ("Travelers"), was dismissed from the case on February 8, 2019, pursuant to stipulation between Claimant and Travelers and with no objection from any other party. The case was originally assigned to a referee, but on January 17, 2020, the matter was re-assigned to the Commission.

Meissen was represented by an attorney in the early stages of this case. However, Meissen's (former) attorney filed a motion to withdraw, which was granted by order of the Commission filed on May 15, 2020. Pursuant to Rule 2(B) of the Judicial Rules of Practice and

Procedure Under the Idaho Workers' Compensation Law and Idaho Code § 3-104, Meissen is required to appear through an attorney in these proceedings. *See Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 744-45, 215 P.3d 457, 464-65 (2009) (holding "[i]n sum, the law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body or a judicial body"). Accordingly, the Commission ordered Meissen to obtain substitute representation. Meissen was given ninety (90) days within which to appear through new counsel. On October 9, 2020, Meissen was given an additional sixty (60) days in which to appear through new counsel. In its October 16, 2020 Order continuing the matter, the Commission cautioned Meissen that failure to obtain such representation could result in the entry of an order of default against Meissen. *See McKinney v. American Roof Masters, Inc.*, IC 2008-014334 (Idaho Ind. Comm. November 18, 2011) (the Commission entered default against an employer corporation that did not appear through a licensed attorney).

Meissen failed to retain counsel as directed by the Commission, and on February 8, 2021, the Commission entered default against Meissen.

## CONTENTIONS OF THE PARTIES

Claimant contends that on January 18, 2018, he suffered an accident/injury arising out of and in the course of his employment. Claimant suffered numerous injuries at a feedlot operated by Snake River while attempting to load livestock onto a trailer that Claimant was hauling for Meissen. Claimant contends that he was an employee of Meissen, hired to operate Meissen's truck and leased trailer to transport cattle to various locations as directed by Meissen. Because Meissen did not provide the required worker's compensation insurance, Claimant contends that the other-named Defendants – Agar, OWL, and Snake River – are Claimant's statutory employers under

Idaho Code § 72-216 and are thus liable to pay Claimant's worker's compensation benefits for the injuries he sustained. Finally, Claimant contends that only Meissen, and no other party, is liable to him for the penalties set forth in Idaho Code § 72-210.

Defendant Agar contends that the evidence, primarily the Independent Contractor Agreement executed between Claimant and Meissen, establishes that the relationship between Claimant and Meissen was that of principal/independent contractor, and therefore Agar is not liable to Claimant for any worker's compensation benefits as a statutory employer. Agar further contends that even if Claimant is determined to be an employee of Meissen, Agar cannot be considered Claimant's statutory employer because Agar's involvement in this transaction was simply as a transportation broker, and not as a category one statutory employer.

Defendant OWL contends that it is an improperly named party and was not a party to any of the agreements that led to Claimant's injuries. OWL contends that Out West Dispatch LLC ("OWD") - a separate and distinct entity from OWL - was the party that contracted with AB Genetics, the owner of the cattle, to dispatch trucks to transport the cattle at Snake River's feedlot. OWL further contends that payment was issued to OWD for the transportation of the cattle in question and that OWD retained its dispatch fee before making payment to the respective entities to whom it had dispatched the load. Thus, OWL was not a party to the transaction and cannot be considered a statutory employer.

Defendant Snake River also contends that Claimant was an independent contractor instead of an employee of Meissen, or, in the alternative, that Claimant was a casual employee of Meissen and thus exempted from the workers' compensation laws. Snake River further contends that even if Claimant was an employee, Snake River is not Claimant's category two statutory employer. Snake River is not in the business of transporting cattle and lacked the capability to haul cattle.

Instead, Snake River is in the business of manufacturing feed and feeding cattle at its feed lot, and that the cattle in question were owned by a separate entity, AB Genetics. Snake River further contends that under *Kelly v. TRC Fabrication, LLC*, 168 Idaho 788, 487 P.3d 723, 728 (2021), Snake River cannot be considered a category one statutory employer because the transportation of cattle is ancillary to Snake River's business, which is to feed and fatten cattle at its facility.

Claimant responds that the evidence establishes that Claimant was an employee of Meissen, regardless of the purported Independent Contractor Agreement between the two respective parties. Claimant also responds that the facts do not support the contention that Claimant was a casual employee of Meissen. Claimant contends that Agar, OWL, and Snake River are all category one statutory employers of Claimant. Claimant concedes that none of the named parties qualify as category two statutory employers.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits (CE) A through O, and R through U, admitted at hearing or subsequently thereafter[1];
3. OWL's Exhibits (OWLE) 1 through 5, admitted at hearing;
4. Snake River's Exhibits (SRE) 1 through 5, admitted at hearing;
5. The transcript of the hearing held on April 6, 2021;
6. The testimony of Claimant taken at hearing;

[1] OWL objected to Claimant's Exhibit U at hearing and it was excluded. However, Exhibit U was later admitted at the post-hearing deposition of Cynthia Weekes without objection.

7. The testimony of witnesses Roy Agar, Deborah Agar, Paul Radloff, and Matthew Buyers, taken at hearing[2];

8. The post-hearing deposition of Cynthia Weekes, taken May 24, 2021.[3]

All outstanding objections are overruled.

After having considered the above evidence and the arguments of the parties, the Commission issues the following findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

1. Claimant was 55 years old at the time of hearing. Tr. 16:14-15. Claimant graduated from high school in Mud Lake, Idaho in 1984 and shortly thereafter, became a truck driver at the age of 18 years old. Tr. 16:18 – 17:5. Claimant hauled livestock (particularly cattle) starting in 1991 and up until the time that he was injured. Tr. 17:1-10. Claimant hauled cattle for Stuart Bertolino out of Billings, Montana; Booth Land and Livestock in Lucerne, Colorado; MRK in Lexington, Nebraska; and Louis Skarr & Sons in Lewisville, Idaho. Tr. 17:11-18; CE S p. 167 (Claimant Depo. 10:10-24).

2. Claimant was married on November 16, 2017 and moved to Kuna, Idaho to live with his wife. Tr. 17:21 – 18:2.

[2] The Commission also ruled that Claimant could take Cynthia Weekes' testimony at the hearing (over Mr. McFeeley's objection). However, Weekes was not able to use ZOOM videoconferencing and resorted to calling via telephone. This arrangement made it difficult to relay attorney's questions to Weekes and the attempt was eventually abandoned. The Commission determined that Weekes' testimony would be taken at a later date so she could participate via ZOOM videoconferencing. Upon motion, the testimony that Weekes gave at the hearing was stricken from the record.

[3] Mr. McFeeley objected to this post-hearing deposition and argued that the rules do not provide for a lay witness, such as Weekes, to be deposed post-hearing. However, based on the technical difficulties that arose during the hearing discussed *supra* and our ruling that Weekes' testimony was pertinent and relevant to the issues at hand, there was good cause to take her testimony post-hearing and the objection is overruled. In essence, the Commission continued the hearing to allow Weekes to testify utilizing video conferencing equipment and facilities pursuant to JRP 10(I).

3. **Relationship between Claimant and Meissen.** Throughout his career as a livestock hauler, Claimant never owned his own truck or trailer. Tr. 17:19-20. After moving to Kuna, Claimant planned to purchase a truck of his own from a friend in Nevada. Tr. 18:5-10. However, the truck was not properly licensed and not ready to haul livestock, so Claimant began to look for work elsewhere. Tr. 18:10-13.

4. In early January 2018, Claimant went to Agar's office and met with Paul Radloff and inquired if Agar was hiring drivers. Tr. 18:14 – 20:2. At the time, Radloff was doing dispatch work for Agar. Tr. 91:1-23. Radloff informed Claimant that there were no employment opportunities at Agar, but that Radloff knew of a truck driver named Greg Meissen who had recently had a shoulder operation and was looking for someone to drive his truck for him. Tr. 20:4-11; 94:19 – 95:2.

5. On January 16, 2018, Claimant met with both Greg and Barb Meissen and asked if he could drive Meissen's truck. Tr. 20:14-18; CE R pp. 92-93 (Barb Meissen Depo. 6:22 – 7:13). At the time, Meissen was incorporated, and ownership was divided 50/50 between Greg and Barb Meissen. CE R pp. 112-113 (Barb Meissen Depo. 26:15 – 27:18). Meissen directed Claimant to fill out a document entitled "Application for Employment" so Meissen could conduct a background check to determine if Claimant had a valid Commercial Driver's License. CE H; Tr. 21:1-5, CE R pp. 92-93 (Barb Meissen Depo. 6:22 – 7:4). In the box marked "Position", Claimant wrote "Truck driver." CE H; Tr. 21:6-18. Barb Meissen admitted that after Claimant turned in the application, she added the words " – contractor" next to "Truck driver". CE R pp. 95-96 (Barb Meissen Depo. 9:1 – 10:5); CE R pp. 141, 144.

6. Meissen also directed Claimant to complete a drug screening test, which he did. CE G; CE R p. 93 (Barb Meissen Depo. 7:16-21); Tr. 21:19 – 22:3.

7. Meissen told Claimant that Claimant could drive Meissen's truck and that there would be a load for him (dispatched via Agar) to pick up and deliver the next day, January 17, 2018. Tr. 22:7-20; 97:21 – 98:19; CE J. Claimant would be paid by Meissen at a rate of $0.45 per mile. Tr. 22:21-23; CE M; CE R p. 94 (Barb Meissen Depo. 8:3-9). Claimant testified that being paid by the mile, and at that rate, was typical compensation for drivers based on his experience hauling livestock. Tr. 22:24 – 23:3.

8. Meissen gave Claimant a $100 advance to use for meals and other expenses while he operated Meissen's truck, which would then be deducted from Claimant's wages. Tr. 23:11-17. Meissen also provided Claimant with a fuel card in order to purchase fuel while he operated Meissen's truck. Tr. 23:7-12. The fuel card had been provided to Meissen by Agar. CE R p. 97 (Barb Meissen Depo. 11:10-24).

9. Claimant did not have a choice in the route that he could take in transporting the livestock. Tr. 24:10-13; 33:23 – 34:3. Claimant did not have a choice to accept or reject a dispatched load. Tr. 34:4-6. Claimant's understanding was that he would transport livestock as directed by Meissen. Tr. 22:4-9.

10. There was no definite end date to this arrangement between Claimant and Meissen. Claimant understood that he would drive Meissen's truck until Claimant either purchased his own truck, or Meissen recovered from the shoulder operation. Tr. 24:14 – 25:2. Claimant understood that he could be terminated by Meissen at any point. Tr. 25:10-12.

11. Meissen and Claimant purportedly entered into an "Independent Contractor Agreement" on January 16, 2018. CE I; *see also* CE R pp. 150-155. The Agreement provided:

> In providing the Services under this Agreement it is expressly agreed that the Contractor [Claimant] is acting as an independent contractor and not as an employee. The Contractor [Claimant] and the Client [Meissen] acknowledge that

> this Agreement does not create a partnership or joint venture between them, and is exclusively a contract for service.

CE I p. 69; CE R p. 152. The Agreement also provided that at least one day's notice was required if either party wished to terminate the Agreement. CE I p. 68; CE R p. 151. The Agreement also provided that Claimant would be "responsible for paying [his] own taxes and health insurance." CE I p. 70; CE R p. 153. At her pre-hearing deposition, Barb Meissen asserted that Claimant signed the Independent Contractor Agreement on January 16, 2018. CE R p. 101 (Barb Meissen Depo. 15:7-12).

12. Claimant had no recollection of reviewing the Independent Contractor Agreement on January 16, 2018, during his meeting with Meissen and insisted he did not sign it. Tr. 36:13 – 37:9. Claimant testified that the signature on the Agreement (CE R p. 155) looked "awful close" to his own, but that it was not his signature. Tr. 40:8-11. On cross-examination, Claimant verified his signature on the form (CE G p. 65) that he completed for his drug screening test. Tr. 41:12 – 42:3. When asked how his signature on the drug test form differed from the signature on the Independent Contractor Agreement, Claimant responded "I don't know." Tr. 42:4-9. Upon inquiry of the Commission about whether Claimant signed the Independent Contractor Agreement, Claimant responded "I did not sign it. If I did [sic] was highly sedated, but I don't – I didn't sign nothing [sic]." Tr. 42:15-19.

13. On the morning of January 17, 2018, Claimant went to Meissen's residence and got Meissen's truck. Tr. 23:19-23. Claimant drove the truck, following Greg Meissen to a location in Caldwell in order to pick up a livestock trailer to attach to the truck. Tr. 23:24 – 24:1. Claimant then followed Greg Meissen to Ontario, Oregon, where Greg picked up Radloff, and the three then proceeded to a feedlot in Vale, Oregon. Tr. 24:1-9. Radloff testified that he did not go to the feedlot in Vale in his official capacity as a dispatcher for Agar, but went simply to "get out of the office"

and because he enjoyed watching the cattle be loaded. Tr. 96:1-19; CE T pp. 290-91 (Radloff Depo. 53:13 – 54:9).

14. Once they arrived at the Vale feedlot, Claimant loaded the cattle into the trailer. Tr. 25:15-19. Meissen directed Claimant to deliver the cattle to Kuna, and once he had unloaded, to proceed to a Snake River feedlot in American Falls to pick up another load of cattle the next day, January 18, 2018. Tr. 26:2-25. Meissen gave Claimant directions to the feedlot and Claimant followed an OWL truck to American Falls, stopping first in Kuna to unload the cattle as directed. Tr. 26:21 – 27:11. Claimant arrived in American Falls on the evening of January 17, 2018. Tr. 28:9-22.

15. **Industrial Accident.** On the morning of January 18, 2018, Claimant arrived at the Snake River feedlot at approximately 7:30 a.m. and waited his turn to load cattle. Tr. 28:24 – 29:2.

16. While attempting to load the cattle, Claimant was severely injured when a cow charged him, knocked him to the ground, and trampled him. Tr. 29:24 – 32:1.

17. At the time of the accident, Meissen did not carry worker's compensation insurance. Tr. 32:5 – 33:1.

18. For his two days of work, Claimant received a check from Meissen in the amount of $66.50. (370 miles at a rate of $0.45 per mile ($166.50), minus the $100 advance). CE M; CE R p. 94 (Barb Meissen Depo. 8:3-21); Tr. 27:12 – 28:5. No taxes were withheld from this paycheck. *See* CE M. Ultimately, this was the only payment that Claimant received from Meissen. Tr. 28:6-8.

19. Claimant filed an unemployment insurance claim. CE O p. 82. In response, Meissen filed and signed a Notice of Claim and Employer Separation Statement with the Idaho Department of Labor on February 8, 2018. CE O p. 83; CE R pp. 105-08 (Barb Meissen Depo. 19:25 – 22:17).

On the form, Meissen indicated that Claimant's first and last day of employment were January 16, 2018 and January 18, 2018 respectively; that Claimant's position was a temporary/seasonal position; and that Claimant was discharged. CE O p. 83.

20. **Subject Dispatch of Livestock.** Claimant suffered his injuries at a feedlot operated by Snake River in American Falls, Idaho. Tr. 110:13-18. The cattle involved in the incident were owned by a company called AB Genetics and were to be transported to a processing facility in Toppenish, Washington. Tr. 101:11-18; 111:18 – 112:1; CE K p. 75.

21. Snake River manufactures and distributes a total mix ration feed to cattle housed at the feedlot, whether the cattle are owned by Snake River, a customer, or some other entity. Tr. 111: 8-14. Snake River is not in the business of shipping cattle and does not own trucks or trailers to ship cattle. Tr. 113:21 – 114:11. AB Livestock is a member and owner of Snake River. Tr. 110:4-12; CE F. In other words, Snake River is a wholly owned subsidiary of AB Livestock. Tr. 109:20 – 110:3. On September 1, 2011, AB Livestock entered into a Transportation Services Agreement with OWL, pursuant to which OWL would be the exclusive carrier of AB Livestock's livestock, with limited exceptions. CE B. The agreement provided that OWL was permitted to subcontract with other carriers to transport AB Livestock's cattle. CE B p. 23.

22. As stated above, the cattle in question were owned by AB Genetics, an entity distinct from Snake River. Tr. 111:25 – 112:1. Further, there is no evidence in the record that AB Genetics is a wholly owned subsidiary of AB Livestock. At some time prior to January 18, 2018, an employee of AB Genetics contacted OWD to arrange for the transport of the cattle in question. Tr. 112:8-21. Matt Buyers, President of AB Livestock, testified as follows:

> Q. [by Mr. Sebastian] Okay. And do you know who owned the cattle that were being shipped on that date [January 18, 2018]?
>
> A. The cattle would be I think owned by AB Genetics, a different entity.

Q. Okay. And who -- who typically arranges for transport of the cattle? So, you have got cattle there at the – at Snake River and they need to be moved somewhere else, who typically would arrange for that?

A. So, can you – can you tell me what you mean by arrange I guess.

Q. Well, so -- so these cattle that I understand on the -- in January 2018 were ready to be – were ready for slaughter. We have heard that from another witness. And obvious – it seems – obviously they were being shipped somewhere to be slaughtered. Who would have arranged for that – for the transportation of the cattle from the Snake River facility to the slaughter yard?

A. Okay. So, I believe in that – I believe there that the – an employee of AB Genetics would determine which cattle are going to be shipped for slaughter and, then, they would contact the trucking company that the – that we were contracted with to be able to arrange the shipment.

Q. Okay. And does AB Livestock ever arrange for that type of transportation?

A. Not – not at that location, no.

Tr. 111:23 – 112:24. However, Buyers also testified that Snake River did not contract with any party to transport the cattle.

Q. [by Mr. Sebastian] Okay. All right. So, do you know if Snake River contracted with – that Snake River itself had contracted with any businesses to transport the cattle on January 18, 2018?

A. I don't believe so, no.

Q. Okay. And does Snake River -- do you know if Snake River paid anyone for transporting cattle on that occasion?

A. I think the way the payments work would be that Snake River does issue the payment and, then, bills back the customer who owns the cattle. I think they handle that initial transaction.

Tr. 115:15 - 116:1.

23. Although located in the same office, OWD and OWL are separate and distinct limited liability companies. Weekes Depo. 9:5-7; OWLE 4 and 5. OWD is in the business of brokering – or dispatching – loads of cattle for transport by livestock haulers including OWL,

while OWL's business is limited to the hauling of livestock. Weekes Depo. 8:13-21; 9:16-19. Typically, OWD dispatches all, or almost all, of its brokered loads to OWL for hauling. Weekes Depo. 12:13 – 13:6. However, in this particular instance, OWL had insufficient trucks to do the work, so OWD engaged another entity to dispatch some of the loads to another hauler. Weekes Depo. 13:20 – 14:17.

24. OWD passed on some of the dispatches to Agar in order for Agar to find someone to haul the cattle in question. Weekes Depo. 14:14-17; Tr. 80:15-21.[4] Deborah Agar, Agar's office manager, testified that Agar interacted with OWD (and not OWL) in arranging for transport of the cattle in question. Tr. 80-83.

25. Agar is a limited liability company formed in 2003. Tr. 58:13-15. Prior to forming Agar, Matt Agar owned his own trucks and hauled livestock under the name Roy M. Agar Livestock Transportation. Tr. 58:16 – 59:19. By January 2018, this livestock hauling business - Roy M. Agar Livestock Transportation - was no longer in operation. Tr. 59:20-23. Unlike Roy M. Agar Livestock Transportation, Agar operated as a livestock load brokerage service and not as a livestock hauling business. Tr. 59:24 – 60:24. Essentially, Agar would receive calls from clients needing loads to be transported; and Agar would also receive calls from owner-operators of trucks looking for loads to haul. Tr. 60:7-11. Agar would dispatch loads to the owner-operators. Tr. 60:7-11. Agar would then bill the company requesting the load and, once it received payment, deduct its brokerage fee and send the rest of the payment to the owner-operators. Tr. 60:11-14. Agar entered into contracts, or agreements, with owner-operators to whom it dispatched loads. Tr. 60:15-17. Agar itself did not own any trucks or employ any drivers. Tr. 60:18 – 61:15. However,

[4] Deborah Agar testified that it was common practice for both OWD and Agar to broker loads originating from the same order and that they would, in effect, share the job of finding carriers to haul livestock.

Agar did own approximately nine (9) trailers used to haul livestock. Tr. 61:20 – 62:8; 76:20 – 77:6. Agar leased these trailers to certain owner-operators. Tr. 62:3-12.

26. On July 17, 2014, Agar entered into a Brokerage Agreement with one such owner-operator, Meissen. CE D. Agar agreed to locate livestock for Meissen to haul, negotiate terms of the livestock hauls, notify Meissen of the hauls, and then provide billings to the shipper or receiver of the hauls. CE D pp. 53-54. In exchange for its services, Agar would retain a 6% to 8% brokerage fee for each haul performed by Meissen. *Id.* As discussed *infra*, Agar would only receive its brokerage fee if the cattle were successfully transported. Agar and Meissen also entered into a Trailer Lease Agreement on July 17, 2014, whereby Agar leased a livestock trailer to Meissen in exchange for 10% of the gross revenue for each haul. CE E; Tr. 64:25 – 65:15.

27. Although the agreement provided that Meissen would be responsible for out-of-pocket expenses such as fuel, Agar provided Meissen a card in order to purchase fuel. CE D p. 55; Tr. 77:21 – 78:1. When asked why Agar provided fuel cards to owner-operators, Deborah Agar responded as follows:

> A. We did have some fuel cards and they were available to people who – like truck owner-operators who leased a trailer from Agar Livestock. None of the other brokerage people were – were offered that. The main reason for doing that was that we had had difficulties with owner-operators that were pulling our trailers, calling in the middle of the night, not having enough money to buy fuel, they had a load of someone's livestock, and it just became much more manageable for us to make that available to them. Each of the cards was assigned to the truck owner-operator. They had specific fuel limitations and other limitations of what could and could not be purchased. Also they had pin numbers assigned to the owner-operator that received the fuel card and no one ever notified me that Greg Meissen had given anyone else access to the fuel card that was assigned to him. So, that's something that I found a little bit disturbing today, but anyway – and, then, the – the – whatever fuel had been charged to the card during the week was deducted from the check that went out to the owner-operator that leased the truck that it was assigned to that week, so –
>
> Q. [by Ms. Dina] So, you were essentially providing an advance on the fee that would be paid to the owner-operator under the brokerage agreement?

A. Basically so, yes. To be sure that they never were without fuel, because they were hauling a live commodity and that's crucial that you don't just park somewhere overnight because you don't have fuel money, so it was – it became necessary. There just was a lot of mismanagement among some of the owner-operators and Greg Meissen had a fuel card of Agar Livestock, but had not been using it. He only used it once in a while, so –

Tr. 77:24 – 79:7.

28. Agar required the owner-operators to provide proof of worker's compensation coverage. Deborah Agar's testimony on this issue was as follows:

Q. [by Commissioner Limbaugh] I have a question regarding the brokerage agreements that you had with the carriers and I'm wondering if you require the carriers to provide any proof of insurance coverage, specifically workers compensations coverage or liability coverage?

A. Absolutely. Yes. Yes, sir. We have – we always required specific limits that were minimums for all liability insurance and cargo insurance. We did request that they all provide workmen's comp [sic] proof of insurance, but found it difficult to enforce, because we have different rules in every state of our country and some states do not even have an actual workmen's comp [sic] program. So, it was one of those things that we requested it from everyone, yes, but didn't have always [sic] complete compliance.

Tr. 88:8-22.

29. As explained above, OWD notified Agar of the load to be hauled from Snake River's feedlot in American Falls. Agar, in turn, dispatched four trucks owned by owner-operators to the feedlot on January 18, 2018, including the Meissen truck (with the trailer that Meissen leased from Agar) driven by Claimant. Tr. 100:14-20; Ex. K p. 75.

30. Agar then billed OWD for the three completed loads on the date of the incident (the fourth load, Meissen's, was not completed due to Claimant's injuries, and thus Agar did not bill OWD for that load). OWLE 2; Tr. 81:7 – 83:5.

31. On January 23, 2018, Snake River issued payment to OWD for the carrier services on the date of the incident in the amount of $24,401.38. OWLE 1. Matthew Buyers, President of

AB Livestock, testified that typically, Snake River would issue the initial payment for the hauling of cattle and then bill the customer who owned the cattle, in this case, AB Genetics. Tr. 115:20 – 116:1. OWD subtracted its dispatch fees of approximately $25 per load from the monies it received from Snake River and then issued payment to Agar for the three completed loads that Agar dispatched on the date of the incident in the amount of $6312.92. OWLE 1 and 3; CE U p. 320.[5] Upon receipt of payment from OWD, Agar disbursed payment to the owner-operators that delivered their loads, minus Agar's agreed upon brokerage fees and/or fees for leasing its trailer. Tr. 82:7 – 83:5. Had Claimant delivered his load, Meissen would have been paid as outlined above, with Agar ultimately responsible for distributing payment - after retaining its own brokerage fees - to Meissen as an owner-operator. *See* Weekes Depo. 20:11 – 21:5.

32. **Summary of Transaction.** In summary, the transactional chain that led to Claimant's injuries is as follows: AB Genetics requested that OWD arrange for the transport of AB Genetics' cattle from Snake River's feedlot to Toppenish, Washington; OWD then passed on some of the loads to Agar for dispatch; Agar, in turn, arranged for Meissen to haul one of the loads; and finally Claimant, who operated Meissen's truck, arrived at the Snake River feedlot in order to load and haul the cattle.

33. The chain of the payments related to this incident is as follows: on behalf of AB Genetics, Snake River issued payment to OWD for the hauling of AB Genetics' cattle; OWD subtracted its dispatch fee of approximately $25 per load and then issued payment to Agar; Agar subtracted its dispatch/leasing fees and then issued the remainder of the payment to the respective owner-operators. Had Claimant completed his haul, a payment for said haul would have been

[5] OWD's check to Agar in the amount of $19,522.00 included other loads not relevant here.

included and Agar would have ultimately issued payment to Meissen, after retaining its brokerage and leasing fees.

34. **Credibility.** The Commission finds that Claimant, Matt Agar, Deborah Agar, Paul Radloff, and Matthew Buyers all testified credibly.

35. Cynthia Weekes' testimony is somewhat problematic. On November 19, 2019, Weekes submitted an affidavit in support of OWL's Motion to Dismiss. CE U. The affidavit explained the transaction outlined above quite differently. In her affidavit, Weekes asserted that Snake River contacted OWL to request transport of the cattle. CE U p. 318. Weekes averred that OWL, not having enough trucks to haul all of the cattle, then asked OWD to dispatch the request to Agar to haul the remaining cattle. CE U p. 318. At her deposition, Weekes asserted that the description contained in her affidavit was incorrect. Instead, she testified that Snake River[6] asked OWD, not OWL, to dispatch the desired loads. Weekes Depo. 8:13 – 11:1. OWD then engaged OWL to haul the loads, and that when OWL did not have sufficient trucks, OWD, on its own accord, passed the requested loads to Agar to dispatch accordingly. Weekes Depo. 11:23 – 15:15. Due to the inconsistency between her testimony and her sworn affidavit, we do not find Weekes' description of the chain of events between the various entities involved in this case to be entirely reliable. We find the more reliable evidence to be the exhibits entered into the record (namely, the payments issued) and the testimony of Buyers, Deborah Agar, and Radloff, which established that AB Genetics ordered – and Snake River subsequently issued payment to – OWD, not OWL, to find a carrier to haul the cattle in question. OWLE 1-3; Tr. 80:15 – 84:7; 87:1-18; 115:20 – 116:1. To the extent Weekes' testimony is to the contrary, it is not accepted.

[6] Despite Weekes' testimony that Snake River ordered OWD to dispatch the load, the more reliable evidence presented at hearing established that it was not Snake River, but the owner of the cattle in question, AB Genetics, that requested OWD to dispatch their cattle.

## DISCUSSION AND FURTHER FINDINGS

36. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). 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). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447−48, 74 P.2d 171, 175 (1937).

37. **Employment relationship.** Coverage under the workers' compensation law generally depends upon the existence of an employer-employee relationship. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

38. The threshold issue in this case is whether Claimant, at the time of his accident, was an employee of Meissen, as opposed to an independent contractor. "Before one can receive compensation for injuries sustained and claimed to have occurred during the course of his employment, it is axiomatic that the relationship of employer and employee must be shown to exist." *Seward v. State Brand Division*, 75 Idaho 467, 470-71, 274 P.2d 993, 994 (1954).

39. Claimant asserts that he was an employee of Meissen at the time of the accident. Defendants counter that the evidence demonstrates that Claimant was working as an independent contractor for Meissen. Whether Claimant was an employee of Meissen at the time of the accident

is a factual issue. *See Livingston v. Ireland Bank*, 128 Idaho 66, 68, 910 P.2d 738, 740 (1995). Claimant has the initial burden of proving this relationship.

40. Under the Worker's Compensation Act, "employee" is defined as "any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer. …" Idaho Code § 72-102(11). An "independent contractor" is defined as "any person who renders service for a specified recompense for a specified result, under the right to control or actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished. …" Idaho Code § 72-102(16). When there is doubt as to whether an individual is an employee or an independent contractor under the Act, the Act "must be given a liberal construction in favor of finding the relationship of employer and employee." *Burdick v. Thornton*, 109 Idaho 869, 871, 712 P.2d 570, 572 (1985).

41. Control is the hallmark of a direct employment relationship. The test for determining whether a worker is an employee is "whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results." *Livingston*, 128 Idaho at 69, 910 P.2d at 741 (citing *Ledesma v. Bergeson*, 99 Idaho 555, 558, 585 P.2d 965, 968 (1978)). The Idaho Supreme Court has articulated a four-factor balancing test to determine whether the "right to control" exists: "(1) direct evidence of the right to control the employee; (2) the method of payment, including whether the employer withholds taxes; (3) whether the employer or worker furnishes 'major items of equipment,' and (4) whether there is a right to terminate the employment at will and without liability." *State ex rel Industrial Commission v. Sky Down Skydiving, LLC*, 166 Idaho 564, 571, 462 P.3d 92, 99 (2020); *see also Livingston*, 128 Idaho at 69, 910 P.2d at 741; *Burdick*, 109 Idaho at 871, 712 P.2d at 572 (1985); *Roman v. Horsley*, 120 Idaho 136, 137, 814

P.2d 36, 37 (1991).

42. While each of these four elements must be considered, no one of them in and of itself is controlling and one or more of the four may not be present in a given case. *Roman*, 120 Idaho at 137, 814 P.2d at 37. The Court has directed that the Commission must balance each of the elements present to determine the relative weight and importance of each. *Id.* at 138, 38.

43. *Direct evidence of the right to control*. Direct evidence of the right to control the manner and method of performing the work, the right to require compliance with instructions, to establish set hours of work, to require the worker to devote substantially full time to the business are all indicative of an employment relationship.

44. Claimant presented substantial evidence that Meissen had the right to control the manner and method of his work. Claimant was required to fill out an employment application and pass a drug screening before he could drive Meissen's truck. According to Barb Meissen, this was done to conduct a background check and ensure that Claimant had a valid commercial driver's license. CE R pp. 96-97 (Barb Meissen Depo. 10:22 – 11:1). When asked why Meissen needed to know if Claimant had a valid commercial driver's license, Barb Meissen responded "[b]ecause if he didn't, and he was pulled over by the DOT [sic], you get shut down for not having a proper driver's license." CE R p. 97 (Barb Meissen Depo. 11:3-5). Furthermore, Claimant was directed by Meissen to go to certain feedlots in order to load the cattle and was subsequently instructed where to drop the cattle off, and where to go to pick up another load. Greg Meissen was present and supervised Claimant for at least one of these assignments; the feedlot in Vale, Oregon. Claimant followed Greg Meissen to pick up the trailer and to the feedlot in Vale. The evidence demonstrates that Claimant did not have a choice in the routes he could take in order to pick up/drop off the cattle. Although Barb Meissen testified that Claimant did have a choice as to which

route he could take, other parts of her testimony indicate otherwise. Her testimony on this issue at her deposition was as follows:

> Q. [by Mr. Wager] Do you know how the route was determined that [Claimant] drove?
>
> A. It was a load that Paul [Radloff] dispatched, so it's the shortest route from point A to point B.
>
> Q. Is that route dictated or is there some flexibility with the driver?
>
> A. It's pretty much dictated, because you can only travel certain roads based on weight and length of the vehicle.
>
> Q. When a route is dispatched, does it come with instructions on where to go or does it just give you point A and point B?
>
> A. It depends.
>
> Q. Do you know, in this circumstance, if a specific route was dictated?
>
> A. I do not.

CE R pp. 97-98 (Barb Meissen Depo. 11:25 – 12:15). In light of Barb Meissen's testimony that drivers did not have much flexibility in their routes while hauling cattle and would generally be expected to take the shortest route between two points, and her lack of knowledge as to whether Claimant's route was dictated in this specific instance, we accept Claimant's testimony that he did not have any choice as to what route he could take to get to the feedlots in Vale, Kuna, and American Falls respectively. Also, it is undisputed that Claimant would be paid per mile. This lends credence to the conclusion that Meissen controlled the routes that Claimant could take to get the job done, lest Claimant drive longer routes to inflate his pay. Likewise, we accept Claimant's testimony that he did not have the right to refuse a dispatched load that Meissen had assigned to him. This factor points in the direction that Claimant was an employee of Meissen.

45. *Method of payment*. Payment by the hour, week, day, month or other regular

periodic interval generally suggests an employment relationship. Withholding income and social security taxes from a worker's wages is also indicative of direct employment. It is undisputed that Claimant was not paid at a regular periodic interval but was paid at a rate of $0.45 per mile driven. However, Claimant testified that being paid in this manner – per mile driven – was typical for drivers in this industry. In *Roman*, the Court upheld the Commission's finding that payment made on a production basis, if common in the trade, was a neutral factor. *Roman*, 120 Idaho at 138, 814 P.2d at 38 (a claimant hired to shake roof of a house was paid per square completed). As discussed above, although Claimant was paid per mile, Meissen controlled the routes that Claimant could take in transporting cattle, and thus controlled how much Claimant would be paid. Furthermore, the evidence indicates that pay per mile was typical for drivers in the livestock hauling business. Therefore, we conclude this factor to be neutral. The failure to make provisions for withholding taxes, as was the case here, may point toward independent contractor status, however, for the reasons discussed *infra*, we give little weight to this factor. *See id.*; *see also Burdick*, 109 Idaho at 872-73, 712 P.2d at 573-74.

46. *Furnishing major items of equipment*. A master who furnishes the equipment for the worker to use is typical of an employment relationship, while a worker who provides their own equipment to perform a job is indicative of an independent contractor. In the instant case, Claimant operated Meissen's truck and a livestock-hauling trailer that Meissen leased from Agar. The truck and trailer are obviously important, if not the most important, equipment needed to haul livestock. Furthermore, Meissen also provided Claimant with a fuel card in order to purchase fuel while transporting the livestock. Essentially, Claimant did not provide any of his own major equipment or tools but relied solely on what Meissen furnished. This factor weighs heavily towards the existence of an employer/employee relationship.

47. *Right to terminate the employment relationship at will and without liability*. The ability to terminate the relationship at will and without incurring liability is indicative of an employer/employee relationship. Claimant testified that there was no defined end-date for his work for Meissen and that it was his understanding that Meissen could have terminated his employment at any point. In contrast, the "Independent Contractor Agreement" contains a clause that a party must provide at least one-days' notice in order to terminate the relationship. This could indicate that the relationship between Claimant and Meissen was not at will; however, we find that one day's notice is so short a period as to essentially constitute an at will relationship and, for reasons discussed below, we give the Independent Contractor Agreement little, if any, weight. Thus, we find that this factor, too, suggests the existence of an employer/employee relationship.

48. The Defendants primarily rely on the "Independent Contractor Agreement" that Claimant and Meissen purportedly entered into on January 16, 2018 to argue that Claimant should be considered an independent contractor rather than an employee. From the record, it is unclear whether Claimant signed the agreement, but Claimant did acknowledge the possibility that he may have signed it while sedated. Regardless, the existence of the Agreement by itself does not determine whether Claimant was an employee or not but is merely one factor to be considered and given appropriate weight. Moreover, Idaho Code § 72-318 specifies that no "contract…designed to relieve an employer…from any liability created by this law, shall be valid." In *Burdick*, the Court determined that the evidence demonstrated that the claimant was an employee, despite the existence of an agreement wherein the claimant agreed that there would be no deductions from her salary for taxes and insurance. *Burdick*, 109 Idaho 869, 712 P.2d 570. The Court agreed with the Commission that "any agreement between the parties is not necessarily determinative of the nature of the relationship between them." *Id.* at 872, 573. The Court held that "[w]here other factors

indicate the existence of a right to control, the Court will refuse to be bound by such an agreement." *Id.* at 872-73, 573-74 (citing *Beutler v. MacGregor Triangle Co.*, 85 Idaho 415, 380 P.2d 1 (1963)). As discussed above, there are a variety of other factors present in the instant case that demonstrate that Meissen had the right to control the time, manner and method of executing Claimant's work. Even if the Commission sets aside its doubts concerning how the agreement came to be signed, these factors outweigh the existence of an agreement that purports to create an independent contractor relationship between Claimant and Meissen.

49. Having weighed all the factors and evidence in this case, we conclude that Meissen assumed control over Claimant's time, manner, and methods of working consistent with an employer-employee relationship.

50. Claimant has met his burden of demonstrating that he was an employee of Meissen, as opposed to an independent contractor, at the time of the January 18, 2018 accident.

51. **Casual employment.** Defendant Snake River also argues, in the alternative, that Claimant's employment should be considered casual, and thus exempt from coverage under Idaho Code § 72-212(2). Snake River Response Brief pp. 12-13. Snake River argues that because Claimant and Meissen anticipated Claimant's employment to be of relatively brief duration – either until Meissen recovered from his surgery, or Claimant purchased his own truck – Claimant's employment is considered casual. Defendant's argument is misplaced. The Idaho Supreme Court has indicated that casual employment includes "only that employment which arises occasionally or incidentally or which comes at uncertain times or at irregular intervals" or "employment whose happening cannot be reasonably anticipated as certain or likely to occur or to become necessary or desirable and which *is not a usual concomitant of the business, trade or profession of the employer*." *Stringer v. Robinson*, 155 Idaho 554, 557, 314 P.3d 609, 612 (emphasis in original);

*see also Stoica v. Pocol*, 136 Idaho 661, 665, 39 P.3d 601, 605 (2001) (holding that the term casual "applies to the employment and not to the employee…"). In the instant case, although Claimant anticipated that his employment would be temporary, the evidence demonstrates that Claimant was to regularly drive and haul loads for Meissen, a usual concomitant of Meissen's business, in fact, the very purpose of Meissen's business. In the brief two days that Claimant worked for Meissen, Claimant completed one haul and began another. The work was consistent and at regular intervals. But for Claimant's injuries, Claimant would have continued to drive for Meissen. In essence, Claimant did the work that Meissen would have otherwise done but for Meissen's recovery from surgery. Under these facts and circumstances, and based on the Court's guidance in *Stringer*, Claimant's employment cannot be characterized as casual.

52. **Statutory employer analysis.** Having determined that Claimant was an employee of Meissen at the time of the accident and had no direct contractual relationship with the other named parties, it is next necessary to consider whether those parties – Agar, OWL, and Snake River – or any of them, are Claimant's statutory employer and therefore potentially liable for the payment of worker's compensation benefits to Claimant.

53. Idaho Code § 72-216(1) provides:

> Liability of employer to employees of contractors 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[, Idaho Code,] in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

Idaho Code § 72-216(1). Meissen did not carry worker's compensation insurance at the time of the accident and thus, was not in compliance with Idaho Code § 72-301. Accordingly, under Idaho Code § 72-216(1), Agar, OWL, and/or Snake River could potentially be liable for compensation to an employee (Claimant) of a contractor or subcontractor (Meissen) under them.

54. The Worker's Compensation Act defines "Employer" as follows:

> "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes 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 there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. …

Idaho Code § 72-102(12)(a).

55. The statutory definition of "employer" is an expended definition "designed to prevent an employer from avoiding liability under the Worker's Compensation Act by subcontracting the work to others who may be irresponsible and not insure their employees." *Harpole v. State*, 131 Idaho 437, 440, 958 P.2d 594, 597 (1998) (quoting *Runcorn v. Shearer Lumber Prod., Inc.*, 107 Idaho 389, 392-93, 690 P.2d 324, 327-28 (1984)).

56. The Idaho Supreme Court has articulated two categories of statutory employers. A category one statutory employer is any entity that expressly or impliedly hires the services of another. A category one statutory employer includes contractors and subcontractors. A category two statutory employer is the owner or lessee of the premises and the virtual proprietor or operator of the business there carried on, but who, for one reason or another, is not the direct employer of the injured worker. *See e.g., Stringer v. Robinson*, 155 Idaho 554, 556 n.1, 314 P.3d 609, 611 n.1.

57. In his closing brief, Claimant concedes that none of the named parties are category two statutory employers.[7] Claimant's Closing Brief, pp. 5-9. Rather, Claimant contends that Agar,

[7] The Commission agrees with Claimant that neither Agar, OWL, nor Snake River are category two statutory employers. Agar and OWL were not owners or lessees of the premises where Claimant was injured. Although Snake River was the owner of the premises where Claimant was injured, the evidence established that Snake River was <u>not</u> the virtual proprietorship or operator of the business there carried on. The work being done in the instant case was hauling livestock. Nothing in the record indicates that Snake River was engaged in the business of hauling livestock for pecuniary gain, rather, the evidence demonstrated that Snake River was in the business of manufacturing feed and feeding cattle. *See Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 249-50, 108 P.3d 392, 396-97 (2005) (the Court held that the owner of the premises where the claimant was injured (Montierth Farms, LLP) was not engaged in the business of hauling wastewater for pecuniary gain and thus, was not the claimant's category two statutory employer).

OWL, and Snake River – qualify as category one statutory employers. *Id.* We will first discuss whether Agar, the entity directly above Meissen in the contractual chain, qualifies as a category one statutory employer.

58. *Agar as statutory employer*. Agar argues that it cannot be considered a category one statutory employer because it did not contract or subcontract any work to Meissen. Defendant Agar's Response Brief pp. 10-16. Agar argues that it is a transportation broker, that it owned no trucks and employed no drivers, and had no control over the carrying or delivering of the loads it brokered. *Id.* In essence, Agar asserts that it acted merely as a matchmaker – matching up a trucking company (Meissen) with a company that required livestock transportation services (AB Genetics).

59. The Idaho Supreme Court has applied the statutory employer analysis in the context of tort claims brought by claimants. In *Kolar v. Cassia County Idaho*, 142 Idaho 346, 127 P.3d 962 (2005), the claimant was a direct employee of JUB Engineers, Inc. ("JUB"). JUB, in turn, contracted with the Burley Highway District to provide engineering services to a project near Albion, Idaho. *Id.* at 349, 965. The claimant suffered injuries when he was hit by a dump truck driven by a Burley Highway District employee. *Id.* Claimant received worker's compensation benefits from JUB and then brought a third-party action against the Burley Highway District. The Highway District defended the suit, arguing that it was immune from third party suit because it was the claimant's statutory employer. The Court ruled that the Burley Highway District did qualify as a category one statutory employer. The Court noted that "employer" included any person who has expressly or impliedly hired or contracted the services of another, which includes contractors, subcontractors, and independent contractors who employed the injured worker. *Id.* at 352, 968. Although the Highway District was not the direct employer of the claimant, the Highway

District had a contractual relationship with an entity under it (JUB) who was the injured worker's direct employer. *See id.* at 353, 969.

60. In *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 108 P.3d 392 (2005), the deceased worker was an employee of 3-C Trucking. Sorrento, a company engaged in the making of cheese, contracted with 3-C Trucking to haul wastewater from Sorrento's cheese-making facility to a storage site on property owned by a third party. *Id.* at 247, 394. The worker, while on this property waiting to dump the load, was run over, and killed. *Id.* at 248, 395. The deceased worker's survivors brought a wrongful death suit against Sorrento. *Id.* Sorrento argued that it was the deceased worker's statutory employer and thus, was immune from a third-party suit. *Id.* The Court agreed and ruled as follows:

> Sorrento qualifies as a statutory employer of [deceased] 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 [deceased] under the Idaho worker's compensation statutes should 3-C Trucking have failed to comply with the worker's compensation statutes. As it happens here, 3-C provided worker's compensation coverage to [deceased] and benefits to the [survivors], obviating the need for Sorrento's worker's compensation liability to come into play in this particular case. The district court correctly determined that Sorrento was the statutory employer of the direct employees of a contractor hired to perform wastewater removal from 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.

*Id.* at 251, 398 (internal citations omitted). Again, although Sorrento was not the direct employer of the deceased worker, Sorrento had a contractual relationship with an entity under it (3-C Trucking) who was the deceased worker's direct employer.

61. Under *Kolar* and *Venters*, the Court has broadly applied the category one statutory employer analysis when there is a contractual relationship or chain that links an entity to the direct employer of the injured worker.

62. Idaho courts have not addressed the liability of a transportation broker as a statutory

employer. However, other jurisdictions have, with varying results. These cases merit some discussion.

63. In *Transplace Stuttgart, Inc. v. Carter*, 255 S.W.3d 878 (Ark. Ct. App. 2007) the Arkansas Court of Appeals determined that a transportation broker was not the trucking carrier's prime contractor, and thus, not a statutory employer of a worker's compensation claimant. Transplace Stuttgart, Inc. ("Transplace") was licensed by the United States Department of Transportation as a transportation broker and would locate carriers to transport loads for shippers in a process referred to as "brokering a load." *Id.* at 879. When a shipper needed a load to transport, it would contact Transplace, who would, in turn, find a carrier to transport the load. *Id.* When the load was delivered, the shipper would pay Transplace, who would then take its brokerage fee, remitting the remainder to the carrier. *Id*. Transplace had an agreement with a carrier, C-Claw, wherein Transplace agreed to broker loads to C-Claw, and in exchange, C-Claw agreed to pay an 8% brokerage fee to Transplace. *Id.* A shipper, Cereal ByProducts, contacted Transplace to broker a load. Transplace then contacted C-Claw to transport the load. An employee of C-Claw subsequently sustained a compensable injury while transporting the load. *Id.* at 880. The employee, after discovering that C-Claw did not carry worker's compensation insurance, filed a claim against Transplace alleging that Transplace was his statutory employer. *Id.*

64. The Arkansas Court of Appeals ruled that Transplace was not the injured worker's statutory employer. Arkansas law provided that "where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage." *Transplace*, 255 S.W.3d at 880. Arkansas courts had defined "subcontractor" as "[o]ne who enters into a contract with a person for the performance of work

which such person has already contracted to perform. In other words, subcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor." *Id.* at 880-81 (citing *Garcia v. A&M Roofing*, 202 S.W.3d 532, 536 (Ark. Ct. App. 2005)). The Arkansas Court of Appeals then concluded:

> In this case, Transplace functioned as a broker in the quintessential sense. It helped Cereal ByProducts identify and arrange a carrier (C-Claw) that would transport Cereal ByProduct's goods from Stuttgart to Dumas. It was C-Claw, not Transplace, that had an obligation to Cereal ByProducts. Transplace's only role in this case was to match up Cereal ByProducts and C-Claw, for a fee.
>
> Because Transplace was not obligated to transport any loads for Cereal ByProducts, Transplace had no work to "farm out" to C-Claw. For these reasons, the subcontracting test … is not satisfied by the facts of this case. Consequently, Transplace was not C-Claw's prime contractor and was not [the injured worker's] statutory employer pursuant to the Arkansas Workers' Compensation Act.

*Transplace*, 255 S.W.3d at 881.

65. In contrast, the North Carolina Court of Appeals ruled that a transportation broker was a "principal contractor" and thus was liable for workers' compensation benefits in *Atiapo v. Goree Logistics, Inc.*, 770 S.E.2d 684 (N.C. Ct. App. 2015). In that case, Owen Thomas, Inc. ("Owen Thomas"), a licensed transportation broker, entered into a "Broker-Carrier Agreement" with a carrier, Goree Logistics, Inc. ("Goree"). *Id.* at 685. Owen Thomas was acting on behalf of its client, Sunny Ridge Farms ("Sunny Ridge"), to procure transportation for Sunny Ridge's goods. *Id.* An employee of Goree subsequently sustained injuries while transporting a load. *Id.* at 686. Goree did not have workers compensation coverage, and Owen Thomas was added as a party defendant to the worker's compensation claim. *Id.* North Carolina law provided that:

> Any principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in G.S. 97-93 for himself personally and

> for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

*Atiapo*, 770 S.E.2d at 687. The North Carolina Court of Appeals agreed with the North Carolina Industrial Commission's conclusion that Owen Thomas's licensure as a "broker" was a distinction without a difference, and that Owen Thomas was a "principal contractor" and thus liable to the injured worker. *Id.* The North Carolina Court of Appeals ruled as follows:

> Owen Thomas contracted with Sunny Ridge to ship its goods. Owen Thomas was to be paid by Sunny Ridge for this service and would retain any monies not paid to the trucking company it hired. It had discretion in selecting a carrier. Owen Thomas provided 1099 tax forms to Goree. Owen Thomas controlled not only the outcome of the task, namely the delivery of goods, but the method by which the task would be performed, including how frequently Goree would report to Owen Thomas, and specifications on the temperature that would be maintained during transport. Sunny Ridge paid Owen Thomas "for insuring a delivery[.]"
>
> Sunny Ridge paid Owen Thomas to deliver its goods. Owen Thomas then hired Goree to perform the delivery. Owen Thomas provided Goree with 1099 tax forms for the money paid by Owen Thomas.
>
> We hold that this evidence supports the Industrial Commission's determination that Owen Thomas acted as a contractor hired by Sunny Ridge for the purpose of ensuring delivery of Sunny Ridge's goods. This in turn supports a finding that Owen Thomas employed Goree, a subcontractor without workers' compensation coverage, and is therefore liable to plaintiff … .

*Atiapo*, 770 S.E.2d at 687 (brackets in original).

66. Agar argues that the Commission should adopt the reasoning of the Arkansas Court of Appeals in *Transplace* and conclude that it is not Claimant's category one statutory employer. Agar argues that its role in this matter is similar to Transplace's, in that it was the "quintessential" broker, and because it did not own trucks or employ drivers, it did not subcontract with Meissen, or "farm out" to Meissen the job of hauling livestock. Instead, it was merely a "matchmaker," facilitating the handshake between the owner of the livestock and the hauler. Per the reasoning of

*Transplace*, it was Meissen which had an obligation to AB Genetics to haul cattle; Agar simply got the two parties together, and having gotten them together, had satisfied its obligation to OWD/AB Genetics.

67. And yet, as in *Transplace*, Agar would not be paid until after the cattle had been successfully delivered to their destination. The *Transplace* court was not impressed by this fact, but the Commission deems it significant, as did the *Atiapo* court. It is difficult to argue that successful delivery of the cattle was not the major part of the service which Agar agreed to provide, albeit by contracting with Meissen. If the only expectation of Agar was that it introduce AB Genetics to Meissen, then why was payment made only upon the successful transportation of the cattle?

68. Meissen and Agar entered into two contractual agreements. The first agreement was the Brokerage Agreement, in which Agar agreed to locate livestock hauls for Meissen to transport, negotiate terms of livestock hauls, notify Meissen of the hauls, and then provide billings to the shipper or receiver of the hauls. In exchange for its services, Agar would retain a 6% to 8% brokerage fee for each haul performed by Meissen. Second, Agar and Meissen also entered into a Trailer Lease Agreement, whereby Agar leased a livestock trailer to Meissen in exchange for 10% of the gross revenue for each haul. Agar was more than a mere "matchmaker" between a shipper seeking to have cattle hauled and a carrier seeking to haul cattle. Rather, Agar had a substantial financial interest in ensuring that the loads it brokered were successfully delivered. If Claimant had not been injured and had the cattle been delivered to Toppenish, Washington, Agar would have been paid both a 6-8% brokerage fee (through the Brokerage Agreement with Meissen) and 10% of the gross revenue for the haul (by virtue of the Trailer Lease Agreement with Meissen). In order to ensure that the loads were successfully hauled to their destination, Agar provided fuel

cards to those owner-operators that it entered into Trailer Lease Agreements with, including Meissen. Tr. 77:21 – 79:7. Thus, like Owen Thomas in *Atiapo*, Agar exercised at least some measure of control over the hauling of the livestock to ensure their delivery. Agar served a role beyond the mere "matching up" of a shipper with a carrier; instead, Agar took steps to ensure that the load was successfully transported. Indeed, a successful delivery was the only way Agar would be paid for its services in brokering the load. Furthermore, it is apparent that Agar had some awareness of its potential liability in conducting its business because it required that owner-operators provide proof of worker's compensation insurance. Tr. 88:8-22. Like the Burley Highway District in *Koler*, and Sorrento in *Venters*, Agar had a contractual relationship with an entity under it (Meissen) who was the injured worker's direct employer.

69. In its brief, Defendant Snake River argues that the ruling in *Kelly v. TRC Fabrication, LLC*, 168 Idaho 788, 487 P.3d 723 (2021), suggests that neither Agar, OWL, nor Snake River can be considered category one statutory employers. Defendant Snake River's Response Brief, pp. 14-15. In *Kelly*, a case of first impression, the Idaho Supreme Court adopted the general rule that "[d]elivery services ancillary to a contract for the sale of goods do not in and of themselves create a category one statutory employer contractual relationship, except when the contract to sell is accompanied by an undertaking to render substantial services in connection with the goods sold, or where the transaction is a mere device or subterfuge to avoid liability under the Idaho worker's compensation laws." *Kelly*, 487 P.3d at 729 (2021). In *Kelly*, TRC Fabrication, LLC ("TRC") purchased 43,000 pounds of metal tubing from Brown Strauss. *Id.* at 725. Under the terms of the sales contract, Brown Strauss assumed the responsibility to arrange delivery of the tubing to TRC. *Id.* Brown Strauss arranged transportation through Jay Transport, who, in turn, contracted with Kelly to haul the tubing from California to Idaho. *Id.* Kelly was subsequently

injured while delivering the goods. *Id.* Kelly brought a tort claim against TRC, and TRC argued that it was Kelly's statutory employer, and thus, immune from the suit. *Id.* The Court disagreed and held that the delivery of the tubing was merely ancillary to the contract at issue, the sale of the tubing (i.e. the sale of goods). *Id.* at 728-29. Thus, TRC was not Kelly's category one statutory employer. *Id.*

70. Snake River's reliance on *Kelly* is misplaced. *Kelly* is distinguishable from the instant case. In *Kelly*, the contract was only incidentally one involving the provision of a service. Here, the contract between Agar and Meissen is one primarily involving the provision of a service. *Kelly* makes it clear that a contract for services is within the scope of the "statutory employer" definition. *Id.* at 728 (citing *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000)). The relevant provisions of Idaho Code § 72-102(12)(a) are worth repeating: "'Employer' means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors." Simply put, the general rule articulated in *Kelly*, that delivery services ancillary to a contract for the sale of goods does not in and of itself create a category one statutory employer contractual relationship, is inapplicable to this case. *Kelly* actually supports the conclusion that vis-à-vis Meissen, Agar is best described as a category one statutory employer, i.e., one who has contracted the services of another.

71. For the foregoing reasons, Claimant has met its burden to prove that Agar is Claimant's category one statutory employer.

72. Our analysis does not end here. As explained in the procedural background section, Agar appears to have had a worker's compensation policy at the time of the accident, and its surety, Travelers, was a party to this case at one point. However, for reasons not entirely clear to the Commission, possibly because coverage under an Oregon policy did not extend to accidents

occurring in Idaho, Claimant stipulated to Travelers' dismissal as a party, without objection from any other party. Thus, without evidence of a policy of insurance providing coverage under Idaho law, Agar is not in compliance with the provisions of Idaho Code § 72-301. Agar is an uninsured employer. Therefore, we must proceed up the contractual chain to ascertain whether Claimant has any other statutory employers.

73. *OWL as statutory employer.* Claimant argues that OWL is Claimant's category one statutory employer. Claimant argues that this contractual relationship is established because OWL entered into an agreement with AB Livestock to be the exclusive carrier of AB Livestock's cattle; and that it was therefore OWL that had a contractual obligation to transport cattle from Snake River's feedlot on the day in question. Claimant's Closing Brief, p. 7. When it turned out that OWL had insufficient trucks to haul the livestock, it awarded a portion of that contract to OWD, who engaged Agar, and then finally, Meissen, who was the direct employer of Claimant. *Id.* at 7-8.

74. Claimant's theory of the case is not supported by the record. Claimant primarily relies on the 2011 Transportation Services Agreement (CE B) between AB Livestock and OWL to establish the proposition that OWL is Claimant's statutory employer. The Agreement provided that OWL would be the exclusive carrier of AB Livestock's livestock (with limited exceptions) and allowed OWL to subcontract other carriers in order to transport AB Livestock's livestock. CE B pp. 22-23. However, the evidence demonstrates that the cattle in question were owned by AB Genetics, not AB Livestock. Although Snake River is a wholly owned subsidiary of AB Livestock, there is nothing in the record to show that AB Genetics is also a wholly owned subsidiary of AB Livestock. In fact, Buyers's testimony is to the effect that AB Genetics is a different entity from Snake River. Tr. 111:23 – 112:21. Thus, Claimant has not established that the said Transportation

Services Agreement applies to the contractual chain present in the instant case.

75. Claimant cites to Weekes' affidavit (CE U) to support the assertion that the transaction played out as Claimant posited; Snake River contacted OWL, who, not having sufficient trucks, engaged OWD to find another carrier for the requested load. *See* CE U pp. 318-19. However, as discussed in the credibility section above, we do not find Weekes' affidavit to be reliable. The most reliable evidence of the contractual chain are the payments issued (the checks) to and by OWD for the shipment of cattle[8], the testimony of Buyers that AB Genetics arranged for the shipment of cattle[9], and the testimony of Deborah Agar and Radloff that OWD requested Agar to dispatch and broker transport of the cattle.[10] The evidence establishes that AB Genetics engaged OWD, not OWL, and that OWD in turn engaged Agar. There is no dispute that OWD is a separate and distinct entity from OWL. There is no evidence to indicate, and Claimant has not proved, via an alter ego doctrine or otherwise, that the two entities should be treated as the same entity.

76. It bears repeating that the evidence established the following contractual chain: (1) AB Genetics contracted with OWD (not OWL) to find a carrier to haul the livestock; (2) OWD, in turn, engaged Agar to find a carrier to haul the livestock; then (3) Agar, who had a Brokerage Agreement and Trailer Lease Agreement with Meissen, contracted with Meissen to haul the livestock; and finally, (4) Meissen hired Claimant to drive his truck and leased trailer. OWL was simply not involved in this chain of contractual relationships. Snake River eventually paid for the haulage on behalf of AB Genetics, later billing AB Genetics in the same amount.

77. Claimant has failed to demonstrate that OWL had a contractual relationship with AB Genetics or Agar. Accordingly, Claimant has failed to meet its burden of proving that OWL

[8] OWLE 1, 3.
[9] Tr. 111:23 – 112:24.
[10] Tr. 80-83; Tr. 106:12-23; *see also* OWLE 2.

is Claimant's category one statutory employer. OWD, which appears to have been engaged by AB Genetics to transport the cattle, is not a party to this case.

78. *Snake River as statutory employer.* The record does not establish the nature of the relationship, if any, between AB Genetics (the owner of the cattle) and Snake River. Nor does the evidence persuade the Commission that Snake River contracted for the shipment of the livestock in question. Buyers testified to his belief that AB Genetics arranged for the transport of the livestock by contacting OWD. Explaining the check written by Snake River, Buyers testified that it was Snake River's business practice to initially pay expenses associated with transport of cattle from its feedlot, then to bill those expenses back to the owner of the cattle. If accurate, the Commission cannot conclude that this arrangement is sufficient to establish Snake River as a category one statutory employer at the top of the contractual chain. The fact of payment does not prove that Snake River contracted with OWD for the transport of the cattle owned by AB Genetics. Claimant has failed to prove that Snake River is a category one statutory employer.

79. *AB Genetics as statutory employer* As with OWD, AB Genetics is not a named party to this case. Therefore, we decline to entertain any arguments as to whether or not AB Genetics is Claimant's statutory employer. Moreover, no party to the instant case appears to assert that AB Genetics is Claimant's statutory employer.

80. In summary, the evidence establishes that Agar is Claimant's statutory employer. The evidence fails to establish that the other named parties, Snake River and OWL, are links in the contractual chain leading to Claimant. The evidence fails to establish that Snake River and OWL had any involvement in arranging for the transport of cattle. The evidence that the Commission finds persuasive fails to support a finding that Snake River and OWL are category one statutory employers.

81. **Penalties under Idaho Code § 72-210.** Idaho code provides that:

> If an employer fails to secure payment of compensation as required by this act, an injured employee, or one contracting an occupational disease, or his dependents or legal representative in case death results from the injury or disease, may claim compensation under this law and shall be awarded, in addition to compensation, an amount equal to ten per cent (10%) of the total amount of his compensation together with costs, if any, and reasonable attorney's fees if he has retained counsel.

Idaho Code § 72-210. A statutory employer who carries worker's compensation insurance is not subject to these penalties if an employee of an uninsured contractor is injured. *Vickers v. Pyramid Framing Contractors, Inc.*, 123 Idaho 732, 852 P.2d 484 (1993). In his opening brief, Claimant concedes that only Meissen, and not any of the other named parties, is liable to Claimant for these penalties. Claimant's Opening Brief p. 30. However, as discussed above, Agar is Claimant's statutory employer and Agar did not carry worker's compensation coverage at the time of the accident. Therefore, Agar is subject to the penalties under Idaho Code § 72-210 for failure to secure payment of compensation as required. Despite the fact that Claimant does not seek these penalties from Agar, the plain language of Idaho Code § 72-210 makes it clear that claimants "shall be awarded" this amount in addition to compensation. The statute mandates that employers who fail to secure payment of compensation as required are subject to a penalty of 10% of the total amount of compensation. Accordingly, we determine that both Meissen and Agar are liable to Claimant for the penalties set forth in Idaho Code § 72-210.

## CONCLUSIONS OF LAW AND ORDER

1. Claimant has met his burden of proving that he was an employee of Meissen, as opposed to an independent contractor, at the time of the subject accident.

2. Claimant has met his burden of proving that Agar is Claimant's category one statutory employer under Idaho Code § 72-216.

3. Claimant has failed to prove that OWL is Claimant's category one statutory employer.

4. Claimant has failed to prove that Snake River is Claimant's category one statutory employer.

5. Meissen is liable to Claimant for penalties set forth in Idaho Code § 72-210 for failing to insure liability.

6. Agar is liable to Claimant for penalties set forth in Idaho Code § 72-210 for failing to insure liability.

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

DATED this 21st day of January, 2022.

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Paul Jeffries
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21st day of January, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by e-mail and regular United States Mail upon each of the following:

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