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** **ORDER ON MOTION FOR RECONSIDERATION** **Filed August 17, 2012**

On July 3, 2012, Defendants BBSI/Surety filed a timely motion for reconsideration with supporting brief.

On July 10, 2012, Claimant filed an objection to BBSI/Surety's motion for reconsideration.

On July 16, 2012, Defendant Floyd, et al. (uninsured employers), filed an objection to Defendants BBSI/Surety's motion for reconsideration.

No reply by Defendants BBSI/Surety has been filed.

DISCUSSION

Under Idaho Code § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, that within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the

decision. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion." Generally, greater leniency is afforded to *pro se* claimants. However, "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." Curtis v. M.H. King Co., 142 Idaho 383, 388, 128 P.3d 920 (2005). On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. Davison v. H.H. Keim Co., Ltd., 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. *See*, Dennis v. School District No. 91, 135 Idaho 94, 15 P.3d 329 (2000) (citing Kindred v. Amalgamated Sugar Co., 114 Idaho 284, 756 P.2d 410 (1988)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

Here, Claimant filed an amended complaint against Tom, Casey, and Evelyn Floyd d.b.a. Action Milling, LLC (AM) and Action Ag, LLC (AA), among other entities. The issues noticed for hearing included whether AM, AA or either of them was an employer of Claimant on or about the date of injury. As part of his *prima facie* case, Claimant has the burden of proving that he was employed by one or more of the Defendants at the time of injury. However, at hearing Claimant chose to assert only that he was an employee of AA, the uninsured employer, rather

than arguing that he was an employee of AM.[1] BBSI/Surety defended the claim on the same basis by adducing evidence intending to show that Claimant was an employee of AA at the time of the accident. AA, of course, attempted to demonstrate that Claimant was an employee of AM at the time of the accident.

From the evidence, the Commission determined that the Claimant had entered into contracts of hire with both AA and AM. The Commission then determined that under the peculiar facts of this case, the relationship between Claimant, AA and AM is best characterized as a dual employment relationship. In such a relationship, where it is demonstrated that Claimant was performing services clearly identifiable to one employer alone at the time of injury, then that employer is exclusively liable for the payment of workers' compensation benefits. However, where the evidence fails to establish that the activities of the employee at the time of injury are severable, then both employers are jointly and severally responsible for the payment of workers' compensation benefits. In this matter, the Commission concluded that the evidence did not support a finding that Claimant's activities at the time of injury could be identified solely to the business of AA, and therefore, both employers are jointly and severally liable for the payment of workers' compensation benefits. In reaching this decision, the Commission focused less on who had the right to direct and control the activities of Claimant at the time of the accident, and more on whether the evidence demonstrated that Claimant's accident arose out of and in the course of his employment with AA, AM or both entities. (*See* Basin Land Irr. Co. v. Hat Butte Canal Co., 114 Idaho 121, 754 P.2d 434, (1988)). In its motion for reconsideration, BBSI/Surety argues that the evidence before the Commission demonstrates that Claimant's work activities are clearly identifiable with AA alone, and that it was error for

[1] It can only be guessed why Claimant chose to proceed in this fashion. He may have decided that AA, though uninsured, possessed assets sufficient to pay workers' compensation benefits plus statutory penalties to Claimant for failing to have insurance.

the Commission to conclude that Claimant's employment at the time of injury is not severable. In particular, BBSI/Surety asserts that the evidence demonstrates that at the time the accident occurred, it was not known, and not knowable, that the corn being transported by Claimant would eventually be delivered to AM at the Wilder feedlot location for on-site milling. As set forth in the Commission's decision, the corn being transported by Claimant had two potential destinations depending on its moisture content. With a moisture content below 18%, the corn would be deposited in storage at the Wilder feedlot for eventual shipment to a remote customer. With a moisture content greater than 18%, the corn would be milled by AM on-site, for local use.

Claimant argues that since the moisture content of the corn was unknown at the time of the accident, it cannot be said that Claimant's activities at the time of the accident were geared toward advancing any of the work or interests of AM, since AM's interest would only arise upon a subsequent determination that the corn had a moisture content high enough to require the use of AM milling services at the Wilder feedlot. Though unstated, the argument of BBSI/Surety implies that had the moisture content of the corn tested below 18%, AM's interests would in no wise be served by Claimant's activities at the time of injury. The assertion is that it was not the business of AM to involve itself with the distribution of unmilled low-moisture corn to a remote customer. BBSI/Surety evidently asserts that had the moisture content of the corn been below 18%, the transport of the unmilled corn to the remote purchaser would have been either the business of AA, or possibly, Wilder Feedlot, LLC. Parenthetically, there is little evidence of record on the business of Wilder Feedlot, LLC. Floyd testified that this was a custom cattle feeding operation run by Floyd on property owned by Montierth. (Tr. 124/4-125/14). The record contains no evidence suggesting that the business of Wilder Feedlot included the storage and sale of unmilled grain to remote buyers.

BBSI/Surety has defended the claim arguing that the evidence fails to establish that at the time of the accident, Claimant was involved in any activity that could reasonably be said to arise out of and in the course of Claimant's employment by AM. We are unpersuaded that this determination turns on whether or not moisture testing had been completed by the time of the accident. To say that it was only the work of AA that was being done at the time of the accident wholly ignores Floyd's intentions vis-à-vis the load of corn. The interest of AM, though possibly contingent and prospective in nature, was nevertheless being served by Claimant's efforts. The possibility that the corn might be shipped to a remote buyer without being milled does not diminish Floyd's expectation, or hope, that AM might pick up a little milling business. Indeed, a good deal of the work that is done in this world is done on a contingent basis, and the fact that Claimant's activities in transporting the grain to AM for moisture testing might have ultimately produced no work for AM does nothing to denigrate the Commission's finding that Claimant's actions were, in some part, related to the business interest of AM. Ultimately, the evidence establishes that Claimant was doing work which advanced the interests of Floyd as a principal of both AA and AM. Claimant's employment at the time of injury was not severable.

For these reasons, the Commission continues to abide by its original Findings of Fact, Conclusions of Law, and Order. Defendants' (BBSI/Surety) motion for reconsideration is DENIED. IT IS SO ORDERED.

DATED this __17th___ day of August, 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 _17th_____ day of August, 2012, a true and correct copy of **ORDER ON MOTION FOR RECONSIDERATION** was served by regular United States Mail upon each of the following:

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