BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DENNIS GRESS, Claimant/Petitioner, v. TRANSYSTEMS LLC, Employer, and AMERICAN CASUALTY COMPANY OF READING, PA, Surety, Defendants/Respondents.	**IC 2010-031702** **(15-000100)** **DECLARATORY RULING** Filed November 20, 2013

Pursuant to J.R.P. 15, Claimant filed a petition for declaratory ruling on August 27, 2013. Claimant seeks clarification of Idaho Code § 72-223 and its application to this case. Specifically, Claimant would like clarification as to whether a motor vehicle insurance provider, whose policy covered Employer at the time of Claimant's motor vehicle accident, is a third party for purposes of subrogation.

Defendants did not respond to the petition.

I.

ISSUE PRESENTED

Idaho Code § 72-223 provides, in pertinent part:

> **72-223**. **Third party liability** — (1) The right to compensation under this law shall not be affected by the fact that the injury…is caused under circumstances creating in some person other than the employer a legal liability to pay damages therefor, such person so liable being referred to as the third party….
>
> (3) If compensation has been claimed and awarded [by claimant], the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to

> recover against such third party to the extent of the employer's compensation liability.

The issue before the Commission is whether Employer's motor vehicle insurance provider is a third party for purposes of Idaho Code § 72-223.

II.

FACTS

On December 18, 2010, Claimant, while acting in the course and scope of employment, was seriously injured in a motor vehicle accident that was caused by another individual. Claimant filed a claim for workers' compensation, as well as a claim against the other individual's liability insurer. In October 2012, Claimant settled with the liability insurer for $100,000. Subsequently, Claimant and Defendants settled the matter of Defendants' subrogation claim, with Claimant paying Surety a subrogated amount of $57,000.

At the time of Claimant's accident, Employer had a motor vehicle insurance policy with Continental Casualty Company ("Continental"), which included coverage for underinsured motorists. In June 2013, Claimant settled with Continental in the amount of $50,000. According to Claimant, Defendants are now asserting a subrogated interest in the Continental settlement, even though the Continental policy covered Employer, rather than the individual who caused Claimant's accident.

III.

ANALYSIS

The question in this case is whether Continental is a third party for purposes of Idaho Code § 72-223. The Commission addressed a similar question in *Reichert v. Magic Valley Foods*, 1998 IIC 1377 (November 30, 1998). In that case, the Commission held that an insurance company providing uninsured motorist coverage to the employer was not a third party for purposes of Idaho Code § 72-223:

> As mentioned above, American also argues that it is not a "third party" within the meaning of that term as used in Idaho Code, Section 72-223. Upon careful review of the provisions of the applicable version of Section 72-223 and the provisions of Idaho Code, Section 41-2505, the latter of which contains similar language establishing the subrogation rights of an insurer that has made payments under an uninsured motorist policy, the Referee concludes that American is not a "third party" under the provisions of Section 72-223. The legislature most likely intended that the language in Section 72-223 "creating in some person other than the employer a legal liability to pay damages. . . referred to as the third party," did not apply to an insurance company providing uninsured motorist coverage such as American, but rather did apply to a separate tortfeasor such as an uninsured motorist. This conclusion is more compatible with the similar provisions of Section 41-2505. The Referee concludes that, for the above reasons, the Surety does not have a right of subrogation against the uninsured motorist policy purchased by the Employer from American and Foreign Insurance Company.

Reichert, 1998 IIC at 1377.4.

The rationale for this holding is self-evident. The insurance company covering a tortfeasor qualifies as a third party because the *tortfeasor* is a third party, that is, a person who is not a party to the action in question, which, here, would be the workers' compensation action. *See* Black's Law Dictionary 1479 (6th ed. 1990). However, an insurance company covering the employer is not a third party, because the *employer* is not a third party; the employer, as a defendant, is very much a party to the action. Therefore, by definition, the phrase "third party" excludes both Employer and Continental, because Continental's liability in this case arises from its contract with Employer, rather than from a contract with an outside party.

Based on the foregoing, we find that Continental is not a third party for purposes of Idaho Code §72-223, and that Defendants therefore have no right of subrogation relating to Claimant's settlement with Continental.

IT IS SO ORDERED.

DATED this 20th day of November, 2013.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

__/s/_____
R.D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2013, a true and correct copy of the foregoing **DECLARATORY RULING** was served by regular United States mail upon each of the following:

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MARK C PETERSON
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eb

_/s/_____