

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

ROY HERRING, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 DEAN BOUTTU, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 FERGUSON CONTRACTING, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2009-002131**

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

FILED: March 31, 2011

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Coeur d’Alene on September 28, 2010. Claimant, Roy Herring, was present in person and represented by Starr Kelso of Coeur d’Alene. Defendant Employer, Dean Bouttu, as well as Defendant Employer, Ferguson Contracting, Inc. (Ferguson), and Defendant Surety, Idaho State Insurance Fund, were represented by H. James Magnuson of Coeur d’Alene. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Briefs were submitted. The matter came under advisement on January 11, 2011.

Claimant's Motion to File Reply Brief, filed with the Commission on December 22, 2010, is granted. Defendants' objection thereto and motion to strike, filed with the Commission on December 27, 2010, are overruled.

### **ISSUES**

The issues to be decided are:

1. Whether Claimant was an employee of any employer at the time of the accident or an independent contractor.
2. Whether Claimant suffered an injury from an accident arising out of and in the course of employment.
3. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.
4. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701—72-706 and whether these limitations are tolled pursuant to Idaho Code § 72-604.

### **CONTENTIONS OF THE PARTIES**

Claimant asserts that he was an employee of Defendant Bouttu and a passenger in Bouttu's truck when it backed into a tree on June 25, 2008, injuring Claimant. Claimant maintains that he provided oral notice of his injury and now demands workers' compensation benefits from Bouttu.

Defendants acknowledge the June 25, 2008 incident, but argue that Bouttu acted as a sub-contractor for Ferguson Contracting and that Claimant was not an employee of either Bouttu or Ferguson at that time. Defendants further allege that the incident did not cause the need for the medical treatment Claimant seeks.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition of Claimant, taken January 28, 2009, and admitted into evidence as Defendants' Exhibit 9;
3. The pre-hearing deposition of Leslie Marvin Herring, taken August 24, 2010, and admitted into evidence as Defendants' Exhibit 22;
4. The testimony of Claimant, Leslie Marvin Herring, and Dean Bouttu taken at the September 28, 2010 hearing; and
5. Claimant's Exhibits 16 and 23 and Defendants' Exhibits 1 through 15 and 17 through 22, admitted at the hearing.

After considering the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. At all relevant times, Defendant Bouttu owned and drove his own dump truck, hauling various loads from 7:00 a.m. to 5:00 p.m., Monday through Thursday, each week. Bouttu was an independent contractor who hauled materials for Defendant Ferguson Contracting.

2. Claimant was 55 years old and had resided in Silverton, Idaho, for approximately nine years at the time of the hearing. He resides with his brother, Leslie Herring. Claimant completed the ninth grade, but dropped out of high school before completing the tenth grade. He worked in construction, installing coolers and laying carpet, vinyl, and tile.

3. In 1983, Claimant sustained a work-related injury in Arizona and underwent anterior C5-6 discectomy and fusion. Several months later, he sustained a second cervical injury

and underwent posterior C5-6 fusion. In 1987, he sustained a third cervical injury and underwent anterior C4-5 and C6-7 microdiscectomy and fusion.

4. In 1997, while working for another employer in Arizona, Claimant sustained a fourth cervical injury and a lumbar injury. He subsequently underwent anterior C5-6 corpectomy with removal of bone graft at C4-5, C5-6, and C6-7 and placement of instrumentation from C4 through C6. In 1998, Claimant underwent L4-5 laminectomy and L5-S1 discectomy and fusion.

5. Claimant moved to Idaho and, in 2003, he alleged a fifth cervical injury and sought workers' compensation benefits. In 2005, he underwent C3-4 laminectomy and fusion. In 2006, he settled his workers' compensation claim.

6. No later than 2006, Claimant began treating with Deborah L. Elliott-Pearson, M.D., who recorded his complaints of neck pain and assessed cervicalgia on August 9, September 9, October 4, and November 1, 2006, and on June 13 and September 5, 2007. On July 11, 2007, Dr. Pearson recorded that Claimant presented with Chronic Obstructive Pulmonary Disease (COPD) which began years earlier due to smoking. At that time, Claimant was taking 17 prescription medications. On October 3, 2007, Claimant reported to Dr. Pearson that something "located on the ceiling fell in on his head." Exhibit 15, p. 401. Dr. Pearson noted extremely tight cervical paraspinal muscles bilaterally and assessed worsening cervicalgia. Dr. Pearson assessed cervicalgia on November 28 and December 26, 2007. Her records establish that Claimant had been taking substantial doses of Flexeril, Norco or Lortab, and OxyContin regularly since at least August 2006.

7. Claimant received Social Security Income benefits (SSI) periodically from approximately 1984 until 2008. In 2008, his SSI benefits ceased and he began working with the Idaho Division of Vocational Rehabilitation (IDVR) to find employment. On January 29, 2008, Dr. Pearson authored a letter to IDVR stating that she found "no medical reason why [Claimant]

can not [sic] be employed as a cross-country, long haul, truck driver, as long as an air ride driver's seat is available for his use." Exhibit 4, p. 77.

8. On February 20, 2008, Claimant presented to Dr. Pearson for follow-up of back pain, cervicalgia, and degeneration of lumbar intervertebral disc. He was taking 16 prescription medications and, on a scale of one to ten, reported a pain level of 9 of 10. Dr. Pearson assessed worsening cervicalgia and low back pain and authorized medication refills of Flexeril (84 capsules), Halcion (28 capsules), Norco (84 capsules), and OxyContin (168 capsules).

9. IDVR paid for Claimant to attend Sage Truck Driving School (Sage) for several weeks, where he obtained his Commercial Driver's License (CDL) with all the endorsements necessary to pull double or triple trailers. Sage assisted Claimant in searching for employment. By March 24, 2008, Claimant was well into his training at Sage and had many job leads. On April 8, 2008, Claimant reported to IDVR that he could not secure employment with his pain medications. IDVR personnel encouraged him not to disclose his prescription narcotic use to prospective employers. A note dated April 9, 2008, by IDVR's Michael Hauser records: "spoke to client, directly confronted regarding his placing roadblocks to employment[,] i.e. listing narcotic pain meds on applications." Exhibit 4, p. 94.

10. On April 16, 2008, Claimant presented to Dr. Pearson for follow-up of back pain, cervicalgia, and left lower extremity radiculopathy. He was taking 13 prescription medications and reported pain of 9 of 10. Dr. Pearson examined Claimant and recorded: "back and neck tight globally except upper thoracic region, painful to touch." Exhibit 15, p. 385. She assessed worsening cervicalgia, low back pain, and back pain. She authorized medication refills of Flexeril (84 capsules), Halcion (28 capsules), Norco (84 capsules), OxyContin (168 capsules), and Ranitidine Hydrochloride (60 capsules).

11. On May 7, 2008, Claimant told Dr. Pearson that his medication was taken by someone who entered his house. He was then taking seven prescription medications and reported pain of 9 of 10. Dr. Pearson assessed worsening back and low back pain and provided refills of Flexeril (84 capsules), Halcion (28 capsules), Norco (84 capsules), and OxyContin (168 capsules).

12. On May 9, 2008, Claimant caught a bus to Texarkana, Arkansas, where he applied for employment as a long haul driver with Southern Refrigerated Transport, Inc., (SRT). On May 12, 2008, Claimant signed and dated an SRT pre-employment health questionnaire providing the following responses, among others:

List all prescription medications and dosages that you are currently taking: N/A  
List any other medications and dosages that you are currently taking: N/A  
Are you currently under a physician's care? No  
List any/all surgeries and date of surgery that you have ever had: N/A  
List all injuries/accident of any kind that have required medical attention and date:  
N/A  
List dates and reasons for being admitted to a hospital: N/A  
....  
List type of work you cannot perform: N/A  
....  
Have you ever been limited or restricted due to your health, injury or illness? N/A  
....  
Have you ever had any problem with your back? No  
....  
Have you ever had any problem with your neck or shoulders? No  
....  
Have you ever been injured while working for any employers? No

Exhibit 17, pp. 1-2. Claimant testified that the form was completed by an individual at Sage; however, Claimant acknowledged signing and dating it for submission to SRT.

13. As part of Claimant's SRT application process, he also completed a medical form in connection with his examination by medical examiner Kevin McCann, in which Claimant responded in the negative to each of the following questions: "Any illness or injury in last 5 years? Shortness of breath? Spinal injury or disease? Chronic low back pain? Narcotic or habit forming drug use?" Exhibit 18.

14. SRT hired Claimant as a long haul driver, and he drove for approximately four or five weeks before returning to his home in Silverton. Claimant testified that by mid-June, he was on a break from SRT for approximately a week. However, IDVR notes of June 16, 2008, indicate: "Roy called. No longer working as truck driver. Last position did not work out. States wants another job." Exhibit 4, p. 98. Claimant's brother, Leslie Herring, testified in his deposition and at hearing that Claimant left SRT because it was hurting his back already after just a few weeks of driving. IDVR notes of July 16, 2008, by Michael Hauser state:

I have met with Roy or talked with him over the phone several times since he was wired [sic] from the trucking firm. Client continually expresses frustration with "the system." He re-iterates his various aches, pain, limitations to any sort of employment at the same time stating that he wants to workbut [sic] is afraid that working would get in the way of his appeals with H&W.

Exhibit 4, p. 99.

15. On June 16, 2008, Claimant presented to Dr. Pearson for follow-up of cervicgia, low back pain, and lumbar strain and radiculopathy. He reported pain of 10 of 10, and reported "low back pain worse than neck." Exhibit 15, p. 382. He was taking eight prescription medications including Aciphex, Colace sodium, Flexeril, Halcion, Ibuprofen, Norco, OxyContin, and Ranitidine Hydrochloride. Dr. Pearson assessed worsening low back and back pain. Per Exhibit 15, p. 382, the record of the visit was created on June 16, 2008, at 12:50:54.

16. Claimant knew Bouttu for a number of years prior to 2008. Claimant testified that he discussed with Bouttu the possibility of working for him sometime in June 2008. Claimant testified that Bouttu needed someone to drive his dump truck and offered Claimant a job driving his truck in approximately June 2008. Claimant testified that Bouttu explained that he needed heart surgery and would be off work for a time.

17. Claimant testified that on a Thursday or Friday in June he and Bouttu discussed the terms of Claimant's employment, agreeing to \$20.00 per hour and that Claimant was to start

the following Monday. Claimant testified that Bouttu came to his home that weekend and offered him a job, but there was no discussion of health insurance or other benefits. The only discussion was that the hourly rate would be \$20.00 per hour. Claimant understood that payment would be every two weeks based on Bouttu's comments that other companies pay every two weeks. Claimant testified that the usual rate was \$30.00 per hour, but he agreed to work for \$20.00 per hour. Claimant testified that Bouttu told him that Bouttu needed to get permission from his general contractor before he could have Claimant work for him. Claimant understood that the general was Ferguson. Claimant acknowledged that there were no W-2 forms or other documents generated establishing the parties' alleged employment agreement.

18. Claimant's brother, Leslie Herring, who lives with Claimant, testified at hearing that Bouttu came to Claimant's home and offered Claimant a job driving truck.

19. Claimant testified that Bouttu picked him up at 7:00 or 7:30 a.m. the following Monday and each weekday morning thereafter and dropped him off at 5:00 p.m. every evening for approximately the next two weeks. Claimant testified that he drove Bouttu's truck sometimes and Bouttu drove it sometimes. Claimant testified that he drove Bouttu's truck more than Bouttu did.

20. Bouttu testified that Claimant called him on June 19, 2008, stating that he was out of work and tired of long haul driving and that he wanted to learn about dump trucking. Bouttu responded that he would be working in Claimant's area and that Claimant could ride with him. Bouttu testified that he went to Claimant's home that weekend, had a cup of coffee, and discussed picking Claimant up on Monday.

21. Bouttu testified that he picked up Claimant in his dump truck on the following Monday, June 23, 2008. Bouttu was hauling soil and rock from sites in the Silverton area. Bouttu testified that Claimant rode with him for a total of four days and they discussed dump trucking companies, pay rates, and truck maintenance. Bouttu testified that he allowed Claimant

to drive his truck for one hour on two different days, but that Claimant did not know how to use the truck mirrors or match the gears and was not a good driver. Bouttu testified that the local rate for dump truck drivers was \$16.49 per hour and that only proven drivers for large companies earned \$20.00 per hour. He testified that no drivers earned \$30.00 per hour.

22. On June 25, 2008, Bouttu drove his truck all day while Claimant rode along. Bouttu picked up a load in Silverton on a hill with a large garage and long driveway. Bouttu backed his truck down the driveway and unintentionally backed into a large tree near the garage. Claimant estimated the truck's speed at about seven miles per hour. Bouttu estimated the truck speed was about walking speed. Claimant testified that the jolt was significant and nearly threw him from the passenger seat back between the driver and passenger seats. Bouttu testified that the impact was minor. Claimant testified that the impact was sufficient to break off the top three feet of the tree. After dumping the load, Bouttu dropped Claimant off at his house, which was only one-half mile away.

23. Bouttu dropped Claimant off about 5:00 p.m. Claimant testified that he was in shock for a while after hitting the tree and that "later that evening I started hurting a little bit and it got worse as the evening went on." He clarified: "I would say by 7:00 I was starting to hurt." Claimant's brother, Leslie, testified at hearing that when Claimant arrived home his neck was "hurting real bad" and "he had a piece that he said was the top of the tree, that when he hit the tree, knocked it off the tree .... And he said, don't throw this away, and I'm going to save this for court." Transcript, p. 123, ll. 11-17, 20.

24. Claimant testified that by the following morning he was hurting too much to go to work. He had numbness and pain in the base of his neck, between his shoulder blades, and in his right arm. Bouttu came to pick up Claimant that next morning and Claimant testified he told

Bouttu that as a result of hitting the tree, he was hurting too much to work. According to Claimant, Bouttu did not respond but just walked back to his truck and drove off.

25. Bouttu testified that Claimant rode with him the very next day, Thursday, June 26, 2008, and that at the end of the day, Bouttu greased his truck in Claimant's driveway because Claimant wanted to learn about truck greasing.

26. Claimant testified that he had one more conversation with Bouttu in which he told Bouttu that he needed to go to a doctor. Claimant asserted that Bouttu just got in his truck and left. Claimant testified he tried to telephone Bouttu many times, but Bouttu had caller ID and would not answer Claimant's calls.

27. On Friday, June 27, 2008, Claimant presented to Dr. Pearson who recorded: "neck and back pain which began 3 days ago. It resulted from MVA – was a passenger in a dump truck that backed into a tree at 7 MPH." Per Exhibit 15, p. 381, the record of the visit was created on June 27, 2008 at 18:04:05.

28. Claimant has not worked since June 25, 2008, and has not received any benefits from anyone since that time. The record contains no indication that Claimant sought payment from Bouttu for his alleged two weeks of work for Bouttu.

29. In January 2009, Claimant filed a First Report of Injury via attorney Starr Kelso.

30. Dr. Pearson referred Claimant to neurosurgeon William Ganz, M.D., who reviewed x-rays taken post-accident and determined that Claimant was not a surgical candidate. Dr. Ganz prescribed physical therapy and recommended a pain management program and an EMG of Claimant's right upper extremity. Claimant was not able to get the physical therapy, EMG, or pain management consultation due to his limited finances and lack of insurance.

31. At the time of hearing, Claimant continued to complain of pain in his right arm and the base of his neck and take prescription medications. He does not work, but spends his time

watching TV. Claimant testified that he has had “a problem with my memory, so a lot of things I don’t remember. .... Ever since this accident, I’ve had quite a problem with remembering things, just couldn’t even remember my own phone number.” Exhibit 9, p. 303, ll. 14-20.

32. Having observed Claimant at hearing and compared his testimony to other evidence in the record, the Referee finds Claimant’s credibility suspect.

### **DISCUSSION AND FURTHER FINDINGS**

33. The provisions of the Idaho Workers’ Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

38. **Employment relationship.** The threshold issue is whether Claimant was an employee of Bouttu at the time of the June 25, 2008 accident. Coverage under the Idaho Workers’ Compensation Law generally depends upon the existence of an employer-employee relationship. Anderson v. Gailey, 97 Idaho 813, 555 P.2d 144 (1976). “Under the workmen’s compensation law the relationship of employer and employee depends upon a contract of hire which may be either express or implied.” In re Sines’ Estate, 82 Idaho 527, 532, 356 P.2d 226, 230 (1960), (superseded by statute as to jurors in Yount v. Boundary County, 118 Idaho 307, 315, 796 P.2d 516, 524 (1990)).

39. In Seward v. State Brand Division, 75 Idaho 467, 274 P.2d 993 (1954), Seward was injured while helping a state deputy brand inspector gratuitously examine brands at the express request of the deputy inspector. The Commission found that Seward was an independent livestock hauler, had previously helped with brand inspections on occasion, and was unaware that the deputy inspector had no authority to hire him. The Commission determined the accident

was compensable. The Idaho Supreme Court reversed, noting that there was no assertion or evidence that the state brand inspector was aware of the deputy's actions. The Court declared:

Before one can become the employee of another, knowledge and consent of the employer, expressed or implied, is required. .... Claimant did not have either an express oral or written agreement for employment and ... the Deputy Brand Inspector at Idaho Falls had no power or authority to employ him, if he did. ....

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, 471-472, 274 P.2d 993, 997-998 (1954).

40. In the present case, whether Claimant was an employee of Bouttu at the time of his accident on June 25, 2008, is a factual issue. See Burns v. Nyberg, 108 Idaho 151, 697 P.2d 1165 (1985). Claimant has the initial burden of proving this relationship.

41. The credibility of the witnesses is pivotal in this case. If Claimant's testimony is more credible than Bouttu's, an employment relationship is established. However, if Bouttu's testimony is more credible than either Claimant or his brother, no employment relationship existed.

42. Claimant's testimony of several circumstances surrounding the alleged employment agreement is inconsistent with other evidence in the record. Claimant testified at hearing that he recovered well after his various neck surgeries and had no pain in his arms, neck, or back of his head before the June 25, 2008 accident. Transcript, p. 50. However, many of Dr. Pearson's records refute this assertion. Among others, her records from April 16, 2008, document Claimant's reported pain of 9 of 10 and Dr. Pearson's assessment of worsening cervicgia. Exhibit 15, p. 385. Her records from June 16, 2008, document that Claimant reported pain of 10 of 10, in follow-up of cervicgia approximately one week before the accident.

43. Claimant testified that Bouttu approached him and hired him in June 2008 to drive Bouttu's dump truck because he was facing heart surgery. Bouttu testified that he suffered

a heart attack in early 2005, was treated, and fully recovered without restrictions. Bouttu testified that he has periodic medical check-ups and the doctor tells him that he keeps getting stronger each visit. The record contains no persuasive evidence that Bouttu had, or was ever scheduled for, heart surgery, or any other type of heart treatment, in 2008 or at any time since.

44. Claimant and his brother testified that Claimant worked for Bouttu for approximately two weeks, starting on a Monday at approximately 7:00 a.m. All parties agree that the accident occurred on June 25, 2008—a Wednesday. According to Claimant's account, he would have had to start working no later than the Monday of the prior week, which was June 16, 2008. This is the very day he was examined and treated by Dr. Peterson, who produced her report at approximately 12:50 p.m. that day. It is also the very day IDVR's Mike Hauser recorded that Claimant called to report that his job, ostensibly at SRT, did not work out and he was looking for another job. It is clear that Claimant did not begin riding with Bouttu that day.

45. Claimant testified that he contacted SRT after he began working for Bouttu and explained he would not be going back to work with SRT. As mentioned above, IDVR notes from June 16, 2008, indicate that Claimant was no longer employed by SRT and was looking for another job at that time. This was clearly before he began riding with Bouttu.

46. Bouttu testified that Claimant called him in June 2008, wanting to learn about dump trucking, and that Bouttu offered to let Claimant ride with him the very next week while he hauled loads in Claimant's area. Bouttu testified that he never discussed hiring Claimant, never offered to hire Claimant, and that Claimant was never his employee.

47. As already noted, Claimant's credibility is suspect. His imperfect recall and his willingness to deliberately withhold relevant information and provide inaccurate information in order to obtain his desired objective are well documented in the record, particularly in his dealings with his prior employer, SRT. Claimant is not a credible witness. Leslie Herring testified that he

has been totally disabled since 1990 due to a severe brain injury sustained in a motorcycle crash that “busted his head open,” and after which he had to relearn everything. The Referee finds Bouttu’s testimony more credible than either Claimant’s or Claimant’s brother’s testimony.

48. Claimant cites Kiele v. Steve Henderson Logging, 127 Idaho 681, 905 P.2d 82 (1995), and asserts that the Commission must construe the facts liberally in favor of finding an employment relationship between the parties. Kiele provides: “When doubt exists as to whether an individual is an employee or an independent contractor under Idaho’s Worker’s Compensation Act, the act must be given a liberal construction by the Industrial Commission in its fact finding function in favor of finding the relationship of employer and employee.” Id. at 684, 905 P.2d at 85. However, Kiele addressed a circumstance where a business relationship clearly existed and the issue was to determine whether Kiele was a direct employee or an independent contractor. In the present case, Defendants dispute the existence of any business relationship at all. Facts need not be construed liberally in favor of the claimant when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

49. The Referee finds that no contract of hire, and thus no employment relationship, existed between Bouttu and Claimant. “Voluntary activities will not suffice; an award of compensation depends on the existence of an employer/employee relationship.” Parker v. Engle, 115 Idaho 860, 865, 771 P.2d 524, 529 (1989).

50. Claimant has not proven that he was an employee of Bouttu at the time of the accident on June 25, 2008. All other issues are moot.

### **CONCLUSIONS OF LAW**

1. Claimant has not proven that he was an employee of Bouttu at the time of the accident on June 25, 2008.

2. All others issues are moot.

## RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 25<sup>th</sup> day of March, 2011.

INDUSTRIAL COMMISSION

/s/  
Alan Reed Taylor, Referee

ATTEST:

/s/  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 31<sup>st</sup> day of March, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO  
PO BOX 1312  
COEUR D'ALENE ID 83816-1312

H JAMES MAGNUSON  
PO BOX 2288  
COEUR D ALENE ID 83816-2288

sc

/s/

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

ROY HERRING, )  
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 Claimant, )  
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 v. )  
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 Surety, )  
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 Defendants. )  
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**IC 2009-002131**

**ORDER**

FILED: March 31, 2011

Pursuant to Idaho Code § 72-717, Referee Alan Taylor submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee’s proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has not proven that he was an employee of Bouttu at the time of the accident on June 25, 2008.
2. All others issues are moot.

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

DATED this 31<sup>st</sup> day of March, 2011.

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 31<sup>st</sup> day of March, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO  
PO BOX 1312  
COEUR D'ALENE ID 83816-1312

H JAMES MAGNUSON  
PO BOX 2288  
COEUR D ALENE ID 83816-2288

sc

/s/