BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

COREY PAUL AUSTIN, Claimant, v. CONNELL TRUCKING, LLC, and PERRY BROTHERS TRUCKING BROKERAGE, LLC, and PERRY BROTHERS TRUCKING, INC., Employers, Defendants.	**IC 2013-034316** **ORDER** **FILED DEC 15 2017**

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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 was an employee of Connell Trucking within the course and scope of his employment at the time of the industrial accident.

2. Connell Trucking was a subcontractor of Perry Brothers Trucking, Inc. throughout the course of Claimant's employment by Connell Trucking.

3. Perry Brothers Trucking, Inc. is subject to the jurisdiction of the Idaho Industrial Commission.

4. Connell Trucking not having a valid policy of workers' compensation at the

time of the industrial accident, Perry Brothers is the statutory employer of Claimant liable for benefits due him under the Idaho Workers' Compensation Law.

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

DATED this 15TH day of DECEMBER, 2017.

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 15TH day of DECEMBER, 2017, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

JAMES D. RUCHTI
OAKLEY BUILDING
1950 E. CLARK ST., STE. 200
POCATELLO, ID 83201

KURT H. SCHWAB
733 ADDISON AVENUE
TWIN FALLS, ID 83301

dkb

/S/_____

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COREY PAUL AUSTIN, Claimant, v. CONNELL TRUCKING, LLC, and PERRY BROTHERS TRUCKING BROKERAGE, LLC, and PERRY BROTHERS TRUCKING, INC., Employers, Defendants.	**IC 2013-034316** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED DEC 15 2017**

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. The hearing of this matter occurred on March 31, 2017 in Pocatello.

James Ruchti represented Claimant. Kurt Schwab represented Connell Trucking, LLC at hearing.

Although initially represented by an attorney, Perry Brothers Trucking Brokerage, LLC and Perry Brothers Trucking, Inc. failed or refused to obtain substitute counsel of record after former counsel withdrew from representing them, effective July 27, 2015. Perry Brothers (LLC and Inc.) were given notice and opportunity on more than one occasion to obtain counsel. They failed or refused to do so. They failed or refused to participate in discovery thereafter. Service of pertinent orders and notices upon Perry Brothers (LLC and Inc.) regarding their discovery obligation was proper according to Idaho Law and Idaho Industrial Commission rules and regulations. Nora Hoffman, putative agent for Perry Brothers (LLC and Inc.), had actual knowledge of these orders and notices and discussed them telephonically with

adjudication staff. Ms. Hoffman participated in a telephone conference involving all parties in which the impact of these orders and notices were discussed. Ultimately, Perry Brothers (LLC and Inc.) failed to show good cause for their failure or refusal to participate in discovery. After nearly a year of nonparticipation, on July 8, 2016, Claimant's motion to strike their Answers as a sanction for failure to meaningfully participate in discovery was granted, and Perry Brothers' (LLC and Inc.) Answers were ordered stricken from the record. Nevertheless, Perry Brothers (LLC and Inc.), through the address provided by Nora Hoffman, were served all documents and given additional opportunity to correct the default and to participate at hearing. They failed or refused to do so.

At hearing, Claimant and Connell Trucking, LLC gave testimony and submitted evidentiary documents. They submitted briefs. The case came under advisement on June 27, 2017 and is ready for decision.

CONTENTIONS OF THE PARTIES

Claimant contends that he was an employee of Connell Trucking, LLC ("Connell Trucking") at the time of the accident. Claimant's testimony about events and circumstances supports a finding that he was hired as an employee and not retained as an independent contractor of Connell Trucking. Steve Connell's testimony includes admissions which support an inference consistent with finding Claimant an employee. Steve Connell's own accident and brain injury undercut any weight which may be given to his assertions of a memory of events and conversations contrary to such a finding; material inconsistencies give grounds for impeachment of his testimony. Additionally, the Claimant was not fired until after the accident occurred.

Claimant further contends that Connell Trucking was uninsured on December 19, 2013,

the date of the accident. Connell Trucking was an independent contractor of Perry Brothers Trucking, Inc., and Perry Brothers Trucking, Inc. is a statutory employer of Claimant for purposes of liability for Claimant's benefits related to the accident. Perry Brothers Trucking, Inc. is subject to Industrial Commission jurisdiction under Idaho Workers Compensation Law.

(Claimant's Exhibit 13 confirms that Perry Brothers Trucking, Inc. and not Perry Brothers Trucking Brokerage, LLC is the relevant entity. Hereinafter "Perry Brothers" refers only to Perry Brothers Trucking, Inc.)

Defendant Connell Trucking, LLC contends that Claimant's business relationship ended on or about December 16, 2013 when Steve Connell terminated it via telephone. On December 19, 2013, having been terminated from his independent contractor role with Connell Trucking and without authorization from Connell Trucking, Claimant contacted Perry Brothers directly to seek a load that would take him toward his home in Idaho. A Perry Brothers' dispatcher assigned Claimant a load to be delivered to Evanston, Wyoming. It was driving this load that Claimant wrecked the truck and injured himself.

Connell Trucking, LLC contends it worked with drivers, some of which were employees and some independent contractors. The business relationship between Claimant and Connell Trucking was an independent-contractor relationship at Claimant's request so Claimant could avoid child-support obligations and wage garnishment.

Perry Brothers contended a lack of Idaho Industrial Commission jurisdiction in its Amended Answer only. Both Answer and Amended Answer did assert that Perry Brothers Trucking Brokerage, LLC "is incorrectly named" and "never had any dealings pertinent to this case with Claimant or Connell Trucking, LLC." Both Answers did assert that Connell Trucking was an independent contractor of Perry Brothers Trucking, Inc. Both Answers

expressly denied as follows: "This Claimant was neither a direct nor statutory employee of Perry Brothers Trucking, Inc. or Perry Brothers Truck Brokerage, LLC."

ISSUES PRESENTED

The issues at hearing, this matter having been bifurcated, are as follows:

1. Whether Claimant was an employee of Connell Trucking, LLC at the time of the accident (this issue encompassed both questions of independent contractor versus employee as well as whether Claimant's relationship with Connell Trucking had terminated prior to the occurrence of the accident);

2. Was Connell Trucking, LLC an independent contractor of Perry Brothers Trucking Brokerage, LLC and/or Perry Brothers, Trucking, Inc. at the time of the accident;

3. Was Perry Brothers Claimant's direct or statutory employer;

4. Is Perry Brothers subject to the jurisdiction of the Idaho Industrial Commission and the Idaho Worker's Compensation Law.

All other issues were reserved.

EVIDENCE CONSIDERED

The record in this matter consists of:

1. The testimony of Claimant, and of Connell Trucking owners Steve and Kali Connell, husband and wife, presented at hearing;

2. Claimant's Exhibits 1 through 23, including an exhibit marked 4A, admitted at hearing; and

3. Connell Trucking Exhibits A through G, admitted at hearing.

Having fully considered all of the evidence of record, the Referee submits the following findings of fact and conclusions of law for review by the Commission and recommends it approve the same.

FINDINGS OF FACT

Identification of the Parties

1. Claimant was an Idaho resident when he agreed to drive truck for Connell Trucking. At all relevant times, owners of Connell Trucking conducted company business from its Wendell, Idaho headquarters.

2. Connell Trucking formed in 2011. At all material times, Steve Connell, his wife, Kali Connell, and her parents, Joe and Donna Meyer, were members who owned the LLC. At the time of hearing, Mr. and Mrs. Meyer were no longer members.

3. In tax year 2013 Connell Trucking maintained business relationships with drivers. Nine were designated as W-2 employees on the company's form W-3 report of taxes withheld. Eight others, including Claimant, were designated as 1099 independent contractors on the company's form 1096. Three of these eight are legal entities and not natural persons. At hearing, Steve identified Claimant and one other driver—the name of Myron Diede appears among these eight—as independent contractors.

4. Steve himself suffered multiple injuries in a truck accident on October 17, 2012. Steve testified that he has ongoing memory issues still.

5. During Steve's extended recovery from his own truck accident, Joe and Donna handled much of the business of Connell Trucking. Kali usually performed many office functions, but was unavailable to the company throughout Claimant's association with it. She testified she was unavailable to the company beginning about April 2013. Despite her temporary absence from the business and her belief that her name may have been temporarily removed as managing member, Kali remained the official managing member at all times.

6. The Idaho Workers' Compensation insurance policy of Connell Trucking lapsed

in the Spring of 2013. It was not renewed until February 2014, after Claimant's accident was brought to the attention of the Commission.

7. Throughout all material dates, Connell Trucking had a written contract to provide rigs and drivers for Perry Brothers. The contract expressly identified Perry Brothers as "contractor" and Connell Trucking as "subcontractor."

8. Perry Brothers is a Wyoming corporation. Perry Brothers solicited customers needing transportation services and provided a dispatcher. Perry Brothers reached into Idaho to contact and contract with Connell Trucking, whose owners were in Idaho at all material times. Perry Brothers received 10% of the earnings of each load it dispatched to Connell Trucking. Perry Brothers would contact drivers for Connell Trucking directly to assign loads. Although this arrangement was nonexclusive—Perry Brothers contracted for transportation services with other companies, and Connell Trucking had contracts with other dispatch companies—Claimant and other drivers in North Dakota for Connell Trucking relied exclusively upon Perry Brothers to provide customers and dispatching services.

9. Pay was based upon "billable hours" for both independent contractors and employees of Connell Trucking. That is, trips involving specific customers were established on a schedule of expected hours required to pick-up and deliver loads. These hours were reflected as the "rate factor" on each bill of lading. Choice of route or whether a driver was faster or slower did not change his pay. Only loads actually delivered were counted. For example, on one occasion mechanical breakdown precluded Claimant from delivering a load. Perry Brothers dispatched another truck and driver to complete the route. Neither Connell Trucking nor Claimant was paid for miles or hours driven before the breakdown occurred.

The Initial Business Relationship

10. In October 2013 Claimant learned that Connell Trucking was seeking drivers via a Craigslist advertisement. Shortly afterward Claimant in a telephonic conversation discussed potential job duties and pay. Work was to be performed primarily in North Dakota but would also include other states.

11. Claimant testified that his initial telephonic conversation was with Steve, but equivocated on cross-examination. The telephone conversation apparently was with Joe. Steve has testified inconsistently about when he first had direct telephonic contact with Claimant and what was discussed.

12. Steve Connell testified that Claimant was paid $20.00 per billable hour. The record does not show the rate at which Connell Trucking's other alleged independent contractors were paid. Connell Trucking's employee drivers on North Dakota runs were paid in a range of $22.00 to $24.00 per billable hour. Employee Chad Jones, as lead driver, was paid in a range of $30.00 to $35.00 per billable hour with additional pay at a lower hourly rate for certain duties and errands related to his lead-driver status.

13. Steve testified that company hiring practices were sometimes shortcutted as Connell Trucking tried to fill the demand for drivers created by the oil-field economic boom in North Dakota.

14. The parties dispute whether Claimant was allowed to take uncompleted hiring paperwork—including a form 1099 or W-9 but not a form W-4—with him to North Dakota, upon Claimant's representation that he would fill it out and return it later, or whether Claimant first obtained a form W-4 and other hiring paperwork after he arrived in North Dakota.

15. Claimant admitted he considered and discussed with Connell Trucking

co-workers—at least with Chad Jones—the possibility of avoiding a child-support wage garnishment by working as an independent contractor. Claimant testified about an early December conversation with Chad Jones and a telephone conversation with Steve a few days afterward about this subject. Claimant denied that he asked Steve or any member of Connell Trucking to allow him to work in that capacity or asked for paperwork which if completed would make him an independent contractor.

The Course of the Business Dealings

Before the accident

16. The entirety of the business dealings between Claimant and Connell Trucking occurred in 2013. All dates pertain to that year unless explicitly shown otherwise.

17. The parties dispute whether trucks, trailers, and loads were available to Claimant between his arrival in North Dakota at the end of October and his first accepted run on November 10.

18. Claimant's first paid run occurred November 10. The rate factor allowed 11 hours of pay. It was identified on Claimant's settlement sheet for the period October 28-November 10.

19. Claimant's settlement sheet for the period November 11-November 24 claims 114 hours (although the "hours worked" column actually adds up to 116 hours).

20. Claimant's settlement sheet for the period beginning December 11 claims 42 hours for runs on December 11, 12, 13, and 14.

21. Claimant signed bills of lading for loads dated from November 10 through December 14. These reflect details of each load carried by Claimant for which he earned pay. The "letterhead" on each bill of lading identifies Perry Brothers Trucking. At the signature line

for each, Claimant replaced "**PERRY BROTHERS TRUCKING**" with "Connell Trucking" immediately above his own signature (capitals and boldface in originals).

22. A pay stub dated November 16 reports a check amount of $700.00. It does not identify the dates of service. It does not specify that any deductions were taken or for what purpose. Steve testified that this probably represented an advance draw on future pay. Claimant testified, "Donna was kind enough to compensate me for those two – almost two weeks, so I chose to stay."

23. The parties disputed whether Claimant provided Connell Trucking a completed W-4 form at any time. Claimant testified that he did so when he was in Idaho during the week including Thanksgiving. Claimant testified that he kept a duplicate copy for his own records, but that it disappeared along with his other paperwork and belongings from the cab of the wrecked truck. Steve denied that Connell Trucking ever received such a document.

24. Claimant's second check from Connell Trucking is dated November 29 in the amount of $1,887.13 Again the pay stub does not specify that any deductions were taken or for what purpose. It does have a handwritten notation of "1099" on it.

25. The two checks together represent the entire sum paid to the Claimant by Connell Trucking in 2013. One additional check in the amount of $421.62—presumably for work performed before the December 19 accident—issued January 24, 2014.

26. For all relevant SMS Gmail messages, phone number 208-421-2739 belonged to Chad Jones.

27. SMS Gmail messages dated November 27 between Claimant and Chad Jones suggest that Claimant believed he had claimed four exemptions, anticipated a $22.00-per-billable-hour rate of pay, and believed that substantial taxes had been withheld from his check.

These messages indicate Claimant was commenting on his check dated November 29. The dissonance of dates is unexplained by the record.

28. By SMS Gmail message on December 13 Claimant informed Donna he had custody of his "youngest 2" and asked her to "change my exemptions to 6."

29. Also by SMS Gmail message on December 13 Claimant stated to coworker Lance Calhoun, "I gotta few errands issues to take care if in Williston." (The texts and instant messages are replete with nonstandard abbreviations and typographical errors. No attempt is made to correct or call attention to individual ones.) Steve testified that Claimant was not authorized to take a company vehicle the 50 miles to Williston, but did so anyway.

30. Via SMS Gmail message on December 16 about 1:42 p.m. Steve instructed Claimant, "Give me a call when you get a chance." Steve testified that this shows he intended to terminate the business relationship with Claimant and did so in a telephone conversation later that evening.

31. On December 16 about 5:28 p.m. Donna provided Claimant the zip code for the company credit/debit card via SMS Gmail message.

32. On December 17 Claimant sent three text messages to Donna (incorrectly identified as "Donna Myers" on Claimant's cellphone). These identified Claimant's new cellphone number and explained purchases Claimant had made to the company credit or debit card. The tenor of these texts does not indicate Claimant was providing a final reconciliation of accounts or that the business relationship had terminated the previous evening.

33. The record does not show any text messages between Donna and Claimant between December 17 and 27, a week after the accident.

34. On the morning of December 19 Chad Jones exchanged a series of SMS

Gmail messages with Claimant about the load Claimant was taking to Evanston. This is apparently the load Claimant was carrying when the accident occurred.

35. The parties dispute whether Steve was aware on the morning of December 19 that Claimant was procuring a load to Evanston. Claimant testified that he had an actual telephone conversation with Steve then, that Claimant—despite being on a probationary status which prevented him from accepting such a long-distance run—was willing to drive to Texas if Steve would allow it, and that as a result of this telephone conversation Claimant's assignment was changed from a run to Texas to a run to Evanston, Wyoming. Steve denied any such contacts and testified that Connell Trucking is not authorized to provide transportation services in Texas as proof that Claimant had fabricated this testimony.

The Accident

36. On December 19 about 2:23 p.m. Claimant was involved in a one-vehicle accident while driving a truck owned by Connell Trucking. He ran a stop sign in Montana. The truck ended up in a field some distance from the intersection.

37. Claimant erroneously testified the accident occurred at a T intersection. The Montana Highway Patrol report shows an X intersection and that Claimant ran over the stop sign on the far side of the intersection. Claimant's testimony that he tried to slow to avoid a vehicle ahead but slid on ice is not corroborated by Montana Highway Patrol. A sheriff actually observed the accident but did not file a report of record.

38. On December 19 about 4:01 p.m. Claimant texted Steve and Chad to tell them he had wrecked. He reported he was unable to stop because of ice on the road.

39. The Montana Highway Patrol report states that Claimant ran a stop sign, drove too fast for conditions, and "DROVE IN DISTRACTED, INATTENTIVE OR CARELESS

MANNER". It reports that Claimant hit a stop sign and fence, and went over an embankment before coming to rest in a field. While photographs taken after the accident show some snow on the ground in the field where the truck came to rest, the report characterizes the road condition as "DRY".

After the Accident

40. On January 4, 2014 Claimant sent a SMS Gmail message to coworker Kent Green asking him to retrieve Claimant's clothes and specific other personal items "from the camper" at the Watford City lot where Connell Trucking employees bunked.

41. Connell Trucking prepared a form 1099-MISC for Claimant pertaining to tax year 2013. The amount of nonemployee compensation listed matches the sum of Claimant's two paychecks issued in 2013.

42. The purported signature of Joe Meyer does appear on Connell Trucking's Answer, which was offered at Claimant's exhibit 2 and admitted without objection. It shows that Joe alleged at the time that Claimant was a "1099 employee" with his own workers' compensation insurance. Although the Answer is undated, it was filed with the Commission on February 13, 2014.

DISCUSSION AND FURTHER FINDINGS

Credibility of Witnesses

43. The finding of facts in this matter is made more difficult because both of the major witnesses, Claimant and Steve Connell, do not make good first impressions for accuracy of memory. Both have provided testimony which was internally inconsistent on substantive matters, which inconsistencies give ground for impeachment of both.

Claimant's testimony

44. While Claimant by demeanor appeared more or less credible on direct

examination, his change of demeanor upon cross-examination was more marked than is customarily seen among forthright witnesses. He appeared deliberately evasive, to be taking pleasure in slipping away from questions rather than answering them. His demeanor became smug as he evaded and complicated cross-examination.

45. Claimant's testimony was irreconcilably inconsistent on a few material points. On a few other material points, his testimony—if accurate—would force other inherently improbable facts to be implied. Some examples are set forth below.

46. Claimant testified he claimed 3 exemptions on the W-4 he filled out. He testified to a specific circumstance why he chose to claim 3 exemptions. An SMS Gmail message shows he told Chad Jones he had claimed 4. When presented with the discrepancy he retreated from his original testimony as if it were unimportant.

47. Claimant testified that he discussed in his initial telephone conversation with Steve that he would be paid $23.50 per hour with a $20.00 per diem. His instant messaging communications, settlement sheets and bills of lading indicate Claimant was expecting to be paid $22.00 per hour. When computing average weekly wage, $1.50 per hour is not a *de minimus* exaggeration.

48. Claimant testified as if from detailed memory that his first telephonic conversation was with Steve and that Steve identified himself by name during that conversation. When presented with evidence of record that indicated this testimony was inaccurate, Claimant casually retreated from the original story as if he had not just testified under oath about contrary details.

49. Claimant testified that on two occasions early in the relationship he messaged photographs of his driver's license and social security card to Connell Trucking, one before and

one after he filled out a W-4. On cross-examination Claimant claimed not to know to whom at Connell Trucking he messaged the first set of photographs, but denied this set was sent to Steve. This undercuts Claimant's express testimony that his initial telephone conversation was with Steve and that Steve expressly identified himself by name. Claimant testified that from North Dakota he repeatedly submitted paperwork to Donna in Idaho regarding loads, purchase receipts, and other documentation, but his testimony and messages of record indicated that contact with her began well after he had submitted the first set of photographic documents.

50. His testimony is silent about why he did not also message a photograph of the completed W-4 with the alleged second submission of initial hiring documentation or at any subsequent submission of documents.

51. Claimant's testimony on cross-examination hedged and retreated from his own testimony on direct examination earlier in the hearing on several instances. He claimed not to know or not to remember facts about which, moments earlier, he had told a detailed version.

52. Even questions as simple as children and child-support obligations became an exercise in evasion. A text to Donna indicated he had obtained custody of his "youngest 2." But on cross-examination he testified that he has only two children. He denied having custody from 2012 to 2015, contradicting the contemporaneous text of 2013. He admitted he did not know how much child support he owed or was required to pay monthly. He alleged, "Child support was always between me and the child's mom." He admitted he did not pay child support, then implied he had been paying child support in November 2013 in this unknown, privately-worked-out amount. Although Claimant claimed prior self-employment he denied any knowledge of its effects upon child-support obligations or garnishments for non-payment.

53. Claimant testified that a Perry Brothers dispatcher almost always offered loads to Claimant via text messages. Upon cross-examination, Claimant was confronted with the dissonance between the absence of such texts and his assertion that he had produced all text and instant messaging documents. He blithely changed his testimony to assert that loads were assigned in person or by telephone.

Steve's testimony

54. Steve's demeanor was more credible on direct than Claimant's. However, he became argumentative on cross-examination and was frankly impeached upon a few material points of hearing testimony which were inconsistent with his deposition testimony.

55. Steve testified Claimant was paid $20.00 per hour and that Connell Trucking not only did not offer a per diem, Steve did not know what a "per diem" was. Being a trucker, Steve's claimed ignorance of per diem is inherently improbable.

56. From deposition to hearing, Steve has given irreconcilably inconsistent testimony about his early contacts with Claimant, when they occurred and what was said.

57. A substantial amount of Steve's testimony requires that one accept hearsay as truth—things Steve's father-in-law told him, things the Montana Sheriff told him, things Chad Jones or other employees told him, etc.—without a scrap of corroboration. Steve pointed to a single text message from himself to Claimant on December 16, essentially "call me when you can", as corroboration of a multitude of problems which prompted Steve to allegedly terminate Claimant's business relationship with Connell Trucking by telephone, allegedly on that date. On every other material point of uncorroborated hearsay, one would expect documentary records to have been generated contemporaneously in the usual course of business. Given Steve's irreconcilable inconsistencies of testimony between his deposition and the hearing, such

uncorroborated hearsay allegations receive no weight.

Kali's Testimony

58. By her demeanor, Kali's testimony appeared credible. Unfortunately, she was not available to the company when Claimant was actually employed.

59. Substantively, only the duration of Kali's unavailability is a point on which her testimony is of concern. She testified she had "a fairly minimal role" in the company in November 2013 but that in December she had returned to her role and had "took it completely back over." Yet, she also testified, "When [Claimant] sent out discovery before, it was when I was not part of the LLC and my name had been taken off. I didn't have access to any of the records. I didn't receive any of the correspondence." Claimant's first set of discovery requests was dated March 18, 2014. Connell Trucking's first response to that discovery was dated May 9, 2014.

60. As a result, Kali's testimony about what was usual for the company receives significant weight, but testimony about what actually occurred during Claimant's business relationship is necessarily hearsay.

Incomplete Record

61. Steve's version of events would have Claimant demanding to work only as an independent contractor to avoid child-support obligations and garnishment until the accident, whereupon Claimant then began to allege that he had been an employee. Claimant's version of events would have Claimant hired as an employee and Steve's recollection to the contrary arising only after the accident to avoid Connell Trucking's liability for workers' compensation. Each side is challenging the truthfulness of the other.

62. The facts of the matter are obscured by a lack of regular business paperwork

on the part of Connell Trucking which should have been made at the start of the business relationship before the accident; some of which was generated afterward. Claimant alleged that his business paperwork had disappeared from the cab of the truck after the accident. Steve alleged a business boom and family circumstances meant that some paperwork got shortcutted. Kali testified that Connell Trucking's relevant documentation had been destroyed in a flood occurring in the winter of 2016/2017. (Kali's testimony does not explain why these documents were not provided between the dates of discovery requests beginning March 2014 and this flood.)

63. Much of the testimony of record is hearsay. In the course of oral testimony at hearing Claimant recounted conversations which he had with various people. Connell Trucking objected to some of this hearsay, which was overruled on the limited basis that what would otherwise be hearsay was being allowed to show Claimant's recollection and was not being accepted for the truth of what some other person allegedly said. The findings and analysis herein have given no weight to any such alleged hearsay statements as true.

64. Additionally, the record is replete with documentary hearsay—statements in the form of text or other instant messaging—most of which entered the record without objection by any party despite the apparent absence of adequate foundation or recognized exception to the hearsay rule. By custom, upon hearsay objections to the admission of written statements of nonmedical witnesses, the Commission routinely has either (1) refused to admit them, or (2) admitted but expressly denied any weight to be assigned to them, unless and until the declarant has testified. Here, these highly abbreviated written statements via text and other instant messaging are of the same category of hearsay.

65. Even if a "business records" exception could be stretched to cover such

documentary hearsay, these texts and other messages arise with additional credibility issues. Claimant apparently has "cherry picked" these electronic communications to present an incomplete recitation of his business communications. For example, Claimant's exhibit 18 purports to be an instant message communication and response between Claimant and Steve. However, Steve's response set forth in Claimant's exhibit 18 omits the first half of Steve's actual response. Claimant's exhibit 9 represents one set of Connell Trucking's discovery responses. It shows that Steve's actual entire instant message response included a paragraph which recited Connell Trucking's accusations of malfeasance by Claimant. Exhibit 18 required active deletion of that paragraph by Claimant before offering that instant message conversation as evidence. One is faced with knowledge that the other text and messaging entries offered by Claimant cannot be relied upon as complete.

66. Another example of incompleteness appears in the absence of text messages between Perry Brothers' dispatcher and Claimant. Claimant testified that runs were offered by dispatchers "almost always through text messaging." None appears of record.

67. The record also lacks relevant, perhaps crucial, testimony from fact witnesses not called at hearing. Testimony from both Joe and Donna Meyer likely would have been helpful. The record does not show whether either of them was unavailable. Any party could have called them as witnesses. None did. No speculation or inference is assigned to the failure of any party to call either of these material witnesses.

68. Post-accident communications, documentation, and allegations are of little use where each side accuses the other of having changed its position and recollection of the facts after the accident.

69. In short, neither party has provided adequate, reliable documentation or testimony

which can reasonably be afforded significant weight. As a result, many of the findings of fact can only relate what was alleged or recorded. The Referee cannot affirmatively find it likely that the underlying fact asserted is accurate.

70. Moreover, both parties have testified essentially that no other documents or electronic communications are available. As this hearing was conducted on bifurcated issues, concern arises about resolution of reserved issues.

Accident

71. The provisions of the Worker's Compensation law are to be liberally construed in favor of the employee. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson,* 128 Idaho 87, 910 P.2d 759 (1996).

72. An "accident" is an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(18)(b).

73. The parties do not dispute that an accident occurred on December 19, 2013.

74. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996).

75. The element, "arising out of" is not in dispute. The business relationship was built around the expectation that Claimant would drive truck on behalf of Connell Trucking. Claimant was driving a Connell Trucking rig when the accident occurred.

76. The questions remain, first, whether the business relationship constituted

"employment," and second, whether Claimant was no longer "in the course of" employment because he had been fired just days earlier.

Employee Versus Independent Contractor

77. Idaho Workers' Compensation Law covers employees. Independent contractors are not covered unless an employer specifically includes them in its insurance policy. Idaho Code § 72-204. These are statutorily defined terms. Idaho Code § 72-102(12) and (17). A four-factor test is applied to determine this issue. *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985); *Ledesma v. Bergeson*, 99 Idaho 555, 585 P.2d 965 (1978). The parties acknowledge that four factors are as follows: 1. Exercise of the right to control the servant's work; 2. The method of payment; 3. Furnishing major items of equipment; and 4. The right to terminate the relationship at will.

78. The parties cite to *Moore v. Moore*, 152, Idaho 245, 269 P.3d 802 (2011) to support their arguments. This Referee presided over the hearings in that case and remembers it. The claimant in *Moore* was a son who had worked for his father's tire business as a child and young adult. By the time of the accident which gave rise to the claim, the son had established his own, independent, tire business. Nevertheless, father and son would sometimes combine to go on buying and selling trips. On the date of the accident, father's business was short an employee as a result of that employee's own workers' compensation accident. One issue in *Moore* was whether son had become an employee by replacing the injured employee or whether the work performed at the time of the accident was part of a joint venture of their respective businesses. The fact that son had his own business was a significant factor in determining that son was not an employee. By contrast, there is no suggestion of record that Claimant was contemporaneously operating an independent business beyond his relationship with

Connell Trucking. Also, Steve expressly denied Claimant the opportunity to drive for someone else during their business relationship. These are significant distinguishing points.

79. The terms of the business relationship between Claimant and Connell Trucking are vague at best. Ambiguity arises. Mutual misunderstanding may have occurred. Steve testified about what terms were usual for independent contractors versus employees of Connell Trucking. Unfortunately, the record does not confirm that these "usual terms" were communicated to Claimant. Steve has testified inconsistently about when he first had a telephone conversation with Claimant and about details of what was said. Moreover, it appears that Claimant's initial contact with the company—in which the terms and conditions of the relationship were discussed and agreed—was with Joe Meyer, not Steve Connell.

First test: exercise of right to control.

80. Claimant does not point to credible examples of Connell Trucking's exercise of its right to control Claimant as an employee. Claimant's suggestion that his routes were dictated to him is not well taken.

81. Choice of Routes. Claimant was paid by a rate factor. As a result, he could choose his routes. Barring uncontrollable events and within the laws and regulations pertinent to the industry, he alone would be responsible for where he drove and how long a trip took to complete. Discussions of record with Steve, Chad Jones, or others, do not show that his route was dictated by the company. However, the record does not show that workers admitted to be employees of Connell Trucking were treated differently than Claimant when it comes to choosing routes.

82. Choice of Trips. Steve testified that as an independent contractor Claimant was allowed to choose to accept or reject trips offered by the dispatcher. Employees were not

allowed to reject such trips. The parties dispute whether Claimant ever rejected an offered trip. However, Steve testified that excessive rejection of trips was one reason why Connell Trucking discontinued the business relationship.

83. Mechanic work. Claimant alleged he lacked a truck driver's usual mechanical knowledge and ability. The record is insufficient to find as fact whether it is likely that independent contractors who drive are more or less mechanical than employees who drive. It is insufficient to find as fact whether Connell Trucking had expectations or standards of mechanical ability which formed a basis for distinction between its independent contractors or employees.

84. Of limited interest in analyzing this factor is the presence of an instant message from lead driver Chad Jones to Claimant, chastising Claimant for leaving the North Dakota living quarters messy. While this item could be evidence of a supervisor controlling an employee, it might merely represent two guys temporarily living together with differing standards of cleanliness.

85. The record is insufficient to show it likely whether Connell Trucking exercised a greater right to control its employees generally than it exercised over Claimant.

86. Nevertheless, the testimony and documents of record offer slightly better support for the proposition that this factor likely tends to favor employee status.

Second test: method of payment

87. One inherent difference between independent contractors and employees in method of payment is the withholding of taxes. The first check stub indicating a $700.00 payment is well more than pay for the number of hours Claimant had driven or claimed on a settlement sheet before its date of issue. Thus, it probably represents payment for the

November 10 load which was paid at a rate factor of 11 hours, plus an advance draw against future pay as Claimant requested in a text message. The check stub itself does not show any taxes withheld. Kali testified that it would have so shown if taxes had been withheld. The second check stub is similarly silent about deductions, yet shows pay in an amount which does not reconcile to any whole-dollar-per-hour rate of pay. That is, $1887.35 cannot be divided by any reasonable set of hours claimed to show a reasonable rate of pay for those hours, given that both Steve and Claimant have represented that he was to be paid $20.00, $22.00, or $23.50 per hour. Indeed, according to an instant message to Chad Jones, a $22.00 figure likely squares with Claimant's express expectation of gross wage amount about $2,500.00—114 hours claimed on a settlement sheet at that rate would be $2,508.00—but whether the odd-dollars-and-cents figure on the check stub represented taxes withheld or deductions for Claimant's improper use of the company credit/debit card for personal use cannot be ascertained from the record. Claimant acknowledged in testimony that he "was required to ask permission before" he used the company credit/debit card for personal expenses.

88. Not dispositive of this factor is the rate of pay. Claimant's rate of pay was essentially the same as for employees. One might expect an independent contractor to demand more in order to pay his self-employment taxes and other costs of self-employment.

89. The handwritten "1099" notation on the check stub for the November 29 check likely was written by Donna. Whether that occurred before or after the accident and what prompted it are questions for which the record does not give likely answers.

90. Similarly, the basis upon which the company's accountant recorded Claimant as an independent contractor likely must have been communicated to him some time in 2014 and not before. The documents of record cannot receive greater weight than the hearsay

provided the accountant upon which he based his reports.

91. Nevertheless, on balance, the testimony and documents of record offer slightly better support for the proposition that this factor likely tends to favor independent contractor status.

Third test: furnishing major items of equipment.

92. Clearly, the tractor-trailer rigs that Claimant drove were provided by Connell Trucking.

93. Whether and to what extent a cellphone or a computer or both were required tools is indicated by their documented business use. The record does not suggest whether the rigs were supplied with a CB radio or other communication device. Claimant apparently was required to provide these at his own expense.

94. The record is insufficient to show it likely whether and to what extent miscellaneous tools for repair and maintenance were required or by whom they were provided.

95. The record is insufficient to show it likely whether and to what extent log books were the property of Claimant or Connell Trucking.

96. On balance, the fact that the major items of equipment, the tractors and trailers, were provided by Connell Trucking shows this factor favors employee status.

Fourth test: right to terminate at will.

97. Steve testified that he terminated the relationship for cause before the accident.

98. Claimant testified that Steve terminated the relationship while Claimant was in the ambulance after the accident.

99. The record is insufficient to show whether the parties considered or negotiated this factor beforehand. It is insufficient to productively analyze this factor.

Integrating the weight of these four factors

100. Connell Trucking worked with both independent contractors and with employees as drivers. The record of the dealings of the parties before the accident is disputed and unreliable on both sides. The fact that Claimant was driving a Connell Trucking rig, delivering product for which Connell Trucking would have received pay for transporting, on its face, supports an inference of employee status. Even if Steve's testimony that Claimant took the proper forms to become an independent contractor with him to North Dakota is accepted, there is no evidence that Claimant actually filled them out. The unverified "1099" notation on a check stub is insufficient to shift the balance.

101. The record of the dealings of the parties after the accident, although disputed, favors independent contractor status. However, these documents are the result of Connell Trucking exclusively providing information to its accountant.

102. By the slimmest of margins, upon this record, it is likely that Claimant was an employee and not an independent contractor of Connell Trucking.

Whether Claimant's Employment Terminated Before the Accident

103. In deposition, Steve testified that he terminated the business relationship between the company and Claimant by telephone on December 16, 2013; that Claimant's refusal to take loads offered by a dispatcher was a major reason for termination; that Claimant asked Steve to arrange a ride back to Idaho; that Steve agreed to do so when it was convenient; that in the meantime, he allowed Claimant to continue to bunk at the company's Watford City, North Dakota yard.

104. In deposition, Steve testified he telephoned Perry Brothers that same evening to remove Claimant's name as an authorized driver.

105. Claimant testified that Steve fired him when Claimant was in the ambulance after the accident.

106. No documentation of record unambiguously shows that Steve or any Connell Trucking representative fired Claimant before the accident.

107. Although Steve points to one ambiguous text to suggest it shows he intended to terminate Claimant's relationship on December 16, instant messaging between Claimant and Donna on December 17 and between Claimant and Chad Jones on December 19 shows supervisors of Connell Trucking were not aware Claimant's services had been terminated. It is inherently improbable that Perry Brothers received, then ignored or otherwise failed to communicate to its dispatcher, such information.

108. At the time of the accident Claimant was driving a Connell Trucking rig, providing transportation service for product of a Perry Brothers' customer, for which Connell Trucking would presumably have been paid but for the intervening accident. The work was being performed by Claimant for the benefit of Connell Trucking.

109. The record does not show it likely that Claimant's employment had been terminated before the accident.

Course and scope

110. Connell Trucking asserts that Claimant was outside the course and scope of the business relationship because Claimant was driving distracted.

111. The Idaho workers' compensation system is a no-fault system. Employer's argument that Claimant, driving distracted, was outside the course and scope of employment is not well taken.

Perry Brothers: Jurisdiction

112. Perry Brothers Answered Claimant's Complaint without alleging a jurisdictional defect. Only upon its Amended Answer did it include lack of jurisdiction as a defense among its other defenses. Thus, Perry Brothers made a general appearance and not a limited appearance for the purpose of denying that the Commission has jurisdiction.

113. In *Smith v O/P Transportation, Inc.*, 120 Idaho 123, 814 P.2d 23, (1991) an Oregon surety insured an Oregon trucking company. The Oregon trucking company contracted with an Idaho trucking company which hired an Idaho employee to provide service under the contract. In its initial decision on the case, the Idaho Supreme Court held that the Commission has subject matter jurisdiction to decide whether the Oregon surety was liable where the Oregon trucking company was deemed the statutory employer of the injured Idaho employee. The case was remanded to the Commission for further proceedings.

114. The workers compensation liability of O/P Transportation, Inc., was insured pursuant to a policy issued by EBI. Prior to the accident giving rise to Smith's claim, EBI cancelled its policy with O/P Transportation. The cancellation was timely made under Oregon law, but notice of cancellation was not given within 60 days prior to the date of cancellation, as required by Idaho law. On remand, the Industrial Commission ruled that the EBI policy was issued only to insure O/P Transportation workers' compensation liability in Oregon, and therefore, Idaho's requirement concerning notice of cancellation could not be applied. Therefore, even though O/P Transportation was appropriately identified as Claimant's statutory employer, because Claimant's injury did not occur until after EBI cancelled its policy of insurance, EBI had no liability to Claimant.

115. On appeal from this decision, the Court reviewed the provisions of the EBI policy, and found that pursuant to the "other states endorsement" language of the policy, coverage under the policy was extended to operations conducted in certain other states, including Idaho. Construing the policy in a light most favorable to the insured, the Court concluded that the policy provided coverage for O/P Transportation's out-of-state operations in Idaho. Therefore, in order to properly cancel a policy ensuring liability arising under the Idaho workers' compensation law, EBI was required to give 60 days notice of cancellation, which it failed to do. Therefore, the EBI policy was in effect at the time of Claimant's accident, and EBI, as the insurer for O/P Transportation, the statutory employer, was required to provide coverage under Idaho law.

116. In this case, as in *Smith*, we conclude that Perry Brothers is Claimant's statutory employer pursuant to provisions of Idaho Code § 72-216(1). That sections states:

> "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."

Perry Brothers entered into a contract with Connell Trucking pursuant to which Connell Trucking, as an independent contractor, agreed to provide trucking services to Perry Brothers. (*See*, Claimant's Exhibit 13). Connell Trucking was not insured for its workers' compensation risks pursuant to Idaho law. Therefore, pursuant to Idaho Code § 72-216(1), Perry Brothers is Claimant's statutory employer liable for the payment of workers' compensation benefits. Pursuant to Idaho Code § 72-216(2), Connell Trucking also remains liable for the payment of workers' compensation benefits, but Claimant shall not recover compensation from both Perry

Brothers and Connell. Pursuant to Idaho Code § 72-216(3) where Perry Brothers pays workers' compensation benefits to Claimant, it has a right of subrogation in this amount against Connell Trucking, Claimant's direct employer.

117. Unlike *Smith*, the record does not disclose whether Perry Brothers had a policy of workers' compensation insurance at the time of the subject accident, and if so, whether that policy afforded coverage in the state of Idaho. Therefore, on the basis of the record before us, we are unable to do anything more than conclude that Perry Brothers is Claimant's statutory employer, and responsible for the payment of workers' compensation benefits to Claimant pursuant to the provisions of Idaho Code § 72-216.

118. A question arose about federal preemption in bankruptcy during the course of discovery. While the record appears to show that Nora Hoffman entered into a personal bankruptcy, there is no material evidence of record to show that Perry Brothers Trucking, Inc. would be entitled to an automatic stay of proceedings.

CONCLUSIONS OF LAW

1. Claimant was an employee of Connell Trucking within the course and scope of his employment at the time of the industrial accident;

2. Connell Trucking was a subcontractor of Perry Brothers Trucking, Inc. throughout the course of Claimant's employment by Connell Trucking;

3. Perry Brothers Trucking, Inc. is subject to the jurisdiction of the Idaho Industrial Commission;

4. Connell Trucking not having a valid policy of workers' compensation at the time of the industrial accident, Perry Brothers is the statutory employer of Claimant liable for benefits due him under the Idaho Workers' Compensation Law.

RECOMMENDATION

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

DATED this 25TH day of OCTOBER, 2017.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:
/S/_____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of DECEMBER, 2017, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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