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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

BURDICK

JOSEPH JERRY MARAVILLA,
Claimant/Respondent/Cross Appellant,

v.

J.R. SIMPLOT COMPANY,
Defendant/Appellant/ Cross Respondent

SUPREME COURT NO. 43538

AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

43538

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REPORTER'S TRANSCRIPTS:

No hearing was held. The case was submitted through the Petition, affidavits and responses.

Claimant's Exhibits:

Submitted with Petition and included as part of the Record

- A. 2011 Simplot/Idaho Industrial contract
- B. Excerpts from the Deposition of John Oborn, taken October 11, 2013
- C. Health and Safety Plan "HASP"
- D. Excerpts from the Deposition of Joseph Maravilla, taken July 11, 2013
- E. Report of Dr. Tara Henrickson
- F. Excerpts from the Deposition of Robert Lewis, taken October 10, 2013

Submitted with Affidavit of Joseph Maravilla and included as part of the Record

- A. Picture of platform from grating
- A1, A2, A3 Pictures of grating and handrails

Defendants' Exhibits:

Submitted with Second Memorandum in Reply to Motion for Declaratory Relief and included as part of the Record

- A. Complaint filed by Maravilla against Idaho Industrial Contractors
- B. Settlement agreement between Maravilla and Idaho Industrial Contractors
- C. Order dismissing the Idaho Industrial Contractors case with prejudice

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant,

vs.

J.R. SIMPLOT COMPANY,

Self-Insured Employer, Defendant.

I.C. No. 2011-025160

**PETITION FOR
DECLARATORY RULING**

INDUSTRIAL COMMISSION

MAY - 1 2015

FILED

The Claimant, JOSEPH JERRY MARAVILLA, pursuant to Rule 15 of the Judicial Rules of Practice and Procedure for the Idaho Industrial Commission, hereby petitions the Commission for a declaratory ruling regarding the issues set forth below.

A. INTRODUCTION

This is a significant case of first impression. The Industrial Commission has never ruled on the enforceability of a surety's or self-insured's subrogated claim to the proceeds of a third-party settlement, where the claimant has proven the employer was concurrently negligent. The prior Idaho case law focused on the credit the concurrent third-party tortfeasor should receive on the judgment for workers compensation benefits previously paid. However, the Idaho Supreme Court has provided guidance through dicta that clearly indicates that a surety loses its subrogated

claim if the employer is negligent (“employer negligence rule”). The Maravilla case now gives the Commission the opportunity to provide additional guidance in the area of employer negligence.

As this case is resolved, Maravilla urges the Commission to consider that the cases relevant to these issues were decided by the Court 30-plus years ago. Since then, tort reform legislation has burdened injured parties with a number of new obstacles to overcome in pursuing a complete recovery in third party claims. Injured parties rarely recover their complete damages in these claims. There is no lawsuit lottery or jackpot justice in America today. This requires the Commission to take a fresh look at these older cases as it builds the legal framework supporting the employer negligence rule to ensure that Idaho workers are fully protected.

In this Petition Maravilla requests that the Commission establish the legal framework to support the employer negligence rule so the parties will be able to identify and present relevant evidence at the hearing on the merits.

B. ISSUES

- × 1. Whether the Industrial Commission has jurisdiction to determine the percentages of fault assignable to employer, Idaho Industrial and Claimant in causing Claimant’s injuries.
2. Whether employer is required to pay a proportionate share of the costs and attorney’s fees incurred by claimant in connection with obtaining the third party settlement under Idaho Code § 72-223(4).
3. Whether claimant is entitled to attorney fees under Idaho Code §§ 72-804 or 12-121 .
- × 4. Whether Employer’s negligence impacts its right to be subrogated to the third party recovery under Idaho Code § 72-223.

C. FACTS

1. Simplot contracted with Idaho Industrial to undertake repairs on a sulfuric acid pad.¹

2. A Health and Safety Plan (“HASP”) was entered into between Simplot and Idaho Industrial so that each would understand the hazards that went with the project.² However, Simplot remained responsible for the safety of all projects.³

3. The HASP did not indicate that a temporary hose would be used to suction acid spills off the pad nor did it identify the hazards of potential overflows due to power outages.⁴

4. Joseph Maravilla worked as a supervisor for Simplot at the time of the accident and was a good employee.⁵ John Oborn was his direct supervisor.⁶

5. During the time period when Maravilla was a production supervisor, he became familiar with the sulfuric acid 300 plant.⁷

6. Prior to the accident, a platform existed in the corner of the sulfuric acid 300 pad this was constructed from grating, as shown in photos.⁸

7. This grating/platform was protected by a guard rail which led from the walkway, and completely surrounded the platform. The three photographs showing similar grating and handrails are attached to [Maravilla’s] Affidavit as Exhibits A.1, A.2, and A.3.⁹

8. Pursuant to its contract with Simplot, Idaho Industrial agreed to remove the two

¹ See 2011 Simplot/Idaho Industrial Contract (“Contract”).

² Oborn Dep. at p. 20; See HASP.

³ Oborn Dep. at p. 21.

⁴ See HASP.

⁵ See Maravilla Dep. at p. 7. Oborn Dep. at p. 60.

⁶ See Maravilla Dep. at p. 7; Oborn Dep. at p. 14.

⁷ See Maravilla Dep. at p. 10.

⁸ See Maravilla Affidavit.

⁹ See Maravilla Affidavit.

existing stair landings in the containment area where the accident occurred.¹⁰

9. To remove the occasional liquids when Idaho Industrial was not on site, Simplot employees opened a wired-shut point of ingress and placed a hose across the walkway to pump off the water/acid mix to a nearby AMMSOX pump.¹¹

10. The accident occurred on a Sunday evening.¹²

11. Between the time Idaho Industrial left the site on Saturday and the time of the accident, a rain event caused a power surge which led to buildup of water and acid in the acid pad.¹³

12. Oborn had actually observed the hose at the beginning of his shift prior to the accident, but had not removed it.¹⁴

13. Maravilla tripped over the Simplot hose and his foot went through the plastic barrier erected by Idaho Industrial.¹⁵

14. The sulfuric acid contacted Maravilla's right boot and approximately six inches of his leg causing severe burns which later required skin grafts and surgery.¹⁶

15. Maravilla was not given a safety violation for this incident as he did nothing wrong.¹⁷

16. Simplot had not placed any barricades around the open pad prior to the accident.¹⁸

17. Dr. Tara Henricksen has a Ph.D. in chemical engineering and is a certified Fire

¹⁰ 2011 Simplot Idaho Industrial Contract ("*Contract*") attached as Exhibit 1 to the Affidavit of Robert L. Lewis, 300 Sulfuric Main Acid Tank Pad Replacement Addendum No. 1, p. 5 of 5, I. Additional Specifications C., (IIC 00107)

¹¹ Oborn Dep. at pp. 33-34, 65; Cox Dep. at pp. 23-24.

¹² Maravilla Dep. at p. 9.

¹³ Maravilla Dep. at p. 19; Oborn Dep. at pp. 43-44; Lewis Dep. at pp. 35-36.

¹⁴ Oborn Dep. at p. 29.

¹⁵ Maravilla Dep. at pp. 22-23; Oborn Dep. at pp. 26-28.

¹⁶ Maravilla Dep. at p. 27, 32-34, 41.

¹⁷ Oborn Dep. at pp. 39, 47, 60.

¹⁸ Oborn Dep. at p. 56; Maravilla Affidavit.

and Explosion Investigator with extensive evaluation and analysis of chemical processes and accidental chemical releases.¹⁹

18. Dr. Henricksen has indicated that Simplot management should have removed the possibility of a sulfuric acid overflow onto the construction/containment area by diverting it. This would have eliminated the hazard.²⁰

19. In addition, the HASP did not identify the hazard even though Simplot clearly knew about it as evidenced by the yellow hose's presence.²¹

20. After the power outage, Simplot management was aware that there was likely sulfuric acid in the Sump area as well as the containment pad, but did not increase personal protection equipment controls or warn anyone of the elevated risk of sulfuric acid burns.²²

21. At the time of the accident, Simplot management knew or should have known the following:

- a. The power had gone out resulting in the shutdown of the 300 Sulfuric plant.²³
- b. When the power goes out, the pump stops working and sulfuric acid backs up.²⁴
- c. The area where the pump was on the 300 Sulfuric plant had recently undergone construction.²⁵
- d. Due to the shutdown, sulfuric acid had spilled onto the pad.²⁶
- e. There was a temporary sump pump in place with a small yellow hose to remove acid from the sump containment area.²⁷

¹⁹ See Henricksen Report and CV attached to the Affidavit of Patrick N. George.

²⁰ See Henricksen Report at p. 5.

²¹ See Henricksen Report at p. 5.

²² See Henricksen Report at p. 5.

²³ See Henricksen Report at p. 6.

²⁴ See Henricksen Report at p. 6.

²⁵ See Henricksen Report at p. 6.

²⁶ See Henricksen Report at p. 6.

²⁷ See Henricksen Report at p. 6.

22. Dr. Henricksen stated:

- a. If management at Simplot had used appropriate hazard control methods during the construction, this incident would not have occurred.²⁸
- b. If management at Simplot had removed the obvious tripping hazard caused by the yellow hose, this incident would not have occurred.²⁹
- c. Had management at Simplot warned Maravilla to increase personal protection equipment including rubber boots, the risk of injury would have been reduced.³⁰

23. Simplot's admitted negligence did serious damage to Maravilla's third party claim against Idaho Industrial. This admitted negligence by Simplot forced Maravilla into accepting a nuisance value settlement of \$75,000.³¹

D. ARGUMENT

Simplot failed to lock out the sulfuric acid that threatened to discharge into a woefully inadequate sump and onto a containment pad that was under construction. Simplot placed a small, yellow hose across a walkway without a warning or barricade. When the power went out, Simplot was unprepared and sent Maravilla to check on a pad without any increased personal protection equipment ("PPE"). One could almost predict that an accident would occur given Simplot's lack of preparation.

The accident did occur. Maravilla walked down a narrow walkway, tripped over the hose, and when he attempted to arrest his fall, his right foot went into approximately six inches of sulfuric acid. The injuries resulting from the severe chemical burns are permanent.

²⁸ See Henricksen Report at p. 7.

²⁹ See Henricksen Report at p. 7.

³⁰ See Henricksen Report at p. 8.

³¹ See Maravilla Affidavit.

Simplot disputes the Industrial Commission's jurisdiction to determine percentages of fault between Idaho Industrial, Simplot, and Maravilla. Without any evidence, Simplot takes the unsupportable position that the fees and costs incurred in generating a small \$75,000.00 settlement with Idaho Industrial must be awarded to them even though they stood idly by during the entire Idaho Industrial lawsuit. Simplot claims that it should receive all of the \$75,000.00 settlement with Idaho Industrial in spite of not participating in the lawsuit and in spite of Simplot's own negligence in causing the accident. Maravilla requests attorney fees and costs.

1. The Industrial Commission Has Exclusive Jurisdiction To Determine Percentages Of Fault Assignable To The Employer, Idaho Industrial, And The Claimant For Claimant's Injuries.

The Industrial Commission has exclusive jurisdiction to determine percentages of fault assignable to Simplot, Idaho Industrial, and Maravilla in causing Maravilla's injuries. The applicable statute provides that "all questions arising under this law . . . shall be determined by the commission." *Idaho Code* § 72-707. The only exceptions to this general rule are where the legislature has specifically provided for one. *Id.* There is no exception carved out of this expansive grant for cases where fault needs to be determined.

Furthermore, the Industrial Commission has broad authority over all civil actions as they touch and concern personal injuries. *Idaho Code* § 72-201; *Brannon v. Pike*, 112 Idaho 938 (1987). This jurisdiction has been described as a "uniquely broad grant of original and exclusive jurisdiction over worker's compensation matters." *Id.* at 940. In another case, the Idaho Supreme Court noted that *Idaho Code* § 72-707 gave the Industrial Commission exclusive jurisdiction of all questions arising under worker's compensation law and this included subrogation. *Idaho State Ins. Fund by & ex rel. Forney v. Turner*, 130 Idaho 190, 191 (1997). Finally, the Idaho Supreme Court has specifically stated that the Industrial Commission has "exclusive jurisdiction to

determine the subrogation rights of the SIF where a worker also recovers from a third party.” *Van Tine v. Idaho State Insurance Fund*, 126 Idaho 688, 690 (1994); *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 519 (2011).

Although Simplot attempts to create an issue here, there is none. Based upon existing case law, one must agree that subrogation is exclusively within the Commission’s authority. Once that conclusion is drawn, it cannot be credibly argued that the tool to reach a conclusion on subrogation, i.e. the fault of the parties, is outside the Commission’s jurisdiction. This is especially true where fault **was not** determined in the third party action. Where would the percentage of fault be decided? What tribunal would consider it? Certainly every injured worker cannot be required to litigate third party claims to conclusion before moving their worker’s compensation case forward. Not only would this result in untimely and slow claims, but it would thwart the public policy favoring the settlement of litigation. *Hill v. American Family Mut. Ins. Co.*, 150 Idaho 619, 627 (2011).

Maravilla respectfully requests that the Commission determine it has jurisdiction to determine percentages of fault. No other tribunal exists to do so and this is clearly an issue that arises under Worker’s Compensation law. Furthermore, this issue has never been excluded by the legislature.

2. Idaho Law Has Long Required Simplot To Pay Its Share Of The Costs And Attorney Fees Incurred To Obtain The Idaho Industrial Settlement.

Since Simplot was negligent in causing this accident, it has already lost 100% of its subrogated claim in this case. However, even if not negligent, Simplot is required to pay its portion of the fees and costs necessary to generate the third party claim. For some baffling reason, Simplot withholds its consent to this simple issue, making it necessary to discuss.

Idaho Code § 72-223(4) requires Simplot to allow the payment of fees and costs incurred by Maravilla in the third party case:

(4) Unless otherwise agreed, upon any recovery by the employee against the third party, the employer shall pay or have deducted from its subrogated portion thereof, a proportionate share of the costs and attorney's fees incurred by the employee in obtaining such recovery.

Simplot has objected to Maravilla paying the attorney's fees and costs in the third party case. Simplot alleges Maravilla took positions in the third party case adverse to Simplot, without any evidence or even logic upon which to base the allegation. Maravilla requests that the Commission should enter an Order allowing him to pay the fees and costs incurred in the third party claim.

3. Simplot should pay attorney fees for its refusal to allow the payment of attorney fees and costs on the settlement with Idaho Industrial pursuant to Idaho Code §§ 12-121 or 72-804.

Although counsel generally refrains from making requests for attorney fees based upon I.C. §§ 12-121 or 72-804, it is necessary here. Idaho Code § 12-121 allows a party to seek attorney fees when that party prevails. Fees are appropriate where the tribunal is left with the belief that the defense was unreasonable or without foundation. *Needs v. State*, 118 Idaho 207, 209 (Ct App. 1990).

The refusal to allow payment of fees and costs is frivolous. There is no legal or factual argument to support it; nor is there any evidence upon which to rely for such a position. Yet Simplot continues to press the position. Attorney fees should be granted on this issue.

Maravilla submits attorney fees could also be awarded under I.C. § 7-804 based upon Simplot's unreasonable position refusing to allow these attorney fees and costs to be paid by Maravilla.

4. Simplot has lost 100% of its subrogated claim to the proceeds received from Idaho Industrial because Simplot was negligent.

Simplot's negligence caused Maravilla's injury. Indeed, if Simplot had acted reasonably, the accident would never have occurred. Of course, Simplot will argue it has lost none of its subrogated claim. Simplot may even go so far as to claim the full \$75,000 since its subrogated claim exceeds that amount. However, since Simplot's negligence injured Maravilla's leg, it has lost its entire subrogated claim. Simplot should be paid nothing out of the \$75,000.00 in proceeds from the third party claim.

The Idaho Supreme Court has held under joint and several liability, third-party tortfeasors are entitled to a credit for worker's compensation benefits paid. *Tucker v. Union Oil Company of California*, 100 Idaho 590, 604 (1979). However, the Court has never directly ruled on the ultimate issue presented by the facts of this case. This is a case of first impression that will have a dramatic and real impact on the lives of injured workers, sureties and self insureds throughout the state of Idaho. In this Petition, Maravilla is requesting the Commission establish the legal framework to support the employer negligence rule so the parties will be able to identify and present the relevant evidence at the hearing on the merits.

Maravilla submits this legal framework should only require him to prove Simplot was negligent at any level for Simplot to lose 100% of its subrogated claim. This issue need not be decided by complicated formulas and numerous expert witnesses. When the employer has been negligent, it loses its subrogation claim.

a. When An Employer Is Negligent, Either The Self Insured Employer Or Its Surety Loses 100% Of The Subrogated Claim

Idaho case law limits a surety's or self insured's right of reimbursement or subrogated claim when the employer is found to be negligent. The Court has consistently held when an

employer's negligence, together with the negligence of a third-party tortfeasor, concurrently contributed to the injury of an employee, the surety loses 100% of its subrogated claim. *Tucker v. Union Oil Company of California*, 100 Idaho 590, 603 (1979). *Runcorn v. Shearer Lumber Products, Inc.* 107 Idaho 389,395 (1984); *Izaguirre v. R&L Carriers Shared Servs., LLC*, 155 Idaho 229, 235 (2013).

When the employer negligence rule was initially adopted, the Idaho Supreme Court cited with approval the California Supreme Court's decision of *Witt v. Jackson*, 366 P.2d 641 (1961):

When the employee or his estate has been satisfied, and employer seeks to recover the amount paid by him, from such third party, **his hands ought not to have the blood of the dead or injured workman upon them**, when he thus invokes the impartial powers and process of the law.

Liberty Mutual Insurance Company v. Adams, 91 Idaho 151, 156 (1966) (Emphasis added)

The Court continues to follow this rule. In *Schneider v. Farmers Merchant*, 106 Idaho 241, 243 (1983) the Court stated, "The reimbursement of workmen's compensation benefits to a negligent employer has been denied largely because it is contrary to the policy of the law for an employer (or its insurer) to profit from his own wrong" In *Runcorn v. Shearer Lumber Products, Inc.*, 107 Idaho 389, 395 (1984), the Court stated, "Our case law...has held that the insurer of an employer who is jointly negligent with the third-party is not allowed the statutory subrogation rights or reimbursement for workers compensation benefits paid to the injured employee." It is clear that so long as the claimant can show his employer "is jointly negligent with the third-party" the surety or self-insured employer loses 100% of their subrogated claim.

In *Izaguirre v. R&L Carriers Shared Servs., LLC*, 155 Idaho 229, (2013) the Court cited to these older cases and stated:

In those situations where the employer is not negligent, the employer is entitled to subrogate to the employee's recovery against a third party, and thus obtain a reimbursement of the workmen's compensation benefits he paid.

Conversely, in those situations where the **employer is negligent, the employer is denied this reimbursement**, and the third party is entitled to a credit against his judgment in the amount of the workmen's compensation benefits the employer paid.

Izaguirre v. R&L Carriers Shared Servs., LLC, 155 Idaho 229, 235 (2013)(Emphasis added)

Maravilla submits Simplot has admitted negligence through its employee, John Oborn. (See paragraphs 15 to 22 of the "Facts") Maravilla believes Simplot admitted negligence has caused a loss 100% of its subrogated claim.

b. No Double Recovery

It is anticipated that Simplot will argue the adoption of an "employer negligence rule" would result in a double recovery for the claimant. Maravilla acknowledges both the *Tucker* Court and the *Runcorn* Court states the policy that the injured employee may not be allowed a "double recovery." *Id.* at 604; *Id.* at 396.

Maravilla concedes that if a claimant obtains a settlement or verdict equal to 100% of his damages in the third-party claim, that claimant should have to pay the surety or self-insured subrogated claim out of the proceeds. *Izaguirre* 155 Idaho 229,235 (2013). These are the rare cases.

Accidents in these cases are always complicated situations with multiple people and factors involved. Claimants often take substantial reductions in their recoveries in these third party cases because of their employers' negligence (which are easy to take shots at since they are always the empty chair) or their own comparative fault. Indeed, it is the trial strategy of a third party Defendant to put as much fault as possible to the employer, who is not present. This results in less negligence being attributed to Defendant. The worker is then required to defend the

Employer and himself from comparative fault allegations in order to recover the full amount of his injuries. Adopting an “employer negligence rule” would rarely result in a double recovery.

If the Commission is concerned about double recovery, it could adopt a safety valve rule. This rule would require that the surety or self-insured employer lose 100% of their subrogated claim if the employer is negligent, **unless** a **combination** of the settlement or verdict from the third party case and the workers compensation benefits, is greater than 100% of the damages in the third party claim. In this situation, the surety or self-insured employer’s subrogated claim could be paid from the amounts over and above 100% of claimant’s damages. Adopting such a safety valve rule would insure that the claimant would never make a double recovery.

Following is a helpful example:

1. Tort damages of \$1,000,000.
2. The surety has paid \$100,000 in medical benefits and \$200,000 in disability benefits for a total subrogated claim of \$300,000.
3. The negligence calculates as follows:
 - a. Third party tortfeasor 80%
 - b. Employer 10%
 - c. Injured employee 10%

Under the no double recovery rule, claimant would be paid \$800,000 from the third party. This amount, combined with the \$300,000 in workers compensation benefits would calculate to \$1,100,000. This would result in a total recovery of \$100,000 over and above the claimant’s damages. Under the no double recovery rule, the claimant would be required to pay the surety \$66,667.00 (\$100,000.00 – \$33,333.00 for fees) for its subrogated claim out of the \$800,000

received from the third party because this would be the net owed to the surety after fees and costs were paid. No double recovery.

c. Many Inequities Are Now On The Shoulders Of The Claimants

The *Tucker* Court carefully analyzed upon whose shoulders the **inequities** of a given scheme would land as they formulated the legal framework on the credit to be given to third party defendants for workers compensation benefits paid. *Id.* at 602. The Court worked through the practical impact of the rules they were establishing.

Maravilla urges the Commission to be very cautious as it establishes the legal framework and rules for these types of cases and to work through examples of how a particular scheme would play out to carefully analyze upon whose shoulders the inequities would land. These third party cases often involve serious injuries and large damages. Subrogated claims of hundreds of thousands of dollars are not uncommon. The actual impact of the Commission's decision will have serious implications on these severely injured people and their families.

Joint and several liability was largely abolished in 1987 by the adoption of Idaho Code § 6-803(3). All of the Idaho Supreme Court cases approving the "employer negligence rule" were issued prior to 1987. Under joint and several liability, if the employer was concurrently negligent, the injured worker could collect 100% of his tort damages from the negligent third party, subject only to a credit for the workers compensation benefits paid by the surety and a deduction for the injured worker's own negligence.

Effective with the abolishment of joint and several liability in 1987, the injured worker can only collect the third-party tortfeasor's proportionate share of the liability. The injured worker can no longer collect that portion of his damages, which represents the difference

between the amount ~~the~~ for which the negligent employer would be responsible under tort and the actual workers compensation benefits received.

For example, in *Tucker* the injured worker was able to collect the difference between the workers compensation benefits and his negligent employer's proportionate share of the tort damages, from the third party tortfeasor, under joint and several liability. Therefore, Tucker's total recovery calculated as follows:

1.	Total damages for Tucker and his wife	\$362,000.00
2.	Less 10% reduction for Tucker's negligence	- \$36,200.00
3.	Less workers compensation benefits paid	<u>- \$16,916.50</u>
4.	Net recovery to the Tuckers from third-party tortfeasor	<u>\$308,883.50</u>

Adding the worker compensation benefits received to the tort recovery, the Tuckers' were able to collect a total of \$325,800. The surety lost its subrogated claim so Tucker did not have to reimburse the surety.

Today, the Tuckers, under several liability, would receive much less:

1.	Total damages for Tucker and his wife	\$362,000.00
2.	Less employer's negligence of 30% (for Tucker's damages only of \$350,000)	-\$105,000.00
3.	Less Tucker's negligence of 10%	<u>-\$36,200.00</u>
4.	Net recovery to the Tuckers from third-party tortfeasor	<u>\$220,800.00</u>

Therefore, under several liability, the Tuckers would now only be able to collect \$220,800.00 in tort recovery and \$16,916.50 in workers compensation benefits, for a total of \$237,916.50. Under several liability, this is a loss of \$88,083.50 if their claim were litigated

today. The injured worker has had this additional **inequity** placed on his or her shoulders by the Idaho Legislature as a result of tort reform.

Maravilla requests that the Commission take this into consideration as it decides upon whose shoulders to place additional burdens. Maravilla urges the Commission to take a fresh look at cases like *Tucker* and *Runcorn* in light of the practical burdens placed on the shoulders of claimants after tort reform. Claimants should not have to shoulder all the inequities. These cases support the Commission holding that self insureds and sureties must lose their subrogation claims if they or their employers are found to be negligent.

CONCLUSION

There can be no difference of opinion on whether Simplot's conduct was negligent. Its own employee has admitted fault. Of course, the parties cannot agree on what impact this negligent conduct by Simplot would have on its subrogated claim. Maravilla respectfully submits that Simplot's negligence eliminates its subrogated claim.

Maravilla urges the Commission to find the following:

1. The Commission has the exclusive jurisdiction to determine the extent of Simplot's subrogated claim.
2. The Commission has the exclusive jurisdiction to order the payment of the attorney fees and costs on the settlement with Idaho Industrial because Maravilla's counsel has a statutory right to the payment of these fees and costs under Idaho Code § 72-223(4).
3. The Commission should order the payment of the attorney fees and costs on the settlement with Idaho Industrial because Maravilla's counsel has a statutory right to the payment of these fees and costs under Idaho Code § 72-223(4).

4. Simplot should have to pay attorney fees pursuant to Idaho Code §§ 72-804 or 12-121 for its unreasonable refusal to allow the payment of the attorney fees and costs on the settlement with Idaho Industrial.

5. So long as Maravilla can prove at a hearing that Simplot was negligent and concurrently contributed to the injury to his leg, Simplot loses 100% of its subrogated claim.

DATED this 29 day of April, 2015.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 

FRED J. LEWIS

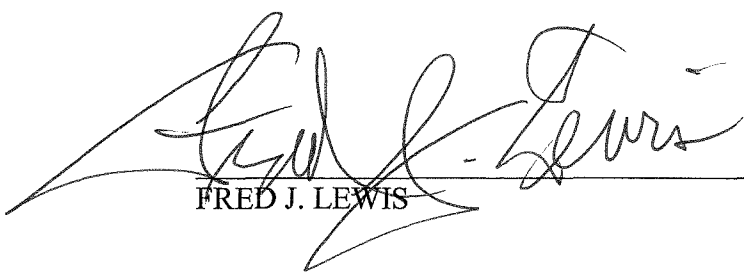
Attorneys for Claimant

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of April, 2015, I caused to be served a true and correct copy of the foregoing, upon the following by the method indicated:

Daniel A. Miller
LUDWIG SHOUFLER MILLER JOHNSON
401 West Front Street Suite 401
Boise, ID 83702
Facsimile: (208) 387-1999

U.S. Mail/Postage Prepaid
 Facsimile
 Overnight Mail
 Hand Delivery
 E-mail


FRED J. LEWIS

Fred J. Lewis (ISB No. 3876)
Patrick N. George (ISB No. 5983)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391/Center Plaza
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Facsimile: (208) 232-6109

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant,

vs.

J.R. SIMPLOT COMPANY,

Self-Insured Employer, Defendant.

I.C. No. 2011-025160

**AFFIDAVIT OF PATRICK N. GEORGE
IN SUPPORT OF CLAIMANT'S
PETITION FOR
DECLARATORY RULING**

INDUSTRIAL COMMISSION

MAY - 1 2015

FILED

STATE OF IDAHO)
 : ss.
County of Bannock)

Patrick N. George, being first duly sworn, deposes and states as follows:

1. I am counsel of record for Plaintiff Joseph Jerry Maravilla in the above action and have personal knowledge of the facts and matters stated herein.
2. Attached hereto as **Exhibit A** is a true and correct copy of the 2011 Simplot/Idaho Industrial contract.
3. Attached hereto as **Exhibit B** are true and correct copies of excerpts from the Deposition of John Oborn, taken October 11, 2013.

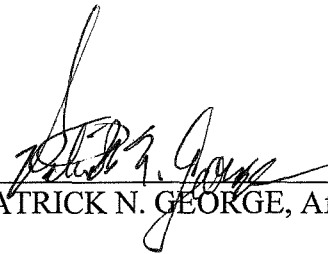
4. Attached hereto as **Exhibit C** is a true and correct copy of the Health and Safety Plan ("HASP").

5. Attached hereto as **Exhibit D** are true and correct copies of excerpts from the Deposition of Joseph Maravilla, taken July 11, 2013.

6. Attached hereto as **Exhibit E** is a true and correct copy of the report of Dr. Tara Henrickson.

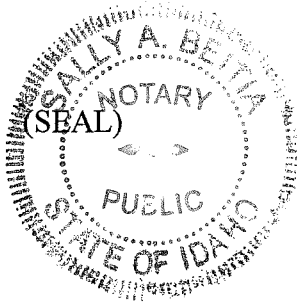
7. Attached hereto as **Exhibit F** are true and correct copies of excerpts from the Deposition of Robert Lewis, taken October 10, 2013.

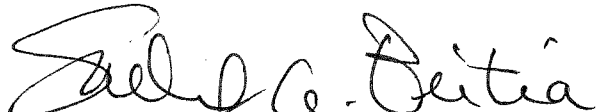
DATED this 29th day of April, 2015.



PATRICK N. GEORGE, Affiant

29th SUBSCRIBED AND SWORN to before me, a Notary Public in and for said state, this day of April, 2015.



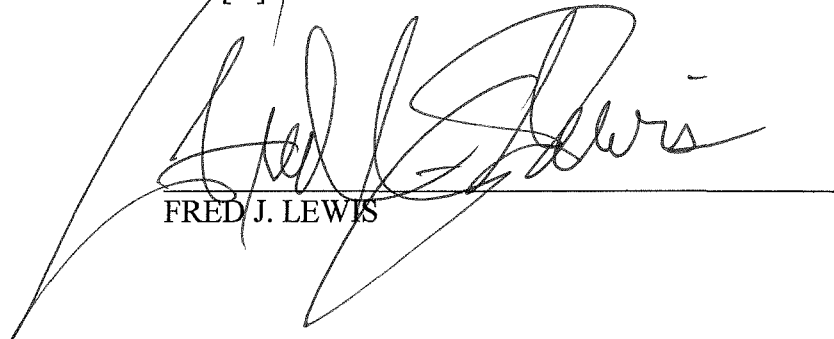


Notary Public for Idaho
Residing at: American Falls
Commission expires: 10-01-16

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of April, 2015, I caused to be served a true and correct copy of the foregoing, upon the following by the method indicated:

Daniel A. Miller	<input type="checkbox"/>	U.S. Mail/Postage Prepaid
LUDWIG SHOUFLER MILLER JOHNSON	<input type="checkbox"/>	Facsimile
401 West Front Street Suite 401	<input checked="" type="checkbox"/>	Overnight Mail
Boise, ID 83702	<input type="checkbox"/>	Hand Delivery
Facsimile: (208) 387-1999	<input type="checkbox"/>	E-mail



FRED J. LEWIS

EXHIBIT "A"



AN EQUAL OPPORTUNITY EMPLOYER

THIS ORDER IS PLACED SUBJECT TO THE ACCOMPANYING TERMS AND CONDITIONS WHICH MAY NOT BE VARIED EXCEPT BY A WRITING SIGNED BY BUYER'S DULY AUTHORIZED REPRESENTATIVE. THIS ORDER MAY NOT BE TRANSFERRED OR ASSIGNED BY ANY PARTY TO THIS TRANSACTION.

PURCHASE ORDER

DATE	PO#	CO#	PAGE
08/15/11	1016941	000	1 of 2
DELIVER NO GOODS FOR ACCOUNT WITHOUT OUR WRITTEN ORDER NUMBER. OUR ORDER NUMBER MUST APPEAR ON PACKAGES, SHIPPING TAGS, INVOICES, PACKING LISTS AND CORRESPONDENCE.			
BILL TO:			
SIMPLOT SHARED SERVICES PO BOX 8628 BOISE, ID 83707			

TO:	SHIP TO:
Idaho Industrial Contractors Inc 1477 Thunderbolt Pocatello ID 83204 ATTN:	Don Plant Stores Warehouse JR Simplot Company 1150 Hwy 30 W PO Box 912 Pocatello ID 83204

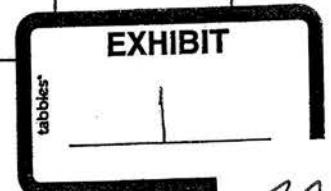
BUYER:	TERMS:	FOB:	SHIP VIA:
Bloom, Lannie J	Net 30 Days	FOB Destination	

DELIVERY INSTRUCTIONS
ATTN: BOB LEWIS

LINE ITEM	REV	STOCK NUMBER/DESCRIPTION	QUANTITY	UOM	DATE NEEDED	TAX CODE	UNIT PRICE	AMOUNT
<p>VENDOR NOTE: THIS ORDER REQUIRES SIGNATURE OF ACCEPTANCE OF ORDER. PLEASE SIGN IN AREA BELOW AND DATE AND FAX BACK TO NUMBER BELOW.</p> <p><i>Robert Lewis</i> (SIGNATURE) <u>August 15 2011</u> (DATE)</p>								
1	0	Simplot Item Number 150000 S3 MAIN ACID TANK PAD REPLACE PER RFQ 110614DNic Replace the existing pad with new concrete and coating system per RFQ 110614DNic and Addendum No. 1. Work shall be completed in a continuous manner on a schedule agreed upon before the start of construction. Demolition debris will be staged on the east end of the plant for loading into ECDC railcars.	0	JB	09/30/11	N	.0000	452,820.00
2	0	Simplot Item Number 150000 S3 MAIN ACID TANK PAD DEMO PER RFQ 110614DNic Replace the existing pad with new concrete and coating system per RFQ 110614DNic and Addendum No. 1. Work shall be completed in a continuous manner on a schedule agreed upon before the start of construction. Demolition debris will be staged on the east end of the plant for loading into ECDC railcars.	0	JB	09/30/11	N	.0000	104,600.00
<p>ORDER TOTAL: \$557,420.00 USD</p> <p>Electronic Address lannie.bloom@simplot.com Phone Number 208 234-5313</p>								

IF YOUR PRODUCTS REQUIRE OR HAVE PREPARED AN M.S.D.S., IT MUST ACCOMPANY PRODUCTS TO SIMPLOT RECEIVING LOCATIONS.

IIC 00098





EQUAL OPPORTUNITY EMPLOYER

THIS ORDER IS PLACED SUBJECT TO THE ACCOMPANYING TERMS AND CONDITIONS WHICH MAY NOT BE VARIED EXCEPT BY A WRITING SIGNED BY BUYER'S DULY AUTHORIZED REPRESENTATIVE. THIS ORDER MAY NOT BE TRANSFERRED OR ASSIGNED BY ANY PARTY TO THIS TRANSACTION.

PURCHASE ORDER			
DATE	PO#	CO#	PAGE
08/15/11	1016941	000	2 of 2

LINE ITEM	REV	STOCK NUMBER/DESCRIPTION	QUANTITY	UOM	DATE NEEDED	TAX CODE	UNIT PRICE	AMOUNT
		FAX Number 208 234-5398 PLEASE ACKNOWLEDGE RECEIPT OF ORDER						

IF YOUR PRODUCTS REQUIRE OR HAVE PREPARED AN M.S.D.S., IT MUST ACCOMPANY PRODUCTS TO SIMPLOT RECEIVING LOCATIONS.

J. R. SIMPLOT COMPANY
Change Order to Purchase Order No.:



Idaho Industrial Contractors, Inc.
 Bob Lewis
 1477 Thunderbolt
 Pocatello, ID 83204
 (208) 317-0206

Date: 9/17/2011
 Change Order No.: 1
 Project: 300 Sulfuric Main Acid Tank Pad
 Replacement

You are directed to perform the following changes in the above contract. All other provisions of the contract shall, except as specifically changed herein, continue in full force and effect.

Description	Line Item Cost	Amount	Lump Sum	T&M
RFI 3, Additional cap/rebar around (2) piers	\$ 475.00	\$ 33,211.00	X	
RFI 4, 8" Wide curb wall along the west side of the pad	\$ 3,646.00	Note: Enter amount, then place an X in either the Lump Sum or Time and Material box.		
RFI 5, North side footing replacement and temp. support	\$ 2,470.00			
RFI 6, Install filler material to build existing footings back to original grade	\$ 26,620.00			

Reason for Changes: See RFI's

Original Purchase Order Price	\$	557,420.00
Previous Change Orders	\$	-
	Subtotal \$	557,420.00
This Change Order Amount	Add/Deduct \$	33,211.00
Total Revised Purchase Order	\$	590,631.00

Contractor:
 By: _____
 Name: _____
 Title: _____
 Date: _____

J. R. Simplot Company
 By: _____
 Name: Matt Rudolph
 Title: Project Engineering Manager
 Date: _____

J. R. SIMPLOT COMPANY

Change Order to Purchase Order No.: 1016941

Simplot

Idaho Industrial Contractors, Inc.
 Bob Lewis
 1477 Thunderbolt
 Pocatello, ID 83204
 (208) 317-0206

Date: 11/29/2011
 Change Order No.: 5
 Project: 300 Sulfuric Main Acid Tank Pad
 Replacement

You are directed to perform the following changes in the above contract. All other provisions of the contract shall, except as specifically changed herein, continue in full force and effect.

Description	Line Item Cost	Amount	Lump Sum	T&M
Expansion joint replacement, Invoice 3251	\$ 10,081.17	\$ 10,081.17	X	
Note: Enter amount, then place an X in either the Lump Sum or Time and Material box.				

Reason for Changes: An acid leak filled the majority of the pad with acid on the freshly installed expansion joints requiring them to be replaced.

Original Purchase Order Price	\$	557,420.00
Previous Change Orders	\$	114,799.99
	Subtotal \$	672,219.99
This Change Order Amount	Add/Deduct \$	10,081.17
Total Revised Purchase Order	\$	682,301.16

Contractor: Idaho Ind. Cont.
 By: Bob Lewis
 Name: Bob Lewis
 Title: President
 Date: 12/16/2011

J. R. Simplot Company
 By: Matt Rudolph
 Name: Matt Rudolph
 Title: Project Engineering Manager
 Date: 12/16/2011



Idaho Industrial Contractors, Inc.

1477 Thunderbolt
Pocatello, ID 83204

Phone # 208-235-4264
Fax # 208-232-0798

Date	P.O. No.
8/16/2011	1170

Contractor
P.R. Steelcoat, Inc. 505 N Falkenburg Rd Tampa, FL 33619

Work to be provided as per your quote dated 06/30/2011
Quotation 300 Sulfuric Main Acid Tank Pad Replacement
Project Protective Lining and Precast Sump
Simplot Pocatello

	\$298,861.00
--	--------------

Simplot

AgriBusiness

Don Plant
P. O. Box 912 (1150 W. Hwy 30 - 83201)
Pocatello, ID 83204

Services: 300 Sulfuric, Main Acid Tank
Pad Replacement

Due Date for Quotation
No later than 1:00 p.m. on: Tuesday 5
July 2011

Date: Wednesday 29 June 2011

REQUEST FOR QUOTATION (RFQ) NO. 110614DNicA1

The J.R. Simplot Company is a private agri-business company with headquarters in Boise, Idaho. Simplot's Processing Plant listed above is hereby requesting a quotation from your firm to perform the services described herein.

As part of this solicitation, we have enclosed a **Statement of Work**, which describes the services required. The selected supplier must be willing to provide Simplot with a comprehensive warranty on its services and a guaranteed schedule commitment. Any resulting agreement will be based on a Simplot contract with language including our standard terms and conditions.

If you are interested in providing a quotation for this project, we ask that you conduct a formal review of the specification, drawings, and this cover letter. All bidders are encouraged to perform a site visit. Based on this review, please prepare a detailed technical and business quotation. Your technical quotation should include the following:

- A complete, detailed description of the services you intend to supply;
- A complete listing of subcontractors and suppliers you intend to use.

TYPE OF CONTRACT

The services are requested on a firm fixed price basis or a time and materials basis depending on which paragraph below is indicated by Simplot. Your business quotation shall consist of the appropriate offer sheet, as well as a discussion of any assumptions you have made.

Firm Fixed Price

The services are required to be performed on a firm fixed price basis. The Bidder shall submit its offer on the attached **Firm Fixed Price Offer Sheet**. The Bidder will be responsible for performing all required work for the agreed upon firm fixed price.

Time and Materials

The services are to be performed on a time and materials basis. The Bidder shall submit its offer on the attached **Time and Materials Offer Sheet**. The offer shall provide fully burdened labor rates, material handling charges, and an estimated ceiling price for performing the work.

SUBMISSION OF QUOTATIONS

All quotations must be received at the J.R. Simplot Company Plant location listed above no later than date and time set forth. Please return quotation to:

Name: Lannie Bloom
Title: Buyer
Phone No.: (208) 234-5313
Fax No.: (208) 234-5398
Email: Lannie.Bloom@simplot.com

Quotations submitted via U.S. mail should be addressed as follows:

J.R. Simplot Company
P.O. Box 912
Pocatello, ID 83204
Attn: Lannie Bloom

Quotations submitted via express mail or hand delivery should be delivered to:

J.R. Simplot Company
1150 West Highway 30
Pocatello, ID 83202
Attn: Lannie Bloom

CONTRACT AWARD

Simplot may award one contract resulting from this RFQ to the Bidder whose offer is, in Simplot's sole opinion, the most advantageous for Simplot, price and other factors considered. Simplot may make multiple awards under this RFQ if Simplot determines that it is advantageous to do so.

A contract award decision may be made on initial bids received, without discussion. Therefore, initial quotations should contain the Bidder's best and final terms.

Simplot may reject any or all offers. Simplot is not obligated to pay any cost incurred in the preparation and submission of a quotation, nor to enter into a contract or any other arrangement with any Bidder.

Before a contract is awarded for the equipment and/or services contemplated herein, the J.R. Simplot Company may conduct such investigation as is necessary to determine the performance record and ability of the Bidder to perform as required by this RFQ and meet the qualifications under the Don Plant Contractor Package if Bidder is to work in the plant. Upon request, the Bidder shall submit such additional information as deemed necessary by the J.R. Simplot Company to evaluate the Bidder's qualifications.

Unless otherwise agreed in writing between the Bidder and Simplot, (1) any designs, drawings, specifications, or other manufacturing information furnished by Simplot to Bidder shall be deemed to be CONFIDENTIAL to Simplot and to have been furnished solely for the performance of this request for quotation and all copies of such information shall be returned to Simplot upon completion of the same, but (2) any designs, drawings, specifications, or other manufacturing information delivered by Bidder to Simplot may be used for any purpose whatsoever. The foregoing shall apply notwithstanding the presence or absence of any contrary legend or statement on any of such information.

AMENDMENTS TO RFQ

If this RFQ is amended, all provisions which are not modified shall remain unchanged.

ALTERNATE BIDS

If for any reason the Bidder is unable or unwilling to quote exactly in accordance with the specifications and other requirements provided with the request for quotation, then the Bidder may, at its option, quote an alternate with the understanding that such an alternative may be rejected. The Bidder must describe clearly in the quotation all exceptions from specifications and other requirements, and this description must be distinct, concise, easily located, and titled as: "Exceptions from specification".

Requests for explanation or interpretation of the RFQ should be directed to me at the phone number listed below.

Sincerely yours,

Name: David Nichalson
Title: Project Engineer
Phone No.: (208) 234-5341
Fax No.: (208) 234-5349
Email: dave.nichalson@simplot.com
Enclosures None

**STATEMENT OF WORK
REQUEST FOR QUOTATION No. 110614DNicA1**

**300 SULFURIC
MAIN ACID TANK PAD REPLACEMENT
ADDENDUM NO. 1**

0				
Issue:	Date:	Description:	By:	Approved:

20

I. ADDITIONS/CLARIFICATIONS:

The specific items of work to be accomplished under this contract include but are not limited to the following:

- A. All cold joints shall be sleeved and doweled per the note on JRS-6732-C-190.
- B. Demolition debris can be directly loaded into the ECDC railcars. Contractor shall install 6" of clean soil in the bottom of the railcar before loading. Material shall be obtained from the JRS landfill area. Railcars will be staged on the west end of the plant, approximately on the west end of the Granulation #2 Warehouse.
- C. There are (2) existing stair landings in the containment area, these will be removed, repoured, and coated.
- D. JRS will perform all electrical work as required.
- E. The drawings have been revised to show the extension of the work to the south launder. The pad from the containment to the launder shall be 8" thick. No coating is required on this portion of the project. The pad has also been extended 6' to the east to extend past the control room man door.
- F. A note was added to paint the top of the containment curb red after the coating has been installed.
- G. The sump has been modified to reflect the required installation. The contractor has the option to precast the sump or cast the sump monolithically in place.
- H. Contractor shall utilize an approved curing compound on all concrete inside the containment. Contractor shall utilize an approved cure and seal compound on all concrete outside the containment area.

II. DRAWINGS

A. The following drawings have been revised:

Drawing No.	Rev.	Description
JRS-6732-C-190	D	2011 Spill Containment Slab, Concrete Plan
JRS-6732-C-191	C	2011 Spill Containment Slab, Coating and Drainage Plans
JRS-6732-C-192	D	2011 Spill Containment Slab, Sections
JRS-6733-C-130	2	1990 Spill Containment Slab, Plan and Sections

Simplot

AgriBusiness

Don Plant
 P. O. Box 912 (1150 W. Hwy 30 - 83201)
 Pocatello, ID 83204

PREBID

Date: Wednesday 22 June 2011
 Time: 10:00 am
 Location: Engineering Conference Room
 Phone: (208) 234-5341

Idaho Industrial Contractors, Inc.
Attn: Bob Lewis
 1477 Thunderbolt
 Pocatello, ID 83204
 Phone: (208) 317-0206

Services: 300 Sulfuric, Main Acid Tank
 Pad Replacement

Due Date for Quotation

**No later than 1:00 p.m. on: Tuesday 5
 July 2011**

REQUEST FOR QUOTATION (RFQ) NO. 110614DNic

The J.R. Simplot Company is a private agri-business company with headquarters in Boise, Idaho. Simplot's Processing Plant listed above is hereby requesting a quotation from your firm to perform the services described herein.

As part of this solicitation, we have enclosed a **Statement of Work**, which describes the services required. The selected supplier must be willing to provide Simplot with a comprehensive warranty on its services and a guaranteed schedule commitment. Any resulting agreement will be based on a Simplot contract with language including our standard terms and conditions.

If you are interested in providing a quotation for this project, we ask that you conduct a formal review of the specification, drawings, and this cover letter. All bidders are encouraged to perform a site visit. Based on this review, please prepare a detailed technical and business quotation. Your technical quotation should include the following:

- A complete, detailed description of the services you intend to supply;
- A complete listing of subcontractors and suppliers you intend to use.

TYPE OF CONTRACT

The services are requested on a firm fixed price basis or a time and materials basis depending on which paragraph below is indicated by Simplot. Your business quotation shall consist of the appropriate offer sheet, as well as a discussion of any assumptions you have made.

Firm Fixed Price

The services are required to be performed on a firm fixed price basis. The Bidder shall submit its offer on the attached **Firm Fixed Price Offer Sheet**. The Bidder will be responsible for performing all required work for the agreed upon firm fixed price.

[] **Time and Materials**

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SUBMISSION OF QUOTATIONS

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Name: Lannie Bloom
 Title: Buyer
 Phone No.: (208) 234-5313
 Fax No.: (208) 234-5398
 Email: Lannie.Bloom@simplot.com

Quotations submitted via U.S. mail should be addressed as follows:

J.R. Simplot Company
 P.O. Box 912
 Pocatello, ID 83204
 Attn: Lannie Bloom

Quotations submitted via express mail or hand delivery should be delivered to:

J.R. Simplot Company
 1150 West Highway 30
 Pocatello, ID 83202
 Attn: Lannie Bloom

CONTRACT AWARD

Simplot may award one contract resulting from this RFQ to the Bidder whose offer is, in Simplot's sole opinion, the most advantageous for Simplot, price and other factors considered. Simplot may make multiple awards under this RFQ if Simplot determines that it is advantageous to do so.

A contract award decision may be made on initial bids received, without discussion. Therefore, initial quotations should contain the Bidder's best and final terms.

Simplot may reject any or all offers. Simplot is not obligated to pay any cost incurred in the preparation and submission of a quotation, nor to enter into a contract or any other arrangement with any Bidder.

Before a contract is awarded for the equipment and/or services contemplated herein, the J.R. Simplot Company may conduct such investigation as is necessary to determine the performance record and ability of the Bidder to perform as required by this RFQ and meet the qualifications under the Don Plant Contractor Package if Bidder is to work in the plant. Upon request, the Bidder shall submit such additional information as deemed necessary by the J.R. Simplot Company to evaluate the Bidder's qualifications.

Unless otherwise agreed in writing between the Bidder and Simplot, (1) any designs, drawings, specifications, or other manufacturing information furnished by Simplot to Bidder shall be deemed to be CONFIDENTIAL to Simplot and to have been furnished solely for the performance of this request for quotation and all copies of such information shall be returned to Simplot upon completion of the same, but (2) any designs, drawings, specifications, or other manufacturing information delivered by

Bidder to Simplot may be used for any purpose whatsoever. The foregoing shall apply notwithstanding the presence or absence of any contrary legend or statement on any of such information.

AMENDMENTS TO RFQ

If this RFQ is amended, all provisions which are not modified shall remain unchanged.

ALTERNATE BIDS

If for any reason the Bidder is unable or unwilling to quote exactly in accordance with the specifications and other requirements provided with the request for quotation, then the Bidder may, at its option, quote an alternate with the understanding that such an alternative may be rejected. The Bidder must describe clearly in the quotation all exceptions from specifications and other requirements, and this description must be distinct, concise, easily located, and titled as: "Exceptions from specification".

Requests for explanation or interpretation of the RFQ should be directed to me at the phone number listed below.

Sincerely yours,

Name: David Nichalson
Title: Project Engineer
Phone No.: (208) 234-5341
Fax No.: (208) 234-5349
Email: dave.nichalson@simplot.com
Enclosures None

FIRM FIXED PRICE SHEET
RFQ No 110614DNic

Please quote on this form your prices for articles specified below for shipment to our Pocatello, Don Plant. **Substitutes must be fully described**. We reserve privilege of accepting all or part of your proposal. Return this form with prices clearly shown for each item, and lower section completed and properly signed.

1. The Firm Fixed Price for providing all required services is:

\$ _____ New Construction
\$ _____ Demolition
\$ _____ Total

2. The Firm Fixed Price add or deduct for Alternative Bid No. 1 is:

\$ _____

Note: Do not include Sales tax in your quote.

List all addendums included with this bid if applicable _____

List all subcontractors associated with this bid, if additional space is required include a separate sheet.

To: AgriBusiness, J.R. Simplot Company, Pocatello, Idaho
All pricing shall be valid for a minimum of 60 days from the date of submittal.

Date: _____

To Whom It May Concern:

We propose to furnish above items at prices shown, which are subject to CASH DISCOUNT _____ %

Prices are F.O.B. Don Plant, Pocatello, ID For shipment via _____

From Shipping point _____ Shipping Weight _____

Transportation charges to be paid by: _____

Shipment to be made within _____ days from receipt of order.

Firm Name _____ By _____

TIME AND MATERIALS PRICE SHEET RFQ No. 110614DNic

The Bidder shall complete the following information for providing the services on a time and materials basis. If additional sheets are needed, you may photocopy this form.

Labor Rates: The Bidder shall list below all fully burdened labor rates for all employees, consultants, and subcontractors that it intends to utilize in the performance of the work. "Fully Burdened Labor Rates" are defined as inclusive of wage or salary rate, fringe, and all applicable overhead and profit.

Individual Name/Category	Fully Burdened Labor Rate
Unit Price per cubic yard, soil removal	_____
Unit Price per cubic yard, fill installation/compaction	_____
_____	_____
_____	_____
_____	_____

MATERIALS: Handling Charges on Materials: _____ %

CEILING PRICE: The estimated ceiling price for completing the work is: \$ _____

Bidder: _____
Name of Company

Authorized Representative: _____
Print Name

Signature: _____

Date: _____

**STATEMENT OF WORK
REQUEST FOR QUOTATION No. 110614DNic**

**300 SULFURIC
MAIN ACID TANK PAD REPLACEMENT**

0				
Issue:	Date:	Description:	By:	Approved:

I. GENERAL CONDITIONS

- A. Work to be performed consists of furnishing all labor, materials, skills and supervision necessary to affect all work required by this specification and the drawings listed hereinafter for the project entitled 300 Sulfuric, Main Acid Tank Pad Replacement.
- B. If there is any question or ambiguity between the project scope and specifications, it is the contractor's responsibility to clarify these prior to submittal of bid.
- C. All bids shall be valid for a period of not less than 60 days.
- D. A Zero Injury Project is the goal and expectation. The successful contractor is expected to follow all Don Plant Safety Rules and actively manage for a safe and accident-free work site.
- E. The contractor's foreman will be required to attend a weekly contractors' safety meeting each Monday from 8:30 to 9:00 AM in the Maintenance Conference Room, and conduct daily tailgate safety meetings with his employees each morning before starting to work.
- F. Safety Indoctrination is required for all contract personnel working at the Don Plant. This indoctrination takes approximately 1 hour. Schedule with Safety Department.
- G. Bidders should take into consideration the work site with attendant operations, maintenance activities, high traffic areas, and limited lay down area and access at times.
- H. The contractor will be required to maintain a clean working site during construction, removing trash or waste materials as it develops even if it comes from other sources. At the end of the project, the contractor will leave the work site clean.
- I. All materials removed from the job site will be handled in accordance with the Don Plant Waste Disposal Manual. Specific advice can be obtained from the Environmental Department.
- J. The Contractor must meet with Simplot and subcontractor representatives to complete a Health and Safety Plan (HASP). Simplot must approve the Health and Safety Plan (HASP) prior to work commencing.
- K. All equipment such as conduit, light fixtures etc. that are not part of this project and are moved or altered during the project to shall be put back to their original condition. A final inspection between contractor, project engineer, maintenance and/or production will be conducted in conjunction with the equipment transfer procedure.
- L. Work by Others – Any subcontractors to be used during the project will be required to submit, for review, a complete Simplot Agreement for Construction, Maintenance Labor or General Services Agreement. This will be reviewed and approval obtained from Simplot prior to any work commencing by the subcontractor. A list of subcontractors to be used is required with submittal of the Bid.
- M. PPE - Contractor shall provide and maintain all required PPE for the project including but not limited to acid gear, rubber boots, rain gear, hard hats, safety glasses, respirators, fall protection, etc.
- N. The work area is located in a sulfuric acid pump tank area. The area is a goggles area and will be throughout the duration of the project. This requirement will be strictly enforced.

II. SPECIFIC ITEMS OF WORK:

The specific items of work to be accomplished under this contract include but are not limited to the following:

- A. Remove all of the existing concrete and fill to required grade as indicated on the drawings.
- B. Remove the southwest column and all attached framing from the old absorbing tower support structure. The northwest and northeast columns will remain in place. Remove the footing down, 6" below top of concrete.
- C. Remove the concrete pier west of the main acid cooler to 6" below top of concrete.
- D. Provide and install fill material as required to obtain proper grade.
- E. Provide and install new sump.
- F. Provide and install concrete pad as indicated on the drawings.
- G. Provide and install new SS sump pump support frame, screen and grating as indicated on the drawings.
- H. Provide and install 2 ½" of potassium silicate concrete coating mix supplied and installed by P. R. Steelecoat, Inc. Contact Paul Steele, work 813-685-0139, cell 813-927-3641

III. OTHER ITEMS OF WORK

- A. The following items related to the accomplishment of this project will be by others.
 - 1. Simplot will provide 80 cy ECDC railcars for the disposal of concrete and soil removed as part of this project. Contractor shall provide an estimate on the number of railcars required for the project.
 - 2. Simplot will provide scrap metal bins for the disposal of structural steel and piping removed as part of this project.
- B. Items furnished by Simplot and installed by Contractor.
 - 1. Soda Ash for chemical neutralization.
- C. The following items of work will be worked in the area at the same time by others
 - 1. The plant will be in operation during the duration of the project. Contractor shall provide access for operations personnel to operate the plant during construction activities.
 - 2. The roadway to the south of the work site will either have to be left open at all times for trucks or a road closure coordinated in advance. The contractor shall bid the project assuming that the road will have to be left open at all times.

IV. WORK SCHEDULE

- A. The Contractor shall complete the work of this contract per the following schedule: The plant will be available for construction starting immediately after contract award. The project will be worked (6) days per week, 10 hours per day to complete the project as quickly as possible. Contractors shall provide a project duration with their bid. The end of all construction needs to be completed before the end of August with a bid award date of 7/22/11.
- B. The Contractor shall submit to the Project Engineer within 10 calendar days of contract award, a schedule showing a start and finish date for a minimum of (5) major activities. The Contractor and the Engineer shall mutually agree upon this schedule after discussion and review. A breakdown of cost shall also be submitted for each of these activities. Simplot reserves the right to request a more complete breakdown if required.

V. BASE BID AND ALTERNATIVE BID

A. BASE BID: A quotation of fixed firm price for the accomplishment of all work required by this specification and the drawings listed hereinafter shall constitute the base bid. Completion of the base bid work is to be in accordance with the schedule listed in Section V.A of this specification. Any exception to the specification shall be stated in writing.

B. ALTERNATE BID: Separate quotations for the following alternative shall be provided in the form of an addition or deduction from the base bid.

1. Add or deduct to work a day and night shift, 10 hours/day, 6 days/week to complete the project on an expedited schedule.

VI. DRAWINGS

A. The following drawings are hereby made part of this specification:

See attached drawing list.

B. Upon completion of construction and demolition, a punch list inspection shall be made by structural contractor, electrical contractor, structural engineer, and project manager.

C. The Contractor shall be responsible for documenting any change that deviates from the construction prints. Changes made to the drawings shall be made on a set of prints that are designated for as-built, if the information cannot be adequately described on the as-built prints then a sketch may be generated to aid in updating the drawings. Once the project is completed the Contractor shall supply a copy of the redlined prints to the Project Manager so that the electronic drawings may be updated to reflect the changes made by the Contractor.

VII. SPECIFICATIONS

A. The following specifications are hereby made part of this specification in addition to the construction drawings:

1. JRS General Engineering Specifications:
 - a) (Spec) (Description)
2. Other applicable codes
 - a) UBC current edition
 - b) AISC
 - c) AWS
 - d) ACI

VIII. LIAISON

A. Simplot has designated a Project Engineer, David Nicholson to act as Simplot's authority in the field. All construction liaisons between the Contractor and Simplot will be through the Project Engineer. Any person (s) at Simplot other than the Engineer, whether material or immaterial, may make no change in the job scope or detail. The Contractor shall instruct his field personnel as to this fact. No allowance or obligation or exception is valid without the Engineer's specific consent. The Engineer must authorize all design changes.

B. The Contractor shall appoint a single individual in his employ as the Contractor's Project Supervisor. He shall also appoint an alternate Project Supervisor to serve in the absence of

the Project Supervisor. All official contact between Simplot and the Contractor shall take place between the Engineer and the Project Supervisor or his alternate.

IX. SUBMITTALS AND SUBSTITUTIONS

A. Shop Drawings and Specially Process Material

1. All materials specially process or shaped such as structural steel, etc., shall be taken from the contract's structural and mechanical drawings to prepare the shop drawings. Complete material take-off shall be taken from the drawings and specifications. The Contractor should familiarize himself with the details in the structural and mechanical drawings so that he can proceed with a minimum time loss. The Contractor shall have three (3) shop drawings prepared and submitted directly to the Engineer for his specially processed material. All shop drawings shall be delivered to the Engineer and reviewed by the Project Engineer and the Engineer of Record before items are fabricated. A lack of familiarizing himself with drawings, drawing details, specifications or receiving shop drawing approval shall not be construed to relieve the Contractor of responsibility for compliance with the specifications and drawings, and the satisfactory completion of the contract.

B. Substitutions

1. Request for substitutions shall be submitted to the project engineer for evaluation during the bidding or after contract award. Contractors shall bid the work per the drawings and specifications.

X. ADDITIONAL REQUIREMENTS

A. Simplot Project Engineering will handle *Quality Assurance*. The owner will handle non-conformance through non-conformance written form to contractor backed up by a non-conformance log. *Quality Control* will be handled by the contractor and monitored by the Simplot Project Engineer through the quality assurance program.

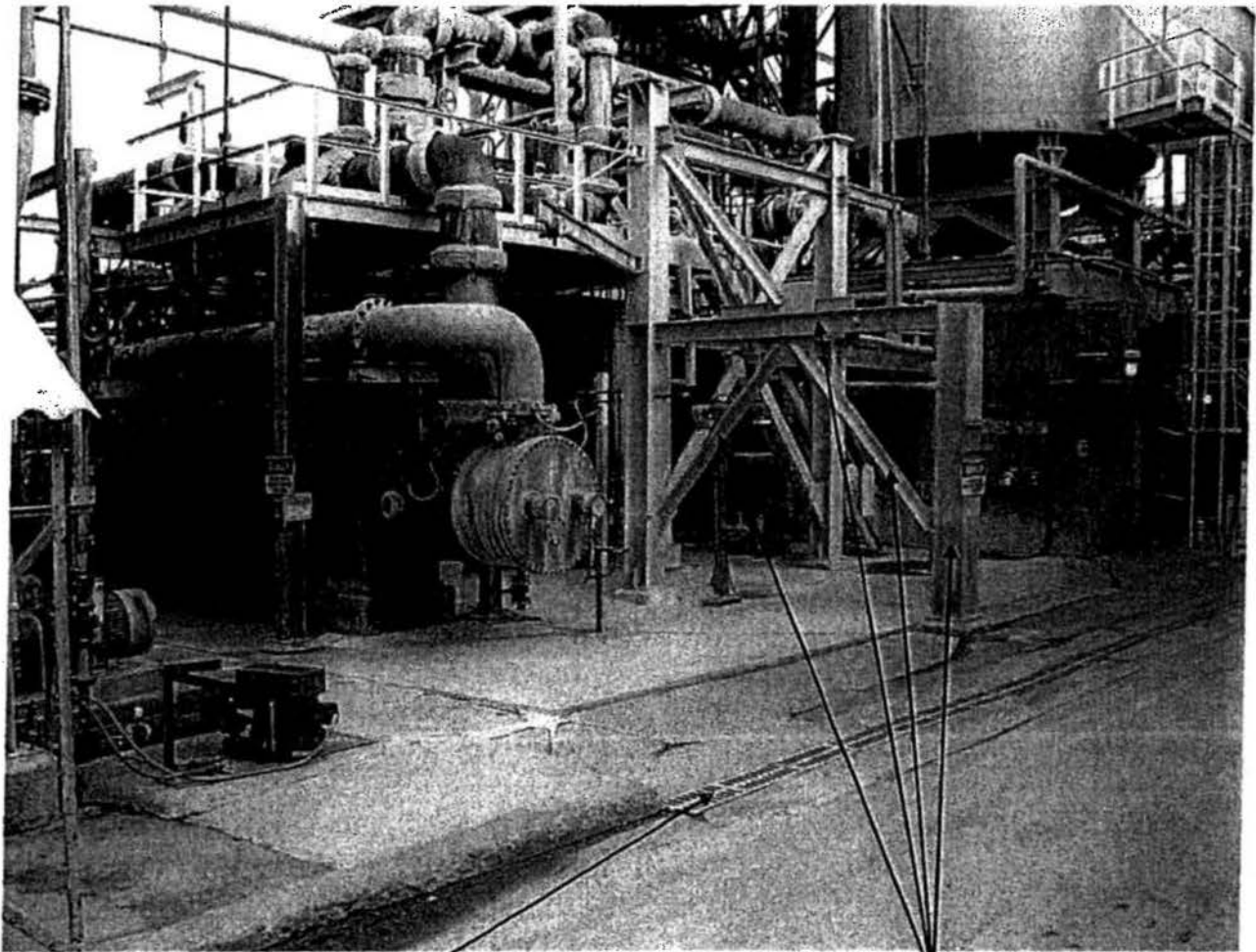
B. All activities will require a sign off form to be produced by the contractor with signatures from contractor first, then Simplot designees. A sample Quality Non-Conformance form is attached. Contractor's version may be used in lieu of this one, if approved.

C. All extra work will be authorized by a *Request for Information (RFI)* form (sample attached) before the work takes place. The contractor and/or owner will initiate an RFI defining extra work. The contractor will indicate cost and schedule impacts, if any, on the form (either lump sum or T/M). The project engineer will assign an RFI number. Once it is approved and signed, work may proceed. This system will be used to document any written or oral questions between Simplot and the contractor. RFIs may not necessarily involve any cost. The project engineer will keep a running log of all RFI's indicating status (open, closed). RFI's will be accumulated once a month (or mutually agreed upon period) and referenced in a Change Order to contractor for billing purposes. All work on RFI's will be subject to the quality assurance program as the rest of the work and cannot be billed for until all signoff forms are properly executed.

D. All extra work will be handled by Lump Sum or Time and Material. For Time and Material, the contractor will provide fully loaded man hour rates by craft discipline and will include overhead, profit, fringes, etc., and a list of tool and equipment rates. All material will be billed at no more than cost + 10%. All lump sum pricing will be based on unit rate list from the Schedule of Values for add and/or deduct.

E. All bills submitted by Contractor shall show the amounts for materials, sales tax on the cost of such materials and labor as three separate items. This billing should occur on the 1st of every month, as appropriate. Each application for payment shall be based upon the Schedule of Values submitted by the contractor. The Schedule of Values shall allocate the entire Contract Lump Sum among the various portions of the Contractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as Owner may require. This schedule, unless objected to by Owner, shall be used as a basis for reviewing the Contractor's applications for payment. Applications for payment submitted by the Contractor shall indicate the percentage of completion of each portion of the Contractor's Work as of the end of the period covered by the application for payment. The estimated percentage completion of each portion of the Contractor's Work in the schedule of values is subject to review by Owner. Owner's determination is final and binding on Contractor.

F. Contractor shall provide Lien Waivers as required for all work and materials provided by the contractor. Progress payments will have conditional lien waivers for all material and subcontractors. A final Unconditional Lien waiver is required at completion of project.



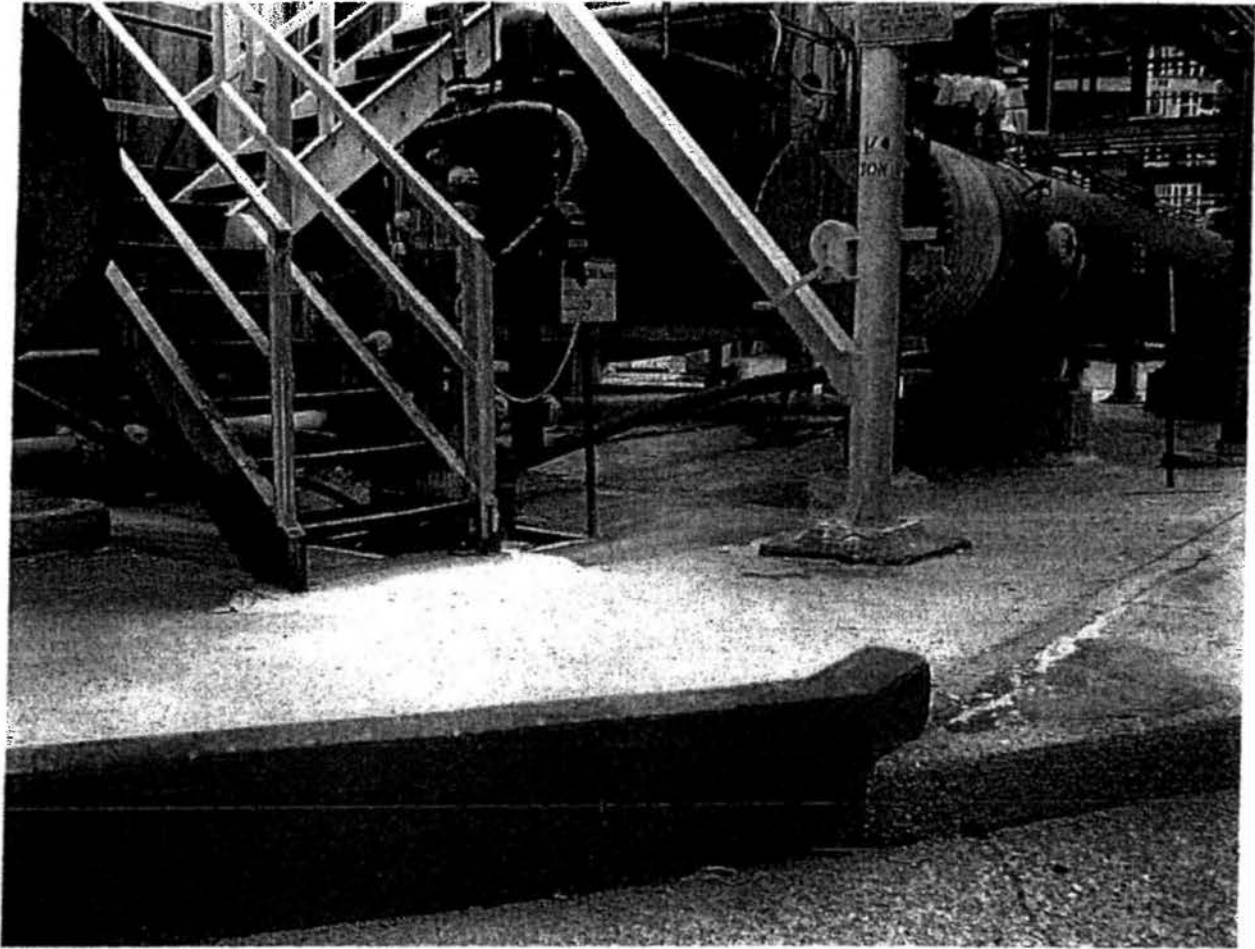
New sidewalk on south side of containment shall slope to the north edge of launder.

Remove existing column and bracing from the northwest column to the south.

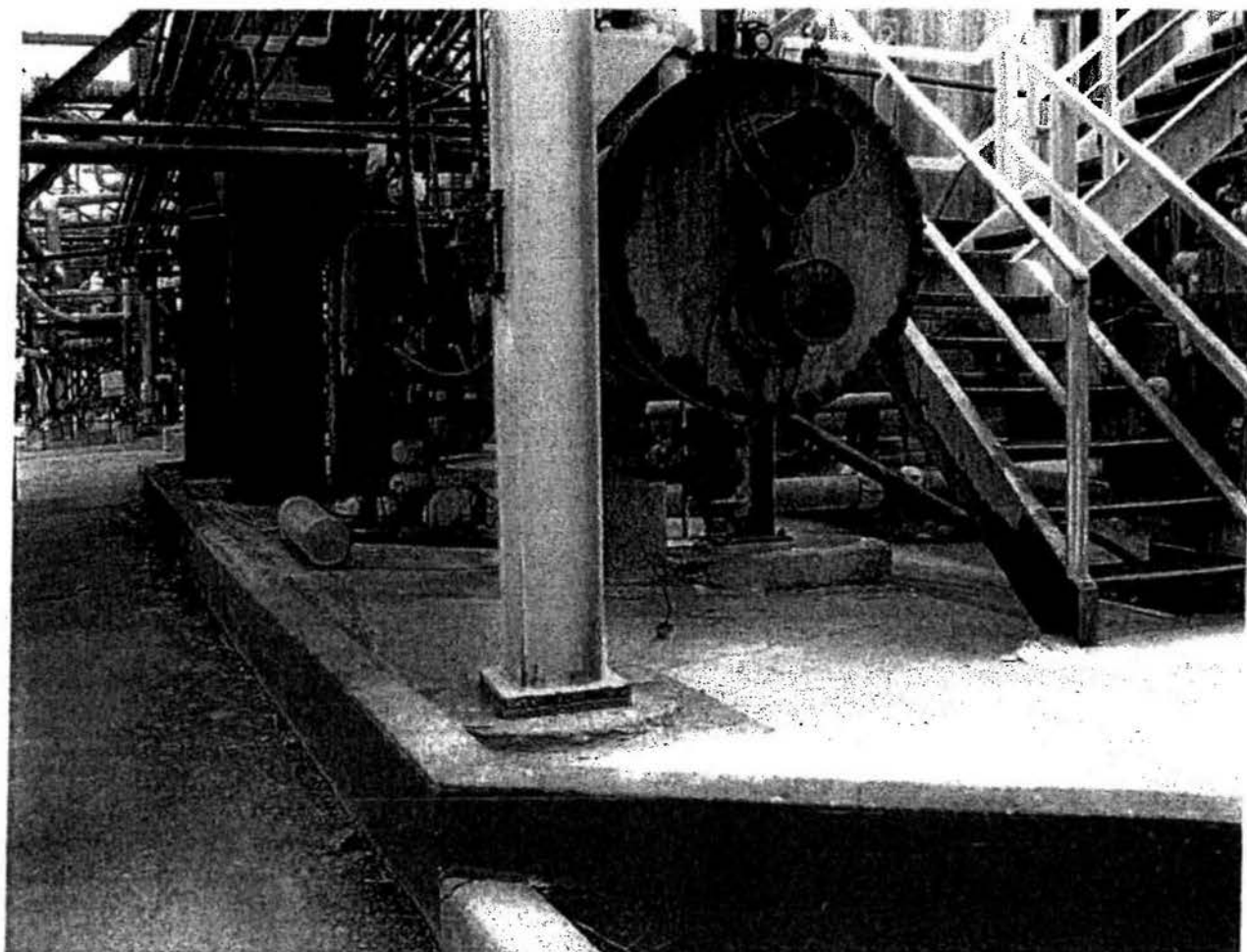
Picture No. 1, View from Southwest Corner



Picture No. 2, View from Southwest Corner, looking north



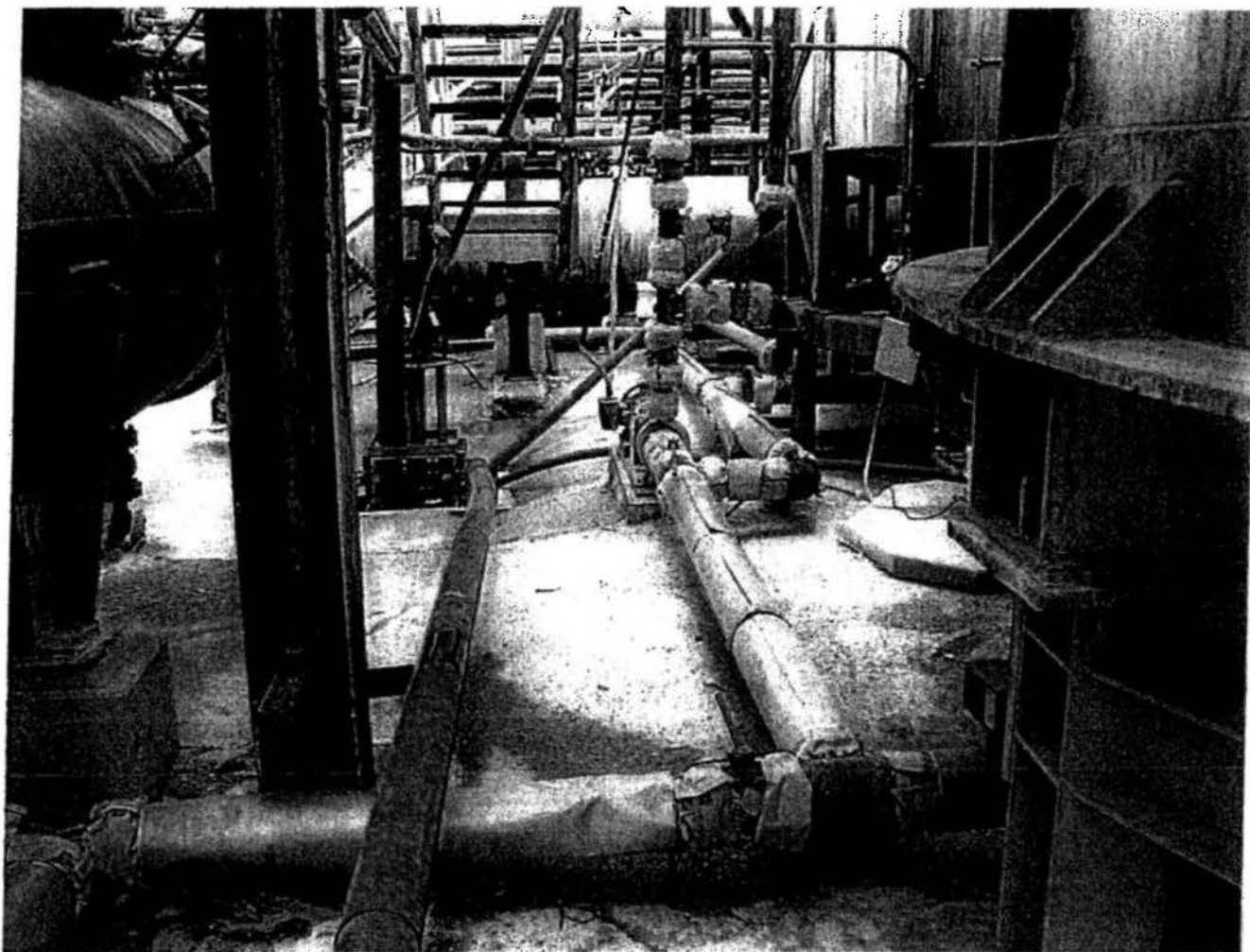
Picture No. 3, View from Northwest Corner, looking south



Picture No. 4, View from Northwest Corner, looking east



Picture No. 5, View from Northeast Corner, looking south



Picture No. 6, View of Sump from the south



AgriBusiness
Don Plant

J.R. SIMPLOT COMPANY / P. O. BOX 912 / POCATELLO, ID 83204 /
PHONE (208) 232-6620 / FAX (208) 234-5487

Interoffice Communication

Date: 23 August 2011

Subject: Sulfuric 300 Main Acid Tank Pad Preconstruction Meeting

Attendees: Steve Daniels, Jeanene Strong, James Leonard, Danny Koger, Bob Lewis, Harold Cox.

Background

The Sulfuric 300 Main Acid Tank Pad Replacement is scheduled to begin construction on 8/29/11. A meeting was held to review the HASP and safety of the project, the environmental handling of the project and construction schedule. Paul Steele was scheduled to attend, but due to an approaching hurricane in Florida, he was unable to attend. He is scheduled to be on-site next Tuesday at which time we will review again w/ Paul and the group.

Discussion Points

Schedule

1. Idaho Industrial is planning on working 6 days a week for 10 hours per day. They will take 3 days off for Labor Day weekend.
2. P. R. Steelecoat is planning to work 12 hours per day and has estimated it will take 12 days to complete the coating installation.
3. Demolition, 10 shifts, Start 8/29/11, Complete 9/10/11
4. New Concrete, 10 shifts, Start 9/12/11, Complete 9/22/11
5. Coating, 12 shifts, Start 9/23/11, Complete 10/6/11
6. Bob is planning to have A-Core in the plant on Friday to sawcut the concrete along the launder by the roadway.
7. I suggested getting the steel removed from the old absorbing tower this week to limit congestion/interference w/ the demolition work. Bob said Western Mechanical is tied up this week, but he would see what he could do to get this removed. His extend-a-boom fork lift is in the shop and not sure when it will be ready. Simplot electricians were able to remove the conduit from the steel last week.

Safety

1. Safety meeting will be held every morning at 7:00 am in the control room.
2. Steve Daniels will locate a pallet of soda ash west of the cooling tower for use on the project.
3. Steve Daniels will have the portable safety eye-washes moved to the site. The south safety shower is likely to be out of service during the majority of the work.
4. A major concern is the Mondi pipe that is in the area and located very close to the ground. Mondi pipe is very brittle and could be damaged easily by a stray jack-hammer bit or piece of equipment. Idaho Industrial will provide a plywood box to go over the Mondi pipe to protect it from physical damage and block a leak if it were damaged.

5. Steve and Idaho Industrial were going to look at the drain lines after the meeting and determine if they could be rerouted to another location during construction.
6. Steve Daniels will notify Boise/shipping of the construction in the roadway and to tell the truckers to expect some delays. He said they can load MAP at G2, but the 16-20 will have to be loaded at G1. This will be for about 4 weeks.

Environmental

1. All of the construction debris will be taken to the east end of the plant to be loaded into ECDC railcars.
2. 3 railcars are in transit to the plant for loading.
3. Danny Koger and Jeanene are working to get the existing material loaded this week to free up space.
4. Jeanene will test the soil as it is exposed. Contaminated soil will be removed as much as possible. If contaminated soil is still present and cannot be removed, the soil will be neutralized with soda ash and buried.

Sump

1. The existing sump will remain in service as long as possible. Once taken out of service, it will be replaced as quickly as possible.
2. The question was asked about secondary containment, currently there is no secondary containment. There was no requirement for a secondary containment. A liner would not be very big because of all the footings in the area, Idaho Industrial does have liner material if needed. A discussion about a SS exterior form or SS double walled sump that the new sump is cast inside was discussed. Jeanene will talk to Kirk Adkins to get a decision on the requirement for the secondary containment. This needs to occur right away.

Coating

1. The coating system is potassium silicate which cannot get wet before it is cured. Water will prevent the material from curing. Acid would accelerate the cure. The cure time is typically 48 hours, but it can be accelerated by acid or heat.
2. This will be discussed in further detail with Paul Steele, next week.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

JOSEPH JERRY MARAVILLA, an)
individual,)
Plaintiff,) Case No. CV-13-480-PI
vs.)
IDAHO INDUSTRIAL CONTRACTORS, INC.,)
an Idaho Corporation,)
Defendant.)

DEPOSITION OF JOHN OBORN
TAKEN OCTOBER 11, 2013

REPORTED BY:

MARY (RAINEY) STOCKTON, CSR No. 746

Notary Public

(208)345-9611 M & M COURT REPORTING (208)345-8800 (fax)

(1)	INDEX	
(2)	TESTIMONY OF JOHN OBORN	PAGE
(3)	EXAMINATION BY MR. GEORGE	4
(4)	EXAMINATION BY MR. CANTRILL	63

(5)	EXHIBITS	
(6)	NO. DESCRIPTION	PAGE
(7)	1 - Supervisor First Report of	26
(8)	Injury/Incident	
(9)	2 - Interoffice Communication dated	50
(10)	December 2nd, 2011	
(11)	3 - Handwritten notes with a page number	64
(12)	66	

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(1) THE DEPOSITION OF JOHN OBORN was taken on
(2) behalf of the Plaintiff at the offices of RACINE, OLSON,
(3) NYE, BUDGE & BAILEY, 201 East Center Street, Pocatello,
(4) Idaho, commencing at 8:54 A.M. on October 11, 2013,
(5) before M. Rainey Stockton, Certified Shorthand Reporter
(6) and Notary Public within and for the State of Idaho, in
(7) the above-entitled matter.

(8) APPEARANCES:

(9) For the Plaintiff:

(10) RACINE, OLSON, NYE, BUDGE & BAILEY
(11) BY: PATRICK N. GEORGE
(12) P.O. Box 1391
(13) 201 East Center Street
(14) Pocatello, Idaho 83204

(15)
(16) For the Defendant:

(17) CANTRILL SKINNER LEWIS CASEY & SORENSEN LLP
(18) BY: DAVID W. CANTRILL
(19) P.O. Box 359
(20) Boise, Idaho 83701

(21) **ALSO PRESENT:** Joseph Jerry Maravilla

(22) Robert Lewis

(23)

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(1) JOHN OBORN,
(2) first duly sworn to tell the truth relating to said
(3) cause, testified as follows:
(4)

(5) EXAMINATION

(6) QUESTIONS BY MR. GEORGE:

(7) Q. Would you state your name for the record?

(8) A. John N. Oborn.

(9) Q. And what is your work address?

(10) A. P.O. Box 912, Pocatello, Idaho or 1150 Highway
(11) West. I'm not sure which one you --

(12) Q. It doesn't matter.

(13) What's your occupation?

(14) A. I am the operations manager for the
(15) reproduction area at the Don Plant for crew A.

(16) Q. Sounds complicated. We'll probably get into
(17) your job a little bit more.

(18) But, first of all, let me just tell you when
(19) we do these depositions, if I ask a "yes" or "no"
(20) question -- which my questions won't be limited to that
(21) -- but if I ask a "yes" or "no" question, you have to
(22) answer audibly yes or no.

(23) A. Okay.

(24) Q. Not "uh-huh" or "huh-uh" or shakes or nods or
(25) stuff like that. If I remind you, it's nothing

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- (1) chairman, they asked me to take his position for the
 (2) next year-and-a-half while he was in Iraq.
 (3) Then I returned back as assistant production
 (4) manager for a year.
 (5) And then they did some restructuring and here
 (6) we are.
 (7) **Q.** Where are you now?
 (8) **A.** The operations manager --
 (9) **Q.** All right.
 (10) **A.** -- over a crew.
 (11) **Q.** So, tell me -- kind of tell me the chain of
 (12) command down through Joe and then maybe a step below
 (13) him.
 (14) **A.** Okay. It went from the -- at this time --
 (15) **Q.** At the time of the incident.
 (16) **A.** At the time of the incident, there was a
 (17) production manager.
 (18) **Q.** And who was that?
 (19) **A.** Stan Christensen.
 (20) Then there were four operations managers.
 (21) Eight shift coaches.
 (22) **Q.** And you were one of the operations managers?
 (23) **A.** I was one of the four operations managers.
 (24) **Q.** All right.
 (25) **A.** Eight shift coaches.

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- (1) him or that somebody else told him?
 (2) **A.** Well, there is a rumor mill out there.
 (3) **Q.** Sure.
 (4) **A.** And there are things that were said that were
 (5) inaccurate.
 (6) But the information he received would have
 (7) been from me.
 (8) **Q.** Well, the good information you received would
 (9) have been from you.
 (10) The rest would have been the rumor mill.
 (11) **A.** That's correct. And that does happen out
 (12) there.
 (13) I mean, you know, people think something as
 (14) tragic as this was, there was an awful lot of things
 (15) that were said.
 (16) **Q.** Understandably. All right. Let's jump in
 (17) here a little bit. On the --
 (18) I don't know if you recall. You have a book
 (19) in front of you. Tell me what that book is.
 (20) **A.** That book is the information of what happened
 (21) in the plant that night from the central control room
 (22) perspective of the equipment that went down.
 (23) **Q.** Who wrote the information that's in that book?
 (24) **A.** The central control room operator.
 (25) **Q.** Who was that?

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- (1) And then I think three, four reliefs.
 (2) And then parallel with the shift coaches, we
 (3) have area managers and there are about six or seven of
 (4) them.
 (5) There's a total of 20 management, so...
 (6) **Q.** So, Joe was not -- was the equivalent of one
 (7) of the shift coaches?
 (8) **A.** Shift supervisors, shift coaches.
 (9) **Q.** Just below you?
 (10) **A.** Just below me.
 (11) **Q.** Were you the direct supervisor for Joe? Or
 (12) was there another supervisor that was directly over Joe?
 (13) **A.** No. I was directly over Joe.
 (14) **Q.** Okay. Is there anyone, in your estimation, at
 (15) Simplot that would know more about the facts of this
 (16) case than you?
 (17) **A.** No, not to my knowledge.
 (18) **Q.** I've seen Stan Christensen's name in a few
 (19) things.
 (20) **A.** Uh-huh.
 (21) **Q.** Yes?
 (22) **A.** Yes.
 (23) **Q.** Would he have more knowledge than you?
 (24) **A.** No. His would all be after the fact.
 (25) **Q.** Would it be based on information that you told

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- (1) **A.** John Graham.
 (2) **Q.** Would that be part of the Subpoena Duces Tecum
 (3) information that I asked for?
 (4) **A.** I'm not sure. It would probably provide some
 (5) clarification on the sequencing of events.
 (6) **Q.** I think what I'd like to do is have you --
 (7) I'm reluctant to go through your book.
 (8) **A.** Okay.
 (9) **Q.** I think what I'd like to do is have you point
 (10) out what pages go with this incident and have Lauren
 (11) come back and copy those pages. Is that --
 (12) **A.** That's fine.
 (13) **Q.** Is that all right?
 (14) **A.** That's fine.
 (15) It says on here the 17th; but that's because
 (16) it was the night of the 16th into the morning of the
 (17) 17th. It starts on Page 66.
 (18) **Q.** This other binder that you have in front of
 (19) you, it doesn't have anything that pertains to the
 (20) incident?
 (21) **A.** Just the interaction between us and my letter
 (22) that I received from you. Just all current.
 (23) **Q.** Okay.
 (24) **A.** Then I have an old copy, the same copy that
 (25) you said that you already had of the smaller pictures of

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- (1) that incident.
- (2) **Q.** Okay. So, basically, with Page 66, I have
- (3) everything.
- (4) **A.** You have everything that I have.
- (5) **Q.** Okay. When, on October 16th, 2011, the date
- (6) of the incident -- did I get the date right?
- (7) **A.** Yes.
- (8) **Q.** As I understand it, there was a project going
- (9) around -- on around a sulfuric pad, we call it number
- (10) 300.
- (11) **A.** Correct.
- (12) **Q.** Tell me what the project was.
- (13) **A.** The project was to repair the coating on the
- (14) pad. The pad was in failure mode so they had cleaned it
- (15) up, sandblasted.
- (16) **Q.** And "they" meaning?
- (17) **A.** Contractors. We had several contractors
- (18) involved with the project manager.
- (19) **Q.** Do you know who they were?
- (20) **A.** I don't.
- (21) **Q.** Do you know whether or not Idaho Industrial
- (22) was out there?
- (23) **A.** I do know that they were there.
- (24) **Q.** You don't know who the subcontractors were?
- (25) **A.** I do not.

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- (1) **Q.** Yes?
- (2) **A.** Yes.
- (3) **Q.** What was the failure?
- (4) **A.** The sump and pad.
- (5) **Q.** When you say "failure," that doesn't mean very
- (6) much to me. Tell me what about it is a failure.
- (7) **A.** It's potentially a release that could end up
- (8) in the environment if we don't take care and maintain
- (9) that pad.
- (10) **Q.** Would it be like a crack?
- (11) **A.** Several cracks, concrete, peeling, gravel from
- (12) degradation of the concrete.
- (13) **Q.** Due to the strong affects of the acid?
- (14) **A.** Due to the extensive corrosive affect of the
- (15) acid.
- (16) **Q.** All right. Are you involved in the bidding
- (17) process at all?
- (18) **A.** No.
- (19) **Q.** Are you involved in safety training at all?
- (20) **A.** Yes, I am.
- (21) **Q.** When a contractor comes into the site, what
- (22) sort of safety is given?
- (23) **A.** We have an annual training class that's
- (24) provided for them.
- (25) We have on-site training that is provided

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- (1) **Q.** When you say "failure mode," what do you mean
- (2) by that?
- (3) **A.** Degradation of the pad. The pad was falling
- (4) apart. Some area was falling apart.
- (5) We worry environmentally about anything that
- (6) we release into the ground.
- (7) And so in order to provide that protection, we
- (8) had to redo the sump and pad work.
- (9) **Q.** Okay. I want to show you an exhibit, No. 2,
- (10) to Mr. Lewis's deposition from yesterday.
- (11) (Discussion off the record.)
- (12) **Q.** (BY MR. GEORGE) This, as I understand it from
- (13) the testimony yesterday, was a photograph of the site
- (14) prior to work.
- (15) **A.** Okay.
- (16) **Q.** Is that your recollection?
- (17) **A.** That's my recollection, yes.
- (18) **Q.** So, that's in failure mode right there?
- (19) **A.** Uh-huh. You don't have -- you've got some
- (20) cracks here, but the failure's towards the back of where
- (21) the sump is located. The extreme failure.
- (22) **Q.** Maybe look at Exhibit 1. Is that helpful?
- (23) **A.** Uh-huh.
- (24) **Q.** Yes?
- (25) **A.** Back in this area right there.

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- (1) where they go through the basic safety. And I say
- (2) "basic safety" requirements of the facility.
- (3) **Q.** Are they tied to the same safety requirements
- (4) of any Simplot employee?
- (5) **A.** No.
- (6) **Q.** Okay. How does it differ?
- (7) **A.** Extensively. For the operators and
- (8) supervisors out there, we receive an extensive amount of
- (9) training as far as safety PPE.
- (10) **Q.** I've seen -- and I don't really understand
- (11) what this is, but I've seen a HASP.
- (12) **A.** A HASP, health and safety plan.
- (13) **Q.** Right. And I don't know -- there's some
- (14) signatures on there that seem to indicate that people
- (15) have gone through a safety program of some sort.
- (16) Tell me what that HASP is for.
- (17) **A.** The health and safety plan is not for our
- (18) people as much as it is for us to understand the hazards
- (19) that they might be bringing to the facility with the
- (20) chemical and coatings that they bring.
- (21) And then anything above -- what my role or the
- (22) role of the supervisor is, is to review that HASP prior
- (23) to permits being issued -- and that could be an operator
- (24) -- and a copy of the HASP is supposed to be in the
- (25) control room to review prior to issuing a permit.

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- (1) Q. So, it's not so much your safety requirements
(2) on the contractor; rather it's the risks that the
(3) contractor brings to the project for you guys.
(4) A. Correct. Yes.
(5) Q. And how do you eliminate the risks to your
(6) employees?
(7) A. By addressing the HASP and making sure that
(8) some of the chemicals and coatings that they bring in
(9) that we're aware of that are hazardous properties and
(10) how it relates to our process.
(11) Q. In your opinion, when -- and we can use this
(12) project as an example.
(13) But once the HASP is signed and a permit is
(14) done, is the independent contractor responsible for the
(15) safety of that project?
(16) A. No.
(17) Q. Who is?
(18) A. We, as management, are responsible for all
(19) projects.
(20) Q. Okay. But you don't impose any safety
(21) requirements on the general contractor -- or on the
(22) contractor?
(23) A. Yes, they have to follow our safety program.
(24) Q. Okay. So, that's back where I was thinking we
(25) were going was: Do they have to follow safety programs

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- (1) that you put in place?
(2) A. They do.
(3) Q. What are those safety programs?
(4) And before you answer that, that's probably
(5) too broad. I'm sorry.
(6) A. Yeah.
(7) Q. Let me ask it this way: Are there certain
(8) requirements that Idaho Industrial would have had to
(9) have followed when they were doing this project?
(10) A. Yes.
(11) Q. How do I get a copy of the rules or
(12) regulations or whatever that they would have had to have
(13) followed when they were working on this project?
(14) A. We require all the contractors to keep on file
(15) the safety training that they provide for their people.
(16) Q. So, would it be -- I have a --
(17) A. We do not monitor that. They monitor that and
(18) we ask for that.
(19) Q. I have a safety manual for 2012 from Idaho
(20) Industrial.
(21) And I'll represent to you that yesterday they
(22) testified that that manual was basically the same as the
(23) 2011 one. All right?
(24) A. Okay.
(25) Q. So, would that be something that you guys

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- (1) would review and say: Yeah, that fits with our program?
(2) A. I would not review that on my level, no.
(3) Q. Somebody would at Simplot?
(4) A. I would hope so; but I would not know. I
(5) don't know that answer.
(6) Q. Okay. Do you see my dilemma?
(7) I'm trying to figure out -- we've got Simplot
(8) here and then we've got an industrial or an --
(9) A. Independent contractor.
(10) Q. -- independent contractor.
(11) Who is responsible for overseeing the safety
(12) of this project?
(13) And the way I understand it from what you're
(14) saying is that Idaho Industrial is responsible but you
(15) have some --
(16) A. Oversight.
(17) Q. -- oversight.
(18) But you don't have any rules or guidelines for
(19) that?
(20) A. I don't know. You're asking something that's
(21) on the safety department level that I don't have -- I
(22) don't know.
(23) Q. That's fair. And if you don't know, you don't
(24) know.
(25) How familiar were you with this project?

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- (1) A. Not very.
(2) Q. Were you over this area?
(3) A. In my role and responsibilities as operations
(4) manager, I have the entire plant.
(5) Q. How big is the plant?
(6) A. Well, I don't know how many acres it is, but
(7) it's fairly large.
(8) Q. Do you know whether or not this project was
(9) almost finished?
(10) A. Yes, it should have been about finished, I
(11) think. If I -- and I'm recalling, I believe we were in
(12) the finishing phases.
(13) The coatings had been applied, to my
(14) knowledge, because I remember sandblasting the week
(15) before.
(16) But some of that is cloudy in my memory right
(17) now of where we were at.
(18) Q. Who was sandblasting the week before?
(19) A. I think they were sandblasting some of the
(20) edges. I can remember seeing sandblast grid around
(21) there.
(22) Q. Do you remember who was doing the
(23) sandblasting?
(24) A. No, I don't.
(25) Q. Would it have been Simplot employees that

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(1) don't know.
 (2) Q. Was there any --
 (3) A. We just came in that night.
 (4) Q. Was there any inquiry into that?
 (5) A. Other than we'd used the yellow hose before.
 (6) Q. Was there acid already in the sump area?
 (7) A. No, not prior to. I had the operator go down
 (8) and check it.
 (9) When we were talking to him in the control
 (10) room, I asked the operator if he had checked it.
 (11) And he said he had been down there and pumped
 (12) it off just a few minutes earlier. Okay? So, he had
 (13) pumped that off.
 (14) It was down-pouring quite heavily and then we
 (15) had the power outage.
 (16) Q. Right.
 (17) A. I said we've got to check that sump and see
 (18) what's in it and see how much acid's there because we
 (19) were trying to get the plant started back up.
 (20) Q. Okay. Here's the part I'm confused about.
 (21) Do you have a hose hooked up already, even if
 (22) there's no acid in this 300 sump?
 (23) A. Yes.
 (24) Q. You do?
 (25) A. Yeah, it was hooked up, yeah, and we were

(1) pumping off intermittently.
 (2) Q. Why? Was the acid leaking before that?
 (3) A. We had drips off-and-on. And it had a little
 (4) bit of spill, I think, earlier in the day, is what they
 (5) were talking about, so they'd have it hooked up to keep
 (6) it pumped off so we didn't destroy the pad work.
 (7) Q. Okay. So, at some point in the day, you're
 (8) saying that Simplot employees put that hose in place.
 (9) A. They had to.
 (10) Q. Okay. And you're confident that it was
 (11) Simplot employees because Idaho Industrial wasn't out
 (12) there that day.
 (13) A. Not to my knowledge. And I had just talked to
 (14) the operator and asked him if it had been pumped off
 (15) because of the rain that was happening. It was a
 (16) tremendous down-pour that we had that night. One of the
 (17) worst that we had in a while. And we had to keep the
 (18) pad pumped off.
 (19) Q. I wish I could remember it. I don't remember
 (20) the down-pour, but I'm sure it was. All right.
 (21) How big are these openings?
 (22) A. I couldn't tell you.
 (23) Q. Have you been through one of them?
 (24) A. Yeah. Yeah. I've been down on the pad
 (25) several times previously while they were doing the work

(1) just to see what they were doing.
 (2) Q. You're a pretty tall guy.
 (3) A. I am.
 (4) Q. 6'3", probably.
 (5) A. 5"-and-half.
 (6) Q. Okay. 6'5"-and-a-half.
 (7) Can you walk through there without bending
 (8) over?
 (9) A. Nope.
 (10) Q. So, you've got to bend over.
 (11) Are they five feet, the opening?
 (12) A. I can't remember because when you walk in, you
 (13) kind of step down in and that was about -- I can't
 (14) remember if it was a foot from the bottom of the pad up.
 (15) I can't remember. There's a little step there.
 (16) Q. What would the proper color had been for acid?
 (17) A. We really don't have one, but we use red for
 (18) water. We don't really have a color for acid. It's
 (19) just that we've hurt people in the past because people
 (20) go grab that and make it an air line if we don't flush
 (21) out the line.
 (22) Q. You mean the yellow is used for air almost
 (23) exclusively?
 (24) A. Almost exclusively.
 (25) I still, even to this day, end up having to

(1) correct because that's all they can find at the time
 (2) they're doing the job.
 (3) Q. I'm going to ask you this question again.
 (4) Do you have any idea of the employees that
 (5) would have put that out there? If I wanted to --
 (6) A. The operators at number three sulfuric.
 (7) Q. Do you know any of their names?
 (8) A. I don't know. We could go back -- you can go
 (9) back on the schedule and find out who the operators were
 (10) for the various crews.
 (11) Our operator at the time was David Bierman.
 (12) Q. Okay. I've heard his name.
 (13) As a housekeeping item, did you take all of
 (14) the photographs on Exhibit 1?
 (15) A. Yes.
 (16) Q. With what kind of camera?
 (17) A. I don't know.
 (18) Q. It has a card, I take it.
 (19) A. Yeah, SD card.
 (20) Q. And that card has probably been reformatted?
 (21) A. It has.
 (22) Q. So, this is what we have and that's all we
 (23) have is what --
 (24) A. I actually sent the pictures out
 (25) electronically with this.

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(1) Q. Okay.

(2) A. So they should be in full form somewhere, but

(3) I could not find it.

(4) Q. There's been some discussion that Joe should

(5) have been wearing full Hazmat when he went back to check

(6) on this acid.

(7) A. Full Hazmat?

(8) Q. Yeah, full Hazmat gear. Should he have been?

(9) A. No. That would not have been our normal

(10) requirement.

(11) Q. Because he wasn't going to go past anything

(12) that was red.

(13) A. No. If he passed something that was red, the

(14) requirement would have been to have had goggles on.

(15) Q. Right. If he goes into a contaminated area,

(16) then I suppose he has to have full Hazmat.

(17) A. No.

(18) Q. When do you have to have full Hazmat?

(19) A. Working in sulfuric acid falling down on you,

(20) or something like that, we would have you fully rubbered

(21) up.

(22) Q. Okay. In this situation -- we'll get in to

(23) this more --

(24) But, as I understand it, he was walking down

(25) this sidewalk.

(1) A. That corridor, uh-huh.

(2) Q. Is there anything in that corridor that would

(3) have required him to wear anything more than goggles and

(4) boots and what he was wearing?

(5) A. He didn't need goggles in that area.

(6) Q. Okay.

(7) A. It wasn't until he crossed into there that he

(8) had to have been wearing goggles.

(9) Q. "Into there" meaning what?

(10) A. Into the plastic enclosed area down on the

(11) pad.

(12) Q. Do you or does Simplot have any reason to

(13) believe that he did anything wrong that night?

(14) And we'll get to a bunch more questions if you

(15) do, but...

(16) A. Well, I believe that Joe was in a hurry to do

(17) the right thing and he went out to check the pad.

(18) The operator made a comment before he went

(19) down there that he had just recently pumped it off.

(20) And so you can see from that picture that the

(21) initial stair is gone. You can see the stairs going up

(22) to that other level, but the step going down was still

(23) removed because of the coatings.

(24) So, that initial step that goes -- walked off

(25) that platform and the platform going over to the other

(1) side of the stairs. On page -- this page right here

(2) used to be -- was a platform.

(3) So, when you stepped off and over and down

(4) into there, that platform was still not reinstalled

(5) because we were still working on the pad.

(6) Q. Okay. Let's go through kind of what I

(7) understand and see if you understand the same thing that

(8) I do.

(9) A. Okay.

(10) Q. My understanding is if we go to the fifth page

(11) of Exhibit 1, there's a hose that sort of runs down the

(12) middle of the pad.

(13) A. Correct.

(14) Q. The sidewalk. Not the pad. I should say

(15) sidewalk.

(16) A. That's right.

(17) Q. My understanding is that he tripped on the

(18) hose and as he tripped he stepped and his step took him

(19) into the pad.

(20) If he tripped on the hose -- let's just take

(21) it that far.

(22) If he tripped on the hose, had he done

(23) anything wrong to that point?

(24) A. No.

(25) Q. The problem, I think, that you're -- that

(1) there's been a lot of rumor about is that he stepped

(2) into the acid intentionally.

(3) MR. CANTRILL: I'm going to object to the form

(4) of the question.

(5) He stepped intentionally, but he did not step

(6) into the acid intentionally.

(7) MR. GEORGE: Okay.

(8) Q. (BY MR. GEORGE) He stepped onto the

(9) containment pad intentionally.

(10) A. Correct, yes.

(11) Q. Okay. And that's what you're saying?

(12) A. Yes.

(13) Q. And you're saying that that happened after a

(14) trip or there was no trip?

(15) A. When I first talked to Joe, he told me he

(16) stepped down into there and stepped into the acid.

(17) When I talked to him later that night --

(18) because he was in shock -- and I will tell you he was in

(19) shock quite a bit. It was not good. And we were trying

(20) to keep him calm. It was a bad situation. I mean, his

(21) pants were gone up to the knee and we cut the rest off,

(22) but it was shredded pretty bad. We were concerned about

(23) his health.

(24) So "we" -- and I refer to the operator and

(25) myself -- took him over --

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- (1) A. Uh-huh.
 (2) Q. Yes?
 (3) A. And I assume that he did. Yes.
 (4) Q. And then he walks down that little corridor.
 (5) A. Correct.
 (6) Q. And then we have the differences of what's
 (7) going on.
 (8) A. Correct.
 (9) Q. All right. I want to go through this with you
 (10) line-by-line.
 (11) It says the employee stepped/stumbled into
 (12) number 300 sulfuric acid pad through the opening in tent
 (13) from contractor pad repair work.
 (14) Where did you get that information?
 (15) A. From Joe and from myself.
 (16) Q. How did you come to the conclusion that he had
 (17) stepped/stumbled into the acid pad through the opening
 (18) in the tent?
 (19) A. He told me.
 (20) Q. Was there any holes in the plastic structure?
 (21) A. No, except for the opening.
 (22) Q. Right. Sorry. Except for the three openings,
 (23) I think, there are.
 (24) A. Yes. Yeah.
 (25) Q. This was located on the northwest corner of

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- (1) assistance from the other area. They were all sending
 (2) people out to respond.
 (3) We were 30 yards away and we had no idea that
 (4) the incident had taken place.
 (5) Q. Did he do the right thing after the acid burn?
 (6) A. Absolutely.
 (7) Q. Okay.
 (8) A. Absolutely.
 (9) Q. He gets back over to where you are and he
 (10) comes in and he's obviously shaken up.
 (11) A. Yes.
 (12) Q. And what happened next? Is that when he gives
 (13) you this information?
 (14) A. No. He tells me, "John, I've been calling for
 (15) you." "I've been calling for you."
 (16) And I look down and his pant leg's gone and
 (17) he's gotten his socks off. He's just barefoot with
 (18) shredded legs -- or shredded pants going up to above the
 (19) calf.
 (20) We quickly grabbed him and walked him out
 (21) because he's talking to us and he's a little in shock
 (22) saying -- he's talking to us. I told Dave Bierman,
 (23) "let's get him out here and get the hose on him."
 (24) And we went out there and kept the hose on the
 (25) back of his calf. And I say, "Joe, what happened?"

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- (1) the pad?
 (2) A. Correct.
 (3) Q. Employee said he stumbled on the hose stepping
 (4) on -- stepping onto the pad into about 6 inches of
 (5) sulfuric at that location.
 (6) So, when does he tell you that he stumbled on
 (7) the hose?
 (8) A. As we were running the water on the back of
 (9) his leg.
 (10) We were trying to determine if we should call
 (11) his folks, what we should do.
 (12) When he came in, he opened the door and
 (13) literally screamed: "I've been trying to call you on
 (14) the radio."
 (15) What we determined later is that he was
 (16) calling on the granulation channel. We found that out
 (17) when we talked to the control room operators. They had
 (18) sent people out to look and see what had happened and
 (19) what was going on. So, we were on another channel. And
 (20) he has a channel that scans. Okay? So he was on
 (21) another channel.
 (22) If I talked to him on a sulfuric channel, he
 (23) would get that where he's at and respond back to me.
 (24) If he calls me from what other channel he's
 (25) set on, that goes to the other area. So, he called for

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- (1) That's where we got some of that information.
 (2) We had responders show up within just a couple
 (3) minutes to see what they can do because I called out for
 (4) an emergency response.
 (5) Q. Okay.
 (6) A. And that's when Joe told me what was going on
 (7) and I tried to keep it -- I tried to keep Joe calm to
 (8) talk about things to see if we should call his parents
 (9) and talk about some of those things.
 (10) Q. On the next page, Page 2 of 2 of your report,
 (11) there is a statement by Stan Christensen.
 (12) A. The item is complete or what?
 (13) Q. Down towards the bottom. I don't know what --
 (14) He says "I have discussed this with Joe
 (15) several times."
 (16) A. That was me. That's my comment. Stan just
 (17) approved the comments.
 (18) Q. Oh, okay. I discussed this with Joe several
 (19) times. The incident happened as Joe stepped down into a
 (20) canopy covered sump area.
 (21) The pad was under construction and was
 (22) completely covered, all but a slit for entry.
 (23) A 93 percent acid product tank ran over
 (24) filling the pad with acid on top of the rain.
 (25) Now, this is -- I don't know -- a few weeks --

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- (1) But it would seem to me like if someone is
 (2) going to change their story, they're going to change it
 (3) from "I stepped over the hose" to "I tripped over the
 (4) hose."
 (5) In this case, it seems that your documents
 (6) suggests the reverse, right?
 (7) **A.** I didn't realize that this would be here
 (8) today. Does that make sense? And so that can then be
 (9) looked at as an error or misjudgment on my part because
 (10) I did not know it was going to be used as legal
 (11) documentation.
 (12) **Q.** Tell me, to the best of your recollection, if
 (13) you had to redraft this document, what would it say?
 (14) **A.** Probably the stepped/stumbled because no one
 (15) will really know except for Joe.
 (16) **Q.** How far is it from the northwest opening where
 (17) Joe would have contacted the acid to the shower where he
 (18) sprayed himself off?
 (19) **A.** About 10 feet, I would suggest. I don't know,
 (20) but I would suggest it's about 10 feet.
 (21) **THE WITNESS:** Is it further than that?
 (22) **MR. LEWIS:** I've been there with a tape
 (23) measure myself.
 (24) **THE WITNESS:** How far is it?
 (25) **MR. LEWIS:** Three, four feet.

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- (1) **THE WITNESS:** Is that all?
 (2) **MR. LEWIS:** Uh-huh.
 (3) **Q. (BY MR. GEORGE)** Well, we've had several.
 (4) Joe thinks it's about 10 feet.
 (5) You think it's about 10 feet.
 (6) He's measured it and it's about three or four
 (7) feet.
 (8) Have you talked to Stan Christensen about this
 (9) case?
 (10) **A.** Nobody -- well, I mentioned that I was going
 (11) to have a deposition. He says, that's all right.
 (12) That's fine. But that's about it.
 (13) I've talked more in correspondence with you
 (14) and Shilo and that e-mail. That's where all my
 (15) correspondence has been.
 (16) **Q.** Have you talked to any of the people
 (17) underneath you about this situation?
 (18) **A.** Oh, yes.
 (19) **Q.** Okay. And specifically about this deposition?
 (20) Or about Joe? Or what?
 (21) **A.** About everything. There isn't a person out
 (22) there that does not care about Joe.
 (23) **Q.** Does Simplot have barricades out there?
 (24) **A.** Yes.
 (25) **Q.** What are they?

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- (1) **A.** Depends on what kind of barricades you're
 (2) referring to.
 (3) We have permanent barricades. We have red
 (4) barricades. We have yellow barricades and yellow
 (5) barricade tape, which is a caution which you can cross
 (6) through, if you know the condition. Or danger -- red
 (7) danger tape.
 (8) **Q.** What is a solid barricade?
 (9) **A.** A solid barricade?
 (10) **Q.** Yeah. What does it look like? I know I'm
 (11) being vague, but I don't know.
 (12) **A.** Well, if you're referring to the one on the
 (13) sulfuric pad, there's a red barricade all the way around
 (14) it, which means that if you cross that line, you need to
 (15) have goggles or additional PPE on.
 (16) **Q.** So, a solid barricade out there doesn't mean
 (17) what I think of as a solid barricade, which is if I fall
 (18) into it, it's going to hold me up.
 (19) **A.** No. There are barricades like that, but not
 (20) in this case, no.
 (21) **Q.** Are there solid barricades out there?
 (22) **A.** Yes.
 (23) **Q.** Are they ever used?
 (24) **A.** In some cases they are.
 (25) **Q.** When would they be used?

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- (1) **A.** You know, if you get so far from a roof, then
 (2) we have to have barricades in place or retractable
 (3) liners to keep people from going certain distances.
 (4) At four feet away from an opening or a hole in
 (5) the ground, we put up solid barricades.
 (6) We have solid barricades on tracks, rail
 (7) tracks.
 (8) **Q.** So, they're used for a variety of purposes?
 (9) **A.** Yeah.
 (10) **Q.** In your estimation, who's responsible for
 (11) putting up barricades around a project when people are
 (12) not there? Let me ask that better.
 (13) Let's assume that everyone has gone home from
 (14) a project; independent contractors. Who's responsible
 (15) for putting up barricades around the hole where they're
 (16) working?
 (17) **A.** That can be answered in several different
 (18) ways.
 (19) **Q.** Okay.
 (20) **A.** Management were responsible for all the
 (21) barricades.
 (22) **Q.** Okay.
 (23) **A.** So, if we have a contractor that puts in a
 (24) barricade, say Idaho Industrial or any of the other
 (25) contractors we have out there, we have to update the

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- (1) barricades daily.
- (2) **Q.** Okay.
- (3) **A.** They may not be there over a weekend, but our
- (4) requirement is that they'll be updated daily.
- (5) **Q.** Who updates them if --
- (6) **A.** Management or we send our operators out to
- (7) make sure the barricades are updated under the direction
- (8) of management.
- (9) **Q.** So, but you don't require them to do anything?
- (10) **MR. CANTRILL:** "Them" being?
- (11) **MR. GEORGE:** I'm sorry. I'm sorry.
- (12) **Q.** (BY MR. GEORGE) "Them" being the independent
- (13) contractor.
- (14) **A.** If they have a serious condition out there
- (15) they need to maintain, contractors have been known to
- (16) send their people out to update their barricades because
- (17) -- depending on the hazards associated with that job.
- (18) **Q.** Okay.
- (19) **MR. GEORGE:** Do you mind if we take a break?
- (20) (A recess was taken from 10:06 A.M. to
- (21) 10:13 A.M.)
- (22) **Q.** (BY MR. GEORGE) How much do you know about
- (23) the plastic structure that was put up?
- (24) **A.** I don't know anything.
- (25) **Q.** We've kind of jumped around and I've tried to

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- (1) follow you where you're going in this thing, but I do
- (2) need to go back and cover some places that you might
- (3) think we've already talked about.
- (4) If you look at your Exhibit No. 1.
- (5) **A.** Uh-huh.
- (6) **Q.** Yes?
- (7) **A.** Yes.
- (8) **Q.** I don't know how you want to do this, but how
- (9) far --
- (10) This northwest corner is the one that I
- (11) understand to be the one that Joe stepped, stumbled,
- (12) whatever you want to say, through.
- (13) **A.** Correct.
- (14) **Q.** Was there any damage to that opening when you
- (15) went back and looked at it?
- (16) **A.** I took this picture at 10:00. When I went and
- (17) did my investigation, no one had been there except me.
- (18) **Q.** That's exactly how it looked?
- (19) **A.** Uh-huh.
- (20) **Q.** Yes?
- (21) **A.** Yes, it is.
- (22) **Q.** Did you see any damage to the opening
- (23) besides --
- (24) Well, was there damage to the opening? I
- (25) can't tell.

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- (1) **A.** Not to my knowledge.
- (2) We had this one side, as you can see right
- (3) there, tied up. And as to who tied it up, I do not
- (4) know. But I know that that's where we were accessing
- (5) the pad from.
- (6) **Q.** And did Joe tell you that's where he fell
- (7) through?
- (8) **A.** Yes.
- (9) **Q.** And there was no platform here on the inside?
- (10) **A.** No, no. It had not been reinstalled.
- (11) **Q.** Obviously the boot here in the alleyway is
- (12) his?
- (13) **A.** It was left right where it was.
- (14) **Q.** I guess I shouldn't call it alleyway.
- (15) **A.** That's right near the safety shower.
- (16) **Q.** Okay. What is this black pipe? Do you know?
- (17) **A.** I can't -- I don't -- I don't recognize it
- (18) right now.
- (19) **Q.** How far down the sidewalk did the hose run?
- (20) **A.** The full length going south out of here.
- (21) **Q.** And I've only been out there once. And I
- (22) can't remember if it's, like, 20 feet or 25 feet or --
- (23) **A.** I haven't measured it, but I would guess it to
- (24) be a good 25 feet and then crossing across the pad over
- (25) into the other sump.

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- (1) **Q.** And Joe, as you understand it, walked the
- (2) length of it towards -- walked the length of the hose
- (3) towards the entrance, correct?
- (4) **A.** That's correct. Yes.
- (5) **Q.** Has Joe had any other safety violations out
- (6) there?
- (7) **A.** Not to my knowledge. Joe was a good employee.
- (8) **Q.** I shouldn't say "any other."
- (9) Was he given a safety violation for this
- (10) instance?
- (11) **A.** No, he was not.
- (12) **Q.** Did he give a written statement on this
- (13) incident?
- (14) **A.** I was supposed to get one from him, but I
- (15) don't know that I did. I don't know. I cannot
- (16) remember. I cannot remember.
- (17) **Q.** Did you look for one?
- (18) **A.** I did.
- (19) **Q.** Okay.
- (20) **A.** Based on your asking me to come to this, I
- (21) went and tried to find all the documentation.
- (22) And that written statement should have been in
- (23) the file folder with that, if it was there, because I
- (24) asked for everything out of the file.
- (25) I went to look for the file because normally

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- (1) Saturday, the day before this accident.
 (2) **A.** Uh-huh.
 (3) **Q.** And there was nobody on-site from Idaho
 (4) Industrial from then until Monday morning.
 (5) Can you confirm or deny that?
 (6) **A.** I cannot.
 (7) **Q.** All right. A couple of the employees
 (8) testified that they wired this thing shut when they had
 (9) the propane tanks going. Were you aware of that?
 (10) **A.** Yes, I was.
 (11) **Q.** Okay. The picture shows that it's opened.
 (12) **A.** Correct.
 (13) **Q.** Can you tell me why it would be open?
 (14) **A.** Access for operators.
 (15) **Q.** Operators of the J.R. Simplot --
 (16) **A.** Of the J.R. Simplot Company.
 (17) **Q.** So, I think you may have even opened that up;
 (18) is that correct?
 (19) **A.** I could have been one. I did not open it, but
 (20) I would have.
 (21) **Q.** Because the operators have to get in?
 (22) **A.** They need access for that sump.
 (23) **Q.** You said you didn't know anything about the
 (24) barricade, and that's fair enough; but you do know it's
 (25) temporary.

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- (1) **REPORTER'S CERTIFICATE**
 (2) **I, MARY (RAINEY) STOCKTON, CSR No. 746,**
 (3) **Certified Shorthand Reporter, certify: That the**
 (4) **foregoing proceedings were taken before me at the time**
 (5) **and place therein set forth, at which time the witness**
 (6) **was put under oath by me;**
 (7) **That the testimony and all objections made were**
 (8) **recorded stenographically by me and transcribed by me or**
 (9) **under my direction;**
 (10) **That the foregoing is a true and correct record**
 (11) **of all testimony given, to the best of my ability;**
 (12) **I further certify that I am not a relative or**
 (13) **employee of any attorney or party, nor am I financially**
 (14) **interested in the action.**
 (15) **IN WITNESS WHEREOF, I set my hand and seal this**
 (16) **24th day of October, 2013.**
 (17)
 (18)
 (19)
 (20)
 (21) _____
MARY (RAINEY) STOCKTON, CSR
 (22) **Notary Public**
 (23) **P.O. Box 2636**
 (24) **Boise, Idaho 83701-2636**
 (25) **My commission expires February 3, 2017**

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- (1) **A.** Oh, absolutely.
 (2) **Q.** What's the purpose for the barricade?
 (3) It's to keep heat in and not people out; is
 (4) that correct?
 (5) **A.** Exactly. It was only for heat.
 (6) **Q.** Okay.
 (7) **A.** It was for curing of the pad and protection
 (8) from upper acid and rain because we knew we were going
 (9) to have a rain storm.
 (10) **Q.** So, it was just there to protect -- they said
 (11) there's a half million dollars worth of --
 (12) **A.** Coating.
 (13) **Q.** -- coating down there.
 (14) It was just to protect the coating?
 (15) **A.** Yeah.
 (16) **Q.** And after the job was done, it was removed.
 (17) **A.** That's correct.
 (18) **MR. CANTRILL:** That's all I have.
 (19) **MR. GEORGE:** Thanks, John. I appreciate you
 (20) coming in. I know it's a hassle and a pain and not your
 (21) favorite thing to do.
 (22) (The deposition concluded at 10:25 P.M.)
 (23) (Signature waived.)
 (24)
 (25)

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EXHIBIT "C"

Health and Safety Plan (HASP) for Contractors

Doc Name: 02 01 38

Owner: Mowrey, James

Department: Safety

Location: Safety Procedures

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Approved By: John Bob

Approval Date: 01-31-2011

Revision Date: 01-25-2011

Effective Date: 01-31-2011

I. SCOPE:

The Contractor Health and Safety Plan (HASP) is developed as a general overview of the job for the purpose of identifying hazards that exist or could reasonably exist from the contractor's craft work. The Contractor Chemical Tracking Form is the last sheet of the HASP and is used to ensure that all chemicals brought, used, and disposed of on-site are accounted for in accordance with State and Federal Regulations.

II. PROCEDURE:

A. For All New Construction or Jobs That Require Significant Modification to a Plant:

1. Upon receiving a contracted job assignment, the Contractor Supervisor or Designee (CS/D) will meet with the Simplot Project Manager (PM) to review the scope of the work and develop the HASP. All details and strategies of the work will be discussed. Known and potential hazards will be identified and listed together with safe work practices, control measures and personal protective equipment needed to mitigate the hazards. The Project Manager will coordinate with all other work group entities and determine hazards that each creates. The PM will communicate this information to all affected work group entities and may need to consult with the following:

- a) Process Engineer
- b) Safety Department or Safety Committee
- c) Environmental Department
- d) Production/Operations
- e) Contractor Employees
- f) Engineering Manager

2. As work progresses, the HASP may need to be modified to reflect planning changes or hazards that were unforeseen. Where more than one work group entity is working on the project or in the same area, it will be necessary for the PM to hold a "Plan-of-the-Day" meeting to assure that all affected work groups are aware of additional hazards together with control measures or requirements. A copy of the HASP will be kept in the control room for the duration of the job and will be made available to other contractors or Simplot employees upon request.

B. For All Routine Work:

1. The contractor will supply to the writer of the Safe Work Permit a HASP that identifies the known and potential hazards of a particular task, together with safe work practices, control measures and personal protective equipment needed to mitigate the hazards.
2. As work progresses, the HASP may need to be modified to reflect planning changes or hazards that were unforeseen.
3. The contractor employees will ask the operator about any known hazards that are present in the area and clarify any daily changes in operations as a result of said hazards.

NOTE: Contractors must provide a complete and signed copy of the HASP to a member of the Safety Department AFTER the work has been completed. The Contractor Chemical Tracking Form must be filled out completely and accurately based on chemicals brought on site. All chemicals must be pre-approved prior to being brought onsite. Copies of the MSDS for all chemicals brought on site must be attached to the HASP.

III. DEFINITIONS:

A. **Health and Safety Plan (HASP):**

A document describing the general overview of a job together with job hazards and associated control measures including personal protective equipment.

B. **Routine Work:**

Any construction or maintenance work that does not consist of new work or significant modifications. If there is a question about whether a task consists of routine work, the Project Manager will make that determination.

C. **Work Group Entity:**

Any individual or group of individuals who have assigned work to perform in a given area.

D. **Control Measures:**

A system, plan or equipment used to protect employees from the existing and/or potential hazards.

E. **Area Supervisor:**

A person responsible for the area in which the contractor work is performed.

IV. ROLES/RESPONSIBILITIES:

A. **Project Manager:**

Ensure that all contracted work is analyzed hazards identified, and safety plans documented and followed.

Ensure the HASP has been reviewed and signed by Project Manager, Area Supervisor, Safety Representative, and Contractor Supervisor.

Will keep a signed copy of the HASP in the Project Binder.

B. **Area Supervisor:**

Will coordinate with PM and CS/D in identifying process area hazards that exist or may exist that could affect employees' safety during the contractor's work assignment in the area. The Area Supervisor will review and sign the HASP.

C. **Process Engineer:**

Will consult with PM and CS/D in giving information that instructs or advises relative to the environmental responsibility of the contractor employee during the contractor's work assignment in the area.

D. **Safety Department/Safety Committee:**

Will consult with PM and CS/D in giving information that instructs or advises relative to hazards or production processes.

E. **Contractor Supervisor/Designee:**

Will ensure that contracted work is done safely by assuring that all work is analyzed, hazards identified, and safety plans are documented and followed. Will participate with the PM and others in the development of the HASP.

Will communicate the information contained in the HASP to all contractor's employees in order that all requirements are clearly understood and work can proceed safely.

Will conduct a meeting with all involved contractor employees to read and discuss the HASP and ensure the contractor's employees sign the document.

Will ensure that the MSDS for any chemical brought on-site is attached to the HASP.

Will maintain an accurate inventory of all chemicals brought on-site.

F. **Contractor Employees:**

Will review and sign the HASP and the work permit verifying that they understand the job procedures and hazards. Will also verify with the Operator any unusual work conditions in the task area.

Guarding of Equipment

Doc Name: 02 01 17**Owner:** Mowrey, James**Department:** Safety**Location:** Safety Procedures

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Approved By: John Bob
Approval Date: 01/24/12
Revision Date: 10/07/11
Effective Date: 02/01/12

I. SCOPE:

Identify potential safety concerns where the operation of a machine or accidental contact with it can injure personnel in the vicinity. The hazard must be either controlled or eliminated.

II. PROCEDURE:

- A. A wide variety of mechanical motions and actions may cause hazards to the worker. These can include movement of rotating members, reciprocating arms, moving belts, meshing gears, cutting teeth and any parts that impact or shear.
- B. Safeguards must meet these general requirements:
 - 1. Prevent contact: the safeguard must prevent hands, arms or any part of the worker's body or clothing from making contact with dangerous moving parts.
 - 2. Secure: guards and safety devices should be made of durable material that will withstand the conditions of normal use. They must be firmly secured to the equipment.
 - 3. Protect from falling objects: safeguards should ensure that no objects can fall into moving parts.
 - 4. Create no new hazards: the edges of the guards should be rolled or bolted so that they eliminate sharp edges.
 - 5. Create no interference: proper safeguarding can enhance efficiency since it can relieve the worker's apprehension about injury.
 - 6. Allows safe lubrication: if possible, a worker should be able to lubricate the machine without removing the safeguards. If not possible, see LockOut/TagOut Procedure #6.
- C. Before a piece of equipment is put back in service after maintenance, cleaning or replacement; maintenance will ensure all guards are properly installed.

III. DEFINITIONS:

A. Guard:

Barrier that prevents access to danger areas. These include fixed, interlocked, adjustable and self-adjusting guards and trip cables.

IV. ROLES/RESPONSIBILITIES:

A. **Operator:**

Is responsible to ensure that all guards are in place prior to putting equipment in service.

Note: If a guard is not possible, a barricade is required to be in place prior to putting equipment in service.

B. **Management:**

Is responsible to ensure that all equipment, which have moving parts and have a potential to cause injury, are guarded properly.

Is responsible to ensure safeguards meet minimum general requirements, prevent worker contact, must be durable and firmly secured, protect equipment from falling objects, create no new hazards, create no interference, and allow safe access to lubrication points.

V. TRAINING:

A. Specific and detailed training is a crucial part of any effort to provide safeguarding against machine related hazards. Thorough operator training should involve instruction or hands on training in the following:

1. A description and identification of the hazards associated with particular machines,
2. The safeguards themselves, how they provide protection, and the hazards for which they are intended,
3. How to use the safeguards and why,
4. How and under what circumstances safeguards can be removed and by whom (in most cases repair or maintenance personnel only), and
5. What to do (e.g. contact the supervisor/barricade or tag-out equipment) if a safeguard is damaged, missing, or unable to provide adequate protection.

B. This kind of safety training shall be necessary for new operators and maintenance or set-up personnel when any new or altered safeguards are put in service or when workers are assigned to a new machine or operation.

NOTE: For further details of regulation, see OSHA Regulation 1910.211 - .222.

VI. SAFETY:

N/A

VII. ENVIRONMENTAL:

N/A

VIII. MEDICAL:

N/A

Barricades and Blinker Lights

Doc Name: 02 01 16
Owner: Leonard, James

Department: Safety
Location: Safety Procedures

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I. SCOPE:

To assure that all personnel are adequately warned and protected when a condition or work in progress creates a hazard to personnel entering an area.

II. PROCEDURE:

- A. The person(s) working in an area that should be barricaded are responsible for placing and maintaining the barricade. They are also responsible for the removal of the barricade and cleanup of material when the job is completed. Whenever possible, return materials to Stores or control rooms for future use.
- B. Barricades and barrier tape must be constructed of easily identifiable material to stop or restrict personnel from entering an area. The following color code is established and corresponding barrier tape can be obtained from the Stores Department:
 1. Red barrier tape: **"DANGER"** with a **Danger Tag**. Entering will place a person in a position to be injured or suffer detrimental health effects. **"Authorized Personnel Only, DO NOT ENTER!"**
 - a. Examples of red barricaded areas include but are not limited to the following:
Overhead lifting hazards, open holes or man ways, acid leaks, and etc..
 - b. Entering or crossing a "DANGER" barricaded area is not permitted by unauthorized personnel. Area operating supervisors (or the person/s responsible for the barricade) may authorize personnel to enter and work within the barricaded area after assuring that the personnel are aware of the hazard and necessary safety precautions are in place.
 2. Yellow barrier tape: **"CAUTION"** with a **Caution Tag**. Entering will expose a person to minor hazards, but being aware of the hazards will allow adequate safeguards to be taken. Employees may proceed with caution after necessary safeguards have been taken.
 - a. Examples of yellow barricaded areas include but are not limited to the following:
Tripping hazards in a walkway, hot work, personnel working near high traffic areas, and etc...
 - b. Entering or crossing a "CAUTION" barricaded area is permitted only after personnel have been informed (by reading the tag) of the hazards that exist in the area and have taken the necessary safeguards.
 3. White background with red and black lettering: **"DANGER"** with a **Danger Tag**, "contains asbestos fibers; avoid creating dust; cancer and lung disease hazard; avoid breathing airborne asbestos fibers". Only trained and certified employees with proper personal protective equipment are authorized to work in this area, **DO NOT ENTER!**
 4. Red background with black lettering: **"DANGER – WATERBLASTING"** with a **Danger Tag**. Danger, high pressure wash. **DO NOT ENTER!**

5. Radiation Barrier Tape: Yellow background with red lettering. **Caution Radiation Area**. Red Barrier tape with a "Danger" tag must be used outside the radiation tape area to keep personnel out of the radiation area.
- C. Barricade shall be a minimum of four (4) feet from a floor opening, wall opening or open trench that would cause a fall of more than four (4) feet. Unguarded equipment exposes personnel to potential injury when moving elements are within four (4) feet of the barricade. Unless physically impossible, barricades protecting people from moving elements shall be at least four (4) feet from the nearest hazard inside the barricade. If it is not possible, the barricade must meet guardrail standards and/or adequately protect from moving equipment.
- D. Without exception, tags must be attached to every barricade or barrier tape at readily accessible locations. The information must be legible.
 1. Red DANGER tags must include the date the barricade was installed and must be updated on a daily basis. The name (not initials) (contractor's name and company) of the person responsible for the barricade and the hazard must be noted on the tag.
 2. Yellow CAUTION tags must include the date that the barricade was installed and the expected date for project completion. Yellow tags may be left for a duration of up to 7 days without update. The name (not initials) (contractor's name and company) of the person responsible for the barricade and the hazard must be noted on the tag.
 3. Information on tags must be legible at arms' length and must be written in ink.
 4. Barricading must be inspected on a daily basis and if the tag for a barricade is not legible, the tag shall be replaced.
- E. The barrier tape must be supported to minimize potential for breaking or sagging and so that it maintains a height of about four (4) feet.
- F. The area operating supervisor and/or operator must be made aware of the location and reason for the barricade.
- G. When overhead work or hazards affect several stories or levels, persons working below should be effectively barricaded from falling hazards.
- H. A safe walkway should be maintained through the area. If it is necessary to barricade an area including a ladder or stairway, both top and bottom of stairway/ladder must be barricaded. The area inside the barricade should be kept as small as possible to minimize disruption to activities outside the barricade.
- I. For some conditions it may be necessary to assign a safety watch to assure that all personnel remain clear of the barricaded area.
- J. On roadways, walkways and other areas where visibility of a barricade could be a problem at night, barricade lighting must be provided.
- K. A supply of track barricade arms with blinker lights and an assortment of signs will be maintained.
- L. When circumstances arise that cause a barricade to be put in place, only the individuals who placed the barricade shall be authorized to remove it.

However, in situations where the employee who placed the barricade is not available when the work or condition has been satisfied, the supervisor of the area or contractor group shall be authorized to remove or have removed a barricade that was placed in service by the employees who are assigned to work under their direction and authority. Barricades may be removed by same or like qualified person. A qualified person in the same job capacity can remove the barricade after the hazard has been removed

1. Removal can only be completed after the hazard has been identified and verified as being corrected and removal of the barricade will not subject employees to conditions that caused the barricade to be put in place initially.
 - a. NOTE: By no means is this provision intended to permit the removal of a barricade for any other purpose than when the work or condition that required placing the barricade has been satisfied as completed or corrected.

III. DEFINITION:

A. **Barricade:**

Barricade/barrier tape made up of material easily identified which is used to restrict access and alert personnel to hazards.

B. **Blinker Light:**

Battery operated, flashing light that is associated with a barricade to prevent personnel from entering a hazardous area at nighttime or in a low visibility area.

C. **Authorized Personnel:**

Person responsible for the barricade, any person who has a work permit to perform work inside a barricade, or any person who has permission from the persons responsible for the barricade.

IV. ROLES/RESPONSIBILITIES:

A. **Employee/Contractor:**

To install a barrier or barricade and tags that effectively warns personnel of the hazards involved.

To remove and properly dispose of all barricade material once hazard no longer exists.

V. TRAINING:

Shall provide safety, health, environmental and job specific training for job assignments.

**Removal And Dispersment Of Plant
Property That Has Been Declared Obsolete,
Unsalvageable, or Waste For Plant Uses
J.R. Simplot Company – Don Plant
Management Directive #C-6 Revision 2
Re-Issue Date: 3/14/1994**



DON PLANT

Location: Don Plant	Document #	01 10 16
Owner: John Bob	Department:	Management

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1.0 Purpose

- 1.1 To ensure that contractors perform their work safely and that they are properly indoctrinated and trained to comply with safety and environmental regulatory requirements.

2.0 POLICY STATEMENT:

- 2.1 To the extent reasonably possible, contractors will be provided a work environment free of hazards that may cause illness or physical harm. The Company will strictly enforce contractor compliance with Federal, State, plant safety (OSHA), and environmental regulations.
- 2.2 Contracts will be written to state that excess materials brought into the Don Plant by a contractor must be removed from the plant at the conclusion of the job/project.
- 2.3 Contractors are prohibited from disposing of solid wastes in plant bins or Snake River Sanitation roll-off bins unless this practice has been approved in their contract and prior arrangements have been made with the Environmental Support Manager or designee. If this

practice has not been approved in their contract, contractors are required to remove all solid wastes, as they are generated, on a daily basis.

- 2.4 Contractors are required to practice proper management of hazardous materials which they bring on plant including proper storage of the items. Contractors are expected to use non-hazardous substitutions whenever practical/possible for any materials brought on-site.
- 2.5 Contractors are required to practice good housekeeping in their areas.
- 2.6 This directive will be read by the contractor and will be incorporated by reference into each contract.

3.0 RESPONSIBILITIES:

- 3.1 The Safety Department is responsible for the indoctrination of contractors in the areas of plant regulations and processes, safe work practices and OSHA compliance.
- 3.2 Environmental Support is responsible for the indoctrination of contractors in compliance with local, State and Federal environmental regulations and to inspect contractor areas to ensure compliance with this directive.
- 3.3 Project supervisors are responsible to coordinate with the Safety Department and Environmental Support to assure that contractors receive indoctrination (when feasible, this will occur at least one week prior to beginning work). When Safety Department and Environmental Support personnel are not available, indoctrination will be performed by trained project supervisors using appropriate documents. The project supervisor must also instruct the contractor with respect to potentially hazardous working conditions that may exist at any new work site within the plant.
- 3.4 Contractors regularly working within the plant will be required to attend annual safety and environmental indoctrinations in January of

each year. However, all such contractors must have attended a plant safety and environmental indoctrination within the past six (6) months.

4.0 CONTRACTOR OBLIGATIONS:

- 4.1 The contractor will furnish the Safety Department with a copy of the following information as it applies to the job:
 - 4.1.1 A copy of their safety program.
 - 4.1.2 Certification and training records for heavy equipment, such as, but not limited to, cranes, forklifts, backhoes, manlifts and front-end loaders.
 - 4.1.3 A copy of their hazardous chemical communication program.
 - 4.1.4 Material Safety Data Sheets (MSDS) for any chemical or product intended to be brought into the plant for use on the job. Training records of employees in the use and understanding of MSDS.
 - 4.1.5 Hazardous material handling program. Planned spill control and cleanup procedures and training records of those who will handle/respond to spills of hazardous materials.
 - 4.1.6 Copy of current (annual) respirator fit test records.
 - 4.1.7 Names of employees with first aid training and emergency medical assistance training, such as C.P.R.
 - 4.1.8 Written proof of insurance with coverage in amounts specified by the J. R. Simplot Company for the contract.
- 4.2 The contractor will additionally comply with the environmental procedures outlined in this directive.

5.0 INSPECTIONS:

- 5.1 Routine safety inspections of contractor sites will be done by the Project Supervisor and the Safety Department. Violations of plant safety rules, OSHA regulations, or any unsafe work practices will be noted and recorded. The contractor will be notified of any safety violations that require correction. The safe work performance of contractors will be utilized in determining whether or not a contractor is awarded future work.
- 5.2 Routine environmental compliance inspections of contractor areas and work sites will be done by the Project Supervisor and Environmental Support. Violations of plant environmental rules and local, State and/or Federal regulations will be noted and recorded. The contractor will be notified of any compliance violations that require correction. The compliance performance of contractors will be utilized in determining whether or not a contractor is awarded future work.

6.0 SAFETY AND ENVIRONMENTAL PROCEDURES FOR CONTRACTOR:

- 6.1 When a contract for services is issued, a copy of the plant safety regulations for contractors is also to be issued and reviewed by the contractor prior to the safety indoctrination meeting.
- 6.2 When a contract for services is issued, a copy of this directive and a copy of the plant environmental regulations for contractors will be issued and reviewed by the contractor prior to the environmental indoctrination meeting.

7.0 MEDICAL SERVICES:

- 7.1 Contractors will be charged a reasonable amount to cover actual costs incurred resulting from their employees being provided medical assistance or transportation to a local hospital. Transportation will be billed at \$125.00 per trip. Charges for medical supplies and/or services of Simplot EMTs or nurse will be as determined by the Medical Department.

8.0 PROJECT SUPERVISOR SAFETY AND ENVIRONMENTAL RESPONSIBILITIES:

- 8.1 The project supervisor will be familiar with plant safety procedures and enforce them when violations are observed. Particular attention will be given to the following:
 - 8.1.1 Entering enclosed spaces.
 - 8.1.2 Scaffolding and work platforms.
 - 8.1.3 Lock out/tag out.
 - 8.1.4 Ladders.
 - 8.1.5 Barricading.
 - 8.1.6 Trenching and shoring.
 - 8.1.7 Respiratory protection.
 - 8.1.8 Track blockage.
- 8.2 Any difficulty in enforcing safety regulations with the contractor should be reported to the Safety Department. Corrective action will be taken with contractors violating safety policies/procedures up to and including termination of the contract(s).
- 8.3 The project supervisor will be familiar with plant environmental procedures and will require compliance with the procedures at all times.
- 8.4 The storage locations for waste material or potentially hazardous material must be established and identified for the contractor. Use of these areas by contractors is mandatory.
- 8.5 Any difficulty in enforcing environmental regulations with the contractor should be reported to Environmental Support. Corrective action will be taken with contractors violating environmental

policies/procedures up to and including termination of the contract(s).

9.0 DEFINITIONS:

- 9.1 The use of the term "contractor(s)" means primary contractor, their sub-contractors, and any and all of their employees who work at the plant.

- 9.2 Indoctrination means indoctrination and training.

EXHIBIT "D"

(1) DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
 (2) THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK
 (3)
 (4) JOSEPH JERRY MARAVILLA, an)
 (5) individual,)
 (6) Plaintiff,)
 (7) vs.) Case No.
 (8) IDAHO INDUSTRIAL CONTRACTORS,) CV-13-480-PI
 (9) INC.,)
 (10) Defendant.)
 (11) _____)
 (12)
 (13)
 (14)
 (15) ORAL DEPOSITION OF JOSEPH JERRY MARAVILLA
 (16) Taken on July 11, 2013
 (17)
 (18)
 (19)
 (20)
 (21)
 (22) REPORTED BY:
 (23) PAUL D. BUCHANAN, CSR NO. 7
 (24) and Notary Public
 (25)

(1) APPEARANCES:
 (2)
 (3) For the Plaintiff: PATRICK N. GEORGE
 (4) Racine, Olson, Nye,
 (5) Budge & Bailey
 (6) Attorneys at Law
 (7) Center Plaza Building
 (8) Pocatello, Idaho
 (9)
 (10) For the Defendant: DAVID W. CANTRILL
 (11) Cantrill Skinner Lewis
 (12) Casey & Sorensen
 (13) Attorneys at Law
 (14) P. O. Box 359
 (15) Boise, Idaho
 (16)
 (17) Also Present: Bob Lewis
 (18)
 (19)
 (20)
 (21)
 (22)
 (23)
 (24)
 (25)

I N D E X

(1)
 (2)
 (3) Examination By: Page
 (4)
 (5) Mr. Cantrill 4
 (6)
 (7) Exhibits:
 (8)
 (9) No. 1 - Color Photographs 9
 (10) No. 2 - Health and Safety Plan 13
 (11) No. 3 - Color Photographs 22
 (12)
 (13)
 (14)
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 (22)
 (23)
 (24)
 (25)

(1) BE IT REMEMBERED that on July 11, 2013, at the
 (2) hour of 9:00 a.m. the deposition of JOSEPH JERRY
 (3) MARAVILLA, produced as a witness at the instance of the
 (4) defendant in the above-entitled action now pending in
 (5) the above-named court, was taken before Paul D.
 (6) Buchanan, CSR #7, and notary public, State of Idaho, in
 (7) the law offices of Racine, Olson, Nye, Budge & Bailey,
 (8) 201 East Center Street, Pocatello, Bannock County,
 (9) Idaho.
 (10)
 (11) WHEREUPON, the following proceedings were had:
 (12)
 (13) JOSEPH JERRY MARAVILLA,
 (14) called at the instance of the defendant, having been
 (15) first duly sworn, was examined and testified as follows:
 (16) EXAMINATION
 (17) BY MR. CANTRILL:
 (18) Q. State your name, please.
 (19) A. Joseph Jerry Maravilla.
 (20) Q. Mr. Maravilla, I am going to ask you a series
 (21) of questions about an accident that took place out at
 (22) the Don plant in which you suffered sulfuric acid burns.
 (23) If you don't understand my questions, please ask me to
 (24) repeat them and I will do so.
 (25) A. Okay.

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- (1) Q. You answered some written questions that I
(2) asked of you. Do you recall answering those?
(3) A. Yes.
(4) Q. Did you review those before you came in today?
(5) A. No.
(6) Q. Have you reviewed them at any time?
(7) A. No.
(8) Q. When you did answer, were they true and
(9) correct to the best of your knowledge?
(10) A. Yes.
(11) Q. And do you wish to make any changes in them
(12) today?
(13) A. No.
(14) Q. Where do you live?
(15) A. Chubbuck.
(16) Q. The same address you put in the
(17) interrogatories?
(18) A. Yes.
(19) Q. I notice you got divorced. When was it you
(20) got divorced?
(21) A. 2008.
(22) Q. You graduated from Treasure Valley Community
(23) College in 2005?
(24) A. Correct.
(25) Q. And you have no education past that.

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- (1) when I was like an operator, but for being a supervisor,
(2) no, I didn't get paid any more.
(3) Q. Were you a supervisor then?
(4) A. Yes.
(5) Q. Tell me who you supervised.
(6) A. I was over the granulation and sulfuric areas.
(7) Q. And how many people did you have working for
(8) you?
(9) A. Around eight or nine.
(10) Q. Were they all on shift that day?
(11) A. Yes.
(12) Q. Had you ever received any reprimands or any
(13) disciplinary proceedings while you were at Simplot?
(14) A. One time I got in trouble for putting a safety
(15) lock on a regular locker in like 2007, like a clothes
(16) locker. That is all I was ever --
(17) Q. Other than that no problems.
(18) A. No.
(19) Q. Who was your direct supervisor?
(20) A. John Oborn.
(21) Q. There was another person that was around that
(22) night, Dave Bierman?
(23) A. He was an operator in the sulfuric area.
(24) Q. Did he report to you?
(25) A. Yes.

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- (1) A. No.
(2) Q. Tell me what you did after 2005.
(3) A. I worked for Bailey Concrete from June of 2005
(4) until around November of 2005, and then I got hired with
(5) the J. R. Simplot Company in 2006.
(6) Q. Do you remember the date of the accident?
(7) A. October 16, 2011.
(8) Q. About 8:30 in the evening?
(9) A. Correct.
(10) Q. What was your shift that day?
(11) A. We just came on first of the night shifts.
(12) Q. What are the shift hours?
(13) A. It was 6 p.m. to 6 a.m.
(14) Q. Did you work that shift regularly?
(15) A. Yes.
(16) Q. How long had you been working that shift?
(17) A. Two hours.
(18) Q. I mean how long had J. R. Simplot Company been
(19) working that schedule?
(20) A. I started on day so probably around a year,
(21) two years.
(22) Q. Did you get paid more for working that shift?
(23) A. Yes.
(24) Q. How much more?
(25) A. Night was like a dollar shift differential

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- (1) Q. So you reported to Mr. Oborn?
(2) A. Correct.
(3) Q. Mr. Oborn reported to whom, the plant manager?
(4) A. Production manager.
(5) Q. Who would that have been?
(6) A. Stan Christensen.
(7) Q. Are these people all still employed by the
(8) Simplot Company?
(9) A. Yes.
(10) Q. Tell me what the project was involving the
(11) sulfuric acid tank that my client was involved with.
(12) A. They were pouring a new pad in the sulfuric
(13) area.
(14) Q. Just my client was doing that, right, pouring
(15) just the concrete?
(16) A. I'm not aware of all that went on.
(17) Q. That's what I was going to ask you. You knew
(18) that they were doing something in that area but you
(19) don't know who had the individual responsibility?
(20) A. I was told they were the general contractor of
(21) the job.
(22) Q. And how long had they been on the job when the
(23) accident occurred?
(24) A. A week, two weeks, I assume. We just came
(25) in -- I mean I was off and we came in on a Sunday night.

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- (1) Q. That's a good question. What day of the week
- (2) was it that this accident happened?
- (3) A. Sunday.
- (4) Q. Do you guys work 24/7?
- (5) A. That plant operates 24/7, correct.
- (6) Q. Was it unusual for you to work on a Sunday?
- (7) A. No.
- (8) Q. Have you ever met Mr. Lewis who is here today
- (9) with me?
- (10) A. I have seen him around.
- (11) Q. Have you ever formally introduced yourself and
- (12) talked with each other?
- (13) A. No.
- (14) Q. As I understand from talking with Mr. Lewis
- (15) this was a rush project; do you agree?
- (16) A. I do not know.
- (17) Q. I am going to mark some pictures that we have
- (18) and ask you to help me with them. Okay?
- (19) A. Okay. Since they were pouring concrete in
- (20) October, I would probably agree with that.
- (21) Q. With what?
- (22) A. That it was rush, because it was cold outside.
- (23) (Deposition Exhibit No. 1 marked for
- (24) identification.)
- (25) Q. Handing you Exhibit No. 1, which is a series

- (1) Q. At least you think 1A and B is as it appeared
- (2) before.
- (3) A. Correct.
- (4) Q. And the concrete is flat; is that correct?
- (5) A. Correct. It's flat here but it does like, it
- (6) slants to the north (indicating).
- (7) Q. As I understand it, the project entailed
- (8) pulling out all the concrete in the sulfuric acid tank
- (9) and lowering it some 20 to 21 inches; is that correct?
- (10) A. I wasn't a project manager on this job but
- (11) that could be a possibility.
- (12) Q. You were working that area the whole time the
- (13) project was being done; right?
- (14) A. Until I got hurt; it wasn't being done for too
- (15) long.
- (16) Q. You were there daily, though?
- (17) A. No, just shift work, we worked three on, four
- (18) off, two on; no, I was not there daily.
- (19) Q. Did you watch the area being demolished, the
- (20) concrete being taken out?
- (21) A. No.
- (22) Q. You never saw any of that.
- (23) A. No.
- (24) Q. Tell me what the sulfuric acid tank does, or
- (25) the sulfuric acid does at the Don plant.

- (1) of four photographs, why don't you take a look at all of
- (2) them.
- (3) A. (Witness complies.) Is this new or is this
- (4) before?
- (5) Q. Just look at them and then we will talk about
- (6) that. That's what I was going to talk about.
- (7) A. Okay, because it looks different.
- (8) Q. It looks different now, doesn't it. Those are
- (9) a series of four photographs taken of the sulfuric acid
- (10) area; is that correct?
- (11) A. Correct.
- (12) Q. My understanding is that's the way it appeared
- (13) before the reconstruction.
- (14) A. I agree with this one (indicating), the first
- (15) one --
- (16) Q. Let me do something. I am going to mark them
- (17) A, B, C, and D so we don't get them mixed up.
- (18) (Pause in proceedings.)
- (19) Q. Okay, you are looking at 1A you were talking
- (20) about.
- (21) A. I agree with 1A is before, it looks before.
- (22) And B looks before. Is this in the front or the back on
- (23) C? Because this looks different. This is raised up,
- (24) brand-new painted red, the concrete looks different than
- (25) it did.

- (1) A. We use it to put in our other process to make
- (2) phosphoric acid, and we bring railcars of it in because
- (3) we don't even make enough half the time so we bring
- (4) other railcars of sulfuric in and off load it so we can
- (5) use it to make other products.
- (6) Q. So you do manufacture some of your own
- (7) sulfuric acid at the Don plant?
- (8) A. Correct, we have two sulfuric acid plants.
- (9) Q. They have different names, don't they?
- (10) A. This is sulfuric 3.
- (11) Q. That's where the accident took place.
- (12) A. Yes.
- (13) Q. And then there is sulfuric acid 4.
- (14) A. Correct.
- (15) Q. How much does the J. R. Simplot Company make
- (16) of sulfuric acid daily, do you know?
- (17) A. I am not sure.
- (18) Q. How big is the tank that holds the sulfuric
- (19) acid?
- (20) A. I am not sure.
- (21) Q. Have you ever been educated in sulfuric acid
- (22) and what it does and does not do?
- (23) A. Very little.
- (24) Q. You know that J. R. Simplot Company has rules
- (25) when you are around sulfuric acid; right?

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- (1) **A.** Correct.
- (2) **Q.** Do you know what those are?
- (3) **A.** Safety goggles; if you are handling it
- (4) directly, rubber gear.
- (5) **Q.** Are there work rules associated with the
- (6) working with sulfuric acid?
- (7) **A.** Absolutely. If you are handling it directly,
- (8) rubber gear. If you are in this area (indicating),
- (9) safety goggles. If you are working in it, I mean if you
- (10) are on a pad and it's in immediate danger to life and
- (11) health, barricade tape.
- (12) **Q.** I am going to mark Exhibit No. 2 here.
- (13) (Deposition Exhibit No. 2 marked for
- (14) identification.)
- (15) **Q.** Do you recognize Exhibit No. 2?
- (16) **A.** Is this a HASP? It hasn't been signed.
- (17) **Q.** I know that, we are just talking about the
- (18) document itself.
- (19) **A.** Yes, I recognize it.
- (20) **Q.** Tell me what it is.
- (21) **A.** A Health and Safety Plan.
- (22) **Q.** Is that developed by the J. R. Simplot
- (23) Company?
- (24) **A.** Yes.
- (25) **Q.** And you went to Page 2 which I wanted you to

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- (1) **A.** Yes, minor burns from like guzzling it up.
- (2) Since I have been out there I don't think anything too
- (3) serious.
- (4) **Q.** What does guzzling it up mean?
- (5) **A.** Like there is a truck that if you have a
- (6) spill, they bring a big 'ol vacuum truck and suck it up.
- (7) **Q.** Tell me the process, sulfuric acid is either
- (8) trucked or trained in and goes into the containment
- (9) tanks; right?
- (10) **A.** Yes.
- (11) **Q.** How big are the containment tanks?
- (12) **A.** I am not sure.
- (13) **Q.** Several thousand gallons?
- (14) **A.** Yes.
- (15) **Q.** And what happens to the sulfuric acid, how is
- (16) it mixed with the phosphate?
- (17) **A.** They send it to a different plant and there is
- (18) a thing called a digester and they put a little bit of
- (19) phosphoric acid, sulfuric acid, water, and the ore that
- (20) comes from the mine and it reacts, and it goes on these
- (21) belt filters and they filter it out of the rock; I mean
- (22) it's a process of how you make --
- (23) **Q.** So you generally understand the process but
- (24) not the exact chemistry.
- (25) **A.** Yes.

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- (1) go to anyway. Look at the requirements when you are
- (2) dealing with sulfuric acid, would you please.
- (3) **A.** (Witness complies.) It doesn't say anything
- (4) about sulfuric.
- (5) **Q.** What I am talking about is safety precautions
- (6) taken that when you go into the area you have to wear
- (7) goggles at all times when you are in the containment
- (8) area; right?
- (9) **A.** Correct.
- (10) **Q.** And you have to hazmat up if you go in the
- (11) containment area?
- (12) **A.** If you are working where it could potentially
- (13) get on you, correct.
- (14) **Q.** And treat any and all standing liquids as a
- (15) possible acid spill?
- (16) **A.** Correct.
- (17) **Q.** And sulfuric acid may appear to be water?
- (18) **A.** Correct.
- (19) **Q.** What does the J. R. Simplot Company teach you
- (20) to do if you ever come in contact with sulfuric acid?
- (21) **A.** Get it off of you as quick as possible, use
- (22) the safety showers. There were safety showers all
- (23) around the area.
- (24) **Q.** Have you ever known any other employees to be
- (25) burned by sulfuric acid?

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- (1) **Q.** So just orally tell me what your job
- (2) description is or was when the accident happened.
- (3) **A.** I was a production supervisor. My job was
- (4) basically to manage the switch crew, the two sulfuric
- (5) plants and there are two granulation plants, a sulfate
- (6) plant, and a feed plant, they make cow feed or
- (7) supplement, and my job was to watch over those plants,
- (8) when I was on shift, on nights I was on the off shift so
- (9) I was pretty much there by myself besides my direct
- (10) supervisor, they call him an operations manager. They
- (11) just started that like the year before.
- (12) **Q.** That's John Oborn.
- (13) **A.** Yes.
- (14) **Q.** Tell me what Dave Bierman's job description
- (15) would be as an operator.
- (16) **A.** His job would be to operate that sulfuric
- (17) plant right here.
- (18) **Q.** What does operating that entail?
- (19) **A.** Make sure it runs, taking tests. They take
- (20) hourly tests on the acid and all of that stuff.
- (21) **Q.** But you don't have to do that?
- (22) **A.** No.
- (23) **Q.** Had you ever been involved with acid spills in
- (24) the time you were with Simplot?
- (25) **A.** Yes.

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- (1) Q. What causes acid spills?
 (2) A. Several different things.
 (3) Q. One of the chief reasons for a spill is loss
 (4) of power; right?
 (5) A. They can be.
 (6) Q. What happens when you lose power?
 (7) A. The pump stops running.
 (8) Q. And the sulfuric acid backs up.
 (9) A. Yes.
 (10) Q. On the night in question in fact the power
 (11) went out, didn't it?
 (12) A. Correct.
 (13) Q. For how long?
 (14) A. I am not sure. When I got over there, John
 (15) met me over there and sent me out to look at the sump.
 (16) And I got hurt. I don't know if it was back on before I
 (17) left. I kind of wasn't worried about the power at that
 (18) point.
 (19) Q. That's what I am trying to find out. I
 (20) understand you said that he sent you over there. Where
 (21) were you before?
 (22) A. I was across the street at that -- we have
 (23) these ponds across the street. We heard the power went
 (24) out. I was with the supervisor on the other side --
 (25) Q. Named?

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- (1) A. It was getting dark, it was raining.
 (2) Q. Raining hard?
 (3) A. Decent.
 (4) Q. When you went over to Plant 3, Plant 3 was
 (5) covered with a netting, was it not?
 (6) A. This whole pad had Visqueen over it.
 (7) Q. Had you ever seen the Visqueen there before?
 (8) A. No, it was not there; I don't think it was
 (9) there on my day shift, I got off that Thursday, but I'm
 (10) not sure, I don't remember.
 (11) Q. Do you know what the last time my client had
 (12) been there before your injury?
 (13) A. Friday, Saturday -- did you guys work on
 (14) Sunday?
 (15) Q. You can't ask him.
 (16) A. I'm not sure.
 (17) Q. Did you put on your hazmat gear?
 (18) A. I put on my goggles.
 (19) Q. That's all?
 (20) A. Yeah, I wasn't planning on going in -- see
 (21) where it's red, if you are outside of that, you have to
 (22) have your goggles on.
 (23) Q. Inside the red you have to have goggles?
 (24) A. No, outside the red you have to have goggles.
 (25) I mean inside the red you have to have goggles as well

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- (1) A. Shawn Maynard. He dropped me off by 12 of
 (2) that because his plant is over there and he went to
 (3) check his plant to see if it went out on his plant.
 (4) Dave called over the radio and said the power went out
 (5) in his plant and I didn't hear about any other plants
 (6) power going out. When you have a problem with a
 (7) particular plant, that's where you go. So I headed that
 (8) way and John met me over there. And that's how I ended
 (9) up over there.
 (10) Q. So when you went over to your plant, No. 3,
 (11) were the lights on?
 (12) A. Yes.
 (13) Q. So the power had been restored?
 (14) A.
 (15) A. Not necessarily. I mean we got back-up lights
 (16) and stuff.
 (17) Q. Battery powered?
 (18) A. Yeah, in the control room, and the lights were
 (19) restored outside, though, so the power could have been
 (20) back on.
 (21) Q. Well, did you have a flashlight with you?
 (22) A. I did not. So it was light enough, so there
 (23) was power.
 (24) Q. Well, was it dark outside or was it daylight
 (25) still?

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- (1) but you don't have to have rubber gear and stuff unless
 (2) you are working, handling it.
 (3) Q. But you knew and you had an understanding that
 (4) that area, the containment area was flooding; right?
 (5) A. No, that's the whole reason I was out there.
 (6) Q. Didn't Mr. Bierman tell you it was flooding
 (7) and to go look --
 (8) A. He said that there was acid in the sump, so my
 (9) boss, John Oborn, said, go look see how much acid is in
 (10) the sump because we don't want it to get on the pad.
 (11) That's what I was doing, I was walking out, the sump is
 (12) over here (indicating) --
 (13) Q. Let me ask you a question. You knew you were
 (14) going to look at the sump. The sump was backing up.
 (15) A. Yes.
 (16) Q. You were in a containment area and you knew
 (17) you were going to look and see what it was and you did
 (18) not put on your hazmat gear, is that correct, except for
 (19) goggles?
 (20) A. Yeah, I wasn't going to go into the -- you
 (21) don't have to. If you are standing here and there is
 (22) acid here (indicating) and you are not going to touch
 (23) it, you don't have to have no rubber gear on.
 (24) Q. So as you approached the area, where did Mr.
 (25) Oborn go?

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- (1) A. He stayed in the control room. The control
 (2) room is right here (indicating).
 (3) Q. How far away is it from where you were
 (4) involved with the sulfuric acid?
 (5) A. I got burned right here (indicating), I don't
 (6) know how far that is, maybe 50, 60 yards.
 (7) Q. So tell me what happened.
 (8) A. I come out of this door. This is all
 (9) covered -- do we have any different pictures?
 (10) Q. I have some.
 (11) A. I had my goggles on and, like I said, it's
 (12) raining --
 (13) Q. Are the goggles opaque or are they clear?
 (14) A. They are like a greenish color; they are
 (15) clear, though. This walkway is not very long. There is
 (16) a hose in the middle of this walkway, a yellow hose. I
 (17) tripped over that hose, I kind of rolled my ankle and
 (18) stepped down, stepped through the plastic and burned my
 (19) foot.
 (20) Q. Whose hose was that?
 (21) A. Idaho Industrial's.
 (22) Q. How do you know that?
 (23) A. Because it was an air hose.
 (24) Q. And Idaho Industrial, you had not been on the
 (25) job for two days.

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- (1) Q. Tell me what it is.
 (2) A. It's the work area that we were working on.
 (3) Q. Do you know who took the picture?
 (4) A. I assume John Oborn took them.
 (5) Q. So the one I want to focus on for a minute is
 (6) the one in the top left-hand corner and the one right
 (7) below it. Tell me what it is.
 (8) A. The top left, that's the walkway I was walking
 (9) in.
 (10) Q. Is there a hose there?
 (11) A. Yes.
 (12) Q. And that's the hose you tripped over?
 (13) A. Correct.
 (14) Q. Did you trip over it or slip?
 (15) A. I tripped, slipped -- I kind of rolled my
 (16) ankle on it (indicating). What do you call that?
 (17) Q. I'll let you answer.
 (18) A. I don't know if it's slip, trip, both.
 (19) Q. When that happened, when you slipped or
 (20) tripped or both, then what took place next?
 (21) A. This isn't very wide. I went this way and
 (22) then I stepped down, took a step to catch my balance,
 (23) stepped down and my foot went through the plastic.
 (24) Q. Did you take pictures of where your foot went
 (25) through the plastic?

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- (1) A. Yes.
 (2) Q. How do you know it was their air hose?
 (3) A. Because my operator had been there for two
 (4) hours and had no reason to get out an hose.
 (5) Q. The color of the hose was yellow?
 (6) A. Yellow.
 (7) Q. And it was in plain sight, right?
 (8) A. Yes.
 (9) Q. So you were walking parallel -- let me get
 (10) these pictures out and show you. I am sure you have
 (11) seen the pictures that show your pants and shoes in the
 (12) area; is that correct?
 (13) A. Correct.
 (14) Q. In fact they are attached to your discovery
 (15) that you gave me -- I am not sure they are Bates
 (16) stamped. It's not marked. I am going to show you
 (17) anyway. It's a series of seven pictures.
 (18) MR. GEORGE: If you want to use those as
 (19) deposition exhibits, I can just run you off another
 (20) copy.
 (21) MR. CANTRILL: Let's do that.
 (22) (Deposition Exhibit No. 3 marked for
 (23) identification.)
 (24) Q. Do you recognize Exhibit No. 3?
 (25) A. Yes.

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- (1) A. I didn't take these pictures. I was at the
 (2) hospital.
 (3) Q. Do you know the strength of that plastic?
 (4) A. Not very, it's ripped all right here
 (5) (indicating).
 (6) Q. Do you know how it was anchored?
 (7) A. No.
 (8) Q. But your testimony is your foot went through
 (9) the plastic.
 (10) A. Yes.
 (11) Q. Did it puncture a hole?
 (12) A. I'm not sure. I don't know if there was slits
 (13) in it; I can't really tell by this picture. But I got
 (14) acid on my foot, I stepped through it.
 (15) Q. And that's your testimony today, you tripped
 (16) or slipped over this hose that was in plain sight.
 (17) A. Correct.
 (18) Q. And you punctured --
 (19) A. As far as the plain sight, I don't agree with
 (20) that. It's raining and you have goggles on. I don't
 (21) agree that's plain sight.
 (22) Q. How hard was it raining?
 (23) A. The ground was pretty wet. And like he had to
 (24) go back, it was raining pretty good.
 (25) Q. So we have several different sources that told

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- (1) us what happened and one source said you tripped and
 (2) another place said you stepped into the area. So which
 (3) is correct?
 (4) **A.** I tripped.
 (5) **Q.** Why did you tell other people you stepped
 (6) into --
 (7) **A.** I did not say that.
 (8) **Q.** I am looking at the information you have given
 (9) us from the hospital. There is a statement, it isn't
 (10) copied all the way through, brought a 26-year-old male
 (11) who had stepped into a pool of 93 percent concentrated
 (12) sulfuric acid. Is that what you told the EMTs?
 (13) **A.** I could have said that. Tripped, stepped,
 (14) fell. I am not knowingly going to step into some acid.
 (15) **Q.** Have you read the incident report prepared by
 (16) I think it's Mr. Oborn?
 (17) **A.** Yes.
 (18) **Q.** Mr. Oborn says I have discussed this with Joe
 (19) several times. The incident happened as Joe stepped
 (20) down into a canopy covered sump area. The pad was under
 (21) construction, was completely covered, all but a slit for
 (22) entry.
 (23) According to John you told him you stepped
 (24) into a canopy.
 (25) **A.** When did he write that? I wasn't even at work

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- (1) and into the safety shower a few feet away.
 (2) **A.** The safety shower is right behind
 (3) (indicating).
 (4) **Q.** So if you are burned with sulfuric acid, do
 (5) they tell you exactly what you are supposed to do?
 (6) **A.** Get to a safety shower.
 (7) **Q.** And that was about, what, four feet away from
 (8) where you were?
 (9) **A.** Yeah, ten feet, close, that's close.
 (10) **Q.** And you immediately started pouring water onto
 (11) the burn site; right?
 (12) **A.** I got my boot off as quick as I could.
 (13) **Q.** How far was the burn area up your leg?
 (14) **A.** It's about six inches (indicating).
 (15) **Q.** So six inches. When you went into the
 (16) containment area, did you touch ground?
 (17) **A.** Yeah.
 (18) **Q.** So you went --
 (19) **A.** All of my weight was on my right foot. I am
 (20) lucky I didn't fall.
 (21) **Q.** Tell me the mechanics of the fall, I am having
 (22) a hard time. If you trip, you fall forward. How could
 (23) you fall --
 (24) **A.** I rolled up on that hose and -- I mean this
 (25) isn't a big area --

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- (1) when that was written so him discussing that with me
 (2) several times. I don't know if I agree with that.
 (3) **Q.** We are going to talk to him and see what he
 (4) says. I don't know, the review date is 11/6 of 2011.
 (5) **A.** I wasn't even at work.
 (6) **Q.** I don't know when it was prepared, to be
 (7) honest with you, I was just given it in discovery.
 (8) **A.** That's fine. I mean when you trip and you
 (9) regain your balance, you are going to step, so I mean
 (10) the way it's worded --
 (11) **Q.** There is interoffice communication from John
 (12) Oborn dated December 2, it says Joe had stepped onto the
 (13) pad, realized what had happened and swung out of the pad
 (14) and into a safety shower a few feet away.
 (15) **A.** I called for help on the radio first, no one
 (16) heard.
 (17) **Q.** You were on the wrong channel; right?
 (18) **A.** I didn't have time (indicating), I just called
 (19) for help.
 (20) **Q.** I understand you were in deep trouble but you
 (21) were on the wrong channel, that's why nobody heard.
 (22) **A.** People heard. I mean people answered on that
 (23) channel but didn't know where I was.
 (24) **Q.** According to John, Joe had stepped onto the
 (25) pad, realized what had happened, swung out of the pad

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- (1) **Q.** It's about four feet wide.
 (2) **A.** I went to the right and, like I said, I
 (3) stepped and then stepped down, regained my balance,
 (4) that's when my right foot went all the way in and, like
 (5) I said, I touched ground.
 (6) **Q.** Do you know anybody who has ever taken a
 (7) picture showing that you made a hole in the --
 (8) **A.** No, and I am not sure I did. I don't know if
 (9) I stepped -- he said there was a slit. I mean I don't
 (10) know -- I think I stepped on the plastic. And back here
 (11) (indicating), I mean you can't see what is going on back
 (12) there. And my boot is right here (indicating) and this
 (13) whole plastic is already open where my boot is. Do you
 (14) see it dangling?
 (15) **Q.** What's that?
 (16) **A.** Where I took my boot off (indicating), it's
 (17) not like that plastic is secured.
 (18) **Q.** But it's that hose that caused you to trip;
 (19) right?
 (20) **A.** I tripped over that hose.
 (21) **Q.** Does the J. R. Simplot Company have a lot of
 (22) hoses around the area?
 (23) **A.** Correct.
 (24) **Q.** Same color?
 (25) **A.** Yep.

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- (1) **Q.** So who have you talked to about this incident
 (2) besides Mr. Bierman, Mr. Oborn, that works at the plant,
 (3) anybody besides those two?
 (4) **A.** Ryan Richardson; he doesn't work there
 (5) anymore.
 (6) **Q.** Was he a friend?
 (7) **A.** He was the manager of the sulfuric area for a
 (8) long time.
 (9) **Q.** Did you give him a written report or oral
 (10) report?
 (11) **A.** He has seen the pictures.
 (12) **Q.** Did you sit down and talk to him?
 (13) **A.** Talked to him, yes.
 (14) **Q.** Over the phone or in person?
 (15) **A.** In person.
 (16) **Q.** How long did that last?
 (17) **A.** A half hour. And I have talked to several
 (18) people about this out there, I can't remember them all.
 (19) Everyone has called to check on me and stuff like that.
 (20) **Q.** So if in fact you went into that area,
 (21) stepped into the area without your hazmat gear on, is
 (22) that a basis for your termination?
 (23) **A.** No, because we weren't aware the accident was
 (24) on the pad. Like I said before, you can be on the pad
 (25) as long as you have goggles on.

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- (1) diluted to the point that nothing can happen.
 (2) **A.** Correct.
 (3) **Q.** What did the EMTs do for you on the way to the
 (4) hospital?
 (5) **A.** I think they gave me some morphine.
 (6) **Q.** But they didn't do anything with the burn
 (7) itself?
 (8) **A.** No.
 (9) **Q.** You went to the emergency room.
 (10) **A.** Yes.
 (11) **Q.** How long were you there?
 (12) **A.** A couple of hours.
 (13) **Q.** What did they do for you?
 (14) **A.** Cleaned it, just kept pouring water on it, and
 (15) my sock and stuff was burning into my skin, so they
 (16) cleaned the --
 (17) **Q.** Let me ask you this. If you had been burned
 (18) in the hospital, let's say you had a sulfuric acid burn
 (19) in the hospital, there is nothing anybody can do except
 (20) apply water?
 (21) **A.** The doctor went and Googled it, I think.
 (22) **Q.** Really.
 (23) **A.** Yes.
 (24) **Q.** So they just poured water by the gallons on
 (25) it?

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- (1) **Q.** I thought you said you knew there was a
 (2) backup --
 (3) **A.** In the sump. If there is acid in the sump,
 (4) you can walk up to the sump, look down in it and see it.
 (5) **Q.** You do not have to wear --
 (6) **A.** That's not a basis for my termination.
 (7) **Q.** You didn't need a flashlight?
 (8) **A.** No.
 (9) **Q.** The EMTs arrived rather quickly, didn't they?
 (10) **A.** Normally we have two EMTs on shift, that are
 (11) EMTs at the plant. We didn't have any that night so
 (12) they came from Pocatello.
 (13) **Q.** And they were there pretty fast?
 (14) **A.** Yeah.
 (15) **Q.** During that entire time were you being flushed
 (16) with water?
 (17) **A.** Yes.
 (18) **Q.** Is there any other thing you can do besides
 (19) flushing with water?
 (20) **A.** No, and actually water intensifies the
 (21) sulfuric burn until you get enough to dilute it.
 (22) **Q.** What about soda ash, doesn't that help?
 (23) **A.** Not on the skin. It makes it burn, it reacts,
 (24) so it would react worse with the skin.
 (25) **Q.** So there is just nothing but water until it's

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- (1) **A.** They had, I don't know what kind of water it
 (2) was, but they just poured water on it, yeah.
 (3) **Q.** And then they called your surgeon, is that
 (4) right?
 (5) **A.** Yeah, they set up an appointment with Maloff
 (6) the next day.
 (7) **Q.** What kind of specialty does he have? I
 (8) couldn't find it anywhere in the records.
 (9) **A.** He is a plastic surgeon.
 (10) **Q.** How did you get home?
 (11) **A.** My parents.
 (12) **Q.** Was the pain gone by then or was it still --
 (13) **A.** No, my foot is swollen (indicating).
 (14) **Q.** And it appeared like a bad sunburn, is that
 (15) what it looked like?
 (16) **A.** It was worse than a sunburn, like third degree
 (17) burns, full thickness burns.
 (18) **Q.** Did you take any pictures of it?
 (19) **A.** Yeah.
 (20) **Q.** I haven't seen those.
 (21) **THE WITNESS:** Do you have any? I e-mailed
 (22) them to you.
 (23) **MR. GEORGE:** I thought I included those.
 (24) **MR. CANTRILL:** I didn't see them. It's just
 (25) something I would like to see so I can tell for myself

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- (1) how bad it was.
- (2) **A.** If you are saying like a sunburn, it's not.
- (3) **Q.** Is it blisters?
- (4) **A.** Yes.
- (5) **Q.** Swells and blisters.
- (6) **A.** I can show you real quick. (Indicating).
- (7) **Q.** So that's farther than six inches up your leg,
- (8) though, isn't it, Joe?
- (9) **A.** No, it's about to there (indicating).
- (10) **Q.** I see, you had it upside-down.
- (11) **A.** Sorry.
- (12) **Q.** Yes, it is worse than a sunburn.
- (13) **A.** I will show you another one.
- (14) **Q.** Your lawyer will give them to me.
- (15) **A.** This was my pinkie toe (indicating).
- (16) **Q.** So when you went to the plastic surgeon the
- (17) next day, what did he do for you?
- (18) **A.** Nothing really. He gave me some -- that night
- (19) they gave me some pain medicine. He looked at it, sent
- (20) me up to get it debrided and they debrided it for a
- (21) couple of weeks to see where it was going to go --
- (22) **Q.** And that's just to take the dead skin off.
- (23) **A.** Yeah. I went in daily and then even on the
- (24) weekends I went in, and then he made the decision to get
- (25) a skin graft.

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- (1) **A.** Yes.
- (2) **Q.** And how did the skin graft go?
- (3) **A.** The skin graft went well.
- (4) **Q.** I understand you had a second surgery; right?
- (5) **A.** Correct, yes.
- (6) **Q.** Why did you have the second surgery?
- (7) **A.** My foot still hurt. I was having problems
- (8) with it swelling and it felt like it's asleep and aches,
- (9) and they thought it was nerves, so they did a nerve
- (10) release on it.
- (11) **Q.** Tell me what that entails.
- (12) **A.** They went into my foot, cut it open and
- (13) released the nerve, he said it released quite a bit, and
- (14) then it was supposed to help and they wrapped like a
- (15) plastic tubing around it and then sewed it back up.
- (16) **Q.** Did that help?
- (17) **A.** No.
- (18) **Q.** Did it make things worse?
- (19) **A.** No, it stayed about the same.
- (20) **Q.** So how long did you miss work?
- (21) **A.** I missed work from October through January,
- (22) and they kept telling me, oh, it will get better, the
- (23) pain I was having. So they are like using you to try to
- (24) do your normal routine --
- (25) **Q.** You say they. Do you mean the physical

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- (1) **Q.** So did the physical therapist do the
- (2) debridement or was it the emergency room?
- (3) **A.** Physical therapist and even at the hospital
- (4) there was a physical therapist on the weekends there to
- (5) debride.
- (6) **Q.** It's full thickness burns.
- (7) **A.** Yes.
- (8) **Q.** And a lot of times those aren't painful
- (9) because it kills all the nerves. Did it continue to be
- (10) painful?
- (11) **A.** When they debrided it, it was painful and it
- (12) was painful because it was so swollen that it hurt.
- (13) **Q.** So you continued with pain medication?
- (14) **A.** Correct.
- (15) **Q.** And you had debridement every day for two
- (16) weeks.
- (17) **A.** Yes.
- (18) **Q.** And then what did you and the doctor decide to
- (19) do?
- (20) **A.** He decided to do skin grafts so I went in for
- (21) one surgery where they like scraped it and then they
- (22) hooked up this vacuum to it and I had to wear that for a
- (23) week, and I had the vacuum pack hooked up and the next
- (24) week they did the skin graft.
- (25) **Q.** So they took the skin from your thigh?

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- (1) therapist?
- (2) **A.** Yes, and the doctors. They said it's just
- (3) going to take time. I tried to go back to work. So I
- (4) went back to work from January to April and limped
- (5) around on it.
- (6) **Q.** The same job?
- (7) **A.** The same job. And then I had to get -- it was
- (8) painful so they scheduled this other surgery to see if
- (9) it would do anything.
- (10) **Q.** The second surgery.
- (11) **A.** The second surgery, and that was in April of
- (12) 2012. And I haven't been back.
- (13) **Q.** Is that because Simplot won't let you back on
- (14) the job?
- (15) **A.** Correct. I called a couple of times and
- (16) tried. And I called them to see if they would --
- (17) because my doctor suggested that they find me a
- (18) different position, and their HR manager told me that I
- (19) needed to return to my regular position.
- (20) **Q.** Why?
- (21) **A.** That's what she said.
- (22) **Q.** So you have been receiving temporary
- (23) disability payments from Simplot?
- (24) **A.** Workmen's comp, yes.
- (25) **Q.** And that's at 60 percent of your normal

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- (1) salary?
- (2) **A.** Workmen's comp is 60 percent of the state --
- (3) what is it, 60 percent of the state --
- (4) **Q.** Average --
- (5) **A.** Average. I have a long-term disability that
- (6) picks up the rest to make it 60 percent of my salary.
- (7) **Q.** Have you been able to do any other work since
- (8) you left Simplot?
- (9) **A.** No, I haven't left yet. I am still employed
- (10) with Simplot.
- (11) **Q.** And have they told you they will ever let you
- (12) back on the job?
- (13) **A.** They have not said anything yet. When your
- (14) year is up they usually terminate you and my year was up
- (15) in April and they scheduled a meeting with me and Pat
- (16) and then they canceled it because they said I am not
- (17) done being seen by doctors and stuff.
- (18) **Q.** How often do you go back to your doctor?
- (19) **A.** Right now I am going to a pain doctor I just
- (20) started going to.
- (21) **Q.** Who is that?
- (22) **A.** His name is Jake Poulter and he is in Idaho
- (23) Falls.
- (24) **Q.** Is workmen's comp picking up that?
- (25) **A.** Yes.

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- (1) said I had to prove that I could be on my feet for ten.
- (2) **Q.** Were you ever allowed to take breaks at work?
- (3) **A.** Yes.
- (4) **Q.** So you sit?
- (5) **A.** Yes.
- (6) **Q.** So if you sit, how long before you can get up
- (7) and walk again?
- (8) **A.** I can walk and it just swells up and hurts. I
- (9) mean I can walk but it's just the repercussion of
- (10) walking.
- (11) **Q.** Has the doctor given you any idea of how much
- (12) more improvement you are going to have?
- (13) **A.** No, he just keeps saying I want to give it
- (14) time, I want to give it time.
- (15) **Q.** He wants to give it time, you don't want --
- (16) **A.** Exactly.
- (17) **Q.** So what have you done to try to hasten the
- (18) process along?
- (19) **A.** Go to other doctors and go to a pain
- (20) specialist and try to get stuff moving forward.
- (21) **Q.** So getting back to the accident and how it
- (22) happened, how do you account, if you can, for the
- (23) difference when there is some statement we have that you
- (24) tripped over a hose, that's what you told me today, and
- (25) everybody else -- not everybody else but a lot of other

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- (1) **Q.** What of your daily activities have been
- (2) curtailed?
- (3) **A.** Several. I mean my life has been curtailed.
- (4) I was an active person and I am not as active as I was.
- (5) I don't even mow my own lawn, so just everything, it
- (6) affects a lot of stuff.
- (7) **Q.** You had a functional capacity exam done by a
- (8) physical therapist; right?
- (9) **A.** Correct.
- (10) **Q.** Tell me what your job entailed at the J. R.
- (11) Simplot Company in the way of lifting and walking and --
- (12) **A.** I walk, I mean I walk, it's a big place, I
- (13) walk several miles a day, and there are tons of stairs.
- (14) As far as lifting, I don't have to lift.
- (15) **Q.** At work you never had to lift anything?
- (16) **A.** I used to but never since I took my supervisor
- (17) job.
- (18) **Q.** So mainly your physical activity at work was
- (19) walking.
- (20) **A.** Yes.
- (21) **Q.** Did you ever have to run?
- (22) **A.** No.
- (23) **Q.** How far can you walk a day now?
- (24) **A.** My foot swells up if I am on my feet too long.
- (25) The doctor has like a two-hour restriction and Simplot

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- (1) people said you told them you stepped into the pool?
- (2) **A.** I don't know. I didn't really talk to anyone
- (3) after it happened. I wasn't there. And as far as
- (4) stepping or tripping, like I said, once you trip, you
- (5) step to regain your balance, I didn't trip in here, I
- (6) tripped here and stepped here (indicating).
- (7) **Q.** Here and here doesn't --
- (8) **A.** I tripped on the hose and stepped in the pad.
- (9) **Q.** In the pad toward --
- (10) **A.** Like I say, I don't know. My boot is right
- (11) here (indicating), I mean that's pretty loose. That
- (12) looks pretty open to me. As far as it being well
- (13) secured, I disagree with you on that.
- (14) **Q.** Could that have been the entryway into the
- (15) containment area?
- (16) **A.** I don't know.
- (17) **Q.** I mean they couldn't entirely shut it off, you
- (18) will agree with me that you have to have an entrance
- (19) into the containment area?
- (20) **A.** Correct, but also you should have barricade
- (21) around that, too.
- (22) **MR. CANTRILL:** Let's take a break and we will
- (23) come back in a few minutes.
- (24) (Short recess.)
- (25) **MR. CANTRILL:** Back on the record.

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(1) Q. I just have a few more questions. Let's go
 (2) back just a few weeks before this incident occurred.
 (3) You said you had been on vacation or you were on a
 (4) rotating shift, which was it?
 (5) A. No, it was not shift. I was on days, on the
 (6) day shift on Thursday.
 (7) Q. So the day before this incident happened you
 (8) weren't at work; right?
 (9) A. No.
 (10) Q. And this project moved quickly, did it not?
 (11) A. From what you tell me.
 (12) Q. So when the containment area was done, do you
 (13) know how deep it was?
 (14) A. I do not.
 (15) Q. Do you have an estimate of how far your leg
 (16) went into the containment area?
 (17) A. Where I fell in at?
 (18) Q. Yes.
 (19) A. Probably six inches.
 (20) Q. That's how deep the sulfuric acid was. Do you
 (21) know how deep the containment area was?
 (22) A. Where I stepped, no -- a foot?
 (23) Q. It was 20 inches, I'll tell you that. So your
 (24) foot would have had to go into the plastic and fall, you
 (25) fell 20 inches.

(1) Q. When you buy pants, what inseam do you buy, do
 (2) you know?
 (3) A. I wear 36-32's, they are a little baggy on me,
 (4) I wear a little baggy pants.
 (5) Q. So you have a 32-inch inseam?
 (6) A. Yes.
 (7) MR. CANTRILL: That's all I have.
 (8) MR. GEORGE: No questions.
 (9) (Witness excused at 9:55 a.m.)
 (10) (Signature requested.)
 (11)
 (12)
 (13)
 (14)
 (15)
 (16)
 (17)
 (18)
 (19)
 (20)
 (21)
 (22)
 (23)
 (24)
 (25)

(1) A. Yes.
 (2) Q. And the only part of your body that went into
 (3) the containment area is your foot.
 (4) A. Is my whole right foot, my whole right leg.
 (5) Q. So nothing else was touched by the acid.
 (6) A. No.
 (7) Q. How long did it take that (indicating) to
 (8) heal?
 (9) A. A while.
 (10) Q. Is that just a blister, is that what it is?
 (11) A. Yes.
 (12) Q. Showing you a picture of your right small
 (13) pinkie; right?
 (14) A. Yes.
 (15) Q. Did the blister burst?
 (16) A. He cut it.
 (17) Q. Is the problem confined to your calf now or is
 (18) it your toes?
 (19) A. It's in here, in my heel and my foot, it's my
 (20) foot.
 (21) Q. Your foot from your ankle down; is that a fair
 (22) statement?
 (23) A. That's fair.
 (24) Q. How tall are you?
 (25) A. Five nine.

(1) CERTIFICATE OF JOSEPH JERRY MARAVILLA
 (2)
 (3) I, JOSEPH JERRY MARAVILLA, being first duly sworn,
 (4) depose and say: That I am the witness named in the
 (5) foregoing deposition; that I have read said deposition
 (6) and know the contents thereof; that the questions
 (7) contained therein were propounded to me; and that the
 (8) answers therein contained are true and correct, except
 (9) for any changes that I may have listed on the Change
 (10) Sheet attached hereto.
 (11) DATED this ___ day of _____, _____.
 (12) CHANGES ON ERRATA SHEET YES ___ NO ___
 (13)
 (14) _____
 (15) JOSEPH JERRY MARAVILLA
 (16) SUBSCRIBED AND SWORN to before me this ___ day
 (17) of _____, _____.
 (18)
 (19) _____
 (20) NAME OF NOTARY PUBLIC
 (21) NOTARY PUBLIC FOR _____
 (22) RESIDING AT _____
 (23) MY COMMISSION EXPIRES _____
 (24)
 (25)

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- (1) CHANGE SHEET FOR JOSEPH JERRY MARAVILLA
- (2) PAGE__ LINE__ REASON FOR CHANGE _____
- (3) READS _____
- (4) SHOULD READ _____
- (5) PAGE__ LINE__ REASON FOR CHANGE _____
- (6) READS _____
- (7) SHOULD READ _____
- (8) PAGE__ LINE__ REASON FOR CHANGE _____
- (9) READS _____
- (10) SHOULD READ _____
- (11) PAGE__ LINE__ REASON FOR CHANGE _____
- (12) READS _____
- (13) SHOULD READ _____
- (14) PAGE__ LINE__ REASON FOR CHANGE _____
- (15) READS _____
- (16) SHOULD READ _____
- (17) PAGE__ LINE__ REASON FOR CHANGE _____
- (18) READS _____
- (19) SHOULD READ _____
- (20) PAGE__ LINE__ REASON FOR CHANGE _____
- (21) READS _____
- (22) SHOULD READ _____
- (23)
- (24) DEPONENT SIGNATURE: _____
- (25)

- (1) REPORTER'S CERTIFICATE
 - (2) I, PAUL D. BUCHANAN, CSR NO. 7, Certified
 - (3) Shorthand Reporter for the State of Idaho, certify:
 - (4) That the foregoing proceedings were taken before
 - (5) me at the time and place therein set forth, at which
 - (6) time the witness was put under oath by me;
 - (7) That the testimony and all objections made were
 - (8) recorded stenographically by me and were thereafter
 - (9) transcribed by me, or under my direction;
 - (10) That the foregoing is true and correct record of
 - (11) all testimony given, to the best of my ability;
 - (12) I further certify that I am not a relative or
 - (13) employee of any attorney or party, nor am I financially
 - (14) interested in the action. 17
 - (15) IN WITNESS WHEREOF, I set my hand and seal this
 - (16) 17th day of July, 2013.
 - (17)
 - (18)
 - (19)
 - (20)
 - (21) _____
 - (22) PAUL D. BUCHANAN, CSR No. 7
 - (23) Notary Public
 - (24) P.O. Box 2636
 - (25) Boise, Idaho 83701-2636
- My Commission expires: June 20, 2016

EXHIBIT "E"



November 24, 2014

David Cantrill
Cantrill Skinner Lewis Casey & Sorenson LLP
PO Box 359
Boise, ID 83701

Re: **STATE RULE 26 REPORT**
Idaho Industrial Contractors, Inc.
Loss Area: JR Simplot Don Plant, Pocatello ID
DOL: October 16, 2011
Our File Number: 2291001

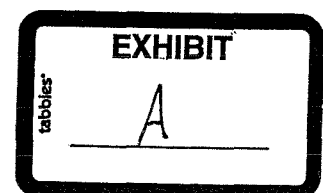
Dear Mr. Cantrill:

CASE Forensics was requested to investigate the incident in which Mr. Maravilla was injured at the J.R. Simplot Don Plant in Pocatello, ID. Pursuant to your request, CASE Forensics has prepared the rule 26 report that is enclosed. If you have any questions concerning this report, please do not hesitate to give me a call at (425) 775-5550.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Tara L. Henriksen".

Tara L. Henriksen PhD, CFI, CFEI, PI
Principal, Chemical Engineer
CASE Forensics




**J. Maravilla y Alamo
Industrial Contractors, Inc.**


November 24, 2014

CASE File No.: 2291001
Date of Loss: October 16, 2011

Report Prepared By:


Tara L. Henriksen, PhD, CFI, CFEI, PI
Principal, Chemical Engineer

Technical Review By:


Alan C. Topinka, PE, CFEI
Principal, Mechanical Engineer



1.0 Synopsis

The purpose of this investigation was to analyze the incident in which Mr. Maravilla was injured while working at the J.R. Simplot Don Plant (Simplot) on October 16, 2011. Mr. Maravilla was injured when he entered a containment area surrounding the 300 sulfuric acid pump tank area without appropriate personal protection equipment. CASE Forensics (CASE) was requested to review the file materials related to this incident, and to develop an opinion regarding the cause of Mr. Maravilla's injury. We were also asked to assess whether or not the work completed by Idaho Industrial Contractors (IIC) which concluded the day prior to the incident contributed to the injury of Mr. Maravilla.

2.0 Scope of Work

As part of this investigation, CASE reviewed photographs, depositions, reports, regulations and literature. To date, CASE has completed the following tasks:

1. Reviewed the depositions and exhibits of: J. Jerry Maravilla, Richard Gleason, Robert Lewis, Neil Nelson, Harold Cox, and John Oborn.
2. Reviewed the "Interoffice Communication," John Oborn, 12/2/11.
3. Reviewed the "Defendant Idaho Industrial Contractors Inc.'s Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents."
4. Reviewed the "Plaintiff's Complaint and Demand for Jury Trial."
5. Reviewed the "Defendant's Answer to Plaintiff's Complaint."
6. Reviewed the "Simplot Request for Quotation (RFQ) No. 110614DNic., 300 Sulfuric Acid Main Acid Tank Pad Replacement."
7. Reviewed the "Statement of Work, Request for quotation No. 110614DNic; 300 Sulfuric Main Acid Tank Pad Replacement."
8. Reviewed the report by Mr. Gleason, RE: Joseph Maravilla v. Idaho Industrial Contractors, dated November 13, 2013.
9. Reviewed OSHA standards, various parts of the Code of Federal Regulations.
10. Reviewed process safety literature.
11. Prepared this report to present the findings and to render a professional investigative opinion.



3.0 Background

3.1 Property Description

The Simplot plant was located just outside Pocatello, ID. The Don Plant produced high quality phosphate fertilizer and feed phosphates. Sulfuric and phosphoric acid were used as part of the process to make fertilizer. The Don Plant was the first fertilizer production facility built by J.R. Simplot and was constructed in 1944.¹ The 300 sulfuric acid tank area was located on a concrete containment pad (roughly 75' x 60'), which also had a sump. A sump, which is a lined hole on the concrete pad, was located near the northwest quadrant of the concrete pad. The purpose of the sump was to serve as a containment area for sulfuric acid that might overflow or leak from the sulfuric acid tank. Under normal operating conditions, a sump pump would operate to drain the sump whenever sulfuric acid was present in the sump.

The concrete pad and surrounding curbing served as a secondary containment area for the sulfuric acid tank area. The concrete pad was sloped such that the sump was a low point for liquid collection. Sumps and secondary containment areas are not intended to serve as permanent storage areas for chemicals, but rather, are put in place to protect people and the environment (soil, groundwater) from chemical spills.

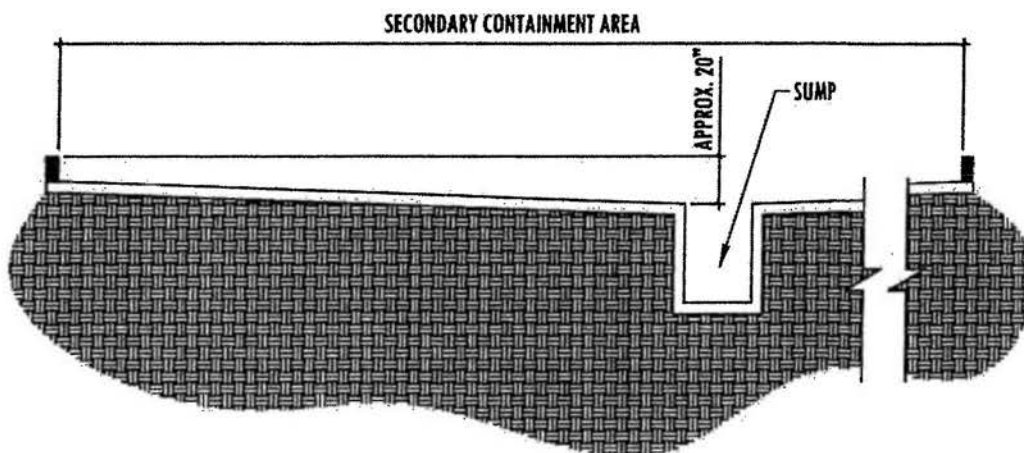


Figure 1. Elevation drawing showing the sump below grade within concrete pad, or secondary containment in the 300 sulfuric acid tank area. The red squares at each side represent the red curbing surrounding the secondary containment area. Drawing is not to scale.

¹ Simplot Agribusiness, Don Plant, http://www.simplot.com/pdf/us_operations/Don.pdf accessed 10/15/14.



3.2 Incident Summary

On October 16, around 8:30 pm, the plant lost power to the 300 sulfuric acid tank area at the Don Plant. Power was restored but the plant was officially down for a period of time.² Shortly after power was lost, operations manager John Oborn, shift supervisor Joseph Maravilla, and operator Dave Bierman met to discuss what they needed to do to get the plant started back up.³ Dave Bierman mentioned that due to the shutdown, there had been some sulfuric acid spill over onto the acid (containment) pad.⁴ Mr. Bierman was uncertain about how much acid had spilled onto the acid pad. John Oborn suggested they go out and see how much acid was on the pad, and Joe Maravilla left alone to check it out. By the time Mr. Maravilla left to check out the containment area, a yellow hose belonging to Simplot had been placed across the walkway and through the containment area, creating a tripping hazard.

3.3 Scope of Idaho Industrial Contractor's Work

In August of 2011, Idaho Industrial Contractors (IIC) was requested to remove the existing concrete in the 300 sulfuric acid tank area and fill to the required grade at the Don Plant.⁵ As part of the approved contract, they were also required to provide and install a potassium silicate coated concrete pad, new sump, and provide and install a new stainless steel sump pump support frame, screen and grating. They were also required to remove the southwest column and all attached framing from the old absorbing tower support structure, which was also located on the old concrete pad.

While the demolition work and new concrete pad was being installed and coated, the Don Plant continued to operate, although conducting this work removed the ability of the sump and the concrete pad to serve as a containment area while workers were inside. By Saturday October 15, 2011 IIC workers had completed the majority of the work in the containment area, and the coating in the containment area needed time to cure. In order to maintain the temperature in the containment area, IIC crew members constructed a clear, 6 mil string reinforced plastic weather shelter over the containment area prior to leaving for the day. Simplot management was aware that in the event of a power loss, sulfuric acid would flow to the sump, and with the sump pump out of service, could potentially spill over onto the concrete pad.

² Simplot Interoffice Communication, December 2, 2011; deposition of John Oborn, exhibit 3 to John Oborn's deposition.

³ Simplot Interoffice Communication, December 2, 2011.

⁴ Simplot Interoffice Communication, December 2, 2011.

⁵ Simplot Purchase Order, PO#1016941.



4.0 Discussion

4.1 Engineering Analysis

Process safety is a blend of engineering and management skills focused on preventing catastrophic accidents, such as fires, explosions, and hazardous/toxic chemical releases. Within the process safety discipline, a methodology called the Hazard Prevention Hierarchy is used to minimize or eliminate hazards such as exposure to harmful chemicals, like sulfuric acid. The recommended procedure for protecting people and the environment from hazards, such as a chemical spill, is to apply the controls in the Hazard Prevention Hierarchy, in order. The hazard controls are; elimination, substitution, engineering controls, administrative controls, and finally, reliance on personal protection equipment (PPE). The most effective way to prevent people and the environment from coming into contact with a hazardous chemical, is to eliminate it, or in other words, to not use it at all. When use of a hazardous chemical cannot be eliminated completely, substitution for a less hazardous chemical is recommended. When a substitution cannot be accomplished effectively, engineering controls are recommended.

In this case, since sulfuric acid was required for the production of the final product, engineering controls (a sump to collect acid overflow and leaks, as well as secondary containment) were selected as a means of hazard control. Administrative controls, such as policies and procedures implemented by management, employee training and signage, were also supposed to be used to limit or prevent exposure to the hazard. Finally, appropriate PPE was required anytime an employee was placed near a hazard, such as a spill of sulfuric acid.

4.2 Hazard Prevention

To understand how to effectively apply hazard prevention, two different operating conditions must be considered at the plant. In condition #1, the 300 sulfuric acid plant would have been operating normally; with the engineering controls that consisted of a sump and secondary containment, available for use. In this situation, workers would not be expected to be in the sump, and engineering controls for a spill would be activated in the event of a power outage. If a power outage was experienced in condition #1, overflow acid would be sent to the sump, where it would be pumped out by a sump pump. In most cases, even with a power outage, the secondary containment area would not be expected to contain any sulfuric acid. In this situation, administrative controls at the Don Plant were also in force, and required adherence to any caution tape, signage, or barriers preventing access to certain areas (confined space, etc.). In addition, anyone who entered



the containment area was required to wear safety goggles for eye protection. Workers were only required to don full rubber PPE if they were expected to handle or be in close proximity to sulfuric acid.

In operating condition #2, the 300 sulfuric acid plant would be operating normally; but the sump and secondary containment would not be available for use as they were under construction. In this case, Simplot management should have removed the hazard of a potential sulfuric acid spill in the area under construction by diverting the flow of sulfuric acid from the containment area in case of a power outage. This would have been an example of an engineering control used to remove a hazard from this area. However, acid did flood the sump and the containment pad just after a power outage. Given the conditions discovered just after the accident, Simplot management allowed sulfuric acid to overflow into the sump and containment area even though the construction of the new sump and containment area was incomplete and the concrete was still curing. Simplot planned to pump the acid from the 300 sulfuric acid plant sump to another sump area via a temporary yellow hose.

Prior to the start of the project, a hazard and safety plan (HASP) was created and signed by representatives from both IIC and Simplot. The HASP for the project did not identify the hazard related to removing the ability of the sump to serve as a containment area for a sulfuric acid spill or explain if any engineering controls were in place to divert sulfuric acid from this area. The HASP also did not explain the use of a temporary yellow hose to drain the sump, nor did it identify any hazards which might have been created by this method of acid transfer. Finally, it did not identify the hazard of a potential overflow into the secondary containment area, which was known by Simplot management to potentially occur in the event of a power outage.

As John Oborn stated in deposition, Simplot management was responsible for safety at the Don Plant, which included the 300 sulfuric tank area under construction. Simplot management should have planned to divert sulfuric acid from the sump and containment areas which were under construction, especially since they were aware that sulfuric acid would be sent to this area in the event of a power outage. After the power outage, overflow of the sulfuric acid tank did occur. Although Simplot management was aware that there was likely sulfuric acid in the sump and containment area, they neglected to activate any administrative or increased PPE controls, at a minimum, to prevent accidental contact with sulfuric acid.



No one from IIC was present at the Simplot plant on the night of the incident. At the time Mr. Maravilla left the control room to check on the level of acid present in the secondary containment area, the following information was known to Simplot management, and perhaps to Mr. Maravilla himself:

1. The power had gone out, resulting in the shutdown of the 300 sulfuric plant.⁶ When this occurs the pump stops running and sulfuric acid starts to back up.⁷
2. The sump into which acid would normally be sent and the containment pad had undergone recent construction.^{8,9}
3. Due to the shutdown, there had been some sulfuric acid spill over onto the acid pad (secondary containment area).¹⁰
4. There was a temporary sump pump in place to remove acid from the sump and containment area which was under construction.¹¹

4.3 Regulations

OSHA regulations require that passageways be kept clear of cords / hoses so that a slipping or tripping hazard is not created. Mr. Maravilla allegedly tripped over a yellow hose which belonged to the Simplot company, and was placed in the walkway by Simplot employees. According to Mr. Oborn, it was likely that Simplot operators from the day shift had placed this hose within the containment area. In addition, Mr. Oborn himself was aware this hose was present, he had seen the hose at the start of the night shift, and did not remove what was an obvious tripping hazard. From a review of file materials in this case, it appears that Mr. Maravilla mistakenly assumed the yellow hose belonged to IIC, but a review of testimony from employees of both Simplot and IIC have confirmed this was not the case.

In his report, Mr. Gleason suggested that IIC should have implemented a guardrail that would have prevented anyone from accidentally falling into the pit (sump). I disagree with Mr. Gleason, and opine that Simplot should have diverted sulfuric acid from the sump area while it was under construction, and should not have allowed the sump or the concrete pad (secondary containment area) to be used as an engineering safeguard for spill containment until construction was completed, and the project was inspected and signed off by a member of the safety /engineering team at Simplot. If it was not possible

⁶ Simplot Interoffice Communication, December 2, 2011.

⁷ Deposition of Joe Maravilla, pg. 17.

⁸ Simplot Interoffice Communication, December 2, 2011.

⁹ Deposition of Joe Maravilla.

¹⁰ Simplot Interoffice Communication, December 2, 2011.

¹¹ Simplot Interoffice Communication, December 2, 2011.



to divert the potential overflow of sulfuric acid from the sump and secondary containment area during construction, then Simplot management should have enacted increased administrative and PPE controls to prevent accidental contact with any standing liquids in the containment area. I note that the safest method would be to divert the sulfuric acid from this area, or shut the plant down until construction was complete.

5.0 Opinions and Bases

The opinions offered in this report are based on a reasonable degree of engineering and scientific probability, and are based on an ongoing investigation being conducted by CASE Forensics. We reserve the right to amend this report or provide a supplemental report as new information becomes available.

5.1 If management at Simplot had exercised the appropriate hazard control methods while the sump and concrete pad were under construction, this incident would not have occurred.

Basis: Mr. Maravilla was burned by contact with standing sulfuric acid in the containment area. Had the flow of sulfuric acid been appropriately diverted from this area while it was under construction, there would not have been any acid in the containment area for Mr. Maravilla to inspect or to come into contact with.

Basis: The Hazard Prevention Hierarchy dictates that the preferred means of protection from this hazard, given the necessity of using sulfuric acid as part of the production process, would have been to divert the flow of sulfuric acid from the containment area while it was under construction.

5.2 If management at Simplot had removed the obvious tripping hazard presented by their yellow hose present in the walkway, Mr. Maravilla would not have slipped/tripped on it.

Basis: Mr. Maravilla slipped/tripped over a yellow hose in the walkway in front of the containment area. Slipping / tripping on this hose contributed to his contact with the acid in the containment area.

Basis: A review of photographs revealed a yellow hose was present in the walkway near the containment area, and it presented a tripping hazard.



5.3 If Mr. Maravilla had donned the appropriate PPE, including rubber boots to protect himself as he approached an acid spill of unknown size, it is unlikely he would have been injured by the spilled acid in the containment area.

Basis: Personal protective clothing was available, is well known and often relied upon to protect employees from contact with acid.

Basis: OSHA requires employees to don the appropriate PPE based on the potential exposure to hazards, such as an acid spill.



6.0 Curriculum Vitae

Tara Henriksen, PhD, CFI, CFEI, PI **Principal, Chemical Engineer**

SUMMARY

Dr. Tara Henriksen is a company Principal and Chemical Engineer who specializes in the evaluation of engineering and process safety issues related to hazardous materials accidents and chemical technology, specifically those associated with large chemical plant and process failures. She holds a Ph.D. in Chemical Engineering from the University of Utah.

Dr. Henriksen is also a Certified Fire and Explosion Investigator who uses her knowledge of fire dynamics, heat transfer, fluid mechanics, chemistry, and chemical engineering in conducting fire origin and cause investigations, and explosion analyses. Her investigations involve the evaluation and analysis of chemical processes and industrial equipment, dust explosions, vapor cloud explosion and accidental chemical releases.

She applies her knowledge of chemical engineering to investigate industrial, residential and wildland fires. Dr. Henriksen has extensive experience investigating sawmill fires and explosions, evaluating flammable gas and dust explosion hazards, investigating heat exchanger failures, and evaluating spontaneous combustion allegations.

Dr. Henriksen also has experience writing standards and codes, including NFPA standards, and the City of Seattle Fire Code. Her research expertise also includes the optimization of chemical process operations, process hazard analysis (PHA), layer of protection analysis (LOPA) and risk assessment.

She has investigated many issues of design defect and patent infringement. She has also provided opinions regarding the cause of accidents related to personal injury claims, such as flammable liquids, fuel gels, chemical burns, and others.

Dr. Henriksen's doctoral research encompassed the study of hydrocarbon pool fires, inverse diffusion flames, premixed flames, and laminar diffusion flames. She specialized in the application of laser diagnostics in the analysis of combustion reactions, refractive index, and the evaluation of the puffing frequency of pool fires. Dr. Henriksen has experience designing and conducting small and medium scale fire tests and evaluating combustion processes using flow visualization and design software.

EDUCATION

University of Utah, Doctor of Philosophy, Chemical Engineering, 2007

University of Utah, Bachelor of Science, Mathematics, 2003

University of Utah, Associate of Science, Chemistry, 2003



LICENSES, CERTIFICATIONS AND REGISTRATIONS

Licensed Unarmed Private Investigator, State of Nevada, No. R-055591
EIT Certification, State of Illinois, No. 061.033904
Certified Fire Investigator, NAFL, No. 21-050229
Certified Fire and Explosion Investigator, NAFL, No. 14035-7798
Hazardous Waste Operations and Emergency Response (HAZWOPER) Certification, IESMC
CPR and AED Certifications, American Heart Association
FI-210 Wildland Fire Investigation, Fire Origin and Cause Determination, NWCG, 2013
Emergency Response Certification, Fire Investigation 1A, IESMC
DOT HM-126F Hazardous Materials Certification, DOT
Fundamentals of Process Safety Certification, ASME

PROFESSIONAL EXPERIENCE

CASE Forensics Corporation, 2010 to Present

Senior Engineer

Evaluates engineering and safety issues related to hazardous chemical accidents and chemical technology. Conducts fire origin and cause and explosion analysis using knowledge of fire dynamics, heat transfer, fluid mechanics, chemistry, and chemical engineering. Applies knowledge of chemical engineering to investigate and prevent accidents. Specializes in the evaluation of engineering and safety issues related to hazardous chemicals accidents and chemical technology. Conducts investigations that involve the evaluation and failure analysis of chemical processes and industrial equipment, dust explosions, vapor cloud explosion and accidental chemical releases, as well as design defect and patent infringement.

AICHE, 2009 to Present

National Safety Coordinator

National Safety Coordinator for the annual CHEM-E-car competition series, which is sponsored by the American Institute of Chemical Engineers. The competition involves innovative chemically-powered cars designed by student teams from colleges and universities across the United States. Dr. Henriksen is responsible for enforcing the safety standards of the program, drafting and reviewing job safety analysis (JSA) templates for entrants, testing student's core engineering competency, evaluating the hazards inherent in design, and updating competition safety standards as appropriate.

Exponent FAA, 2008 to 2010

Engineering Consultant

Applied knowledge of chemical engineering principles to chemical processing, forensics and product liability cases. Specialized in origin and cause evaluation as it applied to the chemical processing industry. Analyzed engineering and safety issues related to hazardous chemical accidents and chemical technology against industry standards. Conducted investigations involving the evaluation and failure analysis of chemical processes and industrial equipment, dust explosions, and chemical releases. Research expertise included the optimization of chemical process operations, process hazard analysis (PHA), layer of protection analysis (LOPA) and risk assessment. Served as a project manager on several origin and cause investigations, where she managed schedule, cost, personnel, and quality of deliverables.

University of Utah, 2004 to 2007

Graduate Research Assistant



Researched the study of hydrocarbon pool fires, inverse diffusion flames, premixed flames, and laminar diffusion flames. Specialized in the application of laser diagnostics in the analysis of combustion reactions, refractive index, and the evaluation of the puffing frequency of pool fires. Utilized laser-induced incandescence to study soot concentration, and laser induced fluorescence to study the location of the reaction zone relative to soot sheets in turbulent pool fires. Experienced with designing and conducting small and medium scale fire tests and evaluating combustion processes using flow visualization and design software.

National Science Foundation, 2001 to 2003

Research Analyst

Forged a collaboration between the Cystic Fibrosis Foundation and the University of Utah Math Department to model complex systems, analyze system dynamics and survival probabilities for patients with CF. Tested the accuracy of the single year assessment of the health of patients with CF by validating 5 dependent variables.

TEACHING EXPERIENCE

ChFE 3353 Fluid Mechanics, University of Utah, Fall 2006

Teaching Assistant

This class comprised an introduction of fluid statics; application of conservation of mass, energy, and momentum to basic fluid mechanics problems; introduction to compressible flow, potential flow, boundary layer and dimensional analysis.

ChFE 6353 Fluid Mechanics, University of Utah, Fall 2005

Teaching Assistant

This course provided an introduction to tensor analysis and derivation of governing partial differential equations. Solution of problems in Newtonian, laminar, incompressible flow are taught. Advanced experience on problems of potential flow, turbulence, non-Newtonian flow, and compressible flow.

Engineering Matters, Youth Education, Summer 2005, Summer 2006

Professor

The goal of this course was to learn about engineering as a career. Students were taught basic engineering principles; electricity, electrolysis, forces of gravity and drag, energy, chemical properties, and safety. They were educated about the various career paths in engineering, and were exposed to civil, mechanical, electrical, chemical and environmental engineering subjects, activities and demonstrations.

PUBLICATIONS

Henriksen, T., (*in press*) "Clinical Trials within the U.S. – Skin Transplants (burns)," Encyclopedia of Stem Cell Research, 2nd Edition.

Henriksen, T., (*in press*) "University of Washington/Hutchinson Cancer Center," Encyclopedia of Stem Cell Research, 2nd Edition.

Way, P., and **Henriksen, T.,** (2011). An Assessment of the Ability of Light Bulbs to Ignite Various Types of Cardboard. Fire and Materials, 12th International Conference, January 2011.



Lewis, K., Biggerstaff, N., and **Henriksen, T.**, (2010). Case Study: Safety device failure results in tanker BLEVE, Mary Kay O'Connor Process Safety Center International Symposium, p. 560, October 2010.

Henriksen T.L., Nathan G.J., Alwahabi Z.T., Qamar N., Ring T.A., and Eddings E.G. (2009). Planar Measurements of Soot Volume Fraction and OH in a JP-8 Pool Fire. Combustion and Flame, 156 (7), 1480-1492, 2009.

Henriksen T.L., Nathan G.J., Ring T.A., and Eddings E.G. (2008). Puffing Frequency and Soot Extinction Correlation in JP-8 and Heptane Pool Fires. Combustion Science and Technology, 180 (4) 699-712, 2008.

Henriksen T.L., Nathan G.J., Alwahabi Z.T., Spinti J., Smith P.J., and Eddings E.G. (2005). Soot Volume Fraction from Extinction in JP-8 and Heptane Pool Fires. 4th Australian Conference on Laser Diagnostics in Fluid Mechanics and Combustion, The University of Adelaide, South Australia, December 7-9, 2005.

PRESENTATIONS

Henriksen T.L., (2014). Tragic Chemical Accidents, Combustible Dust Hazards. American Chemical Society, ACS Webinar, September 2013.

Henriksen T.L., Way, Paul T. (2014). Wildland Fire. Wildland Fire Summit, Las Vegas, NV, June 2013.

Henriksen T.L., (2013). Assessing the Potential of Hot Particles to Ignite Wildland Fires, Interscience Communications. 13th Annual Fire and Materials Conference, San Francisco, CA, January 2013.

Henriksen T.L., (2012). Capstone Safety & Toxicology Course Methodologies. American Institute of Chemical Engineers (AIChE). AIChE National Meeting, Pittsburgh, PA, 2012.

Henriksen T.L., (2012). Process Safety Workshop: CHEME car. American Institute of Chemical Engineers (AIChE). AIChE National Meeting, Pittsburgh, PA, 2012.

Henriksen T.L., (2011). Investigating Wildland Fires. CASE Forensics. CASE Forensics Internal Training Seminar, Seattle WA, 2011.

Henriksen T.L., (2011). Applying Engineering Concepts in Forensics. University of Utah. Graduate Combustion, University of Utah, 2011.

Henriksen T.L., (2011). The CHEME Car Competition: Furthering Undergraduate Education in Process Safety. American Institute of Chemical Engineers (AIChE). AIChE National Meeting, Salt Lake City, Utah, 2011.



Henriksen T.L., (2010). *The CHEME Car Competition: Furthering Undergraduate Education in Process Safety*. American Institute of Chemical Engineers (AIChE). AIChE National Meeting, Salt Lake City, Utah, 2010.

Henriksen T.L., (2007). "Determination of Soot Refractive Index as a Function of Height in an Inverse Diffusion Flame." 5th US Combustion Meeting, Western States Section of the Combustion Institute, San Diego, CA. 2007.

Henriksen T.L., (2005). "Soot Volume Fraction from Extinction in JP-8 and Heptane Pool Fires." WSS/CI Fall Meeting, Stanford, CA. 2005.

CONTINUING EDUCATION

- *8th Annual Wildland Fire Litigation Conference*, Monterey, April 2014
- *The Chemistry of Chocolate*, AIChE, 2013
- *Flame Flashbacks: Causes and Prevention*, AIChE, 2013
- *Human Factors and their Impact on Plant Safety*, Control Engineering, 2013
- *Asbestos Awareness Training*, RGA Environmental, 2012
- *Combustible Dust Hazard Assessment*, 3D Instruments LLC, 2012
- *NFPA Conference*, National Fire Protection Association, 2012
- *Process Safety for the Biofuels Industry*, Center for Chemical Process Safety (CCPS), 2011
- *Mary Kay O'Connor Process Safety Center International Symposium*, Texas Engineering Experiment Station, 2010
- *The International Symposium on Fire Investigation Science and Technology*, University of Cincinnati, 2008
- *Explosion Dynamics*, CFITrainer.net, 2012
- *Wildland Fire Investigation*, CFITrainer.net, 2011
- *Fundamentals of Residential Building Construction*, CFITrainer.net, 2011
- *NFPA Conference*, National Fire Protection Association, 2011
- *Preparation for the Marine Fire Scene*, CFITrainer.net, 2010
- *NFPA Conference*, National Fire Protection Association, 2010
- *Post flashover Fires*, CFITrainer.net, 2009
- *Understanding Fire through the Candle Experiments*, CFITrainer.net, 2009
- *Managing Complex Fire Scene Investigations*, CFITrainer.net, 2009
- *Vacant and Abandoned Buildings: Hazards and Solutions*, CFITrainer.net, 2009
- *A Ventilation-Focused Approach to the Impact of Building Structures and Systems on Fire Development*, CFITrainer.net, 2009
- *Investigating Fatal Fires*, CFITrainer.net, 2009
- *Critical Thinking Solves Cases*, CFITrainer.net, 2009
- *Insurance and the Fire Investigation*, CFITrainer.net, 2009
- *Introduction to Evidence*, CFITrainer.net, 2009
- *Effective Investigation and Testimony*, CFITrainer.net, 2009

SOCIETIES AND MEMBERSHIPS

Air & Waste Management Association (AWMA)
American Institute of Chemical Engineers (AIChE)



CASE Forensics Corporation
J. Maravilla v. Idaho Ind. Inc.
File No. 2291001

November 24, 2014
Page | 14

Combustion Institute USA Western States
International Association of Arson Investigators (IAAI)
International Association of Arson Investigators Washington Chapter (IAAI)
National Association of Fire Investigators (NAFI)
Seattle Fire Code Advisory Board Member, 2012-present
National Fire Protection Association (NFPA)
Committee Member, Hydrogen Technology 2010
Committee Member, Vehicular Alternative Fuel Systems 2010 - present



7.0 Testimony List

Tara Henriksen

Deposition	Mediation	Arbitration	Trial	Court	Case
5/15/14				Circuit Court of the Fifteenth Judicial Court, Palm Beach County, Florida	Delgado v. Fuel Barons, Inc., dba Marshalls, Homes Goods & T.J. Maxx, Napa Home & Garden, Inc., Birdbrain, Inc. Plastic Bottle Corporation aka Container Design Corporation, Ashland, Inc. & Essential Ingredients Inc. Case No.: 502011CA011245XXX XMBAE
7/19/2013				U.S. District Court for Northern District of W Virginia, Elkins Division	Kimberly Landis & Alva Nelson v. Jarden Corp, Hearthmark LLC, Wal-Mart Stores, Inc. C.K.S. Packaging, Inc. Packaging Service Co., & Stull Technologies
5/24/2012				Superior Court of Washington for King County	Rachel Decker v. Lore Shimamura & KPSS. No. 10-2-21687-1SEA
			1/24/2012	Court of Common Pleas Lackawanna County	Atlantic States Insurance Co., A/S/O Custom Designs & Manufacturing Co., Inc., Tara & Alex Tarapachak vs. Sherwin-Williams Company
8/30/2011				Superior Court of Washington for King County	Zula & Ted Bryan V. HS Kent, LLC, d/b/a/ Hawthorn Suites Seattle South Kent



EXHIBIT "P"

1 heat was on Friday, the Friday before the incident.
 2 Q. And explain to me this heat issue that you
 3 had.
 4 A. We just -- we had to heat it up to, like, 70
 5 to 75 degrees at least minimum, you know, inside the
 6 containment in order to get proper cure for the
 7 coatings.
 8 Q. Okay. And the plastic was helping to hold
 9 that heat in?
 10 A. Yes.
 11 Q. And then you built this shelter to also keep
 12 the weather out?
 13 A. Yes.
 14 Q. And that time of year in Pocatello, Idaho is
 15 unpredictable, at best?
 16 A. Yes.
 17 Q. So, it was there to do that, as well.
 18 Who -- how was it built?
 19 Let me ask this first: Who built it?
 20 A. Idaho Industrial built it.
 21 Q. Just --
 22 A. It was not part of the original contract. It
 23 was -- it's not part of the original. It was an RFI.
 24 So, a change order.
 25 Q. Well, you probably felt like you had to do it

1 Saturday was the last time we were there until
 2 6:00 o'clock Monday morning.
 3 And the only thing that happened there is they
 4 said they would not issue a permit and said, well, there
 5 had been a power outage and the pad had been flooded.
 6 And that's when Harold had called me and told
 7 me that, you know, they had flooded the pad with acid.
 8 And I asked him how bad.
 9 And he said, well, I don't know because they
 10 -- you know, they won't let anybody go inside the tent
 11 to see.
 12 So, then I get there and, you know, we're not
 13 told of anybody even stepping in any acid and whatever
 14 until later on. I'd say maybe three hours after we had
 15 been there that even -- that somebody had even stepped
 16 in it.
 17 So, that's -- and essentially -- and then when
 18 we were told this, we are told, well, not to worry. It
 19 has nothing to do with you guys. It's just that there
 20 was an accident that night in the rain, in the dark and
 21 whatever, somebody accidentally -- couldn't see that it
 22 was flooded and accidentally stepped in it.
 23 And at that time, you know, that morning we're
 24 looking around and -- well, yeah, we see pants laying
 25 around. There was pieces of pants that scattered from

1 in order to keep everything right.
 2 A. Yes.
 3 Q. Are you -- have you ever been told that Joe
 4 fell through the plastic?
 5 A. No.
 6 Q. Have you ever been told by anyone that the
 7 plastic was ripped by Joe?
 8 A. No.
 9 Q. Have you ever been told that Joe couldn't have
 10 tripped and fallen because there were no holes in the
 11 plastic?
 12 A. No. I saw the plastic myself. There was --
 13 that -- that kind of a question at that time was never
 14 -- was -- is moot. Never even entered. That -- that
 15 does not even reflect what was told to us at the time.
 16 Q. Okay. What was told to you at the time?
 17 A. When I first got there --
 18 Q. When was that?
 19 A. Probably 6:00 A.M., unless we were to go to
 20 the kronos, I don't know for sure.
 21 That particular project was a six-day a week,
 22 ten-hour a day job that we started at 6:00 in the
 23 morning and we were nearing the end at this time.
 24 And Saturday, which we show five or six hours
 25 that we had worked that day. So, probably 1:00 o'clock

1 the shower to the control room, which is probably a
 2 75-foot walk or whatever, but... There was probably four
 3 or five pieces of pants that were to stay there for
 4 about a week. Nobody ever bothered them.
 5 Q. So, who told -- who told you not to worry
 6 about it?
 7 A. Dave Nicholson, project engineer/project
 8 manager.
 9 Q. And did he say why you shouldn't worry about
 10 it?
 11 A. He said it has nothing to do with you guys,
 12 whatever, that -- that really somebody had accidentally,
 13 in the dark, had stepped in the containment pad that had
 14 flooded through the power outage and had stepped into
 15 it.
 16 And that's really -- that was the last we
 17 would ever hear about it until --
 18 In fact, I did not know who had even stepped
 19 in the acid. Had no idea. Had no idea who Joe
 20 Maravilla was until I was subpoenaed for the deposition.
 21 But that was the last we would ever hear
 22 anything about it other than I knew, yeah, that Joe had
 23 gone back to work and things were, you know, probably
 24 all right, I thought, you know, and this and that.
 25 But then almost two years later, last March,

EXAMINATION

QUESTIONS BY MR. CANTRILL:

Q. I'm going to spend five minutes with you.

Look at Exhibit No. 4 and it shows a picture of an opening.

When you leave the job, would that appear -- that opening appear that way? It's in the middle of the bottom.

A. Oh, in the middle of the bottom? No.

Q. When you leave, what do you do with the openings?

A. They would have been stitched shut.

Q. Okay. And the purpose of the barricade is to keep the heat in; is that correct?

A. Of this temporary shelter, yes.

Q. If you had 20, 90 degree days in a row in July, this barricade would not be necessary; is that correct?

A. That is correct.

Q. It's simply to insure that the coating is not wet?

A. Yes.

MR. CANTRILL: That's all I have, Pat.

MR. GEORGE: Great. That's all I have.

REPORTER'S CERTIFICATE

I, MARY (RAINEY) STOCKTON, CSR No. 746, Certified Shorthand Reporter, certify: That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony and all objections made were recorded stenographically by me and transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

I further certify that I am not a relative or employee of any attorney or party, nor am I financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this 24th day of October, 2013.

Mary "Rainey" Stockton

MARY (RAINEY) STOCKTON, CSR

Notary Public

P.O. Box 2636

Boise, Idaho 83701-2636

My commission expires February 3, 2017

(The deposition concluded at 11:28 A.M.)
(Signature waived.)

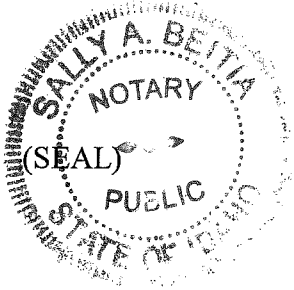
3. The grating from which the platform was constructed was protected by a guard rail which led from a walkway and completely surrounded the platform. I have attached hereto three photographs showing similar grating and handrails as Exhibits A.1, A.2, and A.3.

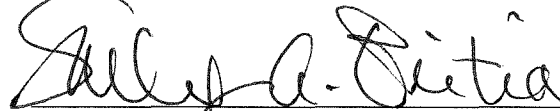
4. On the advice of my attorneys, and to settle my personal injury lawsuit against Idaho Industrial Commission, I agreed to a settlement of \$75,000. I understand that the reason the settlement was so low was because Simplot admitted negligence for my injuries.

DATED this 20th day of April, 2015.


JOSEPH MARAVILLA, Affiant

SUBSCRIBED AND SWORN to before me, a Notary Public in and for said state, this 20th day of April, 2015.




Notary Public for Idaho
Residing at: American Falls
Commission expires: 10-01-16

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of April, 2015, I caused to be served a true and correct copy of the foregoing, upon the following by the method indicated:

Daniel A. Miller
LUDWIG SHOUFLE MILLER JOHNSON
401 West Front Street Suite 401
Boise, ID 83702
Facsimile: (208) 387-1999

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail

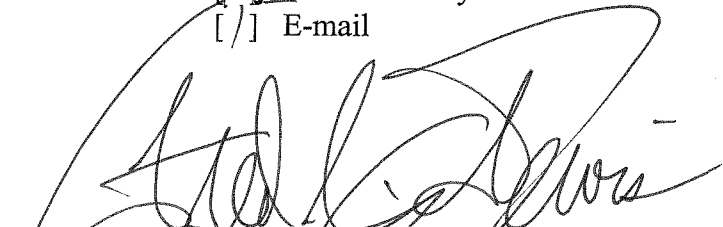

FRED J. LEWIS

EXHIBIT "A"

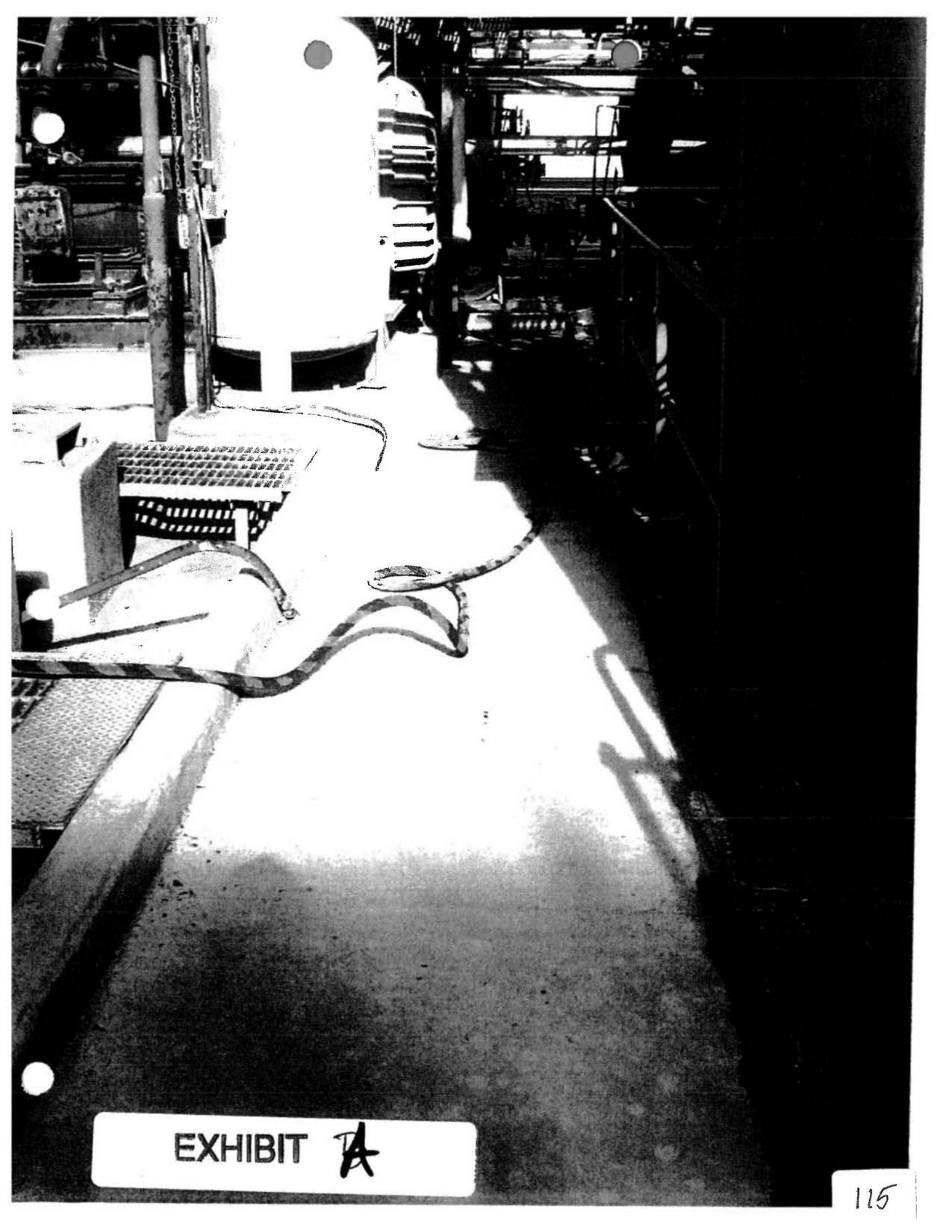


EXHIBIT A

EXHIBIT "A1"

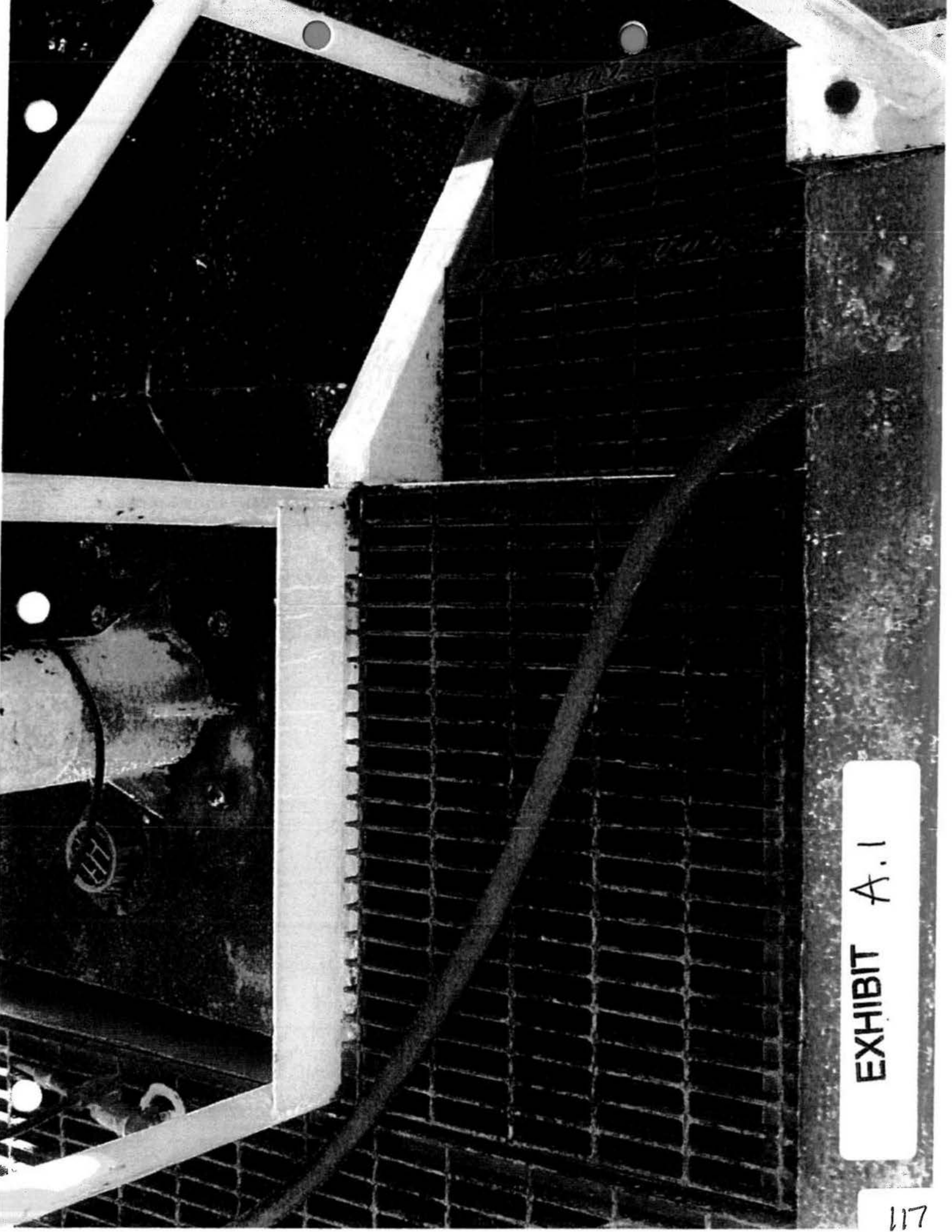


EXHIBIT A.1

117

EXHIBIT⁰⁰ A⁰⁰2

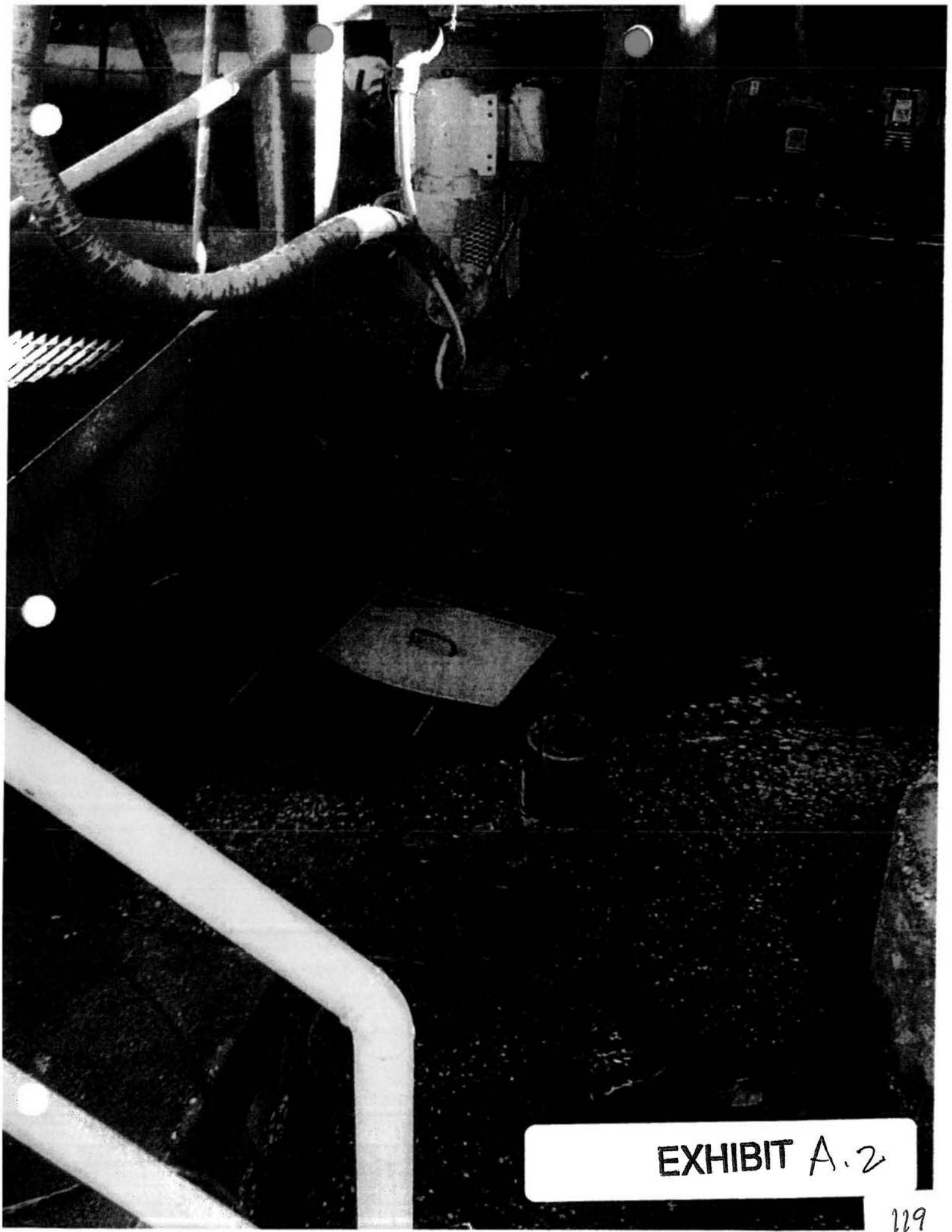


EXHIBIT A.2

EXHIBIT "A3"



EXHIBIT A.3

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 ISB 3571

Attorney for Self-Insured Employer

RECEIVED
 INDUSTRIAL COMMISSION
 2015 MAY 28 P 3 411

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,)	
)	
Claimant,)	I.C. NO.: 2011-025160
)	
)	RESPONSE TO PETITION FOR
vs.)	DECLARATORY RULING
)	
)	
J.R. SIMPLOT COMPANY,)	
)	
Self-Insured Employer,)	
Defendant.)	
_____)	

COMES NOW the Defendant, Self-Insured Employer J.R. Simplot Company (hereafter "Simplot"), by and through its attorney of record, Daniel A. Miller, and Responds to Claimant's (hereafter "Maravilla") Petition for Declaratory Ruling as follows.

Rule 15 of the Idaho Commission's Rules of Practice and Procedure allow for a Petition for Declaratory Ruling if "any person has an actual controversy over the construction, validity or applicability of a statute, rule, or order..." I.C.R.P.P. 15(C).

Two (2) of the issues cited by Maravilla are not appropriate for a “Declaratory Ruling” as there is no dispute as to what the statute in question states, those issues are issues requiring an evidentiary hearing and a hearing on those issues has been set. Those two (2) issues are:

1. Whether an employer is required to pay a proportionate share of costs and attorney fees incurred by claimant in connection with obtaining a third party settlement. I. C. §72-223(4). There is no issue regarding the applicability of Idaho Code section 72-223(4) in this case. The issue in this case is whether Maravilla has taken a position in the third party claim adverse to Simplot, then the Commission has jurisdiction to determine a reasonable fee, if any, and apportion the costs and fees between Maravilla and Simplot. I. C. §72-223(4)(b). This issue has been set for an evidentiary hearing on whether there was a position asserted by Maravilla adverse to Simplot. (Notice of Hearing, ¶ 7). The application of the statute is not in issue.

2. Whether Maravilla is entitled to attorney fees under Idaho Code §§72-804 or 12-121. First, it is clear that Idaho Code section 12-121 does not apply to this workers compensation case. *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920, 925 (2005). Second, 72-804 does apply to workers compensation cases. The issue to be determined by the Commission in this case requires the Commission to take evidence to be presented at the hearing already scheduled and determine if Simplot “contested a claim for compensation made by an injured employee...without reasonable ground.” I. C. §72-804.

As to the issue of whether an Employer’s negligence impacts its right to be subrogated to the third party recovery under Idaho Code § 72-223. Again, there is no dispute that an employer’s negligence does impact its right to subrogation. The issue is to what extent and that issue requires an evidentiary hearing if the Commission has jurisdiction to hear the issue.

In the case of *Pocatello Indus. Park Co. v. Steel W.*, 101 Idaho 783, 621 P.2d 399 (1980), an employee of Steel West by the name of Croft was injured by a malfunctioning door that fell on him.

The building was owned by Pocatello Industrial Park and leased by Steel West. Steel West's workmen's compensation carrier paid Croft a little more than \$14,000 in worker's compensation benefits. Croft sued Pocatello Industrial in District Court. Following a court trial the District Court found that Croft's damages were \$80,000 and that Croft was 20% negligent and Pocatello Industrial Park was 80% negligent. The District Court then reduced Croft's recovery by 20% and it then reduced the recovery by an additional \$14,000 representing the subrogated amount of worker's compensation benefits paid by Steel West's carrier. Pocatello Industrial Park asked the District Court to reconsider and the District Court amended its findings by reducing Pocatello Industrial Park's negligence to 72% and increasing Croft's negligence to 28%. The District Court also amended the decision with respect to the worker's compensation benefits by not reducing Croft's recovery, instead the District Court ruled that Croft's recovery was subject to any lien or subrogation rights of the compensation carrier. Pocatello Industrial Park appealed.


With respect to relying on prior case law as precedence (*Liberty Mutual v. Adams*, 91 Idaho 151 (1966)) our Supreme Court stated: "Furthermore, *Liberty Mutual* was decided prior to the Idaho legislature's adoption of a comparative negligence statute...For that reason, the status of the *Liberty Mutual* rule barring subrogation is currently unknown. In fact, in *Tucker v Union Oil Co. of California*, 100 Idaho 590, 603 P.2d 156 (1979), that question was expressly reserved for another day." *Pocatello Indus. Park Co.*, 101 Idaho at 788. To this date our Supreme Court has not addressed the issue of comparative fault in any subsequent decision. Instead the Supreme Court simply cites as authority supporting a total ban on benefits the *Liberty Mutual* case and its progeny without really addressing the impact of comparative fault statutes. (Maravilla recognizes this in his Petition).

At the time of the status conference setting the hearing in this case it was discussed that if a party wanted to have a hearing on the legal issues then a brief could be submitted and the other

party would have time to respond and oral argument would be presented on the issue (specifically the jurisdiction issue). As Maravilla has noted the jurisdiction issue is an issue of first impression (i.e. jurisdiction of the Commission to assign fault to the parties related to a third party claim that settled prior to trial). Simplot requests that the Commission set a briefing schedule and a date for oral argument on the jurisdiction issue along with the issue of comparative fault.

DATED this 28 day of May, 2015.

LUDWIG ♦ SHOUFLEL ♦ MILLER ♦ JOHNSON, LLP

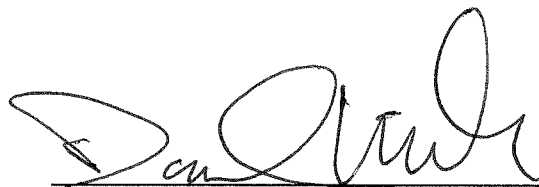
By 
Daniel A. Miller,
Attorney for Self-Insured
Employer/Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of May, 2015, I caused a true and correct copy of the foregoing document to be served upon the following as indicated:

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Pocatello, Idaho 83204-1391

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 Hand Delivery
 Overnight Courier
 Facsimile Transmission
208-232-6109


Daniel A. Miller

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 ISB 3571

2015 JUN -8 P 4:23
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 INDUSTRIAL COMMISSION

Attorney for Self-Insured Employer

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,)	
)	
Claimant,)	I.C. NO.: 2011-025160
)	
)	SECOND MEMORANDUM
vs.)	IN REPLY TO MOTION FOR
)	DECLARATORY RELIEF
)	
J.R. SIMPLOT COMPANY,)	
)	
Self-Insured Employer,)	
Defendant.)	
_____)	

Employer, J.R. Simplot Company (hereafter "Simplot") provides the Commission with this
 Second Memorandum In Reply to Motion For Declaratory Relief:

Where a suit is pending it is proper for a trial court to refuse to entertain a request for
 declaratory relief, if the pending action involves identically the same issues as those raised by the

SECOND MEMORANDUM IN REPLY TO MOTION FOR
 DECLARATORY RELIEF- 1

declaratory judgment action. *Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 149, 627 P.2d 326, 328 (1981).

The Commission has already set for Hearing the issues that Claimant (hereafter "Maravilla") is attempting to raise through the pending Motion for Declaratory Relief. The Commission should find that it is improper to raise these issues through this procedural method when the issues have already been set for Hearing.

Subject matter jurisdiction is so fundamental that it cannot be waived, nor can the parties consent to subject matter jurisdiction. *State v. Urrabazo*, 150 Idaho 158, 162-163, 244 P.3d 1244, 1252-1253 (2010), over ruled on other grounds *Verska v. St. Alphonsus Reg. Med. Center*, 151 Idaho 889, 895 (2011). A court has a sua sponte duty to ensure that it has subject matter jurisdiction over a case. Id. Judgments and orders made without subject matter jurisdiction are void and subject to collateral attack. *Urrabazo*, 150 Idaho at 163. Estoppel has no application where jurisdiction is at issue. *City of Eagle v. Idaho Department of Water Res.*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011). The issue may be raised for the first time on appeal. *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982).

Maravilla cannot raise the issue of Simplot's negligence before the Commission, because the statute granting him the right to proceed against a third party, and granting Simplot its subrogation right, is a built-in res judicata/claims preclusion statute relating to the negligence of the parties.

Idaho Code §72-223 is the code section granting Maravilla a right to proceed against a third party who may be liable for the injuries he sustained as a result of his industrial accident. I.C. §72-223(1).

Idaho Code §72-223 states in part:

“Action may be instituted against such third party by the employee, or in event compensation has been claimed and awarded, by the employee and employer jointly, in the employee's name, or, if the employee refuses to participate in such action, by the employer in the employee's name.”

“If Compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefore, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.”

I.C. §72-223(2) and I.C. §72-223(3).

The wording of these sections are clear, the third party claim is in the name of the employee only. I.C. §72-223(2). If the employer paid benefits then the claim is brought by the employee and employer jointly but only in the name of the employee. *Id.*

These sections have also been interpreted by our Supreme Court to mean there is one action allowed against a third party and an employer does not have to join the one third party lawsuit to preserve its right to subrogation. *Struhs v. Prot. Techs.*, 133 Idaho 715, 721, 992 P.2d 164, 170 (1999). When Maravilla brought his suit against Idaho Industrial Contractors, Simplot's right to subrogation was derivative of Maravilla's recovery, and Simplot was not required to file a separate suit or to join the suit to preserve its right to subrogation. *Struhs*, 133 Idaho at 721; See, *Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 150, 627 P.2d 326, 329 (1981). The Supreme Court also noted that even if the employer brought an action it would be in the name of the employee. *Id.*; I.C. §72-223(2). Whatever outcome resulted from the third party suit, both Maravilla and Simplot are bound by its outcome. *Runcorn v. Shearer Lumber Prods.*, 107 Idaho 389, 396, 690 P.2d 324, 330

(1984).

The doctrine of claim preclusion is set forth in the case of *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.2d 613, 617 (2007). Claim preclusion bars a subsequent action between the same parties or its privy upon the same claim or upon claims relating to the same cause of action which might have been made. *Id.* To be a privy, a person not a party to the former action must derive his interest from one who was party to it. *Ticor Title*, 144 Idaho at 124. Claim preclusion bars adjudication not only on the matters offered and received to defeat the claim, but also as to every matter which might and should have been litigated in the first suit. *Ticor Title Co.*, 144 Idaho at 126.

For claim preclusion to apply to bar a subsequent action there are three requirements: (1) same parties (or privies to a party); (2) same claim; and (3) a final judgment. *Ticor Title Co.*, 144 Idaho at 124. A final judgment disposes of issues that were resolved in the proceeding and as to every matter which might and should have been litigated in the first suit. *Ticor Title Co.*, 144 Idaho at 126.

In the case before the Commission, Maravilla is trying to litigate a claim against a party or at the very least a privy to a party (Simplot) to the Idaho Industrial Contractors case. The claim Maravilla is trying to litigate before the Commission (fault of a party/privy) is identical to the claim raised by Idaho Industrial Contractors in the third party lawsuit, i.e. Simplot's percentage of fault for Maravilla's work accident. There was a final judgment (Order of Dismissal with Prejudice) in the Idaho Industrial Contractor's case. By settling his suit with Idaho Industrial Contractors, and dismissing the lawsuit with prejudice, Maravilla bound Simplot as well as himself from ever

litigating the issue of fault again. *Runcorn*, supra.

The doctrine of claim preclusion prevents Maravilla from bringing what is essentially a negligence suit against Simplot before the Commission. The wording of Idaho Code §72-223(2) and (3) makes clear that the employee and the employer are tied together in the third party claim. No matter who brings the claim it must be in the employee's name.

The language of Idaho Code §72-209(2) makes the above conclusion all the more persuasive. An employer can be liable to another person who may be liable or who has paid damages on account of an injury arising out of and in the course and scope of employment of an employee of the employer and caused by the breach of any duty or obligation owed by the employer to such other person, and the amount of the liability is limited to the amount of compensation which the employer is liable under the workmen's compensation law. I. C. §72-209(2); *Runcorn*, 107 Idaho at 395 - 396. The way Idaho Code §72-209(2) is put into practice is that the employer is placed on the verdict form and the jury is allowed to assign the percentage of liability to the employer whether the employer is a named party or not. *Id.* The third party is allowed a reduction to their portion of the damage award by the percentage of liability attributed to the employer not to exceed the amount of the workmen's compensation benefits paid. *Id.*

There is no doubt that Simplot's alleged negligence was front and center in the Idaho Industrial Contractors lawsuit, as well as the negligence of Maravilla, and of course the negligence of Idaho Industrial Contractors. Simplot was a party/privy to this suit and is protected from a second suit regarding its negligence in a different proceeding.

Attached to this Memorandum are three (3) Exhibits. Exhibit "A" is the Complaint filed by

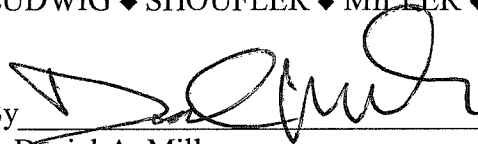
Maravilla against Idaho Industrial Contractors. Exhibit "B" is the settlement agreement between Idaho Contractors and Maravilla. Exhibit "C" is the Order of Dismissal with Prejudice dismissing the Idaho Industrial Contractors case with prejudice.

Simplot requests that the Commission enter an Order that pursuant to the provisions of Idaho Code §§72-209(2) and 72-223 as well as the common law regarding claim preclusion that Maravilla cannot litigate the issue of Simplot's negligence before the Commission, because that issue was decided with finality in the Idaho Industrial Contractors lawsuit.

DATED this 25 day of June, 2015.

LUDWIG ♦ SHOFLER ♦ MILLER ♦ JOHNSON, LLP

By




Daniel A. Miller,
Attorney for Self-Insured
Employer/Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2015, I caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Fred J. Lewis
Patrick N. George
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHTD.
P.O. Box 1391
Pocatello, Idaho 83204-1391

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 Hand Delivery
 Overnight Courier
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208-232-6109



Daniel A. Miller

SECOND MEMORANDUM IN REPLY TO MOTION FOR
DECLARATORY RELIEF- 7

FILED
BANNOCK COUNTY
CLERK OF THE COURT
13 FEB -6 PM 2:13

Richard A. Hearn (ISB#: 5574)
Patrick N. George (ISB#: 5983)
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BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

STEPHEN S. DUNN

BY _____
DEPUTY

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

JOSEPH JERRY MARAVILLA, an)
individual,)
)
Plaintiff,)
)
vs.)
)
IDAHO INDUSTRIAL CONTRACTORS)
INC., an Idaho Corporation,)
)
Defendant.)
_____)

Case No. 0813-480 VI
COMPLAINT and DEMAND FOR JURY
TRIAL

COMES NOW Plaintiff, Joseph Jerry Maravilla ("Maravilla"), by and through counsel, and
for his cause of action against IDAHO INDUSTRIAL CONTRACTORS INC. ("Idaho Industrial"),
avers and alleges as follows:

JURISDICTION AND VENUE

1. This is an action regarding Idaho Industrial's negligence in causing an injury to Maravilla during his employ at Simplot.
2. Maravilla is an individual who was employed at Simplot (the Don Plant) and at all relevant times herein has resided in Bannock County, Idaho.
3. Idaho Industrial is an Idaho Corporation which, at all relevant times herein, operated and resided within Bannock County, Idaho.

EXHIBIT
A
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4. The amount in controversy exceeds the minimum jurisdiction of this Court.
5. Venue and jurisdiction are proper pursuant to Idaho Code §§ 5-404 and 5-514.

FACTUAL ALLEGATIONS

6. Maravilla restates paragraphs 1-5 as if set forth in full herein.
7. On or about October 16, 2011, the #300 sulfuric acid pad was under construction with said improvements being made by Idaho Industrial.
8. Idaho Industrial had been jack hammering in the area, removing concrete, recoating the pad, and had placed a plastic tarp completely around the pad.
9. Maravilla was employed by Simplot at this time and was working as a supervisor.
10. That night an alarm went off indicating that the power to the #300 plant went down and Maravilla was sent to investigate the cause.
11. Maravilla went to the area of the #300 sulfuric acid pad.
12. It was dark and rainy as he approached the containment pad.
13. Maravilla encountered no warning tape nor any sort of blockades either around the pad or at end of the hallway where he was walking.
14. As he walked closer to the pad, he stumbled on a hose that lay in the pathway and his foot went through the plastic and was submerged into approximately 6-10 inches of sulfuric acid.
15. Maravilla immediately called for help, stripped, and stumbled to a shower.
16. From there, Maravilla was taken to the hospital and was diagnosed with a full thickness sulfuric acid burn on his right foot and ankle.
17. Since that time, Maravilla has been unable to work and continues to suffer pain in the ankle.

NEGLIGENCE AND NEGLIGENCE PER SE

18. Maravilla restates paragraphs 1-17 as if set forth in full herein.

19. Idaho Industrial had a duty to use reasonable and/or ordinary care to ensure the Maravilla's safety and others around the construction by keeping and maintaining a safe work place, that the proper covers and guardrails were in place, that railings were in place, that toe boards were in place and that passageways were kept clear as required by 1910.22, 1910.23, 1926.25 and other regulations not specifically mentioned herein.

20. In addition, Idaho Industrial had a duty as established by the OSHA safety requirements to conduct itself in compliance with these regulations. These regulations establish a minimum standard of conduct and are meant to protect persons in the same or similar situation as Maravilla.

21. Idaho Industrial breached these duties by failing to warn, to keep a safe workplace, to place barricades, or to follow workplace rules.

22. As a direct and proximate result of this negligence, Maravilla has suffered damages.

DAMAGES

23. Maravilla restates paragraphs 1-22 as if set forth in full herein.

24. As the direct and proximate result of the negligence, Maravilla was caused to sustain severe and permanent injuries. He has become permanently and visibly scarred and disfigured, has incurred medical expense, will continue to have medical expense and treatment. In addition, he has lost income and will continue to do so. These damages exceed \$10,000.

25. Maravilla has also had to hire an attorney to pursue this case and is entitled to attorney fees and costs pursuant to Idaho Code §§12-120 and 12-121.

WHEREFORE, Plaintiffs pray judgment as follows:

- A. General damages in an amount to be determined at trial;
- B. Past and future medical expenses in an amount to be proven at trial;
- C. Past and future wages in an amount to be proven at trial;
- D. Such other special damages as may be proven;
- E. For attorney fees and costs pursuant to Idaho Code §§ 12-120 and 12-121 and
- F. For such other and further relief as the court deems just and equitable.

DATED this 6 day of February, 2013.

RACINE, OLSON, NYE, BUDGE
AND BAILEY, CHTD

By *Patrick N. George*
PATRICK N. GEORGE

Maravilla hereby demands a trial by a 12 person jury on all so triable issues.

RACINE, OLSON, NYE, BUDGE
AND BAILEY, CHTD

By *Patrick N. George*
PATRICK N. GEORGE

To: New Claims <newclaims@unitedfiregroup.com>
CC: STALEY GRADYN D <gradyns@mutualid.com>, NORRIS-STEELE BARBARA
H <barbaras@mutualid.com>
From: Shari Butler <sharib@mutualid.com>
Date: Mon, 25 Feb 2013 15:15:17 -0600
Subject: Idaho Industrial Contractors Inc., 60333409

Please call us because the real story is that the concrete pad which Idaho Industrial
pured was in a tent and topped off so no one would get in.

The acid over flowed from a different area in the night.

Our contractor was not even there.

Please call Bob Lewis @ 208-317-0206 for a statement.

Thank you.

Gradyn Staley
Agent-Mutual Insurance

RELEASE

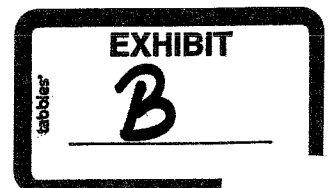
FOR AND IN CONSIDERATION, of the sum of SEVENTY FIVE THOUSAND DOLLARS, (\$75,000.00), the undersigned releases and forever discharges Idaho Industrial Contractors, an Idaho Corporation and United Fire and Casualty, their heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or who might be claimed to be liable, none of whom admit any liability to the undersigned, but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on October 16, 2011 at the J.R. Simplot [Don Plant] in which the Releasor, Joseph Jerry Marravilla was injured.

The Releasors agrees that they will save harmless and indemnify the Releasees from any loss, claim, demand, action, costs and attorneys fees, including, but not limited to, any claim for indemnity or contribution that is or may be asserted by any person or entity whomsoever or whatsoever on account of the above described incident. The undersigned hereby agrees to satisfy any and all liens or subrogated interests or claims out of this settlement amount which may have paid medical benefits as a result of the accident herein described.

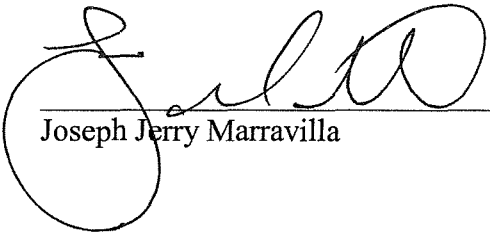
The undersigned Releasors further agree and acknowledge that this release is given as a full and final settlement and satisfaction of that certain action on file in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, Case No. CV-2013-480, entitled Joseph Jerry Marravilla vs. Idaho Industrial Contractors, and that the same may be dismissed with prejudice, each side bearing their own costs and attorney fees.

The undersigned hereby declares that the terms of this settlement have been completely read, and are fully understood and accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and is in no way an admission of any liability on behalf of Idaho Industrial Contractors and United Fire and Casualty, and is instead intended to simply avoid further litigation costs and is for the express purposes of precluding forever any further or additional claims arising out of the aforesaid accident.

The Releasor has filed a workman's compensation claim against the J.R. Simplot Company, which is still pending. Further, the J.R. Simplot Company has asserted its subrogation right to the \$75,000.00 being paid pursuant to Idaho Code § 72-223(3). The releasor hereby agrees that the settlement funds being paid will remain in the trust account of Racine, Olson, Nye, Budge and Bailey until the workman's compensation claim has been fully resolved.



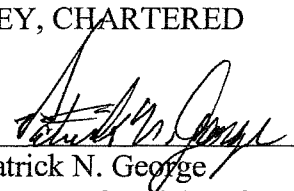
DATED this 9th day of January, 2015.



Joseph Jerry Marravilla

Approved as to form and content

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 

Patrick N. George
Attorney for Plaintiff

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2015 JAN 22 AM 9:34

BY _____
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

JOSEPH JERRY MARAVILLA, an)
individual,)
)
Plaintiff,)
)
vs.)
)
IDAHO INDUSTRIAL CONTRACTORS,)
INC.,)
)
Defendant.)


Case No. CV-13-480-PI

ORDER OF DISMISSAL WITH
PREJUDICE

IT IS STIPULATED, By and between the parties hereto, by and through their respective counsel of record, that the above-entitled action be dismissed with prejudice based upon the filings to the Court herein, and good cause appearing therefor;

IT IS HEREBY ORDERED and this does ORDER that this case be dismissed with prejudice with each party to bear its own costs and attorney fees.

DATED This 22nd day of January, 2015.



David C. Nye
District Judge

ORDER OF DISMISSAL WITH PREJUDICE - 1

EXHIBIT
C

CERTIFICATE OF SERVICE

I hereby certify that on January ^{23rd} ~~19~~, 2015, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Patrick N. George
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
PO Box 1391
Pocatello, ID 83204-1391

- Facsimile: (208) 232-6109
- Hand Delivery
- U.S. Mail
- Email: png@racinelaw.net

David W. Cantrill
CANTRILL, SKINNER, LEWIS, CASEY
& SORENSEN, LLP
1423 Tyrell Lane
P.O. Box 359
Boise, ID 83701

- Facsimile: (208) 345-7212
- Hand Delivery
- U.S. Mail
- Email: Crawford@cassklaw.com

Amy G. Beers
Clerk

Fred J. Lewis (ISB No. 3876)
 Patrick N. George (ISB No. 5983)
 RACINE, OLSON, NYE,
 BUDGE & BAILEY, Chartered
 P. O. Box 1391
 Pocatello, Idaho 83204-1391
 Telephone: (208) 232-6101
 Fax: (208) 232-6109
Attorneys for Claimant

FILED

JUN 16 2015

INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant,

v.

J. R. SIMPLOT COMPANY,

Self-Insured Employer, Defendant.

IC No. 2011-025160

**CLAIMANT'S REPLY TO
SIMPLOT'S RESPONSES**

The Claimant, JOSEPH JERRY MARAVILLA, pursuant to Rule 15(E) of the Judicial Rules of Practice and Procedure for the Idaho Industrial Commission, submits this Reply to Simplot's Responses and in support of his Petition for Declaratory Ruling.

A. INTRODUCTION

This is a significant case of first impression for the Industrial Commission. The Commission has not had the opportunity to rule on the enforceability of a surety's or self-insured's subrogated claim to the proceeds of a third-party settlement where the employer was concurrently negligent. Nevertheless, the Idaho Supreme Court has consistently provided guidance on this issue. For approximately fifty (50) years the Idaho Supreme Court has consistently held that "where the employer is negligent, the employer is denied this

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Attorneys for Claimant

2015 JUN 18 A 10:47
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INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant,

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A. INTRODUCTION

This is a significant case of first impression for the Industrial Commission. The Commission has not had the opportunity to rule on the enforceability of a surety's or self-insured's subrogated claim to the proceeds of a third-party settlement where the employer was concurrently negligent. Nevertheless, the Idaho Supreme Court has consistently provided guidance on this issue. For approximately fifty (50) years the Idaho Supreme Court has consistently held that "where the employer is negligent, the employer is denied this

reimbursement.” *Schneider v. Farmers Merchant*, 106 Idaho 241,244 (1983). This has consistently been quoted by the Idaho Supreme Court in *Izaguirre v. R&L Carriers Shared Servs., LLC*, 155 Idaho 229, 235 (2013); *Runcorn v. Shearer Lumber Products, Inc.*, 107 Idaho 389, 395 (1984); *Tucker v. Union Oil Company of California*, 100 Idaho 590, 603 (1979). This well-established holding from the Idaho Supreme Court is cut and dried. If the employer is in any portion negligent, the surety and self-insured employer lose their entire subrogated claim.

It is appropriate to raise this issue before the Commission Claimant within a Petition for Declaratory Ruling. Because a claimant cannot file a motion for summary judgment, a Petition for Declaratory Ruling is the only procedure where this important issue can be ruled upon prior to the hearing. This increases litigation efficiency by providing the necessary legal framework to allow the parties to present evidence in an organized and more focused fashion at hearing. It will also increase the likelihood of settlement and thereby avoid the necessity of a protracted and complex hearing.

Simplot’s claim that Maravilla is precluded from raising this issue before the Commission under theories of claim preclusion (aka res judicata) is severely misplaced and must be rejected. Claim preclusion does not apply in this case for many reasons as discussed below, including the fact that there has never been a prior final judgment on this issue from any Court or the Commission.

Lastly, Maravilla is entitled to his attorney fees under Idaho Code § 72-804. Simplot should be required to pay these attorney fees, because Maravilla did not take a position contrary to Simplot in the underlying third-party case. Other reasons are set forth below.

There is no need for further briefing on these issues. Full opportunity for briefing has been provided. Claimant’s Petition should now be set for oral argument and decided.

B. ARGUMENT

1. Claim preclusion (aka res judicata) has no application in this matter.

Claim preclusion (aka res judicata) does not preclude Maravilla from raising Simplot's negligence before the Commission with regard to the present subrogation issue. Simplot's arguments to the contrary are without merit and must be rejected.

a. The Commission has exclusive jurisdiction over the right to subrogation as against a third-party recovery.

Simplot does not dispute that the Commission has exclusive jurisdiction to decide whether or not it has lost its subrogated claim by its own negligence. *Van Tine v. Idaho State Insurance Fund*, 126 Idaho 688, 690 (1994); *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 519 (2011). If the Commission has the "exclusive jurisdiction" to decide whether or not Simplot has lost its entire subrogated claim by its own negligence, the Commission is required to hear and consider all facts and evidence necessary to make that decision. Logically then, claim preclusion (aka res judicata) cannot apply.

The Commission has the exclusive jurisdiction to decide the subrogation issue including whether or not Simplot was negligent. This is not left to a court in an action where Simplot neither participated nor was a party. As required by the Idaho legislature, it is for the Commission to decide this issue. This responsibility cannot be abrogated. Once the Commission makes the decision, the parties will be able to present the appropriate evidence at a hearing to establish Simplot's negligence and how it affects its subrogated claim.

b. Simplot cannot satisfy the prima facie elements required for application of claim preclusion (aka res judicata).

Simplot's arguments regarding claim preclusion and res judicata has a problem—it ignores the law. For claim preclusion to apply, Simplot has to prove:

- (1) the original action ended in a final judgment on the merits,
- (2) the present action involves the same parties as the original action, and
- (3) the present claim arises out of the same transaction or series as the original action.

Berkshire Invs., LLC v. Taylor, 153 Idaho 73, 81 (2012).

First, claim preclusion does not apply because there has not been a final judgment in this worker's compensation case brought by Maravilla against Simplot. Nor was there a final judgment in the third-party case. There was a settlement as opposed to a claim that was fully and fairly litigated to a conclusion.

Second, Simplot was not a party to the third-party case. Simplot admits this fact. Under Idaho Code § 72-211, Maravilla was prohibited from bringing a claim against Simplot in the third-party case. Maravilla's exclusive remedy against Simplot was his worker's compensation case. There is absolutely no way under Idaho law that Maravilla could have sued Simplot as a defendant in the third-party district court case against Idaho Industrial.

The Commission must reject Simplot's claim that it should be treated like a de-facto defendant in the third-party case in contradiction of Idaho Code § 72-211. Moreover, Idaho Code § 72-223(2) allows the employee and the employer jointly to bring the third-party claim in the employee's name. In other words, Simplot could have been a unnamed **co-plaintiff** in the third-party case (**never a defendant** in the third-party case pursuant to Idaho Code § 72-211). However, this did not happen. Simplot stayed as far away from the third party case as possible. Simplot did not aid aided in the prosecution of the claim and now refuses to share in the expense.

Hypocritically, after the matter was settled, Simplot claimed to be subrogated to the entire amount even though it did nothing to obtain the result.

In addition, even if Simplot would have been an unnamed co-plaintiff, the district court would have lacked jurisdiction to adjudicate Simplot's subrogated claim because jurisdiction to decide that issue is vested exclusively in the Commission. So, not only was Simplot not a co-plaintiff in the third-party case, a cross-claim for subrogation could not have been brought in the third-party case, because the district court lacked jurisdiction. Moreover, the Idaho Supreme Court has held that claim preclusion (aka res judicata) never applies to cross-claims that are not raised in prior litigation. *See Kootenai Electric Cooperative v. Lamar Corp.*, 148 Idaho 116 (2009).

Claim preclusion (aka res judicata) does not apply, because the Commission has exclusive jurisdiction of this issue, there has been no final judgment, and Simplot was not a party to the prior third-party case.

2. Idaho Supreme Court has repeatedly and consistently held that an employer loses its entire subrogation claim if the employer's negligence caused in any degree the employee's injuries.

In Simplot's first Response filed on April 28, 2015, it conceded that "there is no dispute that an employer's negligence does impact its right of subrogation" (p.2). However, Simplot then goes on to call into question the employer negligence rule barring entire subrogated claims based upon an employer's negligent, which was originally set out in *Liberty Mutual Insurance Company v. Adams*, 91 Idaho 151 (1966) and consistently repeated by the Idaho Supreme Court in numerous decisions thereafter. *See, e.g., Izaguirre*, 155 Idaho at 235 (2013); *Runcorn*, 107 Idaho at 395 (1984); *Schneider*, 106 Idaho at 244 (1983).

Simplot seeks to overrule this long-established and currently cited legal principle by reference to thirty-five year old cases of *Pocatello Industrial Park Co. v. Steel West Inc.* 101 Idaho 783 (1980) and *Tucker v. Union Oil Company of California*, 100 Idaho 590 (1979). Simplot's reading of these cases is wrong.

In *Pocatello Industrial Park Co.*, an employer argued that the district court must have found it "was not at all negligent" with regard to its employee's injury, because the district court had recognized the employer's right to subrogation, which under *Liberty Mutual Insurance Company* would have been improper if the employer had been negligent. 101 Idaho at 788. The Idaho Supreme Court rejected this argument for two different but similar reasons. First, the Supreme Court noted that "it is not so clear that the trial court...actually determined that IIC had subrogation rights" and may have simply left the issue undecided. *Id.* Second, the Idaho Supreme Court noted that "we have no indication that the trial court considered the ramifications of *Liberty Mutual* rule *vis-à-vis* [the employer's] negligence." *Id.* The Supreme Court continued by indicating that "the status of the *Liberty Mutual* rule barring subrogation is currently unknown" and "that the question was expressly reserved for another day" in *Tucker* decided less than a year before. *Id.*

Although *Pocatello Industrial Park Co.* (1980) and *Tucker* (1979) did not address the issue, the Idaho Supreme Court has consistently held and instructed in numerous subsequent cases since then that "where the employer is negligent, the employer is denied this reimbursement." *See, e.g., Izaguirre*, 155 Idaho at 235 (2013); *Runcorn*, 107 Idaho at 395 (1984); *Schneider*, 106 Idaho at 244 (1983). Given this long line of subsequent cases, the issue is now, and has been for quite some time, resolved under Idaho law. It is clear from cases issued

by the Idaho Supreme Court as late as 2013 that the employer's negligent rule is the law in Idaho. *See Izaguirre, 155 Idaho at 235*. Simplot fails to cite any legal authority to the contrary.

The employer's negligence rule established by the Idaho Supreme Court could not be clearer. When an employer's negligence contributed in any degree to the injury of an employee, the surety, or in this case the self-insured employer, loses its entire subrogated claim. *See, e.g., Izaguirre, 155 Idaho at 235 (2013); Runcorn, 107 Idaho at 395 (1984); Schneider, 106 Idaho at 244 (1983)*. Notably, the Idaho Supreme Court did not qualify this rule in any way in 2013 when issuing the *Izaguirre* decision.

Moreover, the employer's negligence rule is an equitable principle created based upon public policy considerations that have been echoed by the Idaho Supreme Court time and time again. Among these public policy considerations, the Supreme Court has held that a negligent employer (or his insurer) should not profit from its own wrong. *See, e.g. Schneider v. Farmers Merchant, 106 Idaho 241, 244 (1983) (citing McDrumond v. Montgomery Elevator Co., 97 Idaho 679 (1976))*. As stated in *Liberty Mutual Insurance Company*, an employer (or his insurer) should not profit when "his hands...have the blood of the dead or injured workman upon them." 91 Idaho at 156 (citation omitted).

It is for this reason that the Idaho Supreme Court has not adopted a partial subrogation rule allowing a negligent employer (or his insurer) a partial reimbursement when the employer's negligence merely contributes to but does not entirely cause an employee's injury. Any portion of the proverbial "blood" on the employer's hands is enough to eliminate the subrogation claim entirely. Although the Idaho Supreme Court in *Tucker* noted that California at that time¹ had adopted a partial subrogation rule, the Supreme Court expressly refused to adopt that rule in

¹ The California case referenced by the Idaho Supreme Court was *Associated Construction & Engineering Co. v. Workers Compensation Appeals Bd.*, 587 P.2d 684 (1978).

Tucker. 100 Idaho at 604. In *Tucker*, the Idaho Supreme Court refused to adopt the rule as follows:

As to that portion of the [California partial subrogation rule] relating to the right of the employer to be subrogated to a portion or all the worker's compensation benefits dependent upon the extent to which the negligence has been assessed against the employer, **we find such to be unnecessary to our decision today.**

Tucker, 100 Idaho at 604 (emphasis added). And at no time since *Tucker* has the Idaho Supreme Court ever adopted the California rule. Instead, the Idaho Supreme Court has repeated again and again that if the employer is negligent to any degree, it and its surety lose its entire subrogation claim. It is that simple.

A partial subrogation rule has not been adopted in Idaho. In California, this rule gives the "concurrently negligent employer...a credit to or reimbursement from the employee for the amount which the employer's compensation liability exceeds the proportionate liability it would suffer as a noninsulated tortfeasor." *Tucker*, 100 Idaho at 604. For example, assume a situation where (a) total tort damages awarded are \$1,000,000; (b) a surety has paid \$100,000 in medical benefits and \$200,000 in disability benefits; and (c) negligence is allocated 60% to the third-party, 20% to the employer, and 20% to the injured employee. In this situation applying California's partial subrogation rule, the claimant would collect \$600,000 from the third-party tortfeasor. The negligent employer's non-insulated proportionate share of the liability in such a scenario would be \$200,000. The worker's compensation benefits paid would exceed the proportionate share of the liability by \$100,000 (\$300,000 in total worker's compensation benefits less \$200,000 as the employer's proportionate share of the liability which then equals a net \$100,000 partial subrogated claim.) Under California's partial subrogation rule, the claimant in this scenario would be required to pay \$100,000 (less costs and fees) out of the \$600,000 received from the third-party tortfeasor.

Adoption of the California rule would create a layer of complexity at the hearing and burden the parties and Commission with armies of experts. This would create a complex hearing that would almost make it cost prohibitive for a claimant to litigate. It would also burden the Commission with a complex and time consuming scheme to apply to these types of cases. In order to apply this rule, the Commission would have to hear evidence from a host of witnesses and experts and make findings of fact that have little to do with workers' compensation benefits. If the California rule were adopted, the Commission would have to:

1. Calculate the total damages in the third-party claim by hearing testimony from life care planners, economists, etc.
2. Allocate negligence of each party involved in the accident, including the employer, employee, and all third-party tortfeasors by hearing the testimony of safety experts, human factor experts, accident reconstruction experts, engineers and other liability experts to testify as to how and why each party was negligent.
3. Develop a formula where the employer would be treated as a noninsulated tortfeasor and their proportionate share of the liability would be calculated. Then that amount would have to be subtracted from the worker's compensation benefits paid to finally arrive at the net partial subrogated claim to be paid out of the claimant's share of the net proceeds from third-party case.

It would effectively turn what should be a summary and simple procedure into an extended and complex civil trial in contravention of Idaho Code § 72-708.

The Idaho Supreme Court's current employer negligence rule (as opposed to the California rule) allows the Commission to hold a simple and summary hearing in compliance with Idaho Code § 72-708. The only issue to be resolved is whether the employer is negligent or

not. This would only require the Commission to hear the liability experts testify and make a determination of whether or not the Commission believes that the employer was negligent. If the Commission finds no negligence by the employer, the self-insured employer or surety are paid their subrogated claim, less attorney fees and costs, from the proceeds of the third-party case. If the Commission finds the employer was concurrently negligent and caused harm to the employee, they and their surety lose their subrogated claim. This is a summary and simple proceeding required by Idaho Code § 72-708.

In summary, the Idaho Supreme Court has never adopted California's partial subrogation rule. Doing so would violate public policy in Idaho and contradict the mandate of Idaho Code § 72-708. Instead, the Supreme Court has consistently reaffirmed the straight-forward rule in Idaho that an employer loses its entire subrogation claim if the employer's negligent contributes in any amount to the employee's injury.

3. Maravilla is entitled to an award of attorney fees for Simplot's unreasonable denial to allow the payment of attorney fees and costs in relationship to the third-party claim.

Idaho Code § 72-223(4) clearly requires Simplot to agree to the payment of attorney fees absent a finding Maravilla asserted a position in the third-party claim adverse to the employer. Simplot has not been able to produce any evidence Maravilla took a position adverse to Simplot in the third-party case. Nor will Simplot be able to produce such evidence since that was not Maravilla's claim in the third party case. Ironically, it was Simplot itself that stated it was negligent through a Simplot supervisor, whose testimony appeared to be covering for Idaho Industrial as he threw Simplot under the "bus" by claiming that Simplot was negligent in various ways.

If Idaho Code § 12-121 does not apply, Maravilla submits that the Commission's powers are broad enough under Idaho Code § 72-804 to award attorney fees for Simplot's unreasonable denial to pay the third-party attorney fees in a third-party case that they destroyed. *Van Tine v. Idaho State Insurance Fund*, 132 Idaho 902, 906 (1994).

C. CONCLUSION

For the reasons discussed above, it is respectfully requested that the Commission find that claim preclusion (aka res judicata) does not apply in this case. It is also requested that the Commission reaffirm the Idaho Supreme Court's oft repeated holding that an employer loses its entire subrogation claim if the employer's negligent contributes in any amount to the employee's injury. Lastly, it is requested that the Commission award Maravilla his attorney fees.

DATED this 16 day of June, 2015.

RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED

By: 

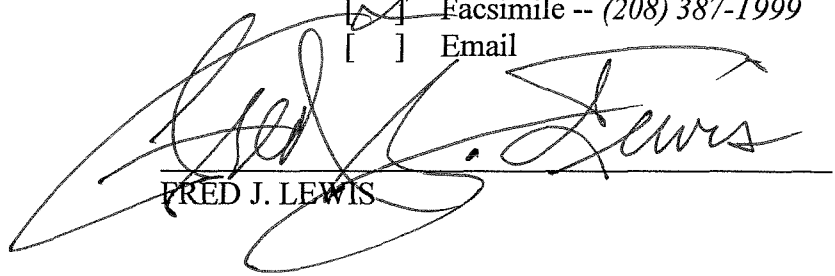
FRED J. LEWIS
Attorneys for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of June, 2015, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Daniel A. Miller
LUDWIG SHOUFLE MILLER JOHNSON
401 West Front Street Suite 401
Boise, Idaho 83702

- U. S. Mail
- Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile -- (208) 387-1999
- Email



FRED J. LEWIS

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Petitioner,

v.

J. R. SIMPLOT COMPANY,

Self-Insured Employer,

Respondent.

IC 15-000108

(2011-025160)

**ORDER ON PETITION FOR
DECLARATORY RULING**

FILED

AUG 11 2015

INDUSTRIAL COMMISSION

Joseph Maravilla (Petitioner) filed his Petition for Declaratory Ruling (Petition) with the Commission on May 1, 2015. The Petition was served on J.R. Simplot Company (Simplot), Respondent herein, who employed Petitioner at the time of the industrial accident giving rise to this matter. Petitioner raised a number of issues in his Petition, which he contended were the proper subject of a J.R.P. 15 Petition for Declaratory Ruling. However, following a telephone conference with the parties, the Commission has determined that only two of the issues identified by the parties are properly the subject of a petition for declaratory ruling. The facts relevant to the instant dispute can be synopsized as follows:

FACTS

1. At all times relevant hereto, Petitioner was employed by Simplot, at its Pocatello facility.

2. At some point in time prior to October 16, 2011, Simplot entered into an agreement with Idaho Industrial Contractors, Inc. (IIC), pursuant to the terms of which IIC performed certain repairs on a sulfuric acid pad located at the Simplot facility. Part of this work

involved the removal of existing stair landings in the vicinity of the acid pad. Because of the construction, Simplot placed a hose across a walkway to transport water/acid mix to a nearby pump. On the day of the accident giving rise to the underlying claim, a rain event caused a power surge which led to the buildup of water and acid in the acid pad. On October 16, 2011, Petitioner tripped on the walkway hose. His foot went through a plastic barrier erected by IIC, and into a quantity of sulfuric acid. Petitioner suffered chemical burns to his right leg, which later required skin grafts and surgery. It is alleged by Petitioner that the accident occurred as a result of the negligence of Simplot and IIC.

3. A workers' compensation claim was filed by Petitioner. A timely complaint was filed on September 24, 2012. The underlying claim (2011-025160) is an accepted claim, and workers' compensation benefits have been paid by Simplot in its capacity as a self-insured employer. The total amount of workers' compensation benefits paid to date by Simplot is unknown. Petitioner's entitlement to workers' compensation benefits in addition to those paid to date is the subject of a hearing before the Commission in the underlying action scheduled for October 7, 2015.

4. At some point following the subject accident, Petitioner filed his lawsuit against IIC in district court, as allowed by Idaho Code § 72-223, alleging, *inter alia*, that his injuries were occasioned as a result of the negligence of IIC. Simplot did not participate in that litigation. At some point prior to trial, Petitioner and IIC resolved Petitioner's claim against IIC by IIC's agreement to pay a settlement in the amount of \$75,000.00. As a result of the settlement, Judge Nye entered his order dismissing the complaint with prejudice on January 22, 2015.

5. Against the \$75,000.00 settlement reached in the litigation against IIC, Simplot claims that it has a right of subrogation pursuant to Idaho Code § 72-223. Simplot contends that its right of subrogation exists even if it is shown to have been partly at fault in contributing to Claimant's injuries. On the other hand, Petitioner contends that any negligence on the part of Simplot cuts off its right to subrogation under Idaho Code § 72-223.

6. With this background, the following issues are before the Commission for declaratory ruling:

ISSUES

1. How, if at all, did the abolition of the doctrine of joint and several liability in 1987 affect the historic rule that any amount of employer negligence is an absolute bar to the employer's right of subrogation under Idaho Code § 72-223?

2. Where a settlement has been reached in a third-party action without a judicial determination of how fault should be apportioned between employer, claimant and a third-party, does the Industrial Commission have subject matter jurisdiction to determine the relative fault of the parties in determining employer's Idaho Code § 72-223 right of subrogation?

DISCUSSION

I.

Pursuant to JRP 15, the Commission may entertain a petition for declaratory ruling where it is demonstrated that an "actual controversy" exists over the construction of a statute which directly affects the interests of the Petitioner. Prior to the 1987 amendment of Idaho Code § 6-803, Idaho case law was well-developed concerning how responsibility for damages should be apportioned between a third-party, an employer and an injured worker in an action brought under Idaho Code § 72-223. However, both parties acknowledge that the legislature's abolition

of the doctrine of joint and several liability in 1987 casts some doubt on the continued validity of the rules developed in *Runcorn v. Shearer Lumber Products, Inc.*, 107 Idaho 389, 690 P.2d 324 (1984); *Tucker v. Union Oil Co. of California*, 100 Idaho 590, 603 P.2d 156 (1979); *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1984), *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993), and other cases. Strange as it seems, the policies and principles guiding apportionment in such cases have not been readdressed by the Court at any time since 1987.¹

7. Whether the rule announced in *Schneider*, *Runcorn* and *Tucker* must be amended following the abolition of joint and several liability is an issue that is controverted by the parties, and one which will impact their rights and responsibilities in connection with Simplot's assertion of a right of subrogation under Idaho Code § 72-223. We believe that this is an appropriate subject for a Petition for Declaratory Ruling under J.R.P. 15, and we also believe that addressing the matter in this vehicle, rather than in connection with the underlying workers' compensation claim, will assist both the parties and the Commission; as Petitioner has pointed out, absent guidance from the Commission at this juncture, the parties must be prepared to put on proof to address all possible outcomes of the legal issues referenced above. Knowing in advance what rule the Commission will apply to the subrogation issue will streamline proceedings and proof

¹ As Petitioner has noted, there is at least one case decided by the Court since 1987 which arguably demonstrates the Court's continued adherence to the rules developed in the various pre-1987 cases treating the issue of apportionment. In *Izaguirre v. R&L Carriers Shared Services*, 155 Idaho 229, 308 P.3d 929 (2013), the Court quoted with approval the rule set forth in *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1984), dealing with the apportionment of damages under facts similar to those at bar. However, in *Izaguirre*, the issue before the Court was dissimilar to the issue before the Commission in the instant matter. First, in *Izaguirre*, it was conceded that employer was not at fault in causing claimant's injuries. Second, the issue in *Izaguirre* was whether the employer's right of subrogation extended to the entirety of the third-party recovery, as opposed to that portion of the third-party recovery which could fairly be said to represent damages of a type compensable under the workers' compensation system. Although the Court quoted from that portion of *Schneider* which addresses the impact of employer fault on the apportionment of the employee's damages, *Schneider* was referenced by the *Izaguirre* Court only to support the Court's conclusion that there is nothing in Idaho law which limits an employer's right of subrogation to that portion of a third-party recovery which compensates an injured worker for the same type of injuries compensable under the workers' compensation law. We believe that in connection with the issue before the Commission in this Petition, the *Izaguirre* citation to *Schneider* must be treated as dicta.

when the underlying matter eventually goes to hearing in October. Moreover, the Commission recognizes that this is an issue of some import, and that it is very likely that the party aggrieved by this decision will desire an immediate review by the Supreme Court. Addressing the issue in connection with a J.R.P. 15 Petition for Declaratory Ruling, as opposed to treating it separately as a bifurcated issue in the related case, will allow such review, without the necessity of trying the balance of the case before appeal could be taken.

8. The Workers' Compensation Laws of Idaho (Act) provide the exclusive remedy for injuries sustained as a result of a work accident. Our statutory scheme is a shield as well as a sword. While the Act guarantees compensation to an injured worker regardless of fault, it also limits the employer's liability. *See* Idaho Code § 72-209. However, this exclusivity is subject to the provisions of Idaho Code § 72-223, which specifies that an injured worker may receive workers' compensation benefits and thereafter bring a negligence action against a third-party tortfeasor who is responsible for the injured worker's injuries. The remedies afforded to the injured worker under the provisions of Idaho Code § 72-209 and Idaho Code § 72-223 are cumulative. *See Schneider v. Farmers Merchant, Inc., supra.* Because these remedies are cumulative, it was necessary to establish a system of apportioning the employee's damages between the employer and the third-party in order to achieve an equitable distribution of liability between the employer and the third-party, and to prevent double recovery by the employee. *Schneider, supra.*

9. In *Tucker v. Union Oil of California, supra*, the Court discussed rules to advance these policies. *Tucker* demonstrates the tension between the no-fault workers' compensation system and the common law doctrine of joint and several liability, in apportioning responsibility between an injured worker, his employer and a negligent third party. Tucker was an employee of

Feed Services. He suffered injuries when aqueous ammonia spurted into his eyes while he was attempting to transfer the substance between two trucks. He filed a claim for workers' compensation benefits, and eventually received benefits totaling \$16,916.50. Tucker also pursued a third-party claim against Collier Carbon. That case went to trial, and eventually a special verdict was returned finding Tucker to be 10% at fault, Feed Services 30% at fault and Collier Carbon 60% at fault. Tucker's damages were found to be \$350,000.00. Linda Tucker's damages were determined to be \$12,000.00. The Court reduced these damages by 10%, representing the negligence attributable to Tucker, and entered judgment in favor of the Tuckers in the amount of \$325,800.00. Feed Services was immune from suit as Tucker's employer. Therefore, although Collier Carbon was only 60% at fault, it was held responsible for 90% of claimant's damages pursuant to the common law doctrine of joint and several liability. To this allocation of negligence Collier Carbon objected, arguing that its liability should be limited to its comparative fault found by the jury.

10. In treating the issue, the Idaho Supreme Court first noted that it was appropriate to reduce Tucker's damages by the amount of his negligence under the version of Idaho Code § 6-801 in effect at the time of trial. Under that section, damages allowed to a plaintiff should be reduced in proportion to the amount of negligence attributable to the person recovering damages.

11. However, the Court balked at Collier Carbon's suggestion that it should only be held responsible for Tucker's damages in proportion to the amount of fault it shared in producing those damages. To do so would create the intolerable inequity of shifting responsibility for the negligence of Feed Services to Tucker and from the shoulders of Collier Carbon, and this result was not mandated by Idaho Code § 6-801. To do as Collier Carbon suggested would be to undermine the fundamental rationale of the doctrine of joint and several liability. The Court

found no evidence in the workers' compensation laws of the State to suggest that the doctrine of joint and several liability should not apply to a third party action brought by an injured worker pursuant to the provisions of Idaho Code § 72-223. Therefore, while it might be argued that it was inequitable for Collier Carbon to bear responsibility for 90% of Tucker's damages when the jury found it to be only 60% at fault, a greater inequity to Tucker would result from requiring him to bear the burden of his employer's negligence.

12. Having determined that the doctrine of joint and several liability required Collier Carbon to bear responsibility for 90% of Tucker's damages, the Court addressed Collier Carbon's next argument that notwithstanding the application of the doctrine of joint and several liability to it, Collier Carbon's damages should nevertheless be reduced by the amount of workers' compensation benefits received by Tucker. Considering this argument, the Court recognized that to allow claimant to receive 90% of his civil damages from Collier Carbon while retaining all workers' compensation benefits paid by Feed Services would result in a double recovery, or nearly so, to Tucker. To avoid this outcome, the Court quoted with approval the procedure utilized in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*, 22 Cal.3d 829, 150 Cal. Rptr. 888, 587 P.2d 684 (1978), to avoid double recovery. Pursuant to that case, where it is shown that the employer is concurrently at fault in causing damages to the injured worker, once the degree of employer fault is identified, the third party's responsibility to pay damages is reduced by the employer's percentage of fault, up to the amount of workers' compensation benefits paid. In this way, the negligent third party is protected against a double, or at least inflated, recovery by the injured worker.

13. *Associated Construction & Engineering Co., supra*, is also important for its treatment of the negligent employer's right to be subrogated to the injured worker's recovery

against the negligent third party. The *Tucker* Court noted that in Idaho, the historic rule is that if an employer is found to be in any degree responsible for the injured worker's damages, such negligence, regardless how small, is a complete bar to employer's right of subrogation against the negligent tortfeasor. See *Liberty Mutual Ins. Co. v. Adams*, 91 Idaho 151, 417 P.2d 417 (1966) and *Witt v. Jackson*, 57 Cal.2d 57, 17 Cal. Rptr. 369, 366 P.2d 641 (1961). This rule, applied to the facts of the instant matter, would result in a complete bar to Simplot's right of subrogation under Idaho Code § 72-223 in the event that Simplot is found to be in any respect responsible for causing Petitioner's injuries. However, as noted by the *Tucker* Court, both *Witt* and *Liberty Mutual* were decided prior to the adoption of comparative negligence, and at a time when contributory negligence on the part of an injured employee was an absolute bar to his recovery. The *Associated* Court addressed how the employer's negligence should affect its right of subrogation after the adoption of comparative negligence. As described in *Tucker, supra*, the *Associated* Court concluded that a concurrently negligent employer should be entitled to exercise its statutory right of subrogation in the amount by which the employer's workers' compensation liability exceeds the proportionate liability it would suffer as a non-insulated tortfeasor. Application of this rule to the facts before the Court in *Tucker* would not yield a different result than the rule of *Witt* and *Liberty Mutual*. Recall that employer paid workers' compensation benefits in the approximate amount of \$16,000.00. However, on the special verdict form it was found to be responsible for 30% of claimant's damages, or \$105,000.00. Under either the rule of *Witt* or *Associated*, Feed Services would not be entitled to pursue subrogation against Collier Carbon. Only where the amount of workers' compensation benefits paid exceeded Feed Services' proportionate share of fault would the rule of *Associated* yield a different result. It was for that reason that the *Tucker* Court stated:

As to that portion of the *Associated* decision relating to the right of the employer to be subrogated to a portion or all of the workmen's compensation benefits dependent upon the extent to which negligence has been assessed against the employer, we find such to be unnecessary to our decision today.

14. The apportionment scheme discussed in *Tucker* was followed in subsequent Idaho cases dealing with Idaho Code § 72-223 third-party cases. For example, in *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983), the Court described the *Tucker* rule as follows:

Based on our focus in apportionment, and on the foundation of § 72-223, the system of apportionment generally works as follows. In those situations where the employer is not negligent, the employer is entitled to subrogate to the employee's recovery against a third party, and thus obtain a reimbursement of the workmen's compensation benefits he paid. Conversely, in those situations where the employer is negligent, the employer is denied this reimbursement and the third party is entitled to a credit against his judgment in the amount of the workmen's compensation benefits the employer paid. *Tucker*, 100 Idaho at 603, 603 P.2d at 169. Thus, the employee's award is reduced by the amount of workmen's compensation he received. In either event, the employee does not retain both the workmen's compensation benefits and the full tort recovery.

The rationale for altogether denying the right of subrogation to a concurrently negligent employer, à la *Liberty Mutual*, is that, "It is contrary to the policy of the law for an employer ... to profit from his own wrong". *Schneider, supra*. Under the doctrine of joint and several liability then in effect, the negligent employer, if uninsulated by the exclusive remedy provisions of the workers' compensation law, would be liable for 100% of claimant's injuries like the negligent third party. The existence of the doctrine of joint and several liability therefore explains why to allow a modestly negligent employer to recover some portion of the workers' compensation payments it made could be viewed as allowing the negligent employer to profit from his wrong.

15. Therefore, and notwithstanding *Tucker's* hint that the rule of *Associated Construction & Engineering Company, supra*, might have some traction, the rule in Idaho, at

least prior to the abolition of joint and several liability, is as Petitioner has suggested: any fault on the part of employer, regardless how minimal, is an absolute bar to employer's right of subrogation to the proceeds of an injured worker's recovery against a negligent third party under Idaho Code § 72-223.

16. In 1987, the Idaho Legislature abolished the common law doctrine of joint and several liability, except in limited situations not argued in the instant matter.² Following the amendment of Idaho Code § 6-803, liability among joint tortfeasors is to be apportioned as follows:

. . . In any action in which the trier of fact attributes the percentage of negligence or comparative responsibility to persons listed on a special verdict, the court shall enter a separate judgment against each party whose negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the person recovering. The negligence or comparative responsibility of each such party is to be compared individually to the negligence or comparative responsibility of the person recovering. Judgment against each such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded

As a prescient *Tucker* Court observed, to shift the inequity of joint and several liability from the shoulders of the negligent third party to the shoulders of the injured worker would require action of the Legislature as opposed to action by the Court. Although that action was taken by the Legislature in 1987, the Court has had no occasion to consider the impact of the abolition of joint and several liability on the *Tucker* rules of apportionment since 1987.

17. Let us examine how the abolition of the common law doctrine of joint and several liability would impact the apportionment of liability in *Tucker, supra*. First, the amendments to Idaho Code § 6-803 would not affect the *Tucker* Court's ruling that *Tucker's* damages must be

² Idaho Code § 6-803(5) provides that the doctrine of joint and several liability continues to abide where two or more tortfeasors were "acting in concert" or where one party was acting "as an agent or servant of another." The parties do not address, and we do not decide, whether either of these exceptions are implicated in the underlying matter.

reduced by his proportionate share of fault, i.e. 10%. As the *Tucker* Court found, the rule that the injured worker's recovery should be reduced by the percentage of fault attributable to him existed notwithstanding the doctrine of joint and several liability, pursuant to the provisions of Idaho Code § 6-801.

18. However, the 1987 amendments to Idaho Code § 6-803 have a significant impact on how responsibility for Tucker's injuries would be apportioned to Collier Carbon. With the abolition of joint and several liability, Collier Carbon would be held responsible for 60% of Tucker's damages as opposed to 90%. The inequity which the *Tucker* Court did not wish to visit on Tucker was nevertheless shifted to Tucker by the legislature.

19. Next, we come to the issue that is at the heart of this matter, i.e. whether the legislature's abolition of joint and several liability demands modification of the rule that any negligence on the part of the employer constitutes a complete bar to the employer's exercise of its right of subrogation to the Claimant's recovery against the negligent third party.

20. As explained above, the rationale for altogether denying such an employer's right of subrogation is that an employer ought not be allowed to profit from his own wrong. Possibly, this concern arises from the fact that prior to the abolition of joint and several liability an uninsulated negligent employer would be liable for 100% of the injured worker's damages, absent immunity from suit conferred by the workers' compensation laws. Therefore, why should an insulated negligent employer be allowed any recovery on his right of subrogation?

21. This rationale falls apart with the abolition of joint and several liability, and the rule of *Associated Construction & Engineering Company, supra*, begins to make more sense. Therefore, Feed Services should be allowed to exercise its right of subrogation to the extent that the workers' compensation benefits paid exceed its proportionate responsibility for Claimant's

damages. This rule does not strike us as a mechanism by which a negligent employer can “profit from its own wrong”. To the contrary, it represents a mechanism by which the negligent employer will be held responsible for his wrong, yet will be afforded a right to exercise its statutory right of subrogation where it has paid workers’ compensation benefits in excess of the percentage of fault assigned to it in the third party action.

22. Finally, we come to the issue of whether Collier Carbon’s responsibility to pay damages should be reduced by workers’ compensation benefits paid to Tucker. Recall that the rationale for doing this in *Tucker* was to prevent the injured worker from obtaining a double recovery where the doctrine of joint and several liability applied and, arguably, to give some relief to the overburdened third party. *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993). With joint and several liability abolished, Collier Carbon would now be responsible only for its proportionate share of Tucker’s damages, and the danger of a double, or inflated, recovery is eliminated.

23. Let us consider some examples to see how these rules play out.

1. Assume that claimant has been paid \$100,000 in workers’ compensation benefits. The claimant also sues a responsible third party, and at trial, claimant’s damages are found to be in the amount of \$200,000, with 50% fault attributed to employer and 50% to the third party. Employer’s proportionate responsibility for claimant’s damages is \$100,000 ($\$200,000 \times 50\%$) and therefore employer takes nothing on his right of subrogation. The third party is required to pay \$100,000 to claimant, representing its proportionate share of claimant’s damages. At the end of the day, claimant receives \$100,000 in workers’ compensation benefits plus \$100,000 from the third party. Claimant has not received more than his damages found at trial.

2. Claimant receives \$100,000 in workers' compensation benefits and, his damages are found to be \$200,000 at trial. However, the employer is found to be only 10% at fault, while the third party is found to be 90% at fault. Therefore, employer's right of subrogation is reduced by only \$20,000 ($\$200,000 \times 10\%$), and it would be entitled to receive \$80,000 ($\$100,000 - \$20,000$) from the third party in exercise of its right of subrogation. The third party would be liable for \$180,000 ($\$200,000 \times 90\%$). Claimant would receive \$100,000 in workers' compensation benefits plus \$100,000 from the third party ($\$180,000 - \$80,000$ payable to employer in exercise of its right of subrogation). Again, the total of the monies payable to claimant under the workers' compensation system, and in connection with the third party claim, do not exceed claimant's total damages found at trial of \$200,000.

3. Claimant is paid \$100,000 in workers' compensation benefits and damages at trial of the third party action are found to be in the amount of \$200,000. This time, however, claimant is found to be 10% at fault, employer 20% at fault, and third party 70% at fault. Employer's right of subrogation is reduced to \$60,000 ($\$100,000 - \$40,000$), and the third party is responsible for \$140,000 ($\$200,000 \times 70\%$). At the end of the day, claimant has received \$100,000 in workers' compensation benefits, and \$80,000 from the third party ($\$140,000 - \$60,000$ payable to employer in exercise of its right of subrogation). Again, the total benefits paid to claimant do not exceed the damages found at trial. In fact, the total "in hand" of Claimant is equal to his total damages found at trial less his proportionate share of fault.

4. Claimant is paid \$100,000 in workers' compensation benefits and damages at trial of the third party action are found to be in the amount of \$200,000. A special verdict is returned pursuant to which the injured worker is found to be 20% at fault, the employer 10% at fault and the third party 70% at fault. Of course, even in the absence of the exclusive remedy provisions

of the Act, the injured worker would not be able to hold employer responsible, since the negligence of the injured worker is greater than that of employer. Under Idaho Code § 6-803, quoted above, an individual tortfeasor cannot be held responsible for the payment of his proportionate share of damages where the negligence of the person seeking recovery is greater than that of said tortfeasor. In this scenario, the negligent third party would be responsible for the payment of \$140,000 ($\$200,000 \times 70\%$). The question is whether the employer who, if uninsured, would have no responsibility to the injured worker, should have a full subrogation right of \$100,000, as opposed to a right of subrogation which takes into account his proportionate share of fault in causing Claimant's damages. We perceive no justification in allowing the employer to recover \$100,000 on the \$100,000 in workers' compensation benefits paid. To do so would be to reward the employer for its negligence, notwithstanding that an uninsured tortfeasor in employer's shoes would owe nothing to Claimant. We believe the appropriate rule is to require the employer's right of subrogation to be reduced by the percentage fault attributable to employer in causing Claimant's total damages. Therefore, employer's right of subrogation would be reduced by \$20,000 ($\$200,000 \times 10\%$), leaving employer with an \$80,000 right of subrogation. Therefore, Claimant would receive \$100,000 in workers' compensation benefits plus \$60,000 from the third party ($\$140,000$ less \$80,000 payable to subrogated employer) for a total of \$160,000. The total monies payable to Claimant under the workers' compensation system and from the third party claim do not exceed Claimant's total damages of \$200,000. Again, the amount eventually payable to Claimant equals his total damages found at trial less his proportionate share of fault. Of course, absent the involvement of workers' compensation, Claimant would only receive \$140,000, this representing the liability of the third party in causing Claimant's total damages of \$200,000. Because of Claimant's

entitlement to workers' compensation he will receive \$160,000. This does not trouble us, since, as the *Schneider* court observed, Claimant's entitlement to workers' compensation benefits, and his right to pursue a third party action under Idaho Code § 72-223 are cumulative remedies.

24. From these examples we conclude that the rule we have arrived at today to treat the interplay between Idaho Code § 72-223 and the provisions of Idaho Code § 6-803 honors the principles underlying both the workers' compensation laws and the legislative abolition of joint and several liability. Double recovery by the injured worker is avoided, employer is denied the opportunity to profit from its wrongs, and an equitable distribution of liability for the injured worker's injuries is achieved between employer and the third party.³

II.

25. Having found that the apportionment scheme envisioned by *Tucker* and other pre-1987 cases must necessarily be revised following the abolition of joint and several liability, we next turn to the question of whether the Industrial Commission has jurisdiction to determine the percentages of fault to be assigned to Petitioner, Simplot and IIC. Obviously, application of the apportionment rule we have described today requires knowing how responsibility for Petitioner's damages will be assigned between the parties. This would have been done had the case against IIC gone to trial. However, as is not infrequently the case, the third-party action against IIC was resolved short of trial, without a judicial determination of the percentage of fault to be assigned to each of the players.⁴

³ The Commission is sensitive to the criticism that in so ruling it might be doing more than is strictly necessary to decide the issue raised by Petitioner. For example, to resolve the issue raised by Petitioner, it is arguably unnecessary for us to decide whether IIC's responsibility to pay damages on any negligence assigned to it should be reduced by the workers' compensation benefits paid. However, because of the interrelationship of these concepts, and the competing interests being balanced, addressing Petitioner's issue in a vacuum is likely to overlook consequences affecting the entire scheme of apportionment.

⁴ In its Second Memorandum in Reply to Motion for Declaratory Relief, Simplot argues that the doctrine of true *res judicata*, or claim preclusion, operates in this case to prevent Petitioner (or his privy, Simplot) from litigating the issue of how negligence should be apportioned between the parties, when that issue could have been (but was not)

26. In any number of decisions, the Court has recognized that the Industrial Commission has exclusive jurisdiction to determine the subrogation rights of an employer under Idaho Code § 72-223. See *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 260 P.3d 1186 (2011); *Idaho State Ins. Fund by and through Forney v. Turner*, 130 Idaho 190, 938 P.2d 1228 (1987); *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994). In order to determine Simplot's right of subrogation under the rules we announce today, it is necessary to understand how responsibility for Petitioner's injuries should be apportioned between Petitioner, Simplot and IIC. The Commission has jurisdiction to consider all questions arising under the workers' compensation laws, and the employer's right of subrogation under Idaho Code § 72-223 is a right created within the context of those laws. Therefore, although the Commission would prefer not to delve into areas that are more appropriately within the expertise and province of a district judge, we conclude that we have no alternative but to entertain the question of how negligence should be apportioned between the players involved in this matter. If the Commission does not do it, who will?

27. For similar reasons, we conclude that the Commission necessarily has subject matter jurisdiction to determine how Simplot's right of subrogation has been impacted by the abolition of joint and several liability, as we have done in this decision.

CONCLUSIONS OF LAW AND ORDER

1. The Industrial Commission has subject matter jurisdiction to consider how the abolition of joint and several liability has impacted the manner in which liability has historically

litigated in the district court case. Therefore, the argument goes, Petitioner is now barred from contending that Simplot was negligent and that Simplot's negligence cuts off its right to subrogation. We conclude that the doctrine of true *res judicata* (claim preclusion) does not apply to these facts. For claim preclusion to apply, a valid final judgment rendered on the merits by a court of competent jurisdiction between the same parties, and upon the same claim must be demonstrated. See *Hindmarsh v. Mauk*, 138 Idaho 92, 57 P.3d 803 (2002). Simply, the district court's dismissal of the complaint with prejudice does not constitute a valid final judgment rendered on the merits. Therefore, the doctrine of claim preclusion cannot apply.

been apportioned between those involved in an Idaho Code § 72-223 case. As well, the Industrial Commission has jurisdiction to determine the percentage of fault attributable to each such party in order to ascertain the employer's right to subrogation under Idaho Code § 72-223.

2. The 1987 abolition of the common law doctrine of joint and several liability does not impact the rule of *Tucker* requiring the injured worker's damages in a third party action to be reduced by the amount of his fault.

3. Where joint and several liability has been abolished in an Idaho Code § 72-223 action, a third party tortfeasor can only be held responsible for his proportionate share of fault in contributing to the injured worker's damages.

4. Where joint and several liability has been abolished, employer's negligence is no longer an absolute bar to the exercise of its right of subrogation. Rather, employer's right of subrogation will be reduced by its proportionate share of fault in contributing to claimant's damages.

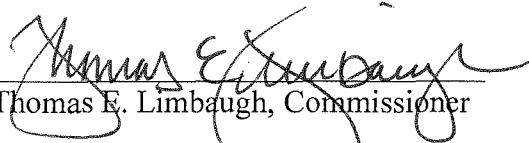
5. Where joint and several liability has been abolished, it is no longer necessary to protect against an injured workers' double recovery by reducing the third-party tortfeasor's responsibility to pay by the amount of workers' compensation benefits paid to the injured worker.

6. Per J.R.P. 15(f)(3), this declaratory ruling has the full force and effect of a final order or judgment under Idaho Code § 72-718.

DATED this 16th day of August, 2015.

INDUSTRIAL COMMISSION


R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST


Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2015, a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RULING** was served by regular United States Mail upon each of the following:

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Attorney for Appellant

BEFORE THE INDUSTRIAL COMMISSION
 OF THE STATE OF IDAHO

RECEIVED
 INDUSTRIAL COMMISSION
 2015 SEP - 1 P 3: 38

JOSEPH JERRY MARAVILLA,)	
)	
Claimant-Respondent,)	I.C. NO.: 2011-025160
)	
)	NOTICE OF APPEAL
vs.)	
)	
J.R. SIMPLOT COMPANY,)	
)	
Self-Insured Employer,)	
Defendant - Appellant.)	
_____)	

TO: THE ABOVE-NAMED RESPONDENT, JOSEPH JERRY MARAVILLA, AND HIS ATTORNEYS OF RECORD, AND THE SECRETARY OF THE ABOVE-ENTITLED ADMINISTRATIVE AGENCY, NOTICE IS HEREBY GIVEN THAT:

1. The title of this action is Joseph Jerry Maravilla v. J.R. Simplot Company.
2. This appeal is taken from the Idaho Industrial Commission, Commissioner R.D.

Maynard presiding.

3. The case number is I.C. NO.: 2011-025160.

4. J.R. Simplot Company is the Appellant and is represented by:

Daniel A. Miller
LUDWIG SHOFLER MILLER JOHNSON LLP
401 West Front Street, Suite 401
Boise, Idaho 83702
Telephone: 208-387-0400
Facsimile: 208-387-1999
Email address: dan@lsmj-law.com.

5. Joseph Jerry Maravilla is the Respondent and is represented by:

Fred J. Lewis
Patrick N. George
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHTD.
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: 208-232-6101
Facsimile: 208-232-6109
Email address: png@racinelaw.net and fjl@racinelaw.net.

6. The above named Appellant appeals to the Idaho Supreme Court from the Industrial Commission's Order on Petition for Declaratory Ruling entered the 11th day of August, 2015.

7. The preliminary issues on appeal are:

Did the Commission commit error by ruling that the District Court dismissal of Maravilla's third party claim with prejudice, was not a decision on the merits, and the doctrine of Res Judicata did not bar Maravilla's subrogated interest issue before the Commission?

8. The Appellant has a right to appeal to the Idaho Supreme Court, and the Order described in paragraph 6 above pursuant to Idaho Appellate Rule 11(d)(1).

9. Appellant does not request the transcript of any proceeding as Appellant's office has been informed by the Agency that no record was kept of the July 15, 2015, status conference.

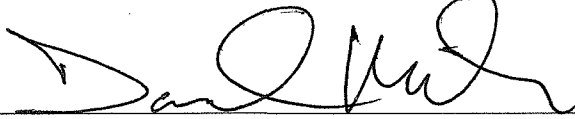
10. The Appellant requests the following documents be included in the record including

those automatically included pursuant to Idaho Appellate Rule 28:

- a. Petition for Declaratory Ruling;
 - b. Affidavit of Patrick N. George in Support of Claimant's Petition for Declaratory Ruling;
 - c. Affidavit of Joseph Maravilla in Support of Petition for Declaratory Ruling;
 - d. Response to Petition for Declaratory Ruling;
 - e. Second Memorandum in Reply to Motion for Declaratory Relief;
 - f. Claimant's Reply to Simplot's Responses; and
 - g. Order on Petition for Declaratory Ruling.
11. There has been no order entered sealing all or any part of the record or transcript.
12. I certify:
- a. That the administrative agency has not been paid a fee for the reporter's transcript because there is no reporter's transcript of the July 15, 2015 Status Conference. In addition, there has been no service on the reporter for the proceeding, because there was no reporter of the proceeding;
 - b. That a deposit against the estimated fee for preparation of the Agency Record has been paid;
 - c. That the appellate filing fee has been paid; and
 - d. That service has been made upon all parties required to be served pursuant to I.A.R., Rule 20.

DATED this 1 day of September, 2015.

LUDWIG ♦ SHOUFLEER ♦ MILLER ♦ JOHNSON, LLP

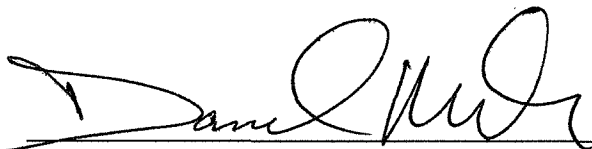
By 
Daniel A. Miller,
Attorney for Self-Insured
Employer/Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of September, 2015, I caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Fred J. Lewis
Patrick N. George
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHTD.
P.O. Box 1391
Pocatello, Idaho 83204-1391

U.S. Mail
 Hand Delivery
 Overnight Courier
 Facsimile Transmission
208-232-6109


Daniel A. Miller

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant/Respondent,

v.

J.R. SIMPLOT COMPANY,

Defendant/Appellant.

SUPREME COURT NO.

CERTIFICATE OF APPEAL

Appeal From: Industrial Commission,
R.D. Maynard, Chairman presiding

Case Number: IC 15-000108 (2011-025160)

Order Appealed from: Order on Petition for Declaratory Ruling,
filed August 11, 2015.

Attorney for Appellant: Daniel A. Miller
401 W Front Street, Ste 401
Boise, ID 83702

Attorney for Respondent: Patrick George
PO Box 1391
Pocatello, ID 83204-1391

Appealed By: Defendant/Appellant, J.R. Simplot Company

Appealed Against: Claimant/Respondent, Joseph Jerry Maravilla

Notice of Appeal Filed: September 1, 2015

Appellate Fee Paid: \$94.00 to Supreme Court and
\$100.00 to Industrial Commission
Checks were received.

CERTIFICATE OF APPEAL FOR JOSEPH MARAVILLA - 1

Name of Reporter:

None

Transcript Requested:

No hearing was held and no transcript was taken.

Dated:

September 2, 2015

Kenna Andrus
Assistant Commission Secretary

CERTIFICATION OF APPEAL

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal and Order on Petition for Declaratory Ruling, and the whole thereof, in IC case number IC 15-000108 (2011-025160) for Joseph Maravilla v. J.R. Simplot.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 2nd day of September, 2015.

Kenna Andrus

Assistant Commission Secretary



Patrick N. George (ISB #5983)
RACINE OLSON NYE, BUDGE
& BAILEY, CHARTERED
201 E. Center Street
P.O. Box 1391
Pocatello, ID 83204
Telephone: (208) 232-6101
Facsimile: (208) 232-6109
png@racinelaw.net

Attorneys for Claimant, Joseph Jerry Maravilla

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant/Respondent/Cross-Appellant,

vs.

J.R. SIMPLOT,

Employer/Defendant-Appellant/Cross-
Respondent.

I.C. No. 2011-025160

NOTICE OF CROSS APPEAL

RECEIVED
INDUSTRIAL COMMISSION
2015 SEP 14 PM 12:20

TO: THE ABOVE-NAMED CROSS-RESPONDENT, J.R. SIMPLOT COMPANY, AND ITS ATTORNEYS OF RECORD, AND THE SECRETARY OF THE ABOVE-ENTITLED ADMINISTRATIVE AGENCY, NOTICE IS HEREBY GIVEN THAT:

1. The title of this action is Joseph Jerry Maravilla v. J.R. Simplot Company.
2. This cross appeal is take from the Idaho Industrial Commission, Commissioner

R.D. Maynard presiding.

3. The case number is I.C. No. 2011-025160.
4. J.R. Simplot Company is the Cross-Respondent and is represented by:

Daniel A. Miller
LUDWIG SHOUFLE MILLER JOHNSON LLP
401 West Front Street Ste. 401
Boise, ID 83702
Telephone: (208) 387-0400

Facsimile: (208) 387-1999
Email: dan@lsmj-law.com

5. Joseph Jerry Maravilla is the Cross-Appellant and is represented by:

Fred J. Lewis
Patrick N. George
RACINE OLSON NYE BUDGE & BAILEY Chtd
P.O. Box 1391
Pocatello, ID 83204
Telephone: (208) 232-6101
Facsimile: (208) 232-6109
Email: fjl@racinelaw.net and png@racinelaw.net

6. The above-named Cross-Appellant appeals to the Idaho Supreme Court from the Industrial Commission's Order on Petition for Declaratory Ruling entered the 11th day of August, 2015.

7. The preliminary issues on cross-appeal are:

Did the Commission err in determining that the abolition of the doctrine of joint and several liability affected established Idaho case law that any amount of employer negligence bars its subrogation right under Idaho Code § 72-223?

8. The Cross-Appellant has a right to appeal to the Idaho Supreme Court, and the Order described in paragraph 6 above pursuant to Idaho Appellate Rule 11(d)(1).

9. Cross-Appellant does not request the transcript of any proceeding as Appellant's office has been informed by the Agency that no record was kept of the July 15, 2015 status conference.

10. The Cross-Appellant requests the following documents be included in the record including those automatically included pursuant to Idaho Appellate Rule 28:

- a. Petition for Declaratory Ruling;
- b. Affidavit of Patrick N. George in Support of Claimant's Petition for Declaratory Ruling;

- c. Affidavit of Joseph Jerry Maravilla in Support of Petition for Declaratory Ruling;
- d. Response to Petition for Declaratory Ruling;
- e. Second Memorandum in Reply to Motion for Declaratory Relief;
- f. Claimant's Reply to Simplot's Responses; and
- g. Order on Petition for Declaratory Ruling.

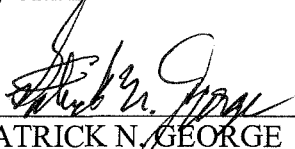
11. There has been no order entered sealing all or any part of the record or transcript.

12. I certify:

- a. That the administrative agency has not been paid a fee for the reporter's transcript because there is no reporter's transcript of the July 15, 2015 status conference. In addition, there has been no service on the reporter for the proceeding, because there was no reporter for the proceeding;
- b. That a deposit against the estimated fee for preparation for the Agency Record has been paid;
- c. That the appellate filing fee has been paid; and
- d. That service has been made upon all parties required to be served pursuant to I.A.R., Rule 20.

DATED this 7 day of September, 2015.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

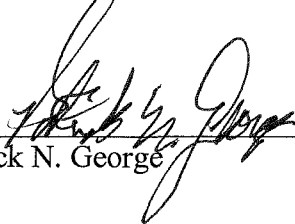
By: 
PATRICK N. GEORGE
Attorneys for Claimant/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of September, 2015, I caused to be served a true and correct copy of the foregoing, upon the following by the method indicated:

Daniel A. Miller
LUDWIG SHOUFLE MILLER JOHNSON
209 West Main Street
Boise, ID 83702
Telephone: (208) 387-0400
Facsimile: (208) 387-1999

- U.S. Mail/Postage Prepaid
- Facsimile
- Overnight Mail
- Hand Delivery
- E-mail


Patrick N. George

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant/Respondent/Cross Appellant,

v.

J.R. SIMPLOT,

Defendant/Appellant/Cross Respondent

SUPREME COURT NO.

CERTIFICATE OF CROSS APPEAL

Appeal From: Industrial Commission,
R.D. Maynard, Chairman presiding

Case Number: IC 15-000108 (2011-025160)

Order Appealed from: Order on Petition for Declaratory Ruling,
filed August 11, 2015.

Attorney for Appellant/Cross Respondent: Daniel A. Miller
401 W Front Street, Ste 401
Boise, ID 83702

Attorney for Respondent/Cross Appellant: Patrick George
PO Box 1391
Pocatello, ID 83204-1391

Appealed By: Claimant/Respondent/Cross Appellant
Joseph Jerry Maravilla

Appealed Against: Defendant/Appellant/Cross Respondent
J.R. Simplot Company

Notice of Cross Appeal Filed: September 14, 2015

CERTIFICATE OF CROSS APPEAL FOR JOSEPH MARAVILLA - 1

Cross Appellate Fee Paid:

The Cross Appellant was notified by the Industrial Commission that the check for fees was incorrect. When the Commission receives the corrected check, it will be forwarded to the Supreme Court.

Name of Reporter:

None

Transcript Requested:

No hearing was held and no transcript was taken.

Dated:

September 16, 2015


Assistant Commission Secretary

CERTIFICATION OF CROSS APPEAL

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Cross Appeal, and the whole thereof, in IC case number 15-000108 (2011-025160) for Joseph Maravilla v. J.R. Simplot

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 16th day of September, 2015.

The seal is circular with a dotted border. The text "INDUSTRIAL COMMISSION" is written along the top inner edge, and "STATE OF IDAHO" is written along the bottom inner edge. Two small stars are positioned on the left and right sides of the seal. In the center, the word "SEAL" is written in a large, bold, serif font.
Kenna Andrus

Assistant Commission Secretary

CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 43538 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court as part of the Agency Record.

DATED this 7th day of October, 2015.


Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH JERRY MARAVILLA,

Claimant/Respondent/Cross Appellant,

v.

J.R. SIMPLOT COMPANY,

Defendant/Appellant/Cross Respondent.

SUPREME COURT NO. 43538

NOTICE OF COMPLETION

TO: STEPHEN W. KENYON, Clerk of the Courts;
DANIEL MILLER for the Appellant/Cross Respondent; and
PATRICK GEORGE for the Respondent/Cross Appellant.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

Attorney for Appellant/Cross Respondent:

Daniel Miller
401 W Front Street, Ste 401
Boise, ID 83702

Attorney for Respondent/Cross Appellant:

Patrick George
PO Box 1391
Pocatello, ID 83204-1391

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions.

NOTICE OF COMPLETION (JOSEPH MARAVILLA - 43538) - 1

In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED at Boise, Idaho, this 7th day of October, 2015.

Kenna Andrews
Assistant Commission Secretary