

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH MICHIELLI,)	
)	
Claimant,)	IC 04-520309
)	
v.)	
)	
MIDWAY AUTOMOTIVE GROUP, INC.,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSION OF LAW,
and)	AND RECOMMENDATION
)	
STATE INSURANCE FUND,)	Filed August 24, 2005
)	
Surety,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d’ Alene, Idaho, on May 13, 2005. Claimant was present and represented by Craig K. Vernon of Coeur d’ Alene. Paul J. Augustine of Boise represented Employer/Surety (Defendants). Oral and documentary evidence was presented. There were no post-hearing depositions; however, the parties submitted post-hearing briefs. This matter came under advisement on August 8, 2005, and is now ready for decision.

ISSUE

The sole issue to be decided as the result of the hearing is whether Claimant suffered an accident arising out of and in the course of his employment.

CONTENTIONS OF THE PARTIES

Claimant contends he was acting within the course and scope of his employment as an automobile salesperson when the throttle on his motorcycle stuck and he wrecked as he was returning from one building to another on Employer's automobile sales campus. He had just dropped off some documentation regarding his sale of a vehicle and was returning to the building out of which he normally worked to help close up the business for the evening when the accident happened. Claimant argues that he was, therefore, furthering Employer's business interests when he was injured.

Defendants contend that Claimant abandoned any furtherance of Employer's interest after he dropped off the documentation and was on a journey of personal convenience at the time of his accident. After his accident, which was not caused by a stuck throttle but was caused by Claimant's "popping a wheelie" and losing control of his racing bike, Claimant told a witness that he was preparing to leave for the day when the accident happened. Further, Employer had a policy that no employee was to use his or her personal vehicle to conduct Employer's business. Finally, Defendants contend that there was no reason for Claimant to have traversed the short distance between the two buildings on his motorcycle, as it was an easy walk that Claimant completed many times a day.

Claimant counters that even if he was "popping a wheelie," he was still furthering Employer's business interests by delivering paperwork to consummate a sale. Further, no one ever told Claimant he was not to ride his motorcycle on Employer's premises and, in fact, he parked it on the lot every day with Employer's knowledge and constructive consent. Finally, the liberal construction afforded claimants to find coverage should apply in this case and Employer

should not be able to deny coverage, yet still benefit from Claimant's actions in furthering Employer's business interests.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, three of Claimant's co-workers, and the owner of the automobile dealership;
2. Claimant's Exhibits A-C admitted at the hearing; and,
3. Defendants' Exhibits A-D admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 21 years of age and resided in Post Falls at the time of the hearing. He was employed by Employer's automobile dealership in Post Falls as a salesperson and had been so employed for about six months prior to his September 5, 2004, accident.

2. About two to three weeks before his accident, Claimant purchased a "brand new" Honda CBR 600 RR motorcycle that has been variously described as: a "crotch rocket", a high performance motorcycle, a racing motorcycle, and a Super Sport that is capable of reaching speeds of 75 miles per hour in first gear.

3. Claimant parked his motorcycle on Employer's lot in plain view of his sales manager and, of necessity, rode it on Employer's lot when coming and going. Employer and other witnesses testified that this was against Employer's policy but all conceded that the "policy" was not enforced.

4. On September 5, 2004, at approximately 5:25 p.m., Claimant was finishing up a sale with a customer who had to leave to go get some documentation to complete the transaction. Claimant worked out of the Nissan building. The customer returned to the Nissan building about 5:45 p.m., at which time Claimant was beginning the process of warming up his motorcycle, as was his custom, in preparation of leaving for the day. He testified that this warming-up process took between ten and fifteen minutes. He spent about two minutes with the customer before he rode his motorcycle to another building on the lot (the Chrysler building) to deliver the paperwork regarding the sale to a finance person. The distance between the two buildings has been variously described as somewhere between 50-250 yards. The Nissan building sits to the east and slightly north of the Chrysler building. It is a common practice for salespeople to walk the relatively short distance between the two buildings to deliver paperwork, etc.

5. Once Claimant had delivered the paperwork to the Chrysler building, he testified that he re-mounted his motorcycle and headed back toward the Nissan building to help other employees complete the duties required to close the lot for the day. En route, Claimant testified that his throttle somehow became stuck and he lost control of his motorcycle, which crashed into a plate glass window in the Nissan building.

6. Claimant also crashed into one of the plate glass windows and suffered a broken right wrist, cuts, and abrasions.

DISCUSSION AND FURTHER FINDINGS

The Idaho Supreme Court case of *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 990 P.2d 738 (1999), provides the framework for analyzing and applying the facts to the law in this case:

The applicable standard for determining whether an employee is entitled to compensation under the Workers' Compensation Act requires that the injury must have been caused by an accident "arising out of and in the course of employment." I.C. § 72-102(17)(a). *See, Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963); *Devlin v. Ennis*, 77 Idaho 342, 292 P.2d 469 (1956). The words "out of" have been held to refer to the origin and cause of the accident and the words "in the course of" refer to the time, place, and the circumstances under which the accident occurred. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927). Where there is some doubt whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the worker. *Hansen v. Superior Prod. Co.*, 65 Idaho 457, 146 P.2d 335 (1944). *See also Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977) (legislative intent that the worker's compensation law be liberally construed in favor of the injured worker); *Beebe v. Horton*, 77 Idaho 388, 293 P.2d 661 (1956) (liberal construction rule in favor of compensability if injury or death could reasonably have been construed to have arisen out of and in the course of employment). Whether an injury arose out of and in the course of employment is a question of fact to be decided by the Commission. *Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997).

Although the law is to be liberally construed in favor of claimants, the burden is on claimants to prove by a preponderance of evidence that the accident arose out of and in the course of employment. *Reinstein v. McGregor Land & Livestock*, 126 Idaho 156, 158, 879 P.2d 1089, 1091 (1994) citing *Basin Land Irr. Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 124, 754 P.2d 434, 437 (1988).

A worker receives an injury in the course of employment if the worker is doing the duty that the worker is employed to perform. *Kessler, Id.*

A presumption arises that an accident arises out of and in the course of employment when the accident occurs on the employer's premises. *Foust v. Birds Eye Division of General Foods Corp.*, 91 Idaho 418, 422 P.2d 616 (1967). However, the mere fact that the injury occurs on the employer's premises is not the exclusive test for compensability, but is only one factor to be considered. *Dinius, Id.* at 575, citing *In re Malmquist*, 78 Idaho 117, 300 P.2d 820 (1956). An employee does not have to be actually engaged in the performance of a task of employment at the time of the accident to recover if there was an exposure to risk by reason of the employment. *Dinius, Id.* citing *Nichols v. Godfrey*, 90 Idaho 345, 351, 411 P.2d 763, 766 (1966).

Stuck throttle or popping a wheelie?

Although hard-pressed to explain exactly how it came about, Claimant contends that his throttle stuck as he was returning to the Nissan building causing him to lose control of his motorcycle; he never shifted out of first gear. Defendants contend that Claimant was showing off and popped a wheelie¹ and that is why he crashed and injured himself, not the performance of any job-related duty.

7. Charles R. Hartridge, a salesperson for Employer, testified that he had seen Claimant pop wheelies on the lot and that Claimant had been warned on previous occasions by management to stop that practice. At the time of Claimant's accident, Mr. Hartridge was "keying" vehicles, that is, locking them up and removing the keys in preparation of closing the lot for the day. He did not actually witness Claimant's accident, but heard it. He testified at hearing:

Q. (By Referee Powers): I just want to get clear in my mind your testimony regarding what you heard. I take it that the bike in question makes a distinct sound as opposed to other sounds in the environment.

¹ The Referee takes notice that the term pop a wheelie means that a motorcycle's front tire/wheel will leave the ground upon a sudden burst of acceleration and will not return to the ground until the source of the acceleration is shut off.

A. Yes. It's really shrill because I guess it does so many RPMs.

Q. And you heard two, what, short bursts of higher RPM noise?

A. Yeah. It's kind of like he was revving it up and then - - I never actually heard tires screeching, but I know what he was doing by the sound.

Q. How did you know that?

A. I heard that sound many times before on different days.

Q. And what did you think he was doing?

A. I thought he was over there showing off at the Chrysler building popping wheelies.

Q. All right. And in your direct testimony, I thought I heard you to say that you heard two short bursts of increased RPM and then a higher burst and then nothing. Am I miscategorizing or misunderstanding your testimony on direct?

A. The two increases in RPM - -

Q. Yes.

A. - - knew [*sic* - it] was the motor because of the sound.

Q. Okay.

A. They were about the same but at different intervals. And when I heard the scraping sound, but didn't - - the motor was not revving up at that point.

Q. So you didn't hear a constant rev?

A. No. It was like he would wind it up, rev it up, and I don't - - I assume he was popping the clutch from the sound of it.

Q. And you were there when the motorcycle made impact with the building?

A. Yes, sir. I was looking straight at it.

Q. And do you recall what you heard at that point in terms of engine RPM?

A. Yes, nothing. It sounded like the motor had either died or it was at idle and making no noise.

Hearing Transcript, pp. 92-93.

8. Shawn Toal was a salesperson at Employer's and was in his office in the Nissan building at the time of Claimant's accident. He testified that Employer had a policy that prohibited the use of personal vehicles on the lot, although he was unaware of any written policy in that regard. He further testified that it takes a minute and a half to walk between the two

FINDINGS, CONCLUSION, AND RECOMMENDATION - 7

buildings if one was taking his or her time. He also testified that earlier on the day of his accident, Claimant popped a wheelie on the lot and was warned by the used car manager that if he popped another wheelie on the lot, he would be fired. Finally, Mr. Toal testified that about two minutes after the accident, he saw Claimant's backpack and helmet on a curb outside the Nissan building; the location where they were customarily kept when Claimant was warming up his motorcycle in preparation for leaving.

9. William Shawn Bird was a sales manager and in his office in the Chrysler building at the time of Claimant's accident. He saw Claimant leave the Chrysler building and heard him revving up his motorcycle. He did not witness the crash, but soon learned of it. He then ran over to the Nissan building and ". . . Joe [Claimant] was jumping around holding his hand saying, 'The throttle stuck. The throttle stuck.'" And I asked Joe, I said, "Well, what are you doing?" and he said, "I was getting ready to leave. I'm leaving." Hearing Transcript, p. 115. He noticed two speed burn marks caused by acceleration and one brake skid mark on the pavement consistent with Claimant's route between the two buildings. He did not notice Claimant's backpack and helmet on the curb near the site of the crash, but testified that he was not paying attention. Mr. Bird also testified that there was a policy prohibiting employee use of their personal vehicles for business purposes.

10. Joseph W. Arrotta is the owner of the dealership. A few days after the accident, Mr. Arrotta asked Claimant what he was doing on his motorcycle at the time of the accident and Claimant responded that he was warming it up to go home. Mr. Arrotta testified that he was strict about prohibiting employees from using their personal vehicles for business purposes. Mr. Arrotta was present when a police officer twisted the throttle on Claimant's motorcycle six or seven times at the scene of the accident and found no problems with it. Mr. Arrotta observed

two speed burn marks caused by acceleration and one brake skid mark on the pavement consistent with Claimant's line of travel between the two buildings. He testified that he himself owns five motorcycles and is an avid rider and knows the difference between rubber marks left by acceleration and those left by braking.

11. Defendants' Exhibit A is a police report made in connection with the police investigation of Claimant's accident. The report indicates that there did not appear to be anything wrong with the throttle on Claimant's motorcycle. The report also indicates that the initial speed burn mark measured 72 feet and the rear brake solid skid mark measured 17 feet.

12. Based on the witnesses' testimony as well as the police report, the Referee finds it more likely than not that Claimant was popping a wheelie when he lost control of his motorcycle and crashed and injured himself. The question now becomes whether such an act was in any way a furtherance of any business purpose of Employer's so as to be within the course and scope of Claimant's employment.

Course and scope of employment:

13. As previously indicated, a presumption arises that an accident occurring on an employer's premises, as here, is incurred out of and in the course of employment. *See, Foust v. Birds Eye Division of General Foods Corp.*, 91 Idaho 418, 422 P.2d 616 (1967). However, *Foust* also held that the injured employee must not be engaged in any abnormal, unforeseeable activity foreign to his or her employment at the time of the accident. Here, Claimant's act of popping a wheelie was certainly an abnormal, unforeseeable activity foreign to Claimant's employment. Nonetheless, Claimant argues that because he had just delivered some documentation to complete a sale, clearly part of his duties, and was returning to the Nissan building to help close up, he was within the course and scope of his employment when injured,

no matter how his injury came about. He cites *Gage v. Express Personnel*, 135 Idaho 250, 16 P.3d 926 (2000), in support of his argument. In *Gage*, claimant was told by management to stay by a rail dock to await the arrival of some supplies. While waiting, claimant opened the door to the rail dock, sat down, dangled her feet off the dock, and smoked a cigarette. Claimant injured herself when she was climbing up a rope back to the dock after she had jumped down to retrieve her cigarette that had fallen apart. The Commission denied compensation concluding that claimant failed to prove that her accident arose out of and in the course of her employment. The Idaho Supreme Court reversed and held that the Commission erred in finding that it was claimant's personal activity of smoking that caused her accident and injury, not any employment duty or interest of her employment. "Clearly, Gage's smoking while on the rail dock did not detract from the benefit conferred upon the employer by Gage's being on site and prepared to work, as she had been directed, awaiting the arrival of labels and product." *Gage, Id.*, at p. 254. Even though the employer in *Gage* had a prohibition against smoking, the Court found that while claimant was performing an authorized act in an unauthorized manner, her smoking was but a **slight deviation** of employer's rule regulating how the work was to be performed. Further, the Court found that the smoking was **not the cause** of claimant's injury as she could have as easily been injured in retrieving some other personal item. *Id.* (Emphases added).

Gage is readily distinguishable. Here, Claimant's decision to warm up his motorcycle prior to leaving was entirely for his personal convenience and in no way geared toward furthering Employer's business interests. His choice to ride his motorcycle to the Chrysler building because he did not want to leave it running and unattended at the Nissan building was also entirely personal; Employer did not instruct him to do so and, in fact, prohibited the use of a personal vehicle to conduct company business. Further, at the time of his accident, Claimant had

already accomplished the “duty” he had set out to perform - - the delivery of the documents. His argument that he was returning to the Nissan building to help close is not persuasive. He had just completed a sale, had the following two days off, was going riding that evening with his buddies, and had his helmet and backpack waiting for him outside, and his statements to others that he was leaving leads to the conclusion that he was going to do just that but for the accident. However, whether Claimant was returning to the Nissan building to help close, or to retrieve his personal belongings and leave is not particularly relevant in that had Claimant walked between the two buildings and had been injured (say he slipped and fell) his claim would be compensable because it would be within the course and scope of his employment to retrieve his personal belongings and to perhaps clock out. Finally, it was Claimant’s totally personal decision to show off and pop a wheelie that was the proximate cause of his accident and injuries and such action not only did not further any business interest of Employer, it did just the opposite. Claimant’s popping a wheelie was much more than a slight deviation of Employer’s rule against the use of a personal vehicle for business purposes, it was a complete and total deviation therefrom.

14. Claimant cites *Mortimer v. Riviera Apartments*, 122 Idaho 839, 840 P.2d 383 (1992) for the proposition that an act done partly for personal reasons and partly to serve the employer is still within the scope of employment. However, as found above, Claimant’s act of popping a wheelie was **solely** for his own benefit (whatever that might have been) and in no way for Employer’s benefit; thus, *Mortimer* is also distinguishable.

15. The Referee finds that Claimant was not injured due to exposure to a risk incident to his employment or exposure to a hazard to which he would not have been exposed outside his work environment. See, *Dinius v. Loving Care and More*, 133 Idaho 572, 576, 990 P.2d 738, 742 (1999) internal citations omitted.

16. The Referee finds that Claimant has failed to prove he suffered an accident arising out of and in the course of his employment.

CONCLUSION OF LAW

1. Claimant has failed to prove he suffered an accident arising out of and in the course of his employment and his Complaint should be dismissed with prejudice.

RECOMMENDATION

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

DATED this __18th __ day of August, 2005.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24th __ day of __August__, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

CRAIG K VERNON
1875 N LAKEWOOD DR STE 200
COEUR D'ALENE ID 83814

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

_____/s/_____

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 STATE INSURANCE FUND,)
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 Defendants.)
 _____)

IC 04-520309

ORDER

Filed August 24, 2005

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusion of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

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

1. Claimant has failed to prove he suffered an accident arising out of and in the course of his employment. As a result, his Complaint is dismissed with prejudice.

ORDER - 1

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

DATED this __24th__ day of ____August____, 2005.

INDUSTRIAL COMMISSION

____/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
James F. Kile, Commissioner

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

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24th__ day of __August____, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

CRAIG K VERNON
1875 N LAKEWOOD DR STE 200
COEUR D'ALENE ID 83814

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

____/s/_____

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