

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

JANE KNOX, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 INTERMOUNTAIN EMPLOYMENT )  
 SOLUTIONS, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2006-503231**

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

November 5, 2008

**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 Twin Falls, Idaho, on December 11, 2007. Claimant was present and represented by Keith E. Hutchinson of Twin Falls. Neil D. McFeeley of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of six post-hearing depositions. This matter came under advisement on May 13, 2008.

**ISSUES**

The issues to be decided as the result of the hearing are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment; and,

2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment.

### **CONTENTIONS OF THE PARTIES**

Claimant is a mobile drug/alcohol tester and was driving to a dairy client to conduct employee testing when she noticed a calf that belonged to the dairy tangled up in a fence. Claimant stopped her car and was walking towards the calf when a vehicle struck her from behind. As a traveling employee, she maintains that her claim is compensable, and that she is entitled to reimbursement for shoulder and knee surgeries.

Defendants contend that it would be physically impossible for an accident to have occurred as Claimant has described. However, even if the Commission finds otherwise, the accident and injury did not arise out of and in the course of her employment as a mobile drug/alcohol tester because she was not a traveling employee. Furthermore, should the Commission find Claimant was a traveling employee, the claim is not compensable because Claimant deviated from work with a personal errand.

Claimant counters that there is no evidence that an accident did not occur and several independent witnesses have corroborated Claimant's version of the events by testifying that she informed them of the accident immediately thereafter. Her job required her to travel away from Employer's premises and her stopping to investigate the potentially injured calf aided her employer by providing good will; it was not a deviation from her employment responsibilities.

### **EVIDENCE CONSIDERED**

The record in this matter consists of:

1. The testimony of Claimant presented at the hearing.
2. Claimant's Exhibits 1- 6 admitted at the hearing.

3. Defendants' Exhibits 1- 4 and 6 admitted at the hearing, and Exhibits 5 and 7 admitted post-hearing upon the laying of a proper foundation in post-hearing depositions.

4. The post-hearing depositions of: Lynell Sue Gee by videotape and Defendants' Exhibits 8 and 9 attached, taken by Defendants on December 19, 2007; Sondra Oates, Hailey Anne Smith, Marie Lickley, Edward Leroy Lewis, and Gabriella Carrillo, all taken by Claimant on January 29, 2008.

All objections made during the taking of the above depositions are overruled.

After considering the above evidence and the briefs of the parties, the Commission hereby issues its decision in this matter.

## **FINDINGS OF FACT**

### **Background**

1. Claimant was 49 years of age at the time of the hearing and resided in Twin Falls, Idaho.

2. Claimant was born and raised in Glens Ferry, Idaho. Her parents owned a ranch and she worked for them during high school.

3. In 1999, Claimant earned an associates degree in marketing and management from the College of Southern Idaho.

### **Employment, Duties & Compensation**

4. Claimant was employed by Intermountain Employment Solutions (IES). IES "leased" Claimant to Cedar Springs Associates, Inc. (CSA), where she worked as a mobile drug/alcohol tester. She worked for CSA two days a week, Tuesdays and Thursdays.

5. As a mobile drug/alcohol tester Claimant visited customers at their job sites throughout the Magic Valley. She conducted both pre-employment and random drug and

alcohol tests. Claimant's duties included: scheduling with CSA clients by phone, driving to the clients' businesses, performing tests on clients' employees, and generating documentation such as chain of custody records and a daily log. Claimant did not generally perform work duties in CSA's office. CSA provided Claimant with a list of clients at the first of every month and Claimant kept in contact with CSA over the phone.

6. Claimant set her own schedule with the clients. She worked as early as 6:00 a.m. and as late as midnight in order to accommodate clients' schedules. Claimant also worked within established time frames. For example, three clients were scheduled on a regular basis. Spears held testing on Tuesdays and Thursdays at 10:00 a.m.; Aardema Dairy at 1:00 p.m.; and Double A Dairy at 3:00 p.m.

7. Claimant chose her own routes to clients' business locations and drove in her own car. Claimant received no compensation for mileage.

8. In pertinent part, CSA's job description for the drug and alcohol testing technicians states: "Emphasis is placed on compliance with applicable guidelines, efficiency and courtesy and professionalism. . . ." It also states "Adverse weather conditions may delay but will not stop the test from being completed in a timely manner. The U.S. Meteorological Society of state officials responsible for public safety will be advised for safe travel." Defendants' Exh. 5.

9. Claimant was compensated a set amount for each test performed. Gee, from CSA, testified Claimant received \$10.00 for drug tests and \$7.50 for alcohol tests.

### **Accident**

10. At around 3:00 p.m. on January 17, 2006, Claimant was traveling in her vehicle from one testing site to another testing location. The weather was cold, windy, and snowy. The county road she was on divided Jerome and Lincoln counties and was northeast of Jerome. The

road was slick and she was traveling slowly. About a mile and a half before reaching her destination, Double A Dairy, Claimant thought she saw a calf hung up on a fence surrounded by other calves.

11. Knowing the value of calves, Claimant pulled to the side of the road, activated her flashers, and exited her vehicle to further investigate. Claimant noticed a vehicle approaching her and waved her arms to alert the driver that she was crossing the road.

12. After crossing, as Claimant was walking to investigate the calf in the fence, a vehicle struck her right hip and knocked her into the burrow pit. She landed on her right side. Claimant testified that the driver of the vehicle that struck her was speaking fast and in Spanish, and that she did not understand a word that he said. The driver helped Claimant to her feet. She did not think she was injured at that time. Together, they walked to the calf. The driver of the vehicle that struck Claimant and another unidentified man freed the calf from the fence. Claimant did not obtain the identity of the man who hit her, and he has never been identified.

13. Claimant briefly testified at hearing about another woman standing near the calf with her car parked on the road. No witnesses to the accident have been identified.

### **Subsequent Facts**

14. Upon returning to her automobile, Claimant phoned the receptionist at Double A Dairy to say she had been in an accident and would be there shortly. When Claimant arrived at Double A Dairy, she was wet, muddy, and cold. She went to the bathroom to clean up and proceeded to finish her scheduled testing.

15. Claimant did one more test on her way home and rescheduled another for the next day as she was feeling sore and cold. She called her boss at CSA to notify her of the accident. Claimant then went to her home.

16. Early the next morning, January 18, Claimant performed testing at the Jerome County Highway District.

### **Medical Treatment**

17. Also on January 18, 2006, Claimant presented to Douglas Stagg, M.D., complaining that her whole body hurt from being struck by a car. He diagnosed left hip and neck pain and a right buttock contusion. Dr. Stagg released her to work with a restriction of ad lib position changes.

18. Claimant next saw Dr. Stagg on February 2, 2006, at which time she was improving with her left hip contusion and strain, her right buttock contusion, and her left neck pain. However, she had by then developed right shoulder and wrist pain. Dr. Stagg released Claimant to regular work and, because she was improving, would see her again as needed.

19. On May 18, 2006, Claimant underwent outpatient arthroscopic surgeries on her right knee and right shoulder.

## **CONCLUSIONS OF LAW**

### **Personal Injury**

20. The first noticed issue is “whether Claimant suffered a personal injury arising out of and in the course of employment.” Based on the briefing of the parties, and the arguments presented, the Commission will address the first issue by determining whether Claimant was injured.

21. Defendants raise several credibility issues. They concern discrepancies in Claimant’s testimony regarding 1) what she was doing before driving to Double A Dairy, 2) her clothing at the accident scene, 3) the direction the car was traveling before and when it hit her, 4) the time she spent lying on the ground after being hit, 5) and whether Claimant was “fluent” in Spanish and could understand the driver of the vehicle that hit her.

22. While there appears to be a fair amount of mystery surrounding some details – such as the identity of the car and driver that hit her – these details are not sufficiently pervasive to destroy Claimant’s substantive credibility. She provides the only testimony regarding the accident. Corroborating evidence proves Claimant arrived at Double A Dairy wet, muddy and cold. She promptly informed several other people of the incident. She rescheduled a testing appointment. She informed CSA. And she went to the doctor and gave a consistent explanation at that time. Taken as a whole, the evidence in this case leads this Commission to conclude Claimant was injured *when* and *where* she alleges. It also leads the Commission to conclude Claimant was injured *how* she alleges. On January 17, 2006, an unidentified car, driven by an unidentified man, hit Claimant on her right side and knocked her down into the burrow pit.

23. Based on the foregoing, the Commission finds Claimant suffered a personal injury on January 17, 2006.

**Arising Out Of and In the Course Of Employment – “Traveling Employee” Doctrine**

24. An injury must be “caused by an accident arising out of and in the course of employment . . . .” Idaho Code § 72-102(18)(a). For the purposes of this decision, it is unnecessary to determine whether Claimant suffered an accident because this case turns on whether Claimant’s activities are within the scope of her employment.

25. 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. *Cheung v. Wasatch Electric*, 136 Idaho 895, 897, 42 P.3d 688, 690 (2002) (citing *Freeman v. Twin Falls Clinic and Hosp.*, 135 Idaho 36, 13 P.3d 867 (2000); and *Kessler v. Payette County*, 129 Idaho 855934 P.2d 28 (1997)). It is the claimant’s burden to show by a preponderance of the evidence

that the accident arose out of and in the course of employment. *Id.* (citing *Basin Land Irr. Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 124, 754 P.2d 434, 437 (1988)).

26. **“Traveling Employee” Doctrine** - The “traveling employee” doctrine is applicable in this case. It is a common law doctrine developed by the Idaho Supreme Court to address fact patterns involving injuries incurred by employees while traveling in the performance of their work duties. The case results are substantially fact-driven. The following is an overview of this case law.

27. In *Ridgway v. Combined Insurance Companies of America*, 98 Idaho 410, 565 P.2d 1367 (1977) the Court stated:

The appropriate rule to be applied to determine the scope of workmen’s compensation coverage for employees whose work entails travel away from the employer’s premises at which the employee normally works is set forth in *Larsen, Workmen’s Compensation Law*, s 25.00, p. 443:

“Employees whose work entails travel away from the employer’s premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.” *Id.* at 411.

The Court also denounced portal to portal coverage, however. “For example, the Commission could find that an employee who is injured while engaging in a non-business-related activity such as skiing, or who drowns while scuba diving during a break in a business trip had distinctly departed on a personal errand unrelated to employment.” *Id.* at 412. Because an employee must maintain himself while away on business, the *Ridgway* Court found that “an employee should ordinarily be covered while traveling to and from restaurants, unless the particular trip represents an unreasonable departure in order to pursue some purely personal activity not connected with his employment or necessary to maintain himself while traveling.” *Id.* In that case, the employee was injured when his car was hit by a train while en route from a restaurant to a hotel.

28. The Court later addressed the doctrine in *Kirkpatrick v. Transtector Systems*, 114 Idaho 559, 759 P.2d 65 (1988). The rule was pronounced as follows: “When an employee’s work requires him/her to travel away from the employer’s premises, he/she will be held to be within the course and scope of his/her employment continuously during the trip, except when a distinct departure for personal business occurs. . . .” *Id.* at 562, (citing *Ridgway, supra.*) However, the Court reasoned the “traveling employee” doctrine was “merely an additional rationale under which liability could have been imposed upon” the employer because the Commission found the employee was discussing business at the time of the car accident, and that he had driven downtown to locate the offices of the business with which he would later be meeting.

29. The Court focused on the personal departure portion of the “traveling employee” doctrine in *Morgan v. Columbia Helicopters*, 118 Idaho 347, 796 P.2d 1020 (1990). In pertinent part, the Court established guideposts for the Commission in deciding these difficult fact-finding cases.

The traveling employee is not “entitled to portal to portal coverage away from home, however. There will always be room for reasonable minds to disagree as to precisely where the line should be drawn between activities which are reasonably incidental to one’s employment and deviations which are so purely personal as to be without any substantial causal connection to one’s employment. . . . Thus, the inquiry to be engaged in by both the Commission and this Court when faced with cases of this sort is whether the departure from the claimant’s employment became so personal that it broke the causal connection to such an extent that the resulting accident could no longer be said to ‘arise out of and in the course of’ the claimant’s employment.” *Morgan* at 349 (citing *Ridgway*).

After indicating it might have determined a different factual outcome, the Court upheld the Commission’s determination that Claimant’s non-work-related activities amounted to such a deviation from the business purpose as to deny coverage. The accident occurred at around 1:15

a.m. when the employee had an alcoholic black out while driving, crossed the center line, and struck an oncoming vehicle.

30. The Court revisited circumstances surrounding business travel and drinking alcohol in *Reinstein v. Land and Livestock, Co.*, 126 Idaho 156, 879 P.2d 1089 (1994). The Court adopted that portion of the Commission’s analysis regarding a personal deviation and the rule pronounced in *Morgan*. Once again, the employee’s personal departure from the employment-related errand rendered the ensuing automobile accident and injuries outside the realm of coverage.

31. The Court discussed the “traveling employee” doctrine five years after *Morgan* in *Andrews v. Les Bois Masonry, Inc.*, 127 Idaho 65, 67, 896 P.2d 973, 975 (1995). The Idaho Supreme Court issued its “restatement” based on *Ridgway* and *Kirkpatrick*. The employee, who had just finished a three month job in Wenatchee, Washington, was driving home to Weiser, Idaho, when he was seriously injured in a car accident. However, because his work did not require him to travel away from his normal place of work, the employee was not a traveling employee and he was not entitled to benefits. *Id.* at 67-68.

32. Most recently, the Court addressed the “traveling employee” doctrine in *Cheung v. Wasatch Electric*, 136 Idaho 895, 42 P.3d 688 (2002). The rule it stated, however, was not the *Andrews* restatement. Instead the Court referenced back to *Ridgway*.

33. **Rule** - Based on the foregoing analysis of Idaho Supreme Court precedent, the “traveling employee” doctrine involves two prongs of analysis. First, the job must require the employee to travel away from the employer’s place of business or the employee’s normal place of work. Second, the actual departure at issue must not be a departure from general work functions for personal errands or business. If both inquires are satisfied, the traveling

employee's accident can be deemed to "arise out of and in the course of" employment under Idaho Code § 72-102(18)(a).

34. **Leased employee status** - Initially, we address the circumstances surrounding Claimant's status as a "leased" employee. The leasing employer (IES) did not describe Claimant's duties. However, the work employer (CSA) described and outlined Claimant's work duties. We, therefore, find CSA is the primary employer for purposes of "traveling employee" doctrine analysis.

35. **First Prong** – As a mobile drug/alcohol tester, Claimant traveled regularly and frequently. On Tuesdays and Thursdays Claimant drove from client to client throughout the Magic Valley to perform CSA testing services. The CSA office was not where Claimant worked the vast majority of the time. Defendants contend Claimant does not fit the definition of a traveling employee because she does not normally work on employers' premises. This argument is without merit. If this position were adopted, truck drivers, police, salespeople and all who make a living on the road would be excluded from workers' compensation coverage.

36. Furthermore, consider *Andrews, supra*. In *Andrews*, the employee's normal place of work was the employer's Wenatchee, Washington construction site. The employee was injured in a car accident while driving home to Weiser, Idaho immediately after completing a six-week job assignment in Wenatchee. Because the employee's work did not require him to travel away from the Wenatchee site – his normal place of work - he was not a traveling employee. *Id* at 68. In the case at hand, however, Claimant's duties included automotive travel on Magic Valley roads. The Commission finds Claimant's duties as a mobile drug/alcohol tester required her to travel away from CSA's premises.

37. **Second prong** - Claimant's position is that she was generating "good will" between herself, the owners of Double A Dairy and CSA when she pulled over to check on the calf caught in the fence. She argues that Employer would have benefited from Claimant's action if only she had not been injured in the process. Therefore, the accident was not a personal departure. We disagree.

38. However, we recognize that it is difficult to establish a clear boundary line for this Commission, as well as those working in the field of Workers' Compensation Law in Idaho, to identify cases in which an employee's activities fall in the realm of personal business. Justice Bistline's concurring opinion in *Ridgway* may be as good a guidance as possible: "In short, the test for determining whether a traveling employee's activity is incidental to his employment or a purely personal deviation is its reasonableness and foreseeability." *Supra* at 416.

39. 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 employment. *Dinius v. Loving Care & More, Inc.*, 133 Idaho 572, 575, 990 P.2d 738, 741(1999) (citing *Nichols v. Godfrey*, 90 Idaho 351, 411 P.2d at 766 (1966)). Employees whose duties involve car travel will pull over, leave the relative safety of their cars and engage in other activities for countless reasons. The reasons are, however, crucial to a compensability determination. In this case, we are faced with determining whether Claimant's decision to get out of her car and walk across a highway to investigate a calf on a snowy winter afternoon was reasonably incidental to her duties as a traveling employee.

40. First, the reason Claimant pulled over - to investigate a calf - is not reasonably related to her duties as a mobile drug/alcohol tester. A calf in danger on a cold winter's day is an unusual situation. There can be no argument that stopping along the roadway to investigate or

render assistance to an animal in distress is in any way part of Claimant's work duties or implied assignment. Moreover, she could have just as easily used her cell phone to inform the dairy about the calf, and it could have handled the matter. Under the weather and road conditions, Claimant's decision to stop her travel and walk onto the road is certainly questionable if not poor judgment on her part. More importantly, a roadside stop may also have been impliedly discouraged by CSA. The evidence which most closely attempts to address such a risk is Defendants' Exh. 5 - the job description for urine collection-alcohol testing technicians. Although the "Personnel" portion includes an "emphasis" on "courtesy," the "Response Timelines" section references government standards for public safety in determining safe travel. Read in context, this applies to the employee testers visiting the clients' job sites to perform testing services. In light of CSA's job description emphasis on response time and safe travel, CSA impliedly discouraged or may even have prohibited activities such as those at issue.

41. By the nature of their work assignments, traveling employees are largely unsupervised in a direct manner. Case law does not provide clear delineations as to what activities are within the scope of traveling employees' work duties. It depends on a case by case analysis. We are reluctant to broaden the scope of coverage by holding an employer liable under the circumstances of this case.

42. The Commission can find no substantial relationship between the activities of this accident and Claimant's work assignment for her employer. Also, such activity did not advance or promote the interests of CSA. Claimant's "good will" or Samaritan act was hers personally, not that of her employer. Therefore, the Commission finds Claimant's roadside stop was not reasonably related to her employment. It was a departure for personal reasons not connected

with her employment. Claimant failed to prove her injury was the result of an accident arising out of and in the course of her employment.

**ORDER**

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

1. Claimant suffered a personal injury on January 17, 2006.
2. Claimant failed to prove her injury was the result of an accident arising out of and in the course of her employment.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 5th day of November, 2008.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
James F. Kile, Chairman

Participated but did not sign  
R.D. Maynard, Commissioner

/s/ \_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of November, 2008, a true and correct copy of the **FINDINGS, CONCLUSIONS AND ORDER** was served by regular United States Mail upon each of the following:

KEITH HUTCHINSON  
PO BOX 207  
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sn/cjh

\_\_\_\_\_/s/\_\_\_\_\_