

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUDY THOMPSON,)
)
 Claimant,)
)
 v.)
)
 CLEAR SPRINGS FOODS, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2008-005836
FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION

Filed January 15, 2009

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 on September 24, 2008. Claimant was present and represented by Dennis Petersen of Idaho Falls. E. Scott Harmon of Boise represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken, but post-hearing briefs were submitted. This matter came under advisement on December 16, 2008, and is now ready for decision.

ISSUE

By agreement of the parties, the sole issue to be decided is whether Claimant suffered an accident arising out of and in the course of her employment.

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CONTENTIONS OF THE PARTIES

Claimant contends that as she was returning to Employer's premises, after moving her car from a snowy employee-designated parking lot, she slipped and fell on a county road, injuring her right shoulder. The employee-designated lot required employees to drive up a hill to get to the main road out of the canyon where Employer's fish processing plant is located, and Claimant's car had become stuck in the past, one time requiring a tow and other times requiring someone to take her home. On the date in question, she decided to move her car up the hill before she became snowed in. She was on her break when she did so. Her claim is compensable under the "personal comfort" doctrine.

Defendants contend that Claimant violated company policy by not getting permission to leave Employer's premises on her break and by not clocking out. Employer was unaware that others had used the non-designated parking area to which Claimant had moved her car. As Claimant was not on Employer's premises when she fell, she was, therefore, not within the course of her employment per existing case law. Further, Claimant's job duties as a fish packager had nothing to do with the alleged injuries suffered in her fall. Finally, Employer had in place alternate means of getting employees out of the canyon in snowy weather and would have implemented those means had it been necessary on the day of Claimant's alleged accident. Claimant's decision to move her car was a decision purely personal to herself and had no nexus with her work duties.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Production Manager Kris Henna, and processing/packaging lead Kathy Henson, taken at the hearing.

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2. Claimant's Exhibits 1-9 admitted at the hearing.
3. Defendants' Exhibits A-J 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 53 years of age and resided in Twin Falls at the time of the hearing. She had worked for about 12 years at Employer's fish processing facility located in the Snake River canyon north of Buhl at the time of the alleged accident. Claimant worked in the packaging department.

2. Employer provided its employees with a parking lot near its packaging facility. The lot was somewhat downhill from a county road that provided the main access from the canyon rim. During slippery road conditions, it can be difficult to get from the parking lot to the county road, and from the county road to the main road at the top of the canyon. Claimant testified that about a week-and-a-half before her alleged accident she was unable to get her vehicle up the hill to the county road and had to be pulled up the hill by some of Employer's mechanics. On other occasions, she had to get rides home because she could not get her car up the hill.

3. On January 31, 2008, Claimant arrived to begin her shift at Employer's at approximately 9:30 a.m. It was "snowy." She parked her 2005 Hyundai Elantra front-wheel drive in the employee-designated lot. As she was nearing the parking lot, she noticed four cars parked up the hill in a turnout off the county road. Claimant did not know why she did not park in the turnout at the time.

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4. At approximately 6:00 p.m., Claimant's second 15-minute break of the day, a co-worker informed her that she was going to move her car from the designated lot to the turnout due to the snowy weather; Claimant decided to move her car as well. Claimant does not remember if it was snowing at the time, but remembers that there was snow on the roadway. After Claimant parked her car in the turnout, she proceeded to walk the short distance back to the processing facility. As she was doing so, she slipped and fell on a snowy/icy portion of the roadway or its shoulder. She was not on Employer's premises at the time.

5. Claimant was reprimanded for failing to ask permission to leave the premises and for failing to clock out in violation of company policy.

DISCUSSION AND FURTHER FINDINGS

In order to qualify for workers' compensation benefits, a claimant must establish that he or she was injured in the course of employment. 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 Worker's 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.2d 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 *Steinbach 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

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a question of fact to be decided by the Commission. *Kessler o/b/o 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).

6. Employer's Production Manager Kris Henna testified that he had made arrangements with a nearby homeowner's association to allow employees to cut through their subdivision to gain access to the main road out of the canyon when the roads were snowy and slick. He did not make such arrangements on January 31, although he did not remember if it was snowing on or about the time Claimant moved her car. Even though he was aware that employees had been towed out of the employee parking lot a week or so before, he believed that

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a company backhoe cleared and sanded the ingress/egress to the employee parking lot on Jan 31. He was unaware that some employees parked in the turnout.

7. Mr. Henna also testified that company policy prohibited employees from leaving Employer's premises (except for lunch) without asking permission and clocking out (two omissions by Claimant when she moved her vehicle that led to a written reprimand). He would not have given Claimant permission to move her car had she asked. Claimant was terminated on March 18, 2008, for reasons unrelated to her alleged accident.

8. Claimant cites *Gilbert v. Mercy Medical Center, Inc.*, 98 IWCD 11071 (1998), as supportive of her position. In *Gilbert*, claimant was doing stretching exercises while performing her duties seated in an uncomfortable chair. A physical therapist happened by and requested that the claimant show him what exercises she had been doing. During the course of her demonstration a short distance away from her work station and still on employer's premises, she was injured. The Commission quoted Professor Larson regarding the "personal comfort" doctrine as it relates to minor deviations from employment and found for the claimant.

Claimant herein contends that her alleged accident is compensable pursuant to the personal comfort doctrine because moving her car to the turnout indirectly benefitted Employer in that she could get home, rest, and have a vehicle to be able to get to work the following day.

9. Defendants rely upon *Freeman v. Twin Falls Clinic and Hospital*, 135 Idaho 36, 13 P. 3d 867 (2000). In *Freeman*, the claimant chose to park her car on the street, rather than in employer's designated parking area so she could more easily get to her car for a cigarette on her breaks. She also complained that the employer-provided parking lot was difficult to ingress and egress as employees were required to pass in a narrow alleyway. The claimant was injured when a co-worker, who was also parking on the street, backed into her vehicle. The Commission

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found that claimant's decision to park on the street was purely personal and had nothing to do with her work duties. The Idaho Supreme Court affirmed. In so doing, the Court stated:

An employee's injury from an accident which occurs while driving to work in an automobile which has not been provided by the employer is generally presumed not to be compensable under the Workers' Compensation Act as not arising out of and in the course of employment. [Internal citations omitted] There are, however, exceptions to this rule. If the nature of the employment has subjected a worker to a peculiar risk, it is deemed to have arisen out of and in the course of employment and so becomes compensable. [Internal citations omitted]

The Court [in *Kessler o/b/o Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997)] outlined further exceptions to the general rule in *Pitkin*: [*Pitkin v. Western Construction*, 112 Idaho 506, 733 P.2d 727 (1987).]

Among the exceptions to the general rule will be found incidents where the employee is on the employer's premises in the vicinity of the actual situs of the employment; where going or returning in some transportation facility furnished by the employer;

when traversing the only means of ingress or egress, whether furnished by the employer or by some other party and used with the knowledge and consent of the employer;

where doing some particular job for the employer even though the place where the accident occurred and the cause thereof would be common to any traveler;

where an employee is traveling to and from the employer's place of business upon some specific mission at his employer's request.

Pitkin, 112 Idaho at 507, 733 P.2d at 728, citing *Erickson v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951).

The general rule that compensation is not allowed to workers for injuries occurring on the way to or from work is based on the perception that such injuries are not sufficiently causally linked to employment. [Internal citations omitted.]

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10. The Referee is not persuaded that Claimant's decision to move her car up a snowy incline and to walk back down that same incline is in any way connected to her work as a fish packager. Further, there is no evidence that Claimant encountered a "peculiar risk" on January 30, 2008. Moreover, the Referee is aware that in certain cases compensation has been allowed where an employee may have been involved in a forbidden activity at the time of injury, i.e., *Gage v. Express Personnel*, 135 Idaho 250, 16 P.3d 926 (2000). However, in *Gage*, the claimant was at her workstation, although smoking in violation of policy, awaiting the arrival of product to begin her next assignment. Here, Claimant was not even on Employer's premises, let alone at her workstation, when her alleged accident occurred. Employer provided means by which Claimant could have gotten out of the employer-provided parking lot should the need have arisen. While it may have been for Claimant's own personal comfort, there was no nexus between satisfying that personal comfort and her employment. She was not engaged, either directly or indirectly, with the duties required of her job at the time she allegedly slipped and fell.¹ While certain personal comfort activities may be reasonably anticipated in the normal course of human affairs during a workday such as restroom breaks, eating lunch, etc., Claimant's act of moving her car off Employer's premises to the turnout could not have been. The moving of Claimant's vehicle was more than a minor or inconsequential departure from her employment.

11. The Referee finds that Claimant's alleged accident did not arise out of and in the course of her employment.

¹ While not considered in this decision, it is interesting to note that Claimant had received several written reprimands concerning paying more attention to her walking, as she had a tendency to fall, do the "splits," and on at least one occasion, injured herself. *See generally* Defendants' Exhibit G., Claimant's personnel file.

CONCLUSION OF LAW

Claimant has failed to prove that she suffered an accident arising out of and in the course of her employment.

RECOMMENDATION

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

DATED this 14th day of January, 2009.

INDUSTRIAL COMMISSION

 /s/
Michael E. Powers, Referee

ATTEST:

 /s/
Assistant Commission Secretary

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ORDER

Filed January 15, 2009

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 that she suffered an accident arising out of and in the course of her employment.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 15th day of January, 2009.

INDUSTRIAL COMMISSION

_____/s/_____
 R.D. Maynard, Chairman

_____/s/_____
Thomas E. Limbaugh, Commissioner

_____/s/_____
James F. Kile, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2009, a true and correct copy of **FINDINGS, CONCLUSION, AND ORDER** were served by regular United States Mail upon each of the following:

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Gina Espinosa