BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CASEY BEARD, Claimant, v. DONAHUE MCNAMARA STEEL, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2011-016468** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 21, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Idaho Falls on August 29, 2013. Dennis R. Petersen represented Claimant. Scott R. Hall represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on December 18, 2013. This matter is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The parties stipulated in writing to the following sole issue to be decided:

1. Under Idaho Code § 72-208, was the Claimant in the course and scope of his employment at the time of the accident such that he is entitled to recovery of medical benefits and if so to what extent is he entitled to medical recovery.

This stipulated issue was further refined at hearing into the following issues:

2. Whether Claimant was Employer's employee at the time of his accident;

3. If Claimant was an employee at the time of his accident, was he acting in

the course and scope of his employment when the accident occurred;

4. If Claimant is entitled to recover medical benefits, is he limited to the amounts paid by Ada County and the Idaho Catastrophic Health Care Cost Program Fund (CAT Fund), or may he recover the full invoiced amount of medical charges under *Neel.*

STIPULATED FACTS

The parties stipulated in writing to the following facts:

1. Alcohol was the reasonable and substantial cause of the accident/injury, therefore Claimant is limited to recover no more than medical benefits under Idaho Code § 72-208.

2. The accident was the cause of Claimant's physical injury – broken neck. (Posterior and Anterior Cervical Fusion C5-6 and C6-7.)

3. Claimant's medical bills total $136,580.25. The CAT Fund paid $52,986.02. Ada County paid $11,000.

CONTENTIONS OF THE PARTIES

Claimant contends he was an employee, acting within the course and scope of his employment at the time he rolled his vehicle on I-84 near Mountain Home in the early morning hours of June 8 while driving to Boise from Burley with supplies he had picked up for Employer in Burley. He is entitled to medical care, but no income benefits, since he acknowledges intoxication was the reasonable and substantial cause of his injury. At hearing, Claimant indicated there may be one other bill which has yet to be accounted for, so the final dollar figure may be a bit higher than stipulated. Under the *Neel* holding, he is entitled to recoup the full invoice amount of his medical bills, and is not limited to the actual amounts paid by Ada County and the CAT Fund.

Defendants contend that Claimant was not Employer's employee at the time of his accident. If the Commission determines otherwise, then Claimant was not acting within the course and scope of his employment at the time of his accident. Finally, if Claimant is

entitled to recover medical costs, he is limited to the actual amounts paid by Ada County and the CAT Fund.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, Gary Dawson, Ph.D., Ryan Donahue, and John McNamara; and

2. Joint exhibits 1 through 21, admitted at hearing.

FINDINGS OF FACT

1. At the time of the accident, Claimant was a 28 year old male, living in Boise, Idaho.

2. Employer is a licensed contractor, primarily in the business of steel erection work. It is owned by Ryan Donahue, Kevin Donahue, and Jack McNamara.

3. Claimant initially went to work for Employer in December, 2008. Other than missing time due to an ankle injury in early 2010, Claimant worked more or less full time for Employer through May 22, 2011.

4. On May 21 and 22, Claimant was assigned to work at a Micron construction site in Boise. Thereafter, he was temporarily laid off due to work scheduling issues at that site.

5. During this layoff, Claimant worked for several days for Jack McNamara, who in addition to being part owner of Employer, also owned a separate company called McNamara Company. Claimant's assignment was demolition on a building in Ketchum. While working on this assignment, Claimant stayed in his mother's vacant house in Arco.

6. Claimant's demolition assignment concluded mid-day on June 7, 2011. Claimant and a co-worker, who Claimant had been driving to the job site from Arco each day, picked up their paychecks in Hailey from Mr. McNamara that afternoon. They left Hailey at around

3:30 p.m. Claimant then drove the co-worker back to Arco.

7. Claimant intended to drive home to Boise on the evening of June 7, 2011. He understood he was to begin work the next morning at the Micron site. Employer disputed Claimant's understanding and testified that Claimant was not expected to return to work before mid to late June. While in or near Arco, Claimant received two phone calls from Levi Donahue, Ryan's brother. During the calls, Claimant was asked if he would pick up some welding wire in Burley which was needed at the job site, and bring it to Boise. Although Levi did the talking, the request was made by Kevin, who was present during these calls. If Claimant did not agree to pick up the wire, Kevin was going to make a round trip drive that evening from Boise to Burley to secure the wire for work. Although Burley was not on a direct route to Boise from Arco, nor on a direct route from Arco to Twin Falls to Boise, Claimant nevertheless agreed to pick up the wire for Employer and bring it with him to Boise.

8. After picking up the wire and other miscellaneous supplies Employer had ordered, Claimant went to Twin Falls to visit his girlfriend, and then began driving toward Boise a bit before 10:00 p.m.

9. Claimant had begun drinking beer on his trip from Hailey to Arco, and he continued drinking alcohol for the remainder of his trip to Burley, Twin Falls, and toward Boise. He testified that he also smoked marijuana at one or more points after leaving Twin Falls.

10. Claimant stopped at the Outlaws and Angels bar in Bliss, Idaho. Claimant does not recall being there, but cell records show he spent well over an hour in the Hagerman cell tower area, which would include Bliss. Credit card records show he spent $52.00 at the Bliss bar.

11. After leaving the Bliss bar, Claimant began driving toward Boise on the interstate.

Near mile post 110.5, at around 12:30 a.m. on June 8, 2011, Claimant lost control of his car, where it rolled in the median, and Claimant was injured, as described previously. The road and weather conditions played no part in his accident; Claimant was simply too intoxicated to control his car. Claimant incurred over $136,500 in medical expenses as the result of his injuries from this car wreck.

DISCUSSION AND FURTHER FINDINGS OF FACT

12. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). 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 *Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (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.*

Employee Status

13. Idaho Code § 72-102(12) defines "employee" in relevant part as "any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer." An "employer" is defined under Idaho Code § 72-102(13)(a) as a person or entity "who has expressly or impliedly hired or contracted the services of another."

14. The evidence is clear that at times prior to the date of injury Claimant had worked under an express contract of hire with employer. The evidence is also clear that the parties anticipated that at some point in time after the subject injury Claimant would again be employed by employer. It is less clear whether Claimant was working under an express contract of

employment at the time of the subject accident. It might be argued that at the time of the accident the unexpected lull in work which resulted in his temporary layoff did not affect his employment status, and that at all times relevant hereto Claimant worked under an express contract of hire with Employer. On the other hand, it might be argued that Claimant's employment came to an end when he was laid off, and was not anticipated to resume until he was called back to work at the Micron site. If the latter, then the question of Claimant's employment status as of the date of injury must be examined. Specifically, we must determine whether Claimant's agreement to pick up the welding wire in the Burley-Rupert area constituted a contract of employment, express or implied.

15. There is little evidence supporting the conclusion that the parties entered into an express contract of employment concerning the retrieval of the welding wire. Claimant testified that Ryan Donahue offered to pay for his fuel for the trip, an assertion which Ryan Donahue denied. There is no evidence that Claimant was paid for his travel time associated with picking up the wire. Absent evidence of an express contract of employment, a contract of employment may be implied-in-fact. A contract implied in fact is a true contract whose existence and terms are inferred from the conduct of the parties. Such an agreement is grounded in the parties' agreement and tacit understanding. *See Kennedy v. Forest*, 129 Idaho 584, 930 P.2d 1026 (1997). It is undisputed that the request to pick up the welding wire emanated from Kevin Donahoe, who also had full authority to hire employees. This case is not like *Seward v. State Brand Division*, 75 Idaho 467, 274 P.2d 993 (1954), in which a state brand inspector's deputy, an individual who did not have hiring authority, asked the claimant in that case to give him a hand rounding up some cows. Nor do we conclude, on the basis of the evidence before us, that Claimant's acquiescence in the request of his Employer was entirely gratuitous, and without the

expectation that he would receive nothing in return. At the very least, Claimant might obtain the thanks and gratitude of a prospective employer, which is valuable consideration to anyone between jobs. The evidence also establishes that the task assigned to Claimant was of no small moment. Had Claimant been unable to pick up the wire, Ryan Donahue testified that he had been prepared to drive to Twin Falls on the evening of July 7, 2011 to pick up the materials himself. From the foregoing we find that even if Claimant's employment came to an end at the time of his layoff, he was impliedly rehired when he was asked to retrieve and transport welding wire from Burley to Boise. Therefore, we find that Claimant was an employee within the meaning of Idaho Code § 72-102(12) at the time of the accident giving rise to this claim.

Course and Scope of Employment

16. For an injury to be compensable under the Worker's Compensation Act [hereinafter, the Act], it must have been caused by an accident both *arising out of* and *in the course of* any employment covered by the Act. I.C. § 72-102(18)(a) (emphasis added). The seminal case treating what it is the injured worker must prove in this regard is *Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951). Although the Idaho rule did not originate in *Eriksen*, the rule is given its most lucid expression in that case. Quoting from the Oregon case *Larson v. State Industrial Accident Commission*, 135 Oregon 137, 295 P. 195 (1931), the *Eriksen* court explained what it means for an accident to arise out of and occur in the course of employment as follows:

> It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person

> familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. . .

Eriksen, supra, or the explanation it adopted, has been cited with approval in almost every subsequent Idaho case in which "arising" and "course" issues are discussed. See *Colson v. Steele,* 73 Idaho 348, 252 P.2d 1049 (1953); *Kiger v. Idaho Corporation*, 85 Idaho 424, 380 P.2d 208 (1963); *Wilder v. Redd*, 111 Idaho 141, 721 P2d 1240 (1986); *O'Loughlin v. Circle A Construction*, 112 Idaho 1048, 739 P.2d 347 (1987); *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993); *Kessler on behalf of Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997); *Dinius v. Loving Care and More, Inc*., 133 Idaho 572, 990 P.2d 738 (1999); *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000).

17. It is clear that in order to prevail, Claimant must demonstrate both that the accident arose out of his employment, and that the accident occurred in the course of employment. See *Kessler on behalf of Kessler v. Payette County, supra*.

18. The parties acknowledge that if this claim is otherwise compensable, then under Idaho Code § 72-208 Claimant is only entitled to recover medical benefits, since it is stipulated that Claimant's intoxication was a reasonable and substantial cause of the accident giving rise to this claim. Since Idaho Code § 72-208 clearly provides that a claimant is entitled to compensation notwithstanding the fact that his intoxication caused the accident, it might be argued that intoxication cannot be a basis for claiming that the accident in question is not one which arose out of and occurred in the course of employment. Indeed, this argument was proposed in *Morgan v. Columbia Helicopters, Inc.*, 118 Idaho 347, 796 P.2d 1020 (1990), a case whose facts bear strong resemblance to those at bar. The *Morgan* Court stated:

> Morgan has argued that Idaho Code § 72-208 does not permit the Commission to deny a claimant benefits because of the claimant's intoxication, but instead only permits the Commission to reduce the claimant's benefits by fifty percent. This

> argument misconstrues the structure of the workers' compensation statutes and the legislative intent behind § 72-208. Section 72-208 does not eliminate the requirement that the claimant must show that the accident arose "out of and in the course of" the claimant's employment. Rather, this section provides that if a claimant is otherwise eligible for benefits *and* the injury is the proximate result of the claimant's intoxication, the claimant's benefits shall be reduced by fifty percent. The section does not create any entitlement to compensation if the claimant is not otherwise eligible for the compensation under the rubric of the workers' compensation statutes.

Therefore, Idaho Code § 72-208 does not automatically afford the Claimant a right to benefits despite the fact that the accident is one which was caused by Claimant's intoxication. Rather, the Commission must determine whether or not, under all the circumstances of the case, the accident is one that can be said to arise out of and in the course of employment. If so, then Claimant is entitled to compensation, subject to the reduction identified in the statute.

19. Setting aside Claimant's intoxication for a moment, it seems clear that the accident is otherwise one which arose out of and was in the course of Claimant's employment. The accident occurred while Claimant was performing the task he had been hired to perform. The accident also occurred as the result of a risk to which he was exposed as a consequence of the work that he had been hired to perform; road hazards are a risk encountered by individuals whose job requires travel. The real question in this case is whether Claimant's intoxication is a circumstance which cuts off the causal connection between his accident and his employment. Two Idaho Supreme Court cases are very instructive on this question.

20. In *Morgan v. Columbia Helicopters, Inc.*, Morgan was the worksite manager of Columbia Helicopters, a firm engaged in helicopter logging operations. Morgan's worksite was called Tamarack Falls, and was located approximately seven miles east of Donnelly. Claimant's home was in Sweet, and claimant had the use of a company vehicle which he was allowed to drive to and from the worksite on weekends. One of the pickups at the Tamarack Falls worksite

required repair, and claimant sought out the services of Stricker, a mechanic with whom claimant was acquainted, who lived in Crouch. On Friday, August 17, claimant left the worksite in his company truck and drove home to Sweet, as was his custom. On August 18, however, he decided to seek out Stricker to discuss the work that needed to be done on the pickup. He left his home in Sweet at about 8 p.m., intending to meet Stricker in Crouch. En route, he stopped at a bar near Banks where he had two drinks and played some pool. He left the bar around 8:30 p.m. and arrived in Crouch at about 9 p.m. where he repaired to the Longhorn Bar, a community social center of sorts in Crouch. There, he found Stricker, and the two discussed the repair of the pickup, in addition to having several more drinks. The record established that in course of the evening claimant consumed between 8-10 drinks.

21. Morgan left Crouch at about 1:15 a.m. and took the most direct route back to Sweet. Between Horseshoe Bend and Sweet, his vehicle crossed the center line of the road and struck an oncoming vehicle, killing the driver of the other vehicle.

22. Morgan filed a claim for workers' compensation benefits. The Commission determined that claimant was a traveling employee at the time of the accident but that his non-work-related activities on the evening of August 18th amounted to such a deviation from the business purpose of the trip that Morgan should be denied coverage. Morgan appealed to the Supreme Court. The Court noted that even traveling employees are not entitled to "portal to portal" coverage while away from home. The inquiry 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. The Court upheld the Commission's conclusion that based on the totality of circumstances presented, Morgan's personal activities on the night of the accident

constituted such a deviation from his employment that the accident could not be said to have arisen out of and in the course of employment. It is important to note that at the time the accident occurred Morgan had returned to the same path home he would have taken absent the deviation. Still, the Commission and the Court endorsed the conclusion that Morgan's intoxication at the time of the accident was nevertheless sufficient to break the causal connection between the accident and claimant's employment.

23. To the same effect is *Reinstein v. McGregor Land & Livestock*, 126 Idaho 156, 879 P.2d 1089 (1994). In *Reinstein*, Zolber was employed as the operations manager at employer's Tammany facility. Employer also had a facility located in Nez Perce, approximately 55 miles from the Tammany plant. From time to time, Zolber's work took him to the Nez Perce facility. On November 1 of 1990, Zolber drove a company truck from the Tammany plant to the Nez Perce facility to review some paperwork relating to a billing problem from a spray job that Zolber had performed. Zolber returned to his truck and drove to Rosie's Bar in Nez Perce where he was met by Baker, an employee at the Nez Perce facility. Zolber and Baker consumed several drinks. As they were returning to their respective vehicles they noticed vehicles driven by other customers and friends at an adjacent bar. Zolber and Baker decided to stop and had several more drinks. Zolber left the bar at around 8:30 p.m. and commenced the 55-mile drive back to Lewiston. En route he suffered the motor vehicle accident giving rise to the claim. Autopsy results indicated that Zolber had a blood alcohol level of 0.30 at the time of death. At hearing before the Industrial Commission the Commission determined that although Zolber's trip from Prairie to Lewiston was part of a business trip, Zolber's detours to the Nez Perce bars were personal activities constituting such a deviation from the business purpose of the trip that the

accident could not be said to be one arising out of and in the course of employment. Zolber appealed.

24. Affirming the Industrial Commission, the Court noted that travel may constitute a business trip even though done in part to serve the personal purposes of the employee. So long as the work created the necessity of travel, it is of no import that a claimant is also serving a private purpose. Even though Zolber's trip was a business-related trip (though one with a personal purpose as well), the Court determined that the Commission did not err in concluding that claimant's bar hopping was so personal that it broke the causal connection between Claimant's employment and the accident. It could be said that Zolber was initially acting within the course of his employment when he traveled to the Nez Perce plant, but his subsequent departures from that employment-related errand severed the relationship between his employment and the accident.

25. As in *Morgan*, and as in the instant matter, Zolber's frolic was long completed by the time the accident occurred; he had returned to the most direct route back to Lewiston. Even so, his previous departures were deemed significant enough to sever the causal relationship. After all, Zolber was not just driving back to Lewiston by the most direct route at the time of the accident; he was driving back to Lewiston by the most direct route with a blood alcohol content of 0.30%.

26. The facts of both *Morgan* and *Reinstein* are very similar to those at bar. Here too, travel should be considered part of Claimant's employment. He was required to drive to the Burley-Rupert area in order to pick up the welding wire and return it to Boise. However, perhaps more so than in either *Morgan* or *Reinstein*, Claimant's penchant for drinking and driving and patronizing speakeasies along the way is a departure from the demands of his

employment that it is of such significance to cut off the causal connection between the subject accident and Claimant's employment. We cannot say that Claimant's accident was one arising out of and in the course of his employment for this reason. Therefore, we do not reach the question of whether Claimant's benefits should be reduced per Idaho Code § 72-208.

27. Likewise, because Claimant did not show it likely that his accident and injury arose out of and in the course of his employment, the issue of the application of *Neel* as applied to the amount of Claimant's recovery is moot.

CONCLUSIONS OF LAW AND ORDER

1. Claimant was an employee of Employer on June 7, 2011;

2. Claimant's injuries did not arise out of or in the course of his employment with Employer;

3. Claimant is not entitled to benefits and his claim should be dismissed.

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

DATED this _21st_ day of ___April_____, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

RECUSED

_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st____ day of ___April_____, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

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