BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TODD LAWRENCE HAMILTON (DECEASED), Claimant, v. ALPHA SERVICES, LLC, Employer, and DALLAS NATIONAL INSURANCE COMPANY, Surety, Defendants.	**IC 2012-008983** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED: 1/9/14**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur d'Alene, Idaho, on July 17, 2013. Starr Kelso, of Coeur d'Alene represented Claimant. Eric S. Bailey, of Boise, represented Defendants. Oral and documentary evidence was admitted. The parties filed post-hearing briefs. The matter came under advisement on December 6, 2013, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant was acting within the course and scope of his employment at the time of the fatal vehicular accident in question;

2. Whether Claimant[1] is entitled to death benefits, and the extent thereof; and

3. Whether Claimant is entitled to attorney fees due to Defendants' unreasonable denial of benefits as provided for by Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

The pivotal issue for resolution in this matter is whether at the time Claimant sustained fatal injuries as the result of a vehicular accident on December 7, 2011, he was acting within the course and scope of his employment for Defendant Alpha Services, LLC. Claimant argues he was, and Defendants claim he was not.

There is no dispute that Claimant was, on the date of the accident, married to Tawni Hamilton and the father of two minor children. All parties agree that if Claimant was acting within the course and scope of his employment with Defendant at the time of accident, death benefits, including funeral expenses, are appropriate. The parties disagree on whether attorney fees are awardable against Defendants. Claimant argues they are, and Defendants claim they are not.

The parties reserve for later determination, if necessary, the issue of whether, and to what extent, Defendants have subrogation rights against any third-party recovery from the other driver involved in the subject accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file in this case;

2. The testimony of Tawni Hamilton, taken at hearing;

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[1] Claimant is deceased and therefore technically not making claim to payment of any award. However, since the action was brought in the deceased's name, and not the name of his surviving spouse/children, throughout this document the term "Claimant" will be used to designate the deceased and/or his surviving wife and children as contextually appropriate.

3. The testimony of witness Robert Wade Zaharie, taken at hearing;

4 The testimony of witness Leodegardio "Leo" Cortes, taken at hearing;

5. Claimant's Exhibits 1 through 7, admitted at hearing; and

6. Defendants' Exhibits 1 through 6[2], admitted at hearing.

Defendants' Exhibit 7 was a hand-drawn diagram of the scene; it was withdrawn as other diagrams of the scene are included elsewhere in the Exhibits. Defendants' Exhibits 8 and 9, the depositions of Robert Wade Zaharie and "Leo" Cortes, respectively, were duplicates of Claimant's Exhibits 1 (Zaharie deposition), and 2 (Cortes deposition). Accordingly, Defendants withdrew their Exhibits 8 and 9 at the hearing.

Claimant withdrew his Motion in Limine at the start of the hearing. All objections made during the depositions of Robert Wade Zaharie and Leodegardio Cortes are overruled. After having considered the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of his death on December 7, 2011, Claimant was a 31-year-old resident of Rathdrum, Idaho, and married to Tawni Brooke Hamilton. Claimant had two dependent minor children - Hailey Swansen, age nine, and Hannah Hamilton, age three.

2. Defendant Alpha Services, LLC (hereinafter "Defendant") is an Idaho-based limited liability company which, among other services, contracts with the U.S. Forest Service (U.S.F.S.) to remove trees on Forest Service land. Robert Wade Zaharie (Zaharie)

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[2] Defendants' Exhibit 5 is listed in Defendants' Rule 10 Disclosure as "Frasco Investigative Services." The exhibit contains a written report summarizing information in part gleaned from recorded witness statements, as well as recorded interviews of Cortes and Zaharie. At the conclusion of the hearing, the Claimant provided, with the Defendants' consent, the Frasco-generated recordings. The recordings are part of Defendants' Exhibit 5, but are submitted by Claimant.

is the general manager and a co-owner of Defendant Alpha Services. Not long before this claim arose, he took over the on-site management of the Wyoming project (defined below), due to the fact it was running significantly behind schedule and over budget. He was able to double production with a decrease in work force on the project by his aggressive management.

3. Defendant hired Claimant in Idaho on or about September 7, 2011, to work on the remainder of what was a multi-year logging operation for the U.S.F.S. in southern Wyoming, (the "Wyoming project"). Claimant left Idaho to begin work on the Wyoming project on September 17, 2011. He was not paid travel expenses, nor a stipend of any sort for travel, nor did Defendant pay for any of Claimant's Wyoming housing expenses.

4. While working in Wyoming, Claimant rented housing less than a mile north of the job site. He returned to his home in Idaho just once between September 17, 2011, and the date of his death – to celebrate the Thanksgiving holiday.

5. The area comprising the Wyoming project job site included U.S.F.S. land on both sides (east and west) of Wyoming Highway 230 in a parcel of forest approximately 45 miles southwest of Laramie, Wyoming, and about 25 miles north of the town of Walden, Colorado.

6. At the time of the accident in question, Defendant's logging operations were ongoing to the west of Highway 230. This active logging area was reached via a dirt forest service road branching off the highway to the west ("the west road")[3]. Approximately one hundred feet south down state Highway 230, a dirt road branches to the east ("the east

[3] In reality the highway at this point runs southwest to northeast, but during the hearing the direction toward Laramie was called north, and to Walden, Colorado, south. For the sake of uniformity, these same directional characterizations will be used herein.

road"). Defendant had placed a large walk-in storage container beside the east road, a hundred yards or so off the state highway. The container housed tools, equipment and supplies for the project and was regularly accessed by employees during the course of their work. Employees needing to reach the container from the active work site would travel east on the west road to the paved highway, then south on the state highway, and then turn left, or east onto the east road to the container.

7. Defendant supplied pickup trucks for the employees to utilize while working. The employees were not typically allowed to use the vehicles for personal errands. Claimant was allowed to take his company truck between the job site and his housing. Three vehicles are relevant to this case – a blue Dodge pickup, which Claimant was driving at the time of the collision, a white Ford F-450 work truck, and a smaller white Mazda pickup. The Dodge and the Ford were equipped with tools and equipment the employees often needed, and they were to keep one of these trucks with them while working so they could perform maintenance or make repairs. The Mazda truck had no tools, and was used for parts chasing and assignments where gas mileage was important.

8. On December 6, 2011, Leodegardio Cortes (Cortes), a 23-year-veteran employee for Defendant, arrived at the job site. He had previously been on the Wyoming project, but was pulled from it to work on a project for Defendant in Shasta, California. Claimant had been hired to replace Cortes on the Wyoming job. At the conclusion of the California job, Defendant assigned Cortes back to the Wyoming project.

9. Cortes and Claimant both had experience running a piece of equipment known as a hot saw. When Cortes arrived back in Wyoming, Zaharie decided to run two shifts daily on that machine. Claimant was given the first shift, which ran from 2:00 or

3:00 a.m. until around noon. Cortes' shift ran from around noon until approximately 8:00 p.m.

10. During his previous stint on the Wyoming project, Cortes had utilized the blue Dodge as his work truck. Claimant used it while Cortes was in California. On the evening of December 6, 2011, the two briefly discussed the truck arrangement by telephone, including who would use which truck, and how they were going to coordinate between them to make sure they each had a tool-equipped work truck with them while they were working. The truck assignment issue was not resolved during that discussion; rather, as Cortes stated, "Well, we were going to see how it was going to work and then see – try to have a service truck the whole time." Claimant's Exhibit 2 - Deposition of Leodegardio Cortes, p. 17, ll. 11-13.

11. In the early morning hours of December 7, 2011, Claimant began his shift on the hot saw, located on the work site to west of the highway. Roughly four hours later, the equipment broke down, effectively ending his shift; company policy required an employee who is not able to perform his job due to mechanical breakdown to clock out. That employee is not paid for the remainder of his shift. Claimant wrote down 4.5 hours on his time sheet, where he kept track of his work hours for payment purposes.[4]

12. Wade Zaharie took the broken part from the hot saw into Laramie, Wyoming to have it welded. He returned to the job site with the repaired part between 11:30 a.m. and

[4] An employee could work outside of his regular shift hours if the work, and equipment, was available, up to a total of 48 hours per week. Claimant theoretically could have gone back to work later on December 7, to make up for the time he lost when the equipment broke down, although Zaharie testified all the equipment was in use by other employees that afternoon. Claimant's counsel argues there may have been a "processor" available for Claimant to use that day. Since such determination is not material to this decision, it will not be discussed further.

noon. Claimant and a fellow employee named Tim Reed installed the part and Cortes took over operating the hot saw. Zaharie then returned to Laramie to take care of other pressing business.

13. Shortly after 2:00 p.m., Mountain Time, (1:00 p.m., Pacific [Rathdrum, Idaho] Time), on December 7, 2011, Claimant called his wife and told her he had been on swing shift, the equipment had broken down, and he was headed to Walden, Colorado to buy groceries. He mentioned to her his stomach hurt, he was tired from switching shifts, and mad because the machinery kept breaking down.

14. Nearly forty minutes later, Claimant again called his wife. He mentioned he would not have phone service for long because he was heading to the job site. At the job site there was no cell phone service; the nearest location with reception was about eight miles south of the work site[5].

15. At approximately 3:00 p.m., Mountain Time, on December 7, 2011, Claimant was involved in a vehicular accident. At the time, he was operating the blue Dodge company truck. As depicted on the Wyoming Highway Patrol Traffic Crash Report diagram, (Claimant's Exhibit 6), just before the accident Claimant had backed the pick up into the southbound lane of the highway from the west road, then began to drive forward, or south in the southbound lane until he came to the intersection of the highway and the east road. There, he started to make a left hand turn onto the east road. As he did so, the pick up truck was struck broadside by a southbound 18-wheel tractor-trailer which was in the act of passing Claimant from the left hand lane of the highway. Claimant was

[5] There was also service beginning a bit less than a mile north of Claimant's housing, but that fact is not relevant to this decision.

pronounced dead at the scene. Other than the semi-truck driver, there were no eye witnesses to the crash.

16. Shortly before the collision, Cortes had driven the white Ford truck to the container to get hydraulic fluid. He was inside the container at the time of the accident and heard the noise of the impact. He was able to find a nearby house with phone service and called the police.

17. Wade Zaharie was notified of the accident while he was still in Laramie. He was not aware Claimant was killed in the crash, so he went to the local hospital to wait for him to be brought in. When he discovered Claimant did not survive, he left the hospital and returned to the crash scene.

18. In speaking with one of the investigating officers, Zaharie learned the police felt alcohol was a significant factor in the accident, because they smelled the odor of beer in the pick up. Zaharie found two six packs of beer and a bag of groceries in the truck when retrieving items from the cab of the Dodge a few days after the accident. None of the beer cans had been opened, but several had punctures in them. No alcohol was detected in Claimant's system at the time of autopsy.

LEGAL DISCUSSION AND FURTHER FINDINGS

19. For an injury to be compensable under the Worker's Compensation Act, (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 test for determining compensability is two pronged, and the claimant must satisfy both elements to be entitled to compensation. *Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997). A worker is *in the course of employment* if the worker is doing the duty that the worker is

employed to perform. *Kiger v. Idaho Corp.,* 85 Idaho 424, 380 P.2d 208 (1963). An injury is considered to *arise out of employment* when a causal connection exists between the circumstances under which the work must be performed and the injury of which the claimant complains. *Kessler,* 129 Idaho 855, 860, 934 P.2d 28, 33 (1997).

20. I.C. § 72-228 provides in relevant part:

> **§ 72-228. Presumption favoring certain claims. -** (1) In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify, and where there is unrebutted prima facie evidence that indicates that the injury arose in the course of employment, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury arose out of the employment and that sufficient notice of the accident causing the injury has been given.

Since this case involves a fatality, applicability of I.C. § 72-228 should be considered. For the statutory presumption to apply, Claimant must, as a preliminary matter, establish that the injury arose in the course of his employment. As such, Claimant must initially present *prima facie* evidence establishing that his death occurred **in the course** of his employment - that is while doing a duty he was employed to perform - in order to gain the presumption that his fatal accident arose **out of** his employment. However, if such *prima facie* evidence is successfully rebutted, §72-228 does not apply. As previously noted, if this *prima facie* evidence is not rebutted, it is then presumed the injury arose **out of** the employment, thus satisfying the second prong of compensability. This "second prong" presumption, that the injury arose out of employment, can likewise be rebutted with substantial contrary evidence. If this presumption is rebutted, Claimant must come forward with sufficient evidence to indicate that his death did in fact occur in the course of his employment. *See, Kessler*, 129 Idaho 855, 861, 934 P.2d 28, 34 (1997).

21. The threshold issue for resolution is, "has Claimant presented a *prima facie* case establishing the fact that he was performing a duty which he was hired to do at the

time of the accident?" If Claimant makes the required *prima facie* showing, the next issue for resolution is, "have Defendants rebutted this showing with evidence which would allow reasonable minds to conclude the presumed facts do not exist?" I.R.C.P. 301.

22. Determining if the accident arose in the course of employment is a question of fact for the Commission to decide. *Kessler*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997). When analyzing this question, the Commission must take into account that:

> 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 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).

Dinius v. Loving Care & More, Inc., 133 Idaho 572, 574, 990 P.2d 738, 740 (1999).

23. Since the claimant cannot testify concerning his actions and intentions immediately prior to the collision, it is up to the fact finder to determine from the record as a whole whether he was acting in the course of his employment at the time of his death. *See, e.g., ASARCO, Inc. v. Industrial Special Indemnity Fund,* 127 Idaho 928, 908 P.2d 1235 (1996). The following points should be considered when determining whether Claimant was killed while performing a duty which he was hired to do:

- Claimant told his wife he was going to Walden, Colorado to get groceries less than an hour before the accident occurred.
- Claimant was driving a company truck at the time of the accident.
- There were groceries, including beer, in the pick up at the time of the accident.
- Claimant had told his wife he was not feeling well that day and was tired.

- Just minutes before the accident, while driving in an area with cell phone service, Claimant told his wife he was going to the job site.
- The semi-truck driver told police Claimant had backed onto the highway from the west road and proceeded south to the intersection of the east road.
- At the time Claimant turned around as described above, Leo was at the container with a white truck. The container, and most likely at least part of the white truck would have been visible to Claimant at or just prior to him reaching the west road.
- The east road led to the company storage container and nothing of interest thereafter.[6]
- Claimant was killed while attempting to turn onto the east road after having come from the west road.

24. Examining the facts and evidence as a whole, and drawing reasonable inferences therefrom, the Referee, applying the standard set forth in *Dinius v. Loving Care & More, Inc.*, *supra* finds the following preliminary facts which apply to the remainder of the analysis:

i. Claimant took a company vehicle to Walden, Colorado on the day of the accident in question to buy groceries and personal items;

ii. Claimant was returning to his Wyoming housing with the groceries in the company vehicle shortly before the accident;

iii. On the afternoon of the accident, Claimant intended to go to the job site for an unspecified reason[7] after returning to Wyoming from Colorado;

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[6] Other than the container, there were a few houses, including one rented by Zaharie, down this road.

iv. While returning from shopping in Walden, as described above, Claimant elected to go to the job site, specifically the storage container located east of Highway 230;

v. Instead of proceeding the short distance to his residence to drop off his groceries prior to going to the job site, Claimant chose to alter his course and go to the container without delay;

vi. Claimant pulled onto the west road and then backed out onto Highway 230 and retraced his path down toward the east road;

vii. While attempting to turn left from Highway 230 onto the east road Claimant's company pick up was struck broadside by a semi-truck/trailer combination which was in the process of overtaking Claimant's truck by passing it in the left hand lane of the highway;

viii. This collision resulted in Claimant's death.

25. On the afternoon of the accident, Claimant thought of a reason he needed to go to the job site after shopping in Walden. This reason was important enough to cause him to abort his trip home and attempt to return to the storage container, even though he was tired and feeling sick. While his exact motive is forever lost, it is more likely than not that Claimant was involved in some activity for which he was hired to do at the time he

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[7] On multiple occasions during the hearing, as well as in previous written statements authored by Claimant's widow, she consistently noted the Claimant told her he was headed to the job site minutes before the accident, but never indicated he had told her a specific reason why. The final time she was asked about this last conversation with her husband, she, for the first and only time, indicated he told her he was going to the site because the equipment had been repaired and he was headed there after first stopping at the container. This statement is at odds with her sworn and non-sworn previous testimony and is disregarded by the Referee. Instead, the Referee relies on her previous answers which do not indicate a specific reason Claimant intended to visit the job site on the afternoon of the accident.

cancelled his trip home with groceries (which was clearly a personal activity), and headed toward the company container.

26. It is not reasonable to assume Claimant was headed to the container for a personal purpose. Employees were not allowed to drink on the job, so it is unlikely he was headed to the container to share a beer with a co-employee. He had not bought groceries for any other employees, so he could not have been making a delivery of personal goods. Rather, the preponderance of the evidence establishes the fact that Claimant saw or thought of something important enough to make him go to the work site even before delivering his groceries to his house less than a mile further up the highway.

27. Claimant's job duties were far broader than simply running a hot saw. He and the other Alpha Services employees were expected to keep the contract operations running efficiently. They were expected to maintain and repair equipment and machinery as needed, and address issues within their capabilities as they arose. To assist them, the employees were given company trucks supplied with tools needed to fix broken parts and perform machinery maintenance. The employees were expected to live near the work site.

28. Claimant's counsel advanced a theory that at the time of the accident that Claimant saw Cortes' white truck[8] at the container and may have been headed there to meet with him to further discuss the idea of exchanging work trucks. Defendants rebut that theory with several arguments, including that Claimant could not have known Cortes was in the container for

[8] There are two white trucks in this case. Cortes had driven the white Mazda truck to the hot saw, and then he took the white Ford from the hot saw to the container. Defendants argue that Claimant could not have believed Cortes was the person at the container since the large Ford looks nothing like the smaller Mazda. Of course, the possibility exists that Claimant only saw a flash of a white vehicle through the trees, and could not tell which vehicle was at the container; he only knew a white truck of some sort was parked there. As discussed *infra*, although the parties debated the point, this line of argument is not crucial to the decision.

a variety of reasons, and further there was no need to exchange trucks since the Ford was equipped with even more tools than Claimant's Dodge. While Claimant's theory is reasonable, and perhaps even probable, there is no need to resolve this debate in order to determine compensability, as is discussed below[9].

29. Claimant knew he was not supposed to use the company truck for personal errands, and the presence of groceries in the truck could get him in trouble with the company. It makes no sense he would risk such conflict unless he had an important reason to do so. While it is unlikely Claimant was seeking to run equipment or other time-intensive activity on behalf of the employer, to be in the course of employment does not require this type of "on the clock" activity. Based upon all the evidence as outlined above, Claimant has made a *prima facie* showing that he was acting within the course of his employment at the time of his death.

30. Defendants argue in rebuttal that Claimant could not have been acting within the course of his employment at the time of the accident. Defendants provide two main arguments to support their position. The first involves the fact Claimant was not gainfully working at the time of the accident - he had finished his shift, and was on his personal time when the collision occurred. The second argument employs the "coming and going" rule. These two arguments will be addressed in turn.

31. Defendants first focus on the fact that Claimant's shift had ended well before the accident. Claimant's shift effectively ended when the equipment broke down, and technically ended by noon, when Leo Cortes took over the hot saw operation. It is

[9] Claimant's counsel lists in briefing several other work related reasons why Claimant might have been headed to the container in addition to the truck exchange idea. While all the proffered reasons are possible, they likewise are all speculative.

also clear that Zaharie had not asked Claimant to do any special errands or other work that afternoon. There was no equipment lying idle which Claimant could have operated after his shift. Claimant had filled in his time card, giving at least some indication he was finished working[10]. Finally, Claimant had gone to Walden, Colorado to buy groceries, which was clearly a personal errand.

32. Defendants' arguments, though true, are not dispositive. They do illustrate the fact that it is highly unlikely Claimant was going to be able to go back on the clock that afternoon, doing any shift work for which he would be paid. However, to do work benefiting the employer is not limited to wage earning activities. This concept is well illustrated by the Industrial Commission case of *Runkle v. Western Heating and Air Conditioning, Inc. and Liberty Northwest Ins.,* IC 2010-011837, November 30, 2011. As noted therein:

> One of the reasons cited by Defendants in denying the instant claim was that at the time of the acute onset of symptoms on April 26, 2010, Claimant had not clocked in, and was not performing his job duties. In other words, Claimant was not acting in the "course" of his employment at the time of the mishap. Claimant asserts that even though he had not yet clocked in when his accident occurred, he was on Employer's premises and was engaged in activities that were incidental to his employment and which accrued to the benefit of Employer.
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> The Idaho Court has, on numerous occasions, discussed the "in the course of" language of Idaho Code § 72-102(18)(a). One of the best restatements of the doctrine appears in *Mahoney v. Silver Wood Good Samaritan Center*, 1986 IIC 0091 (February 10, 1986):
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> > "Course of employment" refers to the course of an activity related to employment which is generally said to be related if it *carries out the employer's purpose or advances his interests*. Thus, an accident is said to arise out of employment if it is within the time and space limitations of employment and is in the course of employment if it is in an activity

[10] Evidence supports the notion that on occasion, the Claimant had changed his time sheet to amend his hours worked when he returned to work after "punching out." Since this information is not material to the decision in this case, it is not discussed further.

> related to employment. *Larson*, The Law of Workmen's Compensation, Sections 6 and 20. *Id.*, at p. 0091.4 (Emphasis added). See also, *Thompson v. Clear Springs Food, Inc.*, 148 Idaho 697, 228 P.3d 378 (2010), and *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 990 P.2d 738, 740 (1999).
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> From the record in this proceeding, it is clear that at the time his accident occurred, Claimant was at the employer's premises preparing for his workday. Unlocking doors and turning on lights and equipment is often the *de facto* responsibility of the first employee in the door, as is making coffee. Many of the activities that Claimant performed upon his arrival were necessary for his comfort and safety. If Claimant did more than the minimum that was required for his comfort and safety, the time spent inured to the benefit of Employer because when other employees arrived, the workplace -- and the coffee -- were ready for them.

IC 2010-011837 at pp. 0090.20, 21. It is clear that activities which benefit the employer, or advance his interests, may be considered when determining if Claimant was acting in the course of his employment at the time of the accident. Put in its simplest form, "course of employment" may be looked at as "related to employment." Defendants' concentration on the fact Claimant was not earning money or on his shift at the time of the collision does not rebut the presumed fact that Claimant was nevertheless acting in the course of employment at the time of the collision.

33. Defendants next argue that even if Claimant had a "work-related intent" as he drove on a public highway toward the company container, he could not have been "in the course of employment" because he had not reached the job site. At most he was "coming" to work. Idaho law provides that an employee is not considered to be at work while "coming and going" to and from the work site. *Clark v. Daniel Morine Construction Co.* 98 Idaho 114, 559 P.2d 293 (1977). Claimant could not be within the course of his employment until he reached his employer's premises. If he was not in the course of his employment, Claimant has no compensable claim.

34. While Defendants recognize there is an exception to the "coming and going" rule for "travelling employees," they argue persuasively against the fact that Claimant was a "travelling employee." Their citation to the Industrial Commission case of *Oscar 2004*, IC 2004-IC0225 is well taken. Claimant was not a "travelling employee" as the term is defined in Idaho. Wyoming was his normal place of work. He was simply an employee hired in Idaho to work at a remote site.

35. Defendants make the following point in their post-hearing brief at p. 23, "The accident occurred on a highway, not at a jobsite. *** The bottom line is that even, assuming arguendo, Claimant was driving to a jobsite…the accident occurred on the way there." The issue for resolution is where is "there" in the phrase "the accident occurred on the way there." Put another way, where does the Claimant need to get to before the coming and going rule ceases to apply? In *Barker v. Fishbach & Moore, Inc.,* 105 Idaho 108, 109, 666 P.2d 635, 636 (1983) the Idaho Supreme Court stated "[u]nless an exception applies, under ordinary circumstances a worker is not in the course of employment while going to and from *an employer's place of business* for purposes of workmen's compensation law." (Emphasis added).

36. If the answer is that "coming and going" ceases when the worker arrives at the employer's place of business, what constitutes the employer's "place of business" in this case? Employer was hired by U.S.F.S. to a multi-year tree thinning project in the national forest of southern Wyoming. Claimant was expected to present himself for work wherever on that parcel his skill was needed. And his boss, Wade Zaharie, could not only tell Claimant where to work within this parcel of contract ground, but when. On direct examination the following exchange took place:

Q. (Defense counsel) How did they figure out – how did it come to be that Todd [Claimant] ended up in the morning shift and Leo came in at noon?

A. (Zaharie) That's what I outlined. That's what I told them to do.

Q. So you're the one that was in charge of making the determination as to who worked what times and where they were supposed to be?

A. Yes.

Hearing Transcript pp. 50-51. It is clear from the testimony the "place of business" where Claimant worked while in Wyoming was not confined to the cab of a hot saw. That "place of business" certainly included, at a minimum, the active logging area, the shop container, and the route(s) one would take between the two. In early December 2011, this route included a small stretch of Wyoming state Highway 230 between the west and east roads.

37. Defendants note the accident did not happen on the east road, the west road, at the container, or at the active logging site. It happened on the highway. There can be no serious argument that employees travelling between the hot saw and the container are covered at all points along this route except for the one hundred feet of state highway they must traverse to get from the west road to the east road and back. To the contrary, they would be covered at *all* points between the two locations while working. Therefore, the fact the accident took place on a public highway does not necessarily mean Claimant was not at his employer's "place of business."

38. As a general rule, Idaho law presumes workers on the employer's premises are acting within the course and scope of their employment, so long as there is a causal connection between conditions existing on premises and the accident. As noted in *Foust v. Birds Eye Division of General Foods Corp.,* 91 Idaho 418, 419, 422 P.2D 616, 617 (1967), a presumption that "the injury arises out of and in the course of employment, prevails where the

injury occurs on the employer's premises…" The *Dinius* Court adds a caveat to the *Foust* presumption when it notes "the fact that an injury occurs on the employer's premises must be accompanied by a showing of a causal connection between the conditions existing on the employer's premises and the accident involved." 133 Idaho at 741, 990 P.2d at 575.[11] Finally, in order to be compensable, the injury has to be in some way connected with, or traceable to, the employee's work. *See, e.g. In Re Malmquist,* 78 Idaho 117, 300 P.2d 820 (1956).

39. There is no dispute Claimant was headed toward the container, but had yet to reach it at the time of the accident. There is no evidence he had been working at the hot saw, so that he was travelling between two different locations on employer's place of business in the course of his ongoing work. On the other hand, he was not heading directly to the container from a personal errand. He *had been* travelling north on a personal errand when he, for some unknown but likely work-related reason, diverted his journey home and pulled onto the west road, which is clearly within Employer's "place of business." He then reversed his direction and headed to the container. In doing so, Claimant was at that point traversing from one part of Employer's premises to another. He was not "coming or going" to work; he had arrived by the time he pulled his truck onto the west road[12].

40. The Referee finds the Claimant, at the moment of the accident in question, was engaged in an activity related to his employment, and was carrying out or advancing his employer's interests. There is simply no plausible reason for Claimant to stop his trip

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[11] There is a clear connection between the conditions existing on the premises and the accident. Employer required the workers to cross a public highway to go to and from the storage shed to the active work site, which they had to do on a regular basis. Claimant was killed crossing this highway.

[12] Even if the accident did not occur on Employer's premises, an argument could be made under *Jaynes v. Potlatch Forests, Inc.* 75 Idaho 297, 271 P.2d 1016 (1954) that by placing the container across the highway from the logging operation, with but one way to and from the two sites, Employer created a peculiar risk which would extend coverage to Claimant.

home and reverse course to go to the company container which would not be related to his employment. This conclusion is consistent with the requirements of *Dinius, supra* which gives the benefit of the doubt in close cases to the Claimant. The Referee further finds the "coming and going" does not apply in this case to bar the claim, as Claimant was on the employer's premises or place of business as he pulled onto the west road. From that point forward, he was engaged in a work activity on employer's premises, even when driving between the west and east road.

41. Once established that Claimant was within the *course of his employment* at the time of the fatal accident, I.C. § 72-228 provides a presumption that the accident arose *out of his employment*. As noted earlier, an injury "arises out of" employment when a causal connection exists between the circumstances under which the work must be performed and the injury. This presumption applies unless Defendants come forward with substantial evidence to the contrary. Substantial evidence is that which a reasonable mind might accept to support a conclusion. It must be more than a scintilla, although it can be less than a preponderance. Finally, the evidence must be "affirmative" or positive. It is not enough to merely present evidence which tends to rule out certain causes for the injury. *Evans v. Hara's Inc.* 123 Idaho 473, 849 P.2d 934 (1993).

42. Defendants have not argued Claimant's death was occasioned by activity unrelated to the circumstances associated with his employment, nor did they present evidence to support such a notion. The facts would not bear out such a claim in any event. Therefore the presumption supplied by I.C. § 72-228 – that the accident arose out of Claimant's employment – stands unrebutted and supplies Claimant with the second prong of the two-prong test needed for compensation.

43. Furthermore, once the *Foust* presumption is established, the Defendants "had the burden of producing evidence indicating that [Claimant's] injury did not arise out of or in the course of his employment." *Kessler* at 129 Idaho 859. Defendants have not come forward with such evidence. Under either the application of I.C. § 72-228, or the *Foust* doctrine, the claim is compensable.

44. The parties reserved the issue of Surety's subrogation rights against a third-party tortfeasor. At the time of hearing, a civil lawsuit was ongoing against the other driver involved in this accident. Without implying a ruling on the issue, Claimant is cautioned to be aware of the Surety's claim for reimbursement out of any third-party settlement or judgment which may be obtained in the civil litigation.

45. Claimant's demand for attorney fees is denied. The outcome in this case was not necessarily self-evident, and Defendants' position was not without merit. The Surety's actions were within the bounds of reason when they denied benefits under the facts of this case.

CONCLUSIONS OF LAW

1. Claimant was acting within the course and scope of his employment at the time of the fatal vehicular accident in question.

2. Claimant's widow and children are entitled to benefits as provided for under I.C.§§72-410 through 416, together with burial benefits as provided for under I.C. §72-436, subject to the limitations of I.C. §72-102(4).

3. Claimant is not entitled to attorney fees pursuant to Idaho Code § 72-804.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions 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 30th day of December, 2013.

INDUSTRIAL COMMISSION

/s/_____
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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kla /s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TODD LAWRENCE HAMILTON (DECEASED), Claimant, v. ALPHA SERVICES, LLC., Employer, and DALLAS NATIONAL INSURANCE COMPANY, Surety, Defendants.	**IC 2012-008983** **ORDER** **FILED 1/9/14**

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

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

1. Claimant was acting within the course and scope of his employment at the time of the fatal vehicular accident in question;

2. Claimant's widow and children are entitled to benefits as provided for under I.C.§§72-410 through 416, together with burial benefits as provided for under I.C. §72-436, subject to the limitations of I.C. §72-102(4); and

3. Claimant is not entitled to attorney fees pursuant to Idaho Code § 72-804.

DATED this 9th day of January, 2014.

INDUSTRIAL COMMISSION

/s/_____
Thomas P. Baskin, Chairman

/s/_____
R.D. Maynard, Commissioner

/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

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