BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JENNIFER WILLIAMS, Claimant, v. KNITTING FACTORY ENTERTAINMENT, Employer, and BERKSHIRE HATHAWAY HOMESTATE COMPANIES, Surety, Defendants.	**IC 2014-008977** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed February 1, 2016

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 Boise on May 14, 2015. Claimant was present and represented by Kira Pfisterer and Charles Hepworth of Boise. Emma Wilson, also of Boise, represented Employer, Knitting Factory Entertainment ("KFE") and its Surety, Berkshire Hathaway Homestate Companies (collectively "Defendants"). Oral and documentary evidence was presented. The record remained open for the submission of post-hearing briefs and this matter came under advisement on July 20, 2015.

Referee Powers authored proposed Findings of Fact and Conclusions of Law and submitted the same, together with the record, to the Commission for its review and decision as anticipated by the provisions of Idaho Code § 72-717. Pursuant to Idaho Code § 72-506(2), the Commission is authorized, indeed, required, to approve and confirm a proposed decision before

it can be deemed a final order, decision or award of the Commission. The Findings of Fact and Conclusions of Law proposed by the Referee are recommendations to the Commission which the Commission is free to adopt, or replace with its own findings. *Lorca-Merono v. Yokes Washington Foods, Inc.*, 137 Idaho 446, 50 P.3d 461 (2002). Here, the Commission has reviewed the proposed Findings of Fact and Conclusions of Law authored by Referee Powers, and declines to adopt the same. The Referee concluded that Claimant's personal cell phone use provided some benefit to Employer and that the journey to repair the same was at least partly related to Claimant's employment. Therefore, the Referee concluded that the trip was a special errand undertaken to advance Employer's interests. As explained below, we disagree with the Referee's treatment of this issue. Accordingly, we also find it necessary to address the two other theories advanced by Claimant in support of a finding that the accident is compensable.

ISSUE

The sole issue to be decided in this bifurcated matter is whether or not Claimant suffered an accident causing an injury arising out of and in the course of her employment with KFE on March 20, 2014.

CONTENTIONS OF THE PARTIES

Claimant was injured when she was struck by an automobile while in the crosswalk at Myrtle and 9th Street in Boise while on the way to her car from KFE to have her personal cell phone repaired. While acknowledging that she was not on KFE's premises when her accident occurred and thus subject to the "coming and going" rule, Claimant argues that one or more of the various exceptions to the coming and going rule applies to make her accident compensable.

Defendants counter that none of the exceptions apply and Claimant was on a purely personal errand when her accident occurred. Thus, she did not suffer an accident causing injury that arose out of and in the course of her employment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Boise City Police Officer Scott McMikle, and Claimant's supervisor Mandi Zillner taken at the May 14, 2015 hearing.

2. Claimant's Exhibits A-T admitted at the hearing.

3. Defendants' Exhibits 1-13 admitted at the hearing.

4. The pre-hearing depositions of KFE employees (all taken by Claimant): Denon Fereday and Veronica Leis, on April 7, 2015; Gregory Marchant and Sarah McVey on April 8, 2015; Mandi Zillner on April 9, 2015; and Jamie Spurny on April 13, 2015.

FINDINGS OF FACT

1. Claimant was 43 years of age and residing in Boise at the time of the hearing. As of the date of the subject accident, Claimant was single, and had sole custody of her three children.

2. Claimant began working at KFE as a marketing director about two years before her March 20, 2014 accident. KFE is in the business of promoting and producing music concerts at various venues, both within, and without the State of Idaho, including the Idaho Botanical Garden in Boise. According to its Chief Operating Officer Greg Marchant, KFE is a 24-hour operation that is ". . . a family friendly company and so we understand that sometimes family issues and personal tasks have to happen." (Defendants' Exhibit 10.)

3. The KFE facility is located in downtown Boise in the BoDo District at the northeast corner of 9th Street and Myrtle.[1] Access to the KFE offices is afforded by an entrance located on 9th Street, just steps away from the northeast corner of the intersection of 9th Street and Myrtle. The building can also be accessed from the alley lying between 8th and 9th streets. Most employees access the building via the 9th Street entrance. Parking for the 10 to 11 KFE employees was a problem, and the available solutions were not entirely satisfactory. Employer provided free parking for employees at an unimproved parking lot (the "dirt lot") bounded by Front on the north, Myrtle on the south, 11th Street on the east and 13th Street on the west. This lot was not favored by some KFE employees, including Claimant, because the surface was unpaved, and difficult to negotiate in inclement weather. Ordinarily, the most direct route from the KFE building to the dirt lot would take an employee across 9th Street, along the north side of Myrtle and finally across 11th Street. KFE employees were not required to use the employer-provided parking at the dirt lot. Employees were free to park wherever they desired. Metered parking is available in the vicinity of the KFE building. As well, employees have access to a number of parking garages in the downtown core. Finally, a limited amount of unmetered ("free") on-street and off-street parking is available between Myrtle and the Boise River, bounded roughly by 9th and 11th streets. This free parking was a favored venue for a number of KFE employees, including Claimant. The most direct access to the free parking area from the KFE facility required employees to cross Myrtle, then 9th Street or 9th Street then Myrtle, at the intersection of 9th Street and Myrtle.

4. The parking situation was further complicated by the construction of the JUMP facility in the large block bounded by Front on the north, Myrtle on the south, 11th Street on the

[1] *See* maps attached as Appendix 1 hereto, copied from Claimant's Exhibit T.

west and 9th Street on the east. During construction, the sidewalks along the north side of Myrtle, south side of Front, and west side of 9th Street were closed to pedestrian traffic. There is some difficulty in ascertaining whether, in spite of the aforementioned sidewalk closures, pedestrian access was nevertheless afforded to the northwest corner of 9th Street and Myrtle via the crosswalk across 9th Street, north of Myrtle, and the crosswalk across Myrtle, west of 9th Street. Evidence on this point is somewhat ambiguous, although not ultimately conflicting. Part of the difficulty lies in the fact that what was open and not open to pedestrians in the vicinity of the JUMP construction changed during the construction process. Claimant's testimony suggests that to get to the free parking area she would leave the KFE facility, cross Myrtle and then cross 9th Street. She suggests that because of construction cones and the lack of a sidewalk on the west side of 9th Street and the north side of Myrtle, she would not access the free parking area by first crossing 9th Street and then crossing Myrtle. (Transcript, 112/20-113/9.) However, this testimony is not sufficient to establish that the crosswalks that would allow a pedestrian to access the northwest corner of 9th Street and Myrtle were closed. Mandy Zillner also offered testimony on this point:

> (Ms. Wilson)
> Q. And can you point for us at - - before you'd moved - - before the Knitting Factory moved the parking, what was the main point of entrance and exit to the corporate offices?
>
> (Ms. Zillner)
> A. On the corner of Myrtle and 9th, there's an entrance. The office right there.
>
> Q. And is that where most of the employees would come in and out of the building on their way to and from work each day?
>
> A. Yes.
>
> Q. Okay. And do you know - - and I'm sorry to do this to you - - do you know if there are any barriers or cones that would prevent you from crossing Myrtle on the west side of 9th?

A. Going this direction?

Q. On the west side. So if Jeni was hit in the intersection on the east side - -

A. Yes.

Q. Do you know if there are cones or other barriers that would prevent you from crossing this intersection on that west side?

A. Currently, there are not. I don't know if there were at that time. There have been on and off throughout the construction process. They redid the sidewalk over there at one point, but I don't know when that was.

Q. Okay. So you're not sure what the situation was on March 20th, 2014?

A. No.

Transcript, 208/14-209/17.

Therefore, Ms. Zillner's testimony, too, is insufficient to establish that in the spring of 2014 there was only one way to access the free parking area from the intersection of 9th Street and Myrtle.

5. Officer McMikle, also offered some testimony about the possible ways to negotiate the intersection of 9th Street and Myrtle. He testified that it is possible to cross the intersection from the northeast corner either by crossing Myrtle then 9th Street or by crossing 9th Street then Myrtle. (Transcript, 103/24-102/8.) However, he did not testify during what timeframes it was possible to use both of these routes.

6. We believe that any ambiguity about the routes available to Claimant from the northeast corner of 9th Street and Myrtle at the time of the accident giving rise to this claim is resolved by the testimony of Denon Fereday, Gregory Marchant and Veronica Leis. Exhibit 2 to the Deposition of Fereday is his map of the route taken by Knitting Factory employees in the spring of 2014 to access the dirt parking lot from the KFE building on the northeast corner of 9th Street and Myrtle. At the time of Claimant's accident, Fereday testified that in order to access

the dirt lot it was necessary to cross Myrtle, walk west down the south side of Myrtle, then cross Myrtle and 11th Street to access the dirt lot. Importantly, he acknowledged that there were two routes by which one could get to the southwest corner of 9th Street and Myrtle; one could either cross Myrtle then 9th Street or cross 9th Street then Myrtle. (Fereday Deposition, 38/4-39/16.) Fereday testified that the route he would take depended on which traffic signal first gave him permission to cross from the northeast corner of Myrtle and 9th Street. Veronica Leis also testified that to access the dirt lot in the spring of 2014 it was necessary to somehow reach the south side of Myrtle so that one could walk west towards the dirt lot. She, too, identified two ways across the intersection of 9th Street and Myrtle, just as Denon Fereday. (Leis Deposition, 28/14-32/6.) Finally, reviewing the map prepared by Denon Fereday, Gregory Marchant confirmed that in the spring of 2014, there were two ways to access the southwest corner of 9th Street and Myrtle from the northeast corner. (Marchant Deposition, 39/24-42/11.)

7. From this testimony, we conclude that at the time of Claimant's accident an employee desiring to access the free parking area or the dirt lot by crossing at the intersection of 9th Street and Myrtle had two routes to choose from: the employee could cross 9th Street then Myrtle or the employee could cross Myrtle then 9th Street.

8. The testimony establishes that as between these two routes, the route that first took an employee across Myrtle was somewhat more hazardous. This danger arose from the fact that the two eastmost lanes of south bound traffic on 9th Street had the ability to turn left onto Myrtle at the intersection of 9th Street and Myrtle. On the day of the accident giving rise to this claim, it was Claimant's intention to access the free parking area by first crossing Myrtle, then 9th Street. At the same time that southbound traffic on 9th Street was given the green light to cross the intersection of 9th Street and Myrtle, Claimant was given the signal to cross Myrtle on

the east. Officer McMikle was somewhat critical of this arrangement, noting that at other similar intersections, i.e. those accommodating left-turning traffic, pedestrians are given a bit of a head start to cross the intersection before the left turning traffic gets the green light to proceed. In this case, while Claimant was visible to the driver of the vehicle in the innermost left turn lane, she was not visible to the driver of the vehicle in the outermost left turn lane, owing to the fact that she was obscured by the vehicle in the innermost turn lane. Therefore, as she attempted to negotiate the crosswalk, she was struck by a vehicle in the outermost turn lane and suffered the injuries that give rise to the current action. There was testimony that the peculiarities of this intersection make it more dangerous for those pedestrians who would attempt to negotiate it by crossing Myrtle on the east. (Transcript, 96/9-21; 103/24-104/25; Leis Deposition, 29/13-31/21.) Therefore, we conclude that as respects pedestrians wishing to cross from the northeast corner of 9th Street and Myrtle to the southwest corner, the route across Myrtle, thence across 9th Street was more hazardous than the route across 9th Street, thence across Myrtle.

9. Of course, for those employees wishing to access either the dirt lot or the free parking area, negotiating the intersection of 9th Street and Myrtle was not the exclusive means of accessing those venues. Other (though longer) routes exist to the parking areas in question. For example, an employee desirous of accessing the free parking area by avoiding the intersection of 9th Street and Myrtle could do so by walking east on the north side of Myrtle, crossing Myrtle at 8th Street, thence walking west on the south side of Myrtle to reach the south side of the intersection of Myrtle and 9th Street. This two block detour still allows the pedestrian to access the favored free parking area in a walking distance that is comparable to the ground that must be covered in order to access the dirt lot.

10. The KFE facility, and BoDo in general, is bounded by four multi-lane one-way streets, Myrtle on the south, Front on the north, 9th Street on the west, and Capitol on the east. Parking is limited within BoDo, notwithstanding that there is both metered parking as well as a public parking garage in BoDo. Pedestrians desirous of accessing the BoDo blocks from without the aforementioned boundaries must negotiate one of the many crosswalks affording access to BoDo.

11. On March 20, 2014, Claimant was crossing Myrtle heading south on the east side of 9th Street in the crosswalk at about 10:00 a.m. going from her office at KFE to her car parked in the free parking area; she was on her way to a Verizon store to get her personal cell phone repaired. As she was in the process of crossing, Claimant was struck and seriously injured by a vehicle turning left from the outside left turn lane.

12. Claimant suffered serious injuries as the result of her accident that need not be discussed further herein. As of the time of the hearing, Claimant had not returned to work although she did have a potential job lined up placing exchange students with families.

DISCUSSION AND FURTHER FINDINGS

13. That Claimant suffered an injury on March 20, 2014, is not disputed. The question is whether or not Claimant suffered an accident causing injury that arose out of and in the course of her employment.

14. For an injury to be compensable, it must have been caused by an accident both arising out of and in the course of employment. *See* Idaho Code § 72-102(18). 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, or some task reasonably incidental thereto. *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, Id., at pp. 860, 33.*

15. Generally, when an accident causing injury occurs off the employer's premises, such accident is non-compensable under the "coming and going" rule; that is, a claimant's accident does not arise out of or in the course of his or her employment while coming to or going from work. *See Clark v. Daniel Morine Construction Co.*, 98 Idaho 114, 559, P.2d 293 (1997). The rule is based on the notion that the Idaho Workers' Compensation Act does not protect against the common perils of life, and the dangers of ordinary commuting on public ways are dangers that are common to all who travel.

Special Errand

16. Over the years, the coming and going rule has been qualified by a number of exceptions. Claimant relies on three exceptions to the rule in support of her claim for compensation. The first is the special errand exception described in *Bocock v. State Board of Education,* 55 Idaho 18, 37 P. 2d 232 (1934), as cited in *Pitkin v. Western Construction,* 112 Idaho 506, 508, 733 P. 2d 727, 729 (1987):

> An exception to the aforesaid general rule is found in cases where it is shown that the employee, although not in his regular place of employment, even before or after customary working hours, is doing, is on his way home after performing, or on the way from his home to perform, some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under the direction of, his employer. In such cases, an injury arising enroute [sic] from home to the place where the

> work is performed, or from the place of performance of the work to home, is considered as arising out of and the course of the employment.

17. "The special errand exception is premised on the idea that an employee leaving his normal place of work to perform a special job for an employer is, nevertheless, still performing part of his normal job." *Finhold v. Cresto*, 143 Idhao 894, 898, 155 P.3d 695, 699 (2007).

18. For example, in *Kelly v. Blue Ribbon Linen Supply, Inc.*, 2015 Opinion No. 102 (November 2, 2015), Kelly was injured in an automobile accident while traveling approximately 125 miles one way to attend an IME as requested by her employer; should Kelly have failed to attend the IME, under Idaho Code §72-434, her entitlement to worker's compensation benefits would have been suspended. The Court found that Kelly's trip was analogous to a special errand, because there was a directive from the employer to the employee requiring performance of an act outside of the normal scope of employment, and the necessity of travel was a significant component of that special errand. In *Pitkin v. Western Const.*, 112 Idaho 506, 733 P.2d (1987), Pitkin's employer instructed him to drive a work truck from a remote mining site (Thunder Mountain) to Boise, and return to the mining site at a specific date. While traveling from Boise back to Thunder Mountain, Pitkin apparently fell asleep, collided with a logging truck and suffered substantial injuries requiring hospitalization. Pitkin's accident was found compensable under the special errand exception, because the necessity of travel was a significant component of the task that had been assigned to Claimant.

19. In *Trapp v. Single Volunteer Fire Dep't*, 1991 IIC 0011 (1991), there was no dispute that claimant suffered injuries while in transit to an EMT class, and that the trip to the class was a significant component of the undertaking. The question in *Trapp* was whether

claimant's design upon becoming an EMT was an activity that was reasonably incidental to her employment, such as to bring the trip within the operation of the special errand exception. Noting that there was no Idaho case which fully explored the question of whether, or under what circumstances, injuries sustained en route to training might be said to arise out of and in the course of employment, the Commission applied a five factor test developed in the Arizona case of *Johnson Stewart Mining Co., Inc. v. Industrial Comm'n*, 133 Arizona 424, 427 P.2d 163 (1982), to analyze the claim:

> (1) Did the activity inure to the substantial benefit of the employer? (2) Was the activity engaged in with the permission or at the discretion of the employer? (3) Did the employer knowingly furnish the instrumentalities by which the activity was to be carried out? (4) Could the employee reasonably expect compensation or reimbursement for the activity engaged in? (5) Was the activity primarily for the personal enjoyment of the employee?

20. However, as pointed out by Claimant, the foregoing "factors" must be viewed in light of "reasonableness" as stated by the Commission in its underlying decision in *Trapp*:

> Thus, we deal not so much in mechanical rules but with a series of factors of reasonableness that the Commission must weigh in light of its own expertise. The accident may not occur at the work site, but must be in a place where the worker may reasonably be; it may not occur during scheduled work hours, but must be at a reasonable time; it may not occur while engaged in a worker's precise job description, but it must pertain to some act reasonably incidental to the employee's work; it may not occur while performing work actually ordered by the employer, but must be activity in which the employer acquiesced; [Citation omitted.] It must be so personal that it cannot be said to have arisen out of and in the course of employment.

Trapp, supra at 0011-5.

21. We agree with the parties that the factors identified in *Trapp* provide a useful framework to evaluate whether the purpose of Claimant's trip was such that it can be concluded

that at the time of the accident giving rise to this claim she was in transit to perform a task which she had been hired to perform, or to perform some task reasonably incidental to her employment.

22. The facts of the present case require us to determine whether a sufficient causal connection exists between Claimant's desire to repair her personal cell phone and her employment such that Employer should be liable for the injuries Claimant sustained while performing the errand. Claimant contends hers was a special errand because:

> (a) Claimant used her cell phone for work purposes and a working cell phone inured to the benefit of KFE;
>
> (b) Claimant had her supervisor's permission to go and get her cell phone repaired;
>
> (c) Claimant was traversing the only means of ingress and egress to her office at KFE and to employee parking furnished by KFE;
>
> (d) Even though she was "off the clock" at the time of her accident, Claimant was a salaried employee and was performing work on KFE's behalf and should have been paid for her cell phone;
>
> (e) Claimant did not enjoy or get any satisfaction out of getting her cell phone fixed; it was a simple necessity due to her needing her phone to communicate with her dependent children and to use for business purposes.

23. Claimant also contends that her leaving to get her cell phone fixed was reasonable:

> (a) Her accident occurred in a place where she was reasonably expected to be - - just steps away from her office and on the only reasonable means of ingress and egress to the employee parking lot.
>
> (b) Her accident occurred during regular work hours;
>
> (c) Her errand was reasonably incidental to Claimant's work because she used her phone for work purposes; and
>
> (d) Claimant had express permission from her supervisor to run the errand.

24. Defendants, of course, have a different perspective on the activity that Claimant was performing at the time of her accident. They contend that the special errand rule does not apply to the present case because Claimant was not performing any duty

incidental to her employment at the time of her accident. Claimant's cell phone usage was "overwhelmingly personal," thus; her errand to get it fixed was also personal to her and not to benefit KFE.

25. Our review begins with consideration of the factors outlined in *Trapp v. Sagle Volunteer Fire Dep't.*, 122 Idaho 655, 656, 837 P.2d 781, 782 (1992), in light of reasonableness. First, was Claimant's activity on the morning of March 20, 2014 to the substantial benefit of Employer? The parties vigorously contest this point. KFE asserts that Claimant was not required to use her cell phone for business purposes, even though at times Employer's management was aware that she did. Claimant argues that repairing her cell phone provided a substantial benefit to Employer, because Claimant used her personal cell phone for work purposes and Employer's clients relied on her personal cell phone to contact her.

26. The great thrust of Claimant's testimony at hearing was to enumerate and explain the various ways in which she used her cell phone to conduct her work off site and before and after normal work hours. (Claimant's Deposition, 24/10-25/22; 27/12-28/6; Transcript, 56/9-57/10; 67/15-69/5; 72/11-73/14; 85/14-86/8.) She also testified to infrequent use of her cell phone for work purposes during work hours and while on the KFE premises, even though her workstation was equipped with a landline and a desktop computer. (Transcript, 71/20-72/10.) Claimant's ability to use her cell phone to make work calls and to send/receive work emails was enabled by employer at the time of her hiring. In this regard, Claimant testified:

> Also upon being hired, Greg Marchant, who I mentioned earlier, who is the COO, is also in charge of IT for the company. And he said he could set up my email onto my BlackBerry so that I would be able to access my emails. And so he connected me to the server with my BlackBerry.

Transcript, 67.

27. Claimant included her work and cell phone numbers on her business cards that she provided to her business contacts. Claimant testified that she was "encouraged" to use her personal phone for business. (Claimant's Deposition, 24/10-12.) She also included her work and cell phone numbers on the automatic signature line on her KFE email account so that when she sent an email from her cell phone it would indicate "Sent from my BlackBerry." KFE was aware of these inclusions and no one asked her to remove her cell phone number on her business cards or email account. Due to the large volume of emails to or from Claimant (approximately 68,000 emails over a two year period), KFE did not provide these documents in discovery. (Transcript, 74-75.) While these emails were not available for the Claimant or the Commission to review, Claimant testified that about half or more of these emails were read or sent using her cell phone. (Transcript, 74-75.) Employer responded that while employees can access the company's email service from their phones to check their emails, they are not able to access its server/computer database where the company's documents are stored. (Transcript, 148-149.) Thus, Claimant could not work on substantive tasks from her phone, such as creating a marketing plan (ad pack). (Transcript, 147-148.)

28. Claimant's co-workers testified regarding their experience with the frequency of Claimant's emails, including emails, if any, received after hours. Mandi Zillner remembers receiving emails from Claimant via Claimant's personal cell phone, including some that were sent after regular work hours. (Zillner Deposition, 8/7-13; 42/11-14.) However, Ms. Zillner also testified that she did not recall Claimant frequently responding to emails after the end of the workday. (Zillner Deposition, 79/16-20.) While Mr. Fereday agreed with Ms. Zillner that there was no expectation to respond to email after hours, Mr. Fereday did so in hopes of advancing his career. (Fereday Deposition, 20/25-21/11.) As to work emails with Claimant, Mr. Fereday

acknowledged the possibility that some were exchanged, but he did not believe Claimant did so on a regular basis. (Fereday Deposition, 41/4-13.) Sarah McVey did not personally see email from Claimant when Claimant was away from the office or after hours. (McVey Deposition, 27/15-23.) Veronica Leis could not recall when Claimant sent her emails, as she did not note the time and date on emails she received. (Leis Deposition, 20/20-21/6.) Even though Mr. Marchant set Claimant up to be able to access her email with her cell phone, he testified that it was Claimant's choice to use her cell phone for work purposes and he was unaware of other employees using their cell phones for business purposes unless the phones were provided by KFE.

29. Claimant offered her Verizon personal cell phone records to support her testimony that she used her cell phone for work purposes. The personal phone records, consisting of 1,600+ pages, are as opaque as they are extensive. No effort was made by either party to analyze the phone records to show whether or to what extent, Claimant used her personal cell phone for work purposes versus personal use. The most relevant Exhibits for the Commission's analysis are Exhibits C, E, and F. (Exhibits B and D are "Explanation Forms" for the call and text message reports.) Exhibit C is 116 pages in length, and shows the calls Claimant made and received, the phone number involved, the duration of the call, and the date and time the call occurred. Exhibit E is 1,481 pages long, and shows when Claimant sent and received text messages, along with the number of the sending or receiving party. This exhibit does not reflect text message content. Exhibit F is 87 pages long and shows the charges for Claimant's cell phone usage and the phone calls made, numbers involved, date and time of the call, and the call length in minute increments. Exhibit R contains Claimant's self-identified list of names and phone numbers for "work"

contacts. Claimant acknowledged that some of the "work" contacts in Exhibit R were personal friends (Mike Chavez and Sarah McVey), and that not *all* conversations with people in the dual role of business/personal contact were work-related.

30. The Commission has reviewed these records in an effort to understand Claimant's use of her personal cell phone for the time immediately preceding her accident (January-March 2014), the Commission has reviewed Exhibit C, pp. 0074-0116. Referencing Exhibit R, 44 calls were made by Claimant to, or received by Claimant from, the work contacts she identified. Claimant made or received a total of 1,374 calls during this period. Veronica Leis (10) and Mike Chavez (9) were the most frequent contacts, followed by Mandi Zillner (8), Chris Moore and Sarah McVey (4), Brad Spencer (3), Knitting Factory Corporate Offices (2), and Leif Smith, Greg Marchant, Denon Fereday, Alan Dettman with (1) call each. None of the work calls occurred before 8 am. Twenty-three of the 44 work calls were made during work hours, Twenty-one were made after work hours. Claimant's friends, Mike Chavez (7) and Sarah McVey (4), were the most frequent after work hours contacts.

31. To understand Claimant's text message usage for the time immediately preceding her accident (January-March 2014), the Commission reviewed Exhibit E, pp. 0954-1481. Referencing the work contacts identified in Exhibit R, Claimant's co-workers/personal friends' numbers appear with the greatest frequency: Mike Chavez (796) and Sarah McVey (212). Claimant's supervisor, Mandi Zillner, was found 163 times, and the rest as follows: Veronica Leis, 131; Kaylena Dalessio, 17; Chris Moore, 8; Denon Fereday, 7; Leif Smith, 5; Brad Spencer, 4; Alan Dettman, 3; Greg Marchant, 1. To put this in perspective, there are 17,364 lines for text messages from January 1, 2014 to March

20, 2014. Therefore, for this timeframe Claimant's "work" related texts constitute 7.75% of total text messages.

32. As with the emails, Claimant's coworkers testified regarding their experiences receiving or sending voice calls or text messages with Claimant on her personal cell phone for work purposes. Although the phone data makes no distinction between "work" or "personal" messages, if Claimant's testimony is correct, the Commission would expect to see the greatest frequency of phone calls and text messages between Clamant and the people with whom she directly works, Ms. Zillner, Claimant's supervisor and marketing director, and Denon Fereday, marketing assistant. This is not the case. Ms. Zillner did not think she had frequent communication with Claimant via Claimant's personal cell phone, "possibly monthly" for text messages exchanges related to Claimant's needs, e.g., Claimant was going to be out of the office, Claimant was running late. (Zillner Deposition, 79/16-80/17.) Ms. Zillner could not think of a specific instance where she needed to reach Claimant with a work question after hours, but could "imagine" such a situation. (Zillner Deposition, 55/16-56/1.) Denon Fereday testified he received after hours calls from coworkers, not necessarily Claimant, maybe once a month. (Fereday Deposition, 17/20-25.) Mr. Fereday believed Claimant used her cell phone remotely after hours "a couple of times", but could not speak to Claimant's using her personal cell phone during normal work hours. (Fereday Deposition, 32/20-33/21.) Sarah McVey was very supportive of the proposition that Claimant used her phone for work purposes when there were Botanical Garden shows. (McVey Deposition, 18/23-19/14.) However, as a staff accountant, Ms. McVey did not personally call Claimant during these shows, and her work duties did not usually overlap with Claimant's responsibilities.

Q. Okay, did your job duties overlap at all?

A. Only during the time that Charvel was on maternity leave. She would approve some marketing invoices for me to enter.

. . . .

Q. Okay, and did you ever need to contact her on her cell phone while she was at the Botanical Gardens?

A. I never personally did, no.

McVey Deposition, 27/6-10.

Given that Sarah McVey is a personal friend of Claimant's and did not regularly share job duties with Claimant or even need to reach her during Botanical Garden shows, the Commission concludes that most of her voice calls and text messages exchanged between she and Claimant were personal. Veronica Leis worked as an office manager and contracts administrator during the relevant time period, reporting to Chris Moore and Greg Marchant. (Leis Deposition, 8/24-9/20.) Ms. Leis was hesitant to confirm whether Claimant had used her cell phone for work purposes, because she "[had] not had a conversation with [Claimant] about that. I'm not sure what [Claimant's] requirements were, so I don't really want to answer that question without knowing—having a solid answer for you on that." (Leis Deposition, 19/24-20/15.) Had Ms. Leis and Claimant used their phone calls or text messages for work purposes, her hesitancy on this point would be inexplicable. Rather, Ms. Leis' testimony supports that her own conversations with Claimant were *not* work-related. Jamie Spurny had limited work interactions with Claimant, and only recalled calling Claimant on her personal cell phone in regards to Claimant's FMLA leave when she was out of the office. (Spurny Deposition, 32/12-17.) Greg Marchant testified

that he did not interact with Claimant during a typical work day. (Marchant Deposition, 11/2-9.) The voice and text message records confirm Ms. Spurny and Mr. Marchant's testimony.

33. With nearly 800 of the purported 1,347 "work" text messages and about 20% of the voice calls from the time period of January 1, 2014 to March 20, 2014, Mike Chavez seems an obvious choice to question for purposes of establishing whether or not these communications with Claimant were work-related. However, Mr. Chavez was not deposed. Ms. McVey testified that for reasons unexplained or confirmed, Mr. Chavez was personally uncomfortable testifying for fear of losing his job. (McVey Deposition, 43/16-44/17.) Mr. Chavez was a graphic designer at the time Claimant was employed at the Knitting Factory. Claimant confirmed that she had a personal relationship with Mr. Chavez, spent time with him outside the office for personal reasons, and conceded that not every conversation with Mr. Chavez was work-related. (Transcript, 128/9-15; 171/13-20.) Yet, Claimant declined to quantify how frequently she communicated with Mr. Chavez about personal matters, and did not clearly explain or elaborate on why she needed such frequent voice and text message contact with Mr. Chavez to perform her job duties. (Transcript, 127/9-128/15.)

> (Ms. Wilson)
> Q. And, I guess, as a graphic designer, did Mike Chavez have a reason to call you late in the evening?
>
> (Claimant)
> A. Not necessarily. But I could be proofing something that he had done and contacting him to proof it.

Transcript, 128/16-21.

Claimant's testimony that she "could" be contacting Mr. Chavez after hours for proofing is certainly plausible for email, e.g., Claimant reviews graphics Mr. Chavez sent to her, but less helpful for explaining the voluminous voice and text message records exchanged

between the two. Claimant's coworkers do not corroborate this testimony. Given Claimant's nearly daily contact with Mr. Chavez per the voice and text message records, the Commission would expect Claimant to assert her job responsibilities required almost daily contact with Mr. Chavez to handle work matters if most of those communications were work-related. Based on the facts before us, the Commission is not persuaded that the majority of these communications were work-related.

34. Claimant testified that she was unaware that having KFE pay for her cell phone was an option. Claimant's immediate supervisor testified that she (the supervisor) used her personal cell phone for business purposes for over a year before being reimbursed by KFE.

35. Other KFE employees used their personal cell phones for business purposes. Jamie Spurny, KFE's human resources manager, used her cell phone for business matters before KFE started paying for it for unknown (at least to her) reasons. Denon Fereday, a KFE employee, who assumed a portion of Claimant's duties after she was terminated, testified that he would get an after-hours business call at home on his personal cell phone about once a month. KFE did not pay or reimburse him for his cell phone. He could also access his business emails from his cell phone. Sarah McVey, a staff accountant, also used her personal cell phone to check and send business-related emails outside of her normal work hours. KFE did not pay for or reimburse her for her cell phone. KFE requested that Sarah not use her cell phone for business purposes after Claimant's accident.

36. As Defendants point out, Claimant had her cell phone before she became employed at KFE; she had no land line at home. It is undisputed that Claimant used her cell phone primarily for personal reasons. Some employees used their personal cell phones

for business purposes on occasion; others did not. The fact that some did not is irrelevant to whether Claimant did. While Employer had no expectation that an employee use a personal cell phone for business purposes, there is no written policy to that effect. Further, KFE did not prohibit any employee using his or her cell phone for business purposes.

37. The Referee found that Claimant's use of her cell phone was of "some benefit" to her employer, although how beneficial he found hard to quantify. The Commission agrees with this assessment. Claimant testified that she made frequent use of her cell phone in furtherance of her employer's interests. However, her cell phone and text records fail to corroborate her assertion that her use of her cell phone to make/receive work calls and texts was of "substantial benefit" to Employer. Claimant testified that the primary use she made of her cell phone was to send/review emails sent to her work email address, but there is little else in the record to support this testimony. The testimony of co-workers largely fails to support the assertion that they were in frequent email contact with Claimant before and after work hours. From review of the evidence, the Commission concludes that Claimant's testimony overstates her cell phone use for work purposes. From this evidence we cannot conclude that Claimant's cell phone use was of "substantial benefit" to employer. Therefore, the first element of the *Trapp* test is not met.

38. However, even if it be conceded that Claimant's cell phone use was of substantial benefit to employer, we believe that this fact does not necessarily support a conclusion that the trip in question was undertaken for the purpose of advancing employer's interest. The accident giving rise to this claim occurred at a time and place certain, and we must examine the reasons for <u>that</u> trip to understand whether it was a special errand undertaken on behalf of the employer.

39. Claimant's normal work day was from 9:00 a.m. to 5:30 p.m. Employees were afforded one hour for lunch. If an employee needed to take some time away from work during the work day to attend to a personal errand, that time was usually taken against the lunch hour. In Claimant's case, on the day of the accident in question, she planned to take her lunch hour late in the day, i.e. at 4:30, in order to attend her son's baseball game. In this way, she could attend the baseball game yet owe no time to her employer. Her plans in this regard had been approved by Mandy Zillner, Claimant's immediate supervisor. At the time of her pre-hearing deposition, Claimant testified that prior to arriving at work on the morning of March 20, 2014, she discovered that her cell phone was no longer working. When she arrived at work she described the following conversation with Ms. Zillner:

> (Claimant)
> A. Yes. I arrived to work and informed Mandi of the fact that my phone was not working and asked her if she would like me to go sooner or later. And she said the sooner the better, because I use it for the purposes of work and personal. And she gave me permission leave, and I left a little bit before 10:00.
>
> (Ms. Pfisterer)
> Q. In general, if you were going to leave, would you have to ask for permission?
>
> A. Always.
>
> Q. And did Mandi ask you to get your phone fixed?
>
> A. She gave consent to me because we both agreed that they wouldn't be able to get ahold of me for work purposes. And I was leaving that day early to go to my Son's baseball game and would still have work continuing throughout the day that they would need to be able to contact me. So she said sooner than later would be better.
>
> Q. And why wouldn't she be able to get ahold of you?
>
> A. Because she would be contacting me on a phone that was broken.
>
> Q. How long had your phone been broken?
>
> A. It had just broken that morning.

. . .

Q. And why were you going to leave early that day?

A. I was going to my son's baseball game.

Q. And what time were you planning on leaving?

A. An hour early, essentially.

Q. So around 4:30.

A. 4:00, 4:30. I can't remember the exact time, but it was roughly around that time.

Q. And is that something that you had talked to Mandy about?

A. Yes. And I had even reminded her when we were discussing the phone that I would be leaving early that day. . . .

Claimant's Deposition, 22/2-23/1; 40/17-41/4.

40. Therefore, per Claimant, the trip to the Verizon store took place sooner, i.e. at 10:00 a.m., rather than later because of her expectation that she would have need of her phone to continue to deal with work obligations after leaving for her son's baseball game at 4:00 or 4:30. At the KFE facility Claimant's workspace was equipped with a desktop computer and a landline. What is left unexplained by the above-referenced portions of Claimant's deposition and hearing testimony is why it was necessary for Claimant to obtain repair of her phone at 10:00 a.m., as opposed to 3:30 or 4:00, when she had the means at her desk to send/receive work emails and make work phone calls for the balance of her time in the office that day. We believe that the actual explanation for Claimant's desire to make these repairs sooner rather than later is found in the email communications she had with Ms. Zillner shortly after arriving at work on the morning of March 20.

41. In her pre-hearing deposition testimony, Ms. Zillner confirmed that shortly after arriving at work on the morning of March 20, she learned that Claimant's cell phone had broken. However, Ms. Zillner testified that part of this conversation was conducted face-to-face and part of it was conducted via email:

> (Ms. Wilson)
> Q. Okay; so let's talk about the day Jeni was injured - -
>
> (Ms. Zillner)
> A. Okay.
>
> Q. - - and I think earlier you referred to an email. Do you remember any other communications that you had with Jeni that day?
>
> A. When she first came in, she mentioned that her phone had broken that morning and to the best of my recollection, I think she had said that she may need to leave earlier to fix it on the way to her son's game, and then we started communicating via email from that point.
>
> Q. So before she came in that day, did you know that she would be leaving early to attend her son's baseball game?
>
> A. I don't remember. I think she mentioned it, but she had a schedule of games that we had spoken about earlier, you know, a few weeks or a month prior and I don't know if I - - I don't recall if I knew that day.
>
> Q. Okay, but then at some point she said I'm going to have to leave a little earlier than originally planned, my phone is broken and I'd like to get it fixed?
>
> A. Yes.
>
> Q. Do you remember what time she originally was going to leave the office?
>
> A. 4:45 or 4:30, I believe.
>
> Q. So do you know why a decision was made for Jeni to leave earlier?
>
> A. Only what's in the email. She had stated that she was going to go earlier, I think it says, to try to be quick about it and didn't like being disconnected from her kids.

(Zillner Deposition, 56/9 – 57/16.)

42. As referenced above, Ms. Zillner and Claimant had the following email exchange on the morning of March 20:

> From: Jeni Williams
> Sent: Thursday, March 20, 2014 9:47 AM
> To: Mandi Zillner
> Subject: today
>
> I am going to leave earlier to do my phone...I am going to try and do it as quick as possible...I hate being disconnected from my kids though...
> As it stands, IOU 2 hours from the other day and I may owe you some today.
> Madi is still really sick and so I don't have help for Eli tonight... ☹
>
> Sorry about this...
>
> Do we have any mtgs. With Mark today?
>
> Defendants' Exhibit 3, 2.

Explaining this email, Claimant testified that her purpose for leaving to get her phone fixed was to re-establish her means of staying in contact with her kids, and to be prepared to do some work after hours. (Transcript, 107/4-109/7; 111/2-14.) Claimant's explanation as to why a trip to the Verizon store at 10:00 am on the morning of March 20 served both a business and personal purpose is not convincing. If it be assumed that Claimant intended to conduct work on her cell phone while at the baseball game or later that evening, this does not explain why she chose to repair the phone at 10:00 am as opposed to 3:00 or 3:30 pm, as originally discussed with Ms. Zillner. While an earlier trip might well have advanced Claimant's interest in re-establishing contact with her children, it would not advance her need to conduct work for the balance of her time at the KFE facility, when she had the means at her disposal to undertake this work via the desktop computer and landline on her desk at work. Therefore, we believe that the impetus to undertake the trip at the time she did was to satisfy her designs upon re-establishing contact with her children.

43. The second *Trapp* factor is whether the activity was engaged in with the permission, or at the discretion of the employer. Certainly, Claimant proceeded as she did with the permission of her employer, but there is no evidence that employer asked of Claimant, or expected of her to obtain repair of her cell phone. There is evidence suggesting that if Claimant needed more time to repair her cell phone than the one hour late lunch she was expecting to take to attend her son's baseball game she would have to make this time up with employer. Again, the best evidence is that this trip was initiated by Claimant for the purpose of accommodating her desires to keep in contact with her children during her work day. On balance, the Commission is persuaded that employer did not require or direct Claimant to make the trip to obtain repair of her cell phone. Therefore, the second *Trapp* factor is not satisfied.

44. The third *Trapp* factor is whether the employer knowingly furnished the instrumentalities by which the activity was to be carried out. Claimant does not satisfy this factor. Claimant had her own personal cell phone before her employment began, and was attempting to travel via her private car to have her phone repaired.

45. The fourth *Trapp* factor is whether the employee could reasonably expect compensation or reimbursement for the activity engaged in. Here, Claimant requested the opportunity to run an errand to fix her personal cell phone. Although Employer permitted the errand, Employer did not suggest or require the errand. Claimant understood that she might need to make up the time taken to run the errand. (Transcript, p. 160/3-25.) Claimant has not satisfied the fourth factor.

46. The fifth *Trapp* factor is whether the activity was primarily for the personal enjoyment of the employee. As developed above, Claimant has testified that she left the KFE facility on the morning of March 20, 2014, to repair her phone because she wanted to keep in

contact with her children and because she expected to need her phone for work purposes after hours. As explained above, we conclude that the primary reason for Claimant's decision to repair her phone sooner rather than later was to advance her personal interest in re-establishing her means of staying in touch with her children. The evidence supports the conclusion that Claimant's purpose in initiating the trip on the morning of March 20, 2014, was primarily personal. We recognize that an errand, such as that undertaken by Claimant, can serve both a business and a personal purpose. Such an errand may still be compensable under the dual purpose doctrine, summarized as follows:

> If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work had had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

See Reinstein v. McGregor Land & Livestock, 126 Idaho 156, 879 P.2d 1089 (1994). The *Reinstein* court also noted that so long as the service of the employer was at least a concurrent cause of the trip, it need not be a paramount cause of the trip. As we have found, Claimant's use of her personal cell phone was of some benefit to employer. Therefore, it might well be argued that the Claimant's employment was, at least, a concurrent cause of the errand in question. However, focusing on the timing of the errand, i.e. the fact that it took place in the morning, as opposed to the afternoon, and Claimant's stated reason for leaving when she did, leaves us unpersuaded that Claimant would have cancelled the trip upon failure of the business purpose. Rather, the evidence persuades us that absent a business connection, Claimant would still have requested permission to leave the premises on the morning of March 20, 2014, for the purpose of obtaining repair of her phone.

47. As to reasonableness, Claimant argues that the errand was reasonably incidental to her work duties because she used her cell phone for work. We agree that there is evidence demonstrating some usage of her personal cell phone for work activities, but the Commission is not persuaded that Claimant's work-related cell phone usage makes her trip a reasonable work-related activity. Smart phones are now ubiquitous in the workplace, and employers and employees routinely contact each other using such devices. Like Claimant, many employees forego a landline and rely exclusively on cell phones. No evidence suggests that Claimant's personal cell phone had to be urgently repaired on the morning of March 20, 2014 to conduct any job responsibilities or that the trip came at Employer's request or directive. While it is understandable that Claimant wished to maintain contact with her dependent children, her sporadic use of a personal cell phone for work purposes does not transform any activity connected to the care and maintenance of the personal cell phone into a work-related event. Claimant has not met her burden of demonstrating that her off-premises accident occurred while engaged in a special errand in the service of her employer.

Only Means Of Ingress/Egress

48. Next, Claimant argues that because she was on the most direct route between her workplace and the dirt lot on the morning of March 20, 2014, she was, effectively, employing the only means of egress from her workplace. As developed in *Erickson v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951), it is recognized that where an accident occurs off the employer's premises but while traversing the only means of ingress to or egress from the premises, such accident is generally compensable notwithstanding that it occurs while going to or from work. In *Dutson v. Idaho Power Co.*, 57 Idaho 386, 65 P.2d 720 (1937) claimant was employed by Idaho

Power at a dam project on the Snake River. The only means by which the work site could be accessed was via a road constructed by employer. While traversing this road on his way to work, claimant was involved in an accident which caused his death. Recognizing that the accident would not have happened when and where it did absent the necessity of claimant showing up for the work day, the Court applied the rule to find the accident compensable, notwithstanding that it occurred prior to claimant's arrival at the employer's worksite.

49. In *Vincent v. Montgomery Ward & Co.*, 1993 IIC 1157 (1993) claimant was employed at a store which leased space in the Coeur d'Alene mall. The mall was surrounded on all sides by a parking lot which, on the day of claimant's accident, was ice-covered and slippery. It was recognized that although there were several entranceways by which claimant could have accessed the mall, all required that she traverse the ice-covered parking lot which surrounded the facility "like a moat". Therefore, the only means of accessing the employer's premises required of claimant that she cross a slick parking lot. In so doing she slipped, fell and suffered significant injuries. It was not found to be a defense to the claim that the parking lot was frequented by members of the public for whose use the lot had been constructed. Members of the public were free to decide not to expose themselves to the dangerous conditions extant on the day of claimant's injury. Claimant had no such choice. Since the parking lot afforded claimant her only means of accessing the premises, the exceptions were found to apply and claimant's condition was deemed compensable.

50. We do not find this exception to be applicable to the facts of the instant case. Simply, the route Claimant was traversing at the time of the accident was not the only means of ingress to or egress from Employer's premises. Employer did not require employees to park in the dirt lot. Employer's facility could be accessed via an entrance on 9th Street and via the

alleyway on the east side of the building. While Claimant may have been on one of two equally direct routes to the dirt lot at the time of her accident, other (albeit longer) routes existed, as is readily apparent from a cursory review of Exhibit A hereto.

51. Claimant also essays the argument that like the Coeur d'Alene mall, the BoDo District is an island surrounded by a sea of busy one-way streets, Front on the north, Myrtle on the south, 9th Street on the west and Capitol on the east. Therefore, the only means of accessing BoDo is to cross the moat-like infrastructure of busy one-way streets. We decline to analogize the facts and holding of *Vincent* to the instant matter. To do so would annex every busy street that must be crossed in the downtown Boise to the premises of the many employers whose place of business is in the urban core. We conclude that the accident did not occur while Claimant was employing the only means of egress from the employer's premises.

Special Hazard

52. Finally, Claimant argues that this case falls under a third exception to the going and coming rule known as the special hazard or peculiar risk exception. Under this exception, where travel to and from work involves a special exposure to a hazard or risk peculiarly associated with the employment, an injury which occurs as the result of exposure to that risk is compensable. *Clark v. Daniel Morine Constr. Co.*, 98 Idaho 114, 559 P.2d 293 (1977); *Jaynes v. Potlatch Forrest, Inc.*, 75 Idaho 297, 271 P.2d 1016 (1954); *Diffendaffer v. Clifton*, 91 Idaho 751, 430 P.2d 497 (1967); *Freeman v. Twin Falls Clinic & Hospital*, 135 Idaho 36, 13 P.3d 867 (2000). Claimant argues that for the employees of KFE, the streets surrounding BoDo and the intersection of 9th Street and Myrtle, in particular, posed a special hazard to which the public at large was not exposed. The best explanation for why such risks should be annexed to the workplace is found in *Erickson v. Nez Perce County, supra*. The *Erickson* Court quoted with

approval the following discussion contained in *Larsen v. State Indus. Accident Comm'n*, 135 Oregon 137, 295 P.195 (1931):

> 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. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Therefore, the reason for allowing recovery for injuries occurring off the employer's premises as the result of exposure to some off-premises hazard is that there is a causal connection between the off-premises hazard and the employment, such as to support a conclusion that the employee, by virtue of his employment, had a greater exposure to the hazard than the public at large.

53. *Jaynes v. Potlatch Forest, Inc.*, *supra*, provides a good illustration of the operation of the rule. In that case, claimant was employed as a millwright by Potlatch. Claimant was required to work during the holiday shutdown of the plant. The regular route from Lewiston to the Potlatch facility is on a county road which runs generally east from Lewiston. The plant was accessed by a branch from this road which headed north, and immediately entered a 50 foot wide railroad right-of-way. The northern boundary of the railroad right-of-way was contiguous with employer's property line. Of course, a rail line lay within the railroad right-of-way, and to access the main entrance to the Potlatch facility, employees were required to cross these tracks.

After the road crossed the right-of-way and entered the employer's property, employees had to pass a gate and guard shack maintained by employer. During normal operating hours the guard shack was manned by a guard whose duties included acting as a flagman at a point near the crossing during shift changes. However, at the time of the accident giving rise to the claim, the flagman was not on duty, owing to the holiday shutdown. Although this plant entrance was not the exclusive means for accessing the plant, almost all Potlatch employees, as well as all visitors to the plant, accessed the facility by this route. On the day of the accident, claimant and his son left the Potlatch facility by this normal route after the completion of their shifts. Immediately after leaving Potlatch property, claimant's vehicle was struck by a train while he was attempting to negotiate the crossing, resulting in his death. In ruling that claimant's death occurred as the result of exposure to an off-premises hazard which should nevertheless be annexed to claimant's employment, the Court employed an analysis very similar to that expressed in *Erickson, supra*:

> It will be noted in most jurisdictions an exception to the general rule has extended the principle to embrace an accident as arising out of and in the course of employment when it occurs at a point where the employee is within range of dangers peculiarly associated with the employment. In this respect it is reasoned that such injury can be seen to have followed as a natural incident to the work and as the result of peculiar exposure occasioned by the nature of the employment because the causative danger is peculiar to the employment and not common to the neighborhood. Under this rule it is not intended to nor does it protect an employee against all the hazards, perils and dangers on his journey from home to work and from work back to his home.

Therefore, it must be demonstrated that there is some causal connection between the conditions under which an employee must approach and leave the premises and the occurrence of the injury. The rule recognizes that to be compensable, the employment must result in a peculiar or abnormal exposure to a common peril. However, it is clear that at some point in the continuum, the connection between the employment and the hazard becomes too tenuous to support the requisite finding of causation:

> By the extension of the off-premises rule it is not intended to cover all possible accidents but only instances where there is a very real and special danger – to reach out and cover that danger; hence the reason for such extension is only to encompass, as in this instance, a hazardous railroad crossing, and not to expand the course of employment for every conceivable purpose; such extension is justified beyond the premises in order that it may embrace of necessity off-premises conditions that are worthy to be designated as risks of such employment and as such compensable.

In *Jaynes*, because the main entrance was by far the most regularly traveled way to access the property, because virtually all Potlatch employees were required to cross the railroad tracks in order to access the premises and because Potlatch recognized, and attempted to protect against, the dangers associated with the crossing of the tracks by employing a flagman, the Court determined that the requisite causal connection was satisfied and that the accident caused by the off-premises hazard was compensable.

54. Therefore, the fact that Claimant's route on the day of injury was not the only means of egress from the property is not necessarily fatal to her assertion that the route across Myrtle east of the intersection of Myrtle and 9th Street constituted a special hazard which should be annexed to her employment. All she need demonstrate is that she was on the usual or customary route which resulted in peculiar or abnormal exposure to a common peril. However, while we do not quarrel with Claimant's assertion that the crosswalk on the east side of 9th Street presented a hazard greater than the hazards normally associated with crosswalks, we think it important that Claimant's route was but one of two equally direct routes to the southwest corner of 9th Street and Myrtle. It is also worth remembering that Claimant was not parked in the dirt lot, but instead chose to park in the free parking area south of Myrtle. Had she wished to avoid negotiating the intersection of 9th Street and Myrtle, she could have accessed her preferred parking place by negotiating the intersection of 8th Street and Myrtle. Moreover, unlike the railroad crossing at issue in *Jaynes*, which was negotiated almost exclusively by Potlatch

employees and visitors to the Potlatch facility, the pedestrian traffic negotiating the intersection of 9th Street and Myrtle on a daily basis mainly consists of people other than the 10 or 11 employees of KFE who park in the dirt lot or the free parking area.

55. We believe the facts of this case are more analagous to those before the Commission in *Freeman v. Twin Falls Clinic and Hosp., supra*, than they are to *Jaynes, supra*. Freeman was employed at the Twin Falls Clinic and Hospital as a janitor. Employer provided free parking for employees located approximately one block from the rear entrance to the facility. Employees were not required to park in employer-provided parking areas. A representative of employer told Claimant that she was free to park on public roads adjacent to the facility, noting that cigarette smokers sometimes preferred to park on public streets that were closer to the facility than employer-provided parking, the idea evidently being that it would be easier to slip out for a quick cigarette. Claimant preferred to park on 6th Street, a public right-of-way adjacent to the front entrance to employer's facility. She had parked at this location on the morning of the accident and was injured when her vehicle was struck by the vehicle of a co-worker. In discussing the applicability of the special hazard exception to the going and coming rule, the Commission discussed two cases from other jurisdictions which it found instructive. In *Sokolowski v. Best Western*, 813 P.2d 286 (Alaska 1991) employer required its employees to park other than on employer's premises. Employer was aware of the fact that most employees parked in a privately owned parking lot located across a busy four-lane road from employer's premises. To access employer's premises from this lot, most employees crossed the street by jaywalking rather than walking to a crosswalk some distance away. Claimant was injured while crossing the street when she slipped and fell on its icy surface. Benefits were initially denied under the going and coming rule, reasoning that there was no special hazard since most

Anchorage streets are generally slippery in the winter. The Alaska Supreme Court reversed after applying a three-pronged test: whether the employee was on a usual route to work at the time of the accident, whether her employment was a cause in fact of the injury, and whether the hazard she undertook was quantitatively greater than risks taken by the general public. The Alaska Supreme Court also determined that for the special hazard exception to apply, there must have been no safe, practical alternative available to the employee.

56. The second case discussed by the Commission in *Freeman* is the Colorado case, *Matter of Welham*, 653 P.2d 760 (Colorado Appeals 1982) where a railroad track separated employer's premises from the municipal parking lot favored by most employees. Employee was killed while attempting to negotiate these tracks after leaving the parking area. The Court concluded that the tracks constituted a special hazard on the normal route by which employees use to access employer's premises.

57. In *Freeman*, the Commission found that claimant's decision to park on the street was largely for personal reasons, and that she was not required by her employer to park where she did. Also, the Commission found that claimant did not establish that the on-street parking employed by claimant was on the normal route used by most employees to access employer's premises. The Supreme Court upheld the Commission's determination that on these facts claimant failed to demonstrate that the street hazard to which she was exposed should be annexed to her employment. *See Freeman v. Twin Falls Clinic and Hosp.*, 135 Idaho 36, 13 P.3d 867 (2000).

58. Here, as in *Freeman*, Claimant was not required to park in employer-provided parking. She elected to park elsewhere as a matter of personal convenience, and could have parked in many other areas had she been so inclined. She was on one of the two most direct

routes to her preferred parking area at the time of the accident. Coincidentally, she was also on one of the two most direct routes to the dirt lot when she was injured. Claimant urges us to conclude that *Freeman* is distinguishable from the instant matter because here Claimant was on the "normal", i.e., most direct, route to Employer-provided parking at the time of her accident. We deem it significant that while Claimant was injured while on a direct route to the dirt lot, there were two equally direct routes to the dirt lot, the other of which was the safer of the two. Therefore, this case is not like *Sokolowski* or *Welham*, where there was no evidence of a practical safe alternative to the route taken by the employees in those cases. We also think it important to recall that Claimant was not en route to employer-provided parking at the time she was injured. Rather, her choice of route was entirely dictated by her personal parking preferences.

59. Finally, as noted in *Jaynes*, there is a continuum of off-premises risks to which an employee might be exposed as a consequence of employment. However, at some point along that continuum, a policy decision must be made that the connection between the employment and the risk is too tenuous to burden the employer with the consequences of injury. Claimant had a number of choices when it came to parking, as well as a number of choices about how to access her preferred parking area. While we recognize, of course, that Claimant's accident occurred but a few steps from employer's premises, we decline to apply the special hazard exception to encompass the street risk to which she was exposed as a pedestrian in downtown Boise. However, of the three theories advanced by Claimant, this is the one that seems to us to be the closest. Were the facts but a little different, i.e. had the evidence established that Claimant was on the only direct route between employer's premises and the dirt lot, a different result may have obtained. However, on these facts, we are unwilling to apply the special hazard exception to the going and coming rule.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has not proven that she suffered an accident causing injuries that arose out of and in the course of her employment with KFE.

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

DATED this 1st day of February, 2016.

INDUSTRIAL COMMISSION

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

__/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

J CHARLES HEPWORTH
PO BOX 2582
BOISE ID 83701-2582

EMMA R WILSON
1703 W HILL RD
BOISE ID 83702

__/s/_____

ka