BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JENNIFER L. MUDGE, Claimant, v. GNP OF IDAHO, INC., Employer, and TOWER INSURANCE OF NEW YORK, Surety, Defendants.	**IC 2010-025109** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED 11/14/2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on May 20 and June 9, 2011. Claimant, Jennifer L. Mudge, was present and represented by Richard K. Dredge of Boise. Defendant Employer, GNP of Idaho, Inc., (GNP), and Defendant Surety, Tower Insurance of New York, were represented by R. Daniel Bowen and Scott Wigle of Boise. The parties presented oral and documentary evidence. This matter was then continued for briefing and subsequently came under advisement on July 14, 2011.

ISSUES

The issues to be resolved were narrowed at hearing and further modified by the parties' briefs and include:

1. Whether Claimant suffered an accident causing a knee injury at GNP;

2. Whether Claimant's knee injury arose out of and in the course of her

employment; and

3. Whether Claimant is entitled to an award of attorney fees.

All other issues are reserved.

ARGUMENTS OF THE PARTIES

Claimant argues that she sustained a compensable right knee injury while riding a motorbike from GNP's inventory during her regular work hours, on GNP's premises, with the approval of her immediate supervisor. She requests attorney fees for Defendants' denial of her claim. Defendants question whether her unwitnessed knee injury actually occurred at GNP and further argue that even assuming it did, the injury did not arise out of and in the course of her employment, but was the result of horseplay, because there was no business reason for her to ride the motorbike and she had been expressly forbidden by the general manager to do so.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Carole Carr, and Michael Larsen taken at hearing;

2. Claimant's Exhibits A through C admitted at hearing; and

3. Defendants' Exhibits 1, 2A through E, 3, 6, 7, and 8, admitted at hearing.

After having considered the above evidence and the arguments of the parties, the Referee submits the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Claimant was approximately 33 years old and had lived in Nampa for one year at the time of the hearing. She has never owned a motorcycle and never repaired a motorcycle, although she rode small motorbikes in her teens.

2. At all relevant times, GNP operated a pawnshop in Nampa. The pawnshop

received a variety of items including motor vehicles, electronics, and jewelry. Mike Larsen was the general manager of the pawnshop. He oversaw all store operations, financial arrangements, and managed from seven to ten employees, including five hourly employees and several assistant managers. J.T. Newton worked as an assistant manager at the pawnshop under Larsen's direction in the fall of 2010. Both Larsen and Newton were physically present most of the time at the pawnshop.

3. Claimant started working as a pawn broker for GNP on May 31, 2009. Her duties included serving customers, evaluating items brought in for loan, determining loan value, ensuring items accepted were in working order, properly tagging items received, and general cleaning. She worked approximately 40 hours per week earning $9.00 per hour. Both Larsen and Newton had authority over Claimant; however, Newton was Claimant's direct supervisor.

4. In early September 2010, a small motorbike was received into the pawnshop. Larsen testified that Claimant later expressed an interest in riding the motorbike on at least two occasions. Larsen denied her permission to ride the motorbike. Newton was not aware that Larsen had specifically told Claimant she could not ride the motorbike. Claimant testified she never asked Larsen about riding the motorbike. Claimant testified that she saw Newton and another GNP employee ride the motorbike approximately one week prior to October 5, 2010.

5. On October 5, 2010, Claimant worked at GNP from 10:00 a.m. until 6:00 p.m. At approximately 5:00 p.m., Larsen left the pawnshop for the day, leaving Newton in charge as the assistant manager. Claimant testified that at approximately 5:20 p.m. Newton rode the motorbike around GNP's parking lot. Claimant then asked Newton if she could ride it and Newton consented. Claimant testified that Newton went back inside GNP's facility and she rode the motorbike slowly around GNP's parking lot a couple of times, never getting beyond second

gear. She testified that upon trying to stop the motorbike, the rear brake failed. The front brake engaged, twisting the motorbike to the right and Claimant planted her right foot to try to keep from falling over. She felt immediate right knee pain. She testified that the motorbike went over, but was not damaged. She went back inside the pawnshop and completed her shift, never mentioning the incident to Newton.

6. Claimant testified that her knee became increasingly painful after her shift and started swelling. She returned home and iced it. Overnight her knee swelled significantly and the next morning she telephoned Larsen and advised him she had ridden the motorbike and hurt her knee. Larsen chastised Newton for allowing Claimant to ride the motorbike for fun. The motorbike could have been started for a customer and might have been ridden by a customer or by the manger on duty to demonstrate it for a customer. Larsen acknowledged that Claimant could have been authorized to start the motorbike and demonstrate it for a customer; however, all parties agree that there was no customer interested in the motorbike when Claimant allegedly rode it. She had never ridden a motorbike or motorcycle at GNP prior to the date of her alleged injury.

7. Claimant sought medical attention and was diagnosed with a complete disruption of her right anterior cruciate ligament (ACL). Surgical repair was advised. She attempted to return to work at GNP on crutches but was unable to perform her duties. GNP had no suitable light-duty work available.

8. On October 11, 2010, Surety's adjuster, Carol Carr, received the claim and promptly learned that the general manager had told Claimant on at least two occasions not to ride the motorbike. Carr then recorded Claimant's statement about the incident with her permission. Carr noted inconsistencies between Larsen's statement that he told Claimant not to ride the

motorbike, and Claimant's denial that she ever asked to do so. Claimant also advised Carr that Newton asked her to take the motorbike for a test-ride. However, Newton reported that he did not ask Claimant to ride it, rather she asked him. Claimant told Carr that it was part of her job to make sure the motorbike functioned properly, and she had to ride the motorbike periodically to prevent fuel from deteriorating the fuel lines. This was contrary to Carr's own experience. Newton assured Carr that there was no need to ride the motorbike to keep the fuel lines operating. Significantly, Claimant told Carr that she did not inform Newton of the crash or brake failure. Carr considered this unusual if Newton had asked Claimant to test-ride the motorbike. Larsen acknowledged that he was upset to learn that Newton had told Claimant she could ride the motorbike. Carr consulted with legal counsel and concluded that Claimant's conduct had no business purpose and was likely horseplay. Consequently, Carr denied the claim.

9. Claimant's credibility is weakened by her inherently unreasonable statements to Carr that she test-rode the motorbike at Newton's request, but then failed to notify Newton that the brakes were faulty. Her credibility is also weakened by her logically inconsistent statements to Carr that she rode the motorbike because it had to be ridden periodically to prevent fuel line deterioration, and her testimony at hearing that Newton rode the motorbike just ten minutes before she did.

10. Having observed the witnesses at hearing, and compared their testimony to the other evidence in the record, the Referee finds that Larsen and Carr are more credible witnesses than Claimant.

DISCUSSION AND FURTHER FINDINGS

11. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793

P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

12. **Occurrence of an accident**. The first issue is whether Claimant's right knee injury occurred on October 5, 2010, at GNP as she alleges. It is uncontested that Claimant worked at GNP on October 5, 2010, and that Newton gave her permission to ride the motorbike. However, her alleged motorbike accident was unwitnessed and Defendants note circumstantial evidence calling into question her account of an accident at GNP. Claimant testified that when the rear brake failed, she laid the motorbike over. However, inspection of the motorbike revealed no damage. Claimant did not report her alleged accident or injury to anyone before she left GNP that day. She worked for approximately another half-hour after allegedly sustaining a complete disruption of her right ACL. Her supervisor noted no limp or other signs of discomfort. By the very next day, Claimant was unable to stand or ambulate except on crutches.

13. As already noted, Claimant's credibility is undermined by her assertion that she test-rode the motorbike at Newton's request, but then failed to notify Newton that the brakes were faulty. Her credibility is further weakened by her report that she rode the motorbike to prevent fuel line deterioration while asserting that Newton had ridden it only ten minutes earlier.

14. Claimant's alleged accident was unwitnessed. There is no direct evidence refuting her account. Defendants acknowledge that Newton told Claimant she could ride the motorbike on the day in question, after which she only had approximately 30 minutes left to finish her shift. There is no dispute that Claimant called Larsen the very next morning and reported her knee injury. The medical records affirm that she reported to medical providers that

her knee injury commenced with a motorbike accident at work.

15. The Referee finds that Claimant experienced the accident and right knee injury she described while riding a motorbike at GNP on October 5, 2010.

16. **Horseplay**. The next issue is whether Claimant's accident arose out of and in the course of her employment with GNP. In Dinius v. Loving Care and More, Inc., 133 Idaho 572, 990 P.2d 738 (1999), the Court summarized the standard for such an inquiry:

> The applicable standard for determining whether an employee is entitled to compensation under the Worker's [sic] Compensation Act requires that the injury must have been caused by an accident "arising out of and in the course of any employment." I.C. § 72-102(17)(a). See Kiger v. Idaho Corp., 85 Idaho 424, 380 P.2d 208 (1963); Devlin v. Ennis, 77 Idaho 342, 292 P.2d 469 (1956). The words "out of" have been held to refer to the origin and cause of the accident and the words "in the course of" refer to the time, place, and the circumstances under which the accident occurred. Walker v. Hyde, 43 Idaho 625, 253 P. 1104 (1927). Where there is some doubt whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the worker. Hansen v. Superior Prod. Co., 65 Idaho 457, 146 P.2d 335 (1944). See also 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). Whether an injury arose out of and in the course of employment is a question of fact to be decided by the Commission. Kessler v. Payette County, 129 Idaho 855, 934 P.2d 28 (1997).
> ….
>
> An injury is deemed to be in the course of employment when it takes place while the worker is doing the duty which he is employed to perform. Kiger v. Idaho Corp., 85 Idaho 424, 430, 380 P.2d 208, 210 (1963). The injury is considered to arise out of the employment when a causal connection is found to exist between the circumstances under which the work must be performed and the injury of which the claimant complains. Kessler, supra, 129 Idaho at 855, 934 P.2d at 28.

Dinius, 133 Idaho at 574-575, 990 P.2d at 740-741.

17. An accident involving a worker occurring on the employer's premises is presumed to arise out of and in the course of employment. Foust v. Bird's Eye Division of General Foods Corp., 91 Idaho 418, 422 P.2d 616 (1967). This presumption can be rebutted by

proof that the employee, while on the employer's premises, was engaged in unforeseeable, abnormal activity foreign to his employment.

18. Claimant herein asserts that at the time of her injury she was testing the motorbike at the suggestion or request of her direct supervisor, Newton. Given her inherently unreasonable statements already noted above, the Referee is not persuaded that Claimant had any business purpose to ride the motorbike on October 5, 2010.

19. In Ohlaug v. Valley Wholesale, 1993 IIC 1314, the Commission addressed a horseplay case and noted that Professor Arthur Larson in The Law of Workmen's Compensation (1990), proposed a four-part test to determine whether any particular act of horseplay constitutes such a substantial deviation from the course of employment that it requires denial of compensation. The test included: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (i.e., whether it was commingled with duty or constituted an abandonment of duty); (3) the extent to which the practice of horseplay had become an accepted part of employment; and (4) the extent to which the nature of employment may be expected to include some such horseplay. See also Gates v. Kraft, Inc., 91 IWCD 56 at p. 4231.

20. In the instant case, Claimant's deviation of riding the motorbike around the pawnshop parking lot was minor—a matter of only several minutes—and occurred near closing time when business at the pawnshop was slow. Significantly, the very conduct Claimant engaged in could have been required as one of her employment duties had a customer inquired about the functioning of the motorbike. The deviation was known and authorized by Claimant's immediate supervisor, although not by the general manager. Because demonstrating the motorbike's operation could have been a required duty of her employment, the horseplay in which Claimant engaged was not altogether unexpected. Application of the four-part test

adopted by the Commission in Ohlaug and Gates supports a finding of compensability.

21. More significant to the present inquiry, is the case of Colson v. Steele, 73 Idaho 348, 252 P.2d 1049 (1953). In Colson, the Court addressed the issue of whether a deviation from work duties was within the course and scope of employment. Colson was a member of a surveying crew working in a remote location. Following the crew's usual lunch in the field, the foreman warmed himself by a fire while Colson and another co-worker practiced target shooting with pistols nearby. Colson was injured by a ricocheting bullet. The Court noted that injuries received in play are not usually compensable. However, where the target practice was usual and customary and was known and condoned by the foreman, the Court found Colson's injury compensable declaring:

> In order for the accident to be held to have arisen out of employment, it is not necessary that it arise out of some act directly furthering the work of the employer. It is sufficient if the accident arises out of a risk incidental to the work as customarily conducted.

73 Idaho at 352, 252 P.2d at 1053.

22. In the present case, although Claimant had no business purpose to ride the motorbike, it is undisputed that Claimant's direct supervisor authorized her to do so. It appears that the direct supervisor and another GNP employee had earlier participated in the same diversion. The Referee finds the present case is controlled by Colson v. Steele, and concludes that Claimant has proven that her accident arose out of and in the course of her employment with GNP.

23. **Attorney fees**. Claimant asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 which provides:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee

> without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

24. Although Claimant's accident herein is found to be compensable, the present case posed a very legitimate threshold question of whether her accident and injury occurred at GNP as she claimed. The accident was unwitnessed. The motorbike was entirely undamaged. Her explanation of why she rode the motorbike was inherently unreasonable and entirely unconvincing. In addition, her account that she was never told by the general manager not to ride the motorbike was directly contradicted by his testimony that he twice instructed her not to do so. She did not immediately report her injury and worked the remainder of her shift without complaint or any apparent difficulty after suffering a complete right ACL disruption. On this basis alone Defendants' denial was not unreasonable. Furthermore, legal precedent in horseplay cases in Idaho is limited and the issue of whether Claimant was acting within the course and scope of her employment was open to reasonable dispute. Defendants did not contest the claim unreasonably. Claimant has not proven her entitlement to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven that she suffered a right knee injury due to an accident while employed at GNP.

2. Claimant has proven that her accident arose out of and in the course of her employment at GNP.

3. Claimant has not proven her entitlement to an award of attorney fees.

RECOMMENDATION

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

DATED this 14th day of November, 2011.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2011, 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:

RICHARD K DREDGE
802 W BANNOCK ST STE 101
BOISE ID 83702-5881

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

srn _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JENNIFER L. MUDGE, Claimant, v. GNP OF IDAHO, INC., Employer, and TOWER INSURANCE OF NEW YORK, Surety, Defendants.	)	**IC 2010-025109** **ORDER** FILED 11/14/2011

Pursuant to Idaho Code § 72-717, Referee 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 has proven that she suffered a right knee injury due to an accident while employed at GNP.

2. Claimant has proven that her accident arose out of and in the course of her employment at GNP.

3. Claimant has not proven her entitlement to an award of attorney fees.

4. All other issues are reserved.

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

DATED this 14th day of November, 2011.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2011, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD K DREDGE
802 W BANNOCK ST STE 101
BOISE ID 83702-5881

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

srn _____/s/_____