BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL P. VAWTER, Claimant, v. UNITED PARCEL SERVICES, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2010-000114** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed May 17, 2011

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 September 28, 2010. Claimant was present and represented by Rick D. Kallas of Boise. Susan R. Veltman, also of Boise, represented Employer, United Parcel Services, Inc., and its Surety, Liberty Insurance Corporation. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on January 3, 2011. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether Claimant suffered an injury arising out of his employment;[1]

[1] Defendants concede that Claimant's accident occurred during the course of his employment.

2. Whether Claimant is entitled to total temporary disability (TTD) benefits and the extent thereof;

3. Whether Claimant is entitled to medical benefits and the extent thereof; and

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

CONTENTION OF THE PARTIES

Claimant contends that he injured his low back while bending over to tie his boots at Employer's satellite facility in Cascade. He argues he is entitled to a *Foust* "premises" presumption that his injury arose out of his employment because his accident happened on Employer's premises and Employer has failed to rebut that presumption. Claimant seeks reimbursement for past medical treatment at the invoiced amounts, TTD benefits from the date of his injury until released to return to work by his treating physician, and attorney fees due to Surety's unreasonable denial of his claim without legal or factual support.

Defendants contend that the *Foust* premises presumption is not applicable because Claimant's injury did not occur on Employer's "premises" in that Employer did not own, control, or maintain the property where Claimant was injured. Further, Claimant should have been prepared for work before beginning his duties, including having his boots properly laced and tied. The act of tying his boots was purely personal and occurred as the result of a risk Claimant himself created versus a risk created by his employment. Moreover, Claimant was, at best, a travelling employee who is not afforded the benefit of the *Foust* presumption. Also, Claimant was engaged in no physical activity incidental to his work duties when he bent down to tie his boot laces. Finally, because the primary issue presented herein is an issue of first impression in Idaho, Defendants did not unreasonably deny this claim and attorney fees should not be awarded. Defendants agree that they owe some TTD benefits if this claim is found to be compensable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Employer's business manager Dax Wilkinson, taken at the hearing;

2. Claimant's Exhibits 1-20, admitted at the hearing;

3. Defendants' Exhibits 1-8, admitted at the hearing; and

4. The pre-hearing deposition of Mike McGuire, taken by Claimant and attended by the Referee on September 16, 2010.

FINDINGS OF FACT

1. Claimant was 51 years of age and has resided in the McCall/Donnelly area for 40 years. He is a graduate of McCall/Donnelly High School and has had no further formal education. He is a Marine Corps veteran.

2. At the time of his industrial accident, Claimant had been employed as a package driver for UPS for 26 years. For about 14 of those years, Claimant worked out of Employer's McCall facilities; during the remaining 13 years he worked out of Employer's Cascade satellite facility at Arnold Aviation (AA) located at the Cascade Airport.

3. Claimant reported for work at the AA facility at the Cascade Airport at around 6:20 a.m. on December 18, 2009. The temperature was approximately 20 degrees below zero. Claimant was required to travel from his home to AA in his private vehicle. Once at AA, Claimant placed his gloves and thermos in UPS's familiar brown truck, started the vehicle to let it warm up, then proceeded into the AA facilities where he kept his DIAD computer[2] and other work-related items. Once inside, Claimant clocked in, sat down on a couch and bent over to tie his boot laces when he felt a pop and immediate pain in his low back.

[2] The DIAD hand-held computer needed to be stored overnight inside the building because its batteries would fail if left out in Claimant's delivery truck.

4. As it was the busy Christmas season for UPS, Claimant did not seek medical care until December 28th. At that time, Claimant was diagnosed with a herniated disk and early cauda equina symptoms. He was taken to surgery on January 19, 2010. Unfortunately, the surgery was unsuccessful, and Claimant was again brought to surgery on July 21, 2010 for a recurrent disk and a one level fusion at L4-5.

5. Surety denied Claimant's claim on the ground that his injury did not arise out of his employment.

DISCUSSION AND FURTHER FINDINGS

6. There is no dispute that Claimant suffered an accident and injury on December 18, 2009, as those terms are defined in Idaho Code §§ 72-102(18)(a)(b) and (c), and that the accident causing the injury occurred during the course of Claimant's employment. The question is whether his accident and injury arose **out of** his employment.

The *Foust* presumption

7. Claimant argues that because his accident and injury occurred at Employer's designated workplace, he is entitled to a presumption that his accident and injury arose out of his employment. He cites the Idaho Supreme Court case of *Foust v. Birds Eye Division of General Foods Corp.*, 91 Idaho 418, 422 P.2d 616 (1967). There, the claimant was walking to her vehicle across a large parking lot maintained for employees adjacent to employer's plant when she was struck by a vehicle driven by a co-worker. The Court presumed that the claimant's injury arose in the course of and out of employment because the accident occurred on the employer's premises. "In the case at bar there is nothing to indicate that respondent, while on the employer's premises, was engaged in any abnormal unforeseeable activity foreign to her employment . . . To the contrary, under the circumstances of respondent's employment, her 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." *Id*., at p. 419.

8. Defendants maintain that the *Foust* presumption does not apply here because Claimant was not injured on Employer's "premises." For the following reasons, the Commission disagrees. Claimant was required to report for work at AA and to end his day there and had done so for 12 of his 26 year employment.[3] Employer had an oral agreement to let it occupy the AA facilities to the mutual benefit of both parties.[4] AA flew Employer's packages on occasion to back-country destinations, and UPS would handle deliveries for AA. Employer saved time, money, and mileage by having Claimant use the satellite location in Cascade. Employer further benefitted by the arrangement in having a location to park its truck and transfer trailer and a place to keep the DIAD computer warm on cold winter nights. Claimant and another UPS driver had keys to AA and could use its bathroom, water, heater, etc. Finally, Claimant completed his paperwork, telephoned Employer's McCall office with DIAD information, and clocked out from the Cascade satellite work site, all at Employer's direction.

9. There is no question that Claimant's normal workplace (other than in his truck) was at Arnold's Aviation at the Cascade Airport in Cascade. We find that for purposes of this matter, the subject accident occurred on Employer's premises.

10. Having found that the accident occurred on employer's premises, it is next necessary to consider the nature of the presumption created by that finding. In *Foust,* the fact that the accident occurred on employer's premises was found to create a presumption that the injury arises out of and in the course of the injured worker's employment. See also, *Kessler on*

[3] *See, Colson v. Steele*, 73 Idaho 348, 252 P.2d 1049 (1953) wherein the Court held that an employer's "premises" may be where employee was required to work by employer.

[4] That Claimant was friends with the owners of AA and initially made the arrangement with them to let UPS use its facilities does not alter the fact that UPS eventually entered into a verbal contract with AA and admittedly benefitted from the arrangement.

behalf of Kessler v. Payette County, 129 Idaho 855, 934 P.2d 28(1997). The Kessler Court provided further guidance on the question of the type of proof that must be adduced to overcome the presumption. In this regard, the *Kessler* Court referred to I.R.E. 301, which specifies:

> Presumptions in General in Civil Actions and Proceedings. (a) Effect. In all civil actions and proceedings, when not unless otherwise provided for by statute, by Idaho appellate decisions or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved. If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption.

Therefore, in order to overcome the presumption that the accident is one arising out of and in the course of employment, Defendant must come forward with proof sufficient to permit reasonable minds to conclude that the accident is not one arising out of and in the course of employment. If the opposing party does come forward with such evidence, then the Commission must ascertain whether the facts are sufficient to demonstrate that the accident is one arising out of and in the course of employment without the benefit of the presumption.

11. Finally, one recent case casts some doubt on the continued validity of the *Foust* rule. In *Dinius v. Loving Care and More, Inc.,* 133 Idaho 572, 990 P.2d 738 (1999), Claimant suffered severe lower extremity injuries when a vehicle operated by her boyfriend pinned her to the wall of employer's building as Claimant was taking out the trash. The Industrial Commission made no specific finding concerning whether the accident occurred on employer's premises. However, the Commission ruled that Claimant had failed to meet her burden of proving that her accident was one arising out of and in the course of employment.

12. On appeal, Dinius argued that she was entitled to the *Foust* presumption. Although the Court noted that the Industrial Commission had failed to make a specific finding on the question of whether or not the accident occurred on employer's premises, it offered the following comment on the *Foust* presumption:

> Even so, the mere fact that an injury occurs on the employer's premises is not an exclusive test for compensability, but rather is only one factor to be considered. *In re Malmquist,* 78 Idaho 117, 300 P.2d 820 (1956). To establish that the accident arose out of and in the course of employment, the fact that an injury occurs on the employer's premises must be accompanied by a showing of a causal connection between the conditions existing on the employer's premises and the accident involved. *Nichols v. Godfrey,* 90 Idaho 345, 350, 411 P.2d 763, 765 (1966). *See also Kessler, supra,* 129 Idaho at 860, 934 P.2d at 31.

Foust creates a presumption that an accident occurring on employer's premises arises out of and is in the course of employment. However, from the quoted language, the *Dinius* Court seems to conclude that even if the injured worker demonstrates that the accident occurred on employer's premises, he must also adduce evidence showing a causal connection between the conditions existing on the employer's premises and the accident involved. Arguably, this undermines that portion of the *Foust* rule creating the presumption that an accident occurring on the employer's premises "arises" out of employment.

13. Regardless, we think the question of the current status of the *Foust* presumption is mooted in this case in view of our conclusion that Defendant's have come forward with evidence sufficient to permit reasonable minds to conclude that the subject accident is not one arising out of and in the course of Claimant's employment. Employer has a reasonable expectation that Claimant will prepare himself such that when he arrives at the work site, he is ready to go to work. Such pre-work preparations such as eating and dressing are not ordinarily part of the work that a worker is paid to perform, and therefore, such activities are not in the "course" of employment. That Claimant chooses, for reasons of personal convenience, to perform one of

these preparatory activities at the work place, as opposed to his home, arguably does nothing to bring this activity into the "course" of Claimant's employment, Defendants concession on the course question notwithstanding. Similarly, the risk of injury to which Claimant was evidently exposed is arguably a common risk, with no particular association to Claimant's employment. We therefore conclude that Defendants have overcome the presumption, leaving the Commission to consider whether the evidence supports a finding that Claimant has met his burden of proving the occurrence of an accident arising out of and in the course of employment.

Arising out of and in the course of employment

14. The term "accident" is a term of art under the Idaho Workers' Compensation law, and is defined at I.C. § 72-102(18)(b) as follows:

> "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.

Here, it is clear that the mishap described by Claimant is one that would qualify as an "accident" under the statutory scheme. See *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983); *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2002); *Page v. McCain Foods, Inc.,* 141 Idaho 342, 109 P.3d 1084 (2005). Moreover, there is no dispute that Claimant's injuries are causally related to the accident.

15. The primary issue presented by this case is whether the accident that admittedly occurred satisfies the requirements of I.C. § 72-102(18)(a). That subsection provides:

> "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law.

Therefore, this subsection requires of the injured worker that he demonstrate that the subject accident both "arises" out of the employment and occurs in the "course" of employment. This statutory requirement is couched in terms very similar to the statutory language employed in

many other jurisdictions whose workers' compensation laws are derived from the original British Compensation Act. As Professor Larson has noted, seldom has statutory language endured the scrutiny that has been devoted to the phrase "arising out of and in the course of employment."

16. In Idaho, the seminal case treating what it is the injured worker must prove in this regard is *Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951). Although the Idaho rule did not originate in *Eriksen*, the rule is given its most lucid expression in that case. Quoting from the Oregon case, *Larson v. State Industrial Accident Commission*, 135 Oregon 137, 295 P. 195 (1931), the *Eriksen* court explained what it means for an accident to arise out of and occur in the course of employment as follows:

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

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

17. It is clear that in order to prevail, Claimant must demonstrate <u>both</u> that the

accident arose out of his employment, and that the accident occurred in the course of employment. See *Kessler on behalf of Kessler v. Payette County*, s*upra*. Here, the parties concede that the subject accident is one which occurred in the "course" of employment. (See Def. brief at pp. 19-20). Indeed, from the record it appears that by the time the accident occurred, Claimant had arrived at the worksite, started his truck, punched in, and was waiting for the engine to warm up in the sub-zero temperature before starting his deliveries. Moreover, the particular activity that Claimant was engaged in at the time of his injury (bending over to tie his shoelaces) was an activity reasonably incidental to the work that he had been hired to perform, such as to bring that activity within the "course" of his employment. *See*, *Thompson v. Clear Springs Food, Inc.*, 148 Idaho 697, 228 P. 3d 378 (2010). This conclusion also finds support in the Court's treatment of the "course" issue in *Gage v. Express Personnel*, 135 Idaho 250, 16 P.3d 926 (2000). Gage's assignment, i.e. the task which she had been hired to perform, was to wait at the rail dock until labeling supplies and product were delivered. Smoking was prohibited on employer's premises. While doing as she had been directed, Gage smoked a cigarette, and suffered an injury as she was attempting to extinguish the cigarette which she had inadvertently dropped from the edge of the loading dock. In overruling a Commission decision denying benefits, the Court observed that at the time of her injury, Gage was performing exactly the task she had been directed to perform (waiting for supplies and product), albeit in an unauthorized fashion. This deviation, however, was not found sufficient to justify a denial of benefits. The rationale of Gage applies even more strongly to the facts of the instant matter. At the time of the accident, Claimant was waiting for his vehicle to warm up before beginning his deliveries, an activity that was assuredly part of the work which he had been hired to perform. The fact that he took this opportunity to tie his shoelaces does nothing to undermine the conclusion that at the

time of the accident giving rise to his claim, he was engaged in the work of his employer.

18. Although the "course" issue in this case is evidently not disputed, the fact that the accident occurred in the "course" of Claimant's employment is important to informing the Commission's analysis of whether the accident is, as well, one which "arises" out of Claimant's employment. If it is conceded that the accident occurred while Claimant was performing the work he had been hired to perform, or some task reasonably incidental thereto, it makes it somewhat easier to answer in the affirmative the question of whether a causal connection exists between the conditions under which the work is required to be performed and the resulting injury. However, the *Eriksen* test contains certain language which poses a direct challenge to the conclusion that Claimant's injury was one arising out of his employment. After describing the circumstances which support a finding that an accident does indeed arise out of employment, the *Eriksen* Court set forth a number of factors which augur against a finding that a particular accident arises out of 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 to have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence.

19. It has been observed that as respects an injured worker's employment, risks of injury come in three flavors. See 1-4 *Larson's Workers' Compensation Law* § 4.00; *Mayo v. Safeway Stores, Inc.,* 93 Idaho 161, 457 P.2d 400 (1969). The first group comprises those risks clearly associated with the workplace. Included in this category of risk are injuries caused by things peculiar to the worksite in question, such as equipment, elevated heights, noxious fumes

or chemicals, assaults occurring as a result of a dispute arising out of the performance of a work-related task, etc. Injuries occurring as a result of this type of risk can almost universally be said to arise out of the injured worker's employment.

20. The second category of risk represents those risks entirely personal to the injured worker, and unconnected to his employment. Questions about compensability of accidents occurring as a result of such risks arise mainly because the risk is imported to the workplace. An injured worker who happens to die at work as the result of a disease or other internal process is not entitled to workers' compensation benefits where it is shown that it was entirely fortuitous that the injured worker's death occurred at work. Similarly, a worker who is assaulted at his place of work by a lifelong sworn enemy who finds him there, does not suffer injury because of a work-created risk. Again, the fact that the assault occurred at work is entirely fortuitous since it would also have occurred at any other location where the assailant found the injured worker. Injuries occurring as a result of this type of risk are almost uniformly deemed to be injuries which do not arise out of employment.

21. This brings us to the third category of risk, a category that has particular significance to the facts of this case. This category comprises so-called "neutral" risks. A risk of injury may be deemed "neutral" where, because of the peculiar facts of the case, it is impossible to say whether the risk of injury is personal to the claimant, or, instead, connected to the employment. A classic neutral risk scenario of this type is illustrated by the facts of *Mayo v. Safeway Stores, supra*. In *Mayo*, decedent, a grocery store employee, was killed at his workplace by a co-worker. Before the co-worker could be apprehended, he committed suicide. Because the players were both deceased, there was no way to ascertain whether the employee's death was the end result of a work-related dispute, or, instead, a dispute personal to the decedent and his

assailant, having nothing whatsoever to do with the workplace. Because there was no evidence that could explain the origin of the assault, it was deemed neutral.

The other type of neutral risk case is one where the evidence affirmatively establishes that the risk of injury to which the worker is exposed is neither connected to his employment, nor personal to the worker. Examples of this type of case include injuries caused by stray bullets, tornadoes, acts of God, etc. In such cases, it can be said with some confidence that the risk of injury is neither personal to the injured worker, nor connected to the employment. Therefore, the risk of injury is neutral.

22. In *Mayo v. Safeway Stores*, s*upra*, after having determined that the risk of injury to which claimant was exposed must be considered to be a neutral risk, the court addressed the question of whether or not the decedent's death was nevertheless compensable as an accident arising out of his employment. The court noted that as respects neutral risks, Idaho has joined a growing minority of states that have adopted a positional risk rule which awards compensation for injuries resulting from accidents that are of neutral origin. The rationale for the rule is that when the cause of injury is truly neutral, there is no more reason to assign the loss to the employee than to the employer. Under such circumstances, with the scales evenly balanced, all that is required to tip them in claimant's favor is the recognition that it was the claimant's employment that brought him to the place of injury. As noted, *Mayo* involved an inexplicable assault, as did *Louie v. Bamboo Gardens*, 67 Idaho 469, 185 P.2d 712 (1947), the case in which the rule was first announced. It is unclear whether the *Mayo* court intended the positional risk rule to apply to <u>all</u> neutral risk cases, or merely those involving assaults. However, the decision does contain the following language which appears to paint with a fairly broad brush:

> We do not hold that the positional risk rule is the exclusive test of compensability, but only that when injury results from a neutral cause, a rebuttable presumption

> arises that the injury arose out of employment. The burden is thus shifted to the employer to prove that the injury was caused by a factor personal to the employee.

23. On the other hand, the proposition that the positional risk rule announced *Mayo* was only intended to apply to cases of inexplicable assault finds support in the court's continued adherence to the *Eriksen* language, most recently cited with approval in *Jensen v. City of Pocatello*, s*upra*, in which it was noted:

> [A]n injury which cannot be traced to the worker's employment as a contributing proximate cause and which comes from a hazard to which the worker would have been equally exposed outside of the workplace is not compensable under our workers' compensation system."

24. If the *Mayo* Court intended to apply the positional risk rule to all neutral risk injuries, then it is difficult to explain the *Jensen* Court's support for the *Eriksen* rule which clearly anticipates that neutral risk injuries do not arise out of employment.

25. As respects the instant matter, the first question that might be asked is whether the risk of injury to which Claimant was exposed can fairly be characterized as a neutral risk of the type described in *Mayo, supra*. In answer, it seems clear that the risk to which Claimant was exposed is qualitatively different than the type of neutral risk discussed by Professor Larson and by the Court in *Mayo*. Here, it cannot be said that the risk in question is unconnected to Claimant's employment in the same sense that a tornado would be. Here, the risk of injury in question <u>is</u> connected to the employment because it was encountered by Claimant as result of the Claimant's performance of a task that was either part of his work, or reasonably incidental thereto. To conclude, as we do, that the risk of bending over to tie one's shoe preparatory to beginning the workday is a work-connected risk, is entirely consistent with the proposition that an accident does not arise out of employment unless there is proof of a causal connection between the conditions under which the work must be performed and the resulting injury.

26. Claimant has demonstrated, and no rational person would disagree, that anyone whose job includes the requirement of carrying boxes all day, frequently in a way that obscures his view of the ground immediately in front of him, would do well to keep his shoes tied. It strains credulity to suggest that the action Claimant took preparatory to the start of his shift did not confer a benefit upon Employer by reducing the chances that Claimant would suffer a trip and fall. It strains credulity to suggest that the risk of injury associated with the tying of the shoelaces was not therefore one which followed as a natural incident of the work. Claimant needed to have his shoes tied to perform his work, and the injury that he suffered as a result of performing this task is assuredly connected to his employment. This is not a case where the evidence establishes an absence of a work connection, or where the evidence is such that it cannot be ascertained whether Claimant's injury was occasioned as a result of a risk personal to him versus an employment connected risk.

27. Defendants argue that the risk to which Claimant was exposed is a common risk at best, because he is required to tie his shoes both for work-related purposes and for reasons personal to him. Everyone who wears shoes (except those who wear slip-ons), ties their shoelaces while bending over in some fashion. However true this may be, the fact of the matter is that Claimant suffered this particular injury as the result of his attempts to accommodate the requirements of his job. Because Claimant was necessarily required to tie his shoelaces before starting work, his job clearly created an actual risk which ultimately resulted in Claimant's injury. Suppose, however, that Claimant had suffered the identical injury while tying his shoes at home before leaving for work, as Defendants evidently contend Claimant was required to do. Certainly, to suggest that such an injury is one arising out of and in the course of employment does not pass the smell test, but the reason is not that such an injury does not arise out of an

employment created risk: It does. Rather, such a claim would be non-compensable due to the fact that such an accident is well outside the course of employment. Getting out of the shower, dressing for work, and fixing breakfast, are not activities Employer pays Claimant to perform. Dressing for work is not part of Claimant's job, just as going to and coming from work are typically not treated as part of a worker's job.

28. Although the risk of injury to which Claimant was exposed is not a "neutral" risk in the sense that term is used in *Mayo v. Safeway Stores, supra*, it is a neutral risk in another sense: As Defendants have noted, the risks associated with tying one's shoelaces are trivial. People in all walks of life, including Claimant, are exposed to the same risk every day, quite apart from their employment. Even though we have found that Claimant's employment did, indeed, subject him to an actual risk of injury due to workplace demands which required of him that his shoelaces be tied, the "arising" test explained in *Eriksen v. Nez Perce County, supra*, may still present an obstacle to the claim.

29. As noted, *Eriksen* provides a good deal of guidance on the type of risk that does not arise out of employment. Excluded, are risks which come from a hazard to which the injured worker would have been equally exposed apart from employment. Excluded, are risks which are common to the neighborhood. Excluded, are risks which are independent of the relation of master and servant. *See, Eriksen v. Nez Perce County, supra*. In short, the excluded risks are those described by Professor Larson and by the *Mayo* court as "neutral" risks, as well as risks of the type at issue here, i.e. a demonstrated risk of the injured worker's employment, but a risk to which he is equally exposed apart from his employment. Therefore, under the rule explained in *Eriksen v. Nez Perce County, supra*, neither a "neutral" risk, in the sense described by the court in *Mayo, supra*, nor an "equal" (for lack of a better term) risk in the sense of the facts of the

instant matter, arise out of employment. However, as set forth above, the *Mayo* Court carved out an exception to this rule for neutral risks, specifying that injuries caused by such risks are compensable. A review of the Court's ruling in *Spivey v. Novartis Seed, Inc., supra*, reveals that the Court has extended the holding in *Mayo*, *supra*, to also embrace what we have distinguished here as actual risks created by the employment, albeit risks to which an injured worker might be equally exposed to apart from the employment.

30. In *Spivey,* the claimant was employed as a seed sorter in a bean warehouse. Her job entailed standing before a moving belt and picking the small (pea-size) bits of rock and tare from the line. While so engaged, she felt an abrupt pop and burning in the top of her right shoulder. She was later diagnosed as having suffered a rotator cuff tear caused, or aggravated, by the accident she described. Defendants denied the claim, arguing that the physical activity in which claimant was engaged at the time of her injury was trivial, and that she could just as easily have sustained her injury in performing any number of activities of daily living unassociated with her employment. In essence, defendants argued that claimant's employment did not subject her to any greater risk of injury than she enjoyed apart from her employment. In this regard, defendants relied on the case of *Wells v. Robinson Construction Company*, 52 Idaho 562, 16 P.2d 1059 (1932), which involved the claim of an outdoor construction worker who had the misfortune to be struck by a bolt of lightning. The rule employed by the court in that case to deny benefits to claimant is but a variation of the rule explained in *Eriksen:*

> The facts differ in each case, but the general principle runs through them all that in order for the injury to be compensable there must be a causal connection between the employment and the injury. It must be shown that the workman was more exposed to injury by lightning by reason of his employment than were others, not so engaged, in the same vicinity. That is, if the workman, in pursuit of his duties under his employment, is exposed to a special or peculiar danger from lightning, or the elements—a greater danger than other persons in the same locality are exposed to—and an unexpected death or injury is sustained by

> lightning or the elements, such injury constitutes an accident "arising out of and in the course of" the employment. Conversely, if it is not shown that the workman was exposed by reason of his employment to a danger greater than, or not common to, other in that locality, his accident death or injury by lightning stroke or the elements is not compensable.
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> *Wells v. Robinson Construction Company* , 52 Idaho at 566-567.

Application of the rule explained in *Eriksen* would yield the same outcome.

31. In *Spivey*, defendants urged the Court to apply the rule explained in *Eriksen*, and to rule that claimant could not prevail where it was shown that her employment subjected her to the same risk of injury to which she as exposed apart from her employment. Defendants urged the Court to rule that in order to prevail claimant must demonstrate that her employment exposed her to a risk of injury that was greater than the risk to which she was exposed apart from her employment. Without much fanfare, the Court rejected defendant's argument, relying on *Mayo, supra*, to conclude that Idaho law no longer supports the proposition that claimant must demonstrate that her employment subjects her to a "greater risk" before she can recover benefits. Implicit in the Court's decision is its rejection of the long established rule that where the risk of injury is neutral, or equal, an injured worker will not be able to satisfy the "arising" component of the rule. Therefore, after *Spivey*, it seems clear that where the risk of injury is one to which claimant is equally exposed both in, and without, his employment, the resulting injury is one which will be deemed to arise out of employment. This rule embraces coverage for both neutral and equal risks. However, it is clear that before benefits are payable, it must be demonstrated that claimant actually was exposed to the risk in question in the course of his employment, and that exposure to that risk led to the injury.

32. In summary, we find that the risk of injury at issue in the instant matter is likely not a neutral risk, but, instead, a risk of injury that bears a causal connection to the work that Claimant was hired to perform. However, like a true "neutral" risk, it is a risk of injury to which

Claimant was equally exposed apart from his employment. *Spivey v. Novartis Seed, Inc., supra,* makes it clear that injuries resulting from both types of risks so characterized should be deemed to arise out of the employment. To the extent that the longstanding rule explained in *Eriksen v. Nez Perce County*, s*upra*, is to the contrary, we perceive that rule is overruled by *Spivey*. Quite apart from the question of whether or not Claimant is entitled to a presumption favoring the compensability of this claim, the evidence establishes that Claimant has satisfied his burden of proving the occurrence of an accident both arising out and in the course of employment.

TTD benefits

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery.

33. Claimant contends that he is entitled to an award of TTD benefits from December 28, 2009 until he was declared medically stable on December 6, 2010 following his second surgery. There being no evidence to the contrary, the Commission finds that Claimant is entitled to TTD benefits from December 28, 2009 through December 6, 2010.

Medical benefits

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured worker may do so at the expense of employer.

34. Claimant has incurred medical expenses totaling $149,033.68. *See,* Claimant's Exhibit 7. *Neel v. Western Construction,* 147 Idaho 146, 206 P.3d 852 (2009), is premised on the assumption that an injured worker who contracts for medical care outside the workers' compensation system has, or may have, exposure to pay the full invoiced amount of medical bills

incurred in connection with his treatment. Here, there is no evidence that Claimant is obligated to pay anything other than the full invoiced amount. Therefore, as in *Neel*, we find Claimant is entitled to payment of the full invoiced amount of $149,033.68.

Attorney fees

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglect or refused to pay an injured employee compensation within a reasonable time.

35. Claimant contends he is entitled to an award of attorney fees because the factual evidence in this case establishes a clear causal connection between the safe work environment and safety policies Claimant was required to follow and his act of tying his boots. Likewise, Claimant asserts there is no legal basis for Defendants' denial because the evidence is overwhelming that Claimant's injury occurred on Employer's satellite work premises, and Defendants have produced no evidence to overcome the *Foust* presumption. Further, within days of the denial, Claimant's counsel wrote Surety a five-page letter setting out Claimant's view of the presumption raised, the absence of evidence necessary to rebut the presumption and the liberal construction afforded to claimants in like cases. Surety did not even respond.

36. Defendants argue that Idaho case law is conflicting regarding "arising out of" cases and that there are no Idaho cases regarding shoe tying. Further, Surety asserts that it should not be found liable for attorney fees because it conducted an investigation and secured a legal opinion prior to denying the claim.

37. This is a close case. Because shoe tying is such a commonplace occurrence, at first blush it would seem that such an act could not be related to employment unless changing or selling shoes was one's occupation. There is no bright line in Idaho case law regarding when an

accident arises out of employment and there are no cases involving boot lace tying. More importantly, the scope and reach of the court's decision in *Spivey v. Novartis Seed Inc.*, is a subject of legitimate debate.

38. The Commission finds that Claimant is not entitled to an award of attorney fees for Surety's unreasonably denying his claim.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant suffered an accident arising in the course of and out of his employment causing an injury on December 18, 2009.

2. Claimant is awarded TTD benefits from December 28, 2009 through December 6, 2010.

3. Claimant is awarded medical benefits in the amount of $149,033.68.

4. Claimant is not entitled to an award of attorney fees.

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

DATED this __17th_____ day of ____May_____, 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 ____17th_____ day of _____May_____, 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:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 83712

SUSAN R VELTMAN
PO BOX 2528
BOISE ID 83701

db

_/s/_____
Assistant Commission Secretary