BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JESUS SANTIAGO PEREZ, Claimant, v. NORTHWEST INTERIORS, LLC., Employer, and TECHNOLOGY INSURANCE CO. INC., Surety, Defendants.	**IC 2021-016284** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED JUL 10 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Boise, Idaho, on February 13, 2023. Emma Nowacki represented Claimant at the hearing. Rachael O'Bar represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. No post-hearing depositions were taken. The matter came under advisement on May 16, 2023.

ISSUES

There are two issues for resolution stemming from the bifurcated hearing:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of his employment; and

2. Whether Claimant's claim is barred by Idaho Code § 72-208.

CONTENTIONS OF THE PARTIES

Claimant was injured as the result of a workplace altercation with a co-employee on May 29, 2021. He asserts the incident occurred on work premises during the course of his employment. The assault by his co-employee was "neutral" in terms of Idaho law governing workplace altercations, giving Claimant a rebuttable presumption that the injury arose out of his employment and is thus compensable. The presumption was not rebutted, so Claimant is entitled to benefits for his injuries. Finally, Claimant is not barred from pursuing benefits under Idaho Code § 72-208, as Defendants have failed to prove the willful intention by Claimant to injure another person.

Defendants argue the altercation between Claimant and his co-worker took place after working hours and off the Employer's worksite. The fight was personal to the two employees and did not arise out of and in the course of Claimant's employment. As such, Claimant did not sustain a compensable injury. Furthermore, the claim is barred by Idaho Code § 72-208.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The hearing testimony of Claimant;
2. The hearing testimony of witnesses Randy Bennett, Francisco Cervantes, and Carlos Figueroa; and
3. Joint exhibits (JE) 1 through 11 admitted at hearing.

Objections made during those depositions which were included in the parties' joint exhibits are hereby OVERRULED.

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FINDINGS OF FACT

1. On May 29, 2021, Claimant was an employee of Employer, a construction company. On that date he and several other employees were working at a jobsite in Meridian, performing interior construction work at the newly built DMV building.

2. The DMV building was located in an established shopping center complex with a shared paved parking lot for the various businesses located in the complex. Employer's workers parked in this lot at a location near the DMV building.

3. It appears from the record the area of the public parking lot where the employees parked was not specifically reserved for them, not cordoned off from the remainder of the public parking lot, and not mandated by Employer as a required place to park. However, it was the most convenient place to park as it was adjacent to the worksite. Furthermore, there is a reference in the record that Employer told its employees to confine their parking to this section of the lot so as not to interfere with parking for the other businesses in the complex.

4. The DMV building worksite itself was fenced off with a chain link fence and locking gate restricting ingress/egress. The jobsite was not open to the public.

5. On the day in question the workers were scheduled to work an eight-hour day, but they finished the necessary work early. When their workday ended, the employees gathered up their tools and took them to their vehicles located in the public parking lot adjacent to the worksite. After loading their tools in their vehicles, the employees were free to go. However, most of the employees that day stayed in the parking lot, discussing going to eat or get a beer, or just conversing.

6. There are various estimates on how much time elapsed between when the workers finished working for the day and headed to their vehicles and when the altercation began, but at

some point while Claimant was still in the parking lot he and another employee, Francisco Cervantes, got into a physical altercation, as discussed below. Claimant's estimate of "within 15 minutes" after the workers "began putting their tools away" in their own vehicles is a reasonable estimate based on the various witness accounts, and is accepted herein as the accurate timeframe.

7. Like the time estimates, there is disagreement over exactly how the altercation began, and who was the initial aggressor. Perhaps not surprisingly, both participants claim to be the innocent victim in the fight. Witness accounts likewise are not consistent, but reviewing all accounts can shed light on some commonalities among the various witness recollections.

Claimant's Testimony

8. Claimant testified in a deposition and at hearing. At his deposition, he testified he had put his tools away and was eating an apple and chatting with two co-workers, Sergio Chavez and Oscar Mora, when Mr. Cervantes "came running towards me, *** and yelling at me." Perez Depo. p. 20. Thereafter, according to Claimant, Mr. Cervantes "just started to hit me." Claimant then testified he asked Mr. Cervantes, "why are you hitting me?" Mr. Cervantes supposedly replied, "because of what [you] said." Mr. Cervantes then proceeded to hit Claimant three times in the face/head area. *Id.* at pp. 22, 23.

9. Claimant testified that he tried to defend himself by kicking at Mr. Cervantes, but when he threw the kick, Mr. Cervantes grabbed his foot and Claimant fell backward, striking his elbow on the ground, causing him personal injury. No one seriously tried to stop the fight until Claimant "got all worked up and went to kick him, that's when they stopped us." *Id.* at 25.

10. Claimant was transported to the hospital by Mr. Mora and Mr. Chavez. Carlos Figueroa, another co-worker went along as Claimant's interpreter.

11. Claimant acknowledged in his deposition that there was "kind of a bad thing" between Claimant and Mr. Cervantes. However, the two had not had any verbal interaction that day, as they "just ignored each other" when they would see one another on a jobsite. *Id.* At 22. He was not asked for his thoughts on why Mr. Cervantes initiated the fight that day.

12. At hearing, Claimant testified consistently with his deposition. He had been in the parking lot for about 10 to 15 minutes before Mr. Cervantes came at him that day.

13. Claimant testified that a year or two earlier, the two had a disagreement over some sheetrock material which had fallen on Mr. Cervantes' sweatshirt. Claimant's explanation was not clear but did point to the fact there had been an issue between the two for some time prior to the date of the altercation. Claimant acknowledged that the disagreement "had nothing to do with the job that was being done." Instead, Claimant suggested the conflict was fueled by Mr. Mora, who would act as an instigator, saying things to each about the other, which added to the conflict.

Mr. Cervantes' Testimony

14. Mr. Cervantes also testified in deposition and at the hearing. At his deposition, he testified that after work hours the employees were in the parking lot. One group, including Claimant, Oscar Mora, Sergio Chavez, Carlos Dijar, and Carlos Figueroa, had gathered and were talking about going to have a beer. Mr. Cervantes testified he overheard members of the group talking about him, (saying he was gay and his friends were gay), so he went over to talk to them. He claimed he was not angry and wanted to "go make peace with [Claimant]." Cervantes Depo. p. 11.

15. According to Mr. Cervantes, he asked Claimant "why are you calling me gay? Why are you attacking me? I've already tried in the past to make amends with you. And you are

still continuing to attack me." *Id.* at 13. Supposedly, at that point Claimant threw a punch at Mr. Cervantes while telling him to "shut up."

16. Once the first punch was thrown, Carlos Figueroa pulled Mr. Cervantes back while Oscar Mora pulled on Claimant to separate them. Now separated, Claimant yelled at Mr. Cervantes, and Mr. Figueroa told Mr. Cervantes to go home so the police would not be called.

17. Claimant continued to yell threats, so Mr. Cervantes testified he turned toward Claimant as Claimant kicked at him. Mr. Cervantes blocked the kick with his knee while grabbing Claimant's foot and Claimant fell to the ground. Mr. Cervantes then left at the urging of his co-workers.

18. Mr. Cervantes denied ever hitting Claimant during the altercation.

19. Mr. Cervantes testified the police investigated the incident, but no charges were ever filed against him.

20. At hearing, Mr. Cervantes testified his issue with Claimant was strictly personal and had nothing to do with work. Mr. Cervantes explained that in the past he worked part time at a radio station while working with Claimant in construction. While working at the station, Mr. Cervantes was able to get free concert tickets on occasion. One time Claimant wanted a pair of free tickets, but Mr. Cervantes claimed he was not able to get those tickets. Mr. Cervantes claimed when he told Claimant he could not give him the tickets, Claimant began "bullying" him verbally, calling him gay and suggesting he could sleep with the man who gave Mr. Cervantes his radio job and get more tickets that way. Allegedly, this harassment continued thereafter, so the two were separated as much as possible while at work for Employer.

21. Mr. Cervantes further testified that after work on the day in question, the employees were putting away their tools in their vehicles and talking about going out for a beer. He claimed

other workers encouraged him that day to "make peace" with Claimant so they could all go drink together and work together moving forward. Mr. Cervantes stated "[w]ork was like our second home, so everybody was just wanting us to be at like [sic] a good place together." Tr. p. 38.

22. According to Mr. Cervantes, Claimant was not interested in making peace. Mr. Cervantes claimed he was going to talk to Claimant in front of everyone, so that they could all see Mr. Cervantes was trying to "make it right" with Claimant.

23. Similar to his deposition testimony, Mr. Cervantes testified at hearing that he walked up to Claimant and told him to stop disparaging gays, his mom, and his wife. In response, Claimant allegedly punched Mr. Cervantes, after which Mr. Cervantes pushed Claimant while Claimant kept punching back. After that, the two were separated and cautioned by co-workers that the police might come and everyone just needed to go home.

24. After the two had been separated, Mr. Cervantes claimed he told Claimant he wanted the conflict to be done and over with, but Claimant responded by approaching Mr. Cervantes and kicking out at him. Mr. Cervantes grabbed Claimant's foot, causing Claimant to fall.

Testimony of Witnesses

25. Several eyewitnesses to the altercation gave deposition testimony. Additionally, witnesses Carlos Figueroa and Randy Bennet also testified at hearing.

26. Mr. Figueroa testified at hearing that he was a foreman for Employer and had worked there for eight years. He recalled the job ended early that day and the employees had left the building and had been in the parking lot for between eight and fifteen minutes after work ended when he realized he had forgotten his speakers and a magnet inside the building. Prior to then, he and the other workers had been talking about getting a beer and maybe some

chicken wings. He was heading back into the building to retrieve his speakers and magnet when he heard arguing. When he came out of the building the two were fighting. He saw Mr. Cervantes punching Claimant, and Claimant trying to kick Mr. Cervantes. Mr. Cervantes grabbed Claimant's foot and pulled it upward. Claimant fell. Mr. Figueroa told Mr. Cervantes to stop.

27. Mr. Figueroa testified that Sergio Chavez and Oscar Mora had separated the two fighters prior to Claimant's kicking episode.

28. In his deposition, Mr. Figueroa testified that while at the hospital Claimant asked him to report the fight as being "on site" as a favor to him, but Mr. Figueroa would not, "[b]ecause in reality the fight happened outside in the parking lot. It was outside of the worksite. It was more like a street fight." Figueroa Depo. p. 17. (JE 9) And that is what he told Cory Moseley, the general manager, in his report.

29. Randy Bennett, a foreman for Employer, testified that he was in the bed of his truck putting his tools away when he heard loud talking in Spanish. Looking up, he saw Mr. Cervantes and Claimant arguing and then Claimant raised his hands in a fighting motion. Claimant then kicked at Mr. Cervantes who grabbed Claimant's foot and threw him down. Co-workers then broke up the fight. Mr. Cervantes got in his car and left immediately thereafter.

30. Mr. Bennett testified he did not report the incident because "we were off the clock" when the fight happened. Tr. p. 65.

31. Witnesses Oscar Mora, Sergio Chavez, Raul Hernandez, and Hugo Megallon were also deposed.

32. Oscar Mora testified that he and Carlos Figueroa, Sergio Chavez, and Claimant were in a group talking after work on the day in question. According to Mr. Mora, Mr. Cervantes approached the group and said he wanted to fight Claimant, and then began to do so,

hitting Claimant, with Claimant fighting back. Mr. Mora and the others in the group separated them, but the two "started up again." Mora Depo. p. 10. (JE 7) After the two were again separated, Claimant approached Mr. Cervantes and kicked out at him, striking him in the knee. Mr. Cervantes grabbed Claimant's foot and lifted his leg, throwing Claimant to the ground.

33. Mr. Mora did not fill out any report, because "you fill one out when it happens inside, while you are working, not outside." *Id.* at 13. Mr. Mora did not think the fight was work-related.

34. Sergio Chavez testified that in the parking lot right after work, Mr. Cervantes approached Claimant, who was talking to another employee, and started a fight with Claimant by throwing a punch. Claimant fought back. Mr. Chavez does not recall anyone trying to break up the fight before Claimant threw the kick which was intercepted by Mr. Cervantes, who then lifted Claimant's leg, causing him to fall backward, injuring his elbow.

35. Raul Hernandez testified at deposition. He recalled that after work some employees left right away but he and several others "stayed behind and [were] having a conversation." Hernandez Depo. p. 9 (JE 8) He was not part of any group, but instead was putting away his tools when he heard arguing between Claimant and Mr. Cervantes. He did not pay much attention because he knew they "already had problems amongst themselves." He also knew Mr. Cervantes "wanted to have some beef with [Claimant]." *Id.* at 10. He did not see the fight but did see Claimant on the ground.

36. Hugo Megallon was also working at the DMV worksite for Employer on the day in question. He testified in deposition that while he did not see the start of the fight, he did observe someone separate them. Once separated, Claimant turned and started toward Mr. Cervantes and

tried to kick him. Mr. Cervantes caught Claimant's foot and lifted his leg, causing Claimant to fall backward.

DISCUSSION AND FURTHER FINDINGS.

37. To receive benefits under Idaho's worker's compensation regime, a claimant must establish that he suffered an injury as defined by Idaho Code § 72–102. *Vawter v. United Parcel Serv., Inc.,* 155 Idaho 903, 907, 318 P.3d 893, 897 (2014). "Injury" is defined by that statute to mean "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." I.C. § 72–102(18)(a).

38. To prove the occurrence of a compensable injury, Claimant must satisfy all elements of I.C. § 72–102(18)(a). He must show, by a preponderance of the evidence, that his personal injury (which is not in dispute herein) *arose out of* and *in the course of* his employment. *Cheung v. Wasatch Elec.,* 136 Idaho 895, 897, 42 P.3d 688, 690 (2002); *See also, Kessler v. Payette County,* 129 Idaho 855, 934 P.2d 28 (1997). "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." *Dinius v. Loving Care and More, Inc.,* 133 Idaho 572, 574, 990 P.2d 738, 740 (1999). "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." *Id.* at 575, 990 P.2d at 741. "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." *Id.* "The determination of whether an accident arose out of and

in the course of employment is a factual determination." *Mortimer v. Riviera Apartments,* 122 Idaho 839, 845, 840 P.2d 383, 389 (1992).

39. When dealing with physical altercations at work, the Idaho Supreme Court has divided such assaults into three categories; first, those which are inherently related to the employment, (generally compensable); second, those which are inherently personal or private (generally non-compensable); and third, those for which the cause of the assault can neither be assigned to the employment nor to a personal dispute among the employees, and are labelled "neutral" assaults. *Mayo v. Safeway Stores, Inc.*, 93 Idaho 161, 457 P.2d 400 (1969).

40. In dealing with "neutral" category assaults, the *Mayo* Court adopted the "positional risk" rule, which holds that in instances when "an injury resulting from a *completely unexplained* assault occurs *on the employer's premises,* and *in the course of employment*, a rebuttable presumption arises that the injury arose out of the employment and is compensable." *Id.* at 163-164. (Emphasis added.)

41. Claimant argues for benefits in this case by following his "roadmap to compensation." First, he argues the assault was "neutral" because it was, in his opinion, either personal or related to work, and because the origin is contested, the assault defaults into the "neutral" category. Next, he argues he was both on Employer's premises, and in the course and scope of his employment, when the assault happened. Finally, because the assault was neutral, *and* because at the time of the assault he was on the employer's premises, *and* within the course of his employment, under the positional risk rule he is entitled to a rebuttable (and unrebutted) presumption in favor of compensability.

Fight Category Analysis

42. Claimant argues the fight either took place due to some vague incident from several years previous involving Claimant dropping sheetrock material on Mr. Cervantes' sweatshirt (perhaps a prank, an accident, intentional?) which was never fleshed out, and which was flatly contradicted as the reason for the fight by Mr. Cervantes, who, it appears from the weight of the evidence, initiated the fight, or it was due to completely personal animosity between the two combatants, based on a long-standing string of insults by Claimant toward Mr. Cervantes and his family and friends.[1] Alternately, if Claimant started the fight, which the weight of the evidence does not support, testimony suggests it was most likely due to his personal dislike of Mr. Cervantes, perhaps with lingering anger over not getting concert tickets when he felt Mr. Cervantes could have given him some. Claimant hinted at yet another underlying factor in the fight - Mr. Mora continually talking behind the backs of the two principals in the altercation, riling them up with rumors and gossip. In any case, the fight had nothing to do with the work they were doing, as acknowledged by Claimant. Tr. p. 11.

43. A neutral assault is one for which there is no explanation. Here there are two or possibly three explanations. Simply because there are conflicting explanations does not mean there is no explanation. The Commission is asked in nearly every contested case to determine which explanation between conflicting opinions and observations and testimony carries the most weight. This case is no different.

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[1] Claimant suggested as much when he testified that Mr. Cervantes attacked him "[b]ecause of what I was talking...." Furthermore, even if a sheetrock at work was the initial spark which led to the "bad blood" between the two, that event, even if it was inherently work related (and the record is not developed sufficiently to reach that conclusion), the animosity over time evolved into a personal dislike which culminated in a "street fight."

44. When all the testimony, exhibits, and evidence is considered, the weight of the evidence supports the finding that the fight in question was due to personal animosity between Mr. Cervantes and Claimant and had no connection to work other than it took place shortly after work at a location near the parties' worksite. *Cf. Cahala v. Ok Tire Store*, 112 Idaho 1020, 739 P.2d 319 (1987). (Personal animosity leading to physical altercation not compensable.)

45. Because the fight was inherently personal, Claimant has failed to prove his injury stemmed from an accident arising out of and in the course of his employment.

Positional Risk Rule Analysis

46. Even if one could read *Mayo* to stand for the proposition that when the explanations for an assault are conflicting, the neutral category should be utilized, Claimant must still prove, under the positional risk rule, that he was on Employer's premises, and in the course of his employment before benefitting from a rebuttable presumption in favor of compensation.

Premises Issue

47. Claimant argues he was on Employer's premises when the altercation took place. His sole support for such proposition is 1) the fact that he stated during the hearing that the parking lot "belonged to the office" Tr. p. 10, and 2) the parking lot was in the vicinity of the worksite, which worksite (the DMV building) had been fenced off to keep the public out during construction.

48. While the DMV may or may not have been an "owner" of the parking lot, Claimant did not work for the DMV. He worked for Employer herein. There is no evidence in the record that Employer owned a portion of the parking lot or had rented or somehow arranged for its employees' exclusive use of a portion of the parking lot. The photographic exhibits to the various witness depositions show the lot as being shared by three separate buildings and several businesses, as is typical for "strip mall" type arrangements. There was mention of the fact

the employees were supposed to park in front of the DMV building so as not to interfere with other businesses and their patrons who used the parking lot. That testimony is not sufficient to establish that the fight took place "on the employer's premises" as required by the positional risk rule application as set out in *Mayo*. Claimant cites to no legal authority defining the term "employer's premises" beyond its common usage. No witness (other than Claimant) when asked, testified to a belief that the parking lot was part of the worksite or employer's premises.

49. While it is doubtful the public parking lot where the fight took place was part of Employer's premises, it is unnecessary to resolve that issue herein, for reasons set out below.

Course of Employment Issues

50. After citing to the rule that "worked performed with the purpose of serving or benefiting the employer falls within the course and scope of employment," Cl. Opening Brief, p. 4, (citing to *Gerdon v. Rydalch*, 153 Idaho 237, 280 P.3d 740 (2012)), Claimant first argues he was in the course and scope of his employment when the fight took place because some employees were still putting their tools in their personal vehicles when the altercation began. Apparently, under this theory, Claimant was still within the course and scope of his duties for Employer so long as at least one other employee was still stowing personal tools in that employee's vehicle. This is true in Claimant's argument even when all agree no employee was still "on the clock" for Employer, and the workday had ceased prior to the fight, and one or more employees had left the parking lot.[2]

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[2] Claimant's argument leads one to wonder if the employee(s) who promptly left the parking lot to drive home would be covered during that trip until the last of the employees finished stowing their work gear. One would think that even if Claimant's argument had some validity, it would have to be on a worker-by-worker basis, such that as any particular employee finishes putting his/her gear away, that employee ceases to be in the course and scope of employment. If that is the case, Claimant had already stowed his gear for the day, and thus would not be in the course and scope of employment even under his own theory.

51. It is difficult to see how Claimant chatting with co-workers in the parking lot after work about where to go have a beer is "work performed with the purpose of serving the employer" or falls within Claimant's course and scope of duties. He was hired as a framer.

52. As noted above, the term "course of employment" refers to the time, place and circumstances under which an accidental injury occurs. The term "arising out of employment" refers to the origin or cause of the injury.

53. In this case, the "cause" of Claimant's injured elbow was an altercation which happened after work had ceased, the parties were "off the clock," and were chatting about eating/drinking plans in groups in the parking lot. The "origin" was a simmering personal dispute not connected to the parties' employment.

54. Claimant has not proven he is entitled to a rebuttable presumption in his favor under the positional risk rule.

55. Without the rebuttable presumption of compensability, Claimant has failed to prove he suffered an injury from an accident arising out of and in the course of his employment.

Idaho Code § 72-208 Analysis

56. Finally, Defendants argue Claimant is barred from pursuing benefits by virtue of Idaho Code § 72-208(1), which states that "[n]o compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or to injure another."

57. In the present case, the weight of the conflicting evidence adduced from witness testimony supports the fact that while Mr. Cervantes was the initial aggressor in the physical altercation, he and the Claimant had been separated before Claimant decided to re-engage Mr. Cervantes by attempting to kick him. This intentional action on the Claimant's part was not

defensive, as the weight of the testimony indicates the two fighters had been separated by co-employees when Claimant attempted his kick. There is compelling evidence that the kick did strike Mr. Cervantes' knee, but he stopped it from doing greater damage by catching Claimant's foot before it landed in Mr. Cervantes' midsection. Claimant's injury flowed directly from this kick and Mr. Cervantes' reaction to it.

58. Claimant's injury was proximately caused by his willful intention to injure another, namely his co-worker, Francisco Cervantes.

59. When the totality of the evidence is considered, Claimant is barred from pursuing benefits by virtue of Idaho Code § 72-208(1) for his attempt to intentionally injure his co-worker Francisco Cervantes.

CONCLUSIONS OF LAW

1. When the totality of the evidence is considered, Claimant has failed to prove his injury stemmed from an accident arising out of and in the course of his employment.

2. When the totality of the evidence is considered, Claimant is barred from pursuing benefits by virtue of Idaho Code § 72-208(1) for his attempt to intentionally injure his co-worker Francisco Cervantes.

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RECOMMENDATION

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

DATED this 21st day of June, 2023.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JESUS SANTIAGO PEREZ, Claimant, v. NORTHWEST INTERIORS, LLC., Employer, and TECHNOLOGY INSURANCE CO. INC., Surety, Defendants.	**IC 2021-016284** **ORDER** FILED JUL 10 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. When the totality of the evidence is considered, Claimant has failed to prove his injury stemmed from an accident arising out of and in the course of his employment.

2. When the totality of the evidence is considered, Claimant is barred from pursuing benefits by virtue of Idaho Code § 72-208(1) for his attempt to intentionally injure his co-worker Francisco Cervantes.

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

DATED this the 7th day of July, 2023.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2023, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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