BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK WINDER, Claimant, v. BINGHAM MECHANICAL, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2022-002236** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas A. Donohue who conducted a hearing in Idaho Falls on December 15, 2022. Robert Beck represented Claimant. Scott Hall represented Employer and Surety. The parties presented oral and documentary evidence. Post-hearing briefs submitted. The case came under advisement on May 17, 2023. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Bifurcated Hearing are:

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

2. Whether Claimant was an employee of Employer at the time of the subject accident on September 16, 2021.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered two accidents, one non-work related on September 11, 2021, the other work related on September 16, 2021. The second accident exacerbated injuries received in the first. Among his symptoms is memory loss from a head injury. The second accident

occurred at a place that was on his reasonable route between home and the job site. He was within the area for which he could receive per diem pay from Employer. Claimant was continually an employee of Employer for all relevant dates. The mere fact of a personal deviation in which illegal activity occurred does not remove him from coverage as a travelling employee.

Defendants contend Claimant, admittedly a travelling employee, with a home near Idaho Falls and a jobsite near Caldwell, made an extreme deviation, for entirely personal reasons, by traveling to Salt Lake City during off work hours. The September 16, 2021, accident occurred in route from Salt Lake City to Caldwell. Thus, the accident did not arise from his employment. The accident occurred outside the course and scope of his employment. The "coming and going rule" prohibits benefits for travel to and from the workplace. An exception is made for traveling employees where off-hours incidental personal needs are reasonably related to the circumstances of the job or to job site location. However, an exception to traveling employee extended coverage prohibits coverage for distinct departures for personal business which do not incidentally relate to work. Here, Claimant's departure was so extreme as to fall clearly outside the coverage afforded a traveling employee. His travel to and from Salt Lake City bore no dual purpose but was wholly outside anything arising from or in the course of his employment. Moreover, Claimant was knowingly factually inaccurate in testimony.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of
   Claimant,
   Angel Adams (his significant other),
   Jeff "Beards" Scott (Claimant's supervisor on the Caldwell job),
   Rocky Huitt (Claimant's supervisor on the next job),
   MyLinda Neddo (Employer's HR representative); and

2. Joint Exhibits 1 through 21 were proposed. After objections, the admission of certain exhibits was reserved to lay a proper foundation for admission. Ultimately, Defendants withdrew proposed Exhibit 19. Exhibits 1 through 18 and 20 and 21 are admitted;

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

(As set forth later herein, Claimant is not a credible witness. Throughout these findings and conclusions, statements which find Claimant testified about something do not suggest a finding of fact that it occurred.)

Introduction and Accident

1. About 5:30 a.m. on September 16, 2021, Claimant was westbound on I-84 near the weigh station East of the Blacks Creek exit, I-84 Exit 64, when he rolled his car (the "September 16 accident"). Because the freeway from Mountain Home to Boise actually runs Southeast to Northwest the record occasionally refers to Claimant's direction as "North." He was travelling to work at a hospital construction or remodel job in Caldwell. He was expected to start his workday at 6:00 a.m.

2. The First Report of Injury shows Claimant told Employer he was coming from his home in Idaho Falls when the September 16 accident occurred.

3. The police report of the September 16 accident shows Claimant told the citing officer that he was coming from Ammon. (For all relevant purposes herein, Ammon and Idaho Falls are used interchangeably.) The officer noted "no visible injuries."

4. For this job Employer considered Claimant a travelling employee. Claimant was paid a premium wage as well as a per diem. He was allowed to keep the full per diem regardless of actual expenses. He was also paid for travel at the start of each workweek from home to the job

site. Claimant was expected to work four 10-hour days. Generally, each week he would travel from his home in Ammon to Caldwell, work four days, then travel back home.

5. On September 11, 2021, on his days off prior to the week of the September 16 accident, Claimant was injured in a traffic accident in Idaho Falls (the "September 11 accident"). His vehicle was struck on the passenger side by another vehicle. The air bag deployed. Claimant testified he hit his head in this crash. He testified that his head put a dent in the door. He testified that his head swelled, and vision blurred. At hearing he both claimed and denied experiencing headaches in the time between the accidents. No party claims the September 11 accident was compensable under Idaho Workers' Compensation Law.

6. Damage to his vehicle prevented Claimant from travelling to begin the week's work on Monday, September 13. He testified that he got his other car out of storage and drove it to work Tuesday. He worked Tuesday and Wednesday and was scheduled to work Thursday.

7. After work on Wednesday Claimant drove his vehicle to locations South of Salt Lake City (the "trip"). He repeatedly testified that his reason for this trip was entirely personal. He repeatedly gave false reasons for this trip. The trip to and from Salt Lake City encompassed the entire night. Claimant testified that he fell asleep at the wheel. The September 16 accident was a one-car rollover accident. In deposition and at hearing, even when he was maintaining the fiction that he went to Idaho Falls instead of Salt Lake City, Claimant has consistently testified that the reason for taking the trip through the night on September 15 and 16 was wholly personal and completely unrelated to his work for Employer.

8. Claimant ultimately admitted at hearing that the purpose of the trip was to obtain cocaine. The record is silent about how much cocaine he obtained or why it was not found in the

vehicle after the September 16 accident.

9. On Tuesday night, September 14, Claimant stayed at a motel in Ontario, Oregon. Employer reimbursed Claimant according to its per diem policy. Claimant paid for lodging there for Wednesday night, September 15, but did not actually stay there. He later sought a refund from the Ontario motel for that night.

10. The police report shows an officer was dispatched to the site of the September 16 accident at 5:31 a.m. Logged data for Claimant's phone shows no phone usage between 11:17 p.m. September 15 and 5:55 a.m. September 16. The next four minutes show a flurry of attempted calls. The record is silent about what happened between 5:31 and 5:55 that morning.

11. On September 16 Claimant's supervisor, Jeff Scott, arrived at the crash site and transported Claimant to the job site. Claimant declined medical care and worked 8.75 hours that day. Employer's timecard app requires particular information at the end of each workday. In the end-of-day input for September 16 Claimant recorded that he was not injured on the job that day.

12. After the September 16 accident Claimant worked at the Caldwell hospital site for two more weeks before the project completed. Claimant then worked at a job site located at BYU-Idaho in Rexburg. Claimant last worked for Employer on October 11, 2021.

13. Claimant testified in deposition that he has never received medical treatment for injuries sustained in a car accident.

DISCUSSION AND FURTHER FINDINGS OF FACT

14. 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).

15. 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). A claimant must prove all essential facts by a preponderance of the evidence. *Evans v. Hara's, Inc.*, 123 Idaho 472, 89 P.2d 934 (1993).

Credibility

16. Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

17. Claimant was not impressive as a factual witness. He offered casual speculation and overt exaggeration as if it were fact. He offered vague and misleading testimony until more focused questions showed the testimony to be untenable. For example, in deposition he testified that he went to Idaho Falls that evening and did not mention Salt Lake City. At hearing, after being shown records establishing that he had been in the Salt Lake City area, he changed that story. To explain the trip, he first identified a "buddy" and used the term "he" before admitting *she* was named Rosanna. The false pronoun suggests intent to mislead. It matters. Rosanna was involved in the cocaine purchase to which he ultimately testified as the reason for going to Salt Lake City. Additionally, Ms. Adams, the woman he lived with in Ammon, appeared as a witness at hearing and testified that she did not know about the trip or the cocaine for months afterward. Claimant further testified to false reasons for his trip, and only after closer questioning did he admit that it

was for cocaine. First, he testified that he just went to visit; then he testified that he went to pick up some personal belongings from Rosanna; then he testified that he went to obtain from her a title to a vehicle; ultimately, he testified that she provided assistance in obtaining cocaine. Incidentally, he later at hearing testified that he had obtained that vehicle title from his daughter two days before the Salt Lake City trip and admitted he had testified falsely. He repeatedly made factually inaccurate statements under oath in deposition and at hearing. Even a point as peripheral as whether he or a son-in-law owned the car he drove at the time of the September 16 accident required a change in his testimony after being confronted with ownership documentation.

18. Moreover, he claimed some of his false statements were the product of a brain injury suffered in the accident. This claim is not credible. Claimant's demeanor at hearing was entirely consistent with an individual who was knowingly misleading the Commission and only confessed to other facts materially inconsistent with prior testimony after close questioning. Further, Claimant's deposition testimony showed very good memory as he recounted his work experience. It showed good memory as he described other events in his life. This makes the faulty memory claim less likely. Even if his false testimony could be attributable to memory loss as a symptom of brain injury, the false statements are material. They occur so frequently that his testimony could not be afforded significant weight. Claimant is unconvincing in his assertions that false statements given under oath arise from a head injury occurring at the time of the September 16 accident or as an exacerbation of a head injury occurring at the time of the September 11 accident. Ms. Adams' generalized corroboration that she has noticed memory loss in Claimant does not establish a sufficient excuse for Claimant's many expressions of false testimony.

19. Claimant gave inaccurate oral and written reports to a law enforcement officer who

responded to the September 16 accident.

20. Claimant testified in deposition in May 2022 that he had not used any illegal drugs for "over three years." Ms. Adams testified at hearing that they had consumed marijuana together in Idaho on more than one occasion within the last two years.

21. Claimant failed or refused to respond fully to discovery requests. He produced some text messages but not others expressly requested. Ultimately Defendants had to resort to subpoena to obtain this information from Claimant's phone provider. When the phone provider balked at the subpoena, this Referee issued an Order compelling—under threat of contempt sanctions—the provider's compliance with the subpoena before such information was forthcoming. Only after receipt of this information could it be determined by credit or debit card usage and by cell tower geography that Claimant went to Salt Lake City and not to Idaho Falls as he had repeatedly testified. Claimant's testimony that he provided "everything" requested which was available in his phone storage appears unlikely. His representations that some information was available and some not are illogical and inconsistent with information he actually provided. His explanation for why some information was available and some not is illogical and inconsistent. Were his explanation true, none of the information would likely have been available.

22. Claimant's demeanor at multiple times during the hearing was indicative of a person who was deliberately attempting to mislead the Commission. Both substantively and by his demeanor Claimant is not a credible witness.

Arising out of and Course and Scope Issues as a Travelling Employee

23. To the extent relevant to this discussion, and accident requires an injury to be compensable under Idaho Workers' Compensation Law. "Injury" requires "an accident arising

out of and in the course of any employment." Idaho Code § 72-102(18)(a); *Atkinson v. 2M Company, Inc.*, 164 Idaho 577, 434 P.3d 181 (2019)(new bright-line rule: company car use arises out of and in the course of employment). *Also see, Basin Land Irrigation Co. v. Hat Butte Canal Co.,* 114 Idaho 121, 754 P.2d 434 (1988)(Basin claimed exclusive jurisdiction of work comp act; thus had burden to prove the issue); Generally, travel to and from work is not covered; this "coming and going rule" is a longstanding parameter for compensability. *Clark v. Daniel Morine Construction, Co.,* 98 Idaho 114, 559 P.2d 293 (1977). A travelling employee is afforded greater coverage for some incidental events while travelling. *Ridgway v. Combined Insurance Companies of America*, 98 Idaho 410, 565 P.2d 1367 (1977). This expanded coverage includes an exception to the coming and going rule for such incidental events made necessary by the fact of traveling. *Cheung v. Wasatch Electric*, 136 Idaho 895, 42 P.3d 688 (2002)(stopping by side of road to put on sunglasses.) Where an employer instructs a traveling employee to use interstate highways and the employee deviates by using back roads which he deems quicker, this minor deviation does not preclude expanded coverage. *Gerdon v. Rydalch*, 153 Idaho 237, 280 P.3d 740 (2012). Where an employee also has personal reasons for performing work arising from and in the course of employment he remains, the personal reasons do not negate the nature of the work performed. *Id.* However, where a traveling employee makes a distinct departure from work and/or such incidental events related to the nature being a travelling employee, where the departure is wholly personal, the distinct departure does not arise from nor occur in the course of employment. *Ridgway, supra.* The Idaho Supreme Court provided this restatement:

> When an employee's work requires the employee to travel away from the employer's place of business or the employee's normal place of work, the employee will be held to be within the course and scope of employment continuously during the trip, except when a distinct departure for personal business occurs.

Andrews v. Les Bois Masonry, Inc., 127 Idaho 65, 67, 896 P.2d 973 (1995)(Not a traveling employee despite working in Wenatchee instead of the usual Treasure Valley).

24. A trip, partly related to work and partly personal, constitutes a distinct departure—a deviation from the business purposes of the trip—where alcohol was involved. *Morgan v. Columbia Helicopters Inc.*, 118 Idaho 347, 796 P.2d 1020 (1990)(Claimant, driving on the most direct route home, stopped for several drinks and crashed).

25. In *Morgan*, the claimant's travel was for the purpose of inquiring of a mechanic about repairs to a company vehicle. But in this case, Claimant's travel was for the purpose of obtaining cocaine. *A fortiori*, *Morgan* applies to show this Claimant's deviation from any business purpose related to Employer was extreme; it began when he headed eastward from Caldwell for the purpose of obtaining cocaine and continued through the September 16 accident itself.

26. Claimant suggests in briefing that if the facts had been different, if the extent of the deviation had been less or if the nature of the illegal activity had been different, Claimant would likely be found entitled to benefits under Idaho Workers Compensation Law. However, the facts are what they are. Claimant lied about them repeatedly until he confessed on the witness stand. It is unproductive to speculate about whether a different set of facts may or may not produce a different result.

27. Claimant exaggerates the importance of the location of the September 16 accident. While it is true that it occurred on the likely route Claimant would have taken had he been driving from home to the job site, he was not driving from home to the job site. Moreover, the motel Claimant had booked both the night before and for that night was West of Caldwell, not 30 miles East. His drive to work from that Ontario, Oregon motel stretched just over 30 miles, not the more

than 700 miles he drove that night. This is distinct from taking a back road on a route because it is quicker. *c.f. Gerdon, supra.*

28. The map data included at Exhibit 18 shows the most eastward reasonable freeway exit leading to the job site would have been nearest the Caldwell Flying J truck stop. The Referee takes judicial notice that this is I-84 Exit 29. So, taking judicial notice of how Idaho freeway exits are numbered, the distance from the Oregon state line to the truck stop is about 29 miles; the distance from I-84 Exit 64 and Exit 29 is about 35 miles. However, neither these comparative distances nor whether the location of the September 16 accident was in line with some other starting locations are salient points.

29. The salient points are that the distance from the motel to the job site represents substantially the entire route of Claimant's reasonable travel to work that morning. If used as intended by Employer, Claimant had opportunity to obtain rest at the motel. Employer had provided per diem for nearby motel stays—and specifically for this motel's charge on the night previous to the trip—so that employees could arrive at work rested. Employer had a reasonable business purpose, indeed, an expectation, that Claimant would arrive at the job site rested and ready to work. But for the distinct deviation involving more than 700 miles Claimant would not likely have been so tired that he crashed. A salient point is that the location of Claimant's September 16 accident does not provide evidence that he was on a reasonable route to work. Geographically, the September 16 accident occurred where and while Claimant was still on a leg of a trip which entirely personal in nature and was so far out of any connection to work that it cannot reasonably be excused in fact or law.

30. Further, Claimant has not shown evidence that the Salt Lake City trip—or any part

of it—arose from or was in the course of employment. Employer did not authorize it; Employer did not know about it; Claimant hid the purpose of it from everyone until he dramatically confessed at hearing. *Arguendo*, consider whether a drive by Claimant of 700 miles to visit a restaurant would be analogous. Reasonable travel for a meal while a traveling employee is compensable according to dicta in several cases cited above. One finds it unthinkable that travel of 700 miles to a restaurant could be found reasonable. Similarly, it is unthinkable that this lengthy overnight trip could be found reasonable, absent a special errand or some other theory for extending coverage not argued here by Claimant.

31. Claimant's briefs offer not a single supporting statute or case law citation. Rather, Claimant argues the law is irrelevant and that the facts are irrelevant, except that he wrecked on a route he would have travelled if he had been coming from his home near Idaho Falls.

32. Even Claimant's brief includes proviso that compensability has a prerequisite, "once we recognize that the claimant has never attempted to mislead anyone …" This prerequisite is not found. Indeed, its contrary has expressly been found many times over in the record.

33. Claimant's brief includes a second proviso that compensability has a prerequisite, that Claimant "never … took a major detour from his work to engage in personal activities." Here, the detour was more than "major;" it was extreme. The case law merely requires the detour be "distinct."

34. Finally, Claimant's brief repeatedly suggests that but for the accident Claimant would have arrived at work on time. He suggests that this is the most salient factor by which Employer might define reasonableness of the departure arising from the trip. At hearing even Claimant admitted "it would be close" whether he would have been on time. Given the time Idaho

State Police was dispatched to the accident scene and the distance to the best freeway exit, let alone the drive through Caldwell to the hospital, Claimant's wished-for timeliness is questionable and was questioned at hearing. However, Claimant's entire suggestion constitutes a red herring. First, Employer identified its expectation that arriving to work rested was important and that this consideration was a reason for providing a motel per diem. No part of Claimant's trip could allow him to arrive at the job site rested and ready to work on the morning of September 16. Second, the Court has chosen not to opine on whether on-time arrival is even a benefit to an employer to be considered in cases like these. *See, Atkinson, supra, at p.582.*

35. This is not a close case. Claimant's wholly personal, extreme deviation, measured in both distance and purpose, shows the September 16 accident did not arise from nor in the course of employment.

36. The second noticed issue is wholly subsumed by the analysis above. Though employed by Employer on September 16, that accident occurred far outside any reasonable potential linkage to work or to the employer/employee relationship.

CONCLUSIONS

1. Claimant failed to show the September 16 accident compensably occurred arising from or in the course of employment.

2. This matter should be dismissed with prejudice.

RECOMMENDATION

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

DATED this 26th day of July 2023.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August 2023, a true and correct copy of the **FINDINGS OF FACTS, CONCLUSIONS OF LAW AND RECOMMENDATIONS** was served by regular United States Mail and Electronic Mail upon the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK WINDER, Claimant, v. BINGHAM MECHANICAL INC, Employer, And IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2022-002236** **ORDER**

Pursuant to Idaho Code § 72-717, Referee Doug Donohue 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 failed to show the September 16 accident compensably occurred arising from or in the course of employment.

2. This matter should be dismissed with prejudice.

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

DATED this 4th day of August, 2023.

INDUSTRIAL COMMISSION

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 4th day of August, 2023, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

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