BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUSTY HENDERSHOTT, Claimant, v. NO LIMITS CONSTRUCTION, Employer, and ACUITY, A MUTUAL INSURANCE COMPANY, Surety, Defendants.	**IC 2023-002027** **FINDINGS OF FACT, CONCLUSION OF LAW AND RECOMMENDATION** FILED JUN 24 2024 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Coeur d'Alene on November 30, 2023. Claimant appeared in person represented by Stephen Nemec. Michael McPeek represented Defendants. The parties presented oral and documentary evidence and later submitted post-hearing briefs. The case came under advisement on February 27, 2024. It is now ready for decision.

ISSUE

After due notice to the parties and by their agreement, the sole bifurcated issue to be decided is whether Claimant suffered an injury caused by an accident arising out of and in the course of employment. All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant was involved in a motor vehicle accident.

Claimant contends he was doing a task related to his job as a construction worker when he

drove from his assigned jobsite to another jobsite where Employer was working to fetch supplies which Employer had not delivered himself. The necessity of the bunkbed-building task, the express telephone communication between Claimant and Employer, the route driven, the fact that Employer allowed Claimant to take the supplies from the second jobsite to the first: all support a determination his injuries arose out of and in the course of employment. Employer's testimony, saying he expressly prohibited the errand, is inconsistent with Claimant's testimony and that of his co-worker. It is also inconsistent with Claimant's history of obeying orders. In characterizing the circumstances of the motor vehicle accident Claimant mainly raises traveling dual purpose and traveling employee doctrine exceptions to the coming and going rule, which shields employers from liability for accidents incurred while coming to or going from an employer's premises.

Defendants contend the "coming and going" rule precludes liability, mainly because Claimant lacked Employer's authorization to fetch the supplies. Claimant's drive off premises occurred on his own initiative. He acted without the consent of Employer, and in defiance of Employer's express directive. Employer said he would bring the supplies to Claimant later that day. Other work existed which Claimant could do in the meantime. Claimant's co-worker even testified there was other work to do. Employer denies Claimant's assertion that Employer and Claimant conversed about paying Claimant for his time driving. Employer was irritated and a bit surprised to see Claimant come to pick up the supplies but permitted Claimant to take the supplies "because he was already there." The motor vehicle accident happened on a route which was not the same one Claimant drove to acquire the supplies in the first place. The Defenses' argument ultimately focuses on the special errand exception to the "coming and going" rule.

EVIDENCE CONSIDERED

The record in the instant matter consists of the following:

1. The Idaho Industrial Commission legal file;
2. Oral testimony at hearing of Claimant, Employer Jeremiah Weaver, and co-worker Kristopher Crawford;
3. Claimant's exhibits A – L;
4. Defendants' exhibits 1 – 13, including the deposition of Claimant.

Claimant points out Defendants' briefing lacks citations to the record as required under Rule 11(c), Judicial Rules of Practice and Procedure ("JRPP"). This deviation from Commission process is confirmed and admonished to the extent Defendants' briefing impedes Claimant from access to the factual basis of Defendants' arguments.

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

1. At the time of hearing, Claimant was fifty-one years old. He held a high school diploma. He was hired in early 2022 to build houses for Jeremiah Weaver ("Employer"), the owner of No Limits Construction. In the past, Employer's father had a similar business and had hired Claimant. Jerimiah Weaver and Claimant have known each other for many years.

2. **Construction Jobsites.** On the date of the accident Employer had two active construction sites. The Marshall Lake jobsite ("Marshall") in Washington involved two structures, and it included building custom bunk beds. The Freeman Lake jobsite ("Freeman"), a

5,000 square-foot home in Idaho, had once belonged to Employer's father and, for the past two years, was under complete remodel.

3. **Co-Workers and Job Tasks.** Three men worked with Employer on both jobsites, Claimant, Kristopher Crawford ("Crawford"), and Devan Tryban ("Tryban"). Employer and Tryban were finishing drywall on Freeman so painters could begin their work on time. Claimant and Crawford were completing punch-list items, including the building of custom bunkbeds at Marshall. They had been working on the bunkbeds for more than one week. Employer explained they were "extremely busy and hectic and overwhelmed sometimes."

4. In the six-to-eight weeks before the accident, Employer's crew usually worked together on the same site, and they normally stayed on one jobsite all day. This avoided time inefficiency spent driving between sites and setting up tools.

5. **Work Schedule and Time Reporting.** On the date of the accident Claimant, Employer, and Crawford began work between 6 and 6:30 am as usual. Tryban began between 8:45 and 9:15 am.

6. According to Employer, he had an "honor system" by which employees reported their work hours on paper timesheets kept in the Employer's tool trailer. Every other Thursday Employer collected the timesheets. Paychecks were deposited in the employees' bank accounts the next day.

7. Claimant explained he logged his work-time twice each day. First, he wrote down the time he clocked-in. Later upon leaving, Claimant recorded his lunch time and the time he clocked-out. He was not paid for lunch time. The record in this case contains none of Claimant's timesheets.

8. **Lunch.** Claimant explained the employees usually brought their lunch to work.

Lunch time was usually spent on the jobsite. Sometimes, "traveling back and forth . . . it was convenient" to stop at a gas station or a restaurant. Crawford usually brought his lunch to the jobsite. Claimant usually got a sandwich on the way to work.

9. Claimant brought no lunch to Marshall the morning of December 7, 2022. Crawford brought his lunch that day, but he did not bring it with him when they later drove to Freeman.

10. **Overview of Events, Routes Taken, Supplies Ferried.** On December 7, 2022, Claimant was injured in a motor vehicle accident due to another motorist's failure to yield. He was driving his personal vehicle on LeClerc Creek road at 12:32 pm when the vehicles collided. Claimant reported spine and upper extremity injuries. Crawford, seated in the passenger seat, incurred none.

11. In an unusual move, Employer chose to split his crew into two teams of two men working on the separate jobsites. There was a lot of work to do at Marshall, including the bunkbeds. Employer expected Claimant and Crawford to be busy there all day.

12. At 10:30 am that day, Claimant spoke to Employer over the phone about supplies – screws and stain – which Claimant and Crawford needed to complete the custom bunkbeds. Claimant and Crawford then drove about five to seven miles from Marshall to Freeman to fetch the supplies. They drove one route away but another route of similar distance when returning. The motor vehicle accident occurred on the returning route. The supplies which Claimant had acquired at Freeman were in Claimant's vehicle at the time of the accident. A few minutes prior to the accident, Claimant and Crawford stopped briefly to get take-out at Burger King, which was four-tenths of a mile off the direct route back to Marshall. The food was also in the vehicle when the accident occurred.

13. Employer soon came to the accident scene. At some point while attending to matters there, one of the three crewmen took the supplies out of Claimant's inoperable vehicle and put them in Employer's vehicle to be taken to Marshall. Employer then drove Claimant and Crawford the rest of the way to Marshall. Employer dropped-off Crawford. Employer then drove Claimant to get medical care.

14. **Conversation Prior to Leaving Marshall**. Claimant initiated a telephone conversation with Employer about the bunkbed supplies which Employer had not delivered the evening before. Employer declined Claimant's offer to come get the supplies from Employer at Freeman. Employer said he would bring them in the afternoon.

15. During the telephone conversation, Claimant made a second offer to come get the supplies. Claimant explained he had 20 minutes of work left to do on the bunkbeds. He offered to take lunch early with Crawford and come get the supplies. Claimant disagrees about what was said from this point forward. Claimant testified Employer said "that's fine if you and Kris come up to the job and get the materials. .... Since you're taking your own vehicle and driving to get materials for the job, that you don't have to take lunch at this time, you can take lunch when you get back." Claimant testified he assumed he would not get paid because the company policy was not to pay wages over the lunch hour. Employer testified that he did not acquiesce to Claimant's offer to pick up the materials.

16. Crawford, who was within earshot of the cellphone conversation, summarized Claimant's recitation of the full conversation as follows: Employer said they did not need to come for the supplies; Claimant let Employer know they would "just take ...[their] lunch and come get them."

17. Employer contends he gave a direct clear answer to Claimant's second offer to get

the supplies: do not come for the supplies. He says he never spoke to Claimant about paying for the time to ferry the supplies to Marshall. He told Claimant there was "other work to do."

18. With a military background, Employer placed importance on order, law, and correctness. Crawford testified Claimant did not commonly ignore orders from Employer. Employer testified he thought Claimant might show up at Freeman.

19. Employer and Claimant disagree on what "other work" there may have been. According to Employer, "other work" would have meant installing base trim upstairs, cleaning-up, and doing punch-list items. Employer testified he did not specify the other work at the time of the phone call. Crawford testified "other work" included trim work, the deck around the hot tub, snow removal, and odds-and-ends.

20. Claimant testified the bunkbeds were a priority because, in a few days, the homeowners would come and they expected to see the beds finished. Crawford agreed the beds were a priority.

21. Claimant testified that Crawford came to Freeman with Employer's knowledge and approval. When asked why Crawford went with Claimant to get the supplies, Crawford testified "we just decided to go for a field trip" and "that's just how it worked out that day." On cross-examination, Crawford clarified that "we wanted to check out the other job." The record does not show that Crawford had Employer's approval to travel to Freeman.

22. **Bench Road Route from Marshall to Freeman.** According to the undisputed testimony of Claimant, there are two routes to travel between the Marshall and Freeman jobsites: "Bench Road" and the "main highway" or Highway 2. Claimant drove the "Bench Road" route to get the supplies which were waiting at Freeman. Claimant discovered the "Bench Road" was rougher.

23. **Conversation at Freeman.** For 20 to 30 minutes the Claimant, Employer, Weaver and Tryban spoke about several things: the location of the supplies, the Freeman tasks, and the reason the supplies had not been delivered by Employer to Marshall the day prior.

24. When Claimant and Crawford arrived at Freeman the screws were in Employer's truck. Claimant put them in his own vehicle.

25. In deposition, Claimant testified that Employer showed no anger when Claimant arrived and that Employer did not complain about Claimant's decision to retrieve the supplies.

26. Crawford testified Employer did not look pleased to see them. He also testified "[b]efore we left the jobsite…we went over and grabbed the screws."

27. Employer testified he was irritated with Claimant when he arrived at Freeman but said nothing. Employer also testified he was surprised when Crawford arrived as well, but he could not recall if Claimant had said Crawford would come along. Employer testified he let Claimant take the supplies because "he was already there."

28. Employer's email by his wife, Shaleen Weaver, to Intermountain Claims dated March 15, 2023, and Employer's statement dated December 22, 2022, recite that upon Claimant's arrival at Freeman Claimant told Employer he decided to take a lunch and get the supplies.

29. Claimant and Crawford did not tell Employer they were going to stop for lunch on the way back to the Marshall jobsite.

30. **"Main Highway" Route from Freeman to Marshall.** Before leaving Freeman Claimant and Weaver decided to pick up burgers on the way back to Marshall. This dictated their route back. After the accident Claimant justified his route choice; the "Bench Road" route was rougher and took longer to drive, and the "main highway" route was preferred because it had been plowed clear.

31. Claimant took the "main highway" route back to Marshall with the supplies.

32. **Burger King Stop.** The most direct path from "main highway" to Marshall would have involved turning left off Highway 2 onto LeClerc Creek road, traveling along side the Pend Oreille River, crossing the state line into Washington until LeClerc meets Bead Lake and then Bench Road. Instead, Claimant reached the intersection of Highway 2 and LeClerc Creek Rd and took a diversion. He crossed a bridge over the river and drove to Burger King, where Claimant and Crawford took approximately ten minutes to get their order and return to Claimant's vehicle.

33. **Accident**. Shortly after getting back on the "main highway" route, Claimant's vehicle collided with a third party's. They were just inside the Washington State line on LeClerc Creek Road, when the third party backed out of a residential drive and caused the accident. Claimant estimated he was traveling 45 miles per hour. The accident occurred at 12:32 pm according to a Washington police report.

34. Police were still at the scene when Employer arrived. Claimant and Crawford gave statements, and someone collected the supplies from Claimant's vehicle and placed them in Employer's vehicle. They took Employer's vehicle to Marshall so Crawford could resume work. Employer then drove Claimant to Newport, Washington, for medical care. He hasn't returned to work for Employer since.

35. **Injuries**. Claimant alleges his injuries involve his spinal cord and bilateral upper extremities.

FURTHER FINDINGS OF FACT AND DISCUSSION

36. The provisions of Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical

construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

37. **Credibility and Significant Findings of Fact** Uncontradicted testimony of a credible witness must be accepted as true, unless the 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).

38. The Referee observed Claimant, Employer, and Crawford at hearing. By demeanor all witnesses appeared credible, although not much weight was attached to testimony that appears in the record to be quotations of others – that is, Claimant quoting Employer or vice versa. Witnesses' demeanor regarding these reconstructions of what was said in long-ago conversations are deemed to reflect general recollection or impressions retained rather than actual words said. Material discrepancies do exist in the witnesses' testimony and statements. Having weighed and assessed the credibility of the witnesses, the Referee resolves the conflicts in their testimony as follows:

39. **No authorization to embark on the errand from Marshall - Claimant Insisted.** If Claimant ran the errand, Employer's supplies could be acquired so the bunkbed work could proceed closer to schedule. The bunkbeds were a priority work at Marshall, but other work was available there, and Employer had promised to bring the screws. Claimant did not bring a lunch that day. Claimant and Crawford could stop somewhere for lunch as was their occasional lunch-time custom.

40. The weight of the evidence shows Claimant insisted on driving the first leg of the short journey to ferry the supplies despite Employer's direction not to. Preponderance of the evidence shows Claimant and Crawford knew they were driving during their lunch hour, against Employer's directive to come to Marshall and get the supplies. Claimant's action was contrary to Employer's express direction.

41. **Authorization to take the supplies from Freeman back to Marshall– Employer Acquiesced**. Once Claimant arrived with Crawford at Freeman, he again offered to transport the supplies. He acknowledged his lunch-time status and asked for the supplies' location. Because Claimant was "already there" Employer told Claimant the supplies were in Employer's truck, thereby impliedly authorizing Claimant to transport the supplies back to Marshall. Claimant retrieved the supplies from Employer's truck and put them in his vehicle. The potential compensability of the trip from Freeman to Marshall is separate from the potential compensability of the round trip.

42. **No wages paid for time driving from Marshall Lake to Freeman Lake or Back.** As will be addressed below, the question of whether wages were paid is not ultimately determinative in our "coming and going" compensability analysis. A determination of this fact is addressed because this is such a close case.

43. The evidence shows Employer never offered to pay wages for the time Claimant was traveling between sites. For the initial leg of the trip, Claimant was on lunch break from the time he left Marshall. Both Claimant's and Crawford's hearing testimony was that they knew that they would be on lunch break when they drove to retrieve the supplies. Little weight is assigned to Claimant's internally inconsistent testimony that Employer told him he need not take his lunch hour to get the materials.

44. The thing that makes this issue a close one is that the business purpose arose after Claimant began his lunch hour. None of the three witnesses expected Claimant to be paid wages on the drive from Marshall to Freeman. Crawford's testimony supports Employer's testimony in this regard. However, by the time Claimant left Freeman, Employer had acquiesced to Claimant's running the errand; thus, the business purpose arose. Despite the fact that the Referee finds that Employer did not offer to pay wages for the drive back to Marshall, this factor does not weigh heavily in determining compensability.

45. **There was "other work" for Claimant to do at Marshall, and the drive for supplies was not necessary.** Other work included punch-list items, base trim installation, completion of hot tub decking, and snow removal. Claimant knew this. It means the entire trip, from Marshall to Freeman and back, was not necessary.

Arising Out of and in the Course of Employment, "Coming and Going" Rule

46. Idaho Code § 72-102(18)(a) defines a compensable injury. It must be caused by an accident "arising out of and in the course of" any employment covered by the worker's compensation law. The burden of proof of a compensable industrial accident case is on the claimant. *Neufeld v. Browning Ferris* Industries, 109 Idaho 899, 902, 712 P.2d 500, 603 (1985).

47. Idaho follows the "coming and going" rule, which generally provides that injuries sustained while traveling to and from work do not arise out of and in the course of employment and are not compensable under the workers' compensation statutes. *Clark v. Daniel Morine Construction Co.,* 98 Idaho 114, 559 P.2d 293 (1977). But there are several exceptions to the "coming and going" rule. The parties' arguments in this case focus on three such exceptions: dual purpose, special errand, and traveling employee. Thus, if the travel at issue involves a dual purpose (business and personal), or if Claimant is on a special errand for employer, or if

Claimant's job duties make him a traveling employee with no deviation from his duties, then the "coming and going" rule does not apply, and Defendants are liable for Claimant's injuries incurred on route between Employer's jobsites.

48. Ultimately, this case requires a determination of *if, how, and when* the Employer authorized Claimant's drive to fetch the supplies. The extent to which express or implied authorization by an employer is required to trigger a "coming and going" exception must be considered. Moreover, one must analyze how compensability is affected where, as here, authority to travel may be denied at one point then granted at another point after the denial is ignored.

49. Some personal deviations from employment duties, performed off or on premises, may disrupt the fundamental statutory requirement of "arising out of" and "in the course of" employment. A brief interval for the performance of a personal errand which is not forbidden may be compensable. *Smith v. University of Idaho,* 67 Idaho 22, 27, 170 P.2d 404 (1946) (Compensable injury incurred by a university housemother employed 24 hours each day who fell while off campus fetching Christmas decorations and coffee.)

50. In the case at bar, the Referee requested each side address *Gage v. Express Personnel*, 135 Idaho 250, 254, 16 P.3d 929, 930 (2000). This precedent is more challenging than *Smith* because it involves an employer's expressly forbidden acts. The *Gage* court held a claimant's "... slight deviation of the employer's rule regulating how the work was to be performed is not enough to deny...[a] claim." *Gage,* at 253. Defendants argue *Gage* is inapplicable because it applies when there are no disputed facts and where the presumption of compensability exists for on-premises accidents. *Gage* was injured while performing her work duty on premises during work hours. She was smoking, which was an expressly prohibited safety violation. The injury occurred when she fell while attempting to get back up to a rail dock after

retrieving her cigarette which had fallen to the ground. Claimant acknowledges a distinction between *Gage* and this case. However, Claimant asserts *Gage* basically favors coverage for employees injured while furthering their employer's interests, even though their actions are prohibited. Upon reflection, *Gage*, is distinguishable in important ways, but its general dicta about furthering an employer's interests despite performance of a prohibited act is reasonably to be considered.

51. **Dual Purpose Exception**. In Claimant's case, a dual purpose exists. The dual purpose rule has been described as follows:

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

In re Christie, 59 Idaho 58, 75-76, 81 P.2d 65, 72 (1938) (citation omitted), *quoted in Reinstein v McGregor Land and Livestock Co.,* 126 Idaho 156, 879 P.2d 1089 (1994).

52. When the facts and circumstances show even a subordinate business purpose, the dual-purpose travel will be a compensable exception to the "coming and going" rule. Claimant cites *Wineland v. Taylor*, 59 Idaho 401, 83 P.2d 988 (1938). The Court granted coverage in that case. Wineland was a mechanic working in Rexburg, Idaho, who was transferring to become a foreman at the employer's shop in Ashton, where Wineland also lived. On the night in question, Wineland stayed late to service a customer. At 11pm he and his wife left for Ashton. They stopped 14 miles north of Rexburg where Wineland attended to his car's leaky radiator. Meanwhile, his wife went to an amusement hall. He joined her after the radiator was attended to. Then, they drove five or six miles when a car struck theirs, resulting ultimately in the claimant's arm amputation.

53. Framed in terms of a possible personal deviation, the *Wineland* court reversed the Commission and deemed the travel work-related. The employer ordered the claimant to report to Ashton as soon as he arrived. Wineland had been engaged in employer's business up to the time he left town, and he was on the only road he could travel. His employer knew Wineland would drive his own vehicle. Putting water in the radiator was necessary. Wineland's activity at the amusement hall was something a reasonable person may do under like circumstances and still be engaged in employer's business. "[T]he main purpose for the trip at the time … and under the circumstances … was in furtherance of employer's business." *Wineland* at 990.

54. From the case at bar, Claimant distinguishes *Reinstein,* the non-compensable dual-purpose case cited above. Reinstein's daughters sought death benefits for their father's estate. An operations manager at employer's plant in Lewiston, his duties included maintaining machinery at employer's Tammany and Prairie plants. He drove employer's truck between plants. On the day in question, he arrived at the Prairie plant late in the afternoon, talked with staff, reviewed paperwork and billing, and wrapped up the day with discussions about personal matters. He left with a man – a friend and co-worker - for drinks at a place six or seven miles from the Prairie plant. The evening's activities for the two ended around 8:30 pm after they had several alcoholic drinks. En route back to Lewiston, he was discovered dead the next morning, about 2 miles outside of town on a road between the bar he left and Lewiston.

55. The *Reinstein* court likened the case to *Morgan v. Columbia Helicopters*, 118 Idaho 347, 796 P.2d 1020 (1990). In both cases, the personal activity of drinking alcohol formed a departure which broke the causal connection with work to the extent that it no longer could be said to "arise out of and in the course of" employment. *Reinstein* at 159-160 citing *Morgan* at 349.

56. Defendants cite a 1987 Industrial Commission decision which analyzes all three of the exceptions considered in this case: *Kautz v. Stein Distributing*, IC 0492 (May 8, 1987). Kautz was a route salesman who delivered alcoholic beverages to business customers. He suffered serious injuries when he crashed into another vehicle while driving his motorcycle on his day off. The Commission decided the claimant's activities at the time were a personal deviation and were no longer within the design of employer's process for handling major or minor discrepancies in the receipt of payments from customers. He should have waited until the next time he was normally on his delivery route to pick up the payment from the customer and bring it back to work. This had been his employer's express directive. Absent that directive, there was also no necessity or urgency to get the payment from the customer and to the employer on *Kautz'* day off. Under these circumstances, employment was not a concurrent cause of the trip. Furthermore, if there was a deviation involved, the Commission pointed out it was a deviation from a personal errand, not from a business errand.

57. In this case, the dual-purpose exception to the "coming and going" rule also applies favorably to Claimant. Unlike *Kautz*, Employer's authorization regarding the errand in question was not developed to the point of a definitive process with multiple phases and considerations for minor and major discrepancies. Employer's authority to fetch the supplies evolved from an expressly stated "no" to an implied "yes." At that point, Employer's business purpose of transporting the supplies coupled with Claimant's purpose of acquiring take out for lunch. The compensability of the trip began at Freeman not at Marshall.

58. The behavior of the parties after the accident also supports the existence of an errand with a dual purpose. Errands of this sort arise from time to time. Multi-tasking of this sort was testified to by Claimant and remains undisputed by the Defense. Furthermore, the motor

vehicle accident occurred on a reasonable route between employer's jobsites. The fact that the route back to Marshall Lake was different from the one Claimant took originally does not make it unreasonable. The distance driven was roughly the same. And, immediately after the accident, the supplies were placed in Employer's vehicle. The supplies were ultimately delivered along with Crawford to Marshall.

59. The facts of the case support a compensable dual purpose because the circumstances show Employer's business purpose intertwined with that of Claimant's personal lunch purpose. Though ferrying the supplies was not necessary at the time Claimant offered to run the errand from Marshall, it became at least a substantial purpose of the travel once he took the supplies from Employer's truck at Freeman. After the accident, the supplies continued their way to Marshall.

60. For the reasons explained above, the dual-purpose exception to the "coming and going" rule applies favorably in this case. Under this theory, Claimant's accident arises out of and in the course of employment for purposes of Idaho Code § 72-102(18)(a).

61. **Special-Errand Exception.** The special-errand exception to the "coming and going" rule also applies favorably to Claimant's case. The special-errand exception to the rule of non-compensability is where an employee, although not at the regular place of business - even before or after customary work hours - is doing some special service or errand or in the discharge of some duty for or under the direction of an employer and suffers an injury en route to or from the place of performance of the work. In such a case, the injury is deemed arising out of and in the course of employment. *Trapp v. Sagle Volunteer Fire Dept*, 122 Idaho 655, 837 P.2d 781, 782 (1992), *Dameron v. Yellowstone Trail Grange*, 54 Idaho 646, 34 P.2d 417 (1934).

62. The Industrial Commission addressed the special-errand exception, and the Court referenced it in *Trapp*, *supra*. The claimant, a volunteer member of the Sagle Fire Department, was solicited by the Department to take an Emergency Medical Training (EMT) course. Trapp was injured in an auto accident when she and five other occupants were traveling to the EMT course. The Commission, in *Trapp*, pointed out five reasonableness factors set forth by the Arizona Supreme Court that are useful in this analysis. 1) Did the activity inure to the substantial benefit of the employer? 2) Was the activity engaged in with the permission of or at the discretion of the employer? 3) Did the employer knowingly furnish the instrumentalities by which the activity was carried out? 4) Could the employee reasonably expect compensation or reimbursement for the activity engaged in? and 5) Was the activity primarily for the personal enjoyment of the employee? *Trapp v. Sagle Volunteer Fire Dept*, 122 Idaho 655, 837 P.2d 781, 782 (1992), citing *Johnson Stewart Mining Co., Inc.* v. Industrial Commission, 133 Ariz. 424, 652 P.2d 163, 166 (1982).

63. These factors as they apply in this case are: 1) Although there was no urgency or necessity, Employer's benefit from the errand is simply the completion of a supplies delivery which someone on Employer's crew must perform - a delivery which allowed half Employer's work crew to continue performing the primary task of their work day – constructing custom bunkbeds; 2) Employer's permission was acquired late in the sequence of communications to qualify as a special errand. Although ultimately Employer granted permission, it was only granted by implication in his informing Claimant where the supplies could be located and remaining silent on his earlier decision otherwise. A special errand basically requires express permission or a direct request from an employer before the employee embarks. Implied authority after an express denial is not sufficient permission under special errand analysis; 3) Employer did

not furnish the vehicle by which Claimant carried out the errand; 4) As discussed above, Claimant could not reasonably expect to be paid for the errand; 5) Overall, the circumstances show the first leg of the trip was solely for Claimant. However, the second leg was run for both Employer's business purpose and Claimant's lunch purpose. The route was a reasonable one. On that leg of the journey, the accident occurred. The supplies were in Claimant's vehicle at that time. The fact that the accident precluded Claimant from completing his intention to deliver the supplies to Marshall in his own vehicle does not outweigh the other factors.

64. Finally, the Burger King deviation for food was a reasonable one which did not break the work-purpose of the errand. It took place in a minimal amount of time and required driving only eight-tenths of a mile off the direct route.

65. On balance, the special-errand exception applies in this case. Factors one and five favor compensability. Factor three is not pertinent. Factors two and four disfavor compensability. Employer's receipt of a benefit, and the behavior of both parties plus Crawford - in which they each played a part in getting the supplies to Marshall – are more weighty factors than the two that disfavor compensability. Initial disapproval of permission by Employer is a factual uniqueness, but it's not determinative considering the general policy favoring compensability in these cases. *See, Atkinson v. 2M Com., Inc.,* at 188, *citing Miller v. Amalgamated Sugar Co.*, 105 Idaho 725, 672 P.2d 1055 (1983); *Jones v. Morrison-Knudsen Co.,* 98 Idaho 458, 567 P.2d 3 (1977); *Hattenburg v. Blanks,* 98 Idaho 485, 567 P.2d 829 (1977).

66. Likewise, the fact that Claimant could not expect payment for travel time is not determinative. The Idaho Supreme Court was not concerned with the fact of non-payment for travel time in *Pitkin v. Western Construction*, 112 Idaho 506, 507, 733 P.2d 727 (1987). Whether a claimant received pay for a particular aspect of a trip is a factor, not by itself determinative, in

analyzing whether coverage applies. *Case of Barker*, 105 Idaho 108, 666 P.2d 635 (1983), appeal after remand 110 Idaho 871, 719 P.2d 1131 (1986).

67. The special-errand exception to the "coming and going" rule applies favorably in this case. Under this theory, Claimant's accident arises out of and in the course of employment for purposes of Idaho Code § 72-102(18)(a).

68. **Traveling-Employee Exception.** Finally, because the facts of this case do not characterize as a traveling employee scenario, this exception does not apply. The traveling employee exception says: "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 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.3d 973 (1995), restating *Ridgway v. Combined Insurance Companies of America*, 98 Idaho 410, 565 P.2d 1367 (1977), and *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 562, 759 P.2d 65, 68 (1988). Andrews was a construction worker on long term assignment. He drove his own vehicle 300 miles from his home in Weiser, Idaho, to the employer's Wenatchee construction project. There he worked for six weeks. On his drive home he was in a car accident and rendered paraplegic. The employer paid $30 subsistence to Andrews for that day. The Commission deemed Wenatchee his normal place of work, and the subsistence pay was void of travel expense reimbursement. Therefore, the Court concluded Andrews was not a traveling employee because his work did not require him to travel.

69. Consider also *Ridgway v. Combined Insurance Companies of America*, 98 Idaho 410, 565 P.2d 1367 (1977). This is a compensable case in which the insurance salesman's hiring terms required him to travel to Salt Lake for a two-week training seminar. He

and three others traveled in a colleague's vehicle when the vehicle was struck by a train and he was injured. Rather than considering this a peculiar-risk-exception case, the Court characterized it as a traveling-employee-exception case because the work explicitly required the travel away from the normal place of business. *Id.* 411-412.

70. Part of what makes this a close case is deciding how to characterize the facts and picking which exception to the "coming and going" rule applies. Idaho's traveling employee case law does not require that the travel itself be part of the employee's duties. *See, Andrews, at* 67, *citing, Ridgway,* and *Kirkpatrick.* Claimant invites reliance on an Industrial Commission traveling employee case *McCawley v. Holman Transportation Services, Inc.*, IC 2013-011563 (October 22, 2014). McCawley was a truck driver on forced layover. The truck driving duties required extensive driving. The case at bar is distinguishable. Claimant's normal work is not travel-based, as are the trucking duties in *McCawley.*

71. Assuming, *arguendo*, the traveling-employee exception did apply to this case, analysis would still result unfavorably to Claimant. Consider another case relied upon by Claimant, *Cheung v. Wasatch Electric,* 136 Idaho 895, 42 P.3d 688 (2002). In this compensable case an electrical engineer and project manager at the Minidoka Dam project was assigned new responsibilities at the AMI project 75 miles away. The engineer worked both projects and traveled between the sites in her personal vehicle. She was paid travel time and expenses. She was given a credit card for such things as gas and oil. While in Minidoka she loaded one of employer's stools in her car as requested by her employer, then she went home. The next morning, en route to AMI, she pulled over to put on her sunglasses. Her car was then struck from behind and she was injured.

72. Unlike *Cheung* and *Ridgway,* Claimant has no explicit travel instructions. Although Employer acquiesced when he and Claimant were together at Freeman, this authorization was merely implied by Employer's and Claimant's actions, not explicit as in *Cheung* and *Ridgway*. The idea to make the journey to Freeman for the supplies initiated on that day from Claimant and it was not necessary that the supplies be brought to the Marshall Lake site at that time. There was other work for Claimant to do.

73. Distance between destinations is another distinguishing fact. *Cheung*'s was a 300 mile journey between sites. In *Ridgway,* the distance between Salt Lake and the eight southwestern Idaho counties in Ridgway's sales region was quite far. In Claimant's case, the distance between Employer's construction jobsites was relatively short – five to seven miles.

74. For the reasons stated above, Claimant was not a traveling employee and, if he were, the traveling employee exception would not apply favorably to Claimant in this case.

CONCLUSION OF LAW

Claimant suffered an accident on December 7, 2022, which arose out of and occurred within the course of his employment for purposes of Idaho Workers' Compensation Law.

RECOMMENDATION

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

DATED this 11th day of June, 2024.

INDUSTRIAL COMMISSION

Douglas A. Donohue, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2024, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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Debra Cupp

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUSTY HENDERSHOTT, Claimant, v. NO LIMITS CONSTRUCTION, Employer, and ACUITY, A MUTUAL INSURANCE COMPANY, Surety, Defendants.	**IC 2023-002027** **ORDER** FILED JUN 24 2024 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Douglas 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 suffered an accident on December 7, 2022, which arose out of and occurred within the course of his employment for purposes of Idaho Workers' Compensation Law.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 24th day of June, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2024, 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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