12-18-2014

Hamilton v. Alpha Services, LLC Respondent's Brief Dckt. 42521

IN THE SUPREME COURT OF THE STATE OF IDAHO

TODD LAWRENCE HAMILTON (DECEASED),

Claimant/Respondent

vs.

ALPHA SERVICES, LLC.,

Employer,

DALLAS NATIONAL INSURANCE COMPANY,

Surety,
Defendants/Appellants.

SUPREME COURT NO. 42521

RESPONDENT'S RESPONSE BRIEF

RESPONSE BRIEF OF RESPONDENT HAMILTON

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APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO
CHAIRMAN THOMAS BASKIN PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

PAGE

STATEMENT OF CASE

NATURE OF CASE

This is an appeal from the Industrial Commission's decision awarding statutory death benefits to the widow and children of Todd Lawrence Hamilton, Deceased.

COURSE OF PROCEEDINGS

A hearing was held before Industrial Commission Referee Brian Harper on July 17, 2013. Referee Harper's recommended Findings of Fact and Conclusions of Law awarding statutory death benefits to Respondents, Mr. Hamilton's widow and children, (hereafter referred to as Hamilton) were unanimously approved, confirmed and adopted by the Commission on January 9, 2014. On the twentieth day (January 29, 2013) following the Commission's Order, at 4:13 p.m., the Employer/Surety (hereafter referred to as Dallas National Insurance) filed a Motion for Reconsideration.[1] R. p. 35. Dallas National Insurance also filed a memorandum of law with their motion entitled, "WIDOWS AND ORPHANS MAKE BAD LAW." R. p. 37. The memorandum did not cite any specific Finding of Fact or Conclusion of Law or provide any new reasons factually or legally to support the motion. Its entire argument, which it summarized in a nutshell, was that the Commission's decision could not have been reached "without the Commission abandoning its duty to fairly evaluate the factual evidence and fairly apply the law." R. p. 42. After considering the motion for reconsideration for a full (7) months, the Commission entered its Order Denying Reconsideration on August 1, 2014. R. p. 50. After the close of business for the Industrial Commission, 5:30 p.m., on the forty-first (41st) day following the Commission's Order Denying Reconsideration, Dallas National Insurance filed this appeal. R. p. 53.

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[1] As set forth in Hamilton's Motion for expedited hearing, Dallas National Insurance is apparently bankrupt and its surety obligations are now those of the Western Guaranty Fund. However, nothing has been filed to notify the Court of this situation and there has not been any substitution of party filed.

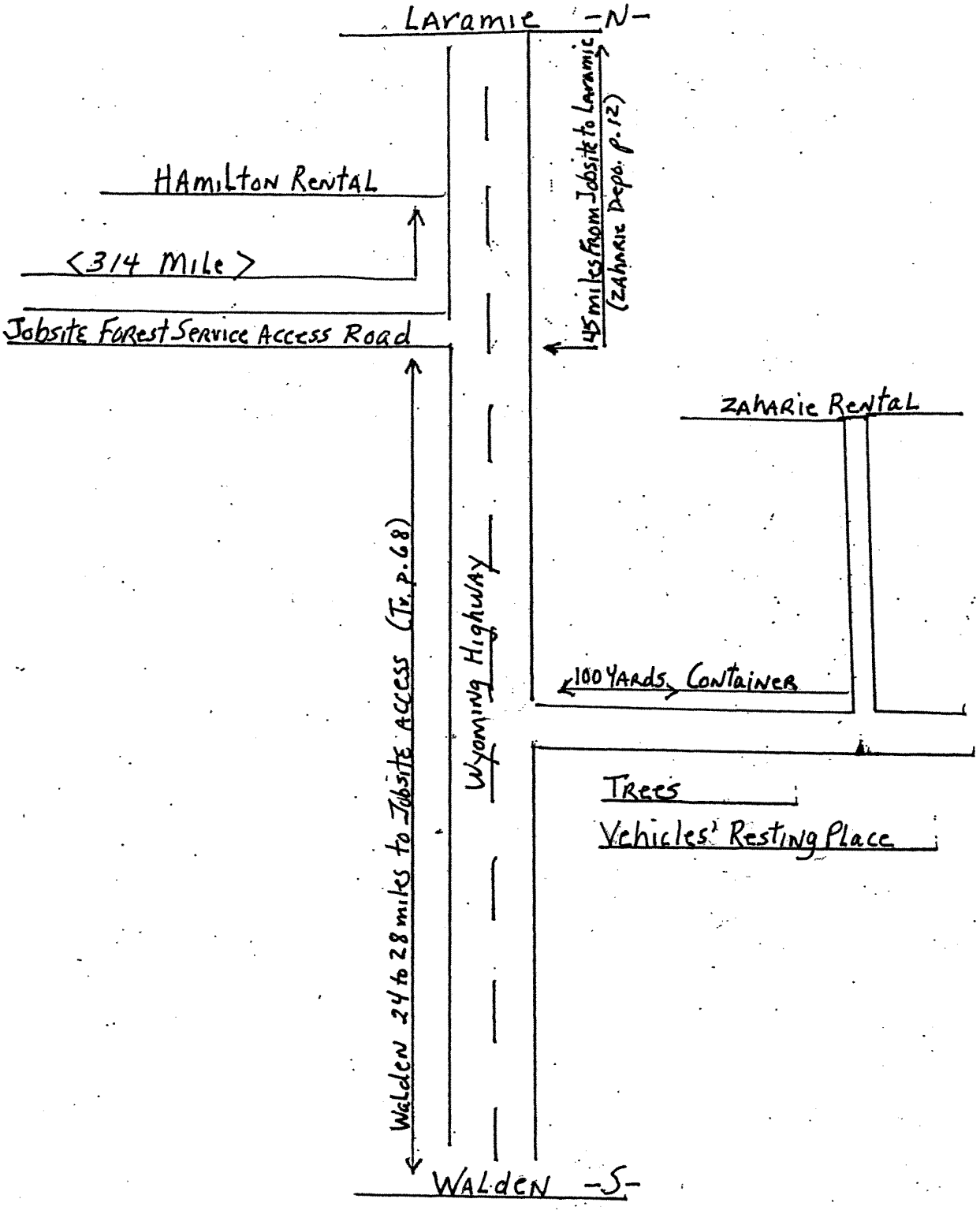
STATEMENT OF FACTS

Mr. Hamilton was hired by Employer (hereafter Alpha Services) in Coeur d'Alene on September 7, 2011 to work at its Wyoming job site. Mr. Zaharie was Alpha Services onsite manager and owner. Mr. Hamilton was not paid travel expenses to the job site, nor housing expenses. He rented a house less than a mile from the job site. R. 14. The Wyoming job site included U.S.F.S. land on both sides (east and west) of the two lane Wyoming Highway 230, approximately 45 miles south of Laramie, Wyoming, and about 24 miles north of Walden, Colorado.

The job site consisted of the active logging operations, which were accessed by a U.S.F.S. dirt road branching west off Highway 230, and the equipment storage container, which was accessed by turning south from the active logging operations access road onto Highway 230 and thenturning left, across the oncoming north bound traffic lane of Highway 230 onto a dirt road that only led to the container, the house rented by Zaharie and a couple other vacant houses.

The storage container housed the company's tools, equipment and supplies. It was regularly accessed by the employees. The only way for employees to reach the storage container from the active site was for them to turn right onto Highway 230, travel south on it for a short distance, and then turn left from it, crossing the oncoming traffic lane of Highway 230 onto a dirt road which led to only the storage container, R. p. 14-15. In order to return to the active work site from the storage container, employees were required to turn right onto Highway 230 and drive north until reaching the U.S.F.S. west access dirt road and then turn left across the oncoming southbound lane of Highway 230. At a minimum the employer's "place of business" the active logging area, the company storage container where supplies were kept, and the roadway that must be travelled between the two locations, which included that portion of

Highway 230 between the U.S.F.S. west access road to the work site and the east access road to the storage container. R. p. 28. A not-to-scale diagram of the area is set forth below.



Mr. Hamilton's job duties were primarily to operate a 'hot saw' and a 'skidder' at the jobsite. Tr. p. 93, l. 13-15. He also performed light duty mechanic work. Id. p. 44, l. 1-7. While Mr. Hamilton's primary job duty was to operate a piece of equipment known as a hot saw, his job duties were far broader than simply running it. Zaharie testified that the company was losing "hundreds of thousands" of dollars on the job and that just prior to Thanksgiving he had come to the Wyoming job site to get personally involved. All employees were expected to do whatever was necessary to keep the operation running efficiently. R. p. 23; Zaharie, p. 14.

Mr. Hamilton kept track of his own hours, using the honor system, on a sheet of paper that he would turn in at the end of each week. Claimant's Exh. 1. Zaharie depo., p. 15, l. 11-15. Mr. Hamilton's time sheets reflected that he would keep a running tally of his work hours by writing down the hours worked as they occurred. When he worked more hours than scheduled on a given day or when he stopped work and then restarted working he would change his initial recorded hours on his time sheet. Id. p. 86, l. 12-p. 87, l. 2. Alpha Services onsite manager/owner, Zaharie, testified that when a piece of equipment broke down that the employee operating it would 'go off the clock'. He testified that the company liked to give them the opportunity to make up the missed hours when there was other work to be done. Tr. p. 91, l. 18-p. 92, l. 18. Prior to the day of his accident, December 7, 2011, Mr. Hamilton's hours had been daylight to dusk, five to six days a week. Zaharie, p. 15, l. 4-7.

The day prior to Hamilton's accident, a longtime company employee, Cortes, returned from another assignment to work at the Wyoming jobsite. Tr. p. 104, l. 1-2. Zaharie determined that they would run a double shift on the 'hot saw'. Attempting to decide how the double shift would work, Cortes and Hamilton had a telephone conversation the night before the first day of the double shift on the hot saw, December 7th. They discussed work shifts and the use of the

company's blue truck. Claimant's Exh. 2, Cortes depo., p. 33. Cortes testified that he gave the shift choice to Hamilton. Cortes, p. 10, l. 19. However, Zaharie testified that he assigned the early shift to Hamilton and the afternoon shift to Cortes. Tr. p. 51, l. 6-9.

Alpha Services had two operational working service trucks, a blue truck and a white truck, carrying tools. The company also had a Mazada, but it did not have tools at the time. Cortes, p. 31, l. 6-13. Each of the service trucks had different tools. If one service truck did not have a tool, the employee needing the tool would get the tool from the other service truck. Tr. p. 85, l. 5-8. The company service trucks were used by employees to travel to and from the jobsite. Zaharie p. 53, l. 5-9. Hamilton had permission to drive the blue service truck to and from his residence also.

Cortes and Hamilton had not personally met before December 7th. Hamilton had been solely using the blue service truck until Cortes arrived. The plan was that Hamilton and Cortes were going to share the blue service truck. Hamilton and Cortes were planning on having he blue service truck at the jobsite at all times. They were planning on trading the use of the Mazda and the blue service truck, but since this was their first day working the same job on separate shifts, they were still attempting to work out the details about who would have the blue service truck, who would have the Mazda, and at what time. Zaharie p. 53, l. 13-p. 54, l. 24. Hamilton and Cortes agreed that they were going to trade trucks at some point because the blue truck had all the tools needed at the jobsite. Tr. p. 84, l. 3-p. 85, l. 25. Cortes testified that during the call, the evening before the accident, that they were going "to see how it was going to go" and decide. Cortes p. 33, l. 17. Cortes testified that they "were trying to be efficient;" make it efficient for the workers. Cortes p. 15, l. 7-11. Zaharie testified that the blue truck, being driven by Hamilton

on the day of his accident, was supposed to be parked at the storage container and the keys kept at that location also. Tr. p. 85, l. 18-25.

The precise events of the evening before, and the date of, the accident are unclear. The statements of the various persons, the deposition testimonies, the hearing testimony, the private investigation report by Frasco, and the police report conflict in many respects. Somewhat surprisingly given the fatal accident of Hamilton, Zaharie testified at hearing that he was "fuzzy" on stuff. Tr. p. 57, p. 76. Cortes testified that he could not recall dates or times. Cortes also testified that a written note, with his name on it, was written, at least in part, by someone else. Cortes testified that he could not even recall being interviewed by the Frasco investigator after the accident. Cortes p. 14; Tr. p. 126, 127.

On the day of his fatal accident, Hamilton was to run the hot saw the first shift from 2:00 a.m. Mountain Time until around noon and Cortes was scheduled to operate the hot saw from around noon until about 8:00 p.m. Mountain Time. According to Zaharie, Hamilton probably started work at 2:00 a.m. Mountain Time. Zaharie observed that the 'hot saw' was operating at 3:00 a.m. on December 7th. Tr. p. 49. At 6:30 a.m. Mountain Time. Hamilton woke Zaharie up at his rental house near the storage container to tell him there was a leak in a hydraulic cylinder on the hot saw. Zaharie had Hamilton and a co-employee, Reed, drive back to the active logging site to remove the cylinder. Reed returned with the cylinder at about 8:00 a.m. Mountain Time. Zaharie p. 27, l. 20-25. A handwritten note attributed to Reed states that at about 8:45 a.m., Hamilton told him that he was going to go to his rental to sleep. Def. Exh. 6, Personnel File. Pursuant to company policy, that required that when equipment broke down that the employee operating it would 'clock out', and his practice a time sheet note was found indicating that at

some point in time Mr. Hamilton had written down 4.5 hours for that day. That would have been at about the time he work Zaharie to tell him that the cylinder was leaking. R. p.16.

Cortes's note that was in the company personnel file reflects that he arrived at the job site at 10:45 a.m. Mountain Time, walked around the logging site, and then took a nap. Cortes's note reflects, at one point in the note, that he did not see Hamilton on that day. However, the 'border' area of the note had a statement that he had seen Hamilton at the job site. Def. Exh. 6. Cortes testified at his deposition that he met with Hamilton at the job site and they introduced themselves. Cortes p. 26. Cortes testified at hearing, that it was not much of a conversation. He confirmed that Hamilton and he were just going to see how the arrangements for the blue service truck were going to work out. Tr. p. 108, l. 6-20. Zaharie returned with the hot saw cylinder after getting it fixed at about 12:15 p.m. Mountain Time. He testified at his deposition that he delivered it to Hamilton or Reed, "Because they both, in—according to my notes, went back and installed the cylinder." Zaharie p. 28-29. At hearing he did was "fuzzy" about this point. Cortes's note, whether written by him or not, stated that at 12:30 p.m. Hamilton came to the job site for 10 minutes to see if the machine had been fixed. Def. Exh. 6.

At about 2:00 p.m. Mountain Time, Mr. Hamilton called his wife. He told her that he was on the way to Walden to get groceries. His told her that his stomach was bothering him, he was tired from the shift change, and that he was upset because the machinery kept breaking down. R. 17; Clmt Exh. 3, p. 1. The Commission found that Hamilton had driven the blue service truck to Walden to buy groceries and personal items. R. p. 21.

At some point in time after starting to operate the fixed hot saw, Cortes drove the white service truck from the logging site to the storage container to get hydraulic fluid. R. p. 18. Cortes parked the white truck at a location by the storage container where it was visible from

either just before, or at, the entrance of the U.S.F.S. access road to the active logging operations location. R. p. 21.

As Hamilton was returning from Walden with groceries in the company's blue service truck, nearly forty minutes after his first call to his wife, at approximately 2:44 p.m. Mountain Time, Hamilton called his wife. Hamilton told his wife that he had "to go back to the job site." His wife testified that he seemed frustrated, but that he was heading back to the job site, and that he would call her on the weekend. R. p. 7; Clmt Exh. 3, p. 1-2.

Hamilton was seen by the driver of the tractor-trailer that struck his truck, just moments before the fatal accident occurred. The semi-truck driver stated that he observed the blue service truck backing out of the dirt road that accessed the active logging operations onto Highway 230, and then proceeding forward, south in the southbound lane of 230, until he came to the intersection with the east road that accessed the storage container. R. p. 21. The Commission found that Hamilton, while returning from shopping in Walden determined that he had to go to the storage container. The Commission found that Hamilton, instead of proceeding the short remaining distance to his rental house to drop off the groceries, Hamilton had chosen, after passing the storage container heading north, to turn off Highway 230 into the U.S.F.S. access road to the working job site and turn around to go back to the storage container. Hamilton backed out of the west access road onto Highway 230 and retraced his route back towards the access road to the storage container. At approximately 4:00 p.m. Mountain Time, as Hamilton reached junction of the access road to the storage container with Highway 320, he attempted to turn left from Highway 230 into the access road to the storage container. Hamilton was unaware of the oncoming semi-truck, behind him and to his left in the north bound lane of Highway 230, and as he turned left to access the road to the storage container the blue truck he was driving was struck

broadside by a semi-truck/trailer combination. This collision resulted in Hamilton's death. R. 21-22.

Despite feeling tired and sick, Hamilton attempted to return to the storage container. The Commission found that there was no other plausible explanation for why he would have turned around and headed back to the storage container than his being involved in some activity to keep the operation running efficiently. R. p. 22-23. Mr. Hamilton was pronounced dead at the scene of the accident. Other than the tractor-trailer driver, there were no eye witnesses. R. p. 18, 22.

ISSUES PRESENTED ON APPEAL

1. Whether the Commission's finding that Hamilton's fatal accident arose out of and in the course of his employment is supported by substantial competent evidence?
2. Whether the Commission erred by not awarding attorney fees?
3. Whether the Respondents are entitled to attorney fees on appeal?

STANDARD OF REVIEW

The Court may not set aside findings of fact that are supported by substantial competent, although conflicting, evidence. *See* I.C. § 72-732; *Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997)."Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Matter of Wilson*, 128 Idaho 161, 164, 9911 P.2d 754, 757 (1996). The Court will not scrutinize the weight and credibility of the evidence relied upon by the Commission but must construe the evidence in the light most favorable to the party who prevailed before the Commission. *Darner v. Southeaset Idaho In-Home Servs.,* 122 Idaho 897, 841 P.2d 427 (1992).

ARGUMENT

The Commission's finding that Hamilton's fatal accident arose out of and in the course of his employment is supported by substantial competent evidence.

An injury that is compensable under the Worker's Compensation Act must have been caused by an accident arising out of and in the course of employment. I.C. § 72-102 (18)(b). The test is two pronged. An injury is considered to "arise out of" employment when a causal connection exists between the circumstances under which the work must be performed and the injury of which the claimant complains. *Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997). As noted by the Commission, since this case involves a fatality, the applicability of I.C. § 72-228 should be considered. R. p. 19.

I.C. § 72-228. Presumption favoring certain claims provides in relevant part:

> "In any claim for compensation, where the employee has been killed...and where there is unrebutted prima facie evidence that indicates that the injury arose in the course of employment, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury arose out of the employment..."

A deceased claimant's representative must initially present prima facie evidence establishing that his death occurred in the course of his employment, while doing a duty he was employed to perform, in order to gain the rebuttable presumption that his fatal accident arose out of his employment. If there is some doubt as to whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the worker. *Hanson v. Superior Prod. Co.,* 65 Idaho 457, 146 P.2d 335 (1944). *See Beebe v. Horton,* 77 Idaho 388, 293 P.2d 661 (1956) (liberal construction rule in favor of compensability if injury or death could reasonably have been construed to have arisen out of and in the course of employment.)

The decision reflects a careful review and evaluation of all the testimony and evidence. The decision sets forth many of its major considerations including the following:

--Hamilton told his wife he was going to Walden about before the accident;

--He was driving a company truck at the time of the accident;

--There were groceries in the truck at the time of the accident;

--He told his wife not feeling well and was tired;

--Just minutes before the accident, he telephoned his wife that he was going to the job site;

--The semi-truck driver that collided with Hamilton told the police that Hamilton backed into Highway 230 from the west road leading to the working site and proceeded south to the intersection with the storage container road;

--At the time Hamilton turned around and backed into Highway 230 the employer's white truck was visible to Hamilton, at or just prior to reaching the west road to the working site, where it was parked at the storage container;

--The east road to the storage container did not access anything other than the house rented by the site manager/owner Zaharie and a few other vacant houses;

--Hamilton, returning from Walden, had passed the east access road to the storage container and had pulled into the west access road to the working site and turned around to go back to the storage container even though he was feeling ill and tired;

--Hamilton's job duties were far broader than simply running a hot saw. He and the other Alpha Services employees were expected to keep the contract operations running efficiently, especially since the company was losing hundreds of thousands of dollars;

--There was no reason for Hamilton to have been going to the storage container for a personal purpose. R. p. 20-22.

The facts of this case are just the opposite of the usual situation involving an employee who departs from an employment related errand to a personal purpose. Hamilton was returning from Walden on a personal errand and traveling north on Highway 230 until he pulled into the U.S.F.S. access road and turned around to go back to the storage container. Hamilton had passed the company storage container and its access road and then he pulled into the U.S.F.S. access road to the working site to go back. It was at, or about, that time that Hamilton was on the

telephone with his wife telling her that he was returning to the work site. Hamilton stopped his personal errand, traveling home from Walden, backed this service truck into Highway 230 and proceeded back, south, to the storage container access road. As Hamilton was turning left into the access road to the storage container he was struck broadside by a semi-truck traveling south on Highway 230 that was attempting to pass him on the left.

The Commission held that Alpha Services's "place of business" consisted, at a minimum, of the active logging area, the equipment container, and the routes between the two locations which consisted of the west side access road to the logging site, the east side access road to the storage container, and Highway 230 which was the only access between the two locations. The Commission held that the fatal accident occurred within the worksite, and occurred as the result of Alpha Service's placement of its storage container at a location that could only be accessed by driving on Highway 230 and turning left across the oncoming traffic lane of Highway 230.

The accident having occurred within the place of business engaged in by Alpha Services the Commission held that Hamilton is entitled to the presumption that the injury arose out of and in the course of his employment. *Foust v. Birds Eye Division of General Foods Corp.,* 91 Idaho 418, 419, 422 P.2d 616, 617 (1967).

The Commission found that not only did the accident occur on the employer's premises but it also found that there was a causal connection between the accident and the conditions that Hamilton had to confront while within the employer's place of business, e.g. the employer placed its storage container in the location whereby it could only be accessed by driving on Highway 230. *See Dinius v. Loving Care and More, Inc.,* 133 Idaho 572, 990 P.2d 738 (1999).

The employer Alpha Services emphasized policy was that all employees were expected to do whatever was necessary to keep the operation running efficiently. Zaharie testified that the business was losing hundreds of thousands of dollars until he came to the site to personal manage it and increase efficiency. He had turned it around in the short time that he was in Wyoming. As of the time of the fatal accident it had yet to be determined by Cortes and Hamilton when, and how, the blue service truck was going to be exchanged between them. Hamilton was feeling ill and was tired. There was no personal reason for Hamilton to be turn around and go back to access the road going to the storage container. The only things down that road were the storage container and Zaharie's rental house. There was no reason other than the pursuit of his employer's interests for Hamilton to be going to the storage container.

The Frasco tape recording of the Cortes interview documents that Cortes told the investigator:

> "I don't see him doing anything else but except probably going to see me, going to get something at the container which we always need stuff so you know we since always need stuff so we always since we know there is a stop [of work] we always, like if I want to prepare and I know what I need to go right there and go to work or even when I left work I just stop right there pick up what I need before I forget and go home and be all ready the just day. [or] He could have been just trying to see maybe if it was time to switch trucks."

Zaharie told the investigator:

> "I would say he was going back to residence and then probably saw that Leo [Cortes] at the container and that is the reason he stopped and he was going back to say Hi or see what Leo was doing or he might have been checking to see if Leo got everything fixed for that hydraulic that had broken, that is actually what Leo was doing he was getting more hydraulic because he had lost too much hydraulic so Leo was trying to top off the tank and get the machine going."

The Commission held:

> "Defendants have not argued Claimant's death was occasioned by activity unrelated to the circumstances associated with his employment, nor did they present evidence to support such a notion." R. 30.

As the Commission held, under the positional risk doctrine presumption, as in *Foust,* and the I.C. § 72-228 presumption, this claim is compensable.

II.

The Commission erred by not awarding Hamilton attorney fees.

Idaho Code § 72-804 provides for an attorney fees if a surety or employer contest a worker's compensation claim without reasonable grounds. Idaho's Worker's Compensation Law are to be liberally construed with a view to effect its objects and promote justice. The whole philosophy of the Workmen's Compensation Law is aimed to secure a 'sure and certain relief for injured workmen and their families and dependents'. I.C. § 72-201; *McNeil v. Panhandle Lbr. Co.*, 34 Idaho 773, 2013 P.1068 (1921). Whether reasonable grounds exist or do not exist for contesting a claim is a determination first to be made by the Commission. *Mayo v. Safeway Stores, Inc.*, 93 Idaho 161, 165, 457 P.2d 400, 404 (1969).

Just as what occurred in *Mayo*, Alpha Services and Dallas National Insurance had all the available facts long before this case went to hearing. They had the duty to rebut the presumption afforded to claimant under the positional risk doctrine if they wished to deny liability. *Mayo* at 93 Idaho 165, 457 P.2d 404. The Commission, citing *Kessler v. Payette County,* 129 Idaho 855, 859, 934 P.2d 28, 32 (1997), recognized that the Appellants "had the burden of producing

evidence indicating that [Claimant's] injury did not arise out of or in the course of his employment."

The Commission held that the outcome in this case was "not necessarily self-evident, and Defendants' position was not without merit." R. p. 31. That may have been true from the perspective of the Commission going into the hearing, but the Alpha Services and Dallas National Insurance, in *Mayo*, had all of the facts, showing the clear existence of the presumptions that they did not even attempt to rebut, available to them long before this case went to hearing. It was err for the Commission, after finding that Alpha Services and Dallas National Insurance failed to come forward with any evidence to rebut the positional risk doctrine presumption, as in *Foust,* or the I.C. § 72-228 presumption, to not award Claimant's their attorney fees.

III.

Hamilton should be awarded attorney fees on appeal.

Idaho Code § 72-804 allows the award of attorney fees to an employee if the Commission or any court finds the Employer/Surety contested an injured employee's claim for compensation "without reasonable ground." *Deon v. H&J, Inc.,* Sup.Ct. Op. No. 125 (Filed November 28, 2014).

Idaho Appellate Rule 11.2 provides in relevant part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief, or other document; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon such the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other

document including a reasonable attorney's fee.

The Appellants Alpha Services and Dallas National Insurance failed to present any evidence to rebut the positional risk doctrine presumption, as in *Foust,* or the I.C. § 72-228 presumption. As the Commission stated in its Order Denying Reconsideration, even in their motion for reconsideration, the Alpha Services and Dallas National Insurance did not proffer any "new legal or factual evidence not already considered by the Commission." R. p. 51. Even though the Surety, Dallas National Insurance Company is apparently bankrupt and the Western Guaranty Fund has apparently assumed its obligations, there still, even as of the filing of this Reply Brief, has been no formal notice given in this proceeding to that effect.

Respondents continue to argue about the "traveling employee" exception to the "coming and going rule." Appellant's Br. p. 12. Hamilton never argued that the "coming and going rule" applied or that Hamilton was a "traveling employee." The Commission found Hamilton was at the job site when the accident happened. The Commission never held that the rule or the exception applied.

The Respondents' "argument" is nothing but the continuation of their ill-conceived rambling argument that the Commission abandoned its duty to fairly evaluate the factual evidence and fairly apply the law in their motion for reconsideration before the Commission. R. p. 42. Respondents "argument" to the Court ignores the many hard decisions that the Commission has had to make in death cases over the years. They ignore the fact that when the facts and the law do not provide for benefits, that the Commission has made tough gut wrenching decisions that have left widows and children without workers compensation benefits.

The Appellant's argument,

> "In attempting to provide for the heirs of Mr. Hamilton, the Referee and the commission have bent the concepts of arising out of an in the course of employment to the breaking point, stacked a presumption upon inferences derived from suspect testimony and have created unworkable precedent on issues governing the employment relationship." (Appellant's Br. p. 11, p. 15).

is not well founded and it is an affront to the integrity of the Commission and the intent of the law.

The Appellants' forcing Hamilton's widow and children to retain an attorney, forcing a hearing to occur, filing a last minute motion for reconsideration, and filing a last minute appeal to the Court, have been nothing but delaying tactics. Each one has been designed to try to permit Appellants to avoid having to pay Hamilton's funeral expenses and to avoid having to promptly provide statutory, subsistence level death benefits, to Hamilton's widow and two children (not Hamilton's estate as suggested in Appellant's issue number 2, until after the "civil lawsuit" ongoing against the semi-truck driver is resolved in the hope that they will end up not having to pay a penny because of potential subrogation rights. *See* R. p. 31 ¶ 44.

CONCLUSION

The Court should affirm in part and reverse and remand in part.

The Court should affirm the Industrial Commission's decision awarding Hamilton's widow and children benefits as provided for under I.C. §§ 72-410 through 416, together with burial benefits as provided for under I.C. § 72-436, subject to the limitations of I.C. § 72-102(4).

The Court should reverse the Industrial Commission's denial of attorney fees and remand back to the Industrial Commission for entry of an award attorney fees for Hamilton equal in amount to the contingency fee with their attorney.

The Court should award attorney fees on appeal to the Respondents.

Respectfully dated this 15th day of December, 2014.

Starr Kelso, Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2014, I served two copies of the Respondent's Response Brief upon Appellants Alpha Services and Dallas National Insurance Company by regular U.S. Mail, postage prepaid thereon, as follows:

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