6-18-2018

Atkinson v. 2M Company, Inc. Appellant's Brief Dckt. 45918

IN THE SUPREME COURT OF THE STATE OF IDAHO

MATTHEW ATKINSON,	)	
	)	**Docket No. 45918**
Claimant-Respondent,	)	
	)	**I.C. No. 2017-008627**
vs.	)	
	)	
2M COMPANY, INC., Employer, and EMPLOYERS ASSURANCE COMPANY,	)	**APPELLANTS' OPENING BRIEF**
	)	
Surety,	)	
	)	
Defendants-Appellants.	)	
	)	

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHAIRMAN THOMAS E. LIMBAUGH PRESIDING

Alan R. Gardner (ISB No. 2342)
Michael G. McPeek (ISB No. 2436)
GARDNER LAW OFFICE
P.O. Box 2528
Boise, ID 83701
Telephone: (208) 387-0881
Facsimile: (208) 387-3501

Attorneys for Appellants

Bradford S. Eidam (ISB No. 2931)
BRADFORD S. EIDAM, PLLC
P.O. Box 1677
Boise, ID 83701
Telephone: (208) 338-9000
Facsimile: (208) 343-2069

Attorney for Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Course of Proceedings 1

C. Concise Statement of Facts 2

II. ISSUES ON APPEAL 6

III. STANDARD OF REVIEW 7

IV. ARGUMENT 7

A. Introduction 7

B. The Commission Erred as a Matter of Law by Applying Incorrect Legal Standards in Determining that Respondent's Accident Occurred in the Course of Employment and Arose Out of Employment 9

V. CONCLUSION 18

TABLE OF CASES AND AUTHORITIES

IDAHO CASES

Barker v. Fischbach & Moore, Inc., 105 Idaho 108, 666 P.2d 635 (1983).....9, 10, 11, 12

Bocok v. State Board of Education, 55 Idaho 18, 37 P.2d 232 (1934).....12, 13

Clark v. Daniel Morine Construction Co., 98 Idaho 114, 559 P.2d 293 (1977).....8, 16, 17

Combes v. State, Industrial Special Indemnity Fund, 130 Idaho439, 432, 942P.2d 554, 556 (1997).....7

Dinius v. Loving Care and More, Inc., 133 Idaho 572, 990 P.2d 738 (1999).....7, 8, 16

Eriksen v. Nez Perce County, 72 Idaho 1, 235 P.2d 736 (1951).....8

Finhold v. Creso, 143 Idaho 894, 155 P.3d 695 (2007).....13

Izaquirre v. R & L Carriers Shared Services, LLC, 155 Idaho 229, 308 P.3d 929 (2013).....7

Jaynes v. Potlatch Forests, 75 Idaho 297, 271 P.2d 1016 (1954).....16

Kelly v. Blue Linen Supply, Inc., 159 Idaho 324, 360 P.3d 333 (2015).....7

Kessler on Behalf of Kessler v. Payette County, 129 Idaho 855, 934 P.2d 28 (1997).....7, 15

Kiger v. Idaho Corp., 85 Idaho 424,380 P.2d 208 (1963).....7, 8

Matter of Barker, 110 Idaho 871, 719 P.2d 1131 (1986).....9, 10, 11, 12

Owen v. Burcham, 100 Idaho 441, 599 P.2d 1012 (1979).....12

Pitkin v. Western Construction, 112 Idaho 506, 508, 733 P.2d 727, 729 (1987).....8, 12

Spanbauer v. Peter Kiewit Sons' Company, 93 Idaho 509, 465 P. 2d 633 (1970).....10, 16

Teurlings v. Larson, 156 Idaho 65, 320 P.3d 1224, (2014).....9

Thomas v. Arkoosh Produce Inc. 137 Idaho 352, 48 P.3d 1241 (2002).....12

Trapp v. Sagle Volunteer Fire Dep't, 122 Idaho 655, 837 P. 2d 781 (1992).....13

CASES OTHER JURISDICTIONS

Vanleeuwen v. Industrial Commission, 901 P.2d 281 (Utah App. 1995).....15, 17

IDAHO INDUSTRIAL COMMISSSION

Solecki v. Bechtel Marine Propulsion Corp., 2013 IIC 0074 (November 8, 2013 ..... 14, 15

STATUTES

Idaho Code §72-102(18)(a) 7

I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a workers' compensation decision of the Industrial Commission involving the going and coming rule. Respondent was injured in an automobile accident on a Saturday morning when he was driving from his home to the Appellant Employer's office in a company pickup. The Industrial Commission in a 2-1 decision concluded that Respondent's accident and injuries arose out and in the course of his employment. Appellant Employer and Surety have appealed, contending that the Commission erred by failing to apply the correct legal standards to the in the course of employment and the arising out of employment issue. Appellants seek reversal and remand to the Commission for findings of fact and conclusions of law consistent with this Court's decision and opinion on appeal.

B. Course of the Proceedings

Respondent's accident occurred on March 11, 2017. R., p. 19. Respondent filed a Worker's Compensation Complaint with the Industrial Commission on May 24, 2017. R., pgs. 1-3. Appellants filed their Answer on June 2, 2017. R., pgs. 4-5. The Commission on July 26, 2017 issued a Notice of Hearing for September 13, 2017. R., pgs. 6-7. One of the issues set for hearing was "Compensability of Claimant's March 11, 2017 accident, including whether Claimant suffered an injury arising out of and in the course of employment by Employer." R., p.6. Referee Alan Taylor conducted the hearing on September 13, 2017 as scheduled. R., p. 15. Respondent on October 11, 2017 filed Claimant's Brief and Closing Argument. R., Additional Documents 1, p.

ii. Appellants filed their Defendants' Post-Hearing Memorandum on October 30, 2017. R., Additional Documents 2, p. ii. Respondent then filed Claimant's Reply Brief on November 13, 2017. R., Additional Documents 3, p. ii. The Commission on March 6, 2018 issued its Findings of Fact, Conclusions of Law, and Order and Dissenting Opinion. R., pgs. 15-34. Referee Taylor submitted a proposed decision, but the Commission indicated in its Findings of Fact, Conclusions of Law and Order and Dissenting Opinion that "[t]he undersigned majority, while agreeing with the outcome in this case, disagrees with the treatment given by the Referee to certain exceptions to the going and coming rule, and therefor issue this decision in lieu of the proposed decision." R., p. 19. Appellants filed their Notice of Appeal on April 10, 2017. R., pgs. 35-39.

C. Concise Statement of Facts

Appellant Employer is a wholesaler of well drilling and irrigation supplies Tr., p. 25, LL. 1-4. Its local office is in Meridian. Tr., p.2 26, LL. 11-15. When Respondence started employment with the Respondent was hired as a delivery driver when he began employment with Appellant Employer in 2011. Tr., p. 24, LL. 15-17. He drove for the company for about three years, and then was promoted to inside sales. Tr., p. 25, LL. 10-14. He continued in that position until 2015, when he was promoted to territorial (outside) sales. Tr., p. 26, LL. 2-6.

As a territorial sales person, Respondent was a salaried employee. Tr., p. 27, LL. 9-15. His monthly salary at the time of the March 11, 2017 accident was $4,000.00. Tr., p. 27, LL. 12-15. Appellant Employer had four other salaried employees besides Respondent. Tr., p. 35, LL. 11-13. As part of their job duties, each of the five salaried employees was required take a turn one

Saturday every five weeks in staffing Appellant Employer's Meridian office. Tr., p. 34, L..12 – p. 35, L. 16. The office was open from 8:00 a.m. to noon on Saturdays. Tr., p. 35, LL. 7-8.

March 11, 2017 was a Saturday. Tr., p. 43, LL. 2-8. On that Saturday, Respondent had switched Saturday shifts with another employee to allow that employee to spend time with his children, who were coming into town for spring break from Arizona where they lived with their mother. Tr., p. 43, LL. 9-22. In return, the other employee would cover Respondent's next regular Saturday shift. Tr., p. 43, LL. 23-24.

The evening of Friday, March 10, 2017, Respondent and his wife had driven in their personal vehicle to the Whitewater Saloon for a date night. Tr., p. 44, L. 19 – p. 45, L. 13; Neither felt capable of safely driving home at the end of the evening, so they took a cab home. Tr., p. 45, LL. 2-6. The next morning, Respondent and his wife, Crystal, left home together before 8:00 a.m. in Appellant Employer's pickup, which Respondent had use of. Tr., p. 45, LL. 12-21; Tr., p. 53, LL. 2-3; Tr., p. 60, L. 24 – p. 61, L. 7. The couple's three children had spent the evening at their grandmother's house, and Crystal Atkinson was supposed to pick the children up at 8:00 a.m. Tr., p. 2, LL. 2-14; Tr., p. 45, LL. 7-19; Tr., p. 60, L. 25 – p. 61, L.8. She needed a car to do so, but since the couple had left their personal vehicle at the Whitewater Saloon, she needed to be driven there to retrieve the family car. Tr., p. 44, L. 19 – p. 45, L. 19; Tr., p. 60, L. 24 – p. 61, L. 8. When Respondent and his wife left their home together in the Appellant Employer's pickup that Saturday morning, their plan was that Respondent would drop her off at the Whitewater Saloon to pick up their car before proceeding alone in the Appellant Employer's pickup to the Appellant Employer's

office for his four-hour Saturday shift. Tr., p. 45, LL. 12 – 24; Tr., p.52, LL. 2-3; Tr., p. 60, L. 24 – p. 71, L. 1. The Whitewater Saloon is located on Meridian Road at the corner of Fairview Avenue and Meridian Road. Tr., p. 48, LL. 5-6. Appellant Employer's Meridian office is located at 130 East Victory Road, which is near the intersection of Meridian Road and East Victory. Tr., p. 46, L. 24 – p. 47, L. 3; Exhibits A and G.

When the two left home that Saturday morning, Respondent drove the pickup and his wife was in the passenger seat. Tr., p. 52, L. 16 – p. 53, L. 6; Tr., p. 61, LL. 12-13. Respondent pulled onto Archery from their driveway and then onto Meadowgrass, where they were then heading east. Tr., p. 52- LL. 21-22; Tr., p. 61, LL. 17-18. The most direct north-south road out of their subdivision is Locust Grove. Tr., p. 48, LL. 21-22. Tr., p. 51, LL. 16-22. They did not, however, make it out of their subdivision onto Locust Grove. Tr., p. 48, LL. 24-25. When he turned onto Meadowgrass at about 7:30 a.m., the sun was shining in Respondent's eyes and he noticed that he couldn't see very well because the windshield was obscured due to the cold weather. Tr., p. 52, L. 21 – p. 53, L. 3; Tr., p. 61, LL. 17-19. He pulled to the side of the street, got out of the pickup, shut the door, and started to scrape the windshield with a credit card. Tr., p. 53, LL. 6-8; Tr., 61, LL. 17-22. As he was scraping the windshield, he was struck by another vehicle and was injured. Tr., p. 55, LL. 6-7. Tr., p. 61, LL. 22-23; Tr., p. 62, LL. 6-8.

Respondent's injuries included injuries to his right leg and right shoulder. Tr., p. 55, LL. 8-16. He was taken by ambulance to St. Alphonsus' Hospital the morning of the accident, where he was an in-patient for five weeks. Tr., p. 17, LL. 17-19; Tr., p. 52, LL. 9-22. By the date of

hearing, he had four or five surgeries, and he had been in rehabilitation since his discharge from the hospital. Tr., p. 55, LL. 20— p. 56, L. 3.

Appellant Employer had continued to pay Respondent his salary since the accident through the date of hearing. Tr., p. 56, LL. 15-25. Respondent returned to work in August 2017 and has been working in inside sales as of the hearing date. Tr., p. 57, LL. 3-9. As of the date of hearing, Respondent was still unable to drive a motor vehicle. Tr., p. 57, LL. 12-16.

Besides a once-in-five week required turn staffing the office on a Saturday, Respondent had other duties during the week in his pre-injury position as a territorial sales person.

Respondent's sales territory prior to the May 11, 2017 accident included southeastern Oregon, Vale and Burns, northeaster Nevada, southeastern Idaho to Burley, and north to McCall. Tr., p. 30, LL. 1-16. Every Monday, Respondent would be in the office preparing a weekly call report, which he would usually try to have completed by noon. Tr., p. 30, LL. 22-24. He would then spend the rest of Monday lining up sales calls with regular and prospective customers. Tr., p. 30, L. 24 – p. 31, L. 6. The rest of his work week would focus on completing the sales calls. Tr., p. 31, LL. 13-16. A sale would involve him arranging for a delivery driver to deliver parts or equipment that had been purchased. Tr., p. 29, LL. 6-11. In some situations, a sale might involve Respondent needing to assist a customer with the installation of parts or equipment. Tr., p. 29, LL. 12-18. Also, Respondent and other sales persons might need to respond to established customers' special needs outside regular working hours. Tr., p. 35, L. 22 – p. 36, L. 22.

Additionally, Respondent would also provide technical assistance to customers. Tr., p. 28, LL. 10-11.

As a territorial sales person, Respondent was given the use of a company pickup to make sales calls, service customers, and commute to and from work. Tr., p. 36, L. 24 – p. 37, L. 25. Appellant Employer paid for the fuel and maintenance expenses of the pickup, with an exception. Tr., p. 40, LL. 4-17. Respondent had permission to use the vehicle for personal use, but he would have to personally pay for fuel if he went on a personal trip over the equivalent of a hundred air miles from the Meridian office. Tr., p. 37, L. 24 – p. 38, L. 5; Tr., p. 40, LL. 5-9.

II. ISSUES ON APPEAL

1. Did the Commission, as a matter of law, incorrectly apply the law of inferences in determining that the Appellant Employer intended to compensate Respondent for travel time?
2. Did the Commission, as a matter of law, apply an incorrect legal standard in determining that the Appellant Employer derived a substantial benefit from providing Responding with the use of a company pickup to commute to and from work?
3. Did the Commission, as a matter of law, incorrectly apply the Court's holdings in Barker v. Fischbach & Moore, Inc. and Matter of Barker to the determination of whether Respondent was in the course of employment at the time of his accident?
4. Did the Commission err as a matter of law by failing to make a finding of fact as to whether Claimant's accident arose out of employment?

5. As a matter of law, does an auto accident that occurs while an employee is commuting from his home to work at his employer's office arise out of employment when the employee is not performing any services for the employer at the time of the accident?

III. STANDARD OF REVIEW

In reviewing an Industrial Commission decision, the Court exercises free review over questions of law. Izaquirre v. R & L Carriers Shared Services, LLC, 155 Idaho 229, 231, 308 P.3d 929, 931 (2013). Whether the Commission applied the correct legal standard to its determination of factual issues is a question of law. *Combes v. State, Industrial Special Indemnity Fund,* 130 Idaho 430, 432, 942 P.2d 554, 556 (1997).

IV. ARGUMENT

A. Introduction

To be compensable under the workers' compensation law, an injury must be caused by an accident "arising out of and in the course of" employment. Idaho Code § 72-102(18)(a); Idaho Code. See *Kelly v. Blue Linen Supply, Inc.*, 159 Idaho 324, 360 P.3d 333 (2015); *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 990 P.2d 738 (1999); *Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963). Both the in-the-course-of-employment requirement and the out-of-employment requirement must be satisfied for there to be compensability. *Kessler on Behalf of Kessler v. Payette County.*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997). As noted in Dinius, supra, "[t]he words 'out of' have been held to refer to the origin and cause of the accident and the

words 'in the course of' refer to the time, place, and circumstance under which the accident occurred." 133 Idaho at 574, 990 P.2d at 740. "An injury is deemed in the course of employment when it takes place while the worker is doing the duty which he is employed to perform." *Id.* at 575, 990 P.2d at 741. "The injury is considered to arise out of the employment when a causal connection is found to exit between the circumstances under which the work must be performed and the injury of which the claimant complains." *Id.* The Court in *Kiger*, supra, elaborated on the "out of employment" requirement, quoting with approval the following explanation from *Eriksen v. Nez Perce County,* 72 Idaho 1, 6, 235 P.2d 736, 738-9 (1951):

> It [an injury] arises "out of employment, when there apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment.

85 Idaho at 430, 380 P.2d at 210-11.

Unless an exception applies, an employee going to and from work is not within the course of employment, and an injury sustained while engaged in such travel does not arise out of the employment. *Clark v. Daniel Morine Construction Co.*, 98 Idaho 114, 559 P.2d 293 (1977). The reason the employee is generally not awarded compensation for injuries that occur while traveling to and from work is that such injuries are not sufficiently linked causally to employment. *Pitkin v. Western Construction,* 112 Idaho 506, 507, 733 P.2d 727,728 (1987). The Court previously

explained in *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 109, 666 P.2d 635, 636 (1983) "that the employment relationship is considered to be suspended from the time the employee leaves his work to go home until he resumes his work the next day." Exceptions to the going and coming rule include: "(1) the special errand; (2) the traveling employee; (3) peculiar risk, and: (4) dual purpose doctrines." *Teurlings v. Larson*, 156 Idaho 65, 73-74, 320 P.3d 1224, 1232-33 (2014). The Commission, however, did not find that Respondent's accident fell within any of those exceptions. Rather, the Commission expanded the Court's payment-for-travel-time doctrine beyond the parameters of any Court holding. In so doing, Appellant's contend the Commission committed reversible error.

B. The Commission Erred as a Matter of Law by Applying Incorrect Legal Standards in Determining that Respondent's Accident Occurred in the Course of Employment and Arose Out of Employment

In the instant case, the Commission determined that *Matter of Barker*,110 Idaho 871, 719 P.2d 1131 (1986) "is controlling and dispositive[.]" Findings of Fact, Conclusions of Law, and Order and Dissenting Opinion, Finding 28, R., p. 26. *Matter of Barker*, supra, was the second appeal involving the same parties. The earlier appeal was *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983) (Barker I). *Barker I* involved the issue of whether Barker was in the course of his employment when he was killed in a car accident after he left work to travel to a dental appointment in Twin Falls, where he resided. 105 Idaho at 109, 666 P.2d at 635. Pursuant to a collective bargaining agreement, Barker received $90 per week as a travel allowance for travel between Twin Falls and the work site, which was located 26 miles east of Arco. *Id.* The work site was 137 miles from Twin Falls. *Id.* The Commission concluded that Barker had not been engaged

in employment at the time of the accident. *Id.* The Court in Barker I determined that the Commission erred as a matter of law in the way it applied *Spanbauer v. Peter Kiewit Sons' Company*, 93 Idaho 509, 465 P. 2d 633 (1970) to the facts. 105 Idaho at 111, 666 P.2d at 635. Thus, it reversed and remanded to the Commission "to determine if other evidence, besides the payment of travel expenses, exists to support a finding that the employee was within the course of employment at the time of the accident." *Id.* Following remand, the Commission again found for the employer and surety and the case was once more appealed, resulting in *Matter of Barker*, supra. The Court affirmed the Commission. It concluded that the Commission correctly applied the standard announced in Barker I, and that no evidence, other than the travel allowance payment, had been submitted "to indicate that the employer intended to compensate the employee for travel time or travel expense." 110 Idaho at 872, 719 P.2d at 1132.

There is no dispute in the instant case that the Appellant Employer provided to Respondent the company pickup that Respondent was driving from his home to work on the Saturday morning of the accident. As a territorial sales person, Respondent was given the use of a company pickup to make sales calls, service customers, and commute to and from work. Appellant Employer generally paid for the fuel and maintenance expenses of the pickup. The Commission recognized, however, that provision of the pickup and the "gas and maintenance necessary to operate the same" were insufficient by themselves for purposes of the in-the-course-of-employment requirement, and that "Claimant must adduce additional evidence 'indicating that Employer intended to compensate employee for travel time,' in order to justify the expansion of the course of employment to include a going-to/coming-from trip." Findings of Fact, supra, Finding 24, R., p. 25. The Commission

went on to conclude that there were "two other circumstances" which would "support the inference that Employer intended to compensate Claimant for travel time[.]" Id. Those were "(1) Claimant's status as a 24/7 "on-call" employee" and; (2) fact that employer enjoyed a significant benefit from this arrangement." *Id.* It elaborated on those "two other circumstances" in its next two findings.

> 25. First, Claimant is a 24/7 "on-call" employee. Claimant may be called upon to respond to an emergency any time of day, and therefore, it is necessary to his work to have immediate access to a company vehicle at all times. Because Claimant must have a company vehicle at home to respond to the needs of a customer, it follows that he must use Employer's vehicle going-to and coming-from the workplace. Because of the demands of his employment, Claimant is effectively denied the option of choosing to use his own vehicle in coming/going journey.
>
> 26. Second, even though the provision of a company vehicle to Claimant may be regarding as an inducement to Claimant, it is also clear that the provision of a company vehicle to Claimant serves the Employer's interests by ensuring that Claimant will always have the means available to immediately respond to emergency calls.

Findings of Fact, supra, Findings 25-26, R., pgs. 25-26. The Commission then found that "[a]lthough we consider this to be a close case, pursuant to Barker, we find these additional factors, along with the Employer's payment of the expenses to travel, to be sufficient to bring Claimant's accident within the course of his employment." Findings of Fact, supra, Finding 27, R., p. 26.

The Court in Barker I, supra, and Matter of Barker, supra, clearly indicated that there must be evidence that an employer intended to compensate an employee for travel time for travel to and from work to be in the course of employment. Respondent was a salaried employee. There is no evidence that Appellant Employer paid Respondent for the time he incurred in traveling to and from work. Moreover, none of the facts the Commission recites in Finding 25 are related to the circumstances of Claimant's accident. That Claimant might have to respond to customer calls

outside normal working hours is not relevant to the particular facts of Respondent's accident. Claimant's injury did not occur while he was traveling to or from a customer's place of business, either during or outside normal working hours; it occurred while he was driving to Appellant's Employer's office where he was to perform a four- hour shift as the sole person staffing the office during the hours the office was open on a Saturday. In *Owen v. Burcham*, 100 Idaho 441, 448, 599 P.2d 1012. 1019 (1979), the Court established the principle that although "[t]here is no sure way to distinguish between a legitimate inference to which a party is entitled and an unreasonable one to which he is not entitled [,] . . . an inference would be unreasonable if it would permit [the trier of fact] to base its verdict on mere speculation and conjecture." Furthermore, relying on *Owen v. Burcham*, the Court held that an inference is illegitimate where there is no evidence in the record on the specific matter at issue. *Thomas v. Arkoosh Produce Inc.* 137 Idaho 352,358, 48 P.3d 1241, 1247 (2002). The specific issue in the instant case, in light of the Commission's reliance on *Matter of Barker*, supra, was whether there was evidence apart from the permitted use of a company pickup and the payment of the fuel and maintenance expense for to establish that Appellant Employer intended to compensate Respondent for his travel time in commuting from his home to Appellant Employer's office. The facts cited by the Commission in Finding 25 do not support the inference drawn by the Commission.

Part of the Commission's problem is that it conflated the focus of *Barker I* and *Matter of Barker* on travel time with the special errand exception to the going and coming rule. As described in *Pitkin v. Western Construction*, 112 Idaho 506, 508, 733 P.2d 727, 729 (1987), citing *Bocok v.*

State Board of Education, 55 Idaho 18, 22, 37 P.2d 232, 234 (1934), the special errand exception is,

> An exception to the [going and coming] rule [which] is found in cases where it is shown that the employee, although not in his regular place of employment, even before or after customary working hours, is doing, is on his way home after performing, or on the way from his home to perform, some special service or errand or the discharge of some duty incidental to the nature of his employment in the interest of, or under the direction of, his employer. In such cases, an injury arising en route [sic] from home to the place where the work is performed, or from the place of performance of the work to home, is considered as arising out of and the course of the employment.

Also *see*, *Trapp v. Sagle Volunteer Fire Dep't*, 122 Idaho 655, 656, 837 P. 2d 781, 782 (1992).

The Court in *Finhold v. Creso*, 143 Idaho 894, 898, 155 P.3d 695, 699 (2007) explained that the key concept underlying the special errand exception is the idea that the employee has been required to perform a task for the employer which required that the employee leave his place of work. "The special errand exception," said the Court, is premised on the idea that an employee leaving his normal place of work to perform a special job for an employer is, nevertheless, still performing part of his normal job." *Id.*

Thus, Respondent being on call to respond to customer needs outside normal working hours would have been relevant under the special errand rule had Respondent's accident occurred while he was traveling from his home to attend to the customer, or on his way home after attending to the customer. Neither scenario, however, was involved relative to Claimant's accident. Thus, the Commission erred by taking features relevant to the special errand exception and applying

them to the issue whether Appellant Employer intended to compensate Respondent for travel time in commuting to and from work.

The Commission's Finding 26 is also problematic for much the same reasons as Finding 25. That Appellant Employer's interests may have been served because use of the company pickup meant that Respondent "would have the means to immediately respond to emergency calls, is disconnected from the fact that Claimant's accident did not occur while he was traveling in response to an emergency call or returning from responding to such a call. That brings one back to the fact that Respondent's accident occurred while he was commuting from his home to Appellant Employer's office, where he needed to be that morning by 8:00 a.m. The Court has never held that an exception to the going and coming rule can be predicated on the idea that an employer derives a benefit from an employee's on-time arrival at work, even if they are commuting to work in a company vehicle. In fact, the Commission itself held only five years ago that any alleged benefit to an employer from his employee's commute to work from home and from work to home was legally insufficient to establish an exception to the going and coming rule. *See Solecki v. Bechtel Marine Propulsion Corp.*, 2013 IIC 0074 (November 8, 2013).

The decedent in *Solecki* was returning to his home in Chubbuck from the INL site northwest of Idaho Falls when he lost control of his vehicle and was killed when the vehicle crashed into an abutment under an overpass. His widow brought a death claim, contending that the death arose out of and in the course of employment because the employer derived a benefit from the decedent's commute and that alleged benefit turned the commute into a special errand. The Commission expressly rejected the spouse's argument. The Commission held that,

> To adopt Claimant's position would entirely scuttle the going and coming rule. All employers derive a benefit from an employee's being at work and most employees must drive to and from that work. To label that travel a '" special errand" because employers derive a benefit from that travel would make all such travel arising out of and in the course of employment.

2013 IIC 0074 at 6.

The Utah Court of Appeals in *Vanleeuwen v. Industrial Commission*, 901 P.2d 281 (Utah App. 1995) reached a similar conclusion to the conclusion in *Solecki.* The Court of Appeals affirmed the Utah Industrial Commission's denial of a claim for injuries sustained by a project supervisor who was injured in a company truck while driving from home to the employer's place of business. The employer was in the landscaping and yard care business. It provided the project supervisor with a company truck to commute to and from work. He also would use the truck to transport employees whom he was responsible for supervising to and from various work sites. The project supervisor argued on appeal that the employer received a substantial benefit from his use of the vehicle as a matter of law. The Court rejected his argument, reasoning that "mere arrival at work is not considered a substantial benefit to the employer." 901 P.2d at 285

As noted previously, both the in-the-course -of- employment requirement and the out-of-employment requirement must be satisfied for there to be compensability. *Kessler on Behalf of Kessler v. Payette County*, supra, 129 Idaho at 859, 934 P.2d at 32. In the instant case, the Commission made the conclusion of law that Respondent proved his "accident arose out of an in the course of employment." Findings, supra, Conclusions of Law 1, R., p. The Commission, however, only made a finding that Claimant's accident was within the course of employment. Findings, supra, Finding 27, R., p., and Finding 32, R., p. Thus, the Commission failed to take

into account the interplay between in the course of employment and arising out of employment issues in going and coming cases. That interplay starts with the premise that here needs to be a travel risk in going to and from work that is so strongly connected to the employment that the in-the- course – of- employment requirement needs to be expanded to avoid an injustice that would result "in the denial of compensation for an injury caused by the employment[.]" Spanbauer v. Peter Kiewit Son's Co., 93 Idaho 509, 511, 465 P.2d 633, 635 (1970); *Jaynes v. Potlatch Forests*, 75 Idaho 297, 302, 271 P.2d 1016, 1018 (1954). The risk concept is consistent with the general definition in Dinius *v. Loving Care and More, Inc.*, supra, that "[t]he words 'out of' have been held to refer to the origin and cause of the accident" and that "[t]he injury is considered to arise out of the employment when a causal connection is found to exit between the circumstances under which the work must be performed and the injury of which the claimant complains." 133 Idaho at 574-575, 990 P.2d at 740-741.

The importance of analyzing risk for out-of-employment purposes is illustrated in the Court's application of the peculiar risk exception to the going and coming rule. See *Clark v. Daniel Morine Construction Co.*, supra. The Court in *Clark* indicated that "an exception to '[the going and coming] rule does exist when such travel involves special exposure to a hazard or risk peculiarly associated with the employment and that risk is causally connected to the accident." 98 Idaho at 115, 559 P.2d at 294. Essentially what the Court is getting at here is that the peculiar risk exception involves the presence of a street risk which distinguishes the going-and-coming travel from the ordinary street risks faced by all commuters. The appellant in *Clark,* for example, alleged that the stretch of road the decedent had to travel to get to the employer's work site was especially

hazardous for the driver of a motor vehicle. 98 Idaho at 114, 559 P.2d at 293. The Industrial Commission, however, found "that the road presented no particular difficulty for a driver[,]" 94 Idaho at 114, 559 P.2d at 294. The Court affirmed.

Employment risk also was a factor for the Utah Court of Appeal in *Vanleeuwen v. Industrial Commission,* supra. As noted above, the Court of Appeals found that the project supervisor's commute to and from work in a company truck was, by itself, a legally insufficient benefit to the employer to establish that the project supervisor's accident while driving home deemed occurred in the course of employment. The Court of Appeals, however, also addressed the absence of any risk fairly associated with the employment regarding the circumstances of the accident. It noted that the project supervisor wasn't performing any service for the employer at the time of the accident. The Court of Appeals explained that:

> VanLeeuwen was not on an employment related "special errand" or "special mission" at the time of the accident. VanLeeuwen was not being compensated for his time spent traveling between his home and Custom's office. The accident did not occur on custom's premises, nor did VanLeeuwen's duties require him to be at the place where the accident occurred. The risk that caused the accident was one common to the traveling public and was not created by duties connected with his employment. [Citation omitted.]

901 P.2d at 285.

Similarly, Mr. Atkinson was not performing a service for the employer at the time of the accident, and the risk that caused his accident was one common to the traveling public and was not created by duties connected with his employment. The Commission erred by failing to address. The Commission erred by failing to determine whether the origin and cause of Respondent's accident arose from a risk sufficiently linked causally to his employment.

V. CONCLUSION

Based on the arguments presented herein, this case should be vacated and remanded to the Commission for findings of fact and conclusions of law consistent with this Court's decision and opinion.

RESPECTFULLY SUBMITTED THIS 18th day of June 2018.

GARDNER LAW OFFICE

By _____
Michael G. McPeek – Of the Firm
Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of June, 2018, I caused a true and correct copy of the foregoing to be served by the method marked blow:

Brad Eidam
P.O. Box 1677
Boise ID 83701-1677

X U.S. mail
____ Email
____ Facsimile
____ Hand Delivery
X Electronic Service

_____
Legal Assistant