7-17-2018

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

MATTHEW ATKINSON, Claimant-Respondent, vs. 2M COMPANY, INC., Employer, and EMPLOYERS ASSURANCE COMPANY, Surety, Defendants-Appellants.	)	Supreme Court No. 45918

RESPONDENT'S BRIEF

Appeal from the Idaho Industrial Commission
Chairman Thomas E. Limbaugh, Presiding

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I. STATEMENT OF THE CASE.

Respondent (Mr. Atkinson) generally agrees with the statement of the case presented by Appellants (Employer/2M Company). The following comments are added for clarification or to provide a more complete understanding of the case.

A. Nature of the Case.

This is a worker's compensation case. Employer denied the compensability of this claim, in part, by taking the position that Mr. Atkinson was not injured "in the course of his employment" because of the "going and coming rule" which excludes from coverage trips to and from work. Mr. Atkinson argued to the Industrial Commission that several judicially recognized exceptions to the going and coming rule placed Mr. Atkinson within the course of his employment.

The Industrial Commission specifically rejected the primary argument asserted by Mr. Atkinson, that he was in the course of his employment because he was travelling to work in transportation provided by Employer. The Commission did, however, find that another judicially recognized exception to the "going and coming" rule applied to the facts of this case and concluded that Mr. Atkinson was injured in the course of his employment. The exception which the Commission found applicable is based upon the Employer's intent to compensate him for travel time while going to or coming from work. The Commission declined to discuss any other exceptions to the going and coming rule which were argued by Mr. Atkinson.

B. Course of the Proceedings.

The Referee to whom the case was assigned and who presided over the hearing, Referee Alan Taylor, issued proposed Findings of Fact and Conclusions of Law which are part of the record on this appeal. R., p. ii, Additional Documents 4. Referee Taylor found that Mr.

Atkinson was injured in the course of his employment because he was travelling in employer-provided transportation when injured. He did not address any other exceptions to the going and coming rule. The Industrial Commission rejected Referee Taylor's Findings of Fact, Conclusions of Law and Recommendation.

C. Concise Statement of Additional Facts.

2M Company sells well drilling and irrigation supplies. Tr. p. 24, L. 24 – p. 25, L. 4. The company operates out of 15 locations throughout the western United States, including its Meridian, Idaho, office. Tr., p. 26, Ls. 7 – 13. It distinguishes itself from its competitors by providing its customers with "Legendary Service." Tr., p. 33, L. 23 – p. 24, L. 11.

At the time of his accident Mr. Atkinson was employed as a territorial sales person and was earning a monthly salary of $4,000.00 in addition to annual bonuses. Tr., p. 27, Ls. 3 – 21. In addition to increasing business by obtaining new customers, Mr. Atkinson became responsible for providing the hallmark "Legendary Service" to current customers of 2M Company by providing technical assistance at the customer's place of business, "running parts" to them, and assisting in the installation of those parts. Tr., p. 28, L. 7 – p. 29, L. 13.

For the customers of 2M Company, Legendary Service means that Mr. Atkinson and the other sales people are on call 24 hours each day, 7 days each week, to assist them in any way possible. Tr., p. 34, Ls. 6 – 11. Mr. Atkinson received after-hours calls from customers an average of two or three times each week, often late in the evening. Tr., p. 35, L. 1 – p. 36, L. 13. For example, Mr. Atkinson testified that on multiple occasions he would receive a call from a dairy customer in the Twin Falls area, jump in his company truck, and deliver a new pump. Tr., p. 36, Ls. 18 – 23. 2M Company considers this aspect of Mr. Atkinson's job important enough to specifically grade his fulfillment of that customer pledge in its annual performance

evaluations. His evaluation dated March 9, 2017, noted that Mr. Atkinson, "is a great team player and always willing to help and always goes the extra mile on nights and weekends to provide legendary service." Claimant's Exhibit B, p. 3; Tr., p. 41, Ls. 11 – 21.

When promoted to the territorial sales position, Mr. Atkinson received a pick-up truck owned by 2M Company for his use at work, "because I am now working all the time." Tr., p. 37, L. 19. This gave him the ability to call on potential new and existing customers. Tr., p. 37, Ls. 20 – 23. The truck which he was driving when he suffered the injury which is the subject of this claim was previously used by a 2M Company regional manager. Defendants' Exhibit 1, p. 8 (Claimant's Deposition, Tr., p. 17, Ls. 13 – 19). Mr. Atkinson was issued a company credit card which he used to purchase fuel for the truck. Tr., p. 40, Ls. 10 – 12. The Employer also paid for any necessary vehicle servicing and maintenance. Tr., p. 40, Ls. 13 – 20. 2M Company policy specifically states that, "Employees are reimbursed for <u>any</u> business travel expenses." Defendants' Exhibit 5, p. 38; Emphasis added.

On March 11, 2017, Mr. Atkinson was injured during his trip to 2M Company's office utilizing the company truck. Tr., p. 52, Ls. 2 – 9.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL.

Mr. Atkinson believes the issues presented by Employer are insufficient or incomplete and that the following issues more accurately reflect the applicable standards pertaining to the resolution of this appeal.

1. Whether there is substantial and competent evidence to support the Industrial Commission's finding that Mr. Atkinson was injured in the course of his employment.

2. Whether there is substantial and competent evidence to support the Industrial Commission's conclusion that Mr. Atkinson's injuries arose out of his employment.

3. Whether the principles articulated in either *Manion v. Waybright*, 59 Idaho 643, 86 P.2d 181 (1938), or *Hansen v. Estate of Harvey*, 119 Idaho 357, 806 P.2d 450 (Ct. App. 1990), aff. 119 Idaho 333, 806 P.2d 426 (1991), govern the outcome of this case.

4. Whether Mr. Atkinson is entitled to attorney fees incurred on this appeal pursuant to I.C.§ 72-804.

III. ARGUMENT.

Employer properly notes that when reviewing decisions of the Industrial Commission this Court exercises free review over questions of law and also reviews whether the Commission correctly applied the law to the facts of the case.

There are other standards of review applicable to this case. Factual findings of the Industrial Commission will be upheld by the Court if they are supported by "substantial and competent evidence." *Sundquist v. Precision Steel & Gypsum*, 141 Idaho 450, 453, 111 P.3d 135, 138 (2005), citing *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id.* Furthermore, the Commission's conclusions regarding the weight and credibility of the evidence will not be disturbed unless clearly erroneous. *Id.* And, finally, this Court, "will not re-weigh the evidence or consider whether (the Court) would have drawn a different conclusion from the evidence presented." *Id.*

Two rules of construction apply to workers' compensation cases. First, the worker's compensation law should be construed liberally in favor of injured workers to provide coverage. I.C.§ 72-201; *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). Second, and specific to the resolution of this case, is the rule that if there is some doubt about whether the accident in question arose out of and in the course of employment, the case should

be resolved in favor of the injured worker. *Cheung v. Wasatch Electric*, 136 Idaho 895, 897, 42 P.3d 688, 690 (2002).

The major disputed issue in this case is whether Mr. Atkinson's accident took place in the course of his employment. Whether an injury arises out of and in the course of employment is a question of fact to be decided by the Commission. *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 990 P.2d 738, 740 (1999). Employer, however, does not assert that any of the Industrial Commission's Findings of Fact are unsupported by substantial and competent evidence. Rather, each of the five issues raised on this appeal by Employer are characterized in terms of legal error committed by the Industrial Commission.

Mr. Atkinson believes that Employer's phrasing of the issues is insufficient and incomplete. Accordingly, in the first two Additional Issues presented here, he asserts that the Industrial Commission's findings and conclusion that he was injured in an accident arising out of and in the course of his employment is a fact-driven determination supported by substantial and competent evidence. Such facts were properly applied by the Industrial Commission to the law governing the applicable legal standard.

Alternatively, in the event the Court determines that there is not substantial and competent evidence supporting the Industrial Commission's finding that Mr. Atkinson was injured in the course of his employment, Mr. Atkinson argues that the Industrial Commission erred by failing to apply the principles of two previous Supreme Court cases to the present case. That is the subject of the third Additional Issue presented by Mr. Atkinson and compels the same ultimate conclusion as that reached by the Commission, that Mr. Atkinson's accident arose out of and in the course of his employment by 2M Company.

A. General "course of employment" principles.

Employer appropriately notes that to be compensable an injury must "arise out of" and "in the course of" employment. I.C.§ 72-102(18)(a). Each phrase has a different meaning. "The words arising 'out of' refer to the origin and cause of the injury and the words 'in the course of' refer to the time, place, and the circumstances under which the accident occurred." *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 33, 43 P.3d 788, 792 (2002).

The principle focus of the dispute in this case is whether Mr. Atkinson suffered an accident and injury in the course of his employment, not whether it arose out of the employment (although this requirement will also be discussed later in this Brief). As a general rule, a worker travelling between their home and work is not considered within the course of their employment. This is called the "going and coming" rule. *Clark v. Daniel Morine Construction Company*, 98 Idaho 114, 115, 559 P.2d 293, 294 (1977). Trips to and from work are not generally considered in the course of employment because the worker has not yet arrived at the workplace and cannot be said to have commenced performing their duties.

This Court has recognized several exceptions to the going and coming rule, including going to or coming from work in "some transportation facility furnished by the employer." *Eriksen v. Nez Perce County*, 72 Idaho 1, 4, 235 P.2d 736 (1951); *Hansen v. Estate of Harvey*, 119 Idaho 357, 806 P.2d 450 (Ct. App. 1990, aff. 119 Idaho 333, 806 P.2d 426 (1991). Another exception has been recognized when an employer pays an employee for travel expenses and there is additional evidence which supports the conclusion that the employer intends to pay for the employee's time travelling. *Case of Barker*, 105 Idaho 108, 666 P.2d 636 (1983) (*Barker I*); and *Matter of Barker*, 110 Idaho 871, 719 P.2d 1131 (1986) (*Barker II*). In other words, if travel

is part of the responsibilities of the job, trips to and from work become in the course of employment. These exceptions are at the heart of this dispute and are discussed below.

B. Substantial and competent evidence supports the Industrial Commission's finding that 2M Company intended to compensate Mr. Atkinson for his travel time.

The Commission provides an informative discussion of the historical recognition by commentators and this Court that when an employer pays an employee for travel time spent in a going or coming trip, injuries incurred during such a trip are covered, notwithstanding the going and coming rule. *Barker I* is the basis for that discussion and is also cited by Employer in its Brief. R., p. 21, para. 16 – p. 22, para. 19; *Appellant's Opening Brief*, pp. 9, 10. The facts of *Barker* will not be repeated here. Ultimately, *Barker I* holds that an employee travelling to and from work will be considered in the course of their employment when the employer regards the travel as part of the job. Payment of travel expenses is some evidence which supports that conclusion, but there must be more. *Barker I, supra*, 105 Idaho at 110, 666 P.2d at 637.

The Court noted that such other evidence could include the size of the travel allowance, or whether the job requires "extended cross-country travel to reach the employment site." *Id.* The Court did not limit such "other evidence" to these two factors, nor did it suggest that both factors must be present. The logical conclusion is that the Commission may consider any "other evidence" which is relevant to assist it in answering the question of whether, "the employer intended to compensate the employee for travel time, (to) justify expanding the course of employment to include going to and from work." 105 Idaho at 110, 111, 666 P.2d at 637, 638, citing 1 Larson, The Law of Workmen's Compensation § 16.30 (1982).

Given the Court's statement in *Barker I* that such other evidence could include the size of the travel allowance it is significant that Mr. Atkinson received a company car, a credit card for purchase of fuel, that his employer paid for all maintenance and repairs to the company vehicle,

and that the 2M Company policy manual specifically states that its employees will be reimbursed for all business travel expenses. In other words, 100% of Mr. Atkinson's travel expenses were paid by 2M Company in practice and pursuant to its own policy. The size of the travel allowance could not have been larger. Although this additional evidence concerning the size of the travel allowance would seem to have satisfied the requirements of *Barker I* and ended the inquiry, the Industrial Commission looked to other evidence to reach its conclusion.

The Commission pointed to two facts as significant: (1) Mr. Atkinson's "status as a 24/7 'on-call' employee and; (2) (the) fact that employer enjoyed a significant benefit from this arrangement." R., p. 25, para. 25. There is substantial and competent evidence in the record to support these findings.

2M Company takes pride in providing its customers with Legendary Service. Mr. Atkinson was a key part in providing that service and was required to be on call 24/7. As Mr. Atkinson testified, he was provided a company vehicle, "Because I am now working all the time." Tr., p. 26, Ls. 2 – 6. Therefore, after regular work hours it is necessary that he keep the truck at his home so he is prepared to provide Legendary Service by responding to a customer's emergency needs. And during regular work hours, including when he is at the office, he also requires the company truck to be prepared to quickly respond to a customer's needs which might arise. It necessarily follows that he is required to travel between home and the office in the company truck to facilitate the ability to provide Legendary Service to 2M Company's customers. Thus, the evidence and all reasonable inferences arising from that evidence support the Commission's findings that Mr. Atkinson "must use Employer's vehicle going-to and coming-from" work and that he "is effectively denied the option of choosing to use his own

vehicle in coming/going journeys" which would include trips between the office and his home. R., p. 25, para. 25; Emphasis in original.

The second significant finding which the Commission pointed to, that 2M Company benefitted from providing Mr. Atkinson with a company truck (R., p. 26, para. 26), is not only reasonable, but undeniable. Mr. Atkinson was provided a company vehicle to facilitate his ability to provide Legendary Service to the customers of 2M Company. So long as he can provide such round-the-clock service, 2M Company is clearly benefitted by retaining satisfied customers.

It is also noteworthy that Mr. Atkinson receives a monthly salary to fulfill his work responsibilities. Accordingly, it is reasonable to infer that his monthly salary is intended by 2M Company to compensate Mr. Atkinson for fulfilling his obligation to drive the truck to the office from his home every fifth Saturday morning so it is available in the event of a customer emergency.

There is, therefore, substantial and competent evidence that 2M Company compensated Mr. Atkinson for his travel in the company truck to the office on the morning of March 11, 2017, when he was injured. The Industrial Commission correctly applied the legal principles of *Barker I* to the evidence presented and properly found that Mr. Atkinson was injured in the course of his employment with 2M Company.

C. Employer fails to raise any legal errors by the Industrial Commission.

Employer has characterized the issues to be resolved on this appeal in terms of legal questions, however, analysis with specific assignments of error is absent. Employer simply invites the Court to reweigh the evidence and second guess the Commission's factual findings.

Employer articulates the first issue on appeal as whether the Industrial Commission incorrectly applied the law pertaining to inferences when it found that Mr. Atkinson was compensated for his travel time to the office. *Appellants' Opening Brief*, p. 6. In discussing this issue Employer argues that Mr. Atkinson was not injured while travelling in response to a customer's emergency call, but simply commuting to work at Employer's office. *Appellants' Opening Brief*, pp. 11 – 12. In other words, Employer claims that whether Mr. Atkinson required access to the company truck to respond to any customer emergencies which might arise while he is at the office is not relevant because he was not responding to such an emergency call. This argument addresses a factual finding rather than a legal issue and misses the Commission's point.

Having the company truck available at the office is necessary to provide the Legendary Service which 2M Company requires of Mr. Atkinson, regardless of whether a customer may call or not. 2M Company also requires that he be prepared for a customer's emergency by having the company truck at his home. That is the essence of being on call 24/7. Thus, the responsibility to provide Legendary Service requires that Mr. Atkinson must travel between home and the office in the company truck. The Commission's Finding 25 is supported by the evidence and supports the reasonable inference that Employer paid him a salary intended to compensate Mr. Atkinson for driving the company truck to the office on March 11, 2017.

Also, on this issue, Employer argues that the Commission erroneously applied the legal principles of the "special errand" exception to the going and coming rule. *Appellants' Opening Brief*, pp. 12-13. This argument is difficult to understand because the Commission specifically declined to address the applicability of the special errand exception to the facts of this case. R.,

p. 26, para. 28. The attempt to argue that the Commission committed legal error in this respect is, therefore, unfounded.

Employer asserts the second issue on appeal to be whether the Industrial Commission applied an incorrect legal standard in determining that Employer substantially benefitted from providing Mr. Atkinson with a company truck. *Appellants' Opening Brief*, p. 6. The Commission clearly applied the legal standard articulated in *Barker I.* Employer, however, fails to explain why that standard is incorrect. Or why the benefit Employer received from providing Mr. Atkinson with the use of a truck does not properly constitute "other evidence" referenced in *Barker I.* Furthermore, Employer does not specify the correct legal standard the Commission failed to apply. Employer simply repeats the argument that Finding 26 "is disconnected from the fact that Claimant's accident did not occur while he was travelling" to or from an emergency call. *Appellants' Opening Brief*, p. 14. The argument is a slight variation on the previous argument, again asking this Court to reweigh the evidence, and fails for the same reasons.

As the third issue on appeal, Employer questions whether the Industrial Commission incorrectly applied the holding in the *Barker* cases in concluding that Mr. Atkinson was injured in the course of his employment. *Appellants' Opening Brief*, p. 6. Employer, however, fails to articulate how the Commission improperly applied the holding in *Barker I.* The only argument on this issue advanced by Employer is that no authority exists for the proposition 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, ..." *Appellants' Opening Brief*, p. 14. Once again, this argument misses the point and misconstrues the Commission's decision.

The Commission did not find that 2M Company received a benefit from Mr. Atkinson's on-time arrival at the office. There is not even a hint of such a finding. The Commission found

that 2M Company benefitted from providing Mr. Atkinson with a company truck, thereby "ensuring that Claimant will always have the means available to immediately respond to emergency calls." R., p. 26, para. 26. Driving the truck to the office ensures that it is available to respond to a customer's emergency needs if such should arise. Employer's argument is not responsive to any finding or conclusion of the Industrial Commission and is, therefore, not supportive of its appeal.

The cases cited by Employer in support of this argument are, accordingly, distinguishable. *Appellants' Opening Brief*, pp. 14-15. Particularly the Utah case. The interpretation of the Idaho Workers' Compensation Law, a unique statutory scheme, rests solely with the Idaho Industrial Commission and Idaho courts. To the extent that judicial decisions from any other states' courts conflict with Idaho law, such foreign decisions are meaningless in Idaho as they are based upon their own statutes. In this instance, the cited Utah case does not add anything which has not already been addressed by this Court in past decisions. At most, the case demonstrates that Utah law differs from Idaho law.

Employer states the fifth issue on appeal to be whether, as a matter of law, an automobile accident which occurs while an employee is commuting from his home to work at his employer's office "arises out of" employment when the employee is not performing any services for the employer at the time of the accident. *Appellants' Opening Brief*, p. 7. The issue, restated, would seem to ask whether the accident can be said to arise out of employment if it did not occur in the course of employment (*i.e.*, the employee was not performing a service for employer). This argument resembles the proverbial red herring and does not require an answer. Both the "arising out of" and the "in the course of" employment elements are required for an injury to be compensable. If one is missing the claim is not compensable. If Mr. Atkinson's job did not

require him to drive the company truck to the office when he was injured he would not be in the course of employment, unless another exception to the going and coming rule applied. And if no other exception applied the injuries from the accident would not be compensable. Injecting the "arising out of" requirement in this context adds nothing to the relevant inquiry.

This issue simply begs reconsideration of the fact which the Commission found to Employer's detriment. The Commission found that Mr. Atkinson was in fact performing a service of benefit to Employer when he was injured which brought the accident within the course of his employment. Therefore, Employer is simply asking this Court, in a very circuitous manner, to reweigh the evidence supporting the findings.

None of the above arguments on the issues presented by Employer point to any specific legal error committed by the Industrial Commission nor identify a specific finding as unsupported by the evidence. The Commission's finding that Employer intended to compensate Mr. Atkinson for his travel time is supported by substantial and competent evidence. The Commission properly applied this finding to the legal principles of *Barker I* and found that the accident occurred in the course of his employment with 2M Company.

The remaining argument presented by Employer switches from the "in the course of" employment question to whether Mr. Atkinson's injury "arose out of" his employment. This argument pertains to the fourth issue it raises on this appeal, whether the Industrial Commission erred as a matter of law by failing to make a finding of fact that Mr. Atkinson was injured in an accident "arising out of" his employment. *Appellants' Opening Brief*, p. 6. In making this argument Employer creates the potential for misleading confusion by utilizing the "peculiar risk" doctrine to explain the "arising out of" requirement. *Appellants' Opening Brief*, pp. 15-17. Mr. Atkinson is therefore compelled to clarify these two very different legal concepts, first by

explaining the meaning of "arising out of" employment, which is followed by an explanation of the very different "peculiar risk" doctrine.

D. Substantial and competent evidence supports the Industrial Commission's conclusion that Mr. Atkinson's injury arose out of his employment.

Employer correctly notes that the Industrial Commission did not make a specific finding that Mr. Atkinson's accident arose out of his employment, although it did specifically reach that conclusion. R., p. 30, Conclusion para. 1. For the reasons discussed below, the conclusion is supported by substantial and competent evidence which is in the record and the failure to make such a finding is not necessary to the ultimate conclusion. If, however the Court believes it necessary to enter a finding on this issue, it should remand this case to the Commission with directions to enter such findings in support of its conclusion.

The briefing submitted to the Industrial Commission, which is included in this record, reflects that the issue which was hotly contested concerned the "in the course of" employment issue. More specifically, the applicability of certain exceptions to the going and coming rule. If the accident was found to have occurred in the course of Mr. Atkinson's employment (as occurred) there would not seem to be a serious question of whether the accident also arose out of his employment. Therefore, the arising out of requirement, which pertains to causation, was not disputed before the Commission. Employer has raised this issue here but failed to accurately articulate the meaning of "arising out of" employment. Therefore, some discussion is required.

"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." *Spivey, supra*, 137 Idaho at 34, 43 P.3d at 793, quoting *Kessler ex Rel. Kessler v. Payette County*, 129 Idaho 855, 860, 934 P.2d 28, 33 (1997). The degree of causal

connection necessary for an accident to arise out of employment has been addressed by this Court in terms of risks. *Mayo v. Safeway Stores, Inc.*, 93 Idaho 161, 457 P.2d 400 (1969).

In that case the Industrial Commission found that Mr. Mayo was killed at work as a result of blows to his head from a hammer wielded by an assistant manager for unexplained reasons. 93 Idaho at 162, 457 P. 2d at 401. The Court affirmed the Commission's determination that the accident arose out of Mr. Mayo's employment. In discussing the "arising out of" requirement the Court observed that cases involving assaults upon employees are typically divided into three categories based upon the type of risk involved; those related to employment, those which are personal, and those which are neutral. 93 Idaho at 162, 163, 457 P.2d at 401, 402. The Court noted that assaults associated with the employment, such as work disputes, are generally covered by workers' compensation, and assaults which are private or personal in nature are generally not covered. 93 Idaho at 163, 457 P.2d at 402. The Court then stated that neutral risks are covered in Idaho because of the "positional risk" rule, which compels coverage because the employment places the injured worker "in the position and environment" where the injury was sustained. *Id.* Thus, assaults by persons who have no grudge against an employee are not personal to the employee, but neutral and covered.

> The rationale for this rule is that when the cause of the injury can be attributed to neither an occupational nor personal origin, and is thus neutral, there is no more reason to assign the resulting loss to the employee than to the employer. Under such circumstances the scales are evenly balanced, and all that is needed to tip them in favor of compensability under the positional risk doctrine is that the employment brought the employee to the place of injury. See 1 Larson, Workmen's Compensation Law, § 12.14, pp. 192.15-192.16.

93 Idaho at 164, 457 P.2d at 403.

The principles articulated in *Mayo* have not been limited to assault cases. In *Spivey, supra*, Ms. Spivey was injured while sorting seeds when she moved "sort of sideways" reaching across the conveyor belt, felt a pop and burning sensation in her right shoulder. 137 Idaho at 31, 34, 43 P.3d at 790, 793. The employer argued that the Industrial Commission erred by failing to find that her job placed her at greater risk for injury than activities of daily living. The Court rejected that contention:

> In this case, appellants suggest a return to the rationale of *Wells* (*Wells v. Robinson Construction Co.*, 52 Idaho 562, 16 P.2d 1059 (1932)) by requiring Spivey to prove that her job duties placed her at a greater risk for injury than that encountered by the general public performing the same physical motions. However, a greater risk analysis is no longer required of a claimant in light of *Mayo* and *Kessler*.

137 Idaho at 35, 43 P.3d at 794; Emphasis added.

The "arising out of" issue was also presented in a more recent case. *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 318 P.3d 893 (2014). Mr. Vawter arrived at work, clocked in, sat down on a bench and bent over to tie the laces in his boots when he felt a pop and experienced low back pain. 318 P.3d at 895, 896. The employer argued that the accident did not arise out of his employment because his job did not expose him to any greater risk than he was exposed to outside of his employment and because the risk of tying his shoes was personal to him. 318 P.3d at 898. The Court rejected the employer's argument, "because this Court has specifically overruled the necessity of proving that a claimant's employment exposed him to a greater risk of injury." *Id.*

Therefore, in order to meet the "arising out of" test, a risk of injury does not have to be peculiar to one's employment but may be a risk presented to the general public as long as the employment exposes the employee to the same risk.

In this case the Industrial Commission found that Mr. Atkinson was injured when struck by an oncoming motor vehicle while on his way to work the morning of March 11, 2017. R., p. 19, para. 9, 10. The driver of the other vehicle reported to an investigating police officer on the scene that the sun was in his eyes and he was not able to see the roadway when his vehicle hit an object, which he later discovered was Mr. Atkinson. Claimant's Exhibit C, p. 6. Clearly the injury arose out of a risk associated with Mr. Atkinson's operation of the company truck. Once the Commission found that driving the company truck to the office was "in the course" of his employment it indisputably arose out of a risk presented by that employment. Thus, the disputed issues in this case focused upon the "in the course of" employment issue, not the "arising out of" requirement.

Employer seriously confuses matters before this Court when discussing the risks which "arise out of" employment, by bringing into the conversation the "peculiar risk" exception to the going and coming rule. *Appellants' Opening Brief*, pp. 16-17. This portion of Employer's argument concludes with the assertion that Mr. Atkinson's accident did not arise out of his employment because, in part, "the risk that caused his accident was one common to the travelling public and was not created by duties connected with his employment." *Appellants' Opening Brief*, p. 17. The totality of Employer's argument on this issue implies that in order for an accident to "arise out of" employment it must have been caused by a risk which is peculiar to the employment. This is a mischaracterization of the law and is the same argument made by the employer in *Spivey* which was rejected by this Court. A brief discussion of the "peculiar risk" doctrine is necessary to respond to Employer's argument.

The "peculiar risk" doctrine is an exception to the going and coming rule. *Jaynes v. Potlatch Forests, Inc.*, 75 Idaho 297, 271 P.2d 1016 (1954). As such, it is not related to the

"arising out of" employment requirement, rather the "in the course of" employment. The doctrine recognizes that when an employee has not yet arrived at work, if subjected to a peculiar risk while travelling there, a reason exists to extend the premises to include the peculiar risk. In *Jaynes* railroad tracks crossed the road which led to an entrance gate to employer's premises utilized by most of the employees. Mr. Jaynes was killed at the railroad crossing after his shift ended and after leaving the employer's premises. 75 Idaho at 299, 271 P.2d at 1016, 1017. The Industrial Accident Board (predecessor to the Industrial Commission) ruled that the accident did not occur in the course of employment because the employee had left the employer's premises and was on his journey home. The Court reversed the decision:

> A vast majority of the state courts, as well as the United States Supreme Court, have consistently declared and adhered to the doctrine that where an employee has been subjected to a peculiar risk, such as crossing railroad tracks under such facts (as in this case) . . ., there is such an obvious causal relation between the work and the hazard that the course of employment concept must be expanded to cover such employees, ...

75 Idaho at 301, 302, 271 P.2d at 1018.

The peculiar risk doctrine is, therefore, separate and distinct from whether an accident arises out of employment. An injured worker is required to show that the accident arose out of employment in every case. An injured worker is <u>not</u>, however, required to show an injury arising out of a "peculiar risk" in every case. Only when asserted as an exception to the going and coming rule.

Employer claims that Mr. Atkinson's accident did not arise out of his employment because, "the risk that caused his accident was one common to the travelling public . . . ." *Appellants' Opening Brief*, p. 17. This statement does not accurately reflect the state of Idaho law and does not support this appeal.

The factual findings, therefore, clearly support the conclusion that Mr. Atkinson's accident not only occurred in the course of his employment, but also arose out of his employment. The decision of the Industrial Commission should accordingly be affirmed on this issue as there is no legal error. In the event the Court deems it necessary for a specific finding addressing the "arising out of" issue, the proper remedy is for the Court to remand the case to the Industrial Commission directing it to enter specific findings on that issue rather than reversal.

E. Alternative Argument - The principles of law applicable to employer-provided transportation govern the outcome of this case.

Before the Industrial Commission Mr. Atkinson argued that two Idaho Supreme Court cases are dispositive of the "in the course of" employment issue presented by the facts of this case. Industrial Commission Referee Alan Taylor issued Findings of Fact, Conclusions of Law, and Recommendation finding that one of those cases was controlling and dispositive of the resolution of this case in favor of compensability. R., p. ii, Additional Documents 4, at pp. 6-10. The Industrial Commissioners rejected the recommendation of Referee Taylor. R., p. 15, Introduction. The Industrial Commissioners' majority opinion distinguished the case which Referee Taylor relied upon. R., pp. 24, 25, para. 23. Mr. Atkinson asserts as an alternative argument here that the Commission erred by failing to apply the principles of either of those cases.

Mr. Atkinson's argument to the Industrial Commission on this issue is set forth in Claimant's Brief and Closing Argument and is part of the record on this appeal. R., p. ii, Additional Documents 1, at pp. 7-12. Mr. Atkinson restates his argument here, with some modification. In the event this Court determines that substantial and competent evidence does not support the Commission's findings that 2M Company intended to compensate Mr. Atkinson for travelling to work on March 11, 2017, the analysis below is put forth as another basis upon

which this Court should affirm the Industrial Commission's decision that Mr. Atkinson suffered a compensable injury.

Two Idaho cases support the proposition that when an employer provides transportation for a going or coming trip, that trip is brought within the course of employment. The cases are virtually identical to this case.

The earliest reported Idaho case addressing this specific exception appears to be *Manion v. Waybright*, 59 Idaho 643, 86 P.2d 181 (1938). Mr. Waybright employed Mr. Watson as a traveling salesman, selling produce in northern Idaho. Waybright's business was headquartered in Spokane, Washington. Watson lived in Coeur d'Alene, Idaho. On occasion he was required to be at his employer's place of business in Spokane. In order to enable him to perform his job, Waybright provided Watson with a company owned car, a Ford sedan. 59 Idaho at 649. Mr. Manion was a longtime friend of Watson and lived in Spokane. Manion wanted to travel to northern Idaho and asked Watson if he could catch a ride with him on March 17, 1937, when Watson was traveling his sales route. Watson consented and they left early in the day. That evening on the return trip Watson was driving the company car to Spokane rather than his home, because he was required to be at his employer's place of business at 6:00 a.m. the following morning. Manion was riding with him. Between Coeur d'Alene and Spokane, the automobile crashed and Manion died as a result of injuries sustained in the crash. Manion's widow and surviving minor children brought suit against Waybright and Watson for damages in tort. It was alleged that Watson drove the automobile in a grossly negligent manner which caused Manion's death, and that he did so while working, thus allowing his negligence to be imputed to Waybright. After trial, judgment was entered against Waybright, who then appealed.

In affirming the judgment against Watson's employer, the Court held:

> The cases referred to firmly establish the law as being that, if the automobile causing the accident belongs to the defendant and is being operated at the time of the accident by one in the general employ of the defendant, there is a reasonable presumption that at such time he was acting within the scope of his employment and in furtherance of his master's business, and that this presumption is only *prima facie* and may be rebutted and overcome by evidence adduced during the trial, by the testimony of any of the parties to the suit.

59 Idaho at 656, quoting from *International Co. v. Clark*, 147 Md. 34, 37, 127 A. 647, 648 (Maryland Ct. of Appeals).

Although a tort case involving the issue of *respondeat superior*, this 79-year old authority has been cited in more recent worker's compensation cases by both the Idaho Supreme Court and the Industrial Commission for the proposition that a worker injured while operating a motor vehicle owned by the employer is presumed to be within the course of employment. *Kirkpatrick v. Transtector Systems*, 114 Idaho 559, 562, 759 P.2d 65, 68 (1988); *Bowman v. Murphy*, 1991 IIC 0244 at 0244.4 (April 10, 1991).

Applying the principles of *Manion* to this case results in the inescapable conclusion that Mr. Atkinson was injured in the course of his employment with 2M Company. Mr. Atkinson was provided a vehicle owned by 2M Company to enable him to perform his job, just as Mr. Watson was provided by his employer. When he got into the company truck on the morning of March 11, 2017, heading to the office as an employee of 2M Company Mr. Atkinson was presumed to be acting within the course of his employment. There is no evidence that he intended to do anything other than go to work to rebut this legal presumption. The holding in *Manion* compels the rebuttable presumption, which remains unrebutted, that Mr. Atkinson was injured in the course of his employment with 2M Company.

A more recent case discussing this exception to the coming and going rule is *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991). In that case Don Harvey owned a roofing

business located in St. Maries, Idaho. He frequently had jobs throughout northern Idaho and eastern Washington. Mr. Hansen was employed by Harvey. When working on jobs outside of St. Maries he often rode in a company truck driven by James Harvey, Don Harvey's son. On July 16, 1985, James Harvey was driving with Hansen and another coworker in the company truck to a job in Spokane, Washington, when he apparently fell asleep. The truck left the roadway resulting in James Harvey's death and injuries suffered by Hansen. After Hansen applied for worker's compensation benefits with the Washington Department of Labor and Industries it was determined that his injuries arose out of the course of his employment with Don Harvey and benefits were paid. Hansen then filed suit in Idaho seeking tort damages against Don Harvey, his employer. In that suit it was alleged that James Harvey's negligence in operating the motor vehicle should be imputed to Don Harvey as James's employer. 119 Idaho at 334, 806 P.2d at 427. The district court dismissed the lawsuit on the basis that Mr. Hansen's injuries arose out of and in the course of his employment and was barred by the exclusivity provisions of the Idaho Workers' Compensation Law.

The matter was appealed to the Idaho Court of Appeals, which affirmed the dismissal based upon, "what we deem to be the sole material fact – that they were riding in employer-provided transportation when the accident occurred. At that time, the employer had extended the risks of employment to include transportation, and the course of employment had been extended commensurately." *Hansen v. Estate of Harvey*, 119 Idaho 357, 359, 806 P.2d 450, 452 (Ct. App. 1990); Emphasis added. The Supreme Court affirmed the district court's dismissal and specifically adopted the analysis of the Court of Appeals with regard to the exception to the going and coming rule in cases when transportation is provided by the employer.

There seems to be some inconsistency between *Manion* and *Hansen*, the former creates a rebuttable presumption and the latter a rule of law, that when an employer provides an employee with transportation while going to or coming from work the trip becomes within the course of employment. The Court in *Hansen* did not cite *Manion*, rather reliance was placed upon 1 Larson, Workmen's Compensation Law, §§ 17.00 and 17.11 (1989), which articulates a rule that if the trip to or from work is made in a vehicle "under the control of the employer" an injury during the trip occurs in the course of employment. 119 Idaho at 338, 806 P.2d at 431.

Larson attempts to draw a distinction between cases involving employer-controlled transportation (such as buses, trucks or other conveyances controlled and operated by the employer) and a company car under the control of an employee. [See Larson's Workers' Compensation Law, § 14.07(1), fn. 2 (Rev. Ed. 2014), which equates an employer providing a company vehicle to its employee as simply paying the employee's travel expenses (which is another exception to the coming and going rule).] The former (employer-controlled transportation) is felt by Larson to extend the risks under the control of the employer to the travel and the latter (providing a company car) as evidence that the employer considers travel to be part of the employment. *Id.*; and compare with Larson's Workers' Compensation Law, § 15.00 (Rev. Ed. 2014).

This Court does not appear to recognize the distinction drawn by Larson. In *Manion* the Court created a rebuttable presumption based solely upon the limited facts of vehicle ownership by the employer and the driver's status as an employee at the time of the accident. No other facts were noted as significant to that holding. In *Hansen* the only two facts recited in the Supreme Court opinion concerning the vehicle in question were (1) that it was a "company truck" and (2) which was operated by an employee. 119 Idaho at 334. The Court of Appeals noted, "the

vehicle was kept and maintained for use in the roofing business" and that the owner's son, a coworker of Hansen's, was operating it at the time of the accident. 119 Idaho at 359. Neither court, however, discussed whether the truck was under the control of the employer, whether it was assigned to James Harvey as a company vehicle under his control which he could keep at his home for travel to and from work, or whether he was paid for his time driving the truck to and from work. If the Court recognized the distinction drawn by Larson one would have expected that the status of the truck would have been discussed in greater detail. Given this lack of detail it appears as though the most recent comment by the Court in *Hansen* on this issue compels the conclusion that accidents involving company vehicles driven by employees of the company while on the way to work are, *ipso facto*, within the course of employment.

In this case, Referee Taylor discussed both *Manion* and *Hansen*. R., p. ii, Additional Documents, Referee Alan Taylor's Findings of Fact, Conclusions of Law, and Recommendation, pp. 6-10. Referee Taylor concluded by stating, ". . . given the facts of the present case, the Hansen case is controlling and dispositive of the instant dispute, ..." *Id.*, at pp. 9, 10, para. 21.

The Industrial Commission, however, rejected Referee Taylor's analysis. The Commission failed to mention *Manion*, but did discuss *Hansen*. R., pp. 22-25. The Commission distinguished *Hansen*:

> However, we conclude that Hansen is inapposite to the facts before us. The rationale for extending the course of employment to travel to and from the work site in Hansen is that by providing a transportation facility to the injured worker, employer extended risks under the employer's control. This rationale necessarily depends on the fact that employer provided not only the vehicle used to accomplish the journey, but also an agent of the employer to operate the same.

R., p. 24, para. 23.

Mr. Atkinson asserts that Referee Taylor was correct. Mr. Atkinson was 2M Company's employee (*i.e.*, agent) and was authorized to drive the truck to the office at the time he was injured. Even utilizing the Commission's narrow interpretation of *Hansen*, Mr. Atkinson should be within the course of his employment because he was the agent of Employer and operating Employer's vehicle when going to work. It would seem inequitable to limit the holding in *Hansen* to provide workers' compensation coverage for passengers, but not drivers, when they are all coworkers going to work. All occupants are employed by the same employer. All occupants are exposed to the same risks of travel. The fact that Mr. Atkinson did not have any coworker passengers in the vehicle should not impact the resolution of the issue.

Furthermore, the rationale underlying the policy for creating this exception to the going and coming rule would seem to be satisfied. 2M Company, in its sole judgement, determined the type of vehicles to purchase for use by its employees, determined which vehicles to assign to Mr. Atkinson, and paid the costs of fuel, maintenance and repair. The truck Mr. Atkinson was driving the morning of March 11, 2017, had previously been assigned to a regional manager of 2M Company. 2M Company clearly purchases a fleet of vehicles for assignment at its discretion to some of its employees. This level of control over risks of travel would seem, from a practical matter, to extend the risks of employment to include the transportation provided to get to work. Therefore, the policy considerations underlying *Hansen* would be served if applied to the facts of this case.

Mr. Atkinson urges the Court to remand this case to the Industrial Commission with instructions to enter findings that he was injured in the course of his employment consistent with the holdings in either *Manion* or *Hansen*.

F. Mr. Atkinson is entitled to attorney fees incurred on this appeal pursuant to I.C.§ 72-804.

Attorney fees in workers' compensation cases shall be awarded, "If . . . any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee . . . without reasonable ground, ..." I.C.§ 72-804. Attorney fees have been awarded under this statute in cases where an employer, even though characterizing the issue before the Court as one of law, simply asks the Court to reweigh the evidence presented to the Industrial Commission. *Duncan v. Navajo Trucking*, 134 Idaho 202, 204, 998 P.2d 1115, 1117 (2000).

In this case, Employer has characterized the issues as legal in nature, however, the arguments presented amount to asking this Court to simply reweigh the evidence. (See section III(C) of this Brief.) Employer provides no analysis of the *Barker I* principles, particularly what might constitute "other evidence" that Employer intended to compensate Mr. Atkinson for his time travelling to work, or why the evidence which the Commission relied upon was not properly considered. Employer has failed to point to any finding which is not supported by substantial and competent evidence.

Several of the legal arguments made by Employer pertain to legal principles which are not relevant to the Commission's decision, such as the special errand and peculiar risk exceptions to the going and coming rule. Furthermore, asserting that there is no legal authority for the proposition that an employer receives a benefit from an employee's on-time arrival at work, when that was not the basis of any Commission finding, is also an unreasonable argument.

For the foregoing reasons Employer should be required to pay Mr. Atkinson's legal fees incurred in responding to this appeal.

IV. CONCLUSION

Mr. Atkinson requests that this Court affirm the Industrial Commission's Findings of Fact, Conclusions of Law and Order dated March 6, 2018. In the event the Court does not affirm the Commission's decision, Mr. Atkinson requests that the Court remand this case to the Industrial Commission with directions to find in his favor applying the principles of *Manion* and/or *Hansen*. If the Court believes it necessary for findings that Mr. Atkinson's injury arose out of his employment, the case should be remanded with instructions to enter such findings. Lastly, in the event the Court does not provide the relief requested above, the case should be remanded to the Commission for a determination of whether any of the other exceptions to the going and coming rule raised below by Mr. Atkinson, but not addressed by the Commission, are applicable to this case.

RESPECTFULLY SUBMITTED this 17th day of July, 2018.

BRADFORD S. EIDAM, PLLC

/s/_____
by Bradford S. Eidam, Attorneys for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of July, 2018, I served a true and correct copy of the foregoing document, upon the person(s) named below, in the manner noted below:

Alan R. Gardner	[X] Electronic Service
Michael G. McPeek	[X] U.S. Mail
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Boise, ID 83701	

/s/_____
by Bradford S. Eidam