BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW ATKINSON, Claimant, v. 2M COMPANY, Employer, and EMPLOYERS ASSURANCE COMPANY, Surety, Defendants.	**IC 2017-008627** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND DISSENTING OPINION** **Filed March 6, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on September 13, 2017. Claimant, Matthew Atkinson, was present in person and represented by Bradford S. Eidam, of Boise. Defendant Employer, 2M Company (2M), and Defendant Surety, Employers Assurance Company, were represented by Alan R. Gardner, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken. Briefs were submitted and the matter came under advisement on November 15, 2017. The undersigned majority, while agreeing with the outcome in this case, disagrees with the treatment given by the Referee to certain exceptions to the coming and going rule, and therefore issue this decision in lieu of the proposed decision.

ISSUES

The issues to be decided are:

1. Compensability of Claimant's March 11, 2017 accident, including whether Claimant suffered an injury arising out of and in the course of his employment by Employer.

2. Whether Defendants are responsible for providing reasonable and necessary medical care for treatment of the injuries Claimant sustained as a result of the accident of March 11, 2017.

3. Whether Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009), is applicable such that Defendants are responsible for payment of the expenses for such medical care at the full invoiced amount through the date the claim is deemed compensable and such payment of medical benefits must be made by Defendants directly to Claimant and his legal counsel.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant was struck by a car and suffered severe injuries while on his way to work in a company truck on March 11, 2017. Claimant asserts his injury arose in the course of his employment and is compensable as an exception to the general coming and going rule. Defendants assert no exception is applicable and the coming and going rule bars his claim.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The pre-hearing deposition testimony of Matthew Atkinson taken July 17, 2017 by Defendants;

3. Claimant's Exhibits A-O, and Defendants' Exhibits 1, 2, 5, and 6, admitted at the hearing.

4. The testimony of Claimant and his wife Crystal Atkinson taken at hearing.

After having considered the above evidence and the arguments of the parties, the Commission issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was 33 years old and lived in the Boise area at the time of the hearing. He was married and had three children. 2M was a wholesaler of well drilling and irrigating pumps and supplies operating through 15 locations in the western United States, striving to provide "Legendary Service" to its customers.

2. **Background.** Claimant worked briefly for 2M in approximately 2007, left for other employment, and in May 2011 returned to work for 2M as a delivery driver. In approximately 2014, 2M promoted him to inside sales at 2M's Meridian office. In 2015, Claimant was further promoted to the position of territorial sales person. He received a monthly salary of $4,000.00. Claimant's direct supervisor was Chad Draper, 2M's Meridian office manager.

3. As a territorial sales person Claimant's duties were to provide legendary personal service to customers—most of whom were contractors—throughout the Treasure Valley, southwest Idaho, southeast Oregon, and northeast Nevada. Claimant responded to calls from customers requesting drilling and irrigating supplies and provided help installing parts. As part of 2M's legendary service salaried sales staff, he was on-call 24-7, nights, weekends, and holidays to help customers in his territory. He typically began work Monday morning at the Meridian office completing reports and scheduling appointments with customers and potential

customers for the rest of the week. The balance of the week he traveled his sales territory, responding to customers' needs and calling upon potential customers. Sales to typical customers ranged from $10,000 to $500,000 annually. Claimant often spent one or two nights per week out of town.

4. As a territorial sales person, 2M provided Claimant a company pickup and credit card to pay for fuel and maintenance. Claimant always took the company truck to work and on sales and emergency calls. Mr. Draper advised Claimant that he could use the company pickup if he needed to run around town for personal errands. On one occasion Claimant asked Mr. Draper about using the company truck to attend a wedding in north Idaho:

> We were going to a wedding in northern Idaho and I asked him if it would be okay if we drove the pickup up there and he said we could use it for whatever we want and if I go over a hundred miles from the branch I have to put my own fuel in it.

Transcript p. 40: ll. 5-9.

5. Claimant received an average of two or three emergency customer calls per week. It was common for Claimant to receive a customer's emergency call, jump in his company truck at 10:30pm, take a new pump to a dairy in Twin Falls, and help install the new pump that same night. Claimant's performance evaluation on March 9, 2017 commended him for always going "the extra mile on nights and weekends to provide Legendary Service." Exhibit B, p. 3.

6. 2M's Meridian office was open each Saturday from 8:00am until noon. Five salaried employees took turns staffing the office, one each Saturday on a rotating basis. Claimant was assigned to staff the office every fifth Saturday.

7. Although not assigned to work at the Meridian office on Saturday, March 11, 2017, Claimant agreed to cover the office that day for another 2M employee. Mr. Draper was advised of the arrangement.

8. **Industrial accident and treatment.** On Friday evening, March 10, 2017, Claimant and his wife enjoyed a "date night" at the Whitewater Saloon in Meridian. At the end of the evening they left their personal vehicle at the Saloon and took a cab home.

9. On Saturday morning, March 11, 2017, the weather was clear and frosty. Claimant warmed up the company pickup in his driveway and then left for work before 8:00am. His wife rode with him. Claimant intended to drop off his wife at the Whitewater Saloon on his way to work so she could retrieve their personal vehicle. The saloon was located along his usual route of travel from his home to 2M's Meridian office. As Claimant drove east, the morning sun partially obscured his vision and he pulled the company truck to the side of the road to scrape the windshield more completely. While leaning over the hood scraping the windshield, Claimant was struck from behind by a passing vehicle and thrown approximately 25 feet. His right shoulder was dislocated and his right leg fractured and nearly severed. His wife called 911 and paramedics transported Claimant by ambulance to the hospital where he remained hospitalized for approximately five weeks and underwent multiple surgeries.

10. By August 2017, Claimant returned to work at 2M as an inside sales person at the Meridian office. He was only able to work four or five hours per day. He was unable to operate a motor vehicle.

11. **Condition at the time of hearing.** At the time of hearing on September 13, 2017, Claimant continued to experience significant right leg symptoms and limitations. He anticipated further treatment, including additional right leg surgeries. His very

substantial medical bills from the accident remained unpaid. He was unable to drive a motor vehicle. Claimant continued working at 2M approximately four or five hours per day as an inside sales person.

12. From the time of the accident through the date of the hearing, 2M has continued to pay Claimant his full monthly salary.

13. **Credibility.** The Referee observed Claimant and Mrs. Atkinson at hearing, compared their testimony with other evidence in the record and found both to be credible witnesses. The Commission does not disturb this finding.

DISCUSSION AND FURTHER FINDINGS

14. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

15. **Course of employment.** The threshold issue is the compensability of Claimant's March 11, 2017 accident, specifically, whether the accident occurred within the course of Claimant's employment by 2M. Generally it is presumed that an employee travelling to or from work is not within the course of employment and thus not covered by workers' compensation protection. Spanbauer v. Peter Kiewit Sons' Co., 93 Idaho 509, 465 P.2d 633 (1970). However, Claimant asserts that his case falls within a recognized exception to the general rule that when the journey to or from work is made via a transportation facility furnished by Employer, the accident falls within the Claimant's course of employment.

16. Commentators have long recognized that where an employee is paid an identifiable amount for time spent in a going or coming trip, injuries incurred while traveling are covered, the rationale being that in such cases the making of the journey is clearly part of the service for which the injured worker is being compensated. 2-14 Larson's Workers' Compensation Law § 14.06 (2017). This rule is also well established in Idaho. Where travel is a part of the employee's work then accidents incurred while traveling are compensable. See Cheung v. Wasatch 136 Idaho 895, 42 P.3d 688 (2002); Kirkpatrick v. Transtector Systems 114 Idaho 559, 759 P.2d 65 (1988).

17. Most jurisdictions also conclude that the deliberate and substantial payment of the expenses of travel, (as opposed to payment for travel time) or the provision of a vehicle under the employee's control, is also sufficient to bring a going-and-coming accident within the course of employment. Idaho, however, is among a minority of jurisdictions that have not followed this general rule. See 2-14 Larson's Workers' Compensation Law § 14.07 (2017).

18. In Matter of Barker, 110 Idaho 871, 719 P.2d 1131 (1986), Barker was traveling from his work site to a dentist appointment when he was killed in a single vehicle car accident. Per his union contract, Barker was paid $90 per week as a travel allowance. His widow pursued worker's compensation benefits, which the Commission denied, under the holding of Spanbauer v. Peter Kiewet Sons' Company, 93 Idaho 509, 465 P.2d 633 (1970). The Commission found Barker was not in the course of his employment at the time of the accident and that payment of travel expenses was irrelevant to whether or not an exception to the coming and going rule should apply. On appeal, the Idaho Supreme Court reversed the Commission and held that payment of travel expenses "along with other evidence indicating the employer intended to compensate the employee for travel time, will justify expanding the course of employment to

include going to and from work." The Court instructed the Commission to consider any potential "other evidence" on remand. No additional evidence was presented to the Commission on remand and, after re-examining the record and argument of the parties, the Commission re-affirmed its original decision. The Supreme Court affirmed on appeal.

19. Therefore, in Idaho, where employer covers some of the expenses of travel, as by paying travel expenses or providing a vehicle for the employee's use, this fact is insufficient to bring a going-and-coming accident within the course of employment without additional evidence indicating that employer intended to compensate the employee for travel time.

20. Claimant argues that the resolution of the instant matter is controlled by the rule discussed in Hansen v. Estate of Harvey, 119 Idaho 357, 806 P.2d 540 (Ct App. 1990), Aff.119 Idaho 333, 806 P2d 426 (1991). In Hansen, Don Harvey employed his son James, and also Hansen and Lehman in Harvey's roofing business. The business operated in both Idaho and Washington and Harvey obtained Washington workers' compensation insurance. While driving a company truck in Washington on the way to a job site, James apparently fell asleep at the wheel. The truck ran off the road killing James and injuring passengers Hansen and Lehman. They applied for and received Washington workers' compensation benefits based upon the Washington Department of Labor and Industries' determination that their injuries arose out of the course of their employment in Washington. Hansen and Lehman then sued their employer, Harvey, in Idaho district court, alleging James' negligence that caused their injuries should be imputed to Harvey. The Idaho district court determined that Hansen and Lehman's injuries arose out of the course of their employment by Harvey and dismissed their tort claims against Harvey.

21. Relying upon an exception to the coming and going rule mentioned in Eriksen v. Nez Perce County, 72 Idaho 1, 235 P.2d 736 (1951), for employer-provided transportation, the Court of Appeals stated:

> [I]t is undisputed that Hansen and Lehman were passengers in a vehicle furnished by their employer, as they traveled to work in Spokane. It is also undisputed that the vehicle was kept and maintained for use in the roofing business. Hansen and Lehman have asserted that they were not paid for commuting and that they did not always ride in the Harvey vehicle. However, these assertions, even if true, do not alter 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 and Lehman further argue that the employer-provided transportation exception was mentioned merely as a dictum in Eriksen. This may be so, but we find the exception to be conceptually sound and widely recognized. We adopt it as the basis of our decision today. Accordingly, we conclude, as did the district court, that the accident occurred in the course of employment. Worker's compensation provided the exclusive remedy. A tort suit against the employer and against the fellow employee's estate was barred by I.C. § 72-209.

Hansen, 119 Idaho at 359, 806 P.2d at 452 (emphasis supplied).

22. Upon review the Idaho Supreme Court affirmed the Court of Appeals; first on the basis of collateral estoppels, noting that Hansen and Lerhman were precluded from relitigating in the Idaho tort action the determination of the Washington Industrial Commission that they were injured within the course of their employment. As a second basis for affirmance, the Idaho Supreme Court stated:

> We also affirm the district court's dismissal for the additional reason set out in the Court of Appeals' opinion which adopted the exception to the going and coming rule, described in Eriksen v. Nez Perce County, 72 Idaho 1, 235 P.2d 736 (1951), where this Court stated that *"where going [to work] or returning [from work] in some transportation facility furnished by the employer,"* an employee is deemed to be within the course of employment. 72 Idaho at 4, 235 P.2d 736 (emphasis added). This rule has also been described in Larson's treatise on worker's compensation law as follows:

> If the trip to and from work is made in a truck, bus, van, car, or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment.... The reason for the rule in this section depends upon the extension of risks under the employer's control.
>
> 1 Larson, Workmen's Compensation Law, § 17.11. A majority of states which have addressed this issue have also adopted this exception in some form. [Citations omitted.]
>
> Under the Larson approach which was adopted by this Court in Eriksen v. Nez Perce County, 72 Idaho 1, 235 P.2d 736 (1951), any time an employee is injured while going to or coming from work in transportation provided by his employer, he is considered to be within the course of employment. The rationale underlying this rule is that "the risks of the employment continue throughout the journey" and since the employer is in control of those risks by providing the transportation, the employee is considered to be within the course of his employment. 1 Larson at § 17.00. As Larson points out, "The distinction between transportation provided by contract and transportation provided without agreement or as a courtesy is being increasingly questioned, since the fundamental reason for extension of liability—the extension of the actual employer-controlled risks of employment—is not affected by the question whether the transportation was furnished because of obligation or out of courtesy." 1 Larson at § 17.30. Furthermore, application of this rule avoids repeated litigation as to whether transportation provided by an employer to an employee was in fact a customary or contractual incident to employment. The Larson rule also promotes a basic policy underlying the concept of worker's compensation that the worker's compensation act is to be construed liberally in favor of worker's compensation coverage of claimants.

Hansen, 119 Idaho at 338, 806 P.2d at 431 (emphasis supplied).

23. Claimant argues that Hansen governs the outcome in this case since here, as in Hansen, Claimant was injured while going to or from work in transportation provided by his employer. 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. Such facts explain why, after getting into the transportation business, an employer can be

charged with the risks that attend transportation to and from the work site. As noted in Hansen, commentators in most jurisdictions abide by this rule. 2-14 Larson's Workers' Compensation Law § 15.01 et seq. (2017).

24. The instant case is more like Barker than Hansen. Here, Employer only provided Claimant with a vehicle, and gas and maintenance necessary to operate the same. These allowances do not, standing alone, represent payment of travel time, but they do, as in Barker, constitute evidence of the payment of travel expenses. As in Barker, 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. What other evidence is there that Employer intended to compensate Claimant for travel time? In our view, the provision of a company vehicle and the payment of expenses associated with its use and two other circumstances support the inference that Employer intended to compensate Claimant for travel time: (1) Claimant's status as a 24/7 "on-call" employee and; (2) fact that employer enjoyed a significant benefit from this arrangement.

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 journeys.

26. Second, even though the provision of a company vehicle to Claimant may be regarded 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.

27. Although 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 of travel, to be sufficient to bring Claimant's accident within the course of his employment.

28. In addition to the above discussed exception to the coming and going rule, Claimant and Defendants have zealously argued the applicability of several additional recognized exceptions under Idaho law, including among others the traveling employee exception, the special errand exception, and the dual purpose doctrine. However, the Barker case is controlling and dispositive of the instant dispute, rendering discussion of other exceptions to the coming and going rule unnecessary. Only the dual purpose doctrine may warrant further discussion.

29. In Smith v. University of Idaho, 67 Idaho 22, 170 P.2d 404 (1946), Smith was a hostess at a girls' dormitory at the university where she resided and managed all affairs connected with operation of the hall. She was on duty twenty-four hours each day. In December 1943, the residents of the hall were preparing a celebration and a Christmas tree was placed in the hall. On December 8, 1943, Smith left the hall and went to town where she purchased a jar of coffee and some Christmas tree ornaments. On returning toward the hall she fell on the street and fractured her femur. She was hospitalized, underwent surgery, and subsequently died from complications due to her fall. The Commission found the accident arose out of and in the course of her employment. On appeal the Idaho Supreme Court affirmed, stating:

> The rule would seem to be well established that an employee does not step aside from his employment and is without the protection of the statute when doing a reasonable and necessary act at the time and place to the end that the business of his employer may be properly conducted. Denials of awards for any period when the employee is actively engaged in working for his employer, or while doing something reasonably incident to his employment, should rarely be based on the proposition that it was not in the course of the employment. There words are construed broadly, and should be so construed, to carry out the intent and purposes of the Workmen's Compensation Act. Nor is the service interrupted when for a brief interval the worker performs a personal errand not forbidden.

Smith, 67 Idaho at 27, 170 P.2d at 407 (emphasis supplied).

30. In Williams v. Knitting Factory Entertainment, 2016 WL 1072695 (Idaho Ind. Com. Feb. 1, 2016), the Commission articulated the dual purpose doctrine, stating:

> We recognize that an errand, such as that undertaken by Claimant, can serve both a business and a personal purpose. Such an errand may still be compensable under the dual purpose doctrine, summarized as follows:
>
> > If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work had had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.
>
> See Reinstein v. McGregor Land & Livestock, 126 Idaho 156, 879 P.2d 1089 (1994). The Reinstein court also noted that so long as the service of the employer was at least a concurrent cause of the trip, it need not be a paramount cause of the trip.

Williams, 2016 WL 1072695, at 16–17.

31. In the present case, it is undisputed that Claimant's route of travel from his home to the Meridian 2M office on the day of the accident was the shortest route to the office and precisely the route and journey he would have taken regardless of whether he planned to stop at the Whitewater Saloon. Moreover, Claimant was not forbidden from taking his wife in the

company truck. He was traveling via the company truck and had not yet arrived at the saloon when he was injured. He made no personal detour prior to his accident.

32. Claimant has proven that his March 11, 2017 accident was sustained in the course of his employment with 2M.

33. **Medical care.** The next issue is Claimant's entitlement to medical care for his industrial injuries. Idaho Code § 72-432 provides in pertinent part:

> the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

34. Having proven that his March 11, 2017 accident occurred in the course of his employment, Claimant has also proven he is entitled to reasonable medical treatment relating to his industrial accident.

35. **Neel.** Claimant requests payment of full invoiced amounts of his outstanding medical bills be made by Defendants directly to Claimant and his counsel pursuant to Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009), and St. Alphonsus Regional Medical Center. v. Edmondson, 130 Idaho 108, 937 P.2d 420 (1997).

36. In Neel, the Idaho Supreme Court held:

> when a surety initially denies an industrial accident claim which is later determined to be compensable, it is precluded from reviewing medical bills for reasonableness under the workers' compensation regulations from the time such bills are initially incurred until the claim is deemed compensable, but once the claim is deemed compensable a surety may review a claimant's medical bills incurred thereafter for reasonableness in accordance with the workers' compensation regulatory scheme.

Neel, 147 Idaho at 149, 206 P.3d at 855.

37. Claimant has proven his March 11, 2017 accident arose in the course of his employment with 2M and he is entitled to reasonable medical benefits related thereto. Defendants denied the claim, thus, pursuant to Neel, Claimant is entitled to recover the full invoiced amount of medical bills incurred in connection with medical treatment including but not limited to multiple right leg surgeries and other treatment due to his industrial accident between the date of Defendants' denial and the date of this decision.

38. In St. Alphonsus Regional Medical Center. v. Edmondson, 130 Idaho 108, 937 P.2d 420 (1997), Edmondson was injured and treated at a hospital. The hospital billed Edmondson's employer who denied the claim. Edmondson's attorney pursued a workers' compensation claim seeking compensation from the employer and surety, offering to collect medical expenses for the hospital for a 30% contingency fee plus a pro-rata share of the costs, or in the alternative inviting the hospital to join in the workers' compensation litigation. The hospital declined and instead filed a notice of medical expenses and requested that the Commission order the surety to pay medical expenses directly to the hospital. The Commission concluded Edmondson's injuries were compensable and he was entitled to workers' compensation benefits. The hospital then sought a declaratory ruling that it was entitled to direct payment of the medical expenses from the employer and surety and a determination of whether Edmondson's attorney's fees could be deducted from the medical expenses. The Commission determined that the workers' compensation laws did not require direct payment to the hospital and approved a 30% contingent attorney fee for Edmondson's attorney as a lien against the award of medical expenses.

39. On appeal the Idaho Supreme Court affirmed, declaring:

> Because the employer and the surety contended that the worker was not entitled to compensation for his injury, the employer did not pay the medical expenses. When the Commission awarded the worker compensation for his injury, the employer and the surety became obligated to pay the medical expenses. This does not mean, however, that the employer and the surety became directly obligated to the provider. Nothing in I.C. § 72–432(1) requires direct payment to a provider.
>
> The provider is not a party to the workers' compensation proceeding. The Commission's order in that proceeding states: "*Claimant* suffered accidental injuries arising out of the course and scope of this employment with Hansen–Rice Construction Company on July 10, 1993, and *is entitled to appropriate workers compensation benefits.*" (Emphasis added). The Commission awarded benefits to the worker, not payment to the provider.

Edmondson, 130 Idaho at 111, 937 P.2d at 423.

40. The Court concluded the Commission acted within its authority in approving Edmondson's attorney's lien against the award of medical expenses noting that Idaho Code § 72–803 required that the Commission approve claims of attorneys in workers' compensation cases, Idaho Code § 72–508 granted the Commission authority to promulgate and adopt reasonable rules and regulations for effecting the purposes of the workers' compensation act, and IDAPA 17.02.08.033 was duly promulgated authorizing the Commission to approve the lien of a workers' attorney against the award to the worker.

41. Pursuant to Neel and Edmondson, Claimant and his counsel are entitled to receive from Defendants payment of the full invoiced amount of the medical bills related to Claimant's March 11, 2017 industrial accident, from the date of Defendants' denial to the date of this decision.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven his March 11, 2017 accident arose out of and in the course of his employment with 2M.

2. Claimant has proven he is entitled to reasonable medical benefits for his

March 11, 2017 industrial accident.

3. Claimant and his counsel are entitled to receive from Defendants payment of the full invoiced amount of the medical bills related to Claimant's March 11, 2017 industrial accident, from the date of Defendants' denial to the date of this decision.

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

DATED this _6th_ day of __March__, 2018.

INDUSTRIAL COMMISSION

___/s/_____
Thomas P. Baskin, Commissioner

___/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

Dissent by Chairman, Thomas E. Limbaugh:

After reviewing the record and controlling case law in this matter, I respectfully dissent. The majority broadly expands an exception to the "coming and going rule" to transform Claimant's ordinary commute to the main office into a compensable activity covered by workers' compensation protection. In general, the "coming and going" rule states that an employee traveling to or from work is not within the course of employment and not covered by workers' compensation protection. Spanbauer v. Peter Kiewit Sons' Co., 93 Idaho 509, 465 P.2d 633 (1970); See Clark v. Daniel Morine Construction Co., 98 Idaho 114, 559, P.2d 293 (1997). The "coming and going" rule is based on the notion that the Idaho Workers' Compensation Act

does not protect against the common perils of ordinary commuting on public ways that are common to all who travel.

After finding Hansen v. Estate of Harvey, 119 Idaho 333, 806 P.2d 426 (1991) inapposite to the present facts (Majority, p. 11), and recognizing that Idaho is not a jurisdiction that recognizes that the deliberate and substantial payment of the expenses of travel alone are sufficient to create an exception to the "coming and going" rule (Majority Opinion, pp. 7-8), the majority nevertheless finds support for its expansion of the exception in Matter of Barker, 110 Idaho 871, 719 P.2d 1131 (1986). In Matter of Barker, supra, the Court held that payment of travel expenses was not a stand-alone exception to the "coming and going" rule, but remanded the matter for "other evidence" from the parties. No additional evidence was produced to the Commission, and Court found the case remained non-compensable. Because the parties did not provide additional evidence, the Court did not have the opportunity to elaborate, interpret, or apply what they intended with this "other evidence" comment. Notwithstanding the constraints of the Court's Barker holding, the majority reasons that Claimant has satisfied this additional evidence requirement by showing he was a 24/7 "on-call" employee, and that Claimant's use of a company vehicle serves Employer's interests by allowing Claimant to immediately respond to emergency calls. (Majority, p. 12.)

I disagree with the majority's creation and application of these factors. The "24/7 on call employee" approach is too broad, and without any discussion of the parties' expectations regarding availability, such as whether Claimant is required to remain in any particular place during on-call time; whether the Claimant is permitted to engage in his own activities during such time; and whether the Claimant's availability during the on-call time is predominantly for the employee's or the employer's benefit. I am not persuaded that Employer expected

unremitting work 24/7, particularly where Claimant and his wife were en route to retrieve their personal vehicle from their date night the previous evening. If Claimant were truly "on call" 24/7, why would he have left his work vehicle at home and used his personal vehicle for a date night with his spouse? The more reasonable inference from these facts is that Claimant is not a "24/7 on call employee." While Claimant did perform well and promptly when customer issues arose, the focus should be on the employee's specific activity at the time of injury. Claimant's accident occurred on the way to retrieve his personal vehicle, which just happens to follow his ordinary route to work. Even if you set aside the personal errand, Claimant's need to commute to work is like all employees who are required to arrive at his or her work site and leave when their day's work is done. The routine quality and regularity of this commute should be a textbook "coming and going" non-compensable activity.

While Employer's interests can be served by providing a company vehicle to Claimant, the company vehicle should not transform *all* driving activities into work-related activities. Although Claimant might have received an urgent call and used his company vehicle, Claimant's injury did not occur under those circumstances. Claimant was not on any special errand for Employer, nor was he "on call" or acting as a traveling employee, i.e., traveling from the main office to a customer. Given Claimant's many personal errands and travels in his company vehicle, the lack of specific compensation for his daily commute, an inference of employer control or benefit is tenuous. Therefore, for the foregoing reasons, I respectfully dissent.

_____/s/_____
Thomas E. Limbaugh, Chairman

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __6th__ day of _____March_____, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

BRADFORD S EIDAM
PO BOX 1677
BOISE ID 83701-1677

ALAN R GARDNER
PO BOX 2528
BOISE ID 83701

_____/s/_____