BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LUCAS RANSOM, Claimant, v. ATLAS BAR, L.L.C., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2019-009638** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed June 5, 2020**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Boise on November 6, 2019. Margurit R. Cleverdon represented Claimant, Lucas Ransom, who was present in person. Paul J. Augustine represented Defendant Employer, Atlas Bar, L.L.C., and Defendant Surety, Idaho State Insurance Fund. The parties presented oral and documentary evidence, and later submitted briefs. The matter came under advisement on February 20, 2019. The undersigned Commissioners have reviewed the Referee's proposed decision and have chosen not to adopt the Referee's legal analysis and recommendation. The Commissioners hereby issue their own findings of fact, conclusions of law and order.

ISSUE

The sole issue to be decided by the Commission as the result of the hearing is as follows:

Whether Claimant sustained an injury from an accident arising out of and in the course of employment.

CONTENTIONS OF THE PARTIES

Employer employed Claimant occasionally as a bouncer. On December 8, 2018, Claimant was working as a bouncer at his station outside the bar entrance when he observed an individual spray-painting, or "tagging," the windows of the next-door business, a skate shop. Claimant followed the individual for approximately half a block to get a photo or video of the individual on Claimant's cell phone to give to the police. Claimant and the individual then got into an altercation that resulted in Claimant's leg being severely broken.

Claimant alleges that the accident arose out of and in the course of employment. Defendants allege that the accident neither arose out of nor in the course of Claimant's employment, and therefore Claimant is not entitled to worker's compensation benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1 through 3, admitted at the hearing; and
2. The testimony of Claimant and Todd Asin, taken at the hearing.

FINDINGS OF FACT

1. **Claimant's Background**. At the time of hearing, Claimant was a resident of Nampa, Idaho. Tr. 9:8-9. He was 39 years old, having been born on April 14, 1980. *Id*. at 10:13-16.

2. At all relevant times, Claimant was self-employed as a motorcycle mechanic under the trade name Union Motorcycle Classics, or UMC, L.L.C. On occasion, however, Claimant performed services, or "odd jobs," for other businesses, including for Employer. Tr. 10:17-11:5.

3. **Background Circumstances**. On the evening of December 8, 2018, Claimant was working as a bouncer for Employer, whose bar was located in downtown Boise on 11th Street, between Grove and Main. Claimant was "filling in" for Employer's regular bouncer who was on vacation. Tr. 11:6-21. Claimant was also scheduled to work on December 7 in addition to December 8. *Id*. at 12:2-3.

4. Claimant and Todd Asin, the owner of the bar, had been acquainted as friends for many years through their shared pastime of motorcycle riding. Asin had been a regular customer of Claimant's motorcycle business. *Id*. at 12:6-9.

5. Asin previously hired Claimant as a fill-in bouncer in the spring of 2018 during the Treefort music festival. Claimant worked for Employer "two or three days" on that occasion. *Id*. at 12:10-23.

6. Claimant recalls that Asin and he never met specifically to go over his responsibilities as a bouncer. *See id.* at 13:1-6. Claimant testified that "[m]ost of the time it was just, hey, can you come help do this and I – don't recall a specific time that was like a sit down and go over ground rules." *Id*. at 13:4-6. Claimant did not receive "formal training" to perform his job as a bouncer. *Id*. at 13:22-25. Although Asin maintained a written description of the job responsibilities for the bouncer position, he did not recall sharing that written information with Claimant. *Id.* at 44:15-45:10, 55:19-56:12. However, both Claimant and Asin testified to their understanding of what was required of a bouncer. *See id.* at 25:4-27:3, 44:15-46:16.

7. Even though he did not remember receiving specific training, Claimant recalled that Asin wanted him to perform the job as follows:

> Q. What, if anything, did Todd say when he asked you to work for him? How did he describe what he wanted you to do?

A. It was – let's see. You know, obviously, checking IDs. Keeping out people who are inebriated. If there is anything – odd jobs to help out the bartender or just odd things, if it was help clean up or – just kind of keep the place flowing I guess.

…

Q. So, going back to this idea of instructions that you may have received from Mr. Asin, what kind of instructions did he give you about anything happening outside the patio?

A. If there was an obvious fight or something going on or if it was something like that, I was told that wasn't something that I would want to get into, but not how I felt this situation was.

Q. With respect to people who are coming up to the bar that had too much to drink, were you instructed about what to do with them outside the patio?

A. Just not to let them in.

…

Q. My understanding is you don't recall a specific conversation that you had with Todd Asin regarding the ground rules that he expected of you as a bouncer at the Atlas Bar.

A. I don't recall a specific time.

Q. You – you did spend a lot of time there at the bar you said; correct?

A. Yes.

Q. You knew about how he wanted his business run; is that correct?

A. Yeah. Yes.

Q. And you – I'm assuming you saw bouncers there working during your time at the bar; is that correct?

A. Yes.

Q. And you, obviously, had some understanding of what your responsibilities were as a bouncer at the Atlas Bar on December 8, 2018; is that correct?

A. Yes.

Q. So, you knew that you had to check IDs; correct?

A. Yes.

Q. You knew that you had to keep obviously intoxicated people out of the bar; is that correct?

A. Yes.

Q. You knew that you were not allowed – that you were to – you were to avoid allowing people who are in the bar to walk out of the bar with alcohol, I assume; is that correct?

A. Yes.

Q. You knew that if – I assume if there was a scuffle in a bar – inside of the bar that you would remove them out of the bar and get them to an area in the streets or on the sidewalk; is that correct?

A. Yes.

Q. He knew that your main obligation was to act as a gatekeeper to avoid allowing people that shouldn't be in the bar into the bar and avoid allowing people that weren't – to be – that were supposed to stay in the bar, to allow them to get out of the bar; is that correct?

A. Correct.

…

Q. Did Mr. – did Mr. Asin ever communicate with you – to you at anytime that as a bouncer you – your job duties were to stay on your post to make sure that people who were not supposed to be in the bar did not get in the bar?

A. I don't recall that.

Tr. 14:1-8, 23:25-24:11, 25:4-26:19, 29:1-6. As set forth above, Claimant testified that he had received instructions that he was not to involve himself in altercations taking place outside the patio. However, when questioned by the Referee he gave a slightly different answer:

Q. Was there – just to be clear, was there any discussion before you performed this job for the first time about what your responsibilities, if any, were to the areas outside the bar and the patio area?

A. There wasn't any.

Q. There wasn't any?

A. I don't – not that I can think of.

Tr. 34:21-35:2.

8. Asin, for his part, recalled that there were "ground rules" for bouncers at Employer's establishment. Tr. 44:15-24. He further stated that he communicated these ground rules to Claimant before hiring him as a fill-in bouncer in March 2018. *Id*. at 44:25-26:7.

9. Asin summarized the ground rules for being a bouncer at his establishment as follows:

> So, everybody that comes in has to have ID. No drinks out. And so anybody that seems too inebriated do not let them come in. I always tell them just sit at your post. You actually – don't bring – said, you know, bring in glassware – I do not want them [customers] to bring glassware in. The bartenders – that's what the bartenders do. Just basically sit there at the post, check IDs. If something occurs inside always talk to them about how to deal with things that occurred. We are not a physical place, you know, it's a – just, you know, do it with words kind of deal. Hey, I think it's time to leave, you know, and you know, we just don't – we are not like a rough place.

Tr. 45:11-23.

10. Concerning events occurring off premises, i.e., outside the patio fence, Asin testified that he gave the following direction to Claimant:

> Q. Did you communicate with [Claimant] at any time prior to his being hired as a bouncer what his responsibilities were for something that happened outside of your patio?
>
> A. No. I just tell him if – if it's outside on the streets then – if it's outside the patio, then, it's not our deal. I would just tell them call the cops if it's – you know, people are arguing or something, just watch it and if it's something physical, just call the police, that's what they are there for, so – same with if something happens inside. I always tell them just get it out to the patio. They can – if somebody wants to fight, let them fight outside. It's not our deal.
>
> Q. Okay. Is there any doubt in your mind that you communicated those basic ground rules with [Claimant] prior to him being hired on as a bouncer?

A. No.

Tr. 45:24-46:16.

11. Asin testified that it was of paramount importance that bouncers stay at their post by the front patio entrance so that the underage, or inebriated be kept from entering the premises. Tr. 49:8-50:5. Claimant did not recall being instructed by Asin that he was to stay at his post by the patio to the exclusion of all else. *Id.* at 29:1-6. Indeed, as revealed above, on cross-examination by defense counsel, Claimant acknowledged that his job responsibilities included, inter alia, entering the bar to escort those involved in scuffles to the sidewalk. *Id.* at 26:8-12.

12. Prior to December 8, 2018, Claimant had not engaged in an altercation with anyone while working as a bouncer for Employer. *Id*. at 15:19-21.

13. The premises of the Atlas Bar included a small fenced patio adjacent to the building, with two tables and a bench. Outside the entrance to the patio was a small stool where Claimant was stationed to check IDs. *Id.* at 16:8-17:1. The inside premises is 800 square feet, including the bar, tables, two bathrooms, and a staircase to the basement. *Id*. at 40:4-15.

14. Next door to the bar was the Prestige Skateshop. *Id*. at 41:12-14. Asin has no ownership interest in the Prestige Skateshop; it is a separate business from the Atlas Bar. *Id*. at 41:15-20.

15. Further, Asin had no business arrangement with the Prestige Skateshop for common security or monitoring of premises. *Id*. at 41:20-24.

16. **Industrial Accident**. On the evening of December 8, 2018, Employer scheduled Claimant to work beginning at 8:00 p.m. *Id.* at 16:4-7.

17. Claimant was injured between approximately 10:30 p.m. and 10:45 p.m. on the evening of Saturday, December 8, 2018. *Id*. at 18:10-14.

18. Prior to the incident in which he was injured, Claimant was performing his regular duty of checking identification at the patio entrance. Tr. 18:15-19. He then noticed a man "come around and start spray painting the window of the skateboard shop." *Id*. at 18:19-20. The man came around the alley that is on the other side of the bar from the skate shop. *Id*. at 19:12-17. He was dressed in a winter coat and a backpack. *Id*. at 20:1-2. Claimant paid the man little attention until he started spray painting the windows of the skate shop. *Id*.

19. Claimant decided to use his cell phone to obtain a photograph or video of the man vandalizing the Prestige Skateshop. *Id.* at 19:19-25. He left his station at the patio entrance and proceeded to follow the man as he began walking off towards Main Street *Id.* Claimant described his reasoning as follows:

> Well, I mean we already planned on calling the police on it and I figured that that would be the best time to have is a photo of the guy that was doing that, so -- you know – the – vandalism. Didn't know what else he had vandalized or it wasn't – just try to get the guy to – to be accountable for it, I guess.

Id. at 20:9-14.

20. Although the man was walking fast, Claimant caught up with him and began walking backwards in front of the man to try to get a photograph of his face. *Id.* at 20:18-20. He told the man that he had him on video "doing that and the police are coming." *Id.* at 20:21-22. The man then lunged at Claimant to take his phone away. *Id.* at 20:22-23. Claimant's phone came out of his hand and he bent over to grab it. *Id.* at 20:23-24. Meanwhile, the man jumped over Claimant's back to grab the phone and in the process, Claimant's leg was slammed into the sidewalk, breaking it. *Id.* at 20:23-21:2. This altercation occurred on or about Main and 11th Streets near the Owyhee building. *Id*. at 21:3-11.

21. Claimant did not know the man who assaulted him. Tr. 21:12-13. He later learned that his name was Lazarus Moon. *Id*. at 21:14-18. Moon was subsequently arrested and prosecuted for the incident. *See* Ex. 2.

22. Claimant suffered injuries to his right leg, breaking both his tibia and fibula near the ankle. Tr. 21:19-24. An ambulance transported Claimant to Saint Luke's Regional Medical Center. *Id*. at 22:7-15. There, Claimant had surgery on his leg and remained hospitalized for three to four days. *Id*.

23. Moon did not try to enter the premises of Employer's bar, nor did he attempt to spray paint Employer's premises. *Id*. at 27:4-10.

24. Claimant telephoned Asin from the ambulance, while on the way to the hospital. *Id*. at 47:14-20. That is when Asin learned Claimant had been involved in a physical altercation during his shift and had suffered an injury. *Id*. Asin recalled that Claimant said, "I made a mistake. I screwed up." *Id*. at 48:7-8.

DISCUSSION AND FURTHER FINDINGS

25. 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).

26. The facts relating to the manner in which Claimant was injured are not in dispute. On the evening of December 8, 2018, Claimant suffered injuries in an assault which was set in

motion by his attempt to take a photograph of a vandal who was "tagging" an adjacent business, the Prestige Skateshop.

27. The evidence admits a little more latitude when it comes to understanding the exact nature of Claimant's job responsibilities. As noted above, it seems clear that while manning a post at the entrance to the patio was an important part of Claimant's job, it did not define the totality of his responsibilities; he was also expected to deal with unruly customers inside the bar. Claimant acknowledged that he had been told that things occurring outside the patio on the public street or sidewalk were not his concern. Tr. 23:25-24:7. On the other hand, Claimant also testified that he and Asin did not discuss Claimant's responsibility for events happening outside the patio, because those things rarely, if ever, happened. Cl.'s Dep. 17:22-18:23; Tr. 34:21-35:2. Asin unambiguously testified that Claimant was told that he (Claimant) was not responsible for altercations or other breaches of the peace which occurred outside the patio, except that he was to call the police if he saw something that warranted police attention. The Referee did not make an explicit observational credibility determination of the testimony of Asin and Claimant. However, he did adopt Asin's version of Claimant's job responsibilities, concluding that Claimant was instructed not to concern himself with altercations or other untoward conduct occurring outside the patio, except to call the Police. *See* Ref. Rec. at ¶ 30. If this represents the Referee's determination that Asin testified more credibly on this point, the record does not seem to supply any substantive basis on which to challenge the Referee's determination.

28. Claimant's testimony does not challenge Asin's assertion that Claimant was expected to call the police for things occurring off the premises; Claimant's statement following the observed tagging that "we already planned on calling the police" supports the conclusion that

he understood this direction. Tr. 20:9-14. After suffering his injuries Claimant called the police on a borrowed phone. *Id.* at 36:5-37:7.

29. The legal question presented by these facts is whether Claimant's injuries are the result of an accident which arises out of and in the course of employment. Idaho Code § 72-102(18) provides:

> (18) "Injury" and "accident."
>
> (a) "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law.
>
> (b) "Accident" means an unexpected, undersigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.
>
> (c) "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

I.C. § 72-102(18). Claimant must satisfy both the "arising" and "course" components. *Kessler on behalf of Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997). Where there is some doubt about whether the accident arose out of and in the course of Claimant's employment, the matter will be resolved in favor of a finding of compensability. *Hansen v. Superior Products Co.*, 65 Idaho 457, 146 P.2d 335 (1944); *Dinius v. Loving Care & More, Inc.*, 133 Idaho 572, 990 P.2d 738 (1999). Whether an injury arises out of and in the course of employment is a factual determination to be made by the Commission. *Kessler*, 129 Idaho at 859, 934 P.2d at 32.

30. The seminal Idaho case discussing the arising and course components of the prima facie case is *Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951). Quoting from the Oregon case of *Larsen v. State Industrial Accident Commission*, 135 Oregon 137, 295 P. 195 (Or. 1931), the Court stated:

> It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is 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 the 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. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Eriksen, 72 Idaho at 6, 235 P.2d at 738-39.

31. The rule of *Eriksen* has been cited with approval in a long line of subsequent Idaho decisions, but has been modified in one significant respect. Regarding the arising component, *Eriksen* excluded from compensability those injuries which result from exposure to a hazard to which the injured worker would have been equally exposed apart from the employment. However, in 1969, Idaho adopted the positional risk rule for neutral risks in *Mayo v. Safeway Stores, Inc.*, 93 Idaho 161, 457 P.2d 400 (1969). In *Mayo*, the Court recognized that the risks an employee might encounter are of various types. *See id.* Some risks are clearly associated with the employment; an employee who suffers an injury from a machine at which he works would not have been exposed to that risk absent the employment. Other risks are clearly personal to the employee; an employee injured in an assault which arises from a dispute that is personal in nature cannot be said to have been injured as a result of an employment created risk. *Id.* at 163, 402. The third type of risk is one which is neither associated with the worker's employment, nor personal to him. *Id.* Such neutral risks were not compensable under the rule announced in *Eriksen* since the employment did not

subject the claimant to a greater risk of injury than he was exposed to apart from employment. *See Eriksen*, 72 Idaho at 6, 235 P.2d at 739. However, *Mayo*, *supra*, recognized the compensability of such injuries under the theory that the claimant's employment brought him to the place where the injury occurred. *Mayo*, 93 Idaho at 163, 457 P.2d at 402. Therefore, under *Mayo*, injuries caused by tornadoes, lightning strikes, or other acts of God are compensable because the employment brought claimant to the place of where he was subjected to a risk of injury, even though the risk was not created by some agency of the employer. As such, when the cause of injury cannot be traced to an origin that is either occupational or personal, there is no more reason to assign the resulting loss to the employee than the employer. To effect the humane purposes of the Act, a presumption arises that such neutral injuries arise out of employment. A claimant no longer needs to show that his employment subjected him to a greater risk of injury; the accident is presumed to have arisen from employment even if claimant was equally exposed to the risk of injury apart from his employment. *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2002); *Vawter v. UPS*, 155 Idaho 903, 318 P.3d 893 (2014).

32. In connection with the arising component, it matters not that the claimant's eventual injury occurred off employer's premises. *See Jaynes v. Potlatch Forests, Inc.*, 75 Idaho 297, 271 P.2d 1016 (1954); *See also Trapp v. Sagle Volunteer Fire Dept.*, 1991 IIC 0011 (January 1991). In *Jaynes*, the employer was held responsible for an injury resulting from the risk of claimant's encounter with a special off-premises hazard connected to the employment; a railroad crossing. *Jaynes*, 75 Idaho 279, 271 P.2d 1016. In *Trapp*, the employer was held responsible for the street risk associated with travel while on a special errand benefiting employer. *Trapp*, 1991 IIC 0011.

33. Applied to the facts of the instant matter, Defendants argue that the risk to which Claimant was exposed was personal to him; as a "good Samaritan," Claimant voluntarily exposed

himself to a risk of injury in order to protect the property of a third party, property in which the employer had no interest. *See* Def. Post-Hearing Br. 11. However, this case is not like *Dinius v. Loving Care & More, Inc., supra*. There, claimant's boyfriend accompanied claimant to her workplace. *Dinius*, 133 Idaho at 573, 990 P.2d at 739. While waiting for claimant to finish her cleaning duties the boyfriend started the couple's vehicle. *Id.* As claimant was walking between the front of the vehicle and the outside wall of the business, the truck lurched forward, pinning her between the structure and the front of the vehicle. *Id.* The Commission found that the vehicle would not have been running absent the boyfriend's presence, which was solely for the benefit of claimant. *Id.* at 576, 742. The claimant's injuries were found to be the result of a risk personal to claimant, a risk which she imported onto the premises. *Id.* The Court affirmed. *Id.* Here, Claimant brought no risk of injury with him to his employment. He was not acquainted with Lazarus Moon, and would not have encountered him absent his (Claimant's) employment. It was his employment that brought Claimant to the time and place of his encounter with Moon. The risk encountered by Claimant is therefore more akin to a neutral risk of the type discussed in *Mayo*, than the personal risk discussed in *Dinius*.

34. However, we believe that it is more accurate to characterize this risk as one that is actually more connected to Claimant's employment than a purely neutral risk. Claimant was a bouncer. His job was, in some sense, to maintain order on Employer's premises. As discussed previously, from his post at the entrance to the patio he was expected to screen patrons and keep the inebriated ones out, as well as maintain order inside the bar by asking unruly patrons to leave. While Employer testified that Claimant was expected to stay at his post by the patio entrance, it is clear that if the circumstances warranted, his job might require him to leave the patio to deal with something going on inside the bar. *See* Tr. 45:8-23. Claimant was not expected to use force in any

of this work. Tr. 46:3-12. If a fight broke out, either inside or outside, he was expected to call the police *Id.* Further, Claimant was told that things happening on the sidewalk, or in the street, "are not our deal" and that such unlawful events or breaches of the peace that he might observe should likewise be reported to the police *Id.*

35. The events leading to Claimant's eventual injury did not occur on the premises, but immediately adjacent thereto. Prestige Skateshop and the Atlas Bar share a common wall, and the windows of Prestige are right next to the patio of the bar, so close that bar patrons evidently noted paint fumes as Moon tagged the Prestige window. *Id.* at 18:21-19:6. Although Claimant had been counseled that crimes occurring off-premises were not his concern, it is not true that he had been given no instruction about how to respond to crimes he might observe; he had been instructed to call the police. *Id.* at 46:3-12. Claimant testified that "we" intended to do so when he observed Moon's activities. *Id.* at 20:9-11. However, when Moon began to retreat, Claimant felt it necessary to photograph him, as an assist to whatever police action might be forthcoming. *Id.* at 20:9-20. It is true that in the heat of the moment Claimant left his post to undertake the actions that eventually led to his injury. However, it nevertheless seems to us that there remains a causal connection between the requirements of Claimant's employment (to maintain order) and the resultant injury. Claimant's injury was a reasonable and foreseeable incident of Claimant's responsibilities as a bouncer. As such, we find Claimant's injury arises out of his employment.

36. As interesting, is the question of whether the subject injury is one occurring in the course of employment. It is clear that Claimant need not be engaged in his actual assigned work to be in the course of employment, so long as he is engaged in an activity "reasonably incidental" thereto. The rationale for this rule is well explained by Larson:

> A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment. An

> activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly. Under the modern trend of decisions, even if the activity cannot be said in any sense to advance the employer's interests, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs and practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.

1 Lex K. Larson, Larson's Workers' Compensation § 20 (Matthew Bender, Rev. Ed.).

37. As we stated in *Trapp*, the test is one of reasonableness:

> Thus, we deal not so much in mechanical rules but with a series of factors of reasonableness that the Commission must weigh in light of its own expertise. The accident may not occur at the work site, but must be in a place where the worker may reasonably be; it may not occur during scheduled work hours, but must be at a reasonable time; it may not occur while engaged in worker's precise job description, but it must pertain to some act reasonably incidental to the employee's work; it may not occur while performing work actually ordered by the employer, but must be activity in which the employer has acquiesced. It must not be so personal that it cannot be said to have arisen out of and in the course of employment.

Trapp, 1991 IIC 0011 (internal citations omitted).

38. Defendants argue that *Gage v. Express Personnel*, 135 Idaho 250, 16 P.3d 926 (2000), supports a finding that Claimant's injury is not one that occurred in the course of Claimant's employment. In *Gage*, the claimant had been instructed to report to the rail dock and wait for labeling and other supplies to be delivered to her before she could begin her assigned task. *Gage*, 135 Idaho at 252, 16 P.3d at 928. Gage was a smoker. The employer explicitly prohibited smoking on the premises. *Id.* at 253, 929. As Gage waited, she lit a cigarette and sat on the edge of the loading dock to enjoy it. *Gage*, 135 Idaho at 252, 16 P.3d at 928. She inadvertently dropped her cigarette and jumped off the dock to retrieve it. *Id.* While climbing back up to the dock she fell and suffered injuries for which she eventually filed a claim. *Id.* The claim was denied by the employer on the basis that Gage's injuries occurred as a result of her engaging in a prohibited activity, i.e. smoking. *See id.* In other words, the claimant was not injured while she was doing her

work, or something reasonably incidental thereto; she was injured because she was engaging in a prohibited activity, and would not have been injured had she honored employer's directive. The Commission adopted this argument and denied benefits. *Gage*, 135 Idaho at 253, 16 P.3d at 929. On appeal, the Court observed that at the time of her injury, Gage was doing the "thing" she had been hired to do; she was waiting at the rail dock, as directed, for labeling supplies to be delivered. *Id.* at 254, 930. However, she was admittedly performing this work in a "manner" that violated the employer's policies. *Id.* Even so, the Court found that Gage was nevertheless in the course of her employment at the time of her injury, and that her slight deviation from the manner in which her assigned work was to be completed was not significant enough to warrant denial of benefits. *Id.*

39. We think *Gage* actually supports a finding that Claimant was still in the course of his employment when he left his post, against instructions, to attempt to document Moon's activities. The evidence is that Claimant did have responsibilities relating to security in the area; he was supposed to call the police if he noted something warranting police intervention occurring off the premises. When Moon left before the police could be called, Claimant acted reasonably in attempting to document the identity of the tagger by taking his photograph. No less than Gage, Claimant was performing his assigned work (of maintaining order), albeit in an unauthorized manner. This turned out badly, but we cannot say that his decision, made in the heat of the moment, was unreasonable in its inception, and is probably more forgivable than Gage's unauthorized smoke break. In departing from employer's directive, Gage was serving no interests but her own; her employer in no way benefited from Gage's smoking. Here, Employer benefited, at least indirectly, from Claimant's actions. Notwithstanding that Moon was tagging the premises of an adjacent business, can it reasonably be said that Employer, a downtown business owner, had no interest in keeping his immediate neighborhood free from the type of graffiti that signals to

potential patrons a seedy environment, urban decay, lawlessness and disinvestment, if not abandonment? No businessman wants the appearance of a neighboring property to sully the appearance of his own. It is hard to believe that Employer would not cheer the apprehension of a miscreant like Lazarus Moon. After all, Employer might be next on Moon's list, and Employer had told Claimant to report such lawlessness to the police. We conclude that Claimant's actions were in the course of his employment, being reasonably incidental to his assigned work, and in furtherance of Employer's interests.

40. Having so found, we need not consider the cases collected by the commentators, showing "course" under the emergency public service doctrine, or where the employee's act benefited a stranger, although these doctrines also augur in favor of a finding that Claimant was acting in the course of his employment when he initiated actions leading to his injuries. *See* 1 Lex K. Larson, Larson's Workers' Compensation §27.01-28.03 (Matthew Bender, Rev. Ed.)

CONCLUSIONS OF LAW AND ORDER

1. Having found the accident to be one arising out of and in the course of Claimant's employment, we conclude that Claimant is entitled to worker's compensation benefits for his injuries.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated. IT IS SO ORDERED.

DATED this 5th day of June, 2020

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Monroe
Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by Email upon each of the following:

MARGURIT R. CLEVERDON Email: margie@cleverdonlaw.com	PAUL J AUGUSTINE Email: pja@augustinelaw.com

el

Emma O. Landers