BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERESA BROWN, Claimant, v. PROGREXION HOLDINGS, INC., Employer, and AMERICAN CASUALTY COMPANY OF READING PA, Surety, Defendants.	**IC 2019-008144** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed December 17, 2021**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Pocatello on June 23, 2021. Michael McBride, of Idaho Falls, represented Claimant, Teresa Brown, who was present in person. David Gardner, of Pocatello, represented Defendant Employer, Progrexion Holdings Inc., and Defendant Surety, American Casualty Company of Reading PA. The parties presented oral and documentary evidence. The parties did not take post-hearing depositions but later submitted briefs. The matter came under advisement on September 16, 2021.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.
2. Whether the Commission should retain jurisdiction beyond the statute of limitations.

CONTENTIONS OF THE PARTIES

This is a slip and fall case. Claimant was injured on March 7, 2019, when she fell on an icy sidewalk adjacent to a median located between Employer's property and the next-door business, Century Link. Claimant argues that the subject accident took place on Employer's premises and is therefore one occurring in the course of employment. In the alternative, Claimant argues that the circumstances under which she went to and from work involved peculiar and abnormal exposure to a common hazard, sufficient to warrant an exception to the going and coming rule. Finally, Claimant argues that the accident is covered because she is a traveling employee.

Defendants argue that at the time and place of the accident Claimant was performing no duty which was a part of her job. The going and coming rule governs this case, and that no exception to the rule applies. In particular, Defendants assert that Claimant's employment did not subject her to a peculiar risk of injury, and that she is not a traveling employee within the meaning of the exception. Finally, the accident did not happen on premises owned or controlled by Defendants.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The transcript of hearing held on June 23, 2021;
3. Joint Exhibits (JE) 1 through 16, admitted at the hearing; and
4. Claimant's pre-hearing deposition taken on October 9, 2019.

JE 1-14 were offered by the parties and admitted into evidence at the beginning of the hearing. JE 15-16 were offered and admitted into evidence in the course of hearing. In their post-hearing brief, Defendants assert that JE 13, the affidavit of Rodney Ellsworth, is inadmissible

hearsay to which no exception applies. In his proposed decision, the Referee observed that Defendants, too, offered evidence to which a hearsay objection might be made, and implied that this should augur against their objection to Mr. Ellsworth's affidavit. The Referee also found that the affidavit was reliable and subject to admission under the hearsay exceptions stated at I.R.E. 803(15) and I.R.E. 803(24). The Commission reaches the same conclusion as the Referee but believes that additional elaboration on our decision to consider the affidavit of Mr. Ellsworth, as well as the various emails submitted by Defendants, is warranted.

JE 1-14 include various emails from Jesse Blair with All Done Services (JE 10 and 11) and the affidavit of Rodney Ellsworth (JE 13). At hearing, the following discussion was had concerning the admission of these exhibits:

> REFEREE HUMMEL: Is there any objection to admission of Exhibits 1 through 14, Mr. McBride?
>
> MR. MCBRIDE: Well, I think by – by agreement of the parties, the answer to that would be, no. David [Gardner], am I right on that? There is obviously hearsay affidavits in the document and, of course, some documentation from a maintenance worker that is also hearsay. I'm content to have it all come in. Dave [Gardner], if you are, if you are not, then I'll have to reverse until you comment.
>
> REFEREE HUMMEL: Mr. Gardner?
>
> MR. GARDNER: Yeah, I agree with Mr. McBride. There are statements in these exhibits that are hearsay. I don't – well, and I do reserve the right to object to statements that are made in affidavits and emails, but I also understand that the rules of evidence, as it pertains to these hearings, are somewhat more informal, and so just recognizing that there are some statements in here that are hearsay, we would just simply note an objection for the record. But, you know, I don't specifically object to any of the exhibits, and I would agree that they can be admitted for consideration by the referee with that understanding that some do contain hearsay.
>
> REFEREE HUMMEL: Very good. At this time I will admit Exhibits 1 through 14.

Tr. 6:10 – 7:11.

From this colloquy, it is somewhat unclear whether counsel for Defendants agreed to the admission of hearsay testimony, reserving an objection to be later articulated, or simply noted that some of the exhibits contained hearsay, but agreed to their admission notwithstanding that content. At any rate, neither party attempted to correct the Referee when he admitted, without qualification, JE 1 through 14. We also note that Mr. McBride described an agreement between Claimant and Defendants concerning the admission of JE 1 through 14, although the substance of that agreement was not elaborated on at hearing. However, Mr. McBride apparently conditioned his agreement to admit JE 1 through 14, with the caveat that should Defendants object to one of the exhibits proffered by Claimant, then Claimant would have to "reverse" on whatever agreement Mr. McBride was referring to. However, in his September 15, 2021, reply brief, Mr. McBride only reiterated that the parties had agreed to the Commission's consideration of hearsay evidence.

First, the Commission agrees that from the exchange above quoted, Mr. Ellsworth's affidavit was admitted into evidence without objection. Second, even were we to consider the objection raised by defendants in their post-hearing briefing, we are persuaded that the affidavit is reliable, and we deem it admissible. It is established that strict adherence to the Rules of Evidence is not required in Industrial Commission proceedings, and the admission of evidence in such proceedings is more relaxed. *Stolle v. Bennett*, 144 Idaho 44, 156 P.3d 545 (2007). In *Stolle*, the court noted that the Commission should have the discretionary power to consider any type of reliable evidence having probative value, even though the same might be inadmissible in a court of law. At issue in *Stolle* was a letter written by a third party purporting to establish the whereabouts of claimant's employer at or around the time the subject accident was alleged to have occurred. The claimant argued that the letter should not have been admitted because no foundation was laid for it and it constituted inadmissible hearsay. The Court found that there was nothing to

suggest that the letter was unreliable or untrustworthy and that the Commission did not err in the admission of the same.

Similarly, while Defendants argue that the affidavit of Mr. Ellsworth is hearsay, they do not persuasively assert that the affidavit is unreliable or untrustworthy. Defendants do assert that Mr. Ellsworth's testimony is ambiguous, in that it is unclear whether the northeast corner pin to which he refers marks the Progrexion property line running east-west, or the property line running north-south which separates Progrexion property from adjacent Century Link property. Claimant asserts that the affidavit establishes that the situs of the accident is on Progrexion property. As set forth below, we conclude that the Ellsworth affidavit, along with the accompanying exhibits, including photographs of the corner pin and a copy of the plat, make it clear that the situs of the subject accident was not on Progrexion property, but did occur on a sidewalk adjacent to Progrexion property. For the reasons just stated above, in addition to those expressed by the Referee, we conclude that Exhibits 1 through 14 were properly admitted.

The undersigned Commissioners have reviewed the Referee's proposed decision, and while the Commission agrees with the Referee's ultimate conclusion, it concludes that different treatment of the issues is warranted. Accordingly, the Commission declines to adopt the proposed decision and issues its own findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. **Claimant's Background**. Claimant was 38 years old at the time of hearing and resided in Idaho Falls, Idaho. She was married with three children. Claimant attended and graduated from Grantsville High School in Grantsville, Utah in 2001. She attended several college courses but did not graduate from college. Tr. 12:1-25.

2. **Subject Employment**. Claimant began working for Employer in 2015. Employer's campus/place of business was, at all relevant times, located at 1935 International Way, Idaho Falls. At all relevant times, Employer employed Claimant as a full-time credit consultant. *Id.* at 13:17-14:11.

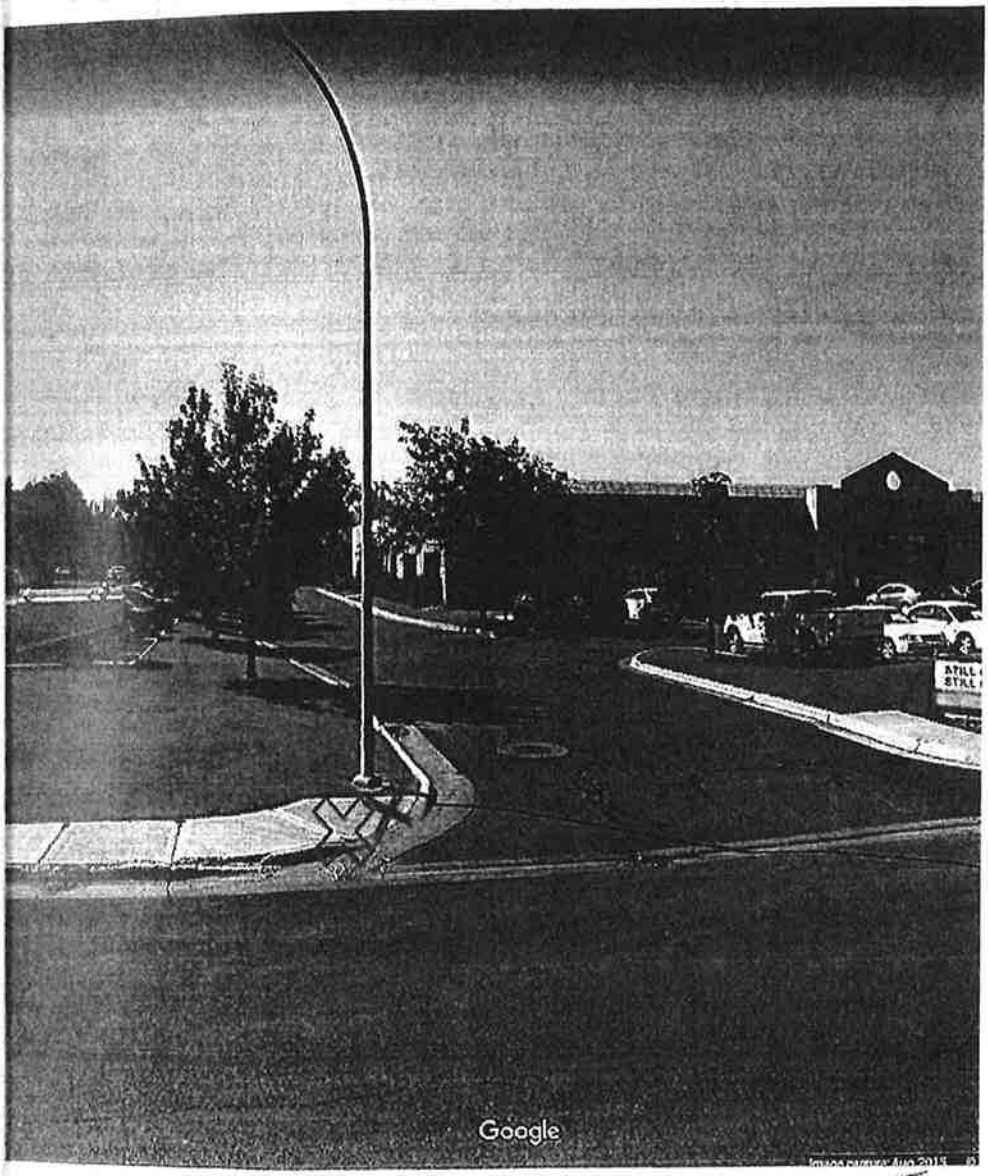
3. Claimant worked for Employer Monday through Friday, 8:00 a.m. to 4:00 p.m. She would drop off her children at the school bus, then drive to work, usually arriving between 7:40 and 8:00 a.m. Her workday started promptly at 8:00 a.m. Upon arriving at work, she ordinarily parked her car on International Way in one of the areas allowed by Employer. *Id.* at 27:3-16. She parked on International Way about 75 percent of the time. On other occasions she parked in the parking lot leased by Progrexion, and located across International Way from Progrexion. *Id.* at 25:8-15.[1] However, she preferred to park on International; that way she did not have to cross the street from the company's leased parking lot to Employer's campus. *Id.* at 28:1-3.

4. **Industrial Accident**. On Thursday, March 7, 2019, Claimant arrived at approximately 7:40 a.m. and parked on-street on the south side of International Way, in front of the Century Link building. She got out of her car and proceeded to walk west on the public sidewalk adjacent to the property of Century Link towards Employer's campus. Walking west, she crossed two entrances to the Century Link campus. Just before she reached the entrance to the parking lot of Employer, Claimant slipped and fell, breaking her left ankle and left fibula. *Id.* at 29:12-30:23; JE 14 – 16.

---

[1] Claimant also testified that she had "..always parked on International." Tr. 27:17-21. This potential conflict seems to be reconciled by reference to another portion of Claimant's testimony. Claimant was specifically asked if, prior to the subject accident, she had ever parked in the leased space across International Way from Employer's place of business. *Id.* at 23:2-10. She acknowledged that she had, and even described the route she would take from her parked vehicle to Employer's business. *Id.* at 23:11-24:1. We conclude that Claimant sometimes did use the parking lot leased by Employer for use by employees.

5. As shown on the pictures contained in JE 6, 7 and 16, the accident occurred on the west corner of the sidewalk located on the median strip between the campuses of Employer and Century Link. JE 16. At hearing, Claimant testified that JE 6 is not entirely accurate in depicting the location of her fall. Tr. 30:24 – 32:4. JE 16, shown below, shows that the actual situs of the fall was slightly farther west on the sidewalk and closer to the entrance to the Progexion parking lot. Notwithstanding this revision, Claimant continued to assert that the fall occurred on the sidewalk, not the Progrexion parking lot. Tr. 44:23 – 45:8.



Exh. No.
Date
Name 16
M & M Court Reporting

38

JE 16. The handwritten "X" marks the spot identified by Claimant at hearing as the spot where she fell. Employer's building is in the rear right.

6. Claimant testified that she fell because "[t]here was ice on the sidewalk." Tr. 45:11. Claimant's recollection is that the entire sidewalk on the median was not maintained by clearing it of ice and snow. *Id.* at 45:16-19.

7. **Employer's Parking Policies**. As explained in a series of Employer emails which Claimant received prior to the accident, and also in Claimant's testimony at hearing, Employer had specific policies as to where its employees could park. Employer had designated free parking immediately adjacent to its building. Employer also had 120 designated, free parking spaces in a lot across International Way that was leased from the City of Idaho Falls. Employees were also allowed to park on International Way itself in designated areas.[2] Overhead pictures of the area emailed to employees showed the allowable areas in green and the non-allowable areas in red. Employees received regular reminders about these policies via email from the operations manager with Employer. JE 3, 4, 5, and 8; Tr. 16:19 - 24:12.

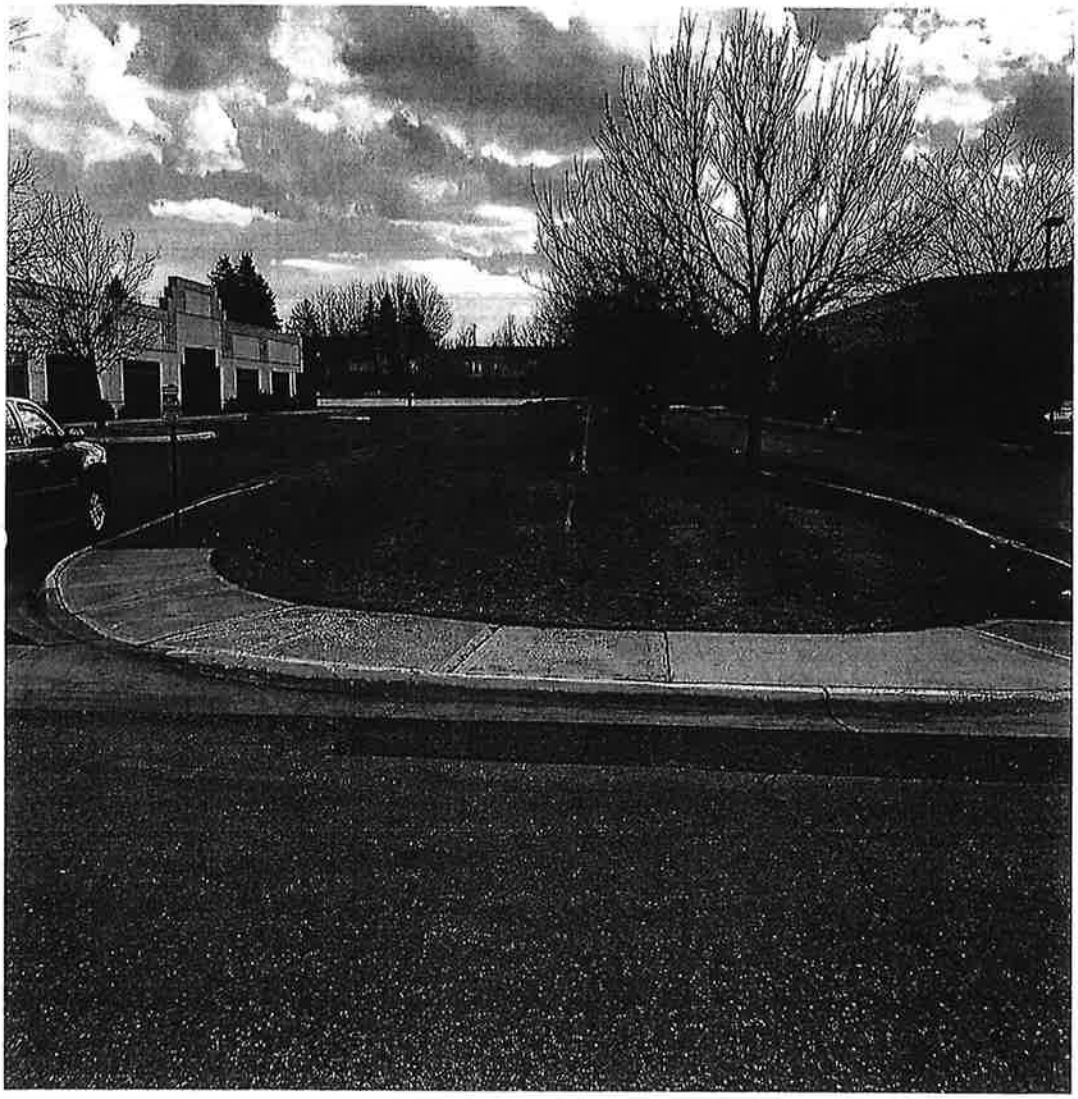
8. Claimant's counsel hired a land surveyor whose affidavit is contained in the record as JE 13. Rodney L. Ellsworth surveyed the two lots comprising Employer's campus and the Century Link campus. Attached as Exhibit 1 to his affidavit is the "2nd amended plat of International Plaza" (the plat) filed in the office of the Bonneville County recorder on December

[2] It is not clear to the Commission that Employer had authority to either allow or prohibit parking on International Way, a public way with legal on-street parking. JE 4 p. 8 does purport to show areas on International Way with parking allowed by Employer, and certain other areas on International Way on which parking was prohibited by Employer. However, it seems possible that these prohibited parking areas are areas which are prohibited by the City of Idaho Falls, rather than by some rule of Employer. For example, JE 4 p. 8 shows that on-street parking is prohibited at the location of the median which figures in this claim. The photos attached to the affidavit of Mr. Ellsworth reflect that the curb at the median is painted in a way that normally signifies that parking is not allowed. Neither Progrexion or Century Link own the sidewalk, and it seems possible that the no parking prohibition comes from the City. However, as developed *infra*, this potential uncertainty is not relevant to the Commission's decision.

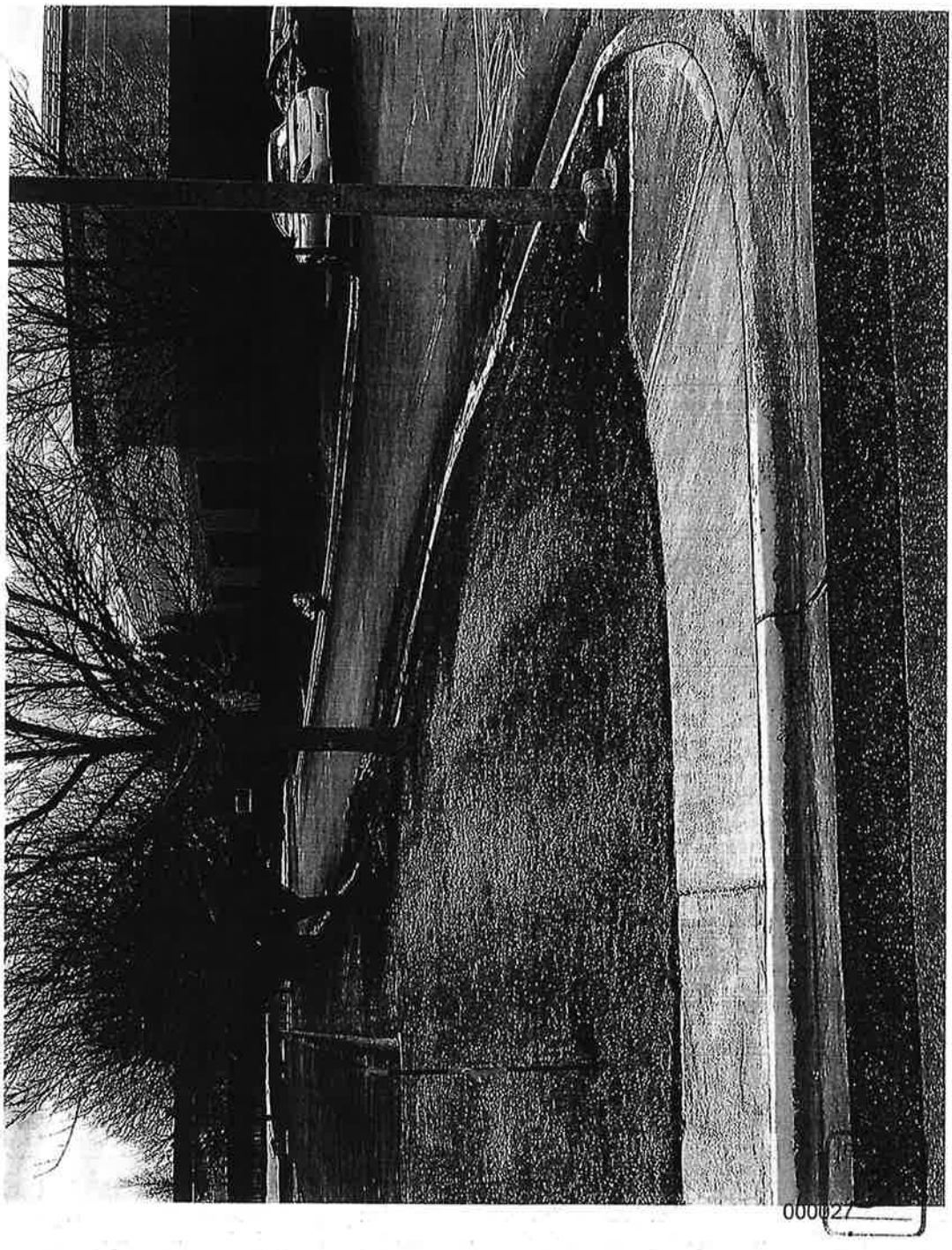
2, 2002. Referring to the plat, the affidavit reflects that lot 25, block 1 is the Progrexion property, while the adjacent Century Link property is identified on the plat as lot 2, block 1. Mr. Ellsworth located the northeast corner of the Progexion property depicted on the plat by use of a magnetic pin indicator. He then stated:

> That I located the Northeast corner pin below the grass. It was marked with "LS 4563" on the survey cap and defines the north/south boundary line between Lot 25 and Lot 2. This was located about six feet south of the back of the sidewalk and appears to line up with the back of curb of the parking area south of the corner. I remarked the corner pin with a stake and placed an orange ribbon on it. I took photos of the stake and area, which I enclose hereto as Exhibits 2 and 3, in order to visualize the corner and north/south boundary lines as referenced in the Plat (Exhibit 1).

JE 13 p. 23.



000026



JE 13 pp. 26-27.

9. Defendants provided for the record a snow removal agreement and two emails from Jesse Blair, the proprietor of the snow removal company, All Done Services, that serviced Employer's premises. In an email, Mr. Blair denied that his company provided snow removal services for any part of the sidewalk Claimant traversed on the morning of the accident. Specifically, All Done Services did not maintain, on behalf of Progrexion, any portion of the sidewalk adjacent to the median, the eastern half of which is owned by Century Link, and the western half of which is part of the Progrexion property. *See*, JE 9, 10, and 11.

10. **Credibility**. The Referee found that the Claimant testified credibly at hearing. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

11. 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).

12. **Accident arising out of and in course of Employment.** Idaho Code § 72-102(17)(a) defines an "injury" as "a personal injury caused by an accident arising out of and in the course of any employment covered by the workers' compensation law." *See also, Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 900 P.2d 738, 740 (1999) (requirement that an injury must have been caused by an accident "arising out of and in the course of employment"). If there is doubt concerning whether an accident arose in the course and scope of employment, the

ambiguity will be resolved in favor of the employee. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 347, 109 Idaho P.3d 1084, 1089 (2005). An injury is considered to arise out of employment when a causal connection exists between the circumstances under which the work must be done and the injury of which complaint is made. *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2001). A worker receives an injury in the course of employment, if the worker is doing the duty that the worker is employed to perform, or something reasonably incidental thereto. *Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963) (quoting *Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951)). This prong of the test examines the time, place, and circumstances under which the accident occurred. Both the "arising" and "course" elements must be satisfied before a claim can be found compensable. *Kessler ex rel. Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997).

13. There is no dispute that Claimant suffered a fall on a slippery sidewalk on the morning of March 7, 2019, and as a result suffered injuries to her left leg and ankle. The dispute, rather, is whether Claimant's injury is one arising out of and in the course of employment. Defendants interpose the "going and coming rule" to deny that Claimant was acting within the course of employment when and where the accident occurred. The "going and coming rule" holds that an employee is not within the course of his or her employment while going to or coming from the workplace. *Atkinson v. 2M Company, Inc.*, 164 Idaho 577, 581, 434 P.3d 181, 185 (2019) ("The reason an employee is generally not awarded compensation for injuries that occur while traveling to and from work is that the employment relationship is considered suspended from the time the employee leaves his work to go home until he resumes his work the next day.") *Id. See also, Finholt v. Cresto*, 143 Idaho 894, 898, 155 P.3d 695, 699 (2007).

14. The "going and coming" rule is not applicable to injuries occurring on the

employer's premises. Moreover, there are notable exceptions to the "going and coming rule" that recognize the compensability of certain claims notwithstanding that they occurred off the premises, and while claimant is going to or coming from the workplace.

15. We first examine Claimant's assertion that hers is an accident that occurred on Employer's premises. However, the mere fact that an accident occurs on the premises of the employer is but one factor to be considered in determining whether a claim is compensable. Even for an injury shown to have occurred on the employer's premises, it must be demonstrated that a causal connection exists between the conditions existing on the employer's premises and the subject accident. *Dinius v. Loving Care*, *supra*; *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

16. The affidavit of Rodney Ellsworth is offered in support of Claimant's assertion that the accident occurred on the premises of Employer. Having carefully reviewed this affidavit and the attached exhibits, the Commission finds that it does not support a conclusion that the subject accident occurred on property owned or leased by Progrexion. Rather, the affidavit, particularly when viewed in light of the exhibits attached thereto, makes it clear that the sidewalk on which the accident occurred, while abutting Progrexion property, actually lies to the north of the Progrexion property line. Mr. Ellsworth's affidavit and attachments clearly identifies the location of the northeast corner pin of the Progrexion parcel. The fact that it is a corner pin has implications for defining both the north-south and east-west boundaries of the Progrexion parcel. Per Mr. Ellsworth's affidavit, the north-south boundary of the Progrexion property runs approximately down the middle of the median separating the Progrexion and Century Link parking lots. The northeast corner pin also demarks the boundary of the property on the north. The pin is located approximately six feet south of the sidewalk, and from the plat it is also clear that the property line

running east-west from that point is parallel to International Way.

17. From these facts, it is clear that the slip and fall, occurring as it did on the sidewalk, did not occur on property owned or leased by Progrexion. It did, however, occur on a sidewalk which abuts Progrexion property. This conclusion follows from the fact that the northeast corner pin identifies the western part of the median as property of Progrexion, and the accident took place on the western corner of that median strip. However, even though the situs of the accident is not shown to be part of the property owned or leased by Progrexion, there is authority for the proposition that the situs of the accident may nevertheless be considered to be a part of the employer's premises, if employer exercises sufficient control over the situs of the accident.

18. In *Vincent v. Montgomery Ward & Co.*, IC 91-728062 (Idaho Ind. Comm. October 20, 1993), employer, a tenant in the Coeur d'Alene mall, was held responsible for injuries suffered by one of its employees, who fell while attempting to negotiate the ice-covered mall parking lot which surrounded the mall like a moat. The employee had been directed by employer to park in a remote part of the lot in order to afford better parking for mall patrons. Further, while employer did not pay a separate fee to its landlord for maintenance of the parking lot, it did pay rent as consideration for the landlord's promise to keep the parking lot free of snow, water, and ice. As part of its rental agreement with landlord, employer had the power to require landlord to meet its obligation under the lease. These facts were found sufficient to lead the Commission to conclude that employer exercised sufficient control over the parking lot such as to confer upon it the status of part of the employer's premises.

19. The same principle has been applied in other jurisdictions in connection with off-premises sidewalks adjacent to employer's property. See cases collected at 2 Larson's Workers' Compensation Law § 13.02[2][a-e] (2021). Where a statutory obligation is imposed upon a

landowner to keep an adjacent public sidewalk free of snow and ice, the obligation imposed by statute is sufficient to bring the sidewalk within the ambit of employer's control sufficient for application of the premises rule.

20. In *Vargas v. Highwall Metal and Spinning and Stamping Company, Inc.*, 404 N.Y.S.2d 408, 62 A.D.2d 1102 (N.Y. App. Div. 1978), claimant left his place of employment, walked several feet on the sidewalk adjacent to employer's premises, and slipped and fell on the icy surface. It was shown that employer had a statutory duty to remove snow and ice from a public sidewalk adjacent to the premises. Notwithstanding that the accident did not occur on employer's premises, claimant's injuries were found to arise out of and in the course of employment. In *Montgomery Ward & Co. v. Malinen*, 71 Or.App. 457, 692 P.2d 694 (Or. Ct. App. 1984), claimant slipped on an ice-covered public sidewalk adjacent to employer's store. Employer had a statutory obligation to keep this public sidewalk free of ice and snow. The court found that because claimant was coming to work by the only practicable route, and across an area that was subject to her employer's control, the risk of injury was one with which employer could fairly be charged. In *Frost v. S.S. Kresge Co.*, 299 N.W.2d 646 (Iowa 1980), the claimant slipped and fell on a snow-covered public sidewalk adjoining employer's store. In *Kresge*, it was shown that the claimant fell in an area of concentrated employee traffic, in fact, on the sidewalk leading to the only door provided for employee use. The case was decided in claimant's favor on two bases: First, that the accident occurred as a result of a special off-premises hazard of claimant's employment. As in *Jaynes v. Potlatch Forests, Inc.*, 75 Idaho 297, 271 P.2d 1016 (1954), discussed *infra*, it was acknowledged that although the risk of ice-covered sidewalks was common to the public, claimant's employment constituted a peculiar or abnormal exposure to that common risk and as a result, her accident was compensable. Second, the *Kresge* court recognized that liability could be

premised on the "extension of the premises" exception, pursuant to which the premises is expanded based on an employer's exercise of control over adjacent areas such as sidewalks. Although employer did not maintain the sidewalk as a result of a statutory obligation to do so, its act of having voluntarily undertaken the removal of snow and ice from the sidewalk demonstrated sufficient control over the sidewalk to extend the work premises for purposes of workers' compensation.

21. Applying these principles to the facts before the Commission, one of the first questions is whether there is a statutory duty obligating Progrexion to maintain the public sidewalks adjacent to the property is leases. The attention of the Commission has been directed to two provisions of the Idaho Falls City Code which may have some bearing on this question. Idaho Falls City Code § 8-10-1 specifies:

> DUTY OF PROPERTY OWNERS: Every person who owns real property within the City shall remove any snow, ice and other obstruction or dangerous condition upon any sidewalk, curb and gutter abutting their property.

There is no direct evidence establishing that Progexion is the owner of the premises on which it conducts business. Counsel for Progrexion suggests that Progexion is a lessee, in which case the provisions of Section 8-10-1 are inapplicable. Therefore, the Commission cannot say that liability is created under the provision of this section of the Idaho Falls City Code. There is, however, another section that requires consideration, and this section does extend certain obligations to lessees, as well as owners of real property. Section 8-10-10 provides:

> SIDEWALK, HAIL, SNOW, SLEET AND/OR ICE REMOVAL REQUIRED.
>
> (A) Definitions:
>
> (1) *Precipitation Event*. Any product of the condensation of atmospheric water vapor (including hail, snow, sleet, and ice) that falls under gravity within City limits, as determined by the National Weather Service Station at the Idaho Falls Regional Airport.

> (2) *Sidewalk.* Any concrete, asphaltic paving or brick material adjacent to a City street, easement, right-of-way or other public way, whether within a public right-of-way or on private property, designated and/or used by pedestrians for travel.
>
> (B) Duty to Remove Hail, Snow, Sleet and/or Ice Promptly.
>
> (1) Unless otherwise provided in this Section, it shall be unlawful for an owner, agent or lessee of real property to fail to remove or fail to cause to be removed hail, snow, sleet, and/or ice, from the entire length and breadth of every Sidewalk in the City within the twenty-four (24) hour period immediately following the cessation of a Precipitation Event.
>
> (2) The duty imposed in this subsection (B)(1) shall not include snow placed onto Sidewalks by snow removal equipment of the City after it has been removed following a Precipitation Event.

Idaho Falls City Code § 8-10-10 (emphasis in original).

24. Strictly read, the code section seems to anticipate that a lessee of real property has an obligation to remove snow and ice "from the entire length and breadth of every sidewalk in the city" within the prescribed time period following a precipitation event. This obligation is not limited to a sidewalk adjacent to the leasehold estate. Rather, the section saddles a lessee with the obligation to scrape every sidewalk in the city. It would impose the statutory obligation on Progrexion to maintain the sidewalk at the situs of the accident, and every other owner and lessee of real property in the City would have a co-extensive obligation to maintain the same sidewalk. We think we know what might have been intended, since the literal reading yields a bizarre result. However, the Commission will not attempt to construe Section 8-10-10 to create a statutory duty on the part of Progrexion to maintain the sidewalk on the western aspect of the median strip where the slip and fall occurred. Rather, we rely on the apparent concession of Progrexion that it was responsible for maintaining sidewalks adjacent to the property it leased.

25. In his opening comments, counsel for Progrexion asserted that Progrexion is the lessee of property owned by another. However, in making this assertion, counsel conceded that

either as tenant or owner, it had the obligation to maintain property within its control, the only question in this case being whether the sidewalk in question was outside of Progrexion's control by virtue of the fact that Century Link had evidently assumed responsibility for maintenance of the sidewalk at the situs of the accident. Tr. 8:24 - 10:7. Even though Progrexion recognized an obligation to maintain sidewalks adjacent to Progrexion property, it did not maintain the sidewalk at the situs of the accident because Progrexion, or Century Link, or both of them, assumed that the obligation to maintain the situs of the accident resided in Century Link. At Progrexion's direction, All Done Services managed the snow clearing and removal on other sidewalks adjacent to Progrexion, as well as the parking lot across International Way, which Progrexion leased from the City of Idaho Falls. However, Jesse Blair has made it clear that his contract with Progrexion did not include any part of the sidewalk abutting the median, even though it is shown that both Century Link and Progrexion leased/owned property adjacent to that sidewalk. Accordingly, it is not argued that Progrexion had no obligation to maintain sidewalks adjacent to its property, but rather that the stretch of sidewalk in question was under the control of someone else, i.e., Century Link, and that this fact relieved Progrexion of any obligation to maintain a sidewalk that later turns out to be adjacent to its leased property.

26. If Progrexion generally acknowledges an obligation to remove snow and ice from sidewalks adjacent to the property it leases, it does not seem to matter much that the obligation to remove snow and ice from the situs of the accident was undertaken by another under the mistaken belief that the situs of the accident was not adjacent to Progrexion property. The extension of the premises rests on Progrexion's acknowledgement of responsibility to clear sidewalks adjacent to its leased property.

27. Therefore, this case falls within the ambit of the rule recognized in *Vincent*, and by

the commentators, that the premises includes those areas outside of the strict confines of employer's property over which it has a right of control. Progrexion did not exercise that control over the sidewalk on the western aspect of the median, but Progrexion generally recognized its obligation to maintain sidewalks adjacent to its property. The fact that it erroneously ceded this obligation to Century Link for the area of sidewalk in question is immaterial to our inquiry. Simply, Progrexion recognized an obligation to maintain sidewalks adjacent to the property it leased; the situs of the accident occurred on a sidewalk adjacent to Progrexion property. It is appropriate to extend the Progrexion premises to include those areas over which it recognized a general obligation to maintain. By this analysis, the situs of the accident is a part of the premises of Progrexion, and the going and coming rule is inapplicable. Per *Dinius*, we must next be satisfied that a causal connection exists between the conditions existing on the employer's premises and the subject accident. This requirement is easily satisfied by recognizing that Claimant slipped and fell on a patch of ice, i.e., a risk of injury created failure to keep the area clear.

28. Aside from the premises rule, there is another basis to hold employer liable, even if the going and coming rule is deemed applicable to these facts. It is noted that numerous exceptions apply to the rule insulating employers from injuries which occur off-premises, while the employee is going to or coming from work. Two exceptions are treated by the parties, the special hazard exception, and the traveling employee exception. We turn first to the traveling employee exception.

29. When an employee's work requires him or her to travel away from the employer's place of business, the employee is covered by worker's compensation. Similarly, where travel is a part of the work performed, injuries which occur away from employer's premises are compensable. *Ridgeway v. Combined Ins. Companies of America*, 98 Idaho 410, 565 P.2d 1367 (1977); *Cheung*

v. Wasatch Electric, 136 Idaho 895, 42 P.3d 688 (2002). The Commission does not find any evidence of record supporting the proposition that travel was a part of Claimant's employment. The traveling employee exception to the going and coming rule does not appear to have application to the facts of this case.

30. Next, Claimant argues that as a result of her employment she was subjected to a peculiar or a special hazard which warrants an exception to the going and coming rule. In Idaho, the special hazard exception to the going and coming rule has long been recognized. It received its most cogent treatment in *Jaynes v. Potlatch Forests, Inc.*, 75 Idaho 297, 271 P.2d 1096 (1954). The Potlatch plant at Lewiston was accessed by a public road which crossed a railroad right-of-way before reaching the plant. Almost all Potlatch employees accessed the plant via this route. Other persons unconnected to Potlatch also used this road from time to time. The northern property boundary of the Potlatch property abutted the railroad right-of-way. On the day of the accident in question, the Potlatch gate house was unmanned and the watchman who would normally act as flagman near the railroad crossing at shift changes, was not working. Decedent and his son were both employed at the plant. After finishing their shift, they left the plant by the usual route, and the vehicle which they were driving was struck by a passing train as they crossed the right-of-way.

31. After citing the general going and coming rule, the *Jaynes* court recognized that the vast majority of jurisdictions who recognize the rule also recognize an exception to it when an accident occurs at a point the employee is within a range of dangers peculiarly associated with the employment. In this regard, the court stated:

> It will be noted in most jurisdictions an exception to the general rule has extended the principle to embrace an accident as arising out of and in the course of employment when it occurs at a point where the employee is within range of dangers peculiarly associated with the employment. In this respect it is reasoned that such injury can be seen to have followed as a natural incident to the work and as the result of peculiar exposure occasioned by the nature of the employment

> because the causative danger is peculiar to the employment and not common to the neighborhood. Under this rule it is not intended to nor does it protect an employee against all the hazards, perils, and dangers on his journey from home to work and from work back to his home.
>
> 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 and circumstances as hereinbefore detailed, 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, otherwise an injustice in the denial of compensation for an injury caused by the employment would result; it is a recognition of the causal connection between the conditions under which an employee must approach and leave the premises of the employer and the occurrence of the injury; it recognizes that the employment involves peculiar and abnormal exposure to a common peril which annexes itself as a risk incident to and inseparable from the employment; it is not necessarily based upon nearness to the plant nor upon reasonable distance therefrom or even identifying the surrounding area as an integral part of the premises for all practical purposes but upon a causal relationship between the work and the hazard.

Jaynes, 75 Idaho at 301-02, 271 P.2d at 1018.

32. Therefore, although the danger in question may be a peril common to the public, it may be one to which the employee is abnormally exposed as a consequence of his employment. The Potlatch employee who was required to cross the railroad right-of-way twice a day could be said to have suffered an abnormal or peculiar exposure to the common peril of crossing railroad tracks.

33. As applied to the facts of the instant matter, it could hardly be argued that icy, and inadequately cleared sidewalks, are not a common hazard during an Idaho Falls winter. The question to be asked under *Jaynes* is whether Claimant's employment involved a peculiar or abnormal exposure to this common hazard. Progrexion was unusually vigilant about crafting and enforcing parking rules. On-street parking along International Way was allowed, except at certain locations, primarily on the north side of International Way. It is not clear from the record, whether the prohibited on-street parking was prohibited by a direction of Progrexion or simply marked as

no parking zones by the City of Idaho Falls. No on-street parking was allowed immediately adjacent to the narrow median at issue.

34. In addition to on-street parking, Progrexion provided areas of free parking on its premises to the north and the south of its building. Other free off-street parking, in fact the majority of the free off-street parking offered by Employer, was provided in a lot it leased from the City of Idaho Falls, immediately north of the Century Link facility. *See* JE 4 p. 8. Any employee utilizing this employer-provided parking lot would be required to cross certain public property, i.e., International Way and associated public sidewalks, in order to gain entry to the Progrexion premises. In fact, when traversing the public space between the leased lot and the Progrexion premises, employees are actually making a traverse between two parts of employer's premises. It is almost universally recognized that a remote parking lot leased/owned and maintained by employer is a part of employer's premises. 2 Larson's Workers' Compensation Law, § 13.04(2)(a).

35. A review of the parking map contained in JE 4 reveals that any employee parking in the lot leased and maintained by Employer would have several choices about how to get from the parking lot to the Progrexion facility, depending on where in the lot the employee parked. Those parking on the east side of the remote parking lot might cross International Way in the vicinity of Ethel's Lane. Those parking on the western side of the leased lot might cross International Way in the vicinity of Borah Avenue. Regardless, it seems likely that the majority of employees walking between the remote parking lot and the Progrexion facility will cross the very same stretch of sidewalk involved in this accident, i.e., the sidewalk on the western aspect of the median strip separating Progrexion from Century Link. We recognize, of course, that Claimant parked on the south side of International Way, closer to the intersection of International Way and Ethel's Lane. However, her accident occurred at a spot likely to be traversed by employees going

between Employer's two premises.

36. This clearly seems to satisfy the special hazard exception to the going and coming rule. The hazard of a slippery sidewalk may have been common to the community, but to employees of Progrexion, constituted a peculiar or abnormal hazard. At the time of the accident giving rise to this claim, Claimant was on the route that would likely have been traversed by employees traveling between the two portions of employer's premises. It does not seem to matter that she got there by virtue of walking from her on-street parking spot. *Vincent v. Montgomery Ward & Co., supra.*

37. This case bears some similarities to *Hamilton v. Alpha Services, L.L.C.*, 158 Idaho 683, 351 P.3d 611 (2015). In *Hamilton*, claimant's workplace was a remote area in which timber harvesting was being conducted. The workplace was bisected by a state highway. Active logging was being conducted on the western part of the work site, which was accessed by a dirt road extending from the state highway. On the eastern part of the worksite, the employer kept a shipping container in which to store supplies and equipment. This part of the worksite was accessed via a dirt road extending from the state highway, approximately one hundred feet south of the dirt road accessing the primary worksite.

38. On the day of the accident, Hamilton, operating one of employer's vehicles, backed onto the state highway from the dirt road leading to the active logging site. He headed south, intending to make a left-hand turn onto the dirt road accessing the storage container. As he made the left-hand turn, he was broadsided by a southbound semi-truck that had moved into the left-hand lane in an attempt to pass. Coverage was denied and the case was defended, in part, on the basis that the accident was one covered by the going and coming rule; Claimant was going to a part of the work site but had not yet arrived at the time the accident occurred. The Commission

and the court rejected this argument, endorsing the view that employer's place of business included, at a minimum, the active logging area, the shop container area, and the route that one would necessarily have to take between the two. Therefore, the public highway on which the accident occurred was actually deemed to be a part of employer's premises, because traversing it was the only means by which an employee could get from one part of employer's premises to the other. Upholding the referee's decision, the court stated:

> The fact that the accident occurred in a place he was regularly asked to work and as a result of conditions he regularly encountered during his work suggests that the coming and going rule is inapplicable, whether because Hamilton was already at his place of employment or because some exception to the rule should govern the case. The Commission did not err in determining that, for purposes of the coming and going rule, Hamilton was at Alpha's place of business when the accident occurred and the coming and going rule is inapplicable.

Hamilton, 158 Idaho at 691-92, 351 P.3d at 619-20.

39. Therefore, the public highway was deemed to constitute a portion of the employer's premises, or that the necessity for use of the public highway to travel between two parts of the employer's premises constituted a special hazard exempting application of the going and coming rule.

40. As applied to the facts of the instant matter, an employee utilizing the leased parking lot must necessarily travel between two parts of Employer's premises in order to get to the worksite. The situs of the subject accident lies along one of the most direct paths that such an employee would take. At the very least, Claimant has demonstrated that the facts of this case implicate an exception to the going and coming rule, by way of the special hazard exception. It also seems appropriate that the public ways separating the two portions of Employers premises should be treated as part of that premises per *Hamilton*. Finally, by dint of Employer's concession of an obligation to control/maintain the sidewalks adjacent to the property it leased, the situs of

the accident should, in fact, be treated as a part of Employer's premises, notwithstanding that employer was previously unaware that the situs of the accident was a sidewalk abutting its property.

41. For the foregoing reasons, we find the claim is one arising out of and in the course of Claimant's employment.

42. **Retention of Jurisdiction**. The parties included "retention of jurisdiction" in the issues for this hearing, however they did not submit any arguments concerning it in their post-hearing briefs. In any event, retention of jurisdiction is irrelevant to this case where the sole issue at the hearing was one of coverage, i.e., whether Claimant's injury arose out of and in the course of her employment. All other issues are reserved.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered a personal injury caused by an accident arising out of and in the course of employment with Employer.

2. All other issues are reserved.

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

DATED this 16th day of December, 2021.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Paul Jeffries
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and Electronic mail upon each of the following:

MICHAEL R MCBRIDE
1495 E. 17TH STREET
IDAHO FALLS ID 83404
mike@mcbrideandroberts.com

DAVID P GARDNER
412 W. CENTER, STE. 2000
POCATELLO ID 83204
dgardner@hawleytroxell.com