BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JEFFERY HARPER, Claimant, v. HSBCAMPS, LLC., d/b/a HSBACADEMY, Employer/Defendant.	**IC 2018-025227** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas Donohue. A hearing was conducted on February 18, 2022. Andrew Adams represented Claimant. Neil McFeeley represented Defendant. The parties presented testimonial and documentary evidence. The parties submitted simultaneous briefs post-hearing. The case came under advisement on March 21, 2022.

ISSUES

The issues to be decided as amended at hearing are:

1. Whether Claimant has complied with the notice and limitation statutes under Idaho Code §§ 72-701 through 72-706;
2. Whether Claimant was an employee of Employer at the time of the accident;
3. Whether Claimant sustained an injury from an accident arising out of and in the course of employment.

All other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his knee in a compensable accident. He was playing a "pick-up" basketball game with co-workers after a day's session of a basketball camp when the injury occurred. First, Claimant asserts he was an employee, not an independent contractor. Employer controlled time, manner, and method of Claimant's work. Second, he was a traveling employee. The job required his presence at various basketball camps at various locations. Third, notice was given. Employer had actual knowledge that Claimant was hurt in the game and taken to the hospital. Claimant argues he should be entitled to benefits.

Defendant contends that the injury did not arise out of or in the course of employment. Moreover, Claimant did not give notice as required. The basketball camp ended for the day at 2:30 p.m. Co-workers began a pick-up game. Although Claimant was free to decline and under no pressure to play, Claimant played to keep in shape for his international professional basketball career. Employer contends it neither suggested the game nor gained benefit by it. An agent of the Industrial Commission has previously determined the accident was not compensable. Although Employer knew of the accident, Claimant never suggested he would make a claim under Idaho Workers Compensation Law until long after the period for notice had passed.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, Employer's co-owners Carson Sofro and Michael Quinney, and Claimant's co-worker Ethan Sager; and
2. Exhibits 6 and 7 admitted at hearing.

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Defendant conducts basketball skills training camps or clinics for kids. At these clinics Defendant coaches and mentors young players and encourages the development of skills on the court. Transcript of Hearing, ("Tr.") p. 50. In June of 2017, Defendant contracted with the McCall high school girls' basketball head coach to conduct a team camp. *Id.* at 51. Whole teams came to be taught skills by Defendant during the day. *Id.* Basketball games were played by these teams in the evening. Defendant was not involved in the evening games played by the high school teams. *Id.* Skills development training provided by Defendant ended at approximately 2:30 P.M.

2. Claimant is a professional basketball player. After playing in college, he played internationally starting in Estonia in September 2013. *Id.* at 11. He played for teams in Australia, Peru, Bolivia, Mexico, Germany, Israel, Japan, and Norway before returning to the United States in 2017. *Id.* at 11-14.

3. He began his association with Defendant in June 2017. *Id.* at 16. Defendant flew him to Boise from Las Vegas and provided hotel accommodations. *Id.* Claimant completed no paperwork. There was no employee handbook. *Id.* at 16.

4. Claimant was told to treat the kids respectfully, not use profanity, and teach them basketball. *Id.* at 18. Defendant did not specifically control the method of how Claimant was to accomplish this task. *Id.* at 23. Various co-workers coached various skills. *Id.*

5. Claimant coached at two successive clinics held at Capitol High School in Boise. *Id.* at 19. The first lasted three days, the second two, both in the same week. *Id.* Defendant provided a uniform, T-shirt, shorts, socks, and basketball shoes. *Id.* At the end of the clinics, Defendant washed the uniforms and returned them to workers. *Id.* Claimant kept the shoes. *Id.*

6. A short time later, Claimant coached at the McCall camp. Defendant provided a rental car which was shared among co-workers to travel from Boise to McCall. Tr. p. 21-22. Defendant provided hotel accommodations in McCall. *Id.* at 63.

7. The job site was located at the gyms of two local public schools. *Id.* at 54. These schools were adjacent to each other. *Id.* Claimant was assigned to the same gym throughout the camp. Mike Quinney, one of Defendant's owners, supervised the clinic at the gym to which Claimant was assigned. *Id.* at 54-55. The skills development clinic was conducted from 9:00 a.m. to 2:30 p.m. each day. *Id.* at 52-53. At the close of each session Claimant was free from that time until the next morning. *Id.* He was not involved in any way with evening activities, including basketball games that the girls' teams played. *Id.* at 61. The evening girls' games were played in a third gym at the high school. *Id.*

8. After concluding clinics for the day, Defendant's owners and Claimant's co-workers would often play a pick-up game of basketball on site. These games were played following the Capital High clinics, as well as the McCall clinic. *Id.* at 20. The games were spontaneous and voluntary, and not everyone played every game. *Id.* at 56. On the day of Claimant's injury, for example, 10 of the 11 coaches/owners working the McCall clinic played in the pick-up game. Mike Quinney was the only HSB owner/coach who did not participate in the McCall game, explaining that unlike other coaches, he no longer had a need to stay in top shape. *Id.* at 66-67. Claimant, on the other hand, was motivated to keep in shape in anticipation of returning to professional play. Claimant did not believe playing the pick-up games was necessary or an advantage to his association with Defendant. *Id.* at 29. Defendant neither encouraged nor discouraged any person associated with Defendant to participate in the pick-up games. *Id.* No person unaffiliated with Defendant played. *Id.*

9. Around 4:00 p.m., during the pick-up game in McCall, Claimant ruptured his patellar tendon. *Id.* at 25. Claimant opted against an ambulance. Mr. Sofro testified that Claimant asked Mr. Sofro not to call an ambulance because Claimant was uninsured. *Id.* at 57. Mr. Sofro drove Claimant to the hospital in McCall and arrived at 4:18 p.m. *Id.* at 41.

10. Defendant had invited Claimant to coach the next clinic. Claimant had also been invited to play in Uruguay. *Id.* at 33. Claimant had informed Defendant he intended to go to Uruguay. Clamant cannot recall whether this move would have occurred before the McCall camp was completed. The injury prevented him playing in Uruguay. He did finish working the McCall camp on crutches before he sought additional medical care in Boise. *Id.* at 40. He recovered fully, but it took one year. *Id.* at 28.

11. In 2018, Defendant provided Claimant a 1099 form for tax purposes. It showed nonemployee compensation of $1,547.56. *See* Exhibit 6. Pay was calculated on a per-camp basis.

12. Claimant did not inquire about Defendant paying any portion of the medical bill until more than one year later. Tr. p. 57.

13. Claimant communicated with IIC compliance investigator Shannon MacKenzie by email in October 2018. She concluded that because the injury occurred after work hours, the injury was not work related. *See* Exhibit 7. Defendant first became aware that Claimant was pursuing a potential worker's compensation claim from Ms. MacKenzie. Tr. p. 57.

14. Mr. Sofro testified that Ms. MacKenzie told him that Claimant had told her he had "withdrawn his complaint." In fact, at this time Claimant had not filed any complaint. He had no complaint to withdraw. *Id.* at 58.

15. Claimant filed a Complaint in this matter on January 14, 2019.

16. In 2020 Claimant went to China to play. Intervening circumstances unrelated to basketball or to this injury prevented him from doing so.

DISCUSSION

17. 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). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

18. The Referee found all witnesses to be forthright and credible in their demeanor. The Commission finds no reason to disturb the Referee's findings and observations on the witnesses' presentation or credibility.

19. As a preliminary matter, it is first necessary to address Defendant's Exhibit 7. In October of 2018, IIC compliance investigator Shannon MacKenzie contacted the parties and conducted an investigation, presumably, into whether, at the time of the subject accident, HSB was required to carry a policy of workers' compensation insurance for the coaches it engaged to teach clinics. Relevant to this determination is whether the coaches are properly characterized as employees vs. independent contractors. The scope of Ms. MacKenzie's investigation is unknown, because little can be discerned about it from the email she sent to the parties after she finished reviewing the matter. She noted that both Claimant and Mr. Sofro agreed that Claimant was injured in a pick-up game of basketball that took place after the camp was concluded. She then stated: "[b]y Idaho workers' compensation laws the injury would have been covered if it had

happened during the course of work related duties. However, the camp had concluded for the day. This is not a work related injury. It happened during a pick-up game which was on the free time of the athletes participating in the camp." From her quoted conclusions it is possible that Ms. MacKenzie had determined that coaches were employees instead of independent contractors, because her starting point was that the injury "would have been covered" had it occurred during working hours. Regardless, her next conclusion that the accident is not compensable because it happened after work hours is a legal determination not ordinarily within the ambit of responsibilities of the compliance department, a department of the Commission primarily concerned with assuring that employers comply with the statutory requirement to obtain workers' compensation insurance. [1] Moreover, the Commission is no more bound by the determination of Ms. MacKenzie on this point than it is by a recommendation that comes to the Commission from a referee. Finally, we do not know what facts informed Ms. MacKenzie's conclusions. Certainly, she did not have the benefit of the parties' factual and legal analysis. For these reasons we do not attach significance to Ms. MacKenzie's conclusion that the accident is not compensable.

Notice and Limitations

20. A claimant must give notice of an accident within 60 days, and make his claim within one year. *See* Idaho Code § 72-701. Where no benefits are paid, a claimant ordinarily has one year from the date of making his claim within which to make and file his complaint with the Commission. *See* Idaho Code § 72-706(1). Here, the written notice required by statute was not given, and neither a timely claim nor complaint was made. However, pursuant to Idaho Code § 72-604, these limitation periods will not run against an employer who has actual knowledge of the

[1] Defendants assert that during his conversation with Ms. MacKanzie Claimant conceded that "he was not in the course of his employment when the accident happened but was simply playing a pickup game of basketball after his responsibilities ended...." (Defendants brief at 11). Nothing in Exhibit 7 supports this assertion, but even if Claimant did make such a statement, no foundation is laid that he understands the legal significance of this term, or meant to use it in its legal sense.

occurrence of an accident yet "willfully fails" to file the employer's first report required by Idaho Code § 72-602. Idaho Code § 72-604 provides:

> When the employer has knowledge of an occupational disease, injury, or death and willfully fails or refuses to file the report as required by section 72-602(1), Idaho Code, the notice of change of status required by section 72-806, Idaho Code, the limitations prescribed in section 72-701 and section 72-706, Idaho Code, shall not run against the claim of any person seeking compensation until such report or notice shall have been filed.

Idaho Code § 72-604. In *Austin v. Bio Tech Nutrients*, 165 Idaho 248, 443 P.3d 262 (2019), an employer failed to file a Notice of Change of Status as required by I.C. § 72-806. A willful failure to file such a required notice also tolls the periods of limitation referenced above. On the question of whether employer's failure was willful, the Court upheld a Commission determination that since the plain language of the Idaho Code § 72-806 requires the filing of such a notice upon the cessation of benefits, the failure to provide such notice was "willful", i.e. done willingly, as opposed to having occurred accidentally due to negligence misunderstanding or other cause.

21. Here, there is no dispute that Defendant was immediately aware of the occurrence of Claimant's injury, and that no First Report was filed with the Commission. The remaining question is whether Defendant's failure to file a First Report was "willful." Defendant has not asserted that its failure to file the report required by Idaho Code § 72-602 was accidental, or due to some misunderstanding. Rather, Defendant asserts that it is not required to file such a report because the accident is not compensable, because Claimant is not an employee, or for some other reason. Therefore, the failure to file the employer's first report cannot be other than conscious, calculated or knowing. Accordingly, the limitation provisions of Idaho Code §§ 72-701 and 72-706 are tolled.

22. If otherwise compensable, Claimant's claim is not barred by any statute of limitations.

Employer/Employee Relationship

23. An employee is "any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer." Idaho Code § 72-102(11). A four-factor right-to-control test is applied to the facts and circumstances of a relationship. The Court generally looks at four factors when analyzing whether a right to control exists, including: (1) direct evidence of such right; (2) the method of payment for the work completed; (3) the party responsible for furnishing the major items of equipment; and (4) the right to terminate the employment relationship at will and without liability. *Moore v. Moore*, 152 Idaho 245, 269 P.3d 802 (2011).

In his post-hearing brief, Claimant argues that he was an employee and not an independent contractor. He refers to the test set forth above and demonstrates that the relationship between Defendant and Claimant was one of employer and employee. Defendant did not address this issue it its post-hearing brief. Rather, Defendant argued only that Claimant's injury was not work-related, and that notice and claim were not timely made. From this, we conclude that Defendant concedes that Claimant is an employee, and so find.

Traveling Employee

24. The central 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.

25. 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.

26. 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.

As developed below, special rules apply to an employee whose work requires him to travel away from employer's place of business or employee's normal place of work. Such employees are continuously within the course of their employment during travel.

27. In his post-hearing brief, Claimant alleges for the first time that his is a covered accident under the workers' compensation law, since he is properly characterized as a "traveling employee," and that he was therefore continuously within the course of his employment during his work in McCall. Per *Ridgeway v. Combined Insurance Companies*, 98 Idaho 410, 565 P.2d 1367 (1977), a "traveling employee" is one whose work requires him to travel away from the

employer's place of business or his normal place of work. In *Ridgeway*, the claimant was hired as an insurance salesman for an eight-county region in southwestern Idaho. However, preparatory to undertaking his duties, he was required to attend a two-week training seminar which employer ran in Salt Lake City. That claimant was found to be a traveling employee during his Salt Lake City training since the trip was a requirement of his work and took him away from his employer's place of business or his normal place of work, which the decision leads one to believe was somewhere in Idaho.

28. In *Andrews v. Les Bois Masonry, Inc.*, 127 Idaho 65, 896 P.2d 973 (1995), the claimant was hired by Les Bois Masonry. Les Bois maintained its books at the residence of one of its principals and leased a yard in Boise where it stored equipment. The decision reflects that Les Bois did its work at many different construction sites in Ada and Canyon Counties. However, claimant was hired to work specifically on a construction project located in Wenatchee, Washington. He stayed in Wenatchee for the duration of the job and after it was completed, returned to Idaho. During his drive home, he suffered the accident for which benefits were sought.

29. On the question of whether Andrews was a "traveling employee", the Court reiterated the rule of *Ridgeway* that a traveling employee is one whose work requires him to travel away from the employer's place of business or the employee's normal place of work. The Court found that claimant was not a traveling employee because vis-a-vis claimant, Les Bois' place of business was Wenatchee, Washington. The claimant was hired to work in Wenatchee and therefore, claimant's work did not require him to travel away from Les Bois' place of business or claimant's normal place of work, i.e. the Wenatchee work-site.

30. Here, before considering the application of the traveling employee doctrine to facts of this matter, we must first ascertain whether Claimant can fairly be characterized as a

traveling employee, i.e., one whose work required of him that he travel away from employer's normal place of business, or Claimant's normal place of work.

31. The facts of the matter are not particularly illuminating as to the normal place of business of Defendant. Defendant is a limited liability corporation that has been in business since the early 2000s. Tr. at 50. The principals are Mr. Sofro, Mr. Quinney, Mr. Harris, along with a number of other "minority owners". *Id.* at 50. The record contains no further information about where Defendant is headquartered, or where its principal place or places of business is located. When Claimant was initially contacted by Defendant, he was flown from Las Vegas to Boise, but this fact sheds little light on the location of employer's principal place of business. Claimant was hired as a coach, and his initial assignments were to provide coaching services at two clinics held at Capital High School, running three days and two days, respectively. *Id.* at 19. Shortly thereafter, he was assigned to his next clinic at McCall, Idaho. Defendant provided transportation to McCall from Boise, as well as hotel accommodations in McCall for the duration of the clinic.

32. On these facts, Claimant's situation bears a closer resemblance to the facts of *Ridgeway* than they do to the facts of *Andrews*. There is no evidence that Claimant made a new contract of employment with Defendant every time he was sent to work at a new clinic. Rather, it appears Claimant was hired to work as a coach, and his work required of him that he travel to various and diverse locations to perform this work. The fact that Defendant provided transportation and hotel accommodations for Claimant supports the conclusion that travel was a necessary concomitant of his employment. Even if Defendant conducted its business out of Mr. Sofro's shirt pocket, such that Defendant's normal place of business was wherever Mr. Sofro happened to be, it seems clear that travel was a necessary and integral part of the work that Claimant was hired to perform, no less than it was in the case of the claimant in *Ridgeway* whose

job required of him that he travel from Idaho to Salt Lake City, and reside there while completing his training. Therefore, the Commission finds Claimant is a travelling employee.

33. The question of compensability is straightforward if one accepts that Claimant is a "traveling employee" subject to the rule announced in *Ridgeway*, supra:

> When an employee's work requires him to travel away from the employer's place of business or his normal place of work, the employee is covered by workmen's compensation while he attends to matters such as eating or securing lodging. It is necessary for traveling employees to attend to these personal needs in order to carry out the employer's work, often at a location unfamiliar to the employee. Thus, keeping in mind the liberal construction that is to be given to the workmen's compensation laws, Colson v. Steele, 73 Idaho 348, 354, 252 P.2d 1049 (1953), the risk incident in going to a restaurant or seeking lodging should normally be covered by the Workmen's Compensation Law.
>
> This is not to say that the traveling employee is entitled to portal to portal coverage while away from home. The Commission could find, for example, that an employee who is injured while engaged in a non-business related activity such as skiing or who drowns while scuba diving during a break in a business trip had distinctly departed on a personal errand unrelated to employment. Compare Wiseman v. Industrial Accident Commission, 46 Cal.2d 570, 297 P.2d 649 (1956), with Silver Engineering Works, Inc. v. Simmons,180 Colo. 309, 505 P.2d 966 (1973). However, because it is necessary for any traveling employee to maintain himself while traveling, an employee should ordinarily be covered while traveling to and from restaurants, unless the particular trip represents an unreasonable departure in order to pursue some purely personal activity not connected with his employment or necessary to maintain himself while traveling.

34. We do not believe that Claimant's participation in the post-work basketball game could possibly be deemed to be a personal departure of such significance to break the general rule that workers are continuously within the course of their employment during travel. Claimant's activity is not that of the skiing flight attendant or scuba diving businessman whose recreational pursuits did constitute departures of such significance to put their accidents outside the course of employment. Again, while Employer did not encourage or require pick-up games, it did tolerate them and participated in them. The games occurred on the employer's premises and involved an activity closely associated with the work which coaches were hired to perform. Such activities do not constitute a basis to deny coverage to a traveling employee.

35. However, whether or not Claimant is fairly characterized as a "traveling" employee is not as critical to the evaluation of compensability as that determination was in *Ridgeway* and *Andrews*. We are not asked, for example, to decide whether a motor vehicle accident involving Claimant while en route to McCall would be compensable. Nor are we asked to consider whether a crosswalk accident occurring while Claimant was walking to a McCall restaurant for his evening meal would be compensable. Rather, we are asked to consider whether an accident which occurs after working hours, yet on the employer's premises, is one which arises out of and in the course of Claimant's employment.

36. We believe that the accident, occurring as it did on the same basketball court on which Claimant had just completed his work responsibilities, occurred on the employer's premises. In *Colson v. Steele*, 73 Idaho 348, 252 P.2d 1049 (1953), a claimant was employed as a member of a surveying crew by Steele. Steele had a contract with the federal government involving surveying work to be performed at what is now the INL facility in southeastern Idaho. The survey crew performed its work in remote backcountry and it was the custom of employees to carry sidearms with which they amused themselves during their half hour lunch break. These activities were undertaken with the knowledge and consent of employer. On the day of claimant's injury, after the conclusion of his half hour lunch break, target practice continued. The claimant was injured when he was struck by a ricocheting bullet. On the question of whether or not his accident was one arising out of and in the course of his employment, the Court first found that the accident occurred on the employer's premises, since it occurred on the premises where claimant was required to perform his work by employer. It is well recognized in Idaho law that accidents which occur on the employer's premises are presumed to arise out of and in the course of employment. *Foust v. Birds Eye*, 91 Idaho 418, 422 P.2d 616 (1967).

37. From this, we conclude that Claimant's accident was one which occurred on the

employer's premises, albeit after Claimant had been released from further responsibilities for the day. Therefore, this case bears more similarity to cases like *Teffer v. Twin Falls School District*, 102 Idaho 439, 631 P.2d 610 (1981) and *Colson v. Steele*, supra, as opposed to *Ridgway*. These cases examine the compensability of accidents occurring on the employer's premises, but under circumstances which make in unclear whether the accident could yet be said to be one which arises out of and in the course of the injured worker's employment.

38. In *Colson* the Court also addressed the "arising" component of the prima facie case, noting that in order for an accident to be held to have arisen out of employment, it is not necessary that it arise out of some act directly furthering the work of the employer. It is sufficient if the accident arises out of a risk incidental to the work as customarily conducted. Here, too, we find that the pick-up game must be viewed as a risk incidental to Claimant's work as a coach as that work was customarily conducted.

39. In *Teffer v. Twin Falls School District*, the claimant was employed as a janitor. 102 Idaho 439, 631 P.2d 610 (1981). Employer permitted employees to use the school gym and weight room after work. Claimant interpreted this to mean that he was free to use the gym after he had completed his assigned tasks, even though he may have done so before his shift came to an end. Employer testified that school district policy did not permit employees to use school facilities during work hours. Claimant suffered an injury while playing basketball in the school gym after he had completed his work tasks, but before the end of his shift. There was testimony that the right to use gym facilities was not used as an inducement for employment. Employer allowed use of the facility for the purpose of employee morale but received no other substantial benefit from the policy. The court affirmed a decision of the Industrial Commission denying benefits. Justice Bistline authored a lengthy dissent.

40. Justice Bistline noted that accidents which occur on the employer's premises are

presumed to arise out of and in the course of employment. He stated that the fact that an accident might occur on the employer's premises before or after work hours is not, in and of itself, a basis to deny compensation. He cited numerous Idaho cases supporting the proposition that accidents occurring before or after work hours are nevertheless compensable if they occur while the worker is engaged in some activity reasonably incidental to work.

41. Justice Bistline noted that commentators recognize a general rule that accidents occurring while engaged in recreational or social activities which take place on the premises during a lunch or recreation period are also compensable.

> Recreational or social activities are generally within the course of employment when
> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Lex K. Larson, Larson's Workers' Compensation sec. 22.03 (Matthew Bender, Rev. Ed.) Justice Bistline could perceive no analytical reason for distinguishing recreational activities undertaken immediately after work from those undertaken during a lunch hour, so long as they occur on the premises as a reasonable incident of the employment.

42. We find Justice Bistline's reasoning, as well as the court's treatment of the same issue in *Colson v. Steele*, supra, instructive. Here, even though the subject accident occurred after Claimant was released from duty for the day, the pick-up basketball game in which he engaged took place on Employer's premises and was a customary activity, undertaken with the knowledge, indeed, participation, of employer. There is no dispute that employer did not require employees to participate in this activity, and there is no testimony that employer enjoyed any specifically articulated benefit from Claimant's participation in the pick-up games. While it

might be speculated that the opportunity for Claimant to hone his skills with other high-caliber players was an inducement to employment, or that employer benefitted from keeping a coach's skill set at a high level, we do not base our holding on such speculation. Instead, it is sufficient to say that the activity taking place on employer's premises after work hours was customary and tolerated by the employer. On this evidence we conclude that the pick-up games were a reasonable incident of the work and that Claimant's accident, occurring as it did during this activity, is covered under the workers' compensation laws. Therefore, even were we to determine that Claimant is not a "traveling employee", his accident, occurring as it did on the employer's premises, under the circumstances we have discussed, is one arising out of and in the course of his employment. The accident was the result of a risk associated with Claimant's employment, which occurred while he was engaged in an activity reasonably incidental to his work.

43. On the basis of the foregoing, we conclude that regardless of whether Claimant is properly characterized as a "traveling employee", the accident which occurred while he was engaged in a pick-up game is one which arises out of and in the course of employment.

CONCLUSION OF LAW AND ORDER

1. Claimant's failure to give timely notice is not a bar as Employer failed to file a First Report of Injury form, tolling the statute of limitations.

2. Claimant was an employee at the time of the accident.

3. Claimant has shown that he was a travelling employee at the time of the accident, and that he was engaged in reasonable activities at the time of the accident.

4. Even if Claimant is not a travelling employee, he has nevertheless shown that his injury was one which arose out of and in the course of his employment.

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

DATED this 17th day of November, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2022, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

ANDREW ADAMS
598 N CAPITAL
IDAHO FALLS, ID 83402
office@curtisandporter.com

NEIL MCFEELEY
PO BOX 1368
BOISE, ID 83701-1368
nmcfeeley@eberle.com
tsmith@eberle.com

Kamerron Slay