ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

WILLIAM T. SEARS, Employee, Claimant, v. WORLD WIDE MOVERS, INC., Employer, and VANLINER INSURANCE CO., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201501928 AWCB Decision No. 15-0140 Filed with AWCB Anchorage, Alaska on October 27, 2015

Compensability of William Sears' (Employee) January 15, 2015 injury was heard on October 15, 2015, in Anchorage, Alaska, a date selected on July 30, 2015. Attorney Gregory Parvin appeared and represented Employee, who appeared and testified. Attorney Adam Sadoski appeared and represented World Wide Movers, Inc. and its insurer (collectively, Employer). The parties agreed to a hearing limited to whether Employee's January 15, 2015 injury arose out of and in the course of his employment with Employer, and related attorney's fees and costs. Other witnesses included Louie Stevens, who testified for Employee, and John Jolly, who testified for Employer. The record closed at the hearing's conclusion on October 15, 2015.

ISSUES

Employee contends his slip and fall on the ice while exiting Walgreens after purchasing a cup of coffee while traveling to a job in his company moving van arose out of and in the course of his

employment with Employer. Therefore, he contends his January 15, 2015 slip and fall is a compensable injury under the Alaska Workers' Compensation Act (Act).

Employer contends Employee ignored company policy when he left the company yard too early, deviated from his employment-related travel for purely personal reasons, and stopped in a company vehicle for coffee. Employer contends Employee's January 15, 2015 injury arose out of these factors and did not arise out of and in the course of his employment with Employer, and is not compensable.

1) Is Employee's January 15, 2015 slip and fall a compensable injury?

Employee contends if he prevails on his compensability argument, he is entitled to an immediate award of attorney's fees and costs.

Employer contends, as Employee's injury did not arise out of and in the course of his employment, it is not compensable and he is entitled to no benefits. Therefore, no attorney's fees or costs should be awarded. Further, Employer contends even if Employee wins on this preliminary issue, the decision confers no actual benefits, so Employee is not entitled to interim attorney's fees at this time.

2) Is Employee entitled to an interim attorney's fee and cost award if he prevails?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) Employee has worked for Employer for 40 years. He has performed all laborer positions and most recently is a driver. Employer's business relocates personal and business property from one location to another using manual laborers and moving vans and trucks. (Employee).

2) Employer agrees Employee and Stevens are trustworthy workers. (Jolly).

3) On January 15, 2015, Employee slipped and fell on ice outside Walgreens while exiting the store after having purchased coffee. Stevens, Employee's driver and helper, was with him at the time and also purchased refreshments. Employee contends he injured his head, shoulders and ribs when he fell. (Employee; Stevens; First Report of Injury, February 5, 2015).

4) On the injury date, Employee was delayed in arriving to work from his home in Wasilla, Alaska, because roads were wet and icy. It took him from between an hour and 45 minutes to two hours to make the trip. Upon arriving at work after driving the usual 55 miles, Employee, who was the crew "lead," met Stevens who already had paperwork for a move scheduled at the Alaska Native Medical Center Hospital in Wasilla. According to Employer's paperwork, Employee and Stevens in Employer's 30-foot box truck were to leave Employer's yard at 10:30 AM for the move scheduled to begin at 11:30 AM. Employee noted the bad road conditions and the trouble he had just had coming to work from Wasilla, and after discussing the matter with Stevens, Employee and Stevens decided to leave early to make sure they arrived at the Wasilla job on time. Supervisory staff was involved in a morning meeting, and neither Employee nor Stevens wanted to interrupt them to tell the dispatcher they were leaving early. After performing a safety check, obtaining necessary equipment and fueling Employer's truck, Employee and Stevens left for Wasilla in Employer's truck. (Employee; Stevens).

5) Employee wanted to stop at the Tesoro station a stone's throw from Employer's building for coffee and Stevens also wanted to obtain a beverage, though he was not a coffee drinker. Employee and Stevens noted, as they approached the Tesoro station, the parking area and street were clogged with Employer's other vehicles that had also stopped so Employer's workers could purchase refreshment. Employee and Stevens stopped their vehicle momentarily, but Employee suggested they continue driving, thinking they could stop elsewhere to obtain refreshment where traffic conditions were more amenable to stopping without blocking traffic and causing a safety hazard. Stevens agreed, and the two proceeded on the normal route down Tudor Road, which becomes Muldoon Road, to the Glenn Highway to get from Employer's yard to Wasilla. (*Id.*).

6) Near the intersection of Muldoon Road and Debarr Road in Anchorage, Employee and Stevens decided they would stop at Walgreens, where Employee knew there was inexpensive, fresh made espresso coffee, which he preferred over coffee admittedly available at Employer's facility. Employee avoided drinking coffee at Employer's building because it was, in Employee's view, of poor quality and sometimes sat for days. Upon approaching the intersection, Stevens turned from Muldoon Road onto a driveway leading directly to Walgreens' parking lot and parked about 40 feet from the building. Employee and Stevens exited the vehicle, walked into Walgreens, obtained their drinks, paid for them, and walked directly back to the truck. Several paces from the exit door, Employee slipped on the ice and fell. Stevens, who

was walking behind Employee, managed to catch his head and lessened the blow somewhat as Employee hit the ground. Prior to the slip and fall, Employee and Stevens were at Walgreens for no more than six minutes obtaining their beverages. What occurred after the slip and fall is immaterial to the issues decided in this decision. (*Id.*; judgment).

7) Employee and Stevens stopped nowhere else on their way from Employer's yard to Walgreens and did nothing at Walgreens except purchase their beverages. (Employee; Stevens).

8) Employee and Stevens acknowledged Employer occasionally told workers at safety meetings it was against company policy to use a company vehicle for personal reasons, including stopping to obtain coffee or other refreshment. However, Employee and Stevens agreed it was common daily practice for Employer's drivers to stop and get coffee, snacks, or other beverages while driving company vehicles, particularly at the Tesoro station near Employer's yard. Both agreed that every working day, at various times, several Employer trucks could be seen parked at or near the Tesoro station while the drivers went inside to purchase items for personal comfort. Employee said it has been so nearly every working day for the entire 40 years for which he has worked for Employer. Employee and Stevens agreed Employer was well aware of this, as the Tesoro station is in a direct line of sight from Employer's building, and Employer's vans and other trucks can be clearly seen parked on the street near Tesoro and in the Tesoro parking lot at various times during the day. (*Id.*).

9) Jolly said whenever he becomes aware of his employees stopping with company vehicles at Tesoro, he immediately writes them up and sometimes even confronts them personally. According to Jolly, such behavior is never ignored. Jolly said Stevens had been "written up" and given a warning for stopping at Walgreens on the injury date. (Jolly).

10) Stevens, who has worked for Employer for about 10 years, denied he had ever been written up for stopping for a beverage and was not written up for stopping at Walgreens on the date in question. He conceded he would not have been at Walgreens parking lot at all on that day if he had not stopped to obtain beverages. Stevens agreed there were several places along the route to Wasilla at which he and Employee could have stopped to obtain beverages, but they chose Walgreens solely because it was closer to Wasilla then many other coffee shops in Anchorage. Stevens denied he and Employee embarked on a "shopping trip" at Walgreens and did not believe he had "deviated" from his route to Wasilla. (Stevens).

11) On the injury date, Employee wanted to get coffee first thing because he was "extremely tired," as he had awoken early to check the weather, get ready and leave his Wasilla home early enough to arrive to work in Anchorage on time. Employee reasoned having coffee would help him stay awake even though he was a passenger in Employer's vehicle. He did not think it was fair or safe to fall asleep while Stevens was driving. In Employee's view, drinking coffee benefits him and Employer because it keeps him alert and better able to perform his job duties, including warning Stevens of any road hazards he might notice before Stevens. Employee denied he and Stevens embarked on a "shopping trip" at Walgreens and did not believe he had deviated from his route to Wasilla. Employee estimated the Walgreens parking lot was approximately one block off the normal route from Employer's building to Wasilla. (Employee).

12) Employee and Stevens made an insubstantial deviation from the direct route between Employer's yard and Wasilla when they turned into Walgreens parking lot. (Experience, judgment and inferences drawn from all the above).

13) At hearing, Employee identified several photographs he had taken several days earlier depicting Employer's building viewed from the Tesoro parking lot, and portraying the Tesoro parking lot and adjacent street. There is a direct line of sight through windows from Employer's building to the Tesoro parking lot. One picture showed at least two and possibly three Employer vehicles parked in or near the Tesoro parking lot. Employee verified the pictures fairly and accurately depicted the scenes shown and the latter picture represented Employer vehicles that could typically be seen at the Tesoro parking lot on any given work day. (Employee).

14) On a recent moving job to the Denali Princess Hotel near Talkeetna, Alaska, Employer allowed its crews to stop at a Tesoro station along the way to get drinks and snacks, and Employer paid for the stop and for the commodities. (*Id.*).

15) Employer's workers get two, 15-minute breaks per day, regardless of whether they are in the office or on the road. The morning break is supposed to occur between 9:45 to 10:00 AM while the afternoon break is supposed to happen between 2:30 and 2:45 PM. Employer allows flexibility in breaks to accommodate "what makes sense" as decided by the crew "lead." (Jolly).

16) Employee retained his right to two, 15-minute breaks on the injury date. The breaks exist so employees can for example go to the bathroom, rest, smoke and drink coffee. Jolly agreed Employer benefited from breaks because breaks keep "my guys fresh and rested." (*Id.*).

17) Jolly testified it was against company policy for employees to use company vehicles for personal use. Jolly defined "personal use" as anything not "revenue-generating." (*Id*.).

18) Customers pay Employer for the time its employees spent on their paid breaks. (Jolly; Employee).

19) On January 29, 2015, Employer filed a notice denying Employee's right to all benefits for his January 15, 2015 injury. Employer gave as a reason for its denial: "Injury did not occur within the course & scope of employment. Employee stopped to get coffee and fell in the parking lot of Walgreens." (Controversion Notice, January 26, 2015).

20) On February 3, 2015, Employee filed a claim requesting temporary partial or temporary total disability from January 15, 2015 and continuing while under care; medical costs; related transportation expenses; eligibility for reemployment benefits; and a finding Employer had made an unfair or frivolous controversion. (Workers' Compensation Claim, February 1, 2015).

21) In his claim, Employee stated:

> All benefits denied. Injury was said did not occur within course & scope of employment. I was employed by Worldwide Movers at the time of injury -- company policy entitles employees to one morning break & one afternoon break, in which both are paid by employer & clients. (*Id*.).

22) On February 23, 2015, Employer answered Employee's claim. Employer admitted nothing in the claim and denied all requested benefits and relief. Employer affirmatively defended on grounds the injury did not arise out of or in the course of employment and alleged all controversion notices were reasonably based upon fact or law. (Answer to Employee's Workers' Compensation Claim, February 19, 2015).

23) On February 23, 2015, Employer denied Employee's claim for benefits. Employer reiterated its grounds for denial. (Controversion Notice, February 19, 2015).

24) On March 13, 2015, upon returning to work after being disabled, Employee met with Jolly and received a written, check-the-box warning. Employee was warned about "leaving work without permission" on January 15, 2015. Jolly selected this descriptive box because Employee deviated from his normal route on the way to Wasilla on January 15, 2015. (Jolly).

25) On July 8, 2015, Employee testified at his deposition. Aside from refereeing basketball games, Employee has worked exclusively for Employer for the last 40 years. (Deposition of William Thurman Sears, July 8, 2015, at 13-14). Currently, Employee drives eight to 10

different vehicles for Employer ranging in size from a standard Econoline Van up to 53-foot semi-tractor trailers. (*Id*. at 23-24). Employee usually picks up the vehicle he will drive on any given day from Employer's yard. (*Id*. at 24). Employee has, with Employer's dispatcher's permission, taken a work truck or trailer home if he had a job in Wasilla. (*Id*. at 24-25) In respect to Employer's policy regarding use of company vehicles, Employee stated:

> Private use is -- they are not -- we are not allowed to have private use, like, they don't let you, like, do jobs on the side with the vehicle or anything like that. That's one of the policies. (*Id*. at 25-26).

Employee agreed he had to "get authorization to use the vehicles for any purpose." (*Id*. at 26). Employee was fairly certain company policy regarding vehicle use had been discussed at company safety meetings before. (*Id*. at 27-28).

26) Employee described his January 15, 2015 injury as follows:

> Walgreens parking lot, went in, grabbed a cup of coffee, paid for it, went out, took about five steps, maybe ten paces outside the door, feet slipped out from under me. I fell on my left side and kind of knocked the breath out of me. I was kind of laying there for 10, 15 minutes before they -- they had to assist me to get me back into the store. (*Id*. at 30).

Employee's co-worker Stevens witnessed the fall. Stevens also went into the store to purchase something, though Employee was not sure what he bought. (*Id*.). Employee stated:

> Q. And was your getting coffee a -- for personal reasons?
>
> A. Yeah. (*Id*. at 31).
>
> . . . .
>
> Q. Are you aware of any policies that prohibit you from going to Walgreens to get coffee during a shift?
>
> A. Like company policies, is that what you are --
>
> Q. Yes.
>
> A. Not aware of anything. That's not saying there is not, but there is no policy that is enforced. (*Id*. at 38-39).

Following the January 2015 slip and fall incident, when he returned to work, Employee "had to talk to the boss about it." The boss was "pretty angry" and made Employee sign something. Employee thought the boss was probably upset because he fell, not because he should not have stopped Walgreens to get coffee. (*Id*. at 39).

27) On July 30, 2015, the parties through counsel attended a prehearing conference. The parties agreed to an oral hearing on October 15, 2015, and limited the issues to: (1) whether the injury arose out of and in the course of employment; and (2) attorney's fees and costs related to the first issue. (Prehearing Conference Summary, July 30, 2015).

28) Employee's October 15, 2015 hearing testimony was consistent with his deposition testimony. Employee and Stevens are completely credible. (Experience, judgment, observations and inferences drawn from the above).

29) At hearing on October 15, 2015, Jolly explained there were other duties Employee could have performed when he arrived to work at about 7:45 AM on the injury date. For example, Employee could have moved trailers and been back in time to leave at 10:30 AM for the Wasilla job with Stevens. Employee did not have permission to leave early for the Wasilla job. Jolly agreed though Employer's paperwork showed Stevens had a small, local job to perform alone that was scheduled to begin at 7:30 AM on January 15, 2015, that job was flexible and could have occurred any time during the day. According to Jolly, Employer's prohibition against employees using company vehicles for personal reasons prohibits stops of any kind with a company vehicle en route to or from a job, except for on long trips like to Fairbanks and stopping at weigh scales as required by law. Jolly was aware of Employee's schedule on the injury date. The Wasilla customer wanted the movers there at 11:30 AM and no sooner. The customer had technicians available to dismantle and move an expensive display. Jolly anticipated one-hour travel to Wasilla and one-hour travel back for the move, notwithstanding the weather conditions. If an employee has to use the bathroom while driving Employer's vehicle, Jolly expects the employee to be "professional." Employees are expected to use customers' bathroom facilities and, if the customer is a residential owner, employees are expected to use the homeowner's bathroom. If a customer refuses to allow Employer's drivers and helpers to use their bathroom facilities, Jolly says management usually has a conversation with the customer and they "work it out." Employer's workers have to "hold it" and "do the best [they] can." Employer's vehicles are not equipped with global positioning satellite equipment,

but do have cameras that record where the truck is going, and activity inside the cab. Employer did not review the video from the accident date. While conceding both Employee and Stevens are "trustworthy," Jolly said they should have told the operations manager about leaving early on the day in question. Notwithstanding other things that could have been done earlier, Jolly had no real issue with Employee and Stevens doing the Wasilla job first; it was just the time they left for the Wasilla job that he found objectionable. While his employees are free to do whatever they want during their two, 15-minute breaks, Jolly said employees are required to tell their supervisor if they walk over to Tesoro to get coffee. Jolly considers going to Tesoro for coffee a "shopping trip." He conceded his employees have paid breaks. As for in-house employees getting coffee, according to Jolly, they are allowed to do this but only on their breaks. "Work is work and break is break." Jolly was concerned about "a whole lot of time" he felt was "unaccounted for" by Employee and Stevens on the injury date. (Jolly).

30) Jolly is somewhat credible. However, there is a disconcerting credibility disconnect between what Jolly says is "company policy," which is selectively applied, and what he knows occurs at work. (Experience, judgment, observations and inferences drawn from the above).

31) Employee was unaware there was extra work for him to do before the Wasilla job began, as no one told him about any such work. Employer had video from the truck on the injury date and could have reviewed it if Employer had concerns about unaccounted-for time, as the video shows everything, and records it in real time. The photographs he took of company vehicles parked at Tesoro near Employer's premises a few days prior to hearing did not depict "road trip" drivers, but regular, local drivers, well familiar to Employee. (Employee).

32) Employee argued this case is a "no-brainer." He asserted Employer was penalizing him for acting reasonably. Employee denied he went on a "shopping trip" on the injury date but simply stopped for coffee like most every driver does most every day of the week. Employee contended Employer's argument he "left early" is specious and "made up," as weather conditions required him to leave early and, in any event, no one ever gets reprimanded for leaving early. Employee contended Employer confused the concept of what may be against company policy with what is not covered by workers' compensation insurance. He asserted the "personal comfort doctrine" applied to this case and covered reasonably foreseeable acts for personal comfort done by workers in the course of their employment. He contended to the extent Employee and Stevens deviated from their route to Wasilla on the injury date, the deviation was

insignificant, foreseeable and reasonable. Alternately, he contended the coffee trip was not a deviation because Employee was entitled to a break and he took it. In any event, Employee conceded a coffee break is personal but completely incidental to his employment with Employer and is covered by the Act. (Employee's hearing arguments).

33) Employer argued Employee tried to minimize his deviation. Employer contended the primary basis for its objection is the fact Employee violated company policy and used its truck for "personal reasons," *i.e*., to obtain coffee. It contended getting coffee is a "shopping trip" and is distinguishable from Employee dealing with bodily functions. Employer argued drinking coffee is not a "necessity," unlike the requirement to relieve oneself. Employer contended Employee is not "entitled" to coffee or coffee of his choosing. Employer contended when Employee deviated from his route to obtain coffee, he took himself out of the "course and scope" of his employment. It contended to hold otherwise would "open the floodgates" to litigation over workers going on personal errands to obtain cigarettes, wine, beer and school supplies. Employer distinguished *Gonzalez* because it addressed a dual-purpose trip, unlike the trip in question in this case. Employer also distinguished *Estate of Stark* noting the employer lost because it failed in its burden of proof. Employer made a "time and place" argument suggesting the injury would never have occurred but for the fact Employee was in a place at a time he never should have been but for his personal errand to shop for coffee. Employer suggested Employee would not have even been on the road at the time and place he was, but for the fact that he ignored another company policy and left early for Wasilla. Employer contended Employee's deviation was inexcusable because coffee was available at Employer's office in unlimited quantities. (Employer's hearing arguments).

34) Employer focused much of its evidentiary presentation on the time frame between the moment Employee arrived at work, the time he and Stevens drove off in the truck, and the time the ambulance arrived at the injury scene. Employer implied Employee and Stevens may have gone elsewhere than Walgreens, or, they may have spent more time "shopping" at Walgreens than their testimony demonstrated. Witnesses' time estimations varied considerably because of faded memories or more pressing issues. Inconsistent time estimations and the exact time events happened are not particularly material to the issue decided in this decision and order. (Experience, judgment, observations and inferences drawn from the above).

35) Employee's stop for refreshment, whether it was for coffee or some other water containing beverage, en route to or from the January 15, 2015 moving job was a physical necessity, is done by most American workers every working day and was reasonably foreseeable and incidental to his employment with Employer. (*Id.*).

36) Employer maintains some control over its employees even on their two, 15-minute breaks because it requires them to tell their supervisor if they walk to Tesoro to obtain coffee. (Jolly; judgment and inferences drawn from the above).

37) Employee and Stevens had Employer's authority to use the company vehicle on the injury date and drive it to Wasilla. (Judgment and inferences drawn from the above).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> > 1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter; . . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

In *Nickels v. Napolilli*, 29 P.2d 242 (Alaska 2001), the Alaska Supreme Court noted the Act creates a system through which employers compensate employees injured on the job, irrespective of fault for the injury. Under the Act, both parties give up and gain advantages in exchange for guaranteed benefits for the injured worker and freedom from tort liability for the employer.

> **AS 23.30.010. Coverage**. Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability

> . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

It his learned treatise, Professor Larson states:

> As the later discussion of personal comfort cases will show, the courts now generally recognize that human beings do not run on tracks like trolley cars, and therefore uphold awards in situations like the following: getting cigarettes during a trip to or from work in the employer's conveyance, running across the street in the course of a delivery trip to buy a little food. . . .
>
> These 'insubstantial' deviations, then, are largely the kind of momentary diversions, which, if undertaken by an inside employee working under fixed time and place limitations, would be compensable under the personal comfort doctrine. For, while crossing a street may seem to be a more conspicuous deviation than crossing a room, there is really no difference in principle between the trucker, whose work-place is the street, who crosses the street for a [beverage], and an inside worker who goes an equal distance down the hall to get a cola drink from the cola machine or across the street for a quick cup of coffee. (1 A. Larson, *Larson's Workers' Compensation Law*, §17.06[3] at 17-38-41 (2008); all footnotes omitted).

Professor Larson sets forth the "personal comfort doctrine" as follows:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment. (2 A. Larson, *Larson's Workers' Compensation Law*, §21.00 at 21-1 (2008)).

Larson's treatise further explains the "modern view" is that "the refreshing activity need not be strictly necessary if it is reasonably incidental to the employment." (*Id*. at §21.03 at 21-16).

Under the Alaska Workers' Compensation Act, coverage is established by work connection, and the test of work connection is, if accidental injury is connected with any of incidents of one's employment, then the injury both would "arise out of" and be "in the course of" employment. The "arising out of" and the "in the course of" tests should not be kept in separate compartments but should be merged into a single concept of "work connection." *Northern Corp. v. Saari*, 409 P.2d 845 (Alaska 1966).

In *Anchorage Roofing Co. Inc. v. Gonzales*, 507 P.2d 501 (Alaska 1973), the Alaska Supreme Court addressed an airplane crash, which occurred after the worker-pilot had departed from a direct flight path to his business-related activity to search for a small dirt airstrip, anticipating a future hunting trip. The injured worker-pilot, who also owned the company, was traveling to Homer, Alaska to give a job estimate and to make temporary repairs to a leaky roof. He was also carrying passengers, two of whom planned to stay in the Homer area to go fishing. The injured pilot filed a flight plan and allotted an additional 30 minutes to survey the terrain around a lake to locate a small, dirt airstrip for use in a future hunting trip. Upon reaching the lake, the worker-pilot departed from the direct flight path to Homer and veered to the east approximately three miles to search for the airstrip. He reduced airspeed cruising velocity to approximately 50-60 miles per hour and lowered his altitude from 3,500 feet to 400-500 feet above the ground. During the low-level, slow-velocity scanning, the plane crashed. (*Id*. at 503).

The board found the business purpose of the Homer trip was sufficiently central to the trip to allow compensation, and held the crash was a compensable injury. The superior court affirmed. On appeal, the insurer contended: (1) there was inadequate evidence to support the board's conclusion that the business purpose of the Homer trip was sufficiently central to the accident's occurrence to allow compensation; *i.e*., creating "a dual-purpose issue"; and (2) as a legal matter, the trip's business character stopped during the scanning operation which led to the accident; *i.e*., creating "a deviation issue." (*Id*.). The insurer contended the board also erred in finding the flight deviation was "insubstantial" and in ruling the company practice allowing such deviations was "supportive of compensation." The insurer also took issue with the lower court's conclusion the deviation created no increased risk. (*Id*.).

Gonzales held the worker-pilot's trip was "dual purpose," as it involved the Homer work trip and a plan to leave two passengers in the Homer area for a fishing trip. The court quoted the dual-purpose test from *Marks' Dependents v. Gray*, 167 N.E. 181 (N.Y. 1929):

> We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . .
>
> The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk. (*Gonzales*, 507 P.2d at 504, citing *Gray*, 167 N.E. at 183)).

Gonzales found substantial evidence supported the board's finding the flight would have been taken even had it not been used for the purpose of searching for a landing strip or to take passengers fishing to Homer. *Gonzales* further found the worker-pilot had decided to take passengers fishing only after the Homer work flight had been arranged. Therefore, substantial evidence supported the board's finding the flight would have occurred regardless of other activities planned during and after the flight. (*Id*. at 505). *Gonzales* held the statutory presumption of compensability would apply until such time as evidence showed the worker was outside the scope of his employment. At such time, the worker-pilot would then have the burden of going forward with evidence his injury was job-related. (*Id*.).

Gonzales next addressed the "deviation" issue. Assuming the dual-purpose doctrine permitted characterizing the overall trip as one for a business purpose, the insurer contended the identifiable deviation while flying around the lake for purely personal reasons removed the worker-pilot from the course of his employment during the deviation. *Gonzales* noted deviation cases "are legion" and are of only limited help because they have infinite factual patterns and widely divergent deviations, and their results "often appear to have been dictated by judicial attitudes toward workmen's compensation acts." (*Id*.). *Gonzales* cited Professor Larson's workers' compensation treatise addressing the deviation issue, and enunciated the general rule:

> An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. (*Gonzales* 507 P.2d at 505 citing 1 A. Larson, *The Law of Workmen's Compensation*, §19.00 at 294.57 (1972)).

Gonzales noted some older decisions denied compensation in such situations but further stated, specifically referring to "the personal comfort doctrine," that under more current case law "an employee is entitled to compensation so long as the activity is reasonably foreseeable and incidental to his employment." (*Id*. n. 14). The court noted many cases hold an otherwise personal deviation is compensable where authorized, expressly or by implication, and some incidental benefit accrues to the employer, "at least where the deviation does not introduce substantial additional hazards." (*Id*. at 506). However, given the fact the employer and the injured worker in *Gonzales* were the same, the court decided to not base its decision upon the authorization issue and wanted "to await a proper factual presentation to the Board before deciding such a question," and instead focused on Larson's "minor deviation rule." (*Id*.).

The insurer argued the board's characterization of the landing strip scanning operation as an "insubstantial" deviation was contrary to law and unsupported by substantial evidence. It contended fully one-third of the flight time allotted to the trip was taken up by the purely personal scanning activity. Noting the absence of an "encompassing substantiality test," the court found the need to "balance a variety of factors such as (1) the geographic and durational magnitude of the deviation in relation to the overall trip, (2) past authorization or toleration of similar deviations, (3) the general latitude afforded the employee in carrying out his job, and (4) any risks created by the deviation which are causally related to the accident." (*Id*. at 507). Applying this test to the facts before it, *Gonzales* found the first three factors weighed in favor of compensability. As for the fourth factor, *Gonzales* found no evidence supported the insurer's argument that reducing airspeed and lowering altitude increased a risk of engine failure or downdrafts causing a crash. Since the insurer had the burden of proving its affirmative defense under the deviation rule, the lack of substantial evidence in the record supporting its argument was a proper basis for the superior court to affirm the board's decision. (*Id*. at 508).

In a footnote, *Gonzales* set forth the "personal comfort" doctrine as follows:

> The 'personal comfort' definition encompasses those momentary diversions from an employment which for social and biological reasons, are inextricably bound up with the normal work flow of an individual, such as eating, drinking, resting, washing, smoking, conversing, seeking fresh air, coolness or warmth, going to the toilet, etc. (*Id*. at 506 n. 19 citing 1 A. Larson, *The Law of Workmen's Compensation* §19.63 (1972)).

In *Marsh v. Alaska Workmen's Compensation Board*, 584 P.2d 1134, 1136 (Alaska 1978), the Alaska Supreme Court affirmed a decision finding an assault on a bartender by a customer not work-connected. The court noted the injured worker was correct in saying that "labeling the employee's activity as 'personal' may not render the ensuing injury *per se* not compensable. However, the activity must still be 'reasonably foreseeable and incidental' to the employment, and not just 'but for' the employment . . . to entitle the employee to claim compensation."

In *Witmer v. Kellen*, 884 P.2d 662 (Alaska 1994), Witmer was president and sole shareholder of a chicken franchise. He was injured while riding as a passenger in a vehicle driven by his employee Kellen, who managed the restaurant. Witmer sued Kellen and Witmer's franchise for personal injuries arising out of this incident. The trial court granted summary judgment in the defendants' behalf finding Witmer's injuries arose out of and in the course of his employment, leaving him with workers' compensation as his exclusive remedy. (*Id*. at 662).

On the accident date, Kellen, using his own vehicle, was preparing to drive to an assistant manager's home to help the assistant jump-start his vehicle. Witmer decided to ride along, and stated as his reason: "It was just a dreary afternoon. There was nothing doing so I thought, heck, I'll ride over with him if he doesn't object." Witmer conceded he did not plan to assist Kellen in jump-starting the car, and had no business purpose in going for the ride. According to Witmer, his sole reason for riding with Kellen was "to take a break from work." (*Id*. at 664). On the way to the assistant's home, Kellen's vehicle got into an accident, injuring Witmer.

Witmer contended he was on a "personal enjoyment break" and the Act's exclusive remedy provision did not apply. The trial court concluded that even if Witmer was on a break at the time of the injury, the trip was "closely related to his employment." The trial court further found that

"reasonable people could not disagree" that Witmer's injuries arose out of and in the course of his employment. The trial court granted summary judgment and Witmer appealed.

On appeal, Witmer cited language from former AS 23.30.265(2), now reproduced in relevant part at AS 23.30.395(2), and argued Witmer's testimony stating his reasons for riding with the assistant manager were personal, and thus dispositive of the case. (*Id*. at 665). The Alaska Supreme Court found, even viewing Witmer's testimony in the light most favorable to him, Witmer could not overcome the strong business connection inherent in his presence in the vehicle with Kellen at the time of the accident. *Witmer* found the decision to accompany Kellen on his job-related errand was both "reasonably foreseeable and contemplated by his employment." (*Id*.). *Witmer* focused on whether the claimant's presence was related to his employment. Finding it was, the Alaska Supreme Court affirmed, finding Witmer's automobile accident arose out of and in the course of his employment. (*Id*. at 666).

In *Estate of Stark v. Alaska Fiber Star, LLC*, AWCB Decision No. 05-0171 (June 23, 2005), the decedent employee was involved in a single, company-owned vehicle accident resulting in his death. The decedent had been dispatched to Whittier, Alaska to work in the early afternoon. He completed his work in Whittier by about 4:33 PM, and left the worksite. The decedent called his wife at approximately 4:27 PM on the accident date and asked her to pick up their children at day care by 5:30 PM because he was working and would not be able to pick them up. At 6:23 PM, local emergency responders received a call from an accident site involving the decedent, which occurred on a frontage road next to the New Seward Highway, in Anchorage. Investigations found the decedent had been ejected during a vehicle rollover and first responder reports suggested a strong alcohol odor emanating from the decedent's mouth. However, the emergency room physician attempting to revive the decedent detected no alcohol on his breath or his person, and no toxicology, laboratory work or autopsy was performed. Consequently, the physician opined there was no way to determine if the decedent had been intoxicated at the time of his death. Investigators found a bottle of Jack Daniels inside the wrecked company van; the decision does not say whether it was empty. One witness said the decedent had come to him months earlier and confessed he had an alcohol problem but was receiving treatment. The decedent's supervisors never suspected or detected the decedent had any issues with drugs or alcohol.

Witnesses tried to determine whether the decedent was still on the clock when he was killed. A supervisor suspected the decedent may have stopped for dinner on the road back to Anchorage and testified, had he done so, the decedent would have been on the clock during his dinner hour and during the delay it caused on his return trip. The supervisor also testified there was no business purpose for the decedent to have been on the frontage road when the accident occurred. The employer argued *Gonzalez* required the board to deny compensability because the decedent made an identifiable deviation past his place of employment and was killed while traveling on a route to a friend's home for purely personal reasons.

Estate of Stark applied the "minor deviation rule." Using substantial evidence, the board piece together what happened, and determined the decedent was still "on the clock" and anything that happened to him on his way back to his employer's premises to drop off the employer's vehicle arose out of and in the course of his employment. The board discounted testimony from the decedent's friend stating she believed the decedent was on his way to her home to drop off a ladder to be used in painting when he was killed, because the ladder was never found either in the van or at the accident scene. The lack of a ladder indicated the decedent had not yet retrieved his own vehicle or the ladder and would not have done so before he returned his employer's truck to the work premises. As to why the decedent was not on the normal route to return the truck, *Estate of Stark* relied upon Professor Larson's rule stating taking a somewhat roundabout route or not being on the shortest line between two points does not necessarily remove an injured worker from the course and scope of his employment. It must also be shown the deviation was aimed at reaching some personal objective. (*Id.* at 20). *Estate of Stark* evaluated the employer's other concerns and dismissed them. The death was ruled compensable. (*Id*. at 23).

In *City Bus Company v. Lockhart*, 229 P.2d 586, 588-89 (Okla. 1951), a bus driver slipped on ice and fell while returning to the bus after crossing the street to get water and a cup of coffee. The employer allowed short stops for rest or meals and paid straight time without reduction during these interims. *Lockhart* found support in the record for the trial court's finding that under the circumstances, the bus driver's "procurement of water and food [were] reasonably necessary to the health and comfort of [the] employee [and did] not break the continuity of employment, the employee remaining under wage while doing so." Compensation was awarded.

In *Redfield v. Boulevard Gardens Housing Corp*., 167 N.Y.S.2d 59, 60 (1957), a patrolman at a housing project was struck by a car as he crossed the street adjacent to the project grounds to get a newspaper. The court awarded compensation noting: "The departure of an employee for a matter of minutes from the premises where he works to satisfy a personal desire, such as to get a cup of coffee or a newspaper, especially when it becomes a custom within the knowledge of the employer, should not be held under working conditions as they exist today to constitute a separation from employment."

In *Jordan v. Western Electric Company, Inc*., 463 P.2d 598 (Oregon App. 1970), a hearing officer and an appellate board had denied the claimant's request for benefits for an injury he sustained when he slipped and fell while off premises as he was returning to work following his 15-minute paid coffee break. The question on appeal was whether under these circumstances the claimant had suffered injury "arising out of and in the course of employment." (*Id*. at 599). The employer-provided coin-operated canteen facilities providing among other things, coffee, but most night employees and their supervisors customarily obtained coffee at the closest restaurant, located about two and one-half blocks away. A hearing officer and appellate board both denied the claim, citing the "going and coming rule." (*Id*.).

On appeal, *Jordan* reviewed the case law and determined the claimant's activity when injured was for the benefit of his employer as well as himself because it refreshed the worker; such activities were contemplated by the employer and the claimant under the employment contract; the employer acquiesced in it; there was an element of control as the supervisor accompanied the employee on the ill-fated trip; the claimant was paid for the time involved; and he was at work and not on a personal mission when the slip-and-fall occurred. The court reversed and remanded the lower tribunals and awarded benefits. (*Id*. at 601-02).

In *King Waterproofing Company v. Slovsky*, 524 A.2d 1245 (Md. App. 1987), an employer appealed from a trial court's decision awarding the claimant workers' compensation benefits for injuries sustained when he was hit by a car while crossing the street during his coffee break. The issue on appeal was whether the accidental injury arose "out of and in the course of his employment." (*Id*. at 1246). The claimant worked for the employer part-time in the evenings

and had a paid, mid-shift break. On the injury date, the claimant took his break, left the employer's premises and crossed a public street on his way to obtain refreshments from a carry-out restaurant. During this trip, the claimant was struck by a motor vehicle and seriously injured. He conceded he was not required to go out for refreshments as part of his job but did so regularly and on occasion, as a favor to his co-workers, would obtain refreshments for them as well. While the employer had a sink with running water, it had no drinking fountain or soda dispenser. (*Id*.). Finding no material, disputed facts the trial court judge entered summary judgment in the claimant's behalf. (*Id*. at 247).

In *Bayfront Medical Center v. Harding*, 653 So.2d 1140 (Fla. App. 1995), an employer appealed an order awarding benefits to an injured worker following an off-premises automobile accident during working hours while the worker was going to a convenience store for food or cigarettes. In affirming, the court applied the personal comfort doctrine and noted "an employer-condoned off-premises refreshment break of insubstantial duration is generally not such a deviation as to remove the claimant from the course and scope of the employment." (*Id*. at 1142).

In *Marotta v. Town and Country Electric, Inc*., 5 A.D.3d 1126 (N.Y. 2008), the New York Supreme Court reversed a workers' compensation board ruling holding that the claimant's injury while stopping at a drive-through coffee barista was not compensable. The claimant, an electrician, reported to work, discussed work plans with his partner and loaded his work truck with supplies and materials. He then drove to his assigned worksite and, while on the direct route, went to a drive-through window to purchase coffee and a muffin. When the claimant twisted and reached for money in his back pocket, he felt a "pop" and suffered herniated discs, which required surgery and produced disability. The claimant filed for benefits, which the carrier disputed. At hearing, the administrative law judge determined the claimant's injuries were compensable and awarded benefits. The employer appealed, and the Workers' Compensation Board reversed, finding the claimant had "deviated from his employment." when he went to the drive-through and, thus, his injury did not arise out of his employment.

Employers in New York State are required to secure compensation for injuries "arising out of and in the course of the employment." (*Id*. at 1126). On appeal, the court determined there was

no dispute the claimant's injury occurred during the course of his employment, "given that he had reported to the employer's office, loaded his work truck with supplies and was en route to his designated job site." (*Id*. at 1126-27). Under New York law, "momentary deviations from the work routine for a customary and accepted purpose will not bar a claim for benefits," and "accidents that occur during an employee's short breaks, such as coffee breaks, are considered to be so closely related to the performance of the job that they do not constitute an interruption of employment." (*Id*. at 1127). The court found the claimant's stop constituted a "momentary and customary break" which did not interrupt his employment and "which can only be classified as reasonable and work-related under the circumstances." (*Id*. at 1128).

In *Cooper v. Barnickel Enterprises, Inc*., 986 A.2d 38 (N.J. Super. 2010), the workers' compensation division awarded disability to a plumber injured in a motor vehicle accident in a company vehicle, which he was authorized to drive to and from his home and between jobsites. On the date in question, the claimant, after going to a job site, went to a union hall to discuss plans for a new job, which was to start the following week. Upon arriving at the union hall, the claimant discovered the instructor with whom he needed to speak was teaching a class and could not be disturbed. The claimant decided to take a "coffee break" and return to the union hall later to speak with the instructor. The claimant was driving his employer's truck to a delicatessen about five miles away from the union hall when the accident occurred. The evidence showed coffee was not available at the union hall on Saturdays. Accordingly, the claimant returned to his truck, turned on the radio and decided to go for coffee to kill time. The accident occurred about three to four miles from the union hall while the claimant was en route.

The issue on appeal was whether the accident "arose in the course of employment." (*Id*. at 39). The trial court judge had determined that, while waiting for the instructor, the claimant "took his regular paid coffee break and went to get some coffee up the road at a place he knew had good coffee." The judge concluded the claimant engaged in "exactly the kind of brief activity which, if embarked on by an inside employee working under set time and place limitations, would be compensable under the personal comfort doctrine." (*Id*.). On appeal, the employer argued the claimant's decision to seek out his preferred beverage at an off-site location constituted a "personal errand" wholly unrelated to work activities and he was, therefore, at the time of injury,

not engaged in business authorized by his employer. The court on appeal noted an injured worker is entitled to compensation if his injury "arose out of and in the course of employment." (*Id*. at 40). The appellate court concluded the claimant could not have been expected to "stand like a statute" or remain at the union with nothing to do for an extended period particularly when coffee was not available at the site. The court said it would not conclude in such circumstances that the claimant's injuries were not compensable merely because the claimant chose to take his authorized coffee break at a place other than the closest location. The court found the distance from the union hall to the coffee shop was reasonable given the community's rural nature. Since the trial court judge had found the claimant credible, and the appellate court held coffee breaks for off-site employees are equivalent to those of on-site workers, the court decided such "minor deviations" from employment permit recovery of workers' compensation benefits. The trial court's award was affirmed. (*Id*. at 41).

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter; . . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute. (*Id*.; emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011). Because the board does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. He must prove that in relation to other causes, employment was "the substantial cause" of the disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Runstrom*.

> **AS 23.30.122**. **Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .
>
> (b) If an employer . . . otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Subsection 145(a) authorizes attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. An award under §145(a) may include continuing fees on future benefits. By contrast, §145(b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150 (Alaska 2007). *Egemo v. Egemo Construction Co.*, 998 P.2d 434 (Alaska

2000) held filing a claim prematurely "does not justify dismissal" of the claim, as the employer was not prejudiced or inconvenienced. *Id*. In summary, *Egemo* stated:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely (footnote omitted). (*Id*. at 441).

AS 23.30.235. Cases in which no compensation is payable. Compensation under this chapter may not be allowed for an injury

> (1) proximately caused by the employee's wilful intent to injure or kill any person;
>
> (2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician.

AS 23.30.395. Definitions. In this chapter,

. . . .

> (2) 'arising out of and in the course of employment' includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-sanctioned activities at employer-provided facilities; but excludes . . . activities of a personal nature away from employer-provided facilities; . . . .

8 AAC 45.180. Costs and attorney's fees. . . .

. . . .

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. . . . .

. . . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

> (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed. . . . Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved. . . .
> . . . .
>
> (f) The board will award an applicant the necessary and reasonable costs. . . .

To "deviate" means to "turn or move increasingly away from a specified course; to cause to turn aside. . . ." Webster's II, *New Riverside University Dictionary*, at 370 (1994).

ANALYSIS

1) Is Employee's January 15, 2015 slip and fall a compensable injury?

Employee contends his January 15, 2015 slip and fall injury is compensable under the "personal comfort" doctrine. Employer contends it is not a compensable injury under AS 23.30.010(a) and AS 23.30.395(2) because it did not "arise out of" and "in the course of" Employee's work. Employer reasons the injury did not arise out of and in the course of his employment because Employee violated company policy by leaving for the Wasilla job too soon, putting him in a place and time in which he otherwise would not have been, which resulted in his injury. It further contends Employee violated company policy by using Employer's vehicle for an activity of "a personal nature away from employer-provided facilities," when he stopped for coffee, and this personal activity is what caused his injury. AS 23.30.395(2).

The parties disagree on whether Employee's stop for coffee arose out of and in the course of his employment. AS 23.30.010(a). It is presumed a claim comes within the Act's provisions. AS 23.30.120(a). The parties' disagreement creates a factual dispute to which the presumption

of compensability must be applied. *Meek*; *Gonzales*. Without regard to credibility, Employee raises the presumption with his and Stevens' testimony stating they took the direct route to Wasilla from Employer's premises, and only stopped to get coffee during an authorized, paid coffee break -- a nearly daily occurrence by Employer's workers for at least 40 years, according to Employee. *Tolbert*; *Wolfer*. Employer rebuts the presumption with Jolly's testimony that leaving early from the yard and using the company truck for personal reasons, such as stopping to get coffee, was against company policy and was therefore unauthorized, breaking the employment connection at the time of injury. *Runstrom*; *Wolfer*. The presumption having been rebutted, Employee must prove his claim by a preponderance of the evidence. *Saxton.*

As support for his position, Employee relies upon the personal comfort doctrine, a legal theory, as applied to the facts in this case, most of which are not disputed. Employer cites several reasons why, as a matter of fact and law, Employee's January 15, 2015 injury is not compensable. Employee has the burden of proving his claim by a preponderance of the evidence, while Employer has the burden to prove its affirmative defenses. *Saxton*; *Gonzales*.

a) Employee's alleged company policy violations do not render his injury non-compensable under the Act.

Employer alleges Employee violated at least two company policies. First, Employee and Stevens left the yard early to travel to Wasilla without informing their supervisors. Second, Employee and Stevens used a company vehicle for personal purposes. Employer contends these violations resulted in behavior not arising out of and in the course of employment, and therefore, any resulting injury was not covered under the Act. AS 23.30.010(a). Employee correctly noted that while Employee's activities may arguably violate a company policy, such violations do not automatically exclude an injury occurring during the company policy violations from coverage under the Act. In some cases, however, they will. For example, if it is against company policy to be intoxicated while on the job, and a worker's intoxication proximately causes an injury, no compensation is payable under the Act -- the injury is not "compensable." AS 23.30.235(2). However, there is no Act provision prohibiting compensability if an employee violates a company policy not specifically enumerated in the Act, and an injury occurs during the violation.

Employer provided no authority stating otherwise and its legal theory runs counter to the "no-fault" system the legislature established to address work-related injuries. *Nickels*. Taken to its logical extreme, Employer's rule would eliminate coverage for employees injured due to their own negligence. Employers could simply make every negligent behavior by an employee or co-worker, "against company policy," thus effectively eviscerating the no-fault concept when a worker's negligence proximately caused an injury. At daily safety meetings, supervisors could simply tell its workers "be careful," and when an injury arose because an employee was not careful enough, the employer could raise the "violation of company policy" rule as a defense. This decision will not interpret the Act in such a way because it would not ensure quick, efficient, fair and predictable benefit delivery to injured workers at a reasonable cost to employers, and would impermissibly re-insert fault concepts into the law. AS 23.30.001(1).

Further, Jolly was not credible when he said Employee violated company policy by leaving the yard early for Wasilla and not telling his supervisor. Since Jolly admitted crew "leads" have flexibility and discretion over how moves are accomplished, given weather and other factors, "leaving early" is a subjective, moving target. AS 23.30.122; *Smith*.

As for the "personal use of company vehicle" policy, Employer's policy as stated is observed more in its violation. While it is clear Employer's employees are not permitted to use a company vehicle to move personal belongings after work, run their own moving business on the side or for similar off-the-clock uses, the prohibition against stopping in a company vehicle for any reason other than at a weigh station is selectively enforced, at times of need, at best. One of those times of need is when a person is injured on the job while making such a stop. It is inconceivable Employer's supervisory personnel are not aware of the accustomed 40-year practice of its drivers and helpers stopping daily at Tesoro to obtain refreshment. Jolly admitted he was aware of this practice, and claims to have disciplined known violators. Yet, the practice continues, as evidenced by recent photos Employee showed at hearing, and Employer at best usually acquiesces in the practice and at least usually looks the other way. AS 23.30.122; *Smith*.

It is similarly not believable that Employer, as Jolly testified, truly expects its in-house workers to obtain refreshment only during their two scheduled paid breaks. Rather, Employer fully

foresees and expects its employees to occasionally obtain refreshment during the work day, as needed. AS 23.30.122; *Smith*. In summary, company policy violations may or may not result in company discipline. But as stated above, Employer has failed to show through statute, regulation or decisional law why these selectively enforced "violations," if they truly exist at all, removed Employee's injury from coverage under the Act. AS 23.30.010(a); *Gonzales*.

b) Treatise guidance and statutory and decisional law support compensability under the "personal comfort doctrine."

This decision's result turns on the meaning of the phrase "arose out of and in the course of the employment," read in connection with the phrase "activities of a personal nature away from employer-provided facilities." The personal comfort doctrine issue may be one of first impression in Alaska. AS 23.30.010(a); AS 23.30.395(2); *Rogers & Babler*.

Professor Larson in his learned treatise on workers' compensation law supports compensability in similar circumstances. He correctly notes human beings do not run on tracks "like trolley cars." Larson states employees who, within the time and space limits of their employment, engage in acts ministering to personal comfort do not leave the course of employment unless the departure is so great that "temporary job abandonment" may be inferred. Nothing in the Act expressly prohibits coverage in Employee's situation because nothing in the Act defines "personal." *Rogers & Babler*.

No precedent-setting Alaska Supreme Court or commission cases are exactly on point. At least one Alaska Supreme Court decision discusses the personal comfort doctrine, although in *dicta*. *Gonzalez*. Cases from other jurisdictions throughout the United States with identical or nearly identical "arising out of and in the course of employment" statutory language uniformly hold that injuries incurred during temporary breaks from employment duties to obtain refreshment for personal comfort are compensable. The Alaska Supreme Court in *Gonzales* defined the "personal comfort" doctrine as momentary diversions from employment, which for biological reasons, are inextricably bound up with a person's normal work flow, such as "eating, drinking, resting, washing, smoking, conversing, seeking fresh air, coolness or warmth, [and] going to the

toilet." But *Gonzales* did not base its decision on the personal comfort doctrine, so while it is persuasive authority, *Gonzales* is not binding precedent.

In an attempt to remove Employee's injury from coverage, Employer labels Employee's "shopping trip" for coffee as purely "personal." Employee admitted his coffee purchase was "for personal reasons." However, the Alaska Supreme Court in *Marsh* said labeling an injured worker's activity as "personal" does not render an ensuing injury "*per se* not compensable." The activity "must still be 'reasonably foreseeable and incidental' to the employment, and not just 'but for' the employment . . . to entitle the employee to claim compensation." *Marsh*.

A large and solid majority of courts in other jurisdictions addressing very similar facts to the case at bar universally support a compensability finding: *Lockhart* (injury incurred while procuring water on a paid break was compensable); *Redfield* (injury incurred crossing the street after obtaining coffee, a customary practice within the employer's knowledge, was not a separation from employment and was compensable); *Jordan* (injury incurred during a slip and fall during work hours while the employee returned to work from an off-premise coffee break was compensable, even though the employer had in-house coffee available); *King* (injury incurred when the employee was hit by a car while crossing a street to get coffee was compensable); *Bayfront* (injury incurred in a motor vehicle accident while going to a convenience store during work hours for personal comfort needs was an insubstantial deviation from work and was compensable); *Marotta* (injury incurred at a drive-through coffee barista after the employee had reported to work, loaded his truck and was en route to his jobsite was compensable); *Cooper* (injury incurred during motor vehicle accident in a company vehicle while getting coffee several miles away from the worksite on a paid coffee break was a minor deviation and was compensable). Several states from this sampling have statutes containing "arising out of and in the course of employment" language in their workers' compensation acts similar or identical to the language found in AS 23.30.010(a). *Jordan*; *King*; *Marotta*; *Cooper*. The designated chair for this panel could not locate a decision with similar facts that denied compensability.

The relevant personal comfort issue facts in this case are mostly undisputed. Employee and Stevens had arrived at work on January 15, 2015, and prepared their company vehicle to drive to

Wasilla and accomplish an authorized company move. They began their drive to Wasilla in the company vehicle. They both had the right to two, paid, 15-minute breaks, even while on the road. Jolly agreed with this axiom and, though he preferred to limit breaks to specified time periods, Jolly conceded the timing for breaks was flexible and based upon "what makes sense" as decided by the crew "lead." Employee was the crew lead on the injury date, and decided to leave early because the roads were icy. Employee and Stevens both wanted to stop for refreshment, noticed the next-door Tesoro was already crammed with Employer's vehicles (all violating "company policy"), and decided to stop later en route to Wasilla. They made no other stops along the way and stopped at Walgreens solely to obtain refreshment. Employee and Stevens are both completely credible. AS 23.30.122; *Smith*.

Employer implied "unaccounted-for" time during the trip to Walgreens raised the question whether Employee and Stevens did something else of a personal nature, which they were not disclosing. But Employer introduced no evidence refuting Employee's and Stevens' credible testimony on this point. AS 23.30.122; *Smith*. Employer had a video recording of the January 15, 2015 trip, concededly did not review it and did not offer it to impeach Employee's testimony.

Thus, Employee's obtaining coffee, whether on Employer's premises or elsewhere, during working hours at authorized, flexible break times, or when it "makes sense," or whenever physically necessary, is not only foreseeable but is part of the employment agreement. As part of the employment contract, the practice is necessarily reasonable and incidental to employment. Contrary to Employer's assertion, drinking something containing water during the workday is a physical necessity, much like the need to relieve oneself after drinking it. *Rogers & Babler*.

Employee, acting as "lead" on January 15, 2015, properly exercised his professional judgment and, rather than stopping at the crowded Tesoro next to Employer's yard, decided to drive further until he and Stevens arrived at Walgreens, where Employee knew Stevens could safely pull off the road and quickly obtain coffee and other refreshments. In short, they took their first 15-minute break, even though it indisputably took only six minutes. Obtaining coffee or other refreshments is undeniably part of the "personal comfort doctrine." *Gonzalez*; 1 A. Larson §17.06[3] at 17-38-41; 2 A. Larson §21.00 at 21-1. Obtaining coffee, especially given

Employee's extreme fatigue after having arisen early to get to work on time in icy road conditions, was inextricably connected to his work duties on January 15, 2015. There is no evidence Employee was abandoning his job when he stopped to get coffee any more than Employer's in-house workers abandon their jobs when they walk down the hallway to obtain refreshment. *Cooper*. Given there is no evidence to support this conclusion, no reasonable inference may be drawn to support Employer's job abandonment theory either. *Jordan*; *Rogers & Babler*. The fact Employer had coffee available in-house is immaterial, as reflected by several sample decisions from across the United States. *Redfield*; *Jordan*; *Cooper*.

Similarly, though it is not "strictly necessary" to drink coffee, as opposed to some other water-bearing beverage, to maintain health and life, drinking coffee or other beverages is still "reasonably incidental to the employment" as reflected by the logic of physical need and the fact that tens of millions of American workers do it every working day. 2 A. Larson §21.00 at 21-1; *Rogers & Babler*. Obtaining refreshment during work was unquestionably an incident of Employee's employment and, therefore, his injury occurring during that task both "arises out of" and is "in the course of" his employment with Employer. Obtaining refreshment is, therefore, "work connected." *Saari*.

As the court said in *Witmer*, "reasonable people could not disagree" that Employee's presence at Walgreens on January 15, 2015 to buy coffee was incidental to his drive to Wasilla for Employer's business purposes and was both "reasonably foreseeable and contemplated by his employment." To the extent the personal comfort doctrine has not been expressly adopted by the commission or by the Alaska Supreme Court, this decision adopts the personal comfort doctrine and applies it in this case, as it is the majority view in the United States and it comports with Alaska law. Employee's January 15, 2015 injury, incurred while he was obtaining coffee for personal comfort, arose out of and in the course of his employment with Employer and is covered under the Act absent some other reason it would not be covered, such as resulting from a substantial deviation from his normal employment. AS 23.30.010(a).

(c) Treatise guidance and statutory and decisional law support compensability under the "minor deviation rule."

The "personal comfort doctrine" is closely related in many instances to the "minor deviation rule." On many occasions, a worker deviates from his normal work or from his work route to obtain his personal comfort refreshment. Employer contends Employee's injury is not compensable because he substantially deviated from his normal route to Wasilla when he turned off Muldoon Road to get coffee. Employee contends he did not deviate from his route because he had a right to take a break, and took it. This decision need not reach Employee's argument.

Larson states an "identifiable deviation from a business trip" for personal reasons usually takes the employee out of the course of his employment until he returns to the route, "unless the deviation is so small as to be disregarded as insubstantial." *Gonzales*; 1 A. Larson, §19.00 at 297.57. The common usage of the word "deviate" means to "turn or move increasingly away from a specified course; to cause to turn aside. . . ." *New Riverside University Dictionary*. The undisputed facts show Employee and Stevens deviated from Muldoon Road onto a driveway leading directly to Walgreens, albeit by only one block, so they could obtain their personal comfort refreshments. Whether one block out of a 55 mile trip is a "substantial" deviation is primarily a judgment call. However, the Alaska Supreme Court in *Gonzales* noted there is no "encompassing substantiality test" in these situations and affirmed a finding that a three-mile deviation by a worker-pilot on his flight between Anchorage and Homer was "insubstantial."

Gonzalez applied a balancing test of factors including: (1) the geographic and durational magnitude of the deviation in relation to the overall trip, (2) past authorization or toleration of similar deviations, (3) the general latitude afforded Employee in carrying out his job, and (4) any risks created by the deviation, which are causally related to the accident. (*Id*. at 507). *Gonzales* held the employer had the burden of proving its affirmative defenses. Applying the *Gonzales* factors to this case: (1) the one block and approximately six-minute deviation in relation to a 55 mile drive is, by most subjective estimates, insubstantial *Rogers & Babler*; (2) as already discussed, though Employer claims stopping for coffee is against company policy, Employer at least tolerates it as evidenced by the fact it occurs every day and it is occasionally authorized; (3) it is undisputed Employer gives Employee, a 40-year veteran worker, considerable latitude in

carrying out his job; and (4) Employer presented no evidence demonstrating Employee subjected himself to any higher risk of personal injury by walking from the company vehicle to and from Walgreens, then he would have subjected himself to had he continued to drive down Muldoon Road in the truck on icy roads. Even assuming, for argument's sake, it is reasonable to assume Employee increased his risk of slipping and falling on the ice by getting out of his truck, as opposed to staying in it where he risked being in an motor vehicle accident, the personal comfort doctrine and minor deviation rule must be construed together. Experience and judgment show the personal comfort doctrine would be nullified and meaningless if Employee did not have the right to make a minor deviation from his normal route to satisfy his personal comfort. *Rogers & Babler*. *Estate of Stark*, upon which Employee relied, is not particularly helpful because it addressed slightly different legal doctrines and had unusual facts.

Therefore, in summary, Employee has proven by a preponderance of the evidence that his minor deviation to obtain personal comfort at Walgreens on January 15, 2015, was reasonable, foreseeable and incidental to his work that day for Employer and was for no non-work-related purpose. *Saxton.* The personal comfort doctrine and the minor deviation rule will be applied to this case. Employer failed to satisfy its burden of proof on its affirmative defenses. Employee's January 15, 2015 slip and fall injury at Walgreens arose out of and in the course of his employment, and is a compensable injury. AS 23.30.010(a); AS 23.30.395(2).

The parties have not presented evidence addressing medical issues, disability, permanent impairment or whether the slip and fall on the ice at Walgreens is "the substantial cause" of Employee's past disability and need for medical treatment, or any ongoing needs. The parties agreed to limit the October 15, 2015 hearing solely to the issues set forth above. Therefore, while this decision finds Employee's January 15, 2015 slip and fall is a compensable injury, it awards no particular benefits as none were addressed at hearing. The parties reserve all their rights to benefit claims and defenses.

2) Is Employee entitled to an interim attorney's fee and cost award if he prevails?

Since no particular benefits were at issue or argued at hearing, the parties have not yet presented evidence for or against any specific award, and this decision has not awarded any benefits. Thus,

it is unknown whether Employer has other defenses to Employee's claim for past and any ongoing disability and medical treatment. Attorney's fee awards under AS 23.30.145(a) are awarded based upon the "compensation awarded." This decision awards no compensation. Attorney's fee awards under AS 23.30.145(b) require successful prosecution of a claim. As it remains to be seen whether Employee is entitled to any specific benefits as requested in his workers' compensation claim, arising from his January 15, 2015 work injury with Employer, it is premature to award attorney's fees and costs at this time. Therefore, Employee is not entitled to an interim attorney's fee and cost award, and this issue will be held in abeyance. *Egemo*. Employee has not waived his right to seek and receive attorney's fees and costs incurred addressing the issues decided in this decision, as well as attorney's fees and costs related to any benefits Employer might voluntarily pay, or which Employee might be awarded following a future hearing on his claim's merits. Employee's counsel is directed to review the applicable statutes and administrative regulations for requesting and documenting attorney's fees and costs in this case. AS 23.30.145; 8 AAC 45.180.

CONCLUSIONS OF LAW

1) Employee's January 15, 2015 slip and fall is a compensable injury.
2) Employee is not entitled to an interim attorney's fees and cost award.

ORDER

1) Employee's January 15, 2015 slip and fall at Walgreens arose out of and in the course of his employment with Employer and is a compensable injury under the Act.
2) Employee's request for attorney's fee and costs is held in abeyance.
3) If the parties do not resolve the remaining issues in this case, Employee may request, and he will receive, a hearing on his claim's merits, at which time he can request attorney's fees and costs for all work performed representing Employee in this claim, as applicable under the Act.
4) If the parties resolve the remaining issues in this case, the parties may submit a stipulation for attorney's fees and costs for approval to the designated chair.
5) If the parties resolve the remaining issues in this case but cannot agree on appropriate attorney's fees and costs, Employee may request, and he will receive, a hearing on those issues.
6) The panel reserves jurisdiction to resolve any additional disputes.

Dated in Anchorage, Alaska on October 27, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____

William Soule, Designated Chair

_____

Robert C. Weel, Member

_____

Mark Talbert, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of William T. Sears, employee / claimant v. World Wide Movers, Inc., employer; Vanliner Insurance Co., insurer / defendants; Case No. 201501928; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on October 27, 2015.

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Elizabeth Pleitez, Office Assistant