ALASKA WORKERS' COMPENSATION BOARD

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

PATRICIA S. KOLB, Employee, Claimant, v. WALMART ASSOCIATES, INC., Employer, and NEW HAMPSHIRE INSURANCE CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201419711 AWCB Decision No. 16-0043 Filed with AWCB Anchorage, Alaska on June 15, 2016

Patricia S. Kolb's (Employee) March 20, 2015 workers' compensation claim was heard in Anchorage, Alaska on April 27, 2016, a hearing date selected on February 25, 2016. Attorney Joseph Kalamarides appeared and represented Patricia S. Kolb, who appeared and testified. Attorney Vicki Paddock appeared and represented Walmart Associates, Inc. and New Hampshire Insurance Co. (Employer). Trudy Jordan appeared and testified on Employer's behalf. The record remained open for Mr. Kalamarides supplemental attorney fees and costs affidavit. The record closed when the panel deliberated on May 20, 2016.

ISSUE

Employee contends her lateral tibial fracture arose out of and in the course of her employment with Employer. Employee contends her personal shopping at the end of her shift before she clocked out was a minor deviation. Employee contends her deviation was not enough to remove

her injury from arising out of and in the course of her employment and Employer maintained control over her after the injury when, instead of calling 911 to transport her to an emergency room, an assistant manager transported Employee and required her to go for a drug test and to a gas station so the assistant manager could get food and gas before taking Employee to the emergency room. Employee contends because she was under Employer's control her injury arose out of and in the course of her employment with Employer.

Employer contends Employee's injury did not arise out of and in the course of her employment. Employer contends Employee was engaged in personal shopping when she was injured, personal shopping was not part of Employee's job duties and Employee's personal shopping while on the clock was expressly prohibited by Employer and not a sanctioned activity. Employer contends Employee's deviation from employment does not fall within the personal comfort doctrine; Employee's activity was merely a convenience to her as she was engaging in an unsanctioned activity. Employer contends a misconduct deviation need not involve a prohibition instituted to protect employees and when Employee engaged in personal shopping she was either off the clock or, in the alternative, deviating from employment due to her misconduct. Employer contends to find Employee's injury arose out of and in the course of her employment with Employer would be a rubber stamp on time theft.

After carefully reviewing the evidence and arguments, the panel has unresolved questions not addressed by the existing evidence, as discussed below. The panel is considering ordering a second independent medical evaluation (SIME) to address gaps in the medical evidence. Therefore, on its own motion, the panel is reopening the hearing record to allow briefing and argument on the following issue:

Should the parties brief whether an SIME should be ordered to address gaps in the medical evidence?

FINDINGS OF FACT

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

1) Employer's Associate Purchases Policy (OP-23) updated on October 1, 2009, applies to all Employer's employees and provides:

> Associates may make purchases only during meal periods, breaks, or off-duty hours. Merchandise cannot be sold to anyone unless the facility is open for business. . . . Any violation of this policy is a serious infraction. The company will investigate any deviation from this policy. If the company determines an associate has violated this policy, s/he may be subject to discipline, up to and including termination.

(Walmart's Associate Purchase Policy (OP-23), October 1, 2009.)

2) Employee has worked for Employer since July 2013. She started as a stocker in health and beauty aids and after several months with Employer was assigned duties as a cashier in Employer's Eagle River, Alaska store. (Deposition of Patricia Kolb, December 22, 2015.)

3) On July 26, 2013, Employee acknowledged she was oriented and aware of Employer's Associate Purchase Policy. Employee has been aware of the policy since she was hired. In January 2014, when Employee became a cashier, the policy was presented to her again during cashier training. (NOA Participant Checklist / New Associate Safety Checklist Departmental, Patricia Kolb, July 26, 2013; "My Training Plan" Cashier, Patricia Kolb, January 13, 2014.)

4) Employee has seen supervisors and other employees shop and thinks they were on the clock. She was not aware anyone was ever disciplined for shopping while on the clock. (Kolb.)

5) When hired, Employee worked "30-something" hours per week. Since returning to work after her injury, she works "about 22, 23" hours a week. (Deposition of Patricia Kolb, December 22, 2015; Kolb.)

6) On December 4, 2014, Employee shopped during Employer's "25% discount days," which is a two-day period employees who worked on Thanksgiving can shop and receive a larger than normal discount. Discount shopping days last 48 hours. Employee forgot to purchase cat food and kitty litter on December 4, 2014. (*Id.*; Kolb; Jordan.)

7) On December 5, 2014, Employee worked an afternoon shift scheduled to end at 5:00 p.m. Her relief cashier arrived "a bit before 5:00 p.m." and Employee closed out her register at 4:47 p.m. (Deposition of Patricia Kolb, December 22, 2015; Kolb.)

8) Employer gives employees who clock out prior to their shift's end demerits. (Jordan.)

9) On December 5, 2014, Employee wanted to take advantage of her 25% discount shopping and, before clocking out, got a shopping cart. She planned to leave it near the restrooms close to the employee locker room and time clocks, clock out, get her belongings from her locker, and then proceed to a register to check out with her purchases. Employee went to the store's "Pet Zone" to get cat food and kitty litter. The kitty litter was heavy and on a shelf 70 inches high. Employee had to reach up to get it. When the kitty litter fell down off the shelf, Employee tried to stop it from crashing and spilling all over the floor with her knee and leg. When the kitty litter hit Employee, it broke her leg. Employee fell, hit her head, and was unable to walk. (Deposition of Patricia Kolb, December 22, 2015; Kolb.)

10) Employer's assistant managers Chip Dawdy and "J.J." were notified Employee was injured. Dawdy took Employee's and others' statements about the incident. J.J. transported Employee to the back of the store on a cart so she could get her purse and coat. Instead of calling "911" to obtain an ambulance to transport Employee, Dawdy and J.J. decided J.J. would take Employee to an emergency room. However, before J.J. took Employee to the emergency room, J.J. took Employee to Workplace Safe for a drug test. Upon completion of the drug test, and before taking Employee to Providence Hospital Emergency Room, J.J. took Employee to Tesoro so J.J. could get gas and something to eat. (*Id*.)

11) After her incident with the kitty litter and injury, Employee had no control over what became of her; control belonged to Dawdy and J.J. (Jordan; Kolb; experience, judgment, observations, and inferences drawn therefrom.)

12) When J.J. took Employee for the drug test, J.J. expected Employee to walk into Workplace Safe. Employee attempted to walk, but was in severe pain and despite her attempts was unable to bear weight. A male stranger picked Employee up and carried her into Workplace Safe. (Kolb.)

13) On December 5, 2014, Employee did not clock out when she completed her work for the day. (Kolb; Jordan.)

14) Trudy Jordan is Employer's personnel coordinator. She assists with hiring, maintaining employees' personnel files, and "keeping personnel on track." If employees are unexpectedly unable to clock out at their shift's end, Jordan is responsible for contacting employees to inquire and determine their quitting time. Jordan then completes an "Hours Adjustment / Prize or Award

Form." Jordan signs the form, a salaried member of management signs the form, and the employee for whom Jordan completes the form signs it. (Jordan; Hours Adjustment / Prize or Award Form, Patricia Kolb, Signed by Trudy Jordan on December 8, 2014 and Patricia Kolb on July 10, 2015.)

15) On December 8, 2014, since Employee had not clocked out on December 5, 2014, Jordan contacted Employee because Jordan "needed to know what time she left." After speaking to Employee, Jordan completed an Hours Adjustment Form and recorded Employee's December 5, 2014 "Clock Out" time as 16:47. The reason for the adjustment was: "Didn't clock out." Jordan signed the form on December 8, 2014; Dawdy signed it on December 10, 2014. Employee did not initial the form, but signed it on July 10, 2015. The form states:

> By placing my initials here and signing below, I acknowledge that I have reviewed all information above and that everything on this form is accurate to the best of my knowledge. I also acknowledge that I have been informed and agree to this hours adjustment, prize or award. . . .

(*Id.*)

16) On July 9, 2015, Employee returned to work with no restrictions. However, since returning to work, she works "about 22, 23" hours a week; "about three" hours less per day than prior to the injury. Employee has reduced her hours because her leg starts to hurt after standing for four or five hours. (Deposition of Patricia Kolb, December 22, 2015.)

17) All injuries at Walmart are entered into a computer system. The same system is used to report injuries to employees and the public. (Jordan.)

18) Employer's Eagle River, Alaska store has time clocks in three locations. There are two timeclocks at the back of the store near employee lockers and restrooms, and at two "hubs." One hub is at Employer's customer service center near the cash registers, and close to shopping cart parking. (Jordan.)

19) Employer's employees are not permitted to shop or make purchases while on the clock. Employees are permitted to shop and make purchases during breaks, before they clock in for work, and after they clock out. It is reasonable to expect employees to shop at Employer's store because they receive a 10 percent discount; however, when employees shop while on the clock, Employer considers the shopping "theft of time." When Employer discovers employees shopping during working hours, while on the clock, the employees are disciplined. Jordan stated

she was sure people do shop while on the clock, but if Employer does not know an employee is breaking the policy, the employee cannot be disciplined. (*Id.*)

20) Dawdy and J.J. are not medically trained. (Jordan.)

21) On December 5, 2014, after the kitty litter accident, a decision was made for J.J. to take Employee to the hospital instead of calling an ambulance. Employer does not have a policy addressing evaluation of medical incidents. However, its policy provides if a customer is hurt or injured, Employer's staff should not move the customer. According to Jordan, Employee should not have been transported by assistant manager J.J.; an ambulance should have been called for a broken leg "if the break was obvious." Dawdy and J.J. did not follow Employer's policy. (Jordan; experience, judgment, observations, and inferences drawn therefrom.)

22) Employer did not treat Employee as a customer when assistant manager J.J. transported Employee to Providence Medical Center's Emergency Room after taking her for a drug test and to the gas station so assistant manager J.J. could fill her car and get a bite to eat. (Experience, judgment, observations, and inferences drawn therefrom.)

23) When individuals with fractured limbs are transported by paramedics, fractured limbs are stabilized to prevent further damage. (*Id.*)

24) The driving distance between Walmart in Eagle River, Alaska and Providence Hospital in Anchorage, Alaska is slightly less than 16 miles and can be driven in approximately 20 minutes. (*Id*.)

25) On December 5, 2014, Employee was treated in Providence Alaska Medical Center's Emergency Room four hours after the kitty litter container fell on her right knee causing her to fall. She was not able to walk on her knee or bear weight on her right leg, secondary to pain. An x-ray revealed a "moderately displaced" lateral tibial fracture. Employee's knee was immobilized and she was released with crutches and instructed to follow-up with Eugene Chang, M.D. (Providence Emergency Department Encounter Note, Jessica Diab, M.D., December 5, 2014.)

26) On December 9, 2014, Gregory Schweiger, M.D., reviewed the December 5, 2014 x-ray and computer assisted tomography (CT) scan and found they were both positive for a significantly depressed and widely displaced lateral tibial plateau fracture. Dr. Schweiger determined Employee's fracture required surgery. (Chart Note, Dr. Schweiger, December 9, 2014.)

27) On December 10, 2014, Employee was admitted to Providence Hospital and Dr. Schweiger performed a complex open reduction internal fixation (ORIF) of Employee's right tibial plateau fracture and open repair of her lateral meniscus. Employee was discharged on December 11, 2014. (Physician Discharge Summary, Dr. Schweiger, December 11, 2014; Post-Op Chart Note, Dr. Schweiger, December 23, 2014.)

28) On December 12, 2014, Employee was notified workers' compensation benefits were being denied because Employer determined Employee's injury did not arise out of and in the course of her employment. (Adjuster's Notes, authored by: vlhenle, December 12, 2014.)

29) On December 17, 2014, Employee filed a general liability claim against Employer. Employer asserted Employee was in control of the kitty litter when she was injured and determined there were no defects or issues with the way the kitty litter had been stocked and denied Employee's claim. (Adjuster's Notes, created and authored by: jkbufal, January 15, 2015.)

30) On January 15, 2015, Employer denied Employee's general liability claim. Employee was notified she was in the care, custody, and control of the kitty litter and if she felt the item was too heavy, she had a duty to ask for assistance. (Adjuster's Notes, authored by: hawest, January 15, 2015.)

31) On February 17, 2015, Dr. Schweiger determined Employee was totally disabled and scheduled her for re-evaluation on March 3, 2015. (Disability Work Status, February 17, 2015.)

32) On March 3, 2015, Dr. Schweiger completed a questionnaire at Sedgwick's request. He indicated Employee needed to attend medically necessary follow-up appointments for her surgically repaired tibial plateau fracture; Employee's "condition" will cause episodic flare-ups and periodically prevent Employee from performing her job functions and make it necessary for Employee to miss work. Dr. Schweiger also indicated it would not be necessary for Employee to work part-time or on a reduced schedule due to her "condition." He ordered Employee to remain off work "until further notice / or medically stable." (Responses to Certification of Health Care Provider for Employee's Serious Health Condition, Dr. Schweiger, March 3, 2015.)

33) On March 23, 2015, Employee filed a workers' compensation claim for temporary disability benefits, medical costs, a compensation rate adjustment, and a finding of unfair or frivolous controversion. (Claim, March 20, 2015.)

34) On April 2, 2015, Employer controverted Employee's claim, denying all benefits. The basis for its controversion was, "The injury, condition, and / or disability did not arise out of or in the course and scope of employment. Employee was not working and conducting personal shopping at the time of injury." (Controversion Notice, April 1, 2016.)

35) On April 2, 2015, Dr. Schweiger provided the following history:

> She is four months out from ORIF of her significantly depressed lateral tibial plateau fracture. I kept her touchdown weightbearing for an additional month due to the significant amount of depression that she had and the amount of bone graft I had to place.

Dr. Schweiger let Employee begin partial weight bearing as tolerated. She was instructed to wear her brace when bearing weight, wean herself off crutches and then off the brace over the next four months. (Chart Note, Dr. Schweiger, April 2, 2015.)

36) On July 7, 2015, Dr. Schweiger released Employee to return to work with no restrictions. Her fracture was well healed. She was instructed to return in six months, at her one year anniversary, for x-rays and follow-up. Dr. Schweiger explained "at some point if it looks like it is going to need a total knee replacement . . . we many want to think about taking her hardware out preemptively." He was not prepared to remove the hardware at that time and instructed Employee to "continue her activities as tolerated." (Chart Note, Dr. Schweiger, July 7, 2015.)

37) On January 26, 2016, Employee returned to Dr. Schweiger as instructed for her one-year follow-up appointment. She reported she had increasing pain in her knee over the past "couple of months." Dr. Schweiger noted when he last saw her Employee was doing quite well, "but this has been a progressive situation." Employee's range of motion was worse than it was previously. X-rays revealed some collapse on the knee's lateral plateau. Dr. Schweiger concluded:

> I think she has degenerated her lateral plateau away and I think at this point the only solution is going to be a total knee replacement. I told her we will need to get a CT scan to visualize the bone to see exactly what she has in the way of bone stock to support a total knee replacement. I will also have to take her hardware out prior to proceeding with this. In the near future I am going to get a CT scan and perform a surgery to remove her hardware prior to referral for a total knee replacement. I will discuss this with the joint replacement surgeons to decide if she is best pre or post hardware removal. We will call her and schedule these interventions.

(Chart Note, Dr. Schweiger, January 26, 2016.)

38) On April 29, 2016, Joseph Kalamarides filed an Affidavit of Counsel for services provided on Employee's behalf between July 29, 2015 and April 27, 2016. Mr. Kalamarides worked 18.35 hours and billed $400.00 per hour ($7,340.00). Paralegal time was billed at $175.00 per hour and 7.15 hours were expended on Employee's matter ($1,251.25). Costs incurred for postage, court reporting, and medical records are $150.10. Total costs ($1,251.25 + $150.10) are $1,401.35. Combined attorney fees and costs total $8,741.35. (Affidavit of Counsel, April 29, 2016.)

39) Given his and his paralegal's experience, Mr. Kalamarides rates are reasonable as are the rates for his paralegal. All costs are reasonable and awardable. (Experience, judgment, observations, and inferences drawn therefrom.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > 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; . . . .

A decision may be based 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.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee 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 death 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 death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or 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 death or 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 death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .

An act outside an employee's regular duties undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is furthered, is within the course of employment. 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §27 Scope, at 27-1 (2008). Depending upon the facts of the case an employee's misconduct may or may not be a deviation from employment. When misconduct involves a prohibited overstepping of the boundaries that define the ultimate work to be done by the claimant, the prohibited act is outside the course of employment. 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §33 Scope, at 33-1 (2008). However, when misconduct involves a violation of regulations and prohibitions relating to the method of accomplishing the ultimate work, the activity remains within the course of employment. *Id.* Express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities that contribute directly to accomplishment of the ultimate work, when violated, are considered a course of employment interruption. *Id.*

"The clearest illustration of violation of instructions delimiting the ultimate job for which the claimant is employed is the situation in which the prohibition forbids personal activities during working hours. These activities might in some instances be a departure from employment even without the prohibition; but when they are expressly outlawed, all doubt is removed." 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §33.01[1]. Prohibited Acts for Personal Benefit, at 33-2 (2008) (citations omitted).

Conversely, when forbidden conduct and prohibitions relate only to methods to perform work, compensation is not blocked. 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §33.02. Misconduct Which Is Not a Deviation from Employment, at 33-10 (2008) (citations omitted). There are no *contra* holdings in the United States. *Id.* at 33-12.1.

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 Scope 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 (Act), coverage is established by work connection, and the test of work connection is, if accidental injury is connected with any incident 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).

Anchorage Roofing Company, Inc. v. Gonzales, 507 P.2d 501 (Alaska 1973), involved an employee who sustained injuries when, while flying the plane used to transport him to his business-related activity, he departed from the direct flight path of return to employer's place of business. 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 employee deviated three miles from the direct route to search for a small dirt airstrip in anticipation of a future hunting trip. 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 Court upheld the determination the employee's deviation was insubstantial. The Court noted:

> Deviation cases are legion. Both parties cite a number of such cases in support of their respective positions. These are of only limited help, however, both because of the infinite variety of factual patterns, which vary in the degree of deviation from a minor detour to a complete temporary abandonment of an employer's business, and because the results often appear to have been dictated by judicial attitudes toward workmen's compensation acts.
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> In measuring the legal effect of a departure from a normal business route, the guideposts are the materiality of the deviation and its purpose. Professor Larson states the following general rule:
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> > 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.
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> 1 A. Larson, The Law of Workmen's Compensation, §19.00 at 294.57 (1972). . . .
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> Some older cases from other jurisdictions denied compensation unless the employee was, at the time of injury or death, performing his normal work to the direct benefit of his employer. E.g., *In re Betts*, 118 N.E. 551 (Ind. 1918); *In re O'Toole*, 118 N.E. 303 (Mass.1918); *Spooner v. Detroit Saturday Night Co.*, 153 N.W. 657 (Mich.1915). However, today it is generally held, utilizing the rubric of various doctrines, e. g., the 'personal comfort,' 'emergency,' 'authorization,' or 'minor deviation' doctrines, that an employee is entitled to compensation so long as the activity is reasonably foreseeable and incidental to his employment. In *Northern Corp. v. Saari*, 409 P.2d 845, 846 (Alaska 1966), this court held: "(I)f the accidental injury or death is connected with any of the incidents of one's employment, then the injury or death would both arise out of and be in the course of such employment." See also *State Dep't of Highways v. Johns*, 422 P.2d 855, 859 (Alaska 1967).
>
> Either of two doctrines provides a legal base to uphold the finding of compensability below. First, under the 'authorization' doctrine, the Board found that Mr. Gonzales 'considered the deviation from the direct route a privilege of employment . . . in accordance with company practice. . . .' There are many cases holding that an otherwise personal deviation is compensable where authorized, expressly or by implication, and of some incidental benefit to the employer, at least where the deviation does not introduce substantial additional hazards.
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> We prefer, however, not to rest our decision on such a base in view of the peculiar nature of the business herein and the near identity of claimant and company. For

> all practical purposes, it would be impossible to disprove such a claim in any small family owned corporation. We prefer to await a proper factual presentation to the Board before deciding such a question.
>
> The second doctrine which could be applied is characterized as the 'minor deviation rule.' *Id.* at 505.

The court recognized Professor Larson analogizes certain "insubstantiality" cases to "personal comfort," but does not intimate the two categories are identical, and two additional considerations have been utilized by courts when assessing deviations' significance: added risk and nature of employment. *Id.* The court noted:

> An encompassing 'substantiality' test has not emerged from either the case law or from Professor Larson. Rather, there is the need, in close cases, to balance a variety of factors such as the geographic and durational magnitude of the deviation in relation to the overall trip, past authorization or toleration of similar deviations, the general latitude afforded the employee in carrying out his job, and any risks created by the deviation which are causally related to the accident.

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's dual purpose analysis acknowledged the formula generally used to determine whether, on a dual purpose trip, the business purpose is sufficient to allow recovery under any workers' compensation act and 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. . . .
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> This 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 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 *M-K Rivers v. Schleifman*, 599 P.2d 132 (Alaska 1979), a remote site case, the court held injuries sustained by an employee while traveling from a remote work site to cash his payroll check at a bank in a city about 30 miles away were compensable. The errand was viewed as serving both the employer's and employee's mutual benefit. Therefore, the errand was incidental to the employee's employment.

In *Marsh v. Alaska Workers' Compensation Board*, 584 P.2d 1134 (Alaska 1978), the Alaska Supreme Court affirmed a decision finding a customer's assault on a bartender not work-connected. Marsh worked as a bartender. While on break to get some food, Marsh sat with a female customer. The woman's husband, Razo, was playing pool but returned to the table to find Marsh kissing his wife. Razo and Marsh exchanged words and Razo hit Marsh, who fell to the floor unconscious. Marsh suffered a blood clot in his brain, which required surgery and resulted in partial paralysis and memory loss. Even though Marsh sustained an injury while at work, the Court found he had taken himself outside the scope and duties of his employment during his encounter with Razo, and it was Marsh's conduct that motivated Razo's assault on Marsh. The Court held substantial evidence supported the Board's determination Razo's assault on Marsh was not work-connected and did not entitle Marsh to compensation. 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." *Id.* at 1136.

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 an open bottle of Jack Daniels inside the wrecked company van. 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 pieced 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.

Sears v. World Wide Movers, Inc., AWCB Decision No. 15-0140 (October 27, 2015), involved the "personal comfort" and "minor deviation" doctrines. The employee slipped and fell on the ice upon exiting Walgreens after purchasing a cup of coffee while traveling to a job in his company moving van. He contended his injury arose out of and in the course of his employment with the employer. The employer argued the employee's injury did not arise out of and in the course of employment because he violated company policy when he left the company yard early, and deviated from his employment-related travel for personal purposes when he stopped the company vehicle for coffee. Sears argued his injury was compensable under the personal comfort doctrine, defined by the Alaska Supreme Court in *Gonzales*. *Sears* found the employee had correctly noted that while his activities may arguably violate a company policy, such violations do not automatically exclude an injury from coverage under the Act just because it occurred during company policy violations.

> [T]here 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*.
> . . . .
>
> 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*.

Id. at 26-28.

Sears found no evidence the employee abandoned his job when he stopped at Walgreens to purchase coffee any more than in-house workers abandon their jobs by walking down the hallway to obtain refreshment. While drinking coffee was not "strictly necessary" to maintain

life and health, it was "reasonably incidental to the employment" and *Sears* noted tens of millions of American workers do it every working day. *Id.* at 31. "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*." *Id.*

Sears concluded the employee's minor deviation to obtain personal comfort was "unquestionably" an incident of the employee's employment, was reasonably foreseeable and contemplated by his work for employer, and if not for his job, he would have had no reason to stop at Walgreens, at that place and at that time, for a cup of coffee. *Id.* at 31, 33. *Sears* applied the *Gonzales* balancing test factors and found: (1) the geographic and durational magnitude of the deviation in relation to the overall trip, a one block, six minute deviation, was insubstantial; (2) past authorization or tolerance of similar deviations was a regular occurrence because although the employer claimed stopping for coffee is against company policy, it at least tolerated it as evidenced by the fact it occurs every day and is occasionally authorized; (3) the general latitude afforded the employee, a 40-year veteran in carrying out his job was considerable and undisputed; and (4) there was no evidence presented by the employer that the employee subjected himself to any higher risks created by the deviation, which were causally related to the accident.

Sears determined the personal comfort doctrine and minor deviation rule must be construed together. In doing so, it found "the personal comfort doctrine would be nullified and meaningless" if the employee did not have a right to make a minor deviation from his normal route to satisfy his personal comfort. *Id.* at 33.

In *Goodyear Aircraft Corp. v. Gilbert,* 180 P.2d 624 (Arizona 1947), a machinist making souvenirs out of shell cases in violation of company rules, which banned such use of the machines, was injured when the shell on which he was working exploded. The machinist's claim was denied.

Foster v. Continental Gin Company, 74 So.2d 474 (Alabama 1954), involved a claimant who, before work commenced, used the employer's planer to make a wooden lampstand for his personal use. He continued doing this work after his normal starting time and was injured. Although prohibited by the rules, it was a common practice for the employer's employees to make items for their personal benefit. The shop's foremen and others in authority knew employees engaged in work for their personal benefit and permitted it to continue. The court held, "working on his own personal property exclusively for his own benefit could not, in our view, under any sort of rationale afford the conclusion that he was fulfilling the duties of his employment or engaged in something incidental to it." *Id.* at 477.

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 *Maheux v. Cove-Craft, Inc.*, 193 A.2d 574 (N.H. 1960), Maheux was injured on his employer's premises during his lunch break, while using his employer's table saw to make a checkerboard for his personal use. With the employer's knowledge, employees regularly made personal use of the shop's machines during their lunch hour. The employer had never expressly forbidden employees' personal use of the employer's machinery, and written notice forbidding personal use of employers' machinery was never posted. Personal use of employer's machinery during lunch breaks was a consistent and customary practice; was, impliedly, sanctioned in Maheux's case by his immediate superior in charge of the plant; and because Maheux's personal use of the employer's machinery was known to and encouraged by the employer, it was considered a condoned activity and a condition of employment. The court noted, it was well settled in its jurisdiction that personal activities, not forbidden, but reasonably to be expected, may be a natural incident of employment, the injury resulted from a risk employee's employment subjected him and injuries suffered during such personal activities are compensable. *Id.* at 576.

Maheux's personal activity was found to be ordinary and usual and the court did not find he had left his employment. *Maheux's* finding Maheux had not departed from his employment when he was injured engaging in a personal activity, and his injury was compensable, were sustained. *Id.*

In *Daniels v. Krey Packing Company*, 346 S.W.2d 78 (Missouri 1961), Daniels, a packing plant employee, after receiving $610.00 in workers' compensation benefits, brought a common law action to recover damages for injuries sustained while working for the employer. The circuit court set aside a verdict for Daniels and entered judgment for the employer. The Missouri Supreme Court held the injury sustained by Daniels during her uncompensated lunch period, while attempting to enter the employer's storeroom to exchange a previously purchased knife she was required to furnish to perform her work duties, arose out of and in the course of employment and was covered under the Worker's Compensation Act, precluding recovery at common law. The court found Daniels' injuries unquestionably arose out of her employment. Daniels' contract with the employer required her to furnish the knives with which she worked and the employer, by maintaining a storeroom where employees could purchase their knives, implicitly invited Daniels to enter the storeroom by the means made available to her by her employer. It also determined Daniels' injuries arose in the course of her employment, which does not require that the employee be directly engaged in the task with which she is primarily charged to perform. It is only necessary to establish the task the employee was engaged in resulted in injury and was incident to the work conditions or that the employee was injured doing an act reasonably incidental to performance of duties the employer might reasonably have knowledge or reasonably anticipate. *Id.* at 83. When injuries are traceable to dangers inherent in the work environment, they are in the scope of employment and compensable, even though the injury occurred during an interval outside an employee's regular compensated work hours. *Id.*

In *Wilson v. Sears, Roebuck & Company*, 384 P.2d 400 (Utah 1963), Wilson took advantage of her employee discount privilege and purchased two large rugs from the employer. While on her lunch hour, she drove her vehicle to customer pickup to take delivery of her rugs. Unable to take the delivery when she arrived, she parked and walked away, got out of her vehicle, and proceeded along the walkway to the back door when a pile of tires fell upon her and caused injury. After the accident, the rugs were loaded into Wilson's car, she drove the car home and

the rugs were unloaded. She then returned to work and completed an injury report. Thereafter, she received and accepted compensation.

Wilson pursued a personal injury action, which was denied. The Utah Supreme Court affirmed the trial court's determination Wilson was injured while engaged in an activity encouraged or acquiesced to by her employer during employee lunch periods and while on employer's premises, and employee's exclusive remedy was under the Worker's Compensation Act. The court held an employee does not *ipso facto* lose employee status when the "noon whistle blows." Wilson was granted the fringe benefit of being able to purchase merchandise at a discount and was permitted to take delivery of the purchased items on her lunch hour. The court considered such benefits "helpful" in employer-employee relations, and noted the majority of decided cases hold employees have workers' compensation protection if injured while attempting to take advantage of such privileges during the lunch hour while on the employer's premises. The court also noted the converse. "Where it appears that the employee was injured while doing an entirely personal act or something forbidden by her employer, a different rule would prevail." *Id.* at 401.

Buehner v. Hauptly, 161 N.W.2d 170 (Iowa 1968), was a death claim by the decedent employee's widow. A deputy commissioner found the employee's death did not arise out of and in the course of employment and the commissioner made a similar finding on review. Appeal was taken. The district court affirmed and appeal was again taken. Decedent was a carpenter employed to construct a grain elevator and was repeatedly instructed not to ride the hoist used to haul material and tools from the ground to the work level. The Iowa Supreme Court held the employee who was fatally injured while using the hoist to descend from the top of the elevator was at a prohibited place, that is, on the hoist and the fatal injury did not arise out of and in course of his employment. The test applied by the court was whether the employee was doing what a person so employed may reasonably do within the time of the employment and at a place he may reasonably be during that time. The court acknowledged, "The difficulty is not with the rule but with its application. In attempting to fit the present controversy into this formula, it is immediately apparent several conclusions are possible." *Id.* at 172. The court considered three questions: (1) Was decedent where he might reasonably be when he suspended himself from the

forbidden hoist? (2) Did this amount to stepping outside the scope of employment? (3) Or was it merely performing the service of the employment in a prohibited manner? The court distinguished the employee's death from failure to wear a helmet or other safety equipment, which results in injury, and decided there was no analogy because in the latter cases, the employee is performing the task assigned to him in an unsafe manner. Those cases involve only a rule violation as to how a permitted task should be done, and are compensable. *Id.* In the case of decedent, he was at a place, engaged in activity expressly and repeatedly forbidden. The court found the deceased employee's act in attempting to descend by the hoist was not only in direct violation of an enforced employer's rule, but completely rash and outside the deceased employee's reasonable requirements. The court held the employee's death did not arise out of and in the course of his employment. *Id.*

Martin v. Bonclarken Assembly, 251 S.E.2d 403 (North Carolina 1979), a death case, involved stipulated facts and uncontroverted evidence. Bonclarken Assembly, a conference and mountain resort facility, was equipped with hotel accommodations and recreational activities, including a ten acre lake. Martin was a 15 year old boy who worked for the employer as a laborer earning $2.00 per hour. Martin, like all of the employer's employees, had an hour for lunch. Employees were not paid for their lunch hour, but had the choice of eating a free lunch in the employer's hotel dining room or going elsewhere. Employees were on their own during their lunch hour. The employer supervisor in charge of maintenance told his employees, including Martin, that they were free to use the employer's gym and tennis courts during their lunch hour when they were not on the payroll. The lake's swimming area was regularly closed for lunch and the lifeguard would put his life-saving equipment in a storage room to indicate the lake's closure to swimming. Posted regulations governed lake use, had been in effect several years, were placed on a large signboard and confronted all at the footbridge crossing, which was the only access to the lake. Posted regulations provided rules for swimming and boating, which was permitted during specific hours only under the lifeguard's supervision. Posted regulations prohibited individuals who had not taken a lifeguard administered swimming test from swimming outside the lake's chained-in area. Martin had never taken a test.

The Industrial Commission granted Martin's next of kin's claim for death benefits and the Court of Appeals affirmed. The issue on appeal was whether the evidence was sufficient to support a finding that Martin's death resulted from an accident arising out of and in the course of his employment. In North Carolina, "arising out of" and "in the course of" employment are not synonymous; they impose a double condition, both of which must be satisfied for a claim to be compensable. When an injury results from a condition or risk created by the job, it arises out of employment. "In the course of employment" refers to the time, place, and circumstances surrounding injury. If the employee is engaged in an activity or duty he is authorized to undertake and which is calculated to further, either directly or indirectly, the employer's business and an injury occurs, it arises out of and in the course of employment. *Id.* at 405.

The court found when Martin jumped into the lake's deep water, outside the chained-in area, during his lunch hour, and during a time the lifeguard was off duty, Martin was acting outside the scope of his employment, "in contravention of specific instructions from his employer, and that he had no reasonable grounds to believe otherwise." *Id.* at 406. Martin was engaged in a personal recreational activity, totally unrelated to his work duties.

> The risk of his drowning during the lunch hour in a lake he was forbidden to enter at that time was a risk foreign to his employment. In short, deceased's accidental drowning was neither a natural and probable consequence nor an incident of his employment; there was no causal relation to his death and the performance of any service calculated to further the business of the Assembly either directly or indirectly.

Id. The court held Martin's death did not arise out of and in the course of his employment.

In *King Waterproofing Company v. Slovsky*, 524 A.2d 1245 (Md. App. 1987), an employer appealed from a trial court's decision awarding Slovsky 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. Slovsky worked for the employer part-time in the evenings and had a paid, mid-shift break. On the injury date, Slovsky 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, Slovsky 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.

Finnegan v. Industrial Commission of Arizona, 755 P.2d 413 (Arizona 1988), involved an auto mechanic injured after work hours while working in his employer's garage on a co-worker's automobile. The Industrial Commission of Arizona denied benefits, appeal was taken and the court of appeals affirmed the denial. Upon petition for review, the Arizona Supreme Court held Finnegan was injured in the course of his employment. Although Finnegan's activity after clocking out was for a co-worker's personal benefit, his co-worker had received permission from the shop's owner to stay after work and use the owner's facilities and tools to repair his car. It was understood neither Finnegan, nor his co-worker were compensated for their after-hours work. The employer maintained a policy allowing employees to work on their vehicles in employer's auto repair garage after business hours.

"Whether an activity is related to the claimant's employment -- making an injury sustained therein compensable -- will depend upon the totality of the circumstances." *Id.* at 415. (Citations omitted.) Allowing employees to use employer owned equipment promotes and maintains good employer-employee relationships, which creates a sufficient nexus between the employment and the injury. Therefore, where, as in *Finnegan*, an employee uses employer's equipment for a personal activity, recovery should be granted even if the injury occurs after the employee is off the clock. *Id.* at 416.

Briley v. Farm Fresh, Inc., 396 S.E.2d 835 (Virginia 1990), was a personal injury action brought by an employee against her employer. The question on appeal was whether the trial court correctly ruled Briley's exclusive remedy was under the Worker's Compensation Act. The court noted the facts presented on appeal left important factual questions unanswered but the deficiencies would partly be cured when the court viewed all reasonable inferences fairly

deducible from the stated facts in the light most favorable to the employer, who prevailed before the trial court.

Briley worked part-time for the employer as a cake decorator in its bakery department; she had no regular hours and was only called to work when needed. On the day of the accident, Briley told a coworker she was finished with her work and leaving. Briley removed her employer provided white coat as she regularly did when checking out. Instead of departing the building and going to her car, Briley did some shopping for her mother, with whom she lived. Briley shopped for approximately 20 minutes when she slipped, fell, and suffered severe injuries. Briley admitted at the time of the fall, she was not performing any duty or function for her employer and was not on a break. The record did not indicate if employer's employees were entitled to a discount on the cost of items purchased at the store. It was also silent about existence of a company policy regarding employees shopping in the store.

On appeal, Briley conceded if the accident had occurred in the store while she was coming or going to her work area, or if the accident occurred in the parking lot or a walkway outside employers building while she was going to or coming from work, it would be covered as a workers' compensation injury. However, Briley contended the employment relationship terminated and when the accident occurred, she was a business invitee and customer in the store. She asserted she was entitled to maintain a common-law action for damages against the employer. The court disagreed with Briley.

The court said: "The statutory language 'arising out of and in the course of employment,' must be liberally construed to accomplish the humane and beneficent purposes of the Act." In Virginia, "arising out of" refers to the origin or cause of the injury, and "in the course of" refers to the time, place, and circumstances under which the injury occurred.

> An accident occurs during the course of the employment if it takes place within the period of employment, at a place where the employee may reasonably be expected to be, and while the employee is reasonably fulfilling the duties of the employment or is doing something reasonably incidental to it.

Id. at 836-837. (Citations omitted.) The court did not recognize a concept of "instantaneous exit" from the employer's premises immediately upon termination of work and stated an employee has a reasonable time after completing work to leave the premises. *Id.* at 837.

In *Briley*, there is no contention Briley violated any work rule by engaging in personal shopping as she was leaving the employer's store. The court stated:

> Indeed, is to be anticipated that employees of a supermarket would purchase merchandise while on the premises and after completing assigned work duties. This plaintiff would not likely have been at the supermarket at 2:00 a.m. but for her employment there. Moreover, the risks that led to her injury were all part of the work environment. In sum, the plaintiff was injured at a place where she was reasonably expected to be while engaged in an activity reasonably incidental to her employment by defendant.
>
> Even though arguing that her status had changed from employee to business invitee, the plaintiff concedes that her tort action would be barred if she had sustained the injury as she 'was coming or going to her work area.' This amounts to a contention that she is covered by the Act, if she falls at the 'salad bar' while en route to her car to drive home but that she is not covered by the Act when she falls at the exact same location after making 'a relatively brief deviation' from a direct route to her car.

Id. The court held Briley's injury arose out of and was in the course of employment, and her exclusive remedy was under the worker's compensation act.

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 *Carrick v. Riser Foods, Inc.*, 685 N.E.2d 1261 (Ohio Ct. of Appeals 1996), Carrick was injured while on his employer's premises. During an employer sponsored break, after placing money in a soda machine, the can got stuck and, when attempting to dislodge the can, Carrick rocked the soft drink machine, and it fell on and fractured his femur. The employer was aware

the machine malfunctioned. Carrick and his co-workers had rocked the machine on multiple prior occasions despite an employer placed warning label that notified employees tipping or rocking the machine may cause serious injury or death. The employer also provided a reimbursement procedure for employees who lost their lost money. Carrick did not follow the procedure because the appropriate office to seek reimbursement was not open when the machine malfunctioned.

In Ohio, to be compensable, injury must have occurred in the course of, and arising out of employment. "In the course of" relates to time, place, and circumstances of the injury. *Id.* at 1262.

> Generally, an employee is considered in the course of his employment while performing an obligation of his contract of employment. However, the employee need not be injured in the actual performance of his duties since he is in the course of his employment 'when he does such things as are usually and reasonably incidental to the work of the employer.' Therefore, when the employee is injured while, e.g., taking refreshments during a break, he may be entitled to benefits.
>
> These general guidelines must nonetheless be tempered by the purpose of the Worker's Compensation Act. The Act is not meant to impose a duty on an employer as an absolute insurer of the employee's safety. Rather, the Act is intended to protect employees against the risks and hazards incident to the performance of their duties.
>
> As a logical result the principle that an employer is not an absolute insurer of its employees' safety, injuries that result from an employee's misconduct or deviant behavior are not compensable, as the conduct falls outside the scope of employment.
>
> . . . The mere fact that injury occurred during employment is not sufficient to establish entitlement to benefits. (Citations omitted.)

Id. at 1262-1263. *Carrick* analogized the act of rocking the soda machine to horse play and concluded the hazard created by Carrick tipping the soda machine was not a hazard incident to performance of his stocker duties and there was no evidence to demonstrate any association between Carrick's employment and the circumstances of his injury. Therefore, *Carrick* found the injury did not occur in the course of employment. *Id.* at 1263.

Kish v. Nursing and Home Care, Inc., 727 A.2d 1253 (Connecticut 1999), is a "minor deviation" case. The issue was whether an injured employee may recover workers' compensation benefits for an injury suffered while performing her job in a manner that did not comply with the employer's policy. Kish, a nurse, visited patients in their homes and oversaw their care. She visited five patients per day, worked out of her car, and took a lunch break when she found time. She set her own work schedule and was reimbursed for mileage. Kish cared for an elderly woman and had reserved a commode for her at a medical supply facility because the one the patient was using was unsafe. Kish's supervisor directed Kish not to deliver the commode herself, but to have the patient's caretaker pick it up. On the date of Kish's injury, during her visit with the patient, Kish noted her patient's condition had worsened and thought the makeshift commode being used was unsafe and needed to be replaced immediately. Kish decided to drive to the medical supply facility to pick up the commode. On her way, Kish saw a postal truck parked on the opposite side of the street. Remembering she had a personal greeting card to mail, Kish stopped and parked her car. She crossed the street, gave the greeting card to the mail carrier, and while crossing back to her car, Kish was hit by an automobile. The employer had an unwritten agency policy that visiting nurses were not permitted to pick up or deliver items for their patients; however, these activities were not prohibited by the employer's policy manual. Kish admitted she was aware of the unwritten policy. Kish's supervisor did not authorize Kish to mail a personal letter while in the course of her employment, but agreed the patient's commode was unsafe and needed to be replaced.

Kish applied three factors to determine if the injury occurred in the course of employment, which require injured workers to prove the accident giving rise to the injury took place "(a) within the period of the employment; (b) at a place [the employee] may reasonably [have been]; and (c) while [the employee was] reasonably fulfilling the duties of the employment or doing something incidental to it." *Id.* at 1256.

In *Kish*, the parties agreed the injury occurred within the employment period. Employer argued it did not condone the manner by which Kish assisted her patient. *Kish* found Kish was at a place where she was reasonably entitled to be, and it was necessary to be there to fulfill her employment duties. *Kish* cited Professor Larson, "'[W]hen misconduct involves a violation . . .

relating to the *method* of accomplishing [the] ultimate work [to be done by the claimant], the act remains within the course of employment.' 2 A. Larson & L. Larson, Workers' Compensation Law (1998) §31.21, p. 6-26." *Id.* at 1257. Kish was injured in the midst of her attempt to procure a medical necessity for her patient; the trip taken to accomplish this goal was the very work for which employer employed Kish, even if the method did not comply with the employer's unwritten policy. The court stated a contrary result would reduce the distinction between "ultimate work" and "method" to an absurdity. *Id*.

The employer also argued because Kish was injured while mailing a personal greeting card, rather than driving to obtain a medical necessity for her patient, the injury did not occur within the course of employment. *Kish* found the employer's contention unavailing, but acknowledged there is no bright line test to distinguish activities that are incidental to employment from those that constitute a substantial deviation.

> In deciding whether a substantial deviation has occurred, the trier is entitled to weigh a variety of factors, including the time, place, and extent of the deviation; as well as 'what duties were required of the employee and the conditions surrounding the performance of his work. . . .'
> . . . .
>
> For present purposes, it suffices to explain that the term of art 'incidental' embraces two very different kinds of deviations: (1) a minor deviation that is 'so small as to be disregarded as insubstantial'; and (2) the substantial deviation is deemed to be 'incidental to [employment]" because the employer has acquiesced to it. If a deviation is so small as to be disregarded as insubstantial, the lack of acquiescence is immaterial.

Id. at 1258. (Citations omitted.) *Kish* concluded absence of permission was not fatal to Kish's claim because the deviation was so minor it could be disregarded as insubstantial. *Id.*.

In *Zahner v. Pathmark Stores, Inc.*, 729 A.2d 478 (New Jersey 1999), Zahner slipped and fell after working her shift at a supermarket, clocking out, and remaining in the store to shop for her mother. Zahner appealed an order basing claim dismissal on a finding her injury arose in the course of but did not arise out of employment. New Jersey conducts a two part analysis to determine compensability. "Arising out of" refers to causal origin, and "course of employment" refers to the accident's time, place, and circumstances in relation to the employment. Although

the test is independently applied and met, *Zahner* reminded the basic compensation coverage concept is "unitary, not dual," and best expressed in the term "work connection." *Id.* at 482. (Citations omitted.) For an injury to arise "out of" the employment the risk of the accident must have been contemplated by a reasonable person when entering the employment, as incidental to the employment. In other words, the risk is incidental to the employment when connected to what the employee has to do to fulfill his service contract. The "but for" test is applied to determine whether it is probably more true than not the injury would have occurred during the time and place of employment rather than somewhere else. *Id.* at 483. "Accidents which are a result of 'distinctly associated' or 'neutral' risks are compensable while accidents resulting from 'personal' risks are non-compensable. 'Personal' risks include those risks which arise from the 'personal proclivities' of the employee and have a 'minimal' connection to the employment." *Id.* (Citations omitted.)

Zahner found Zahner's injury occurred in the course of her employment because she never left the store from the time she clocked out to the time she slipped and fell. She was on the employer's premises throughout the entire incident, and the employer had control over the area where she was injured. She fell in an area where she, as well as any customer, was permitted. It was also found, however, Zahner's injury did not arise out of her employment with employer. Zahner chose to remain on employer's premises to shop for her mother. The slip and fall did not arise out of a risk connected to Zahner's job as a cashier for her employer; Zahner's "personal proclivities" gave rise to the harm she incurred as a result of the slip and fall at the employer's premises and, therefore, she was unable to establish her injuries were caused by an accident both arising out of and in the course of her employment and dismissal was proper. *Id.* at 484.

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 the claimant's injury while stopping at a drive-through coffee barista was not compensable. Marotta, 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 Marotta twisted and reached for money in his back pocket, he felt a "pop" and suffered herniated discs, which required surgery and

produced disability. He filed for benefits, which the carrier disputed. At hearing, the administrative law judge determined Marotta's injuries were compensable and awarded benefits. The employer appealed, and the Workers' Compensation Board reversed, finding Marotta 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 Marotta'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 Marotta'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 Cooper, 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, Cooper, 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, he discovered the instructor with whom he needed to speak was teaching a class and could not be disturbed. Cooper decided to take a "coffee break" and return to the union hall later to speak with the instructor. Cooper 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, Cooper 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 Cooper 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, Cooper "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 Cooper 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 Cooper'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 Cooper 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 Cooper's injuries were not compensable merely because he 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 Cooper credible, and the appellate court held coffee breaks for off-site employees are equivalent to those of on-site workers, *Cooper* decided such "minor deviations" from employment permit recovery of workers' compensation benefits. The trial court's award was affirmed. *Id*. at 41.

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, . . . functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded.
>
> **AS 23.30.110. Procedure on claims**. . . .
> . . . .

> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

The Alaska Workers' Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), addressed the board's authority to order an "SIME" under AS 23.30.095(k) and AS 23.30.110(g). With regard to §095(k), the AWCAC referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8:

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Bah* at 4. The Commission also outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it.

Id. at 5. Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id.* When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between Employee's physician and an EME?

2) Is the dispute significant? and

3) Will an SIME physician's opinion assist the board in resolving the disputes?

Deal v. Municipality of Anchorage (ATU), AWCB Decision No. 97-0165 at 3 (July 23, 1997). *See also, Schmidt v. Beeson Plumbing and Heating*, AWCB Decision No. 91-0128 (May 2, 1991). Accordingly, an SIME pursuant to §095(k) may be ordered when there is a medical dispute, or under §110(g) when there is a significant gap in the medical or scientific evidence. *Holland v. Fluor Alaska, Inc.*, AWCB Decision No. 04-0242 (October 12, 2004).

The board has broad discretion to order an SIME. It has discretion to order the specialty to conduct an SIME, and to empanel one or several doctors for an SIME if necessary to ensure "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost" to Employer. *Mazurenko v. Chugach Alutiiq JV*, AWCB Case No. 11-0047 (April 19, 2011); *Lindeke v. Anchorage Grace Christian School*, AWCB Decision No. 11-0040 (April 8, 2011); *Childers v. Anchorage School District*, AWCB Decision No. 12-0119 (July 3, 2012).

> **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 fact finders' minds 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*.

"It is well-established in workers' compensation law 'that a preexisting disease or infirmity does not disqualify a claim under the work-connection requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought.'" *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 315 (Alaska 1981) *quoting Thornton v. Alaska Workmen's Compensation Board*, 411 P.2d 209, 210 (Alaska 1966).

> **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 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

Considering the broad procedural discretion granted in AS 23.30.135(a), wide discretion exists under AS 23.30.095(k) and AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME or other medical evaluation to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties." *Hanson v.*

Municipality of Anchorage, AWCB Decision No. 10-0175 (October 29, 2010) at 18; *Young v. Brown Jug, Inc.*, AWCB Decision No. 02-0223 (October 28, 2002).

AS 23.30.155. Payment of Compensation.

. . . .

(h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

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 recreational league activities sponsored by the employer, unless participation is required as a condition of employment, and activities of a personal nature away from employer-provided facilities;

. . . .

(24) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury; "injury" includes breakage or damage to eyeglasses, hearing aids, dentures, or any prosthetic devices that function as part of the body and further includes an injury caused by the wilful act of a third person directed against an employee because of the employment. . . .

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues. . . .

(c) After the prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made between the parties or their representatives. The summary will limit the issues for

> hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

The board's authority to hear and determine questions in respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties." *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981). The board has discretion to raise questions on its own motion with sufficient notice to the parties. *Summers v. Korobkin Constr.*, 814 P.2d 1369, 1372 n. 6 (Alaska 1991). But, absent findings of "unusual and extenuating circumstances," the board is limited to deciding the issues delineated in the prehearing conference, and, when such "unusual and extenuating circumstances" require the board to address other issues, sufficient notice must be given to the parties that the board will address these issues. *Alcan Electric v. Hope*, AWCAC Decision No. 112, at 5 (July 1, 2009).

> **8 AAC 45.120. Evidence.**
> . . . .
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> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

ANALYSIS

Should the parties brief whether an SIME should be ordered to address gaps in the medical evidence?

There is an old adage: "Bad facts make bad law." When presented with compelling and unusual circumstances, or the fear a bad actor might get away with something, fact-finders are forced to make legal decisions they find just under the circumstances. Fact-finders sometimes get creative with the law and how it is applied to "bad facts." In an effort to do justice, they make rules and interpret things in ways that do not always make sense for later cases. "Bad law" is created when the decision's unintended side effect is bad legal precedent. *Rogers & Babler*.

To determine compensability, the three step presumption analysis must be applied to Employee's claim. *Meek*. Employee is able to attach the presumption of compensability. Her testimony she

was making a minor deviation close to the end of her shift when she obtained a cart and went to the store's pet zone to get personal items and while attempting to get a kitty litter container off the shelf, lost her grip and the kitty litter fell, broke her leg and injured her knee before she could clock out establishes a "preliminary link" between her injury and the employment. *Tolbert*.

Because Employee has established the link, Employer must overcome the presumption at the second stage by presenting substantial evidence demonstrating a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom*. Employer is able to rebut the presumption with Jordan's testimony Employer has an established and enforced prohibition against employees shopping while on the clock and because Employee selected the time she was off the clock on December 5, 2014, as 4:47 p.m., she was no longer working when she was injured. Employee's evidence is not weighed against Employer's rebuttal evidence; therefore, credibility is not examined at the second stage of the presumption analysis. *Wolfer*. However, at the third stage of the presumption analysis, credibility must be weighed and if the evidence is conflicting or susceptible to contrary conclusions, a finding regarding the weight to be given a witness's testimony is conclusive. *Runstrom;* AS 23.30.122.

The instant matter is a case of first impression. The facts are unusual and could be interpreted in several different ways. Both witnesses' credibility can be questioned. The panel is split and undecided on which witness to find credible and whose testimony to give the greatest weight.

This case involves compelling circumstances in which both Employer and Employee were bad actors. Employer has a firm policy prohibiting employees on the clock from shopping. Employer does, however, encourage employees to shop, wants them to shop at the store where they work, and gives them a discount, which serves as an incentive for its employees to shop. Employee was aware of Employer's associate purchase policy, which provides employees can make purchases only during meal periods, breaks, or off-duty hours. Employee testified she has seen supervisors and other employees shop while on the clock and was not aware anyone was ever disciplined. Not all panel members have found Employee's testimony credible or worthy of weight. AS 23.30.122; *Smith*.

When cashiers are relieved from their register before their shift ends, Employer expects employees to do "zone work," which means they will straighten product on shelves and provide customer service until it is their scheduled time to clock out. If an employee were to instead shop with time left on their shift, or stood at the time clock waiting for time to pass and their scheduled shift to conclude, Employer would consider this "theft of time." If Employer is aware of employees engaging in "theft of time," Jordan testified Employer administers discipline up to and including dismissal. Not all panel members have found Jordan's testimony credible or worthy of weight. AS 23.30.122; *Smith*.

On December 5, 2014, Employee was relieved from her register at 4:47 p.m. She had 13 minutes left on her shift. Instead of clocking out at the time clock near the registers at the customer service counter, Employee decided to get a shopping cart and shop on her way to the time clock at the back of the store where her personal belongings were in her locker. She could have easily clocked out at the time clock near the registers. However, Employer frowns upon employees who clock out early. Instead of working the remaining 13 minutes of her shift, Employee choose to take the cart to the pet zone, place cat food and kitty litter in the cart, and then take the cart to the back of the store. She planned to leave it near the restrooms close to the employee locker room and time clocks, clock out, get her belongings from her locker, and then proceed to a register to check out. Unfortunately, her plan was foiled when she was unable to maintain a grip on the heavy kitty litter container located 70 inches off the ground. Employee did not want the container to fall on the floor and make a mess so she broke the container's fall with her knee and leg. A reasonable mind can conclude Employee wanted to avoid a mess for several reasons, including she is a dedicated Employee and did not want to create a mess in the store, but also because she did not want it to be discovered she was shopping before she clocked out. *Rogers & Babler*.

The plot thickens. Upon receiving notice Employee was injured, two assistant store managers, Dawdy and J.J., made a decision regarding how Employee would be moved from the pet zone. Dawdy and J.J. placed Employee on a cart, took her to the locker room so she could get her belongings from her locker, and then wheeled her out of the store to J.J.'s car. Dawdy and J.J. decided J.J. would transport Employee to an emergency room. Employer treated Employee as an

"employee" even though it seems to contend she was off the clock tending to personal business when the accident occurred. Had Employee been treated as a customer, she would not have been moved and a call would have been made to 911, Employee's leg and knee would have been immobilized for transport, and she would have gone straight from Employer's store in Eagle River to Providence Hospital in Anchorage, Alaska. Instead, treating her as an employee, not a customer, J.J. took Employee to Workplace Safe for a urinalysis to have her tested for illicit drug use. Employee was unable to bear weight on her leg and knee when she attempted to get out of J.J.'s car to walk into Workplace Safe. A male stranger picked Employee up and carried her into Workplace Safe for the drug test. Instead of then taking Employee to Providence Hospital's emergency room, J.J. took Employee to a gas station where J.J. filled her car up with gas and got herself something to eat. Four hours after Employee experienced her fractured tibial plateau, she was seen by a physician.

The facts in this case become suddenly more mysterious, when Jordan contacted Employee on December 8, 2014, because Employee had not clocked out on December 5, 2014. Jordan testified she routinely contacts employees who were unable to clock out to ask the time they completed their work. She records their "clock out" time for payroll. Jordan contacted Employee because Jordan "needed to know what time she left." After speaking to Employee, Jordan recorded Employee's December 5, 2014 "Clock Out" time as "16:47." Jordan signed an "hours adjustment form" on December 8, 2014; Dawdy signed it on December 10, 2014. Employee signed it seven months later on July 10, 2015, upon returning to work and thereby acknowledged she reviewed all information on the form, it was accurate, and she had been informed and agreed to the adjustment.

Employer's position is Employee's injury did not arise out of and in the course of her employment with Employer because Employee admitted she was no longer working on December 5, 2014, after 4:47 p.m. In the alternative, Employer contends if Employee was on the clock, her activity in violation of Employers' prohibition against employees shopping while on is a deviation from employment. Employee testified it was not her intention to clock out until after she completed gathering the items for her cat and to then pay for them after she clocked out. Employee could have told Jordan her shift ended at 5:00 p.m. and to record her clock out time as

5:00 p.m. If Jordan accurately recorded the clock out time Employee provided her, it can be concluded Employee knew she was violating Employer's policy which prohibits Employee from shopping while on duty.

Based upon these facts alone, the panel could make a determination Employee's claim is not compensable because she was injured while violating company rules. There is substantial case law supporting denial of Employee's claim. *Goodyear Aircraft Corp.*; *Foster*; *Wilson*; *Buehner; Martin*; *Carrick*; *Zahner*. This conclusion would require a majority to find Jordan credible.

Employee asserts her personal shopping was a minor deviation, which did not remove her injury from arising out of and in the course of her employer. Despite Employer's prohibition against shopping while on the clock, Employee maintains employees and supervisors regularly shop while on the clock, and Employer is aware of and condones this shopping.

Based upon these facts alone, a determination could be made Employee's injury arose out of and in the course of employment and her claim is compensable if the panel were to find it is a common practice for Employer's employees to conduct personal shopping while on the clock. If it were found Employee's shopping experience was reasonably foreseeable and incidental to her employment, Employee may be entitled to compensation. There is substantial case law supporting compensability of Employee's claim. *Gonzales*; *Sears*; *Redfield*; *Maheux*; *Daniels*; *Wilson*; *Finnegan*; *Briley*; *Kish*; *Marotta*. This conclusion would require a majority to find Employee credible.

Either of these determinations would be made at the third stage of the presumption analysis, which requires credibility determinations. However, this case's facts are more complex and leave panel members undecided. This case has unusual, convoluted, and ambiguous facts. Employee's injury raises questions regarding whether Employer's decision to move Employee, transport her, expect her to walk into Workplace Safe, and delay her medical treatment for up to four hours contributed to the extent and seriousness of Employee's fracture, thus making her injury compensable under Alaska law.

Dr. Schweiger reviewed the CT scan and x-ray from Providence on December 9, 2014, and determined Employee had a significantly depressed and widely displaced lateral tibial plateau fracture. Dr. Schweiger performed a complex ORIF to surgically repair Employee's right tibial plateau fracture and openly repair her lateral meniscus on December 10, 2014. When Employee returned to Dr. Schweiger on January 26, 2016, for her one-year follow-up appointment, she reported she had increasing knee pain the past "couple of months." Dr. Schweiger noted that when he last saw Employee on July 7, 2015, she was doing quite well, "but this has been a progressive situation." Employee's range of motion was worse than it was previously and x-rays revealed collapse on the knee's lateral plateau. Dr. Schweiger concluded Employee's lateral plateau had degenerated "away" and total knee replacement was the only reasonable and necessary treatment.

Dr. Schweiger's medical records do not mention the events under Employer's control between the time Employee injured her leg and knee and when she was finally delivered to Providence Hospital's emergency department. Specifically, two assistant managers with no medical training decided to place Employee on a cart, take her to her locker, and then take her to J.J.'s car without immobilizing Employee's leg or knee. J.J. then took Employee for a drug test and expected Employee to walk in to Workplace Safe. When Employee attempted to walk on her leg and knee, the pain intensified and despite her attempts was unable to bear weight. A male stranger picked Employee up and carried her into Workplace Safe. As a practical matter, these events were irrelevant to Dr. Schweiger; he treated the conditions with which Employee presented. But they are relevant to the issues to be decided in this case.

Jordan admitted Dawdy and J.J. have neither medical training nor expertise and Employee should not have been transported by an assistant manager. Employer's assistant managers chose not to follow Employer's policy, which provides if a customer is hurt or injured, Employer's staff should not move the customer. Jordan acknowledged an ambulance should have been called. Had Employer's policy been followed, there quite likely would be no gaps in the medical evidence and the panel's unresolved questions would be answered. Employee was, however, moved by Dawdy and J.J. They transferred her from the floor to a cart and from the cart to J.J.'s vehicle. Upon arrival to the scene of an Employer-required urinalysis, Employer expected

Employee to walk into Workplace Safe. She attempted to do so but due to significant pain, was unable to bear weight. Employee was carried into Workplace Safe and after the urinalysis had to get back into J.J.'s car. The medical evidence does not address the consequences, if any, of the unrestricted movement to which Employer subjected Employee.

An SIME may be ordered when there is a significant gap in the medical evidence or a lack of understanding of the medical evidence, and an independent medical examiner's opinion will help ascertain the parties' rights. AS 23.30.095(k); AS 23.30.110(g); *Bah*. *See also, Brown v. ASRC Energy* Services, AWCB Decision No. 14-0129 (September 24, 2014). Fact-finders have broad procedural discretion to make investigations, including ordering independent medical examinations. AS 23.30.110(g); AS 23.30.135(a); and AS 23.30.155(h); *Deal*; *Harvey*; *Childers*. Any available evidence may be considered when deciding whether to order an SIME to assist in investigating and deciding issues in contested claims to properly protect all parties rights. *Hanson*; *Young*; *Mazurenko*.

More medical evidence is needed to properly protect all parties' rights and assist panel members to render a decision regarding compensability. Further investigation is necessary to determine if the movement Employer forced upon Employee after her injury occurred aggravated or accelerated the fracture to produce the disability and need for medical treatment for which Employee seeks benefits. AS 23.30.155(h); *Burgess Construction Co.* The questions plaguing the panel are:

1) Could the movement of Employee from the floor to a cart, without stabilizing her leg or knee, have exacerbated the fracture causing it to be significantly depressed and a widely displaced lateral tibial plateau fracture?

2) Could Employer's requirement Employee engage in transfers from the store's floor to a cart, from the cart to J.J.'s car, or from J.J.'s car to Workplace Safe have exacerbated the fracture causing it to be significantly depressed and a widely displaced lateral tibial plateau fracture?

3) Could Employer's requirement Employee attempt to walk into Workplace Safe for a drug test have exacerbated the fracture causing it to be significantly depressed and a widely displaced lateral tibial plateau fracture?

4) Could Employee's work for Employer since July 9, 2015, have aggravated, accelerated, or combined with a pre-existing condition causing Employee's lateral plateau to degenerate? And, if so, is work for Employer the substantial cause of Employee's need for total knee replacement?

The obligation exists to provide a simple and inexpensive remedy with speedy and informal procedures, and to meet this end hearings may be conducted in the manner to best ascertain parties' rights. AS 23.30.001; AS 23.30.135(a). The panel on its own motion is allowed to reopen the record for additional argument, if necessary. 8 AAC 45.120(m). The hearing record will be reopened. Whether an SIME should be ordered was not an issue identified for hearing in a prehearing conference summary and although the panel has discretion to raise questions on its own motion, it cannot decide such questions without sufficient notice to the parties and an opportunity for the parties to be heard. *Summers*. This case of first impression involves complicated and convoluted facts and important legal issues. The panel is split and undecided on weight to give witness testimony and whether witnesses' testimony is credible. The panel needs further medical evidence to answer perplexing questions, the answers to which, when combined with the other evidence, will assist the fact-finders in resolving this matter. AS 23.30.135. These "unusual and extenuating circumstances," require the record to be reopened and the issue of whether an SIME is appropriate to be addressed. 8 AAC 45.120(m).

To ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to Employee at a reasonable cost to Employer, the parties shall be given an opportunity to brief and argue whether an SIME is appropriate given the medical gaps identified. The parties will be directed to simultaneously file briefs by close of business on Friday, July 8, 2016. If, in addition to briefing, any party wants oral argument limited to the SIME issue, they will be directed to request a hearing date for oral argument no later than Friday, July 1, 2016, by calling Sertram Harris and requesting the next available hearing date after July 8, 2016, convenient for all parties

and the panel members who heard this matter on April 27, 2016. Briefing and oral argument will be limited to whether it is appropriate to order an SIME to address gaps in the medical evidence raised when the factual findings can be interpreted to make a determination in favor of either party when determining if Employee's injury arose out of and in the course of her employment with Employer. No additional evidence shall be submitted. 8 AAC 45.120(m); AS 23.30.001.

CONCLUSION OF LAW

The parties should brief whether an SIME should be ordered to address gaps in the medical evidence.

ORDER

1) The April 27, 2016 hearing record is reopened for the following, limited purposes:
   a. The parties are directed to submit written briefs in conformance with the applicable briefing regulations no later than close of business on Friday, July 8, 2016.
   b. If either party wants oral argument, they are directed to request a hearing date for oral argument no later than Friday, July 1, 2016, by calling Sertram Harris and requesting the next available hearing date after July 8, 2016, convenient for all parties and the April 27, 2016 panel members who heard this matter. Oral argument, if requested, will be scheduled for a total of 60 minutes.
   c. The parties are directed to address in their briefs and in any oral argument whether an SIME is appropriate to answer the questions raised by gaps in the medical evidence when the factual findings can be interpreted to make a determination in favor of either party when determining if Employee's injury arose out of and in the course of her employment with Employer.
2) The record is reopened for only the parties' briefs and oral arguments. No further evidence can be submitted.

Dated in Anchorage, Alaska on June 15, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/S/
Janel Wright, Designated Chair

/S/
Amy Steele, Member

/S/
Rick Traini, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of 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 Patricia S. Kolb, employee / claimant v. Walmart Associates, Inc., employer; New Hampshire Insurance Co., insurer / defendants; Case No. 201419711; 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 June 15, 2016.

/s/
Vera James, Office Assistant I

CERTIFICATE OF SERVICE
The undersigned hereby certifies that on
the _15_ day of _June_____, 2016__,
a true and correct copy of this document was
mailed, First-Class U.S. Mail, postage prepaid,
to the following:

Patricia Kolb
Vicki Paddock
Joseph Kalamarides
York Risk Services Group Inc.

_____/s/_____
By: Vera James, Office Asst I