ALASKA WORKERS' COMPENSATION BOARD

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

JAMES V. STEVENS, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201518693
J. A. SPAIN & SONS, INC., Employer,	)	AWCB Decision No. 16-0098
and	)	Filed with AWCB Anchorage, Alaska On October 27, 2016
AMERICAN INTERSTATE INSURANCE COMPANY, Insurer, Defendants.	)	

James V. Steven's May 12, 2016 claim was heard on October 5, 2016 in Anchorage, Alaska. This hearing date was selected on July 7, 2016. Attorney Jonathan Hegna appeared and represented Mr. Stevens (Employee), who appeared and testified. Attorney Michael Budzinski appeared and represented J. A. Spain & Sons, Inc. and American Interstate Insurance Company (Employer). The record closed at the hearing's conclusion on October 5, 2016.

ISSUE

The facts are undisputed; the parties disagree on how the law applies to those facts. Employee contends he was injured in an automobile accident while in the course and scope of his employment. Employer contends the injury was not in the course and scope of the employment because the accident happened while Employee was travelling to work.

Was Employee injured in the course and scope of his employment?

FINDINGS OF FACT

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

1. Employee began working for Employer in July 2015 as an equipment operator/truck driver. (Employee Deposition, July 6, 2016).
2. Employer had a contract with Matanuska-Susitna Borough to provide maintenance on borough roads. The contract covered borough roads connecting to the Parks Highway extending from north of the City of Houston to near Talkeetna, but did not include the Parks Highway itself. (Employee; Employee Deposition, July 6, 2016).
3. Employer maintained a shop on Hatcher Pass Road near Palmer and a smaller shop in Willow. (Employee Deposition, July 6, 2016).
4. During the summer, Employee worked as part of a crew that graded roads, cleared brush from the right of ways, cleared culverts, mowed the shoulders of the road, and otherwise kept the roads in good repair. Employees generally worked eight hours per day during the summer. (Employee Deposition, July 6, 2016).
5. At end of the day during the summer, employees would generally park their equipment near where they were working, come back the next morning, and resume working. (Employee Deposition, July 6, 2016).
6. At the end of the summer work, employees prepared the equipment for winter work. They installed sanding beds and plows on trucks and prepared the road graders for plowing snow. (Employee Deposition, July 6, 2016).
7. During the winter, Employee operated a plow/gravel truck. Because the work was weather dependent, Employee was on call, 24 hours per day, seven days per week, and needed to be within one-half hour of the plow truck. (Employee).
8. Employee had an assigned route during the winter, but because of variation in snowfall, equipment problems, or for other reasons, he was sometimes required to plow or gravel in other areas. On some occasions, Employee was called to help with equipment maintenance at the Willow shop. (Employee Deposition, July 6, 2016).
9. Employee owned property that fronted the Parks Highway about 17 miles from his home. Employee parked his plow truck at the Parks Highway location, which Employer also used to

park other equipment. Employee was not compensated for the use of the property. (Employee Deposition, July 6, 2016).

10. During the winter, employee's pay began when he arrived at the plow truck. Some employees kept their assigned equipment at their homes, and were not required to travel to begin work. (Employee; Employee Deposition, July 6, 2016).
11. On November 28, 2015, Employee was at home when he received a call from his supervisor asking that he get his plow truck and begin sanding. He left his home and began to drive to the plow truck via the Parks Highway, the only available route. There had been an ice storm, and the roads were extremely slick; Employee stated they were the worst conditions he had seen that winter. As Employee was driving, a four wheel drive pickup pulling a snowmachine trailer slid across the center line and hit him head on. Employee was injured, and one of the occupants of the other vehicle was killed. (Employee; Employee Deposition, July 6, 2016).
12. Employee had not yet reached the plow truck, so was not yet "on the clock." (Employee).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **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.
>
> **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, benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence to the contrary is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). But the presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **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;

In most cases, two related rules provide guidance in determining whether an injury while travelling to and from work is "in the course of employment." The first, the "premises rule," holds that injuries suffered on an employer's premises by an employee going to or coming from work are compensable. (*Municipality of Anchorage v. Robertson*, 35 P.3d 12, 13-14 (Alaska 2001). The second rule, the "going and coming rule," holds that injuries occurring off the employer's premises while an employee is going to or coming from work are not compensable. (*Id*.) In general, "for an employee having fixed hours and a fixed place of work, going to and coming from work is covered only on the employer's premises." 1 A. Larson, *Workers' Compensation Law* § 13.01[1] (2008) (footnotes and emphasis omitted).

Given the wide variety of possible employment relationships, neither the premises rule nor the going and coming rule fit well in all situations, and courts have recognized several exceptions. One of those exceptions is the "special errand" exception. In *R.C.A. Service Co. v. Liggett*, 394 P.2d 675 (Alaska 1964), an employee who lived in Fairbanks normally worked in Clear. His regular shift was Monday through Saturday and he resided at Clear. He would fly home Saturday after his shift and return Monday morning before his shift began. At his employer's request he worked on Christmas, a Sunday, and arranged on his own to fly home for Christmas dinner after his shift was complete. He was killed when the plane crashed. The Court recognized the "special errand" exception to the going and coming rule and explained that the exception applies when the journey the journey itself is an important part of what the employee is compensated for. One indication that the travel is in the course of employment is that the employer pays the cost. In *Liggett*, the Court held the exception did not apply because the employee had paid for the flight, and the purpose of the flight was personal, to return home for Christmas dinner.

The Court again addressed the special errand exception in *State v. Johns*, 422.P.2d 855 (Alaska 1967). In *Johns*, the employee had been temporarily reassigned from his normal work location to a work camp. There were no accommodations available at the work camp, and employee was chosen because he lived closer to the work camp than other employees. The employee was to commute using his own automobile, but the employer was to provide gasoline, and the employee was to be paid for half of the travel time. He was injured during the commute. The Court held the special errand exception applied, noting the location was "rather remote," the commute was in the employer's interest, and the employer was bearing at least part of the cost of the travel. The court explained the exception applied when:

> an employee, having identifiable time and space limits on his employment, makes and off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself. *Id*. at 860. (footnote omitted).

In some cases, courts have applied a version of the special errand exception to "on call" employees. In *Paige v. City of Rahway*, 376 A.2d 1226 (New Jersey, 1977), the employee was a supervisor at a water plant who worked a regular shift but was on call when at home. The employee was required to provide contact information if he left his home for more than a few minutes. On arriving home one evening after his regular shift when he would have been on call, the employee was assaulted and severely injured. The court explained the rationale of the going and coming rule was that the employment relationship was suspended when an employee left work at the day. However, because the employee's on call status obligated him to the employer after the end of the normal work day, and because the employer received a substantial benefit from the on call arrangement, the court held the assault arose out of the employment.

In *Nehring v. Minnesota Mining and Mfg. Co.*, 258 N.W. 307 (Minnesota 1935), an electrician who worked regular hours remained on call for emergencies. While at home, the employee received a call to come to the factory. On the way he was killed in an automobile collision. The court held the injury compensable, explaining that if an employee is called to work while off duty, he is on a special errand from the time he leaves his home until the time he returns.

In *Johnson v. Fairbanks Clinic*, 647. P.2d 592 (Alaska 1982), a physician worked regular hours at a clinic. On a long weekend when he was not scheduled to work, he was at his vacation home, about 60 miles away. Although he was not formally on-call, the normal practice was to have pre-surgery consultations with patients the day before their surgery. Because a patient was scheduled for surgery on the following Monday, the doctor drove to the clinic for the consultation, and on the way was involved in a serious collision as the result of extremely icy roads. The Court held the injury was compensable. Although the Court's analysis is framed in the context of the special errand exception, it found that making the trip outside of normal hours, over a riskier than normal route at the implied request of the employer, warranted an exception to the going and coming rule.

Another exception, the "special hazard" exception, applies when an employee's normal route to work entails a greater risk than the risks common to the public. In *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286 (Alaska 1991), the employer required employees to park off-

premises. Through an informal agreement, the employees used a parking lot across 36th Avenue in Anchorage. While crossing 36th Avenue mid-block, the employee was injured when she slipped and fell on the icy street. Although it had not been adopted by the Supreme Court, the board considered the special hazard exception, but concluded it did not apply for two reasons; first, because the employer did not require employee to park in the lot, and second because the general public was exposed to icy streets during the winter in Anchorage they were not a special hazard. The Supreme Court reversed and remanded to the board for additional findings. The court explained the rule applied when an employee was on the only or normal route to work and the route posed risks not faced by the general public. The court noted the rule might apply in the case because the general public typically the hotel parking lot, and did not have to cross an icy street on foot.

The Court again addressed the special hazard exception in *Seville v. Holland America Line Westours, Inc.*, 977 P.2d 103, 104 (Alaska 1999). In *Seville*, the employee was injured in a fall on an icy public sidewalk adjoining the employer's premises. A municipal law required the employer to remove ice and snow from the sidewalk. The board denied the employee's claim on the grounds the public sidewalk was not part of the employer's premises, and it rejected the special hazard exception because the risk to the employee was no greater than the risk to the general public. The Supreme Court agreed that despite the employer's obligation to maintain it, the public sidewalk was not part of the employer's premises, but it held the special hazard exception did apply. The Court explained the rationale for the exception was that a claimant has been subjected to a particular risk because of his employment. *Seville* at 109. (citing Larson § 15.15). The Court held that the employer's legal duty to control a specific hazard adjacent to its premises supplied the necessary "work-relatedness," despite the fact the general public was exposed to the same hazard.

Another exception to the premises and the going and coming rules is the "remote site" exception. The Alaska Supreme Court articulated the rationale for the exception in *Andersen v. Employer's Liability Assurance Corp.*, 498 P.2d 288,290 (Alaska 1972):

> Although it is often possible for a resident employee in a civilized community to leave his work and residential premises to pursue an entirely personal whim and thereby remove himself from work-connected coverage, the worker at a remote

> area may not so easily leave his job site behind. The isolation and the remote nature of his working environment is an all-encompassing condition of his employment. The remote site worker is required as a condition of his employment to do all of his eating, sleeping and socializing on the work premises. Activities normally totally divorced from his work routine then become a part of the working conditions to which he is subjected.

Typically the remote site exception applies to injuries occurring during "personal time" while at a remote site. *See, e.g., Hayson v. Chugach Management Services, Inc.*, AWCB Decision No. 08-0084 (May 9, 2008). However, it may also be applied to off-site activities that are reasonably foreseeable given the remote location. In *M-K Rivers v. Shleifman*, 599. P.2d 132 (Alaska 1979), the Court held the exception applied to an employee who had left the remote site to deposit his paycheck at a bank in a nearby city. The court held the trip was incident to the employment, and the employee's injury was compensable.

ANALYSIS

Was Employee injured in the course and scope of his employment?

Because the facts are undisputed, this case presents only a legal question, and the presumption analysis of AS 23.30.120 need not be applied. *Rockney.*

In cases where an employee works fixed hours at fixed place of work, the premises and going and coming rules provide a bright line – injuries on the employer's premises are compensable, and those occurring off-premises are not. The premises line provides the distinction between work-related and personal activities. In some cases, however, injuries occurring off the premises are sufficiently work-related to be covered under the special errand, special hazard, on-call, or remote site exceptions.

Although Employee occasionally worked at Employer's Willow shop, that was not his destination the day he was injured. Had the injury not occurred, he would have driven to the plow truck, graveled the roads on his route, and returned home without ever going to the Employer's premises. Had Employer leased the property where the truck was parked from Employee, the result might be different, but merely parking the truck on the property does not convert it in to the Employer's premises. If that was the case, the homes of the employees who parked plow trucks at their homes would also be the Employer's premises. During the winter,

Employee did not have a fixed place of work. Similarly, because he was on call, he did not have fixed hours.

In this case it is questionable whether the going and coming rule applies because there is no fixed place of work. If it does apply the question becomes whether Employee falls within the special errand or on call exceptions. However, if the going and coming rule does not apply, the question is essentially the same – was employee's travel sufficiently work-related as to be considered to be part of his employment.

In *Paige,* the court looked at two factors in determining the injury arose out of the employment. First, the employee's on call status obligated him to the employer after the end of the normal work day, and, second, the employer received a substantial benefit from the on call arrangement. In *Johnson* the court held that travel to work outside of normal hours, over a riskier than normal route at the implied request of the employer, warranted an exception to the going and coming rule. Here, Employee's on call status significantly limited his personal activities. He was on call twenty four hours per day, seven days per week, and was expected to be able to reach the plow truck within one-half hour. The nature of the work meant Employee would be called to work when the roads were riskier than normal as a result of snow or ice. Additionally, Employee was significantly obligated to Employer even when he was not working as he was on call 24 hours per day, every day and needed to respond within a short time. As a result, his activities were restricted when not working. And the on call status substantially benefited Employer. Had it not used on call employees, Employer would have been required to pay employees wait on standby until the weather conditions necessitated plowing or graveling. Employee's travel was sufficiently work related to be considered to have arisen out of his employment with Employer.

CONCLUSION OF LAW

Employee was injured in the course and scope of his employment.

ORDER

1) Employee's disability and need for medical treatment arose out of and in the course of his employment with Employer and is a compensable injury.

3) The parties are directed to attempt to resolve any remaining issues. If unresolved issues remain, any party may seek relief through a prehearing conference on an existing claim, a new claim or a petition.

4) Jurisdiction is reserved over any claims for specific benefits, which will be heard in a subsequent hearing upon due notice.

Dated in Anchorage, Alaska on October 27, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
David Ellis, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order in the matter of JAMES V. STEVENS, employee / claimant; v. J. A. SPAIN & SONS, INC., employer; AMERICAN INTERSTATE INSURANCE COMPANY, insurer / defendants; Case No. 201518693; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on October 27, 2016.

/s/
Elizabeth Pleitez, Office Assistant