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.	FINAL DECISION AND ORDER AWCB Case No. 201419711 AWCB Decision No. 16-0099 Filed with AWCB Anchorage, Alaska on October 28, 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. *Kolb v. Walmart Associates, Inc.*, AWCB Decision No. 16-0043 (June 15, 2016) (*Kolb* I) requested supplemental briefing to address whether a second independent medical evaluation (SIME) is appropriate to answer the questions raised when determining if Employee's injury arose out of and in the course of her employment with Employer. The record closed when the panel deliberated on October 17, 2016.

ISSUES

Employee contends gaps in the medical evidence could be filled by an SIME ordered under AS 23.30.110(g). Employee contends if the evidence creates questions which cannot be answered, ordering an SIME permits experts to supply the answers. Whether Employer's delay in getting Employee to the emergency room made her broken leg worse is a gap in the medical evidence appropriate for an SIME ordered under AS 23.30.110(g).

Employer contends if the board was unable to determine if Employee's injury arose out of and in the course of her employment based upon the evidence presented at hearing, then Employee failed to prove her claim by a preponderance of the evidence. Employer contends Employee's claim must be denied, and Employee should not be given an additional opportunity to formulate a new theory of Employer's liability not put forth at hearing, or develop additional medical evidence. Employer contends an SIME ordered under AS 23.30.110(g) is simply a mechanism to assist Employee to meet the burden of proof she failed to meet at hearing. Employer contends it is legal error to order an SIME.

1) **Shall an SIME be ordered?**

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, and was not enough to remove her injury from arising out of and in the course of her employment. Further, Employee contends 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.

2) **Did Employee's injury arise out of and in the course of her employment with Employer?**

Employee contends her injury arose out of and in the course of her employment with Employer and she is entitled to workers' compensation benefits. As her attorney assisted her to obtain these benefits, Employee contends she is entitled to an attorney fees and cost award.

Employer contends Employee's injury did not arise out of and in the course of her employment with Employer, and Employee is not entitled to workers' compensation benefits. Therefore, there is not benefit upon which to base an attorney fee and cost award and Employee's claims should be denied.

3) **Is Employee entitled to attorney fees or costs?**

FINDINGS OF FACT

Kolb I's factual findings are adopted and those relevant to the issues being decided are reiterated. 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 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 was oriented and aware of Employer's Associate Purchase Policy. In January 2014, when Employee became a cashier, the policy was presented to her again. (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. Employee testified most of Employer's employees shop while 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. (Deposition of Patricia Kolb, December 22, 2015; Kolb.)

6) On December 4, 2014, Employee shopped and made purchases 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 percent discount 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 make her purchases. On her way to clock out and get her belongings from her locker, 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 off the shelf, Employee used her knee and leg to stop it from crashing and

spilling all over the floor. 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 an 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 Employer through 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 completed her shift, but did not clock out when she completed her day's work. (Deposition of Patricia Kolb, December 22, 2015; 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, 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, 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) 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. When employees shop while on the clock, Employer considers the shopping "theft of time." Jordan stated when Employer discovers employees shopping during working hours, while on the clock, the employees are disciplined. She stated she is sure people shop while on the clock, but added if Employer does not know an employee is breaking the policy, the employee cannot be disciplined. (Jordan.)

18) Employer's employees are encouraged to shop and make purchases at Employer's stores and store management desires its employees to make purchases at the store where they work because management's bonuses are tied to the store's sales. (*Id.*)

19) Employees and management clock out at the time clock nearest where they store their personal items during work. Jordan stated to clock out she, like Employee, goes to the back of the store where her belongings are stored in her locker. (*Id.*)

20) 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." (Jordan.)

21) 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.)

22) 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.)

23) 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.)

24) 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.)

25) 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.)

26) 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, authored by: jkbufal, January 15, 2015.)

27) On January 15, 2015, Employer notified Employee her claim against Employer's general liability policy was denied because the kitty litter was in her care, custody, and control 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.)

28) 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.)

29) 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.)

30) On March 23, 2015, Employee filed a workers' compensation claim for temporary disability benefits from December 2014 through April 2015, medical costs, a compensation rate adjustment, and a finding of unfair or frivolous controversion. (Claim, March 20, 2015.)

31) 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.)

32) 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.)

33) 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.)

34) On July 9, 2015, Employee returned to work for Employer. (Kolb Deposition, December 22, 2015.)

35) 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 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.)

36) Employee incurred the following medical expenses to treat her December 5, 2014 injury:

Providence Emergency Medicine	DOS: 12/5/2014-12/6/2014	$4,739.77
Providence Pre-Admission Testing	DOS: 12/9/2014	$530.00
Providence Services	DOS: 12/10/2014 – 12/11/2014	$46,549.26
Providence Anchorage Anesthesia	DOS: 12/10/2014	$2,240.00
Alaska Physical Therapy Specialists	DOS: 3/30/2015	$80.00
Orthopedic Physicians Anchorage	DOS: 12/9/2014 – 7/7/2015	$13,905.38

(Employee's Notice of Filing, February 11, 2016.)

37) Alaska Emergency Medicine Associates and Alaska Radiology Associates sent Employee's outstanding bills to Cornerstone Credit Services, LLC. The total balance due these providers, with interest, is $2,755.09. (Letter from Cornerstone Credit Services, August 16, 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.)

40) *Kolb I* requested supplemental briefing from the parties to address whether an SIME should be ordered to address a gap in the medical evidence. Specifically, whether the movement Employer forced upon Employee after her injury occurred aggravated or accelerated her fracture. Employer objected to an SIME and contended *Kolb I* demonstrated Employee did not meet her burden to prove by a preponderance of the evidence her injury arose out of and in the course of her employment. Employee contended no one knows the effect Employee's transportation by Employer to Workplace Safe for a drug test and then to the emergency room had on Employee's broken leg and an evaluation by a board appointed physician would provide important evidence to answer these questions, which pose a gap in the medical evidence. Employee did not oppose an SIME and contended the board's discretion is vast when deciding whether or not to order one. (Employer's Supplemental Brief Ordered by AWCB Interlocutory Decision 16-0043, July 8, 2016; Employee's Memorandum in Support of a Board-Ordered SIME, July 8, 2016.)

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.

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.
>
> 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:

> 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). . . .
>
> 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.
>
> 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. . . .
>
> 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 *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.

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*.
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> . . . .
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> 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 *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.* 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.

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.

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. . . .'
> . . . .
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> 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 *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.

> **AS 23.30.110. Procedure on claims**. . . .
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> (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*.

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. *See also, Holland v. Fluor Alaska, Inc.*, AWCB Decision No. 04-0242 (October 12, 2004);

> **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
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> (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*.

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

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

> **AS 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries. . . .

Attorney's fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging,* 787 P.2d 103 (Alaska 1990). In workers' compensation cases, "the objective is to make attorney fee awards both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers." *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 973 (Alaska 1986).

> **AS 23.30.395. Definitions**. In this chapter, ...
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> > (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;
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> > . . . .
> >
> > (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. . . .

"Purchase" is "the transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration." Black's Law Dictionary, Abridged Fifth Edition. "Purchase" means to "acquire by the payment of money or its equivalent; to buy something." McMillan Dictionary, 2016.

"Shopping" is "to seek or examine goods, property, etc., offered for sale" or "to look for something that you want to buy." *Id*.

ANALYSIS

1) Shall an SIME be ordered?

Upon initially considering and reviewing the evidence the panel was split and undecided at the presumption's third stage when determining whether a preponderance of the evidence proved Employee's injury arose out of and in the course of her employment with Employer. However, this split did not mean Employee failed to meet her burden of proof. It simply meant the panel did not have a meeting of the minds and were undecided. A panel member believed additional medical evidence may assist in determining if Employee's injury arose out of and in the course of her employment with Employer and wanted to know 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.

A medical dispute does not exist. *Smith*. There is no gap in the medical or scientific evidence that bars a determination on whether Employee's injury arose out of or in the course of her employment. *Holland.* Given the parties' arguments and upon further reflection, an SIME will not assist to resolve the parties' disputes. *Bah; Deal*. An SIME will not be ordered.

2) Did Employee's injury arise out of and in the course of her employment with Employer?

To determine compensability, the three step presumption analysis must be applied to Employee's claim. *Meek.* Employee makes a "preliminary link" and attaches the presumption of compensability with her testimony she was making a minor deviation close to her shift's end when she obtained a cart 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. *Tolbert*.

Because Employee 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 rebuts the presumption with Jordan's testimony Employer has an established and enforced prohibition against employees "shopping" while on the clock and because Employee agreed she was off the clock on December 5, 2014, at 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.

Employer's written policy, contrary to Jordan's testimony, permits employees to make "purchases" only during meal periods, breaks, or off-duty hours. Employer's policy also

provides merchandise cannot be "sold" to anyone unless the store is open for business. Jordan's testimony Employer prohibits employees from "shopping" while on the clock is not credible for several reasons. First, there is a distinct difference between making a purchase, which is obtaining something by paying for it with money, and shopping, which is looking at goods, comparing them, and deciding which, if any, will be purchased. Jordan's testimony Employer prohibits employees from "shopping" and Jordan's reliance on Employer's associate purchase policy to state Employee's injury did not arise out of and in the course of her employment with Employer is not credible and given no weight. AS 23.30.122; *Smith*. Jordan's testimony Employer prohibits employees from "shopping" is further undercut and entitled to no weight because Employer encourages its employees to shop and then purchase items from Employer at the store where the employees work. *Id.* Employer gives its employees a discount, which serves as an incentive for its employees to shop and make purchases from Employer. Employee was aware of Employer's associate purchase policy. It was not her intention to violate the policy. Employee, like Jordan, clocks out at the time clock near lockers provided for Employer's employees. To avoid going all the way to the back of the store, only to come back to the front to get a cart, Employee got a cart near her register, and intended to gather two items accessible between her register and the time clock nearest her locker. After clocking out, Employee intended to make her purchases. She had no intention of making her purchases prior to clocking out. Her intent was to make her purchase pursuant to Employer's associate purchase policy when she was off-duty. Employee stated "shopping" while on the clock is a common practice of both Employer's employees and its supervisors. Employee's testimony is credible and given greater weight than Jordan's testimony. *Id*.

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, Jordan testified 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. Jordan's characterization of "theft of time" is not credible or worthy of weight. AS 23.30.122; *Smith*. Jordan admitted she, herself, does not

clock out at the time clock nearest her when her shift ends, which would also appear to violate Employer's policy, as the policy was stated by Jordan. She stated she, instead, goes to the time clock at the back of the store near her locker. Employer does not have a policy which requires its employees to clock out at the time clock they are closest to when their shift ends.

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 on her way to the time clock at the back of the store where her personal belongings were in her locker, pick up cat food and a container of kitty litter. According to Employee's credible testimony, this is a routine pattern and practice of employees and management. AS 23.30.122; *Smith; Rogers & Babler*. Employee planned to leave the cart 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 with her items to make her purchase. Employee was in compliance with Employer's written associate "purchase" policy when she was injured. A reasonable mind can conclude Employee tried to stop the kitty litter from falling because as a dedicated employee she wanted to avoid a mess, thereby benefiting Employer. *Rogers & Babler; M-K Rivers.* .

Employer also contends Employee's injury did not arise out of or in the course of her employment because Employee admitted she was no longer working on December 5, 2014, after 4:47 p.m. But Employer treated Employee post-injury like an employee and not like a customer. Had it treated her like a customer, Dawdy or J.J. would have called 911 and relinquished Employee's control to medical professionals. Instead, Employer's supervisory agents retained complete control over Employee until delivering her to the emergency room. Though Employee signed a form months later saying she had clocked out at "16:47" for payroll purposes, in reality she was still under Employer's control for four hours thereafter. In essence, Employee was still "on the clock" until Employer's agents dropped her off at the emergency room. Employee testified it was not her intention to clock out until after she completed gathering two items for her cat and paying for them after she clocked out. Employee's testimony is credible. AS 23.30.122; *Smith*. Employer's argument is without merit.

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 making "purchases" while on the clock, Employee maintains employees and supervisors regularly shop while on the clock, and Employer is aware of and condones this shopping. Employee is credible in her description of what occurs in Employer's workplace. While employees benefit from an Employer provided discount, Employer also incentivizes and encourages employees to shop. Employer is without a policy requiring employees to clock out at the nearest time clock when their shift ends. It is therefore foreseeable employees will gather items to purchase when moving from their duty station to the time clock at the back of the store near Employer provided lockers, clock out, collect their personal belongings, and proceed to a register to make their purchases. *Rogers & Babler*. Employer's business philosophy encourages employees to shop and make purchases at the store where they work. Management bonuses are tied to sales. Employee's "shopping" had a strong business connection that benefited Employer and her store's management, and is contemplated by Employer. Employer's associate purchase policy prohibits employees from paying for items while on the clock; it does not dictate employees must clock out at the closest time clock when employees' shifts end. Employee, after leaving her register did not immediately leave her status as an employee on duty. *Witmer*. The form she signed months later retroactively stating she "clocked out" at "16:47" for bookkeeping purposes cannot revise the history of events as they actually unfolded on December 5, 2014. On that date, Employee took an anticipated and reasonable minor and relatively brief deviation before reaching the time clock to clock out. It was during this minor and relatively brief deviation her injury occurred. *Stark*; *Kish*; *Briley*.

Case precedent provides no bright line test to distinguish activities that are incidental to employment from those that constitute a substantial deviation. It is a common practice for Employer's employees to conduct personal "shopping" while on the clock. Employee credibly testified she has seen supervisors and other employees shop while on the clock. AS 23.30.122; *Smith*. Employee's shopping experience was reasonably foreseeable and incidental to her employment. Her deviation was relatively brief and minor. Her injury arose out of and in the course of her employment with Employer and is compensable. *Gonzales*; *Sears*; *Stark*; *Redfield*; *Maheux*; *Daniels*; *Wilson*; *Finnegan*; *Briley*; *Kish*; *Marotta*.

3) Is Employee entitled to attorney fees or costs?

Employer controverted benefits in this case, so fees and costs under AS 23.30.145(a) may be awarded. *Cortay*. Employee retained an attorney who was successful in prosecuting the only issue set for hearing. This decision finding Employee's injury arose out of and in the course of her employment means her claim is compensable. She is entitled to unpaid benefits, which are a significant benefit to Employee because her disability was lengthy and her medical bills are substantial. Employee would not have received benefits but for her attorney's involvement. Therefore, Employee is entitled to attorney's fees and costs. AS 23.30.145(a); 8 AAC 45.180; *Cortay*.

Employee's billing timesheets itemize 18.35 hours of attorney time at $400.00 per hour and 7.15 hours of paralegal time at $175.00 per hour, with costs at $1,401.35, totaling $8,741.35. Considering the claim's nature, length, and complexity, and the services performed, Employer's resistance, and the benefits resulting to Employee from attorney services obtained, Employee is awarded $8,741.35 in reasonable attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180.

CONCLUSION OF LAW

1) An SIME shall not be ordered.
2) Employee's injury arose out of and in the course of her employment with Employer.
3) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's claim is granted.
2) Employer is ordered to pay medical benefits, indemnity benefits, and interest on past medical and indemnity benefits paid.
3) Employee is awarded $8,741.35 in reasonable attorney fees and costs.
4) Jurisdiction to resolve other issues is reserved.

Dated in Anchorage, Alaska on October 28, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Amy Steele, Member

/s/
Rick Traini, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 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 October 28, 2016.

/s/ _____
Vera James, Office Assistant