Alaska Workers' Compensation Appeals Commission

Joseph J. Bielski, II, Appellant, vs. Norcon, Inc. and CH2M Hill Energy, Ltd., Appellees.	Final Decision Decision No. 172 November 30, 2012 AWCAC Appeal No. 12-008 AWCB Decision No. 12-0030 AWCB Case No. 201107760

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 12-0030, issued at Fairbanks, Alaska on February 17, 2012, by northern panel members Robert Vollmer, Chair, Jeff Bizzarro, Member for Labor, and Sarah Lefebvre, Member for Industry.

Appearances: J. John Franich, Franich Law Office, LLC, for appellant, Joseph J. Bielski, II; Robert J. McLaughlin, Law Office of Robert J. McLaughlin, PLLC, for appellees, Norcon, Inc. and CH2M Hill Energy, Ltd.

Commission proceedings: Appeal filed March 7, 2012; briefing completed July 26, 2012; oral argument held on November 6, 2012.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Joseph J. Bielski, II (Employee or Bielski), who resided in North Pole, Alaska, worked for appellee, Norcon, Inc. (Employer or Norcon), at a worksite in Fort Greely, Alaska. He was injured in a motor vehicle accident while traveling from Fort Greely to his home. As a result, Bielski filed a workers' compensation claim (WCC) seeking certain benefits. The Alaska Workers' Compensation Board (board) denied his

claim.[1] Bielski has appealed to the Workers' Compensation Appeals Commission (commission). We affirm.

2. Factual background and proceedings.

Although some of the conclusions to be drawn from the underlying facts in this matter are at issue, they are, for the most part, undisputed. We therefore adopt the board's findings, with citations to the Record on Appeal.

On April 28, 2011, while driving to his home in North Pole, Alaska from his worksite in Fort Greely, Alaska, Employee was involved in a single-vehicle rollover accident.[2]

As a result of the accident, Employee fractured two vertebrae in his cervical spine.[3]

On June 22, 2011, Employer controverted Employee's benefits on the basis Employee's injuries did not arise in the course and scope of his employment since Employee was on his way home from work.[4]

On June 22, 2011, Employee filed a WCC claiming temporary total disability (TTD) from April 28, 2011, and medical costs.[5]

On July 13, 2011, Employee filed an amended WCC claiming TTD from April 29, 2011, permanent partial impairment (PPI), medical costs, penalty, interest, attorney fees and costs, and a reemployment eligibility evaluation.[6]

On August 25, 2011, and because of Employer's controversion, the Reemployment Benefits Administrator (RBA) referred the matter to the board for a determination

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[1] *See Joseph J. Bielski v. Norcon Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 12-0030, 16 (February 17, 2012).

[2] R. 001.

[3] R. 001.

[4] R. 002.

[5] R. 005-06.

[6] R. 011-12.

whether Employee's inability to return to work was the result of an injury that arose out of and in the course and scope of his employment.[7]

On September 15, 2011, Employee filed an affidavit of readiness for hearing (ARH) on his June 22, 2011, and July 13, 2011, WCCs.[8]

On September 26, 2011, the parties attended a prehearing conference. Employer acknowledged Employee filed an ARH on his claims and did not object to proceeding to hearing on the merits of Employee's claims. Employee further amended his claim to include a claim for additional penalty under AS 23.30.070. The board's designee scheduled the hearing for February 2, 2012.[9]

On October 12, 2011, the parties attended a prehearing conference and stipulated to re-scheduling the hearing set for February 2, 2012, to January 5, 2012.[10]

At the time of the accident, Employee had been working for Employer at Fort Greely for about three months as an apprentice electrician. Employee was paid an hourly wage and a per diem amount of either $105.00 or $115.00 a day for five days per week.[11]

Mr. [Doug] Tansy is a business representative for the International Brotherhood of Electrical Workers (IBEW).[12]

Mr. [Dave] Kezer has worked for Employer for 21 years, is Manager for Employer's Electrical Division, and a vice president of the company.[13]

Employee's working conditions were governed by an Inside Agreement between the IBEW and the National Electrical Contractors Association, Inc. (NECA).[14]

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7 R. 227.

8 R. 019.

9 R. 203-05.

10 R. 208-10.

11 Hr'g Tr. 11:19–12:9, Jan. 5, 2012; R. 005.

12 Hr'g Tr. 8:6-9, Jan. 5, 2012.

13 Hr'g Tr. 59:9-17, Jan. 5, 2012.

14 Hr'g Tr. 37:4-21, 61:17-20, Jan. 5, 2012; R. 089-94.

The Inside Agreement explicitly addressed the various locations where employees would report to a job, compensation for travel based on mileage, and per diem compensation. The Inside Agreement stated, in relevant part:

> **Section 3.16 Reporting Points/Transportation**
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> When an Employer does not have a permanent shop, the Union Hall . . . shall be designated the reporting point and considered its shop. Employees shall report at the shop at starting time . . . to be picked up by the Employer at the starting time of their regular shift. Employees shall be transported to the [jobsites] and returned to starting point at the Employer's expense. Travel time shall be paid for by the Employer at the applicable rate.
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> **Section 3.17 Shop Report**
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> When employees are ordered to report to the shop in the morning, they shall report at the starting time and shall return to the shop no later than 4:30 p.m. if a one-half hour lunch period is taken, or 5:00 p.m. if an one-hour lunch is taken.
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> **Section 3.18 Job Report**
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> (a) Employers may request employees to report direct to jobs at starting time of their regular shift in a conveyance other than the Employer's and perform eight hours of work, providing such jobs are at least one week's duration . . . . The employees shall be compensated for travel expenses to jobs with mileage measured from the union hall or designated dispatch point . . . at the following rates:
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> | 0 - 25 miles | No compensation |
> | 26 - 50 miles | $.60 per mile, one way |
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> . . . .
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> **Section 3.23 Per Diem and Expenses**
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> (a) Employees working outside a radius of fifty (50) direct road miles . . . except as specified in Section 3.20, shall receive:
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> . . . .
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> (2) Board and lodging shall be paid by the Employer . . . . For projects where camp facilities are provided, per diem may not be available. . . . When per diem applies, Employees shall **receive thirteen ($13.00) dollars per hour** for all hours worked up to a maximum of eight hours (8) in any one day. **Effective November 24, 2008.**
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> **(3) Per Diem shall increase to fourteen ($14.00) per hour effective November 1, 2010.**

The IBEW and NECA agreed travel to work involving 25 miles or less does not merit any additional compensation. It is fair and logical to then conclude the IBEW and NECA agreed a distance of 25 miles or less reflects a routine commute to work. They then agreed traveling more than 25 miles but less than 100 miles to work merits additional compensation in the amount of $.60 per mile, one way. It is fair and logical to then conclude the IBEW and NECA agreed additional compensation should be paid, based on mileage traveled, for the extra time and expense of traveling a distance greater than a routine commute. They then agreed traveling more than 100 miles to work merits additional "per diem" compensation of $14.00 per hour for all hours worked up to a maximum of eight hours in any one day.[15] It is fair and logical to conclude traveling more than 100 miles to work is neither a routine commute, nor a practical one, so additional compensation is provided to employees to stay a reasonable distance from the worksite in order to avoid inordinate travel.[16]

The Fort Greely worksite was about 95-100 miles from Employee's home in North Pole, and about 110 miles from the union hall in Fairbanks.[17]

Fort Greely is a missile defense Army base with a population of approximately 7,000 to 10,000. It is approximately three to four miles from Delta Junction. There are grocery stores and restaurants in the area.[18]

Rooms were available to employees in the Fort Greely area at the "Trophy" and the "Steakhouse."[19]

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[15] The board inadvertently erred in its recitation of the terms of the Inside Agreement quoted on the preceding page. It provided for additional compensation in the amount of $.60 per mile for one way travel between 26 miles and 50 miles. For one way travel in excess of 50 miles, additional per diem compensation of $14.00 per hour for all hours worked up to a maximum of eight hours in any one day was the operative term.

[16] *See Bielski*, Bd. Dec. No. 12-0030 at 5.

[17] Hr'g Tr. 10:6-14, Jan. 5, 2012.

[18] Bielski Dep. 37:5–38:1, Sept. 14, 2011.

[19] Hr'g Tr. 12:15-17, Jan. 5, 2012.

Employer paid for the rooms of employees who stayed at the Steakhouse.[20]

Employees who stayed at the Steakhouse were not paid per diem compensation.[21]

Since Employer had to either house or pay its employees under the terms of the Inside Agreement, the per diem was designed to cover room and board for its employees.[22]

Employer placed no restrictions on how Employee could spend the per diem compensation.[23]

The per diem compensation was "your money to . . . spend how you see fit."[24] An employee might choose to live cheaply and stay in a tent and keep the per diem, another employee might wish to live more comfortably and use the per diem to rent a house.[25] There were no restrictions on using it to pay commuting expenses.[26]

Some employees preferred to stay in accommodations available in the Delta Junction/Fort Greely area other than the Steakhouse, and used their per diem to rent a house.[27]

Employee could use his per diem compensation to either stay in the area or to travel home.[28]

"Sherry," who Employee described as the "desk jockey" at the worksite, gave Employee the choice of either staying in an Employer paid room at the Steakhouse or receiving per diem compensation.[29]

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20 Hr'g Tr. 61:11-16, Jan. 5, 2012.

21 Hr'g Tr. 30:15-24, Jan. 5, 2012.

22 Hr'g Tr. 62:8-25, Jan. 5, 2012.

23 Hr'g Tr. 12:11-13, 38:1-9, 61:23–62:1, Jan. 5, 2012.

24 Hr'g Tr. 38:8-9, Jan. 5, 2012.

25 Hr'g Tr. 46:8-13, 62:25–63:7, Jan. 5, 2012.

26 Hr'g Tr. 38:10-13, 53:20-25, Jan. 5, 2012.

27 Hr'g Tr. 62:25–63:7, Jan. 5, 2012.

28 Hr'g Tr. 12:11-14, Jan. 5, 2012.

29 Hr'g Tr. 30:4-12, Jan. 5, 2012.

Employee chose to take the per diem compensation.[30]

Employee commuted daily between his home in North Pole and the worksite at Fort Greely.[31]

Employee was the only employee who commuted. Other employees used their per diem to stay "in town."[32]

The federal government contracted with Doyon Utilities (Doyon) to rebuild the entire Fort Greely electrical distribution system. Doyon, in turn, had a contract with Employer to perform work on the project, which included telephone pole removal at the facility. Doyon was responsible for the poles but Employer physically removed the poles and then placed them in a "lay-down" area at Doyon's specific direction. Disposal of the poles was Doyon's responsibility, and Doyon sometimes gave away old poles to employees who worked at Fort Greely.[33]

Employee became aware through other Fort Greely employees that poles were available for personal use. Employee believed Employer owned the poles and asked a number of Employer's employees about obtaining some poles to take home to use as light poles. Employer gave Employee permission to take home some telephone poles.[34]

Employee thought removing poles from the worksite was something that benefited both himself and Employer.[35]

The telephone poles were 35 feet in length and weighed 696 pounds each.[36] Employee cut the poles to a shorter length for transport. Employee's supervisor and other employees helped Employee load five poles onto a twenty foot, dual axle, 16,000

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30 Hr'g Tr. 30:15-18, Jan. 5, 2012.

31 Bielski Dep. 28:2-10, 34:8-15, Sept. 14, 2011.

32 Hr'g Tr. 22:7-18, Jan. 5, 2012.

33 Hr'g Tr. 63:17–66:11, Jan. 5, 2012.

34 Hr'g Tr. 18:21-25, 27:21–29:4, Jan. 5, 2012; Bielski Dep. 24:19–25:9, Sept. 14, 2011.

35 Hr'g Tr. 26:7-12, Jan. 5, 2012.

36 Hr'g Tr. 19:22-25, Jan. 5, 2012.

pound gross weight, trailer using Employer's equipment.[37] The five poles loaded onto the trailer varied in length from approximately 24-25 feet to 31 feet long.[38] Neither Employee nor Employer owned the trailer, which Employee borrowed from someone else. Employee pulled the trailer with his personal vehicle.[39]

Employee asked the Fort Greely head lineman to "sign him off the base" with the poles.[40]

Employee worked a four-day workweek, Monday through Thursday, ten hours per day, from 7:00 a.m. to 5:30 p.m.[41]

On Thursday, April 28, 2011, at the end of Employee's workweek, Employee left work for his three-day weekend towing the trailer and poles. Employee was off-the-clock and not being paid his hourly wage. On the Delta Junction side of Birch Lake, at about mile marker 300 on the Richardson Highway, Employee's vehicle hit a frost heave. The trailer jackknifed causing the front of Employee's truck to push towards the left, then to roll over three times.[42]

Employee had previously hauled bobcats, trenchers, and cars with a trailer, but had not hauled anything as heavy as the telephone poles.[43]

It is "probably a fairly decent assumption" that the impetus of the trailer caused the accident.[44]

Employee, Mr. Tansy, and Mr. Kezer were credible witnesses.

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37 Bielski Dep. 22:23–23:9, Sept. 14, 2011.

38 Hr'g Tr. 14:4-11, Jan. 5, 2012.

39 Bielski Dep. 22:23-24, Sept. 14, 2011.

40 Hr'g Tr. 28:3–29:4, Jan. 5, 2012; Bielski Dep. 25:6-9, Sept. 14, 2011.

41 Hr'g Tr. 12:5, Jan. 5, 2012; Bielski Dep. 31:24–32:10, Sept. 14, 2011.

42 Hr'g Tr. 15:17–16:1, Jan. 5, 2012; Bielski Dep. 21:16–22:20, 32:3-19, Sept. 14, 2011.

43 Hr'g Tr. 13:13-22, 20:6-12, Jan. 5, 2012.

44 Bielski Dep. 27:2-8, Sept. 14, 2011.

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[45] To the extent that the facts in this case are undisputed,[46] the question before the commission is whether the law was applied properly to these facts. In these circumstances, the adequacy of the board's conclusions of law is given "fresh consideration on appeal."[47] Otherwise, we exercise our independent judgment when reviewing questions of law.[48]

4. Discussion.

a. The coming and going rule.

AS 23.30.010(a) provides in relevant part: "[C]ompensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment *arose out of and in the course of employment*."[49] The Alaska Supreme Court (supreme court) has held that these two elements, 1) arising out of, and 2) in the course of employment, "should be merged into a single concept of work connection. In other words, if the accidental injury . . . is connected with any of the incidents of one's employment, then the injury . . . would both arise out of and be in the course of such employment."[50] However, the supreme court has applied a general rule that "injuries occurring off the employer's premises while the employee is *going to or coming from* work do not arise in

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[45] Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[46] *See Bielski*, Bd. Dec. No. 12-0030 at 1.

[47] *See M-K Rivers v. Schleifman*, 599 P.2d 132, 134 (Alaska 1979) (quoting *W. R. Grasle Co. v. Alaska Workmen's Comp. Bd.*, 517 P.2d 999, 1003 (Alaska 1974)).

[48] *See* AS 23.30.128(b).

[49] Emphasis added.

[50] *Northern Corp. v. Saari*, 409 P.2d 845, 846 (Alaska 1966) (footnotes omitted).

the course of his employment."[51] Bielski's injuries occurred off Norcon's premises, while he was coming from work.

Nevertheless, there are exceptions to the foregoing rule that injuries occurring while an employee is coming from or going to work are not considered work-related and compensable. The two that are at issue here are: 1) the remote site exception,[52] and 2) the special errand exception.[53] Before the board, Bielski presented evidence and argued that either or both of these exceptions applied in the circumstances of this case, whereas Norcon presented evidence and argued against their application. In their briefing to the commission, the parties made similar arguments. However, at oral argument, Bielski also maintained that, under the provision for Per Diem and Expenses provided for in the Inside Agreement, and because he was compensated for travel, that travel was an integral part of his employment, which made his injuries work-related and compensable.

b. Bielski has the burden of proof whether his injuries are work-related.

Whether an employee's injuries arose out of and in the course of employment is a question to which the statutory presumption of compensability[54] pertains.[55] Resolving it requires application of the three-step presumption of compensability analysis set forth in case law.[56] Here, in terms of both the remote site and special errand exceptions to the coming and going rule, it is undisputed that Bielski's evidence satisfied the first step, establishing a preliminary link between his claim and his employment. Nor is it disputed

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[51] *R. C. A. Service Co. v. Liggett*, 394 P.2d 675, 677-78 (Alaska 1964) (emphasis added) (footnote omitted).

[52] *See, e.g., Doyon Universal Services v. Allen*, 999 P.2d 764 (Alaska 2000); *Andersen v. Employer's Liability Assur. Corp.*, 498 P.2d 288 (Alaska 1972).

[53] *See, e.g., Liggett,* 394 P.2d 675, and *State, Dept. of Highways v. Johns*, 422 P.2d 855 (Alaska 1967).

[54] "[I]t is presumed, in the absence of substantial evidence to the contrary, that . . . the claim comes within the provisions of this chapter[.]" AS 23.30.120(a)(1).

[55] *See, e.g., Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501, 503-04 (Alaska 1973).

[56] *See, e.g., Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991).

that, with respect to both exceptions, Norcon satisfied the second step in that analysis, having presented substantial evidence rebutting the presumption.[57] Where work-relatedness is the issue, in the third step of the analysis, "[t]he burden of proving that an injury arose out of and in the course of the employment rests upon the claimant for compensation[.]"[58] In the particular circumstances of this case, that would entail Bielski proving that the remote site exception, the special errand exception, or the contract terms, applied to make his injuries work-related.

c. The remote site exception to the coming and going rule is inapplicable.

An injury arises out of and in the course of employment if it occurs "during (1) 'employer-required or supplied travel to and from a remote job site'; (2) 'activities performed at the direction or under the control of the employer'; or (3) 'employer-sanctioned activities at employer-provided facilities.'"[59] As the supreme court elaborated:

> Because of the unique situation that remote worksites present, we have adopted a particularly expansive view of "work-connectedness," which we have articulated in the now-familiar "remote site" doctrine. The crux of this doctrine is that everyday activities that are normally considered non-work-related are deemed a part of a remote site employee's job for workers' compensation purposes because the requirement of living at the remote site limits the employee's activity choices.[60]

The supreme court further elaborated:

> [We have] stated that because the "all-encompassing" nature of the remote sites makes it impossible for a "worker at a remote area" to "leave his work and residential premises to pursue an entirely personal whim and thereby remove himself from work connected coverage," remote worksites

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[57] *See, e.g., Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991).

[58] *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d at 503-04 (quoting *R. C. A. Service Co. v. Liggett*, 394 P.2d 675, 677 (Alaska 1964)).

[59] *Doyon Universal Services v. Allen*, 999 P.2d at 768 (quoting AS 23.30.395(2)).

[60] *Id.*, 999 P.2d at 768-69 (citing *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1053 n.1 (Alaska 1994) (footnotes omitted)).

> present a special situation in which many commonplace activities must be deemed incidents of employment, even though those same activities might not be considered work-related if conducted at a non-remote site.[61]

Applying the foregoing criteria, the board held that Bielski failed to prove by a preponderance of the evidence that the remote site doctrine applied. It noted that, under the terms of the above-quoted Inside Agreement, he was not, in the particular circumstances of this case, being compensated for travel to and from a remote site. Pursuant to the Inside Agreement, because he *opted* to travel more than 100 miles one way to the worksite, Bielski was paid additional compensation of $14.00 per hour, for all hours worked up to a maximum of eight hours in any one day. The additional compensation was intended as an inducement to avoid excessive travel. Moreover, Bielski was not required to use the additional compensation for travel. He was free to use it to stay in Fort Greely, where accommodation alternatives were available.[62] Furthermore, the board rejected the argument that Fort Greely was a remote site. Among the factors the board considered were: 1) the population is between 7,000 and 10,000; 2) Fort Greely is located a short distance from Delta Junction, where lodging, groceries, and restaurants are available; and 3) the Fort Greely/Delta Junction area is readily accessible via the Richardson Highway.[63]

We agree with the board. Paraphrasing AS 23.30.395(2), there was neither employer-required nor employer-supplied travel to and from a remote worksite. Norcon did not supply the travel; Bielski provided his own transportation. Subsidizing that travel by paying him additional compensation is not the same thing as *supplying* the travel. Whether Norcon required him to travel is a related question. We conclude, like the board, that by giving its employees viable options, staying at the Steakhouse in Fort Greely, at Norcon's expense, or staying elsewhere in Fort Greely, using the additional compensation, Norcon was not *requiring* Bielski to travel between his home in North

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[61] *Doyon Universal Services v. Allen*, 999 P.2d at 769 (quoting *M-K Rivers v. Schleifman*, 599 P.2d at 134).

[62] *See Bielski*, Bd. Dec. No. 12-0030 at 12-13.

[63] *See id.* at 13.

Pole and the worksite. Nor was Fort Greely a remote site, one where the all-encompassing nature of the site made it impossible for Bielski to leave his work on a purely personal matter and thereby remove himself from work-connected coverage.[64] Here, not only was it possible for Bielski to leave Fort Greely on workdays, he *did* leave to return to his home in North Pole. Moreover, he was not subjected to the conditions which ordinarily exist at an isolated, remote site. Bielski was not required to do all his eating, sleeping, etc., at the worksite.

These considerations lead us to conclude that the remote site exception is inapplicable.

d. The special errand exception to the coming and going rule is inapplicable.

Preliminarily, whether the special errand exception is applicable in this matter involves the one factual dispute between the parties that is of significance: Following the removal of the telephone poles by Norcon's employees, was the subsequent transportation of them by Bielski away from Fort Greely of benefit to Norcon? Bielski testified that he thought the poles belonged to Norcon, so that his transporting them away from the worksite was, at least in part, serving Norcon's interest.[65] Dave Kezer testified that the poles were the responsibility of the contractor Doyon, not the subcontractor, Norcon, that after removing them from the ground, Norcon placed them in an area designated by Doyon, and that Norcon had no obligation to dispose of them.[66] The board resolved this factual dispute in Norcon's favor. Even though the board found Bielski's subjective belief that the poles were Norcon's was sincere and understandable, it found Kezer's testimony to be "direct, specific, certain[,] and credible, and he was better situated than Employee to have accurate factual knowledge regarding responsibility for the poles."[67] Based on this evidence, the board concluded,

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64 *See Doyon Universal Services v. Allen*, 999 P.2d at 768.

65 Hr'g Tr. 26:7-12, Jan. 5, 2012.

66 Hr'g Tr. 63:17–66:11, Jan. 5, 2012.

67 *Bielski*, Bd. Dec. No. 12-0030 at 14.

rightly in our view, that Bielski was not benefitting Norcon by transporting the telephone poles away from the worksite.

As the board pointed out,[68] the supreme court has identified criteria for determining whether the special errand exception is applicable. The overarching consideration is "whose interest is being served by the trip when determining if an employee is engaged in a special errand."[69] Among the criteria are: 1) whether the employer had immediate need of the employee's services; 2) whether the employee was required to travel because living quarters were not available near the worksite; 3) whether the employee was selected for the job because of his proximity to the worksite; and 4) whether the employer furnished transportation or reimbursed the employee for providing his own transportation.[70] In light of these criteria, the board concluded that Bielski failed to prove by a preponderance of the evidence that the special errand exception was applicable.[71]

Again, we concur with the board's conclusion. First, Norcon had no need for Bielski to transport the telephone poles from the worksite. Second, Bielski was not *required* to travel to and from the worksite; he could avail himself of local accommodation. Third, Norcon did not select Bielski for the job at Fort Greely because he lived in proximity to the project. Fourth, Bielski's subjective belief that he was serving Norcon by transporting the telephone poles away from the worksite in no way transcends the actual fact that the poles were not Norcon's and it did not benefit from their removal from the worksite. Last, whether Norcon reimbursed Bielski for the trip when he transported the telephone poles is a closer question. Norcon did compensate Bielski for the time he spent making the drive back and forth between North Pole and Fort Greely *each workday*. However, Bielski was compensated because he opted to make those daily drives rather than stay in Fort Greely. On his trip home with the

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68 *See Bielski*, Bd. Dec. No. 12-0030 at 8-9.

69 *Id.* at 9.

70 *See Bielski*, Bd. Dec. No. 12-0030 at 9 (citing *State, Dept. of Highways v. Johns*, 422 P.2d at 859 and *R. C. A. Service Co. v. Liggett*, 394 P.2d at 679).

71 *See Bielski*, Bd. Dec. No. 12-0030 at 15.

telephone poles in tow when he was injured, Bielski was not, strictly speaking, reimbursed for providing his own transportation while on a special errand for Norcon. His compensation would not have been any less had Bielski driven home to North Pole on April 28, 2011, without the telephone poles.

As the supreme court explained: "[I]n the case of a special errand the explanation of the exception is found in the principle that the journey is an inherent part of the service, and as stated by Professor Larson, that it 'involves a trip in which the bother and effort of the trip itself is an important part of what the employee is actually compensated for.'"[72] Here, in terms of the above-mentioned criteria set forth by the supreme court in *State of Alaska v. Johns* and *R. C. A. Service Co. v. Liggett*, Bielski's trip home when he transported the telephone poles was not an inherent part of his services to Norcon. We conclude that the special errand exception is inapplicable.

e. The provision in the Inside Agreement for compensation in the form of per diem and expenses does not make Bielski's injuries while coming from the jobsite compensable.

As we understand it, Bielski's position is, because he was compensated for travel pursuant to the Per Diem and Expenses provision in the Inside Agreement, his travel, including the trip when he was transporting the telephone poles, was work-related, thereby making the injuries he suffered on that occasion compensable. This argument appears to be distinguishable from the remote site or special errand exceptions to the coming and going rule. Consequently, we analyze it as deriving solely from the terms of the Inside Agreement, and, by virtue of that, consider it to be distinctive to this matter.

We note that the Inside Agreement has two sections that provide for additional compensation to employees for 1) travel,[73] or 2) travel or lodging.[74] Pursuant to Section 3.18(a), employees who travel between 26 and 50 miles one way to a jobsite are entitled to additional compensation on a mileage basis. Section 3.23(a) provides

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72 *R. C. A. Service Co. v. Liggett*, 394 P.2d at 678 (footnotes omitted).

73 *See* Inside Agreement, Section 3.18(a), *supra*.

74 *See* Inside Agreement, Section 3.23(a), *supra*.

additional compensation, at an enhanced hourly rate for hours worked, to employees who would have to travel more than 50 miles one way to a jobsite. Moreover, they are given the option of finding local accommodation[75] or traveling back and forth to their homes.

The pertinent question is whether the additional compensation called for in the foregoing sections of the Inside Agreement somehow makes injuries sustained during travel work-related and compensable. On any job where employees travel the requisite distance, 26 to 50 miles one way, they qualify for additional compensation calculated on their mileage. Hypothetically, assume one of these employees is injured coming from or going to the jobsite. Should he or she be entitled to workers' compensation benefits? In the alternative, assume hypothetically that one of Bielski's co-workers at the Fort Greely jobsite who stayed locally and received additional compensation at the enhanced hourly rate was injured while traveling between the local accommodation and the jobsite. Should he or she get benefits? Finally, should Bielski, who opted to travel more than 50 miles one way, thus qualifying for the enhanced hourly rate, receive benefits? In all three scenarios, we think not.

In the case of the employee who receives mileage, the purposes of the additional compensation are 1) to defray the employee's travel expenses, and 2) to compensate the employee for the inordinate amount of time required to travel to and from the jobsite. The purposes of additional compensation at the enhanced hourly rate are the same, although the time and expense of actual travel are alleviated for those employees who opt to use local accommodation. Given the purposes of the additional compensation, no matter the form in which it is paid, in our view, it is problematic to conclude that it somehow converts travel to and from the jobsite into a compensable event. The payment of compensation for travel, in and of itself, does not supply the requisite nexus between travel and employment so as to bring the travel within workers' compensation coverage.

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[75] In the specific circumstances here, Norcon would pay for lodging at the Steakhouse. Hr'g Tr. 61:11-16.

5. Conclusion.

We AFFIRM the board's decision.

Date: *30 November 2012* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board, as set forth above. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[76] For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[77] and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

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[76] A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[77] *See id*.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of a typographical error, this is a full and correct copy of the Final Decision No. 172 issued in the matter of *Joseph J. Bielski, II, v. Norcon, Inc. and CH2M Hill Energy, Ltd.,* AWCAC Appeal No. 12-008, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 30, 2012.

Date: *December 4, 2012*

Signed

B. Ward, Commission Clerk