Alaska Workers' Compensation Appeals Commission

Wal-Mart Associates, Inc., New Hampshire Insurance Company, and York Risk Services Group, Appellants, vs. Patricia S. Kolb, Appellee.	Final Decision Decision No. 237 August 1, 2017 AWCAC Appeal No. 16-015 AWCB Decision No. 16-0099 AWCB Case No. 201419711

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0099, issued at Anchorage, Alaska, on October 28, 2016, by southcentral panel members Janel Wright, Chair, Rick Traini, Member for Labor, and Amy Steele, Member for Industry.

Appearances: Vicki A. Paddock, Russell Wagg Meshke & Budzinski, PC, for appellants, Wal-Mart Associates, Inc., New Hampshire Insurance Company, and York Risk Services Group; Joseph A. Kalamarides, Kalamarides & Lambert, for appellee, Patricia S. Kolb.

Commission proceedings: Appeal filed November 10, 2016; briefing completed April 5, 2017; oral argument held May 24, 2017.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Patricia S. Kolb (Ms. Kolb) was injured on December 5, 2014, at a Wal-Mart store. A dispute arose over whether she was injured in the course and scope of employment with Wal-Mart Associates, Inc. (Wal-Mart). On April 27, 2016, Ms. Kolb's claim was heard by the Alaska Workers' Compensation Board (Board). The Board initially issued an Interlocutory Decision and Order[1] raising a question of whether a Second Independent

---

[1] *Kolb v. Walmart Associates, Inc. and New Hampshire Insurance Co.*, Alaska Workers' Comp. Bd. Dec. No. 16-0043 (June 15, 2016) (*Kolb I*).

Medical Examination (SIME) should be ordered to address any gaps in the medical evidence and whether Wal-Mart's actions towards Ms. Kolb following the injury exacerbated the fracture. The Board acknowledged there was a split within the panel over the issue of the credibility of the witnesses.

The Board received additional briefing from the parties, closed the record on October 17, 2016, and issued its Final Decision and Order on October 28, 2016.[2] Based in part on the additional briefing, the Board found that no SIME was needed and that Ms. Kolb had been injured within the course and scope of her employment. The additional briefing assisted the Board in reaching a consensus that also found Ms. Kolb to be more credible than Wal-Mart's witness. Wal-Mart appealed to the Alaska Workers' Compensation Appeals Commission (Commission) and filed a Motion for Stay. A stay was granted on December 21, 2016, as to past medical and indemnity benefits but denied as to future medical benefits.[3] Oral argument on the issues of the appeal was heard on May 24, 2017. The Commission now finds that Ms. Kolb was injured within the course and scope of her employment and affirms the decision of the Board.

2. *Factual background and proceedings.*[4]

Ms. Kolb has worked for Wal-Mart since July 2013. She started as a stocker in health and beauty aids and after several months began work as a cashier at Wal-Mart's Eagle River, Alaska, store.[5]

---

[2] *Kolb v. Walmart Associates, Inc. and New Hampshire Insurance Co.,* Alaska Workers' Comp. Bd. Dec. No. 16-0099 (Oct. 28, 2016) (*Kolb II*).

[3] *Wal-Mart Associates, Inc., New Hampshire Insurance Company, and York Risk Services Group v. Kolb,* Alaska Workers' Comp. App. Comm'n Appeal No. 16-015, Order on Motion for Stay (Dec. 21, 2017).

[4] We make no factual findings. We state the facts as found by the board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[5] *Kolb I* at 3, No. 2.

Ms. Kolb attended orientation on July 26, 2013, and at that time was made aware of Wal-Mart's Associate Purchases Policy (OP-23).[6] This policy applies to all of Wal-Mart's employees and provides in part:

> 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.[7]

In January 2014, when Ms. Kolb became a cashier, the policy was again presented to her during cashier training.[8] Ms. Kolb testified she saw supervisors and other employees shop when she thought they were on the clock. She thought most of Wal-Mart's staff shopped on the clock and she was not aware of anyone who was ever disciplined for shopping while on the clock.[9]

On December 4, 2014, Ms. Kolb shopped and made purchases during Wal-Mart's "25% discount days," which is a two-day period when employees who worked on Thanksgiving may shop and receive a larger than normal discount. Discount shopping days last 48 hours. Ms. Kolb forgot to purchase cat food and kitty litter on December 4, 2014.[10]

On December 5, 2014, Ms. Kolb worked an afternoon shift scheduled to end at 5:00 p.m. Her relief cashier arrived "a bit before 5:00 p.m." and Ms. Kolb closed out her register at 4:47 p.m.[11] Wal-Mart gives demerits to employees who clock out prior to their shift's end.[12] Ms. Kolb wanted to take advantage of her 25% discount shopping and so, before clocking out, she picked up a shopping cart, which she planned to leave near the

---

[6] *Kolb I* at 3, No. 3.

[7] *Id.*, No. 1.

[8] *Id.*, No. 3.

[9] *Id.*, No. 4.

[10] *Id.*, No. 6.

[11] *Id.*, No. 7.

[12] *Id.* at 4, No. 8.

restrooms which are close to the employee locker room and time clocks.[13] She then planned to clock out, get her belongings from her locker, and proceed to a register to purchase her items.[14]

On her way to clock out, Ms. Kolb went to the store's "Pet Zone" to pick up cat food and kitty litter.[15] The kitty litter, on a shelf 70 inches high (above her head), was heavy, and the kitty litter fell off the shelf. When Ms. Kolb tried to stop it with her knee and leg from crashing and spilling all over the floor, the kitty litter hit her, breaking her leg. Ms. Kolb fell, hit her head, and was unable to walk.[16]

Wal-Mart's assistant managers Chip Dawdy and "J.J." were notified Ms. Kolb was injured. Mr. Dawdy took Ms. Kolb's and others' statements about the incident.[17] J.J. then transported Ms. Kolb 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 take her to the hospital, Mr. Dawdy and J.J. decided J.J. should take Ms. Kolb to an emergency room.[18] However, before taking her to the emergency room, J.J. took Ms. Kolb to Workplace Safe for a drug test.[19] He expected her to walk into Workplace Safe. However, due to her severe pain, she was unable to stand and bear weight and a male stranger picked her up and carried her into Workplace Safe.[20]

Upon completion of the drug test, but before taking Ms. Kolb to Providence Hospital Emergency Room, J.J. took Ms. Kolb to Tesoro so J.J. could get gas and something to eat.[21] At this time, Ms. Kolb was under the supervision of the Wal-Mart

---

[13] *Kolb I* at 4, No. 9.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*, No. 10 (these statements do not appear in the record).

[18] *Id.*

[19] *Id.*

[20] *Id.*, No. 12.

[21] *Id.*, No. 10.

employees Mr. Dawdy and J.J.[22] Ms. Kolb did not clock out on December 5, 2014, because she was injured and unable to finish clocking out.[23]

Trudy Jordan is Wal-Mart's personnel coordinator.[24] She testified 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, Ms. Jordan is responsible for contacting employees to inquire and determine their quitting time. The protocol is for Ms. Jordan to complete an "Hours Adjustment / Prize or Award Form." Ms. Jordan first signs the form, she then has a salaried member of management sign the form, and then the form is presented to the employee for signature.[25]

On December 8, 2014, since Ms. Kolb had not clocked out on December 5, 2014, Ms. Jordan contacted her because she "needed to know what time [Ms. Kolb] left." After speaking to Ms. Kolb, Ms. Jordan completed an Hours Adjustment Form and recorded Ms. Kolb's December 5, 2014, "Clock Out" time as 16:47.[26] The reason for the adjustment was: "Didn't clock out." Ms. Jordan signed the form on December 8, 2014; Mr. Dawdy signed it on December 10, 2014. Ms. Kolb did not initial the form, but she did sign 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 . . . .[27]

Wal-Mart's Eagle River, Alaska, store has time clocks in three locations. There are two time clocks at the back of the store near employee lockers and restrooms, and at

---

22 *Kolb I* at 4, No. 11.

23 *Id.*, No. 13.

24 *Id.*, No. 14.

25 *Id.* at 4-5, No. 14.

26 *Id.* at 5, No. 15; actually 16:47 is incorrect. This is the time Ms. Kolb closed out the cash register. Her actual clock out time should have been some minutes later, accounting for the time it would have taken her to reach the time clock.

27 *Id.*

two "hubs."[28] One hub is at Wal-Mart's customer service center near the cash registers, and close to shopping cart parking.[29] Employees and management usually clock out at the time clock nearest where they place their personal items for storage during work hours. Ms. Jordan stated she, like Ms. Kolb, goes to the back of the store to clock out because that is where her belongings are stored in her locker.[30]

According to Ms. Jordan, Wal-Mart's employees are permitted neither to shop nor to make purchases while on the clock. She further testified employees are permitted to shop and to make purchases during breaks, before they clock in for work, and after they clock out. It is reasonable to expect employees to shop at Wal-Mart's store because they receive a 10 percent discount. Wal-Mart's employees are encouraged to shop and make purchases at Wal-Mart'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.[31] Ms. Jordan testified that when employees "shop" while on the clock, Wal-Mart considers the shopping to be "theft of time."[32] Ms. Jordan stated that when Wal-Mart discovers employees shopping during working hours, while on the clock, those employees are disciplined.[33] Ms. Jordan stated she was sure people do shop while on the clock, but if Wal-Mart does not know an employee is breaking the policy, the employee cannot be disciplined.[34]

Wal-Mart does not have a policy addressing evaluation of medical incidents. However, its policy provides if a customer is hurt or injured, Wal-Mart's staff should not move the customer.[35] All injuries at Wal-Mart are entered into a computer system. The

---

28 *Kolb I* at 5, No. 18.

29 *Id.*

30 *Kolb II* at 6, No. 19.

31 *Id.*, Nos. 17-18.

32 *Id.*, No. 17.

33 *Id.*

34 *Id.*

35 *Id.*, No. 20.

same system is used to report injuries to both employees and the public.[36] On December 5, 2014, the decision was made for J.J. to take Ms. Kolb to the hospital instead of calling an ambulance.[37] According to Ms. Jordan, Ms. Kolb should not have been transported by assistant manager J.J. to the emergency room. Rather, an ambulance should have been called for the broken leg, assuming the break was obvious.[38] Mr. Dawdy and J.J. did not follow Wal-Mart's policy.[39] Significantly, neither Mr. Dawdy nor J.J. testified at hearing. By the actions of Mr. Dawdy and J.J., Wal-Mart did not treat Ms. Kolb as a customer, but rather treated her as an employee.[40]

The driving distance between Wal-Mart in Eagle River, Alaska, and Providence Hospital in Anchorage, Alaska, is slightly less than 16 miles and can be driven in approximately 20 minutes.[41] On December 5, 2014, Ms. Kolb was treated in Providence Alaska Medical Center's Emergency Room approximately four hours after the kitty litter container fell on her right knee, breaking her leg. An x-ray revealed a "moderately displaced" lateral tibial fracture. Ms. Kolb's knee was immobilized and she was released with crutches and instructed to follow-up with Eugene Chang, M.D.[42]

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 Ms. Kolb's fracture required surgery.[43] On December 10, 2014, Ms. Kolb was admitted to Providence Hospital and Dr. Schweiger performed a complex

---

36 *Kolb I* at 5, No. 17.

37 *Id.* at 6, No. 21.

38 *Id.*

39 *Id.*

40 *Id.*, No. 22.

41 *Id.*, No. 24.

42 *Kolb II* at 7, No. 22.

43 *Id.*, No. 23.

open reduction internal fixation (ORIF) of her right tibial plateau fracture and open repair of her lateral meniscus. Ms. Kolb was discharged on December 11, 2014.[44]

On December 12, 2014, Ms. Kolb was notified workers' compensation benefits were being denied because Wal-Mart determined her injury did not arise out of and in the course of her employment.[45] On December 17, 2014, Ms. Kolb filed a general liability claim against Wal-Mart. Wal-Mart asserted Ms. Kolb was in control of the kitty litter when she was injured, and there were no defects or issues with the way the kitty litter had been stocked.[46] On January 15, 2015, Wal-Mart denied Ms. Kolb's general liability claim. Ms. Kolb was notified she had the care, custody, and control of the kitty litter and if she felt the item was too heavy, she had a duty to ask for assistance.[47]

On February 17, 2015, Dr. Schweiger determined Ms. Kolb was totally disabled and scheduled her for re-evaluation on March 3, 2015.[48] At Sedgwick's request, Dr. Schweiger completed a questionnaire on March 3, 2015, and indicated Ms. Kolb needed to attend medically necessary follow-up appointments for her surgically repaired tibial plateau fracture. He further stated Ms. Kolb's "condition" would cause episodic flare-ups and would periodically prevent Ms. Kolb from performing her job functions, thus making it necessary for her to miss some work. Dr. Schweiger also indicated it would not be necessary for Ms. Kolb to work part-time or on a reduced schedule due to her "condition." He ordered Ms. Kolb to remain off work "until further notice / or medically stable."[49]

On March 23, 2015, Ms. Kolb filed a workers' compensation claim for temporary disability benefits, medical costs, a compensation rate adjustment, and a finding of unfair

---

[44] *Kolb II* at 7, No. 24.

[45] *Id.*, No. 25.

[46] *Id.*, No. 26; however, stacking "heavy" kitty litter on a shelf 70 inches high seems imprudent.

[47] *Id.*, No. 27.

[48] *Id.* at 8, No. 28.

[49] *Id.*, No. 29.

or frivolous controversion.[50] On April 2, 2015, Wal-Mart controverted Ms. Kolb'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. [Ms. Kolb] was not working and conducting personal shopping at the time of injury."[51]

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 Ms. Kolb 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.[52]

On July 7, 2015, Dr. Schweiger released Ms. Kolb to return to work with no restrictions and stated 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 [may] 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."[53] Ms. Kolb returned to work at Wal-Mart on July 9, 2015.[54]

On January 26, 2016, Ms. Kolb returned to Dr. Schweiger, per instructions, for her one-year follow-up appointment, and reported increasing pain in her knee over the past "couple of months." Dr. Schweiger noted Ms. Kolb's range of motion was worse than previously, and X-rays revealed some collapse on the knee's lateral plateau. Dr. Schweiger concluded:

> I think she has degenerated her lateral plateau away and I think at this point the only solution is going to be a total knee replacement. I told her

---

50 *Kolb II* at 8, No. 30.

51 *Id.,* No. 31.

52 *Id.*, No. 32.

53 *Id.*, No. 33.

54 *Id.* at 9, No. 34.

> 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.[55]

Ms. Kolb incurred the following medical expenses to treat her December 5, 2014, injury:

Provider[56]	Dates of Service	Cost
Providence Emergency Medicine	12/5/2014-12/6/2014	4,739.77
Providence Pre-Admission Testing	12/9/2014	530.00
Providence Services	12/10/2014-12/11/2014	46,549.26
Providence Anchorage Anesthesia	12/10/2014	2,240.00
Alaska Physical Therapy Specialists	3/30/2015	80.00
Orthopedic Physicians Anchorage	12/9/2014–7/7/2015	13,905.38

Alaska Emergency Medicine Associates and Alaska Radiology Associates sent their outstanding bills for treatment of Ms. Kolb to Cornerstone Credit Services, LLC.[57]

On April 29, 2016, Joseph Kalamarides filed an Affidavit of Counsel for services provided on Ms. Kolb's behalf between July 29, 2015, and April 27, 2016. The combined attorney fees and costs totaled $8,741.35.[58] The Board found that based on his and his paralegal's experience, Mr. Kalamarides' rates and his paralegal's rates and charges were reasonable. The Board also determined all costs were reasonable and awardable.[59]

In *Kolb I*, the Board requested supplemental briefing from the parties to address whether an SIME should be ordered to address a possible gap in the medical evidence, and whether the actions Wal-Mart forced upon Ms. Kolb after her injury aggravated or accelerated her fracture. Wal-Mart objected to an SIME and contended *Kolb I* demonstrated Ms. Kolb had not met her burden of proof, which required a showing by a

---

55 *Kolb II* at 9, No. 35.

56 *Id.*, No. 36.

57 *Id.*, No. 37.

58 *Id.* at 9-10, No. 38.

59 *Id.* at 10, No. 39.

preponderance of the evidence her injury arose out of and in the course of her employment. Ms. Kolb did not object to an SIME and contended no one knew what affect the delay in medical treatment had on her broken leg. The delay was caused by Wal-Mart's actions in taking her to Workplace Safe for a drug test and stopping for food and gas prior to taking her to the emergency room. The Board thought an evaluation by a Board appointed physician would provide important evidence to answer these questions, which posed a gap in the medical evidence. Ms. Kolb did not oppose an SIME and contended the Board's discretion is vast when deciding whether to order an SIME.[60]

In *Kolb II*, the Board decided it did not need an SIME after all, but the additional briefing had helped it to resolve any questions and concerns it had had previously. The additional briefing enabled the Board to reach a consensus as to her claim.

On July 9, 2015, Ms. Kolb returned to work with no restrictions. It does not appear from the record that Ms. Kolb was disciplined for her failure to clock out on December 5, 2014, or for her shopping.

3. Standard of review.

AS 23.30.128(b) states:

> The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. **The board's findings regarding the credibility of testimony or a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record.** In reviewing questions of law and procedure, the commission shall exercise its independent judgment. (Emphasis added).

AS 23.30.122 provides that:

> 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. (Emphasis added).

---

[60] *Kolb II* at 10, No. 40.

4. Discussion.

a. Did the Board commit legal error in failing to decide the merits of Ms. Kolb's claim after the first hearing?

A hearing before the Board is governed by statute. Each hearing panel must include a hearing officer and representatives from industry and labor.[61] However, if only two members are available, the two members of a panel constitute a quorum.[62]

The Board may require an injured worker to submit to a physical examination if the Board so requests.[63] Further,

> (a) In making an investigation or inquiry or conducting a hearing, the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.
>
> (b) All testimony given during a hearing before the board shall be recorded, but need not be transcribed unless further review is initiated. Hearings before the board shall be open to the public.[64]

The Board's regulations further provide:

> (j) If the hearing is not completed on the scheduled hearing date and the board determines that good cause exists to continue the hearing for further evidence, legal memoranda, or oral arguments, the board will set a date for the completion of the hearing.
>
> (k) The board will, in the board's discretion, permit a member
>
> (1) to attend a hearing by telephone; or
>
> (2) who did not attend a hearing before a two-member panel to review the written record, evidence, and hearing recording and to deliberate with
>
> (A) a deadlocked two-member panel to make a decision; or

---

[61] AS 23.30.005(a).

[62] AS 23.30.005(f).

[63] AS 23.30.110(g).

[64] AS 23.30.135.

(B) the remaining member of a two-member panel if, before a decision is filed on a case heard by a two-member panel, one member dies, resigns from the board, is replaced by the governor, or the member's term of appointment expires.[65]

Moreover, contrary to the assertions of Wal-Mart, a three-person panel cannot be deadlocked. An even-numbered panel could be deadlocked but not a three-person panel. The request by the Board for additional briefing to address panel members' questions was prudent and the additional briefing proved its worth by enabling the panel to reach a conclusion. The need for the additional briefing did not mean that Ms. Kolb had failed to prove her claim by a preponderance of the evidence; it merely meant the panel still had some unaddressed concerns. Pursuant to AS 23.30.135 and 8 AAC 45.070, the Board may undertake any investigation or inquiry it believes to be necessary in the furtherance of its decision-making, and the request for additional briefing meets this criterion. After reflecting on the parties' additional briefing, the panel considered all the evidence and reached a unanimous conclusion regarding which witness to believe. The Board then considered the legal merits of Ms. Kolb's claim and reached a unanimous conclusion that Ms. Kolb was injured within the course and scope of her employment.

In *Kolb I*, the Board did not reach a consensus regarding credibility because at least one panel member had some unresolved questions. The panel felt it needed additional medical evidence to address, among other things, whether the delay in treatment had aggravated the original injury to Ms. Kolb. The Board then asked the parties for additional briefing on the question of whether an SIME was needed. After the Board received the additional briefing, the panel met again to discuss the issues. The Board then reached a conclusion. The Board decided it did not need an SIME after all and the panel was able to reach a unanimous conclusion regarding the credibility of witnesses and the merits of Ms. Kolb's claim. The Board's actions fall squarely within the mandates of the Alaska Workers' Compensation Act (Act).

Moreover, Wal-Mart did not object to the request for additional briefing regarding a possible SIME. Wal-Mart did not ask the Board to reconsider its Interlocutory Decision

---

65 8 AAC 45.070(j) and (k).

and Order asking for additional briefing. Wal-Mart did not file a petition for review. Indeed, Wal-Mart provided the requested briefing, contending an SIME was unlikely to help the Board reach a consensus. Ms. Kolb also provided briefing on why an SIME might help the panel.

The Board, in coming to its final decision, agreed with Wal-Mart that an SIME on whether Wal-Mart's actions at the time of Ms. Kolb's injury aggravated the original injury would not materially help the Board to determine whether Ms. Kolb was in the course and scope of her employment when she was injured. Whether her injury was aggravated after the fact is not pertinent to the question of whether Ms. Kolb was in the course and scope of her employment when the injury occurred.

The Board acted within its legislative mandate in delaying its final decision until it could resolve questions one or more panel members had. This action was prudent.

b. Are credibility determinations of the Board binding on the Commission?

Wal-Mart asserts the Board committed legal error in its credibility findings regarding which witnesses to believe, and then used those legally incorrect credibility determinations to support its finding that Ms. Kolb was injured in the course and scope of her employment. Wal-Mart contends that, since the Board based its credibility determination on a legal error, the credibility determination must be set aside as erroneous. Ms. Kolb asserts the Board's findings on credibility are binding on the Commission and may not be set aside even if legal error occurred, which it did not.

Both the Act and the Alaska Supreme Court (Court) mandate the Commission accept the Board's findings regarding credibility. The Commission is bound by these findings. AS 23.30.122 states "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."

AS 23.30.128(b) is even more restrictive. It simply states "[t]he board's findings regarding the credibility of testimony of a witness before the board are binding on the

commission." Thus the Board's findings on credibility are binding on the Commission per AS 23.30.122 and AS 23.30.128.

Furthermore, the Court, in *Rosario v. Chenega Lodging*, expressly rebuked the Commission where it had not deferred to the Board's findings on credibility. "We construe AS 23.30.128(b) to mean that the Commission must follow the Board's credibility determination. 'Bind' means '[t]o impose one or more legal duties on (a person or institution) . . . . The Commission was thus required to accept the Board's credibility determinations . . . ."[66]

Therefore, the Commission, following the statute and directive by the Court, accepts the Board's findings that Ms. Kolb was a more credible witness than Ms. Jordan. The Commission must follow the Board's findings of credibility. The Commission, therefore, affirms the Board's findings of credibility.

c. Was Ms. Kolb an employee within the course and scope of her employment when she was injured?

1. Did Ms. Kolb violate Wal-Mart's No Purchases Policy?

Wal-Mart contends Ms. Kolb violated a specific policy against shopping while on the clock and such a violation took Ms. Kolb out of her employee status. Wal-Mart then contends it was legal error for the Board to make a distinction between shopping and purchasing to find that Ms. Kolb had not violated Wal-Mart's express policy. This distinction is at the heart of the positions of Wal-Mart and Ms. Kolb.

Ms. Kolb was injured on Wal-Mart's premises and she was still on the time clock at the time of her injury. The *prima facie* evidence is that she was an employee within the course and scope of her employment at the time of her injury since she was at work, unless there is a reason that took her out of employment status at the time of injury.

Wal-Mart contends that because she was in violation of its "No Purchases" policy Ms. Kolb had taken herself out of her employment status and, therefore, she should not be covered by workers' compensation. Wal-Mart agrees Ms. Kolb was on its employment premises when she was injured. Wal-Mart further agrees Ms. Kolb had not clocked out

---

[66] *Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013).

when she was injured. Wal-Mart's argument is that her violation of an explicit policy against purchasing items while on the clock removes her from employed status and makes her claim not compensable.

> **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 . . . .

At the core of Wal-Mart's defense is the meaning of its No Purchases policy. Throughout the policy, the language used is that an employee may not make "purchases" while on the clock. This policy is a No Purchase policy. It is not a No Shopping policy. For example, *Black's Law Dictionary* defines "purchase" as "[t]he act or instance of buying."[67] *Webster's Third New International Dictionary* defines "purchase" as "to obtain (as merchandise) by paying money or its equivalent: buy for a price . . . ." It further defines purchase as "an act or instance of purchasing."[68] Purchase has also been defined

[67] *Black's Law Dictionary* 1270, (8th ed. 2004).

[68] *Webster's Third New International Dictionary* 1844 (2002).

as to "get something by paying money for it."[69] "Definition of PURCHASE: to obtain by paying money or its equivalent."[70]

This language, "purchase," is very different from the preliminary act of shopping which usually means examining or evaluating goods, often with the intent to buy.[71] "Shopping" is "searching for, inspecting, or buying goods . . . ."[72]

The Board found that Ms. Kolb did not intend to purchase kitty litter and cat food until after she had clocked out. At the point of injury, she was shopping for cat food and kitty litter with the intention of paying for the items after she clocked out, pursuant to Wal-Mart's policy. This finding is supported by substantial evidence in the record as a whole based on Ms. Kolb's credible testimony.

While Wal-Mart's witness testified Wal-Mart does not condone shopping or purchasing on the clock, no evidence was presented of any disciplinary actions actually taken against Ms. Kolb or any other employee for shopping versus purchasing while on the clock. In fact, one must suppose Wal-Mart encourages its employees to know what is on its shelves at all times, a policy which entails shopping (searching for, examining, or inspecting goods) and supports good customer service.

The Board found Ms. Kolb credible regarding her intent and this finding is binding on the Commission. The evidence, based on the plain language of Wal-Mart's policy, is that Ms. Kolb, at the time of her injury, was not in violation of its "No Purchases" policy. Ms. Kolb was shopping but she did not purchase the kitty litter while on the clock. Since Ms. Kolb did not violate the express language of the policy, she was in the course and scope of her employment when she was injured. The Board's decision is supported by substantial evidence in the record and by the Commission's interpretation of Wal-Mart's policy. The Board's finding is affirmed.

---

[69] *Cambridge English Dictionary* (2017), *available at* http://dictionary.cambridge.org/dictionary/english/purchase.

[70] *Merriam-Webster* (2017), *available at* https://www.merriam-webster.com/dictionary/purchase.

[71] *See, e.g.,* https://www.meriam-webster.com/dictionary/shop (2017).

[72] *See, e.g.*, *Webster's Third New International Dictionary* 2101 (2002).

2. Alternatively, if Ms. Kolb did violate Wal-Mart's policy, would that violation remove her from her status as an employee?

The short answer is no. There are several policies that have been promulgated by the Court which support a finding that a violation of Wal-Mart's policy, such as Ms. Kolb's actions here, was insignificant and insufficient to remove Ms. Kolb from employment status.

First, in *Northern Corp. v. Saari*, the 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."[73]

In *Nickels v. Napolilli*, 29 P.2d 242 (Alaska 2001), the Court noted the Act creates a system through which employers compensate employees injured on the job, <u>irrespective of fault</u> for the injury. (Emphasis added). 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.

The Court looked more deeply at deviations from employment in *Anchorage Roofing Company, Inc. v. Gonzales*, where an employee 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.[74] 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. 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.[75] The Court upheld the Board's determination the employee's deviation was insubstantial.

---

[73] *Northern Corp. v. Saari,* 409 P.2d 845, 846 (Alaska 1966); See also *State Dep't of Highways v. Johns*, 422 P.2d 855, 859 (Alaska 1967).

[74] *Anchorage Roofing Company, Inc. v. Gonzales*, 507 P.2d 501 (Alaska 1973).

[75] *Id.* at 503.

In quoting from *Larson's Workers' Compensation Law*, the Court noted "[a]n 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."[76] The Court added "[t]here 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."[77]

In looking at the deviation in *Gonzales,* the Court also referred to another doctrine which could be applied and which is characterized as the 'minor deviation rule.'[78] The Court recognized Professor Larson analogized certain "insubstantiality" cases to "personal comfort," but he did not intimate the two categories are identical. The Court noted two additional considerations have been utilized by courts when assessing deviations' significance: added risk and nature of employment.[79] "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."[80]

Gonzales noted some older decisions denied compensation "unless the employee was, at the time of injury . . . , performing his normal work to the direct benefit of his employer."[81] The Court then stated "today it is generally held, utilizing the rubric of various doctrines, that an employee is entitled to compensation so long as the activity is

---

76 *Gonzales* at 505 (citation omitted).

77 *Id.* at 506.

78 *Id.*

79 *Id.*

80 *Id.* at 507.

81 *Id.* at 505.

reasonably foreseeable and incidental to his employment."[82] 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."[83]

In *M-K Rivers v. Schleifman,* 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.[84] 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*, the Court found an employee still in employment status even though the employee argued he was not working at the time of injury. Mr. Witmer was president and sole shareholder of a chicken franchise.[85] He was injured while riding as a passenger in a vehicle driven by his employee, Mr. Kellen, who managed the restaurant. On the accident date, Mr. Kellen, using his own vehicle, was preparing to drive to an assistant manager's home to help the assistant manager jump-start his vehicle. Mr. 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."[86] On the way to the assistant's home, Mr. Kellen had an automobile accident, which injured Mr. Witmer. Mr. Witmer contended he was on a "personal enjoyment break" and the Act's exclusive remedy provision did not apply. The Court found, even viewing Mr. Witmer's testimony in the light most favorable to him, Mr. Witmer could not overcome the strong business connection inherent in his presence in the vehicle with Mr. Kellen at the time of the accident. *Witmer* found the decision to accompany Mr. Kellen on his job-related errand was both "reasonably foreseeable and contemplated

---

[82] *Gonzales* at 505, n. 15.

[83] *Id.* at 506.

[84] *M-K Rivers v. Schleifman,* 599 P.2d 132 (Alaska 1979).

[85] *Witmer v. Kellen*, 884 P.2d 662 (Alaska 1994).

[86] *Id.*

by his employment."[87] Finding Mr. Witmer's presence at the time of the accident was closely related to his employment, the Court held the accident arose out of and in the course of his employment.[88]

Further, the Act states that an injury is presumed to be compensable unless substantial evidence is provided to the contrary or the evidence shows the injury was caused by the intoxication of the injured worker, the worker being under the influence of non-prescription drugs, or the worker was injured from the willful intent to injure the employee or another.[89] Thus, based on *Gonzales, Witmer,* and *Schleifman,* an insignificant deviation from one's normal work will not remove an employee from employment status at the time of the injury.

Larson's Workers' Compensation Law also provides some guidance here. "An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment."[90] 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.[91]

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.[92] "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

---

[87] *Witmer* at 662.

[88] *Id.* at 666.

[89] AS 23.30.120(a).

[90] 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §27 Scope, at 27-1 (2008).

[91] 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §33 Scope, at 33-1 (2008).

[92] *Id.*

some instances be a departure from employment even without the prohibition; but when they are expressly outlawed, all doubt is removed."[93] Conversely, when forbidden conduct and prohibitions relate only to methods to perform work, compensation is not blocked.[94]

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.

Several cases from other jurisdictions shed light on the kinds of minor deviations which do not remove an employee from employment status at the time of injury. In *Redfield v. Boulevard Gardens Housing Corp.*, a patrolman at a housing project was struck by a car while he crossed the street adjacent to the project grounds to get a newspaper.[95] The court awarded compensation noting, "[t]he 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."[96]

In *Maheux v. Cove-Craft, Inc.*, Mr. 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.[97] 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

---

[93] 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §33.01[1]. Prohibited Acts for Personal Benefit, at 33-2 (2008) (citations omitted).

[94] 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).

[95] *Redfield v. Boulevard Gardens Housing Corp.*, 167 N.Y.S.2d 59 (1957).

[96] *Id.* at 60.

[97] *Maheux v. Cove-Craft, Inc.*, 193 A.2d 574 (N.H. 1960).

forbidding personal use of employers' machinery was never posted. Because Mr. 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 to and injuries suffered during such personal activities are compensable.[98] Mr. Maheux's personal activity was found to be ordinary and usual and the court did not find he had left his employment.

In *Daniels v. Krey Packing Company*, Ms. 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.[99] The Missouri Supreme Court held the injury sustained by Ms. 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 Ms. Daniels' injuries unquestionably arose out of her employment. Ms. 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 incidental 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 of or reasonably anticipate.[100] 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.[101]

---

98 *Maheux* at 576.

99 346 S.W.2d 78, 80 (Missouri 1961).

100 *Id.* at 83.

101 *Id.*

In *Wilson v. Sears, Roebuck & Company*, Ms. Wilson took advantage of her employee discount privilege and purchased two large rugs from the employer.[102] 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, 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. 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."[103]

Finnegan v. Industrial Commission of Arizona involved an auto mechanic injured after work hours while working in his employer's garage on a co-worker's automobile.[104] The Arizona Supreme Court held Mr. 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

---

[102] *Wilson v. Sears, Roebuck & Company*, 384 P.2d 400 (Utah 1963).

[103] *Id.* at 401.

[104] *Finnegan v. Industrial Commission of Arizona*, 755 P.2d 413 (Arizona 1988).

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."[105] 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.

Briley v. Farm Fresh, Inc. was a personal injury action brought by an employee against her employer.[106] The question on appeal was whether the trial court correctly ruled Ms. Briley's exclusive remedy was under the Worker's Compensation Act. Ms. 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, Ms. Briley told a coworker she was finished with her work and was leaving. Ms. Briley removed her employer-provided white coat as she regularly did when checking out. However, instead of departing the building and going to her car, Ms. Briley went shopping for her mother, with whom she lived. Ms. Briley shopped for approximately 20 minutes when she slipped, fell, and suffered severe injuries. The court said "[t]he 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."[107] 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.[108] The court did not recognize a concept of "instantaneous exit" from the

---

105 *Finnegan* at 415. (Citations omitted.).

106 *Briley v. Farm Fresh, Inc.*, 396 S.E.2d 835 (Virginia 1990).

107 *Id.*

108 *Id.* at 836-837. (Citations omitted).

employer's premises immediately upon termination of work and stated an employee has a reasonable time after completing work to leave the premises.[109] In *Briley*, there is no contention Ms. Briley violated any work rule by engaging in personal shopping as she was leaving the employer's store. The court said it was to be anticipated that employees of a supermarket would purchase merchandise while on the premises and after completing assigned work duties. Ms. Briley 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, Ms. Briley was injured at a place where she was reasonably expected to be while engaged in an activity reasonably incidental to her employment by defendant. The court held Ms. 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.[110] 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. Ms. 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. Ms. 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. Ms. Kish's supervisor directed Ms. Kish not to deliver the commode herself, but to have the patient's caretaker pick it up. On the date of Ms. Kish's injury, during her visit with the patient, Ms. Kish noted her patient's condition had worsened and thought the makeshift commode was unsafe and needed to be replaced immediately. Ms. Kish decided to drive to the medical supply facility to pick up the commode. On her way, Ms. Kish saw a postal truck parked on the opposite side of the street. Remembering she had a personal greeting card to mail, Ms. 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, she was hit by an

---

[109] *Briley* at 837.

[110] *Kish v. Nursing and Home Care, Inc.*, 727 A.2d 1253 (Connecticut 1999).

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* 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."[111] *Kish* found Ms. Kish was at a place where she was reasonably entitled to be, and it was necessary to be there to fulfill her employment duties. The court acknowledged there was no bright line test to distinguish activities that are incidental to employment from those that constitute a substantial deviation. In deciding whether a substantial deviation has occurred, the trier is entitled to weigh a variety of factors, including the time, place, and extent of the deviation; as well as 'what duties were required of the employee and the conditions surrounding the performance of his work . . . .' For present purposes, it suffices to explain that the term of art 'incidental' embraces two very different kinds of deviations: (1) a minor deviation that is 'so small as to be disregarded as insubstantial'; and (2) the substantial deviation is deemed to be 'incidental to [employment]" because the employer has acquiesced to it. If a deviation is so small as to be disregarded as insubstantial, the lack of acquiescence is immaterial.[112] *Kish* concluded absence of permission was not fatal to Kish's claim because the deviation was so minor it could be disregarded as insubstantial.[113]

In *Marotta v. Town and Country Electric, Inc.*, 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.[114] Mr. Marotta, an electrician, reported to work, discussed work plans with his partner, and loaded his work truck with

---

111 *Kish* at 1256.

112 *Id.* at 1258. (Citations omitted).

113 *Id.*

114 *Marotta v. Town and Country Electric, Inc.*, 51 A.D.3d 1126 (N.Y. 2008).

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 Mr. Marotta twisted and reached for money in his back pocket, he felt a "pop" and suffered herniated discs, which required surgery and produced disability. Employers in New York State are required to secure compensation for injuries "arising out of and in the course of the employment."[115] The court determined there was no dispute Mr. 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."[116] 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."[117] The court found Mr. 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."[118]

These jurisdictions found that minor deviations, like that of Ms. Kolb, did not take an employee out of work status. These examples support the Board's finding that Ms. Kolb, even if in violation of Wal-Mart's No Purchases Policy, was still an employee at the time of her injury and that injury occurred within the course and scope of her employment. The record as a whole contains substantial evidence that Ms. Kolb was an employee at the time of her injury. The Board's decision is affirmed.

5. Conclusion.

The Board was within its statutory and regulatory requirements for Board hearings when it asked for and received supplemental briefings following its Interlocutory Decision

---

115 *Marotta* at 1126.

116 *Id.* at 1126-27.

117 *Id.* at 1127.

118 *Id.* at 1128.

and Order. This request did not imply Ms. Kolb had failed to meet her obligation to prove her claim by substantial evidence. The Board's findings of credibility are binding on the Commission and must be accepted. The credibility findings are supportive of the Board's determination Ms. Kolb was injured in the course and scope of her employment. Wal-Mart's No Purchases policy is, by its plain language, a 'no purchase' policy and not a 'no shopping' policy and Ms. Kolb did not violate it. Even if the policy were violated, any violation was minor and inconsequential and did not take Ms. Kolb out of employment status. She was in the course and scope of her employment at the time of injury. The Board's decision is AFFIRMED.

Date: ___*1 August 2017*______ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date

shown in the Commission's notice of distribution (the box below). 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 changes made in formatting for publication, this is a full and correct copy of Final Decision No. 237 issued in the matter of *Wal-Mart Associates, Inc., New Hampshire Insurance Company, and York Risk Services Group vs. Patricia S. Kolb,* AWCAC Appeal No. 16-015, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 1, 2017.

Date: *August 2, 2017*

Signed

K. Morrison, Appeals Commission Clerk