

No. A163347

***IN THE
FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA***

**CITY AND COUNTY OF SAN FRANCISCO,
Petitioners,
v.
WORKERS' COMPENSATION APPEALS BOARD
and STEVEN PACATTE (Deceased),
Respondents.**

**WCAB Case Number ADJ12113500
Hon. Anthony Corso**

**AMICUS CURIE BRIEF OF CALIFORNIA WORKERS' COMPENSATION
INSTITUTE IN SUPPORT OF PETITIONERS
CITY AND COUNTY OF SAN FRANCISCO**

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I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

[California Rule of Court 8.208]

Name of Interested Entity or Person	Nature of Interest
City and County of San Francisco	Petitioner – Employer
Workers’ Compensation Appeals Board	Respondent – Court
Steven Pacatte	Respondent – Employee (deceased)
Colleen Bialas	Respondent – Dependent and Guardian <i>ad litem</i>
Miller Eve Pacatte	Respondent – Minor dependent
California Workers’ Compensation Institute	<i>Amicus Curiae</i>

Respectfully submitted,

October 12, 2021

/s/ Ellen Sims Langille
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II. DECLARATION OF COMPLIANCE

[California Rule of Court 8.200(c)(3)]

No party nor any counsel for a party in the pending appeal has authored this brief in whole or in part. Petitioner City and County of San Francisco is an associate member of the California Workers' Compensation Institute and has paid generalized dues and assessments for the current fiscal year. No party nor any counsel for a party in the pending appeal has made a monetary contribution intended to fund the preparation or submission of the *amicus curiae* brief. No person or entity, other than CWCI and its members, has made a monetary contribution intended to fund the preparation or submission of the *amicus curiae* brief.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct based on my own knowledge, except as to matters stated on information and belief, and as to those matters I believe them to be true. Executed this 12th day of October, 2021, at Pacifica, California.

Respectfully submitted,

/s/ Ellen Sims Langille

Ellen Sims Langille, CWCI General Counsel
Counsel for *Amicus Curiae* CWCI

III. CERTIFICATION OF COMPLIANCE

[California Rule of Court 8.204]

I, Ellen Sims Langille, swear that I have read the within *Amicus Curiae* Brief and know the contents thereof; that the brief contains 6,241 words exclusive of tables, signature blocks, and these certificates, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts stated therein are true and on that ground allege that such matters are true; and that I make such verification as an officer of the California Workers' Compensation Institute.

Respectfully submitted,

October 12, 2021

/s/ Ellen Sims Langille

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VI. INTRODUCTION

It is axiomatic in workers' compensation that an employee's claim for benefits is barred by the going and coming rule when the injury arises during a regular commute.¹ It is equally axiomatic that the going and coming rule has suffered a long and tortuous² – and often conflicting – development, now riddled with exceptions³ that threaten to wholly swallow the rule itself. If left to stand, the decision below would sanction the ultimate destruction of the rule.

The question presented by this case is one of law, and the Board's conclusions on questions of law are reviewed de novo.⁴ And when a workers' compensation decision rests on the Board's erroneous interpretation or application of the law, the reviewing court will annul the decision.⁵

¹ *California Casualty Indemnity Co. v. IAC (Cooper)* (1943) 21 Cal.2d 751, 8 Cal. Comp. Cases 55.

² *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 156, 104 Cal. Rptr. 456, 37 Cal. Comp. Cases 734.

³ *Bramall v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 151, 156, 144 Cal. Rptr. 105, 43 Cal. Comp. Cases 288.

⁴ *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1542-1543.

⁵ *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1335, 1444; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 515-516.

VII. LEGAL ARGUMENT

A. The WCAB's Decision Below Is Based On A Plainly Erroneous Interpretation Of Law, And Must Be Annulled.

1. THE WCAB EXPRESSLY BASED ITS DECISION ON THE WEIGHING OF EVIDENCE IN A LIGHT MOST FAVORABLE TO A FINDING OF COMPENSABILITY.

In his Opinion on Decision, which was adopted and incorporated as the decision of the WCAB, the WCJ explained the legal rationale for his finding of compensability as follows:

[T]he weighing of evidence must be evaluated in a favorable light to the Applicant in order to fulfill the liberal construction rule required under Labor Code section 3202.⁶

The entirety of the decision below rests upon the layered effect of this stated rationale. The WCJ (and thus the WCAB) premised the finding of compensability upon the liberal evaluation of the facts and evidence in this case:

In applying the balancing test the undersigned concludes the Applicant having access to his vehicle provides a clear benefit to the employer and occurred with the employer's implicit consent, both of which place this injury within the exception to the going and coming rule.⁷

⁶ Opinion and Order Denying Petition for Reconsideration, at p. 5 [Exhibit I, at p. 130] [emphasis added].

⁷ Opinion and Order Denying Petition for Reconsideration, at p. 5 [Exhibit I, at p. 130].

To the extent that the WCAB's underlying legal rationale is erroneous, this Court is obliged to annul the decision.⁸

2. LABOR CODE SECTION 3202 PERMITS THE LIBERAL CONSTRUCTION OF STATUTES, NOT EVIDENCE.

There is no question that Labor Code section 3202 requires the liberal construction of statutes for the purpose of extending workers' compensation benefits. ***But this rule does not extend to the liberal interpretation of facts.*** Labor Code section 3202 mandates that the law be construed favorably to employees: "This clause requires the courts to view the legislation from the standpoint of the injured worker, with the objective of securing for him the maximum benefits to which he is entitled."⁹ Neither the statute nor any Supreme Court precedent suggests that courts must view the factual evidence in such a manner.

While there are some outdated precedents permitting such application, the Legislature has since enacted Labor Code section 3202.5, which requires that injured workers meet the evidentiary burden of proof on all issues by a preponderance of

⁸ *Lockheed Martin v. Workers' Comp. Appeals Bd. (McCullough)* (2002) 96 Cal.App.4th 1237, 1241, 117 Cal. Rptr. 2d 865, 67 Cal. Comp. Cases 245; *Rex Club v. Workers' Comp. Appeals Bd.* (1997) 53 Cal.App.4th 1465, 1471, 62 Cal. Rptr.2d 393, 62 Cal. Comp. Cases 441.

⁹ *Quinn v. State of California* (1975) 15 Cal.3d 162, 124 Cal. Rptr. 1, 40 Cal Comp. Cases 597 [emphasis added].

evidence.¹⁰ Since the enactment of section 3202.5, the companion statute has served to moderate the liberal construction rule of section 3202.¹¹ As the 5th District Court of Appeal succinctly stated:

[T]he Legislature adopted Labor Code section 3202.5 to **prevent** the policy of liberal statutory construction from being expanded into a requirement that the evidence be viewed in the light most favorable to the applicant.¹²

In *Lantz v. Workers' Comp. Appeals Bd.*,¹³ a case holding that the special mission exception to the going and coming rule requires that an activity be extraordinary in relation to an employee's routine duties, the Court of Appeal examined the statutory construction, rationale, and legislative history of both sections 3202 and 3202.5.

Looking first at the statutory construction "from a textual standpoint," the *Lantz* court pointed out the circular logic required to apply a liberal construction rule

¹⁰ "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by preponderance of the evidence in order that all parties are considered equal before the law." Lab. C. §3202.5, as amended in 2004.

¹¹ SULLIVAN ON COMP, §1.12 (liberal construction under §3202 no longer applies to questions of fact after enactment of §3202.5).

¹² *Lantz v. Workers' Comp. Appeals Bd.*, *infra*, 226 Cal.App.4th at 315 [emphasis added]. Unlike the *Maher* case cited by the WCAB (see *infra* at Part C-3), *Lantz* directly involved a dispute under the going and coming rule as well as the special mission exception.

¹³ *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 315, 171 Cal. Rptr. 3d 829, 79 Cal Comp. Cases 488 (*mod. and rhrq. den.* 2014 Cal. App. LEXIS 501, *rev. den.* 2014 Cal. LEXIS 5337).

to define the scope of “course of employment.” In essence, the court concluded that joining the “arising out of and in the course of the employment” language under section 3600 to the policy statement behind “liberal construction” would be tautological:

The [result] illustrates that using the policy of liberal construction to help interpret and apply the course-of-employment limitation begs the question whether the employee was injured in the course of his employment. In short, the policy of liberality is predicated upon there being a person who is “injured in the course of [his or her] employment” and, therefore, when given its plain meaning, does not aid in deciding the threshold question of whether the employee was injured in the course of his or her employment.¹⁴

The *Lantz* court next considered relevant case law, looking to a recent Supreme Court decision addressing the going and coming rule in which the dissent had argued that the mandate for liberal construction under section 3202 should have rendered the subject injury as compensable. Because the Supreme Court majority was aware of the dissent’s reliance on the liberal construction rule and yet did not adopt that position, the *Lantz* court concluded that the Supreme Court majority

¹⁴ *Lantz, supra*, 226 Cal.App.4th at 313-314.

“impliedly recognized the circular reasoning of using the policy of liberal statutory construction to justify expanding the exceptions to the going and coming rule.”¹⁵

Turning finally to the legislative history and after reviewing the Legislative Counsel’s Digest, the *Lantz* court concluded as follows:

The distinction between statutory construction and reviewing the evidence was clearly part of the Legislature’s thinking when, in 1982, it enacted Labor Code section 3202.5.... We believe Labor Code sections 3202 and 3202.5 must be read together and, when so read, these provisions direct courts to distinguish carefully between (1) questions of statutory interpretation and (2) inquiries into what was proven by the evidence presented.¹⁶

The principle that, at least since the enactment of Labor Code section 3202.5, the rule of liberal construction applies only to the interpretation of laws and not to questions of fact has been confirmed by the courts on multiple occasions.¹⁷

¹⁵ *Lantz*, *supra*, 226 Cal.App.4th at 314, reviewing *Santa Rosa Junior College v. Workers’ Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 220 Cal. Rptr. 94, 50 Cal. Comp. Cases 626.

¹⁶ *Lantz*, *supra*, 226 Cal.App.4th at 315.

¹⁷ *See, e.g., Wings West Airlines v. Workers’ Comp. Appeals Bd. (Luckenbach)* (1986) 187 Cal.App.3d 1047, 232 Cal. Rptr. 343, 51 Cal. Comp. Cases. 609 (rule of liberal construction cannot be used to relieve party from meeting evidentiary burden); *Leeth v. Workers’ Comp. Appeals Bd.* (1986) 186 Cal.App.3d 1550, 1557, 231 Cal. Rptr. 468, 51 Cal. Comp. Cases 540; *Rogers v. Workers’ Comp. Appeals Bd.* (1985) 172 Cal.App.3d 1195, 1199, 218 Cal. Rptr. 662, 50 Cal. Comp. Cases 550 (liberal construction does not assist applicant in meeting burden of proof); *Power v. Workers’ Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 787, 224 Cal. Rptr. 758, 51 Cal. Comp. Cases 114 (rejecting argument that whenever there is conflict in evidence, principle of liberal construction must result in finding in favor of employee); *Wehr v. Workers’ Comp. Appeals Bd.* (1985) 165 Cal.App.3d 188, 194,

Based on the legislative history and precedential case law, the liberal construction rule under section 3202 does not apply to the weighing of facts and evidence.

3. THE WCAB HAS ERRED AS A MATTER OF LAW IN APPLYING THE LIBERAL CONSTRUCTION RULE TO QUESTIONS OF EVIDENCE.

Despite these developments, the WCAB here expressly weighed the evidence in a light most favorable to the applicant. The decision below explicitly based its decision on a finding that “the weighing of evidence [in this case] must be evaluated in a favorable light to the Applicant.”¹⁸

Because that interpretation of law is plainly erroneous, and because that finding constitutes the foundation for the ultimate finding of compensability in this case, the decision below must be annulled.

B. Whether Express Or Implied, A Finding Of Necessity Over Convenience Is Critical To The Application Of The Required Vehicle Exception.

In *Hinojosa v. Workers’ Comp. Appeals Bd.*,¹⁹ the Supreme Court engaged in a thorough analysis of the decisions that had developed around the going and coming

211 Cal. Rptr. 321, 50 Cal. Comp. Cases 165 (liberal construction does not apply to burden of proof).

¹⁸ Opinion and Order Denying Petition for Reconsideration, at p. 5 [Exhibit I, at p. 130].

¹⁹ *Hinojosa v. Workers’ Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 104 Cal. Rptr. 456, 37 Cal. Comp. Cases 734.

rule. The court found a “sensible line... between the extremes of absolute coverage and absolute rejection for all transit-suffered injuries.”²⁰ In reviewing the going and coming cases that had found compensability, the court pointed out that these were cases involving “extraordinary transits”²¹ wherein the employer’s special request or imposition of an unusual condition had restored the employer-employee relationship:

1. an employee firefighter required to travel to a station house other than his own in order to attend a fire drill²²
2. where the employer placed an extraordinary requirement upon the employee, such as a designated route to the job that inured a benefit to the employer but a hazard to the employee²³
3. if the employee departed on a “special mission” to go to or from a particular designated destination at the request or invitation of the employer,²⁴ and

²⁰ *Hinojosa, supra*, 8 Cal.3d at 157.

²¹ *Ibid.* [emphasis added]

²² *Hinojosa, supra*, 8 Cal.3d at 158, citing *Le Febvre v. Workmen’s Comp. App. Bd.* (1968) 69 Cal.2d 386, 71 Cal. Rptr. 703, 33 Cal. Comp. Cases 653.

²³ *Hinojosa, supra*, 8 Cal.3d at 159, citing *Judson Mfg. Co. v. Ind. Acc. Com.* (1919) 181 Cal. 300.

²⁴ *Hinojosa, supra*, 8 Cal.3d at 159, citing *Dimming v. Workmen’s Comp. App. Bd.* (1972) 6 Cal.3d 860, 101 Cal. Rptr. 105, 37 Cal. Comp. Cases 211.

4. when the employee was expressly or impliedly required or expected to furnish his own means of transportation to the job.²⁵

The WCAB’s decision below bounces back and forth between the “special mission” exception under (3) and the “required vehicle” exception described in (4). Because the court in *Hinojosa* relied upon the “required vehicle” exception in (4) to find compensability in that case, we can begin there. It is worth noting, however, that the employee in *Hinojosa* was paid wages during the time of the disputed travel and that the nature of the work made it “necessary” for him to drive from one ranch to the other during each workday; these two factors are not present in the instant case.

1. IN APPLYING THE “REQUIRED VEHICLE” EXCEPTION, “NECESSARY” DOES NOT HAVE THE SAME MEANING AS “CONVENIENT.”

The *Hinojosa* court’s use of the term “necessary” to describe that injured worker’s use of a personal vehicle is critical to the proper application of the exception to the going and coming rule.²⁶

²⁵ *Hinojosa, supra*, 8 Cal.3d at 160, citing *Smith v. Workmen’s Comp. App. Bd.* (1968) 69 Cal.2d 814, 73 Cal. Rptr. 253, 33 Cal. Comp. Cases 771.

²⁶ The *Hinojosa* court described the transit in that case as an “extraordinary situation in which the job is structured, and dependent upon, transportation from one place of work to another so that the use of an instrument of such transportation is a requisite of employment.” 8 Cal.3d at 162. The structure of decedent’s job in the instant case includes no such requirement.

The term has been examined in detail by a number of subsequent cases. For example, the Court of Appeal in *Joyner v. Workmen's Comp. Appeals Bd.* reiterated the point that *Hinojosa's* finding of compensability was premised upon the necessity of using a personal vehicle to complete the requirements of employment.²⁷

However, a showing that public transportation is unavailable, impractical, or inconvenient will not render the going and coming rule inapplicable.²⁸ In *Baroid v. Workers' Comp. Appeals Bd.*,²⁹ the employee contended that public transportation was not available and that the use of a personal automobile was an implied or express condition of employment under *Hinojosa*. But the *Baroid* court refused to apply such a broad interpretation, finding instead that the employee had not demonstrated that a private automobile was a necessity:

Applicant has not shown other means of transportation were unavailable (e.g., taxi, private bus service, ride from a friend, bicycle, walking). Indeed, we have serious reservations about the mere absence of public transportation as meaning the employee when using his private vehicle to travel to work is within the special mission exception. (Citations omitted) To accept applicant's

²⁷ *Joyner v. Workmen's Comp. Appeals Bd.* (1968) 266 Cal.App.2d 470, 476, 72 Cal. Rptr. 132, 33 Cal. Comp. Cases 667 (very nature of employer's business established that employee's personal truck with its contents was a necessary instrumentality of that business).

²⁸ 1 HANNA CA LAW OF EMPLOYEE INJURIES AND WORKERS' COMPENSATION (2021) §4.151[2].

²⁹ *Baroid v. Workers' Comp. Appeals Bd.* (1981) 121 Cal.App.3d 558, 574, 175 Cal. Rptr. 633, 46 Cal. Comp. Cases 790.

proposition would have widespread expansion of the special mission exception whenever the employee can show that public transportation is unavailable, impractical, or even inconvenient. Accordingly, we reject applicant's attempted expansion of the special mission exception in this regard.³⁰

Under *Hinojosa*, “necessary” does not have the same meaning as “convenient.” Courts have distinguished *Hinojosa* and barred compensation under the going and coming rule because the use of the employee’s car was strictly at the choice of, and for the benefit and convenience of, the employee, and did not require a special route or mode of transportation or increase the risk of injury.³¹

We read *Hinojosa* to mean that an injury occurring during a particular transit from the home to the job is compensable when the transportation is accomplished by means imposed either as a condition of employment, such as the requirement that the employee use his own car during working hours, or that he use his own car at the special request of or as an accommodation to his employer. **A practice adopted for the mutual convenience of the employer and the employee and left to the discretion of the employee ... does not rise to the status of a requirement of employment,** nor does it establish such a “special” advantage to the employer as to extend the employer-employee relationship to the regular commute from the home to the place of work.³²

³⁰ *Baroid, supra*, 121 Cal.App.3d at 574 [emphasis added].

³¹ *Wilson v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal. 3d 181, 127 Cal. Rptr. 313, 41 Cal. Comp. Cases 76; *Hinson v. Workers’ Comp. Appeals Bd.* (1974) 42 Cal.App.3d 246, 116 Cal. Rptr. 792, 39 Cal. Comp. Cases 700.

³² *Hinson, supra*, 42 Cal.App.3d at 250-251.

While Respondents' Answer repeatedly asserts that use of a personal vehicle was required, the actual evidence at trial was that the use of a personal vehicle is optional. According to testimony from Captain Neuneker, there is no requirement for firefighters to use their own vehicle at work:

If a firefighter appears at a fire station and does not have their car to get between facilities, they are still eligible for detail out, and would have to find their own transportation up to and including getting a ride, borrowing a vehicle, getting a ride from your chief, taking public transportation, or taking an Uber or Lyft.³³

Respondents' contention (unsupported by any particular references to the record) that "all firefighters" were "basically mandated" to use their own vehicles³⁴ is simply not the same thing as a requirement necessitated by the employer.

Many cases find compensability based on an express or implied requirement that the employee use a personal vehicle as a condition of employment. For example, in *Huntsinger v. Glass Containers Corp.*,³⁵ the employee had duties both in the office and in the field and he was required to use his vehicle for the field work; in

³³ Trial testimony by Captain Neuneker, Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at p. 28.

³⁴ Respondents' Answer, at p. 26.

³⁵ *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 99 Cal. Rptr. 666 (exception applies when employer requires employee to drive to and from its office in order to have his vehicle available for company business during the day).

State Farm Mut. Auto. Ins. Co. v. Haight,³⁶ the employee was required to use his vehicle to travel to work sites; and in *Lobo v. Tamco*, a supervisor testified that the employee was required to use his personal car to discharge his work duties.³⁷

In all of the foregoing cases the common thread is that something about the location of the work, the nature of the work, or the hour the work was performed deviated from that which was the customary, fixed, or usual norm.³⁸

The facts of the present case can be distinguished from a “requirement” as set forth by these cases. In contrast to *Huntsinger*, the employee in this case had no duties in the field; in contrast to both *State Farm* and *Lobo*, even Respondents admit that the evidence in this case shows that SFFD does not mandate the use of a personal vehicle.³⁹

There is no evidence that CCSF encouraged or relied upon decedent’s use of his own car in connection with his job duties. The uncontradicted testimony at trial

³⁶ *State Farm Mut. Auto. Ins. Co. v. Haight* (1988) 205 Cal.App.3d 223, 252 Cal. Rptr. 162 (express condition of employment for employee to use personal vehicle while on duty).

³⁷ *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 105 Cal. Rptr.3d 718.

³⁸ *Baroid v. Workers’ Comp. Appeals Bd.* (1981) 121 Cal.App.3d 558, 569, 175 Cal. Rptr. 633, 46 Cal. Comp. Cases 790.

³⁹ Respondents’ Answer, p. 30 (testimony that it is up to the individual firefighter to figure out how to get to their detail).

was that employees were free to choose their own method of transportation.⁴⁰ And as in *Lobo*, there is no evidence that CCSF derived a different or additional benefit from decedent's use of his personal car to commute than it would have received had he used any other form of transportation.

In this case, the evidence is consistent that decedent's use of his personal vehicle was not at the express or implied requirement of the employer but rather for his own convenience. Under the circumstances, the "required vehicle" exception does not apply and the claim should be barred.

2. TRANSPORTATION OF WORK EQUIPMENT DOES NOT TRIGGER THE "REQUIRED VEHICLE" EXCEPTION TO THE GOING AND COMING RULE.

The fact that a firefighter may transport his work gear and other equipment in a personal vehicle does not transform that vehicle into an exception to the bar against compensation under the going and coming rule. This rule has been firmly established by a number of published decisions, most notably *Wilson v. Workers' Comp. Appeals Bd.*, where the Supreme Court confirmed that the transportation of work materials – even essential ones – to facilitate work does not warrant exception

⁴⁰ Respondents' Answer, p. 30 ("As adults," it is up to the individual firefighter to figure out how to get to their detail).

to the going and coming rule “unless such materials require a special route or mode of transportation or increase the risk of injury”⁴¹

Likewise, in *Savaikie v. Kaiser Foundation Hospitals*, the court found that a hospital pet therapist who used his own car to transport his work material (i.e., his therapy dog) was not acting in the course of his employment, because there was no evidence that a specially outfitted vehicle was necessary to transport the therapy dog or that the hospital required the therapist to use a specially outfitted vehicle: “Merely transporting work material does not establish the required vehicle exception to the going and coming rule.”⁴²

⁴¹ *Wilson v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 181, 185, 127 Cal. Rptr. 313.

⁴² *Savaikie v. Kaiser Foundation Hospitals* (2020) 52 Cal.App.5th 223, 231, 265 Cal. Rptr.3d 92 (“No doubt when work material is an animal, certain forms of transportation, such as public buses, may not be available. There is no evidence in the record, however, that transporting an animal could only be done by one form of transportation, specifically the employee’s own vehicle. [The hospital] did not object to [the employee] using Uber or Lyft, for example.”). In much the same way, there was no showing that the gear and equipment at issue in this case could not be transported by any other means, including Uber or Lyft.

Other respondeat superior cases make the same point. *See, e.g., Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 406, 207 Cal. Rptr. 3d 586 (evidence showed that instructor could have used other means for commute and for off-campus commitments but used personal vehicle as matter of convenience); *Tryer v. Ojai Valley School* (1992) 9 Cal.App.4th 1476, 1482-1483, 12 Cal. Rptr.2d 114 (commute between two designated school campuses while transporting essential work materials was not compensable, distinguishing *Hinojosa* because it required “the use of a vehicle as an integral part of performing the job at disparate locations throughout the course of work hours”); and *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 714, 159 Cal. Rptr. 835 (transport of cleaning equipment and small

The leading treatise on California workers’ compensation has explained the rationale for the employer-required transportation exception to the going and coming rule as follows:

The fact that the employee transports tools or other materials between work and home does not necessarily establish an implied requirement that use of the employee’s vehicle is necessary for employment. It is the employer’s special request or imposition of an unusual condition that removes the mode of transit between home and work from the employee’s choice or convenience and places it in the ambit of the employer’s choice or convenience thereby placing the trip within the employment relationship.⁴³

At trial, Respondents sought to elicit testimony confirming that firefighters routinely keep their gear and equipment in their personal vehicles for the benefit of the employer. On appeal, Respondents overstate that testimony to a very significant degree when they contend that “all three witnesses [testified that] most if not all firefighters use their personal vehicle to move assignments.”⁴⁴ In fact, Captain

furnishings does not establish required vehicle exception as a matter of law). While these are not workers’ compensation cases, California courts often cite tort and workers’ compensation cases interchangeably in going and coming cases. *Ducey, supra*, 25 Cal.3d at 722.

⁴³ 1 Hanna CA LAW OF EMPLOYEE INJURIES AND WORKERS’ COMPENSATION (2021) §4.155[2][b] [emphasis added].

⁴⁴ Respondents’ Answer, at p. 16. The same overly broad language is used at p. 26.

Neuneker testified that other firefighters have used public transportation including Muni -- or even their own bicycles -- to get between stations when detailed out.⁴⁵

The evidence in this case does not support a finding that the employer required the employee to use his personal vehicle. Based on the law regarding transportation of work equipment and the trial evidence that other firefighters have used alternate means of transportation when being detailed out, the contention that decedent's use of his personal vehicle was "required" by the employer must fail.

3. IF UPHELD, THE WCAB'S RELIANCE ON THE EMPLOYER'S "IMPLICIT CONSENT" WOULD TRANSMOGRIFY THE REQUIRED VEHICLE EXCEPTION INTO AN UNRECOGNIZABLE STANDARD.

TRANSMOGRIFY

trans·mog·ri·fy [/tranz'mägrə,fi,tran(t)s'mägrə,fi/]

verb: **transmogrify**; 3rd person present: **transmogrifies**; past tense:

transmogrified; past participle: **transmogrified**; gerund or present participle: **transmogrifying**

1. transform in a surprising or magical manner [Oxford Languages]
2. to change or alter greatly and often with grotesque or humorous effect [Merriam Webster]
3. to change in appearance or form, especially strangely or grotesquely [Dictionary.com]

"the cucumbers that were ultimately transmogrified into pickles"

⁴⁵ "Captain Neuneker is aware of individuals who had to take public transportation between stations when detailed out, including taking Muni. Captain Neuneker is aware of individuals who take a bicycle in to work...." Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at pp. 28-29.

The WCAB used an incorrect legal standard to determine whether the use of a personal vehicle was a requirement of employment. In its decision below, the WCAB has created a brand new definition of the “required vehicle” exception to the going and coming rule, allowing compensation when the employer merely “implicitly consents” to an employee’s use of a personal vehicle. This not-so-subtle shift in the standard for employer conduct, would transmogrify the exception and should not be permitted.

At least as early as *Smith*, the Supreme Court mandated an express requirement for the furnishing of transportation in order to trigger the exception to the going and coming rule.⁴⁶ Since *Hinojosa*, the accepted standard warranting an exception to the going and coming rule has been a showing that the employer had “expressly or impliedly required” the employee to use his personal vehicle for work activities.⁴⁷ Diligent research by counsel for *amicus curiae* has not revealed any reported instance of “implied consent” used as a standard to avoid the bar against compensation. Indeed, such a standard would effectively negate any application of the going and coming rule, inasmuch as all employers “consent” in some manner to their employees’ choice of transportation -- so long as they eventually arrive at work.

⁴⁶ *Smith v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 821, 73 Cal. Rptr. 253 (employer “instructed Smith to have his car available on the job every morning”).

⁴⁷ *Hinojosa, supra*, 8 Cal.3d at 160 [emphasis added].

The WCAB’s shift to a mere “implicit consent” standard⁴⁸ represents a transformation from a “requirement” standard to a “consent” standard, unwarranted by *Hinojosa* or any of its progeny.

C. A Theoretical “Special Mission” Is Insufficient To Support An Exception To The Going And Coming Rule.

Having examined and refuted the “required vehicle” exception, we can turn back to the “special mission” exception identified in *Hinojosa*. The “special mission exception” to the going and coming rule permits a finding of compensability if it can be proven that at the time of injury the underlying activity was: (1) special, that is, extraordinary in relation to the employee's routine duties; (2) within the course of the employment; and (3) undertaken at the request or invitation of the employer.⁴⁹

⁴⁸ Opinion and Order Denying Petition for Reconsideration, at p. 5 (concluding that “Applicant having access to his vehicle provides a clear benefit to the employer and occurred with the employer’s **implicit consent**, both of which place this injury within the exception to the going and coming rule.”) [emphasis added].

⁴⁹ SULLIVAN ON COMP, §5.48, citing *City of San Diego v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1385 (police officer’s commute to courthouse was not a special mission but instead was within the purview of the going and coming rule).

1. PROOF OF AN EXCEPTION TO THE GOING AND COMING
RULE REQUIRES MORE THAN A THEORETICAL SPECIAL
MISSION.

In cases applying the exception, the common thread is that something about the location of the work, the nature of the work, or the hour the work was performed deviated from that which was the customary, fixed or usual norm.⁵⁰

But the WCAB’s decision here appears to rest on a theoretical Special Mission rather than an actual one. In its decision below, the WCAB adopted and incorporated as its own the bulk of the WCJ’s Opinion on Decision – relying particularly on evidence that decedent *could* have been called to another station far away and *would* have been responsible for moving all of his gear.⁵¹

The theoretical possibility that decedent *might* have been detailed out is not a sufficient basis to qualify for the “Special Mission” exception to the going and coming rule. Indeed, the evidence at trial was that decedent had never been detailed out from his position as a driver at Engine 14.⁵²

⁵⁰ *Baroid v. Workers’ Comp. Appeals Bd.* (1981) 121 Cal.App.3d 558, 569, 175 Cal. Rptr. 673, 46 Cal. Comp. Cases 790.

⁵¹ Opinion and Order Denying Petition for Reconsideration, at p. 2 [Exhibit I, at p. 127].

⁵² See testimony from Captain Neuneker, who “testified that after the [decedent] was scheduled to be a driver at Engine 14, he was never detailed out.” Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at p. 30; see *also* testimony from Battalion Chief Joseph Moriarty, who “confirmed the [decedent] had never been assigned out since being stationed permanently at Station 14.”

2. EVIDENCE AT TRIAL CONFIRMS THAT THERE WAS NO
REALISTIC CHANCE THAT DECEDENT WAS GOING TO BE
DETAILED OUT ON THE DATE OF INJURY.

Equally problematic to the “special mission” exception is Respondents’ repeated contention that “we do not know” whether the decedent would have been detailed out on that particular day,⁵³ or alternatively, that there is no direct evidence showing whether he would have been detailed out that day.⁵⁴ On the contrary, **we do know**, and there are multiple points of evidence in the record confirming, that he would not have been assigned to any station other than his usual and customary workplace.

The record demonstrates that Captain Neuneker testified that Station 14’s engine company was already short-staffed on 12/12/2018; that Station 14 actually required an addition of firefighters from other stations on that date; that decedent was Station 14’s only scheduled engine driver; that the driver position is rarely reassigned to another station; and that there was “little or no chance” that he would have been detailed out that day.⁵⁵ Even the WCJ acknowledged that another witness,

Opinion and Order Denying Petition for Reconsideration, at p. 2 [Exhibit I, at p. 127].

⁵³ Respondents’ Answer includes statements (notably without reference to the record or any evidence) that “we don’t know whether or not he would have been detailed out.” (p. 16).

⁵⁴ Respondents’ Answer, at p. 16.

⁵⁵ Testimony from Captain Neuneker, Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at pp. 27-31.

Lieutenant Annie Hodinott, confirmed that she found no evidence that decedent would be assigned to a different firehouse on December 12, 2018.⁵⁶

Respondents disparage the reliance by Petitioners on *Newland v. County of Los Angeles*,⁵⁷ contending that the case is an inappropriate comparison inasmuch as the facts there related to a respondeat superior claim. But the Respondents' brief never explains why that renders *Newland* somehow inapposite.⁵⁸ And in fact, the *Hinojosa* court itself looked to tort liability cases when it crafted the very guidelines upon which Respondents now rely.⁵⁹ In any event, it is noteworthy that Respondents do not bother to address the legal issue raised by *Newland*, to wit: that the employee *must be acting* within the course and scope of their employment *at the time of injury* in order for an injury to be compensable.⁶⁰ Petitioners and this Court may properly rely on the standards set forth in *Newland*.

⁵⁶ Findings of Fact & Opinion on Decision, at p. 3 [Exhibit E at p. 65].

⁵⁷ *Newland v. County of Los Angeles* (2018) 24 Cal.App.5th 676, 234 Cal. Rptr.3d 374, 83 Cal. Comp. Cases 1232.

⁵⁸ At best, Respondents suggest that liberal interpretation rules require a less restrictive test for liability in respondeat superior cases than in workers' compensation law. Respondents' Answer, at p. 32.

⁵⁹ The *Hinojosa* court's reasoning was "draw[n] from the decisions arising under the workmen's compensation law *and from those fixing the liability of the employer for the tort of the employee* that occurs in the course of employment...." *Hinojosa*, *supra*, 8 Cal.3d at 157-158 [italics added].

⁶⁰ *Newland*, *supra*, 24 Cal.App.5th at 694.

In their Answer, Respondents grudgingly acknowledge that “there is no direct evidence that [decedent] would have been detailed out that day.”⁶¹ Actually, Respondents’ own witness, Captain Neuneker, confirmed that there is no evidence that applicant would have been reassigned to any other station,⁶² or that he was going to be detailed out on December 12, 2018,⁶³ or that anyone from Station 14 or indeed the entire City was going to be detailed out for an OES assignment that day.⁶⁴ This testimony was fully supported by another of applicant’s witnesses, Battalion Chief Joseph Moriarty.⁶⁵

Based on this direct and uncontradicted evidence,⁶⁶ there is no question that decedent was not acting in the course and scope of his employment as he drove to work *at the time of injury* or indeed that entire day.

⁶¹ Respondents’ Answer, at p. 16.

⁶² Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at p. 28.

⁶³ Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at p. 29.

⁶⁴ Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at p. 29.

⁶⁵ “Mr. Moriarty testified that he is not aware of any records admitted in this proceeding that show any firefighter was reassigned out to OES on December 12, 2018.... Mr. Moriarty is not aware of any OES assignment on December 12, 2018.” Exhibit B, Minutes of Hearing and Summary of Evidence, dated April 30, 2021, at pp. 24-25.

⁶⁶ As opposed to circumstantial evidence, direct evidence is that which, if believed, proves or disproves a disputed fact without need for inference, and includes witness testimony [www.americanbar.org].

3. THE DECISION BELOW IS BASED IN PART ON AN OVERLY BROAD APPLICATION OF A CASE THAT HAS NO BEARING ON THE DISPUTED ISSUES IN THIS MATTER.

The WCAB has pointed to *Maier v. Workers' Comp. Appeals Bd.*⁶⁷ for the broad proposition that any injuries sustained while performing reasonable activities expressly or impliedly permitted by employment are compensable.⁶⁸ But the *Maier* case did not actually involve the going and coming rule nor any other exception to a bar against compensation. Instead, the decision simply found that a nurse was entitled to compensation benefits for an injury sustained during treatment for a preexisting disease, where the treatment was required as a condition of continued employment. It is not a legally relevant comparison to the facts of the instant case.

The WCAB's conclusion from *Maier* that compensability lies wherever employment "impliedly permits" an activity causing injury is overly broad and not sustainable on examination. To hold otherwise would sanction a finding of compensability for any commute, inasmuch as it can be acknowledged that employers want their employees to come to work and are generally agreeable to any method of transportation that accomplishes this result.

⁶⁷ *Maier v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 190 Cal. Rptr. 904, 48 Cal. Comp. Cases 326.

⁶⁸ Opinion and Order Denying Petition for Reconsideration, at p. 5 [Exhibit I, at p. 130].

VIII. CONCLUSION

At the beginning of this amicus curiae brief, it was suggested that the exceptions to the going and coming rule have long threatened to swallow the rule entirely. If that is the ultimate result desired by this Court, then this case presents the perfect opportunity: If affirmed, the decision below represents the end of the compensation bar. If this Court is prepared to proclaim as compensable injuries sustained during a normal commute, during regular commute hours, and while using a personal vehicle on the theoretical chance that the employee might one day be called upon to use the vehicle at their discretion – then certainly, affirmance of the decision below is in order.

Amicus curiae respectfully suggests that such a drastic outcome is not warranted. Instead, in the interests of public policy, this Court should confirm the continuing viability of a longstanding rule barring compensation during a routine commute:

[I]f there is to be a going and coming rule at all, lines must be drawn as to certain injuries being barred from compensability under that rule. (Citations omitted) **Indeed, the evasion of the going and coming rule by arbitrary exceptions based upon impertinent facts does injustice** to those workers whose injuries come within the going and coming rule because they cannot point to any “unusual” fact about their journey to or from work.⁶⁹

⁶⁹ *Baroid, supra*, 121 Cal.App.3d at 572-573 [emphasis added].

The WCAB’s improper reliance on “liberal construction” as applied to the facts and evidence in this case, and its unwarranted adoption of an “implicit consent” standard, have so seriously undermined its conclusions as to completely invalidate the decision below, and this Court should annul the decision.

Respectfully submitted,

October 12, 2021

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IX. CERTIFICATE OF SERVICE

I certify that on October 12, 2021, I electronically filed the foregoing

**AMICUS CURIAE BRIEF OF
THE CALIFORNIA WORKERS' COMPENSATION INSTITUTE
IN SUPPORT OF PETITIONERS
CITY AND COUNTY OF SAN FRANCISCO**

with the Clerk of the Court for the First District Court Of Appeal by using the appellate TrueFiling system. The following case participants were served electronically through the TrueFiling system:

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Recon Unit Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142	

I certify that all participants in the case are registered TrueFiling users and that service will be accomplished by the appellate TrueFiling system.

Respectfully submitted,

October 12, 2021

/s/ Ellen Sims Langille
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