

No. C101549

IN THE
THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

Zenith Insurance Company,

Petitioner,

v.

Workers' Compensation Appeals Board and Javier Hernandez,

Respondents.

WCAB CASE NUMBER ADJ16567838

HON. CURTIS SWANSON

**CALIFORNIA WORKERS' COMPENSATION INSTITUTE'S
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITIONER ZENITH INSURANCE COMPANY**

Ellen Sims Langille, Amicus Counsel (SBN: 154329)

California Workers' Compensation Institute

1999 Harrison St., Suite 2100

Oakland, CA 94612

Telephone: (510) 251-9470

elangille@cwci.org

Counsel for *Amicus Curiae*

California Workers' Compensation Institute

I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

[California Rule of Court 8.208]

Name of Interested Entity or Person	Nature of Interest
Javier Hernandez	Applicant, Respondent herein
Ceja Reyes	Employer
Zenith Insurance Company	Insurer, Petitioner herein
Workers' Compensation Appeals Board	Trial court, Respondent herein
California Workers' Compensation Institute	<i>Amicus Curiae</i>

Respectfully submitted,

December 18, 2024

/s/ Ellen Sims Langille
Ellen Sims Langille, CWCI Amicus Counsel
elangille@cwci.org
Counsel for *Amicus Curiae* CWCI

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 Zenith Insurance Company is a regular 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 this *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 this *amicus curiae* brief.

I declare under penalty of perjury 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 18th day of December 2024, at Mount Dora, Florida.

Respectfully submitted,

/s/ Ellen Sims Langille

Ellen Sims Langille, CWCI Amicus 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 6,160 words inclusive 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 because the officers of the California Workers' Compensation Institute are absent from the County where my office is located and are unable to verify the petition, and because as amicus counsel for the California Workers' Compensation Institute I am more familiar with such facts than are the officers.

Respectfully submitted,

December 18, 2024

/s/ Ellen Sims Langille
Ellen Sims Langille, CWCI Amicus Counsel
elangille@cwci.org
Counsel for *Amicus Curiae* CWCI

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VI. INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, *amicus curiae* California Workers' Compensation Institute seeks to provide this Honorable Court with an examination of the "tortuous history" of the going and coming rule in California, from its judicial birth nearly 100 years ago through the development of numerous exceptions to the rule. In analyzing each of these exceptions, we demonstrate that none applies to the facts of this case. The brief concludes with a focus on a Labor Code section that may provide this Court with guidance as to legislative intent to narrow the myriad exceptions to the going and coming rule.

VII. LEGAL ARGUMENT

It is axiomatic that the Workers' Compensation Act extends only to injuries suffered by an employee, where those injuries arise out of and in the course of their employment. Under California workers' compensation law, a "grand bargain" exists between the employer and employee, whereby the injured worker receives relatively swift and certain payment of benefits regardless of fault while the employer is shielded from civil liability and its concomitant potential damages.¹

¹ *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16, 276 Cal. Rptr. 303; *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708, 30 Cal. Rptr. 2d 18.

A. The Going and Coming Rule Is a Judicially Created Construct That Was Designed to Reinforce the Grand Bargain by Precluding Compensation for Non-Work-Related Injuries.

The Supreme Court has explained that the compensation bargain serves a number of public policy ends, including the guarantee of prompt, limited compensation for work injuries as an inevitable cost of production as well as to spur increased industrial safety.²

But these policies are not served where injuries are sustained outside of the employer-employee relationship or outside the employment location where the employer has no opportunity to increase safety. Accordingly, nearly 100 years ago, the Supreme Court recognized that injuries sustained by an employee while engaged in activities incidental to employment but not while rendering any service to the

² *S. G. Borello & Sons, Inc. v. DIR* (1989) 48 Cal. 3d 341, 354, 256 Cal. Rptr. 543 (the purposes identified by the Supreme Court include “(1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee’s work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees injuries.”).

employer, such as travel going to and coming from work, fell outside of the scope of the workers' compensation bargain.³

Since that time, because an employee begins to render service only upon arrival at the place of employment, the “going and coming” rule has precluded compensation for injuries sustained while an employee travels to and from work.⁴

B. Reasonable Exceptions Have Been Established in Recognition of Borderline Cases, But None of These Exceptions Applies Here.

Over the ensuing century, the California Supreme Court has established a number of exceptions in recognition of borderline cases requiring a more flexible

³ *Ocean Accident and Guarantee Co. v. Industrial Acc. Com.* (1916) 173 Cal. 313, 322, 159 P. 1041. The court noted that in the very broadest sense, any injury occurring during the employee's travel to work is an injury growing out of and incidental to their employment, since it is a necessary part of the employment that the employee travel to work. But the court reasoned that the right to compensation benefits is founded upon whether a *service* is being rendered at the time of injury, and an employee “going to and from his place of employment is not rendering any service.” In its decision below, the WCAB opined that the 60-mile distance of applicant's vanpool commute took it out of “ordinary” for purposes of the rule as set forth in *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157, 104 Cal. Rptr. 456. But this is a legally incorrect analysis. The actual test to determine if a trip is an ordinary local commute is whether or not the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force. 1 Hanna CA Law of Employee Injuries & Workers' Comp §4.151.

⁴ *California Casualty Indem. Exchange v. Industrial Acc. Com. (Cooper)* (1943) 21 Cal.2d 751, 135 P.2d 158, 754 (“The reason for the rule is that the relationship of the employer and employee is suspended from the time the employee leaves his work to go home until he resumes his work....”).

determination of precisely when an employee enters the course of their employment and begins to perform services arising out of and in the course of employment.

In each of these exceptions, the central issue is either (1) whether there was an express or implied agreement that the employer-employee relationship would continue throughout the employee's travel, or (2) whether there was an express or implied requirement of the employment that the trip be undertaken.⁵

1. TRANSPORTATION FURNISHED OR REQUIRED BY EMPLOYER

The Supreme Court has held that if an employer furnishes its employees with transportation to and from the workplace and where the means of transportation remains under the control of the employer, any injury sustained by an employee during such transport is compensable.⁶ Likewise, where the worker is required to

⁵ 1 Hanna CA Law of Employee Injuries & Workers' Comp. §4.153.

⁶ *California Casualty Indem. Exchange v. Industrial Acc. Com. (Duffus)* (1942) 21 Cal.2d 461, 132 P.2d 815. The court reasoned that because the essential prerequisite to compensation that the danger from which the injury resulted be one to which the employee was exposed as an employee in her particular employment was met when the employee solely by reason of her relationship to her employer entered the vehicle provided by the employer. 21 Cal.2d at 466.

have an automobile available for use at work, travel to and from work in the automobile is in the course of the employment.⁷

In this case, the uncontradicted evidence is that the employer neither furnished transportation to the applicant nor required that he have an automobile at work.⁸

While the WCAB seems to have gotten itself caught up in the supposed “benefit” the employer received by having its employees come to work (“defendant simply expected the employees to somehow show up on time for work”⁹), the Supreme Court has discounted this act as a factor in a compensability determination.¹⁰

2. PAYMENT OF WAGES OR TRAVEL EXPENSES DURING TRAVEL

Where an employer expressly or impliedly agrees that the employment relationship continues during the period of “going and coming,” particularly by payment of wages during the time spent traveling to and from work, the Supreme

⁷ *Smith v. Workers’ Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 820, 73 Cal. Rptr. 253 (requirement that worker furnish vehicle on the job curtails the application of the going and coming rule); see also *County of Tulare v. Workers’ Comp. Appeals Bd.* (1985) 170 Cal.App.3d 1247, 1252, 216 Cal. Rptr. 885 (exception applies where nature of job impliedly requires employee to arrange own transportation to accomplish purpose the job). See 1 Hanna CA Law of Employee Injuries & Workers’ Comp §4.155.

⁸ Petition for Writ of Review, p. 15 (#7).

⁹ WCAB Opinion and Decision on Reconsideration, p. 3.

¹⁰ See *Ocean Accident, supra*, 173 Cal. 313, 322; see also discussion of this point at fn. 3 *supra*, and in the Petition for Writ of Review at pp. 44-46.

Court has held that injuries sustained during the journey are compensable.¹¹

Likewise, where an employer regularly pays an additional amount to cover transportation costs, injuries sustained by an employee on their way to work are compensable.¹²

In this case, applicant had clocked out from his job nearly an hour prior to the accident, and was not receiving wages at the time of injury. Not only were travel expenses not provided by the employer, the uncontested evidence showed that the employer expressly renounced any obligation to provide or pay for transportation for its employees. In fact, rather than *receiving* payment for transportation, applicant himself *paid* the van driver \$10 a day in exchange for transportation.¹³

3. TRANSPORTATION OF WORK TOOLS / HOME AS SECOND JOB SITE

Another type of exception to the going and coming rule was found by the Supreme Court where the employee is required to transport tools or equipment back

¹¹ *Kobe v. Industrial Acc. Com.* (1950) 35 Cal.2d 33, 215 P.2d 736. The court determined that, by payment of wages specified to cover the time required to travel to and from work, the employer has impliedly agreed that the employment relationship should commence at the time the employee leaves their home and continue until their return. 35 Cal.2d at 36. See 1 Hanna CA Law of Employee Injuries & Workers' Comp §4.154.

¹² *Zenith Nat'l Ins. Co. v. Workers' Comp. Appeals Bd.* (1967) 66 Cal.2d 944, 59 Cal. Rptr. 622. The court found that payment of an additional \$10 per day constituted a substantial payment intended for travel expenses in order to induce the employee to accept employment. 66 Cal.2d at 949.

¹³ Findings & Award, p. 2.

and forth to work, with injuries being held compensable if such materials required a special route or mode of transportation.¹⁴ And where an employee is required to perform some work at home, the Supreme Court has found that injuries during the commute are compensable in the same manner as travel between two employer-owned premises at the employer's request.¹⁵

There is no allegation in this case that applicant was transporting tools at the time of injury, nor using his home as a second job site.

4. NO REGULAR PLACE OF EMPLOYMENT

Where an employee has no regular or normal place of employment, the Supreme Court has found that the going and coming rule will not preclude compensation for injuries sustained en route to a worksite.¹⁶

¹⁴ *Wilson v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 181, 127 Cal. Rptr. 313. The court found that mere transport of equipment does not warrant exception from the going and coming rule. 16 Cal.3d at 185.

¹⁵ *Wilson, supra* 16 Cal.3d at 184. The court opined that such injuries are compensable only where the circumstances of the employment, and not mere dictates of convenience to the employee, make the home a second job site. 16 Cal.3d at 184. See 1 Hanna CA Law of Employee Injuries & Workers' Comp. §4.158.

¹⁶ *LeFebvre v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 386, 71 Cal. Rptr. 703. The court ruled that a volunteer firefighter was acting in the scope of his employment from the moment he left his home to engage in any firefighting or training drill, with such travel plainly required by his employment. 69 Cal.2d at 388.

The uncontradicted evidence in this case is that applicant had a single job site throughout his employment.¹⁷

5. COMMERCIAL TRAVELER RULE

Perhaps the most expansive exception to the going and coming rule recognized by the Supreme Court relates to commercial travelers, who are regarded as acting within the course and scope of their employment during the entire period of travel upon the employer's business, including traveling or procuring food and shelter.¹⁸

There is no allegation in this case that applicant was acting as a commercial traveler.

6. SPECIAL MISSION / SPECIAL ERRAND

When the employee engages in a special activity which is within the course of their employment, and which is reasonably undertaken at the request or invitation of the employer, an injury suffered while traveling to and from the place of such activity also is within the course of employment and is compensable.¹⁹

¹⁷ Findings & Award, p. 2.

¹⁸ *Wiseman v. Industrial Acc. Com.* (1956) 46 Cal.2d 570, 297 P.2d 649. The court confirmed that a commercial traveler is regarded as acting within the course of his employment during the entire period of their travel upon their employer's business. 46 Cal.2d at 572.

¹⁹ *Dimmig v. Workers' Comp. Appeals Bd.* (1972) 6 Cal.3d 860, 101 Cal. Rptr. 105. The court identified a trip as "special" when it is extraordinary in relation to routine duties, not outside the scope of the employment. 6 Cal.3d at 868. See 1 Hanna CA Law of Employee Injuries & Workers' Comp. §4.157.

The uncontradicted evidence in this case is that applicant was injured during his commute at the end of the workday,²⁰ and there is no allegation that he was engaged in any special mission or errand on behalf of his employer.

7. SPECIAL RISK / ZONE OF DANGER

Where the employment itself creates a danger to employees entering or leaving the premises, the Supreme Court has identified a ‘field of risk’ or ‘zone of danger,’ the extent of which varies depending on the degree to which the employer’s conduct contributes directly as a proximate cause of the employee’s injuries.²¹ This exception is often invoked in instances of the always-fraught left turn into the employer’s parking lot.²²

Because the WCAB specifically invokes this exception in its decision below, particular attention must be paid here. Cases invoking the special risk exception are uniformly ones in which the employee was subjected to a risk related to going into or

²⁰ Findings & Award, p. 2.

²¹ *Parks v. Workers’ Comp. Appeals Bd.* (1983) 33 Cal.3d 585, 190 Cal. Rptr. 158. In *Parks*, the court held that an off-premises injury to a teacher was compensable when her risk was “qualitatively greater” than the general public because she was “regularly” subjected to the risk of becoming a “sitting duck” for an assault while stopped at a particular intersection. 33 Cal.3d at 592.

²² The Supreme Court has determined that the making of a left turn into an employer’s parking lot exposes the employee to a particular risk – one distinctive in nature and not shared by the public generally. See, e.g., *Pacific Indemnity Co. v. Industrial Acc. Com. (Henslick)* (1946) 28 Cal.2d 329, 338, 170 P.2d 18; *Greydanus v. Industrial Acc. Com.* (1965) 63 Cal.2d 490, 493, 47 Cal. Rptr. 384. See 1 Hanna CA Law of Employee Injuries & Workers’ Comp. §4.156.

out of the location of the employer's premises and under conditions over which the employer exercised some control.²³

In contrast, where the injury occurs at a location over which the employer has no control, courts are loathe to expand the employer's responsibility to encompass isolated events on public streets.²⁴ The necessary prerequisite for the exception to apply is a connection to employment: "[T]he fact that an accident happens upon a public road and the danger is one to which the general public is likewise exposed, does not preclude the existence of a causal relationship between the accident and the employment *if the danger is one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree.*"²⁵

²³ See, e.g., *Freire v. Matson Navigation Co.* (1941) 19 Cal.2d 8, 118 P.2d 809 (steamship employee required to walk across public bulkhead constituting the only means of access to employment location); *Greydanus, supra*, 63 Cal.2d 490 (dairy employee required to turn left off highway into farm); *Lewis v. Workers' Comp. Appeals Bd.* (1975) 15 Cal.3d 559, 125 Cal. Rptr. 353 (employee crossing public street from parking lot leased for exclusive benefit of employees).

²⁴ See, e.g., *G.E. Engine Maintenance v. WCAB (Main)* (1998) 69 Cal.App.4th 1528, 82 Cal. Rptr.2d 199 (no exception for injury from traffic accident during commute, in absence of evidence that employee was exposed to a hazard not shared by the general public); *Rivera v. Workers' Comp. Appeals Bd.* (1977) 70 Cal.App.3d 705, 710, 139 Cal. Rptr. 67 (no special risk created by ongoing labor dispute and confusion at job site, when injury occurred on street outside of employer premises). The *Rivera* court noted that the accident occurred as a result of union activity over which the employer had no control.

²⁵ *Henslick, supra*, 28 Cal. 2d at 338 [emphasis added].

The decision below directly contradicts the ruling in *General Ins. Co. v. Workers' Comp. Appeals Bd. (Chairez)*, where the Supreme Court held that an employee on a public street at a time and location generally available to the public is not subject to a greater risk than anyone else on the street.²⁶ Where, as here, there are no facts indicating that the employee was exposed to a greater risk than the general public traversing the same highway, the special risk exception does not apply.²⁷

The WCAB strains to avoid the rule from *Chairez* by positing that the employer created a special risk by hiring someone without a driver's license.²⁸ The WCAB's rationale appears to be that, by offering employment to a worker without a license to drive, the employer here *forced* applicant to rely upon an inherently dangerous vanpool. But this rationale, completely without precedent, suggests that

²⁶ *General Ins. Co. v. Workers' Comp. Appeals Bd. (Chairez)* (1976) 16 Cal.3d 595, 601, 128 Cal. Rptr. 417 (no exception to going and coming rule where injury occurred while employee was parking on public street, which constitutes type of risk public faces daily, and employee was not subjected to greater risk than anyone else on street). The Supreme Court endorsed a "premises line" rule for going and coming cases, noting that it "has the advantage of enabling courts to ascertain the point at which employment begins -- objectively and fairly." 16 Cal.3d at 599.

²⁷ Notably, the decision below does not explain how or why applicant's participation in a vanpool placed him at a greater risk than anyone else driving on the highway that day.

²⁸ WCAB Opinion and Decision on Reconsideration, pp. 4-5 ("Petitioner hired the applicant to work at a location 60 miles from his home, in spite of the fact that the applicant did not know how to drive, have no car, and did not have a driver's license.... This situation required applicant to take extraordinary action to ensure he could make it to work on time, everyday [sic], and get home afterwards.... Thus, this was the employment-related condition that created the special risk.").

any employer not within walking distance of this worker's home inevitably creates a "zone of risk" for their entire commute, *merely by hiring him*. But the case law does not support this reasoning. Indeed, injuries incurred on a public bus on the way to work are generally not compensable,²⁹ and showing that public transportation is unavailable, impractical, or inconvenient does not prevent the going and coming rule from precluding benefits.³⁰ Application of the going and coming rule must not differentiate as between transportation choices made by workers who lack a driver's license.

8. DUAL PURPOSE RULE

Finally, the Supreme Court held in *Lockheed Aircraft Corp. v. Industrial Acc. Com.* that an employee remains within the course of employment even while conducting personal business, provided that there is a sufficient connection to the employment.³¹ A necessary corollary of the Supreme Court's ruling in this case is that an injury is not compensable where the employee's activities neither directly nor indirectly serve the employer.³²

²⁹ *Hinojosa v. Workers' Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157, 104 Cal. Rptr. 456.

³⁰ *Baroid v. Workers' Comp. Appeals Bd. (Hancock)* (1981) 121 Cal. App. 3d 558, 574, 175 Cal. Rptr. 633.

³¹ *Lockheed Aircraft Corp. v. Industrial Acc. Com.* (1946) 28 Cal.2d 756, 172 P.2d 1.

³² *Id.*, at 759.

Here again, the WCAB below specifically relies upon this exception for its decision. Accordingly, a more in-depth review of the exception is warranted. Notably, this exception is rarely applied in going and coming cases; it is most often referenced in civil *respondeat superior* claims, where an injured third party seeks to proceed against an employer.³³ In practice, the Dual Purpose Rule is applied where an employee is combining their own business with that of the employer, not necessarily during a commute to and from the place of employment.³⁴ Indeed, the leading workers' compensation treatise does not even include the Dual Purpose Rule in its discussion of the exceptions to the going and coming rule.³⁵

The “dual purpose” exception is not often employed in going and coming cases, and reported cases are few.³⁶ One rare example finding compensability under

³³ See, e.g., *Halliburton Energy Services, Inc. v. Dept. of Transportation* (2013) 220 Cal.App.4th 87, 97, 162 Cal. Rptr.3d 752; *Pierson v. Helmerich & Payne Intl. Drilling Co.* (2016) 4 Cal.App.5th 608, 631, 209 Cal. Rptr.3d 222 (requisite benefit to employer must be one not common to commute trips by ordinary members of the workforce).

³⁴ Sullivan On Comp, §5.53 (Dual Purpose Rule applies any time business and personal activities are intermingled, and employee remains within course of employment if there is sufficient connection to employment, and where an employee's actions are entirely personal and unrelated to employment, the rule does not apply).

³⁵ See 1 Hanna CA Law of Employee Injuries & Workers' Comp §4.

³⁶ Reported cases invoking the dual purpose doctrine usually involve commercial travelers (see, e.g., *Leonard Van Stelle, Inc. v. Industrial Acc. Com.* (1963) 59 Cal.2d 836, 31 Cal. Rptr. 467), for whom a finding of non-compensability is rare, or a special errand on behalf of the employer.

the exception also included the fact that the injury occurred on the employer's premises and while the employee was still in the process of departing for the evening.³⁷ Importantly, the dual purpose exception is not properly applied to going and coming cases unless the employee is performing work at home.³⁸

Plainly, the applicant here was not performing work at home and the exception is inapposite to the present facts. The WCAB nevertheless applies the dual purpose exception to find compensability, on the basis that applicant's trip home in the vanpool served the employer's business interests by providing delivery of employees each day.³⁹ But as explained in detail in the Petition, these facts do not suffice to invoke the dual purpose exception inasmuch as all employees are required to engage in the basic work-related activity of showing up.⁴⁰

In the case most often cited for application of the dual purpose exception, *Bramell v. Workers' Comp. Appeals Bd.*,⁴¹ the Court of Appeal, after reviewing all of the relevant standards, determined that "[c]ompensability of petitioner's injuries thus

³⁷ *Ward v. Sarti Enters.* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 170. WCAB panel decisions are not binding precedent.

³⁸ *Bramell v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 151, 156, 144 Cal. Rptr. 105 (noting that the dual purpose exception applies "when work is performed at home.").

³⁹ WCAB Opinion and Decision on Reconsideration, p. 6.

⁴⁰ Petition for Writ of Review, p. 45. See *Pierson, supra*, 4 Cal.App.5th at 631 (requisite benefit to employer does not include employee's timely arrival at work).

⁴¹ *Bramell, supra*, 78 Cal.App.3d 151.

pivots on whether performance of work at home was dictated by the terms or conditions of her employment or whether it was merely a matter of her personal convenience.”⁴² Applying this standard to the facts of this case, the evidence here plainly supports a finding that applicant’s employment was not predicated upon his participation in the vanpool (to the contrary, such participation was repeatedly and emphatically designated as voluntary) and it is apparent that the employer enjoyed no specific benefit by applicant’s participation in a vanpool.

In the absence of evidence that applicant was performing work at home, or that his participation in the vanpool was dictated by the terms of his employment as opposed to being a matter of personal convenience, the dual purpose exception cannot apply to overcome the going and coming rule.

C. Relevant Statutory Authority Related to Vanpools Provides Guidance as to Legislative Intent to Maintain a Narrow Construction of Exceptions to the Going and Coming Rule.

In 1994, the Legislature enacted Labor Code §3600.8, confirming that employees voluntarily participating in alternative commute programs (such as

⁴² *Brammell, supra*, 78 Cal.App.3d at 158.

vanpools) are not considered in the course and scope of their employment unless they are paid wages for the period of travel.⁴³

The statute is directed toward voluntary participation in an alternative commute program sponsored by a governmental entity, including those programs sponsored by an employer in compliance with local government air-quality mandates. Even where the employer reimburses the employee for costs related to the alternative commute program, the statute mandates that such payment is not to be considered payment of wages for the period of travel, absent specific agreement.⁴⁴

Certainly, the facts of the present case do not fit neatly into section 3600.8. There is no indication that the vanpool at issue in this case was in any way related to an effort to address air quality, nor is there evidence that the employer here sponsored or provided the vanpool. Nonetheless, the fact that the Legislature specifically enacted a rule precluding employees participating in such a vanpool – even one actually sponsored and provided by the employer – from consideration as

⁴³ Lab. C. §3600.8. In its enactment of this statute, the Legislature expressly indicated that it was declaratory of existing law. Stats. 1994 ch. 622 §5. See also *Jarvis v. Workers' Comp. Appeals Bd.* (1998) 63 Cal. Comp. Cases 1289, 1291 (writ denied, rev. denied) (when participation in vanpool was voluntary and no compensation was paid for travel time, injury was barred by going and coming rule despite fact van was provided by employer).

⁴⁴ Lab. C. §3600.8(b). An exception is included for state employees riding in a vehicle registered or owned by the state, who are deemed to be within the course and scope of employment. Lab. C. §3600.8(e).

acting in the course and scope of their employment may provide some evidence of legislative intent to maintain the going and coming rule, even in the face of strong public policy.⁴⁵

Although the Legislature has enacted significant changes in the Workers' Compensation Act during the last 100 years, it has not disturbed the going and coming rule or its judicially created exceptions. As one commentator has opined, courts should leave to the Legislature the major task of restructuring the rules governing employer liability.⁴⁶

VIII. CONCLUSION

In this case, the WCAB adopted a simplistic analysis that threatens the very foundation of the going and coming rule. By equating the basic act of an employee showing up on time for work with a “service” or “benefit” to the employer sufficient to invoke a finding that a commute is fully within the course of employment, the WCAB risks transforming a rare exception into a general rule of compensability in virtually all instances of travel going and coming to work.

⁴⁵ *Jarvis, supra*, 63 Cal. Comp. Cases at 1291 (statute demonstrates “a legislative philosophy to support a narrow construction of any exception to the going and coming rule”). See also 1 Hanna CA Law of Employee Injuries & Workers’ Comp. §4.151[3] (describing the statute as “consistent” with other rules governing injuries while traveling to and from work).

⁴⁶ See Bouret, *The California Going and Coming Rule: A Plea for Legislative Clarification* (1979) 15 Cal. Western L. Rev. 116.

One shudders to imagine the scenarios that the WCAB’s rationale might encompass: would a commuting employee who stopped at McDonald’s for a sausage biscuit be classified as acting for the employer’s benefit, because they did not arrive at work hungry? or might an office worker be covered during a trip to Macy’s to buy new clothes, because the employer benefits by not having naked employees in the office? or perhaps an employee who stays home sick is deemed acting for the employer’s benefit, because they do not infect their coworkers?

A narrow reading of the judicially-created exceptions to the going and coming rule is appropriate to avoid the workers’ compensation system from becoming a cure-all while still ensuring that it provides substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character.⁴⁷

The WCAB decision should be annulled.

Respectfully submitted,

December 18, 2024

/s/ Ellen Sims Langille
Ellen Sims Langille, CWCI Amicus Counsel
elangille@cwci.org
Counsel for *Amicus Curiae* CWCI

⁴⁷ CALIFORNIA CONSTITUTION, ARTICLE XIV, SECTION 4.

IX. CERTIFICATE OF SERVICE

I certify that on December 18, 2024, I electronically filed the foregoing

**AMICUS CURIAE BRIEF OF THE CALIFORNIA WORKERS'
COMPENSATION INSTITUTE IN SUPPORT OF PETITIONER
ZENITH INSURANCE COMPANY**

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

Darren Wong, Esq. CHERNOW, PINE & WILLIAMS P.O. Box 9055 Van Nuys, CA 91409-9055 <i>Attorneys for Petitioner</i>	Jason Litt, Esq. Bradley Pauley, Esq. HORVITZ & LEVY 3601 West Olive Ave. 8 th Fl. Burbank, CA 91505-4681 <i>Attorneys for Petitioner</i>
Tina Eshghieh, Esq. Michael Farr, Esq. The Law Offices of Arash Khorsandi 2960 Wilshire Blvd., Third Floor Los Angeles, CA 90010-1100 <i>Attorneys for Respondent</i>	Allison J. Fairchild, Esq. Anne Schmitz, Esq. WCAB, ATTN APPELLATE UNIT PO Box 429459 San Francisco, CA 94142-9459 <i>Attorneys for Respondent</i>

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

Respectfully submitted,

December 18, 2024

/s/ Ellen Sims Langille
Ellen Sims Langille, CWCI Amicus Counsel
elangille@cwci.org
Counsel for *Amicus Curiae* CWCI

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Tina Eshghieh The Law Office of Arash Khorsandi 278654	Tina@arashlaw.com	e-Serve	12/18/2024 5:58:22 AM
Allison Fairchild Workers' Compensation Appeals Board 170095	afairchild@dir.ca.gov	e-Serve	12/18/2024 5:58:22 AM
W***** Workers' Compensation Appeals Board Court Added	wcabwritunit@dir.ca.gov	e-Serve	12/18/2024 5:58:22 AM
Bradley Pauley Horvitz & Levy LLP 187298	bpauley@horvitzlevy.com	e-Serve	12/18/2024 5:58:22 AM
Ellen Langille California Workers' Compensation Institute 154329	elangille@cwci.org	e-Serve	12/18/2024 5:58:22 AM
Michael Farr	michael@arashlaw.com	e-	12/18/2024

The Law Offices of Arash Khorsandi, PC		Serve	5:58:22 AM
Anne Schmitz WCAB Commissioners 166664	ASchmitz@dir.ca.gov	e-Serve	12/18/2024 5:58:22 AM

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Date

/s/Ellen Langille

Signature

Langille, Ellen (154329)

Last Name, First Name (PNum)

California Workers' Compensation Institute

Law Firm