

The Course & Scope

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SEEKING LIBERTY & JUSTICE

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The Chair's Comments

By
Richard M. Lewis



I am writing the column with great anticipation on the eve of our section's annual meeting and CLE program in North Myrtle Beach, S.C. Vic Morgan and Bruce Hamilton have put together a great program with impressive speakers, the weather forecast is great and I have a tee-time Saturday afternoon. Life is good.

I should note that at our last council meeting on March 17, there was extensive discussion of the South Carolina flag issue and boycott in relation to our section's plans for future meetings in South Carolina. The council adopted a resolution that the section support the boycott and not return to South Carolina for future meetings as long as the flag issue remains unresolved. Hopefully, this matter will soon be resolved.

Please remember to visit our section's Web site, at www.barlinc.org, for a variety of information, including minutes of council meetings, past issues of our newsletter and listings of Section Council members and section committees. Plans include adding a listserv which is an electronic means of exchanging ideas and information among members of the section. It should be an effective practice aid for us all.

I anticipate that this will be my last column as section chair. I appreciate the opportunity to serve as chair for the past year and look forward to turning over the reins to Lenny Jernigan next year. We have an impressive and talented group of

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What Goes Around Comes Around

An Update on the Going and Coming Rule

By Annemarie Pantazis

The "going and coming" rule has its roots in the common law and states that an injury occurring while an employee is traveling to and from work is not compensable. *Royster v. Culp*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996).

An injury must arise out of and in the course of employment in order to be compensable under the North Carolina Workers' Compensation Act. N.C.G.S. § 97-2(6)(1991). The two requirements are separate and distinct, and both must be satisfied in order to render an injury compensable. The term "arising out of" refers to the origin or causal connection of the injury to the employment while the phrase "in the course of" refers to the time, place and circumstances under which the injury by accident occurs. See *Barham v. Food World, Inc.*, 300 N.C. 239, 332, 266 S.E.2d 676, 678 (1980). Generally, the "going and coming" rule provides that an injury occurring while an employee travels to and from work does not satisfy the "in course of employment" prong of N.C.G.S. Section 97-2 and is therefore not compensable. *Royster*, 343 N.C. at 281, 470 S.E.2d at 31.

There are, however, three categories of situations where the North Carolina courts have refused to apply the going and coming rule as a bar to recovery. The courts have deemed an injury to be "in the course of employment" when: 1) the injury occurs on the employer's premises; 2) the injury occurs during the employee's performance of a "special errand" for the employer; or 3) the employer either arranges transportation pursuant to an employment contract or the employer compensates the employee for his transportation costs to and from work. This article will explore the various situations in which the going and coming rule has been applied and how the exceptions to the rule have developed over the years.

Applications of the Going and Coming Rule

The Rationale Behind the Rule

The going and coming rule stems from the rationale that the risk of injury while traveling to and from work is one common to the public at large. See *Creel v. Town of Dover*, 486 S.E.2d 478, 126 N.C. App. 547 (1997). Nevertheless, the courts have recognized that employment begins a reasonable time before actual work begins, continues for a reasonable time after work ends, and includes intervals during the work day for rest and refreshment. See *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968). Oftentimes, litigation results from injuries

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Chair's Comments

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lawyers who constitute the officers and council of the section. I thank each of them for their time and effort on the section's behalf.

In particular, I express my appreciation to Tony Lathrop, editor of the newsletter; Bruce

Hamilton and Vic Morgan who co-chair the CLE Committee; and Mark Sumwalt and Henry Byrum, who organized the upcoming Forms Manual. Their contributions have been significant and of great benefit to the section.

I thank you for your support over the past year, and on behalf of the council, I invite your comments, ideas and criticism in order that we may improve our section. ♦

What Goes Around Comes Around

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that occur during these gray areas of employment.

The most common applications of the going and coming rule involve situations where employees are injured either on the public highways while driving their own vehicle to and from work or on a parking lot not owned by their employer. The public highway cases focus on the mode of transportation and the reason for traveling. The parking lot cases focus on who is responsible for the control and maintenance of the parking lot. In order for the going and coming rule to act as a bar to recovery, none of the three exceptions to the rule can apply. In other words, if the injury occurs on a parking lot owned by the employer or if the injury occurs on the public highways while the employee is on a special errand for the employer, the injury will be compensable. The scope of these exceptions are herein discussed in more detail.

Public Highway Cases

Wright v. Wake County Public Schools, 103 N.C. App. 282, 405 S.E.2d 228 (1991). The most clear example of a claim being barred by the going and coming rule is **Wright v. Wake County Public Schools**, 103 N.C. App. 282, 405 S.E.2d 228 (1991), in which the Court of Appeals held that a part-time school bus driver, who was involved in a car accident immediately after leaving a mandatory school transportation meeting, was not injured while performing a duty arising out of or during the course of his employment. In **Wright**, the plaintiff was employed as a part-time school bus driver by the defendant. His duties included driving a school bus and attending school transportation meetings.

On the morning of Nov. 30, 1988, the plaintiff drove his school bus on his designated early morning route. Later that morning, the plaintiff drove his own car to a school transportation meeting, for which the bus drivers were paid a predetermined amount for each meeting. The plaintiff's supervisor encouraged the bus drivers

to drive their own cars to the meeting in order to limit the number of school buses in the parking lot.

After the meeting, the plaintiff left the school grounds between 10 and 10:30 a.m. in his personal car and was immediately involved in an automobile accident on a public street. The plaintiff was not required to report back to the school until 2-2:15 p.m. and was on his own personal business after leaving the morning meeting. The commission held that because the plaintiff was going about his personal business at the time of the accident, he did not sustain an injury by accident arising out of and in the course of his employment. **Wright**, 103 N.C. App. at 283, 405 S.E.2d at 229. In his appeal, the plaintiff argued that because his presence was required at the meeting and because he was directed to drive his own car to the meeting, the accident occurred in the course of his employment. The Court of Appeals rejected this argument and held that since "being required to drive to a meeting is no different from being required to drive one's car to work," the plaintiff is barred from recovery under the Workers' Compensation Act. *Id.* at 284, 405 S.E.2d at 229.

Mullis v. AMP, Inc. (I.C. No. 349374, COA No. 96-527, 2/20/96.) The **Wright** case has been relied upon in at least two Full Commission decisions. In **Mullis v. AMP, Inc.** (I.C. No. 349374, COA No. 96-527, 2/20/96), the plaintiff was killed in an automobile accident on a rain slick road while reporting to a call for overtime work. The plaintiff's normal shift began at 3 p.m. The plaintiff's supervisor called him at home and gave him the opportunity to earn overtime by working the 9 a.m. shift. The plaintiff was not required to accept the overtime work and if the plaintiff had refused to come in, the employer would have called the next employee on the seniority list.

The Full Commission opinion, written by Commissioner Bolch, relied on the **Wright** decision and held the decedent's death was not caused by an accident arising out of and in the course of his employment. The Full Commission also held that the facts did not support an extension of the "special errand" exception to the going and coming rule because plaintiff was reporting to voluntary overtime work. *See also*

Jones v. Trust Co., 206 N.C. 214, 173 S.E. 595 (1934). Commissioner Ballance dissented and was of the opinion that this case should have been categorized as a special errand exception to the going and coming rule. The Court of Appeals affirmed the Full Commission's decision in an unpublished opinion dated Feb. 4, 1997. *Mullis v. AMP, Inc.*, 125 N.C. App. 419, 481 S.E.2d 700 (1997).

Bell v. Conetoe Volunteer Fire Dept. (I.C. No. 532640 4/21/97). The Full Commission again applied the *Wright* holding in *Bell v. Conetoe Volunteer Fire Dept.* (I.C. No. 532640 4/21/97). In that case, the plaintiff was the president of the volunteer fire department who was injured in a motorcycle accident after leaving a meeting at the fire house. The plaintiff's duties included fighting fires and presiding over regularly scheduled monthly meetings at the fire station. On April 18, 1995, the plaintiff had just finished presiding over one of the regularly scheduled monthly meetings. All members of the volunteer fire department were required to attend the meeting.

After the meeting, the plaintiff left the fire station in order to return home. The plaintiff drove his motorcycle approximately 100 yards before losing control on a curve in the public road. Although the plaintiff did not receive travel expenses for attending the meeting, he did receive certification hours that went toward maintaining his fire fighting certification. Commissioners Bolch and Mavretic held that since the plaintiff was attending his personal business after leaving a work-related function, the going and coming rule prevented his recovery. Commissioner Ballance dissented on the basis of the special errand exception and was of the opinion that N.C.G.S. Section 143-166, *et seq.*, should be extended to provide benefits for those injured as well as killed while performing a hazardous public service.

Parking Lot Cases

The majority of parking lot cases turn on whether or not the employer owns, maintains, or controls the parking lot on which the employee is injured. In *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996), the Supreme Court adopted a bright line test that deemed only those injuries sustained on parking lots owned, controlled, or maintained by the employer to be compensable. This current trend as reflected in *Royster* and applied in *Jennings v. Backyard Burgers of Asheville*, 123 N.C. App. 129, 131, 473 S.E.2d 205, 207 (1996), is to deny workers' compensation benefits if the employee is injured off-premises while taking a necessary route between the place of employment

and the employer's parking lot.

Royster v. Culp, Inc., 343 N.C. 279, 470 S.E.2d 30 (1996). In *Royster*, the plaintiff was struck by a car and injured while attempting to cross a public highway that separated his place of employment from a parking lot which was owned and operated by his employer. The Deputy Commission and the Full Commission denied benefits. In a unanimous opinion, the Court of Appeals reversed. The Supreme Court then granted discretionary review and reversed the Court of Appeals ruling with two justices dissenting.

The Supreme Court stated that the premises exception to the going and coming rule did not apply because the injury occurred on a public street. The court reasoned that the plaintiff was not performing any duties for the employer at the time of the injury and was not exposed to any greater danger than the public generally. The court relied heavily on *Barham v. Food World*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980), in which an employee was injured when she slipped and fell on ice in a loading zone in front of the employer's store in a shopping center. The employee was walking to her work site after parking her car in the shopping center parking lot. The employer did not own the parking lot or the loading zone, but the employer did have access to the entire shopping center. The Supreme Court in *Barham* emphasized that the employer did not own, maintain, or provide control over the parking lot and that the employee was not performing any duties of her employment at the time of her injury.

In *Royster*, the Supreme Court noted that the plaintiff was not performing any duties for the employer at the time of his injury. By crossing a public street, the employee was also not exposed to any greater danger than that of the public generally. Justice Whichard dissented and agreed with the Court of Appeals that the case of *Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 862 (1957), should be controlling.

In *Hardy*, a 13-year-old boy was killed while crossing a public highway to go to his home after laboring at this employer's barn. The employer's farm included land on both sides of the highway. The boy lived in a farmhouse on the employer's property across the street from the barn. The employer provided rent-free housing to the employee and his family so the family could be available at various times night and day to work on the farm. The Supreme Court deemed that the boy's death was

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compensable under the special errand exception because "the fact that the employee had to cross the highway on his way to and from the farm constituted an additional hazard of his employment." *Hardy*, 246 N.C. at 586, 99 S.E.2d at 867.

Justice Whichard disagreed with the *Royster* majority's interpretation of *Hardy* and noted that the plaintiff in *Royster* faced the same additional hazard as the boy in *Hardy*. Justice Whichard also disagreed with the majority's application of *Barham* in that the employee in *Barham* had not yet entered the employer's premises when she was injured. In *Royster*, the employee was injured while moving between one portion of the employer's premises (the parking lot) and another (the workplace). Since the employee would have received benefits had he been injured while moving from an on-premises parking lot to the workplace, Justice Whichard felt that fairness and logic would dictate that an employee parking in an off-premises lot which is owned and controlled by the employer would also receive the same treatment. *Royster*, 243 N.C. at 284, 470 S.E.2d at 32.

Jennings v. Backyard Burgers of Asheville, 123 N.C. App. 129, 131, 473 S.E.2d 205, 207 (1996). In *Jennings*, the Court of Appeals reluctantly applied *Royster* and held that the going and coming rule prevented an employee from receiving workers' compensation benefits when the employee was injured while going down a narrow set of stairs in a parking lot not maintained, owned, or controlled by the employer. When the plaintiff was hired by the employer, he was instructed to use the parking lot next door to the defendant's premises when going to and from work. The parking lot was accessible only by using a steep stairway on a hillside behind the defendant's premises. The plaintiff was injured after leaving work one day when he slipped and fell down several stairs.

The Court of Appeals noted that although the employer instructed the plaintiff to use the adjacent parking lot and the lot was accessible only by using the stairway, the plaintiff was not entitled to benefits because at the time of his injury, the plaintiff was not performing any specific duties for the defendant and because the employer did not own, maintain, or control the parking lot or stairway. The Court of Appeals stated, however, that it did not agree with the Supreme Court's narrow interpretation of the premises exception in *Royster*, but that it was nevertheless bound by that decision in holding that the plaintiff's injuries did not arise out of or in the course of his employment.

The Premises Exception

Overview of the Premises Exception

As a general rule, injuries occurring while an employee is going to or coming from work are not compensable. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676 (1980). However, when an employee is injured while going to or coming from work, but is on premises owned, controlled or maintained by the employer, the injury is compensable. *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996). The trend by the Supreme Court is to deny compensability if the injury occurs off-premises, even if the place where the injury occurs is a necessary route between one area of employer-owned property to another area of employer-owned property. The theory behind the narrow reading of the premises exception is that crossing public roads and navigating public walkways are risks inherent to the general public and are not special hazards caused by employment.

This narrow reading of the premises exception was most recently affirmed by the Supreme Court in *Smallwood v. Eason*, 123 N.C. App. 661, 474 S.E.2d 411 (1996), rev'd 346 N.C. 171, 484 S.E.2d 526 (1997). In *Smallwood*, the plaintiffs, Peggy Smallwood and Craig Morning, were picked up after their shift at the Perdue Farms maintenance garage by Morning's brother, Duane Morning. Duane Morning was driving an automobile

Section Pro Bono Participation

■ **Create a Pro Bono Committee.** The committee leads and coordinates the section's pro bono efforts. Consider appointing members active in pro bono as well as section leadership.

■ **Build Discussion of Pro Bono Into Section Meetings.** Include substantive law discussion where appropriate. The Pro Planning Committee will continue to provide a member to make a presentation at section meetings throughout the year.

■ **Publish Articles on Pro Bono in Section Newsletter.** The chair of the section's Pro Bono Committee, or other members of the committee or section, may write articles on pro bono issues within the respective substantive area. Also, articles by members who have performed pro bono service can help demonstrate how pro bono service is possible within a given section.

■ **Where Appropriate, Develop Special Projects.** The particular substantive area of a section may lead it to develop a special program to recruit, train, or develop a panel of mentors, experts, or willing volunteers.

■ **Consider Legislative Action to Address Legal Needs of the Poor.** The North Carolina Bar Association's efforts to address the legal needs of the state's poor go beyond promoting pro bono service and seeking adequate funding for legal services programs. Thus, sections are encouraged to consider legislation which will help to improve access to justice for the poor. Sections should be aware of both the potential consequence of their own proposed legislation on access to justice for the poor and consider what reforms within their substantive area may be possible. The Governmental Affairs Office would be happy to assist this effort. In 1993, the Governmental Affairs Office worked with the Litigation Section and the Legal Services Resource Center to support a successful initiative: Simplifying the process to achieve indigent status, thus making it easier for a pro bono attorney representing a client in court to proceed.

For more information on how your section can be come involved in pro bono activities, please contact the North Carolina Bar Foundation, Pro Bono Project, PO Box 12806, Raleigh, NC 27605.

owned by Laura Grant. At about the same time, a forklift driven by defendant Curtis Eason and owned by Perdue stalled in the road adjacent to the Perdue facilities. He was unable to move the forklift completely out of the road and defendant Morning collided with the forklift causing injury to the plaintiffs. The road adjacent to the Perdue facilities was the only means of ingress and egress from the Perdue facility. The road was open to the general public, but no homes or businesses other than Perdue were on the road.

The Court of Appeals held that even though Perdue did not own the road, the employees were at the site of the accident because of their employment. Since the Perdue access road was the only way for the plaintiffs to arrive and leave work and since the accident was due in part to the stalled Perdue forklift, the Court of Appeals held that the plaintiffs' injuries were not barred by the going and coming rule. The Supreme Court reversed this holding and relied on Judge Greene's dissent. Judge Greene cited **Royster** and held that the premises exception applies only if the place where the injuries occurred was either owned, maintained or controlled by the employer. This is so, even if the accident occurs at a place the employee is required to traverse in order to access his actual place of employment. **Smallwood**, 123 N.C. App. at 670, 474 S.E.2d at 418. Since Perdue did not own, maintain or control the public road on which the accident occurred, the plaintiffs were not in the course and scope of their employment with Perdue at the time of the accident and the Workers' Compensation Act would therefore not apply.

Treatment of the Premises Exception In a Majority of Jurisdictions

This trend by the N.C. Supreme Court of not extending the premises exception to an off-premises necessary route is the minority view and has only been reluctantly endorsed by the Court of Appeals. See **Jennings v. Backyard Burgers of Asheville**, 123 N.C. App. 129, 131, 473 S.E.2d 205, 207 (1996); **Smallwood v. Eason**, 123 N.C. App. 661, 474 S.E.2d 411 (1996). Prior to the **Royster** holding, North Carolina courts held that the premises exception included "adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer." **Harless v. Flynn**, 1 N.C. App. 448, 456, 162 S.E.2d 47, 53 (1968); See also **Bass v. Mecklenburg County**, 258 N.C. 226, 233, 128 S.E.2d 570, 575 (1962).

Professor Larson has noted that "one category in which compensation is almost always awarded is that in which the employee travels along or across a public road between two portions of the employer's premises, whether going or coming, or pursuing active duties." See, e.g., 1 Larson, *Workmen's Compensation Law*, § 15.14 (1999). As stated in **Jennings**, most jurisdictions hold that an injury in a public street or other off-premises place between a plant and a parking lot is in the course of employment because it is a necessary route between two portions of the employer's premises.

See, e.g. **Hughes v. Decatur Gen. Hosp.**, 514 So. 2d 935 (Ala. 1987); **Knoop v. Industrial Comm'n**, 121 Ariz. 293, 589 P. 2d 1325 (App. 1978); **Wentworth v. Sparks Regional Medical Ctr.**, 49 Ark. App. 10, 894 S.W. 2d 956 (1995); **Lewis v. WCAB**, 15 Cal. 3d 559, 125 Cal. Rptr. 353, 542 P. 2d 225 (1975); **State Compensation Ins. Fund v. Walter**, 143 Colo. 549, 354 P. 2d 591 (1960); **West Point Pepperell, Inc. v. McEntire**, 150 Ga. App. 728, 258 S.E. 2d 530 (1979); **Gray Hill, Inc. v. Industrial Comm'n**, 145 Ill. App.3d 371, 99 Ill. Dec. 295, 495 N.E. 2d 1030 (1986), cert. denied, 479 U.S. 1089, 107 S.Ct.

1298, 94 L.Ed. 2d 154 (1987); **Harlan Appalachian Regional Hosp. v. Taylor**, 424 S.W. 2d 580 (Ky.Ct.App.1968); **Thomasee v. Liberty Mut. Ins. Co.**, 385 So. 2d 1219 (La. App.1980), cert. denied, 392 So. 2d 675 (La. 1980); **Wiley Mfg. Co. v. Wilson**, 280 Md. 200, 373 A. 2d 613 (1977); **Smith v. Greenville Prods. Co.**, 185 Mich. App. 512, 462 N.W. 2d 789 (1990); **Lewis v. Walter Scott & Co.**, 50 N.J. Super. 283, 141 A. 2d 807 (1958); **Gaik v. National Aniline Div., Allied Chem. & Dye Corp.**, 5 A.D. 2d 1039, 173 N.Y.S. 2d 409 (1958); **Blair v. Daugherty**, 60 Ohio App. 2d 165, 396 N.E. 2d 238 (1978); **Swanson v. General Paint Co.**, 361 P. 2d 842 (Okla. 1961); **Willis v. State Acc. Ins. Fund**, 3 Or. App. 565, 475 P. 2d 986 (1970); **Epler v. North Am. Rockwell Corp.**, 482 Pa. 391, 393 A. 2d 1163 (1978); **Branco v. Leviton Mfg. Co., Inc.**, 518 A. 2d 621 (R.I. 1986); **Lollar v. Wal-Mart Stores, Inc.**, 767 S.W. 2d 143 (Tenn. 1989).

Applications of the Premises Exception in North Carolina

Maurer v. Salem Co., 266 N.C. 381, 146 S.E. 2d 432 (1966). The claimant in this case was injured after work in his employer's parking lot while pushing a fellow employee's car trying to get the engine started in order to get a ride home. The Supreme Court found the case compensable because the injury occurred on the employer's premises and thus fitted within the premises exception of the going and coming rule. The court also found that the 20 to 25 minutes between the plaintiff leaving work and the injury was without significance since the time had been devoted exclusively to starting the vehicle.

Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E. 2d 570 (1962). In **Bass**, the claimant, who was provided room and maintenance on the premises of her employment, was injured when she slipped and fell while on her way from her living quarters to the building where she expected to have breakfast before proceeding to the main building where she worked. In recognizing her claim as compensable, the Supreme Court noted that "the great weight of authority holds that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment ... are compensable, provided the employee's act involves no unreasonable delay." *Id.* at 233, 128 S.E.2d at 575. See also **Davis v. Manufacturing Co.**, 249 N.C. 543, 107 S.E.2d 102 (1959) (holding that claimant's broken ankle occurred in the course of her employment because claimant slipped and fell while walking from her parked car in the employer's parking lot down a clay walk to her employer's plant).

Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968). The **Harless** case is a good example of the factors necessary for an injury to fall within the premises exception. In **Harless**, the plaintiff was employed at the Henry T. Link Corporation plant in Lexington. Link Corporation maintained on its premises a parking lot where its employees and guests parked their automobiles.

One afternoon, the plaintiff and defendant were preparing to leave the employer's parking lot to go eat lunch at a place off the employer's premises. The vehicle in which the plaintiff was a passenger was struck by a vehicle driven by the defendant. The accident occurred while both cars were on the employer's parking lot. The court gave a lengthy explanation as to the time, place and circumstances requirements necessary to exempt the going and coming rule. Since the accident occurred on the employer's premises, the court held that the plaintiff's injury occurred

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within the course of her employment and was therefore covered by the Workers' Compensation Act.

Ham v. Ogden Corp. (I.C. No. 656673; 8/27/98). This case was heard by the Full Commission after the Supreme Court issued its narrow interpretations of the premises exception in **Royster and Smallwood**. The Full Commission distinguished **Royster** and awarded benefits to a janitor who was injured on a parking lot not owned by his employer, but located at his place of employment. The janitor was employed by the employer-defendant to provide maintenance and janitorial services to Bridgestone/Firestone at Bridgestone's plant in Wilson. The business relationship between the defendant and Bridgestone was governed by a contract entered into between them. Under the terms of the contract, Bridgestone would dictate the work that was to be performed by the defendant's employees. Bridgestone provided a parking lot for the use of the defendant's employees. The plaintiff was required to show a security card in order to access the parking lot. The parking lot was guarded by security personnel and was not open to the public.

The defendant's employees were responsible for maintaining the parking lot when so directed by Bridgestone. Such maintenance included repairing the fence and lights, hanging signs, picking up litter, mowing grass and clearing snow. Other contractors also worked on the parking lot at the direction of Bridgestone. The defendant did not own or lease any property on the Bridgestone plant. Upon arriving to work one morning after a winter storm, the plaintiff parked in the parking lot and stepped out of his car. He immediately slipped on ice in the parking lot and sustained injuries to his left wrist.

The Full Commission consisting of Commissioners Bunn, Mavretic and Ballance unanimously held that the plaintiff was entitled to benefits because at the moment the plaintiff entered the Bridgestone parking lot, he was "about his employer's

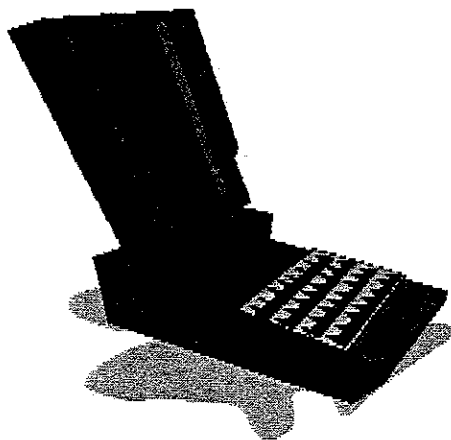
business and was no longer coming to his assigned place of employment." The Full Commission broadly interpreted the premises exception to apply even though the defendant did not maintain, control or own the parking lot. The Full Commission reasoned that since the plaintiff reported to the Bridgestone plant pursuant to the defendant's instructions and since the Bridgestone plant was the plaintiff's regular place of business, the premises exception applied and the plaintiff was therefore entitled to benefits.

Holt v. Alex Lee, Inc. (I.C. No. 504560, 9/26/97). In **Holt**, the Full Commission applied the premises exception and found a meat cutter's injuries compensable when he returned to the supermarket at which he worked after he had left for the day and slipped on a wet spot on the floor. The store had closed for the day and the plaintiff was going to his car in the parking lot. Before entering his car, the plaintiff realized that he had left some groceries in the meat cooler that he had purchased earlier in the day. The plaintiff knocked on the locked door and his supervisor let him into the store to pick up his groceries. After retrieving his groceries from the meat cooler, the plaintiff slipped on a wet portion of the floor that had just been mopped. The Full Commission awarded benefits reasoning that "injuries sustained by an employee while going to and from his place of work upon the premises owned or controlled by his employer are deemed to have arisen out of and in the course of the employment ... and are compensable."

The Special Errand Exception

The special errand exception states that when travel is contemplated as part of the employee's work, injuries occurring during travel are compensable. **Ross v. Young Supply, Inc.**, 71 N.C. App. 532, 322 S.E. 2d 648 (1984). The special errand exception has been summarized by Professor Larson as follows: "When an employee having identifiable time and space limits on his employment, makes an off premises journey which would normally not be covered due to the usual going and coming rule, the journey may be brought within the course of employment by

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the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself." 1 Larson § 16.11.

The Court of Appeals has adopted Larson's exception by finding that the "special errand rule provides that an employee is entitled to compensation under workers' compensation while performing a duty or special errand for the employer." See *Powers v. Ladies Funeral Home*, 306 N.C. 728, 295 S.E. 2d 473 (1982). The rationale behind the going and coming rule is that the risk of injury while traveling to and from work is one common to the public at large. However, if an employee is injured while performing a special duty or errand for the employer, the employer assumes the risk of travel and the injury is compensable. The special errand exception encompasses business trips and trips made for both personal and employment reasons (the dual purpose doctrine). The conceptual difficulty in applying the special errand exception is determining when the special errand ends and the going and coming rule begins.

Business Trips

North Carolina adheres to the rule that employees whose work requires travel away from the employer's premises are within the course of their employment continuously during such travel, except when there is a distinct departure for a personal errand. In *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E. 2d 790 (1969), the plaintiff was staying at a hotel in Milwaukee for a week while on a business trip. The plaintiff was required to attend classes at the hotel during the day, but was free to spend his evenings as he wished. On the night of the accident, the plaintiff, along with two others, walked three or four blocks to the Milwaukee River and observed some yachts. After walking several blocks, they then decided to go to the steakhouse at which they planned to eat dinner. While walking from the river to the steakhouse, the plaintiff was struck by a car and killed.

The Court of Appeals held that the plaintiff's injury was compensable because "traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping or eating away from home." *Id.* at 42, 167 S.E.2d at 793. The theory is that since requiring the employee to stay overnight provides a benefit to the employer, any injury that an employee sustains during his overnight stay is compensable provided that the employee is acting reasonably at the time of his injury. *Id.* at 44, 167 S.E. 2d at 794.

The court was of the belief that there was a reasonable relationship between the plaintiff's employment and the eating of meals. Even though the plaintiff had taken a personal trip to the marina, he was on his way to dinner when he was actually struck by the car. Since the plaintiff "was at a place where he might reasonably be at such time and doing what he, as an employee, might reasonably be expected to do," the court found that he was acting in the course and scope of his employment." *Id.* at 44, 167 S.E.2d at 794.

The Court of Appeals again ruled that employees are in continuous employment during business trips in *Cauble v. Soft-Fly, Inc.*, 124 N.C. App. 526, 477 S.E. 2d 678 (1996), cert. denied 345 N.C. 751, 485 S.E. 2d 49 (1997). In *Cauble*, the decedent-employee was employed by the defendant and assigned to an equipment installation in Erie County, N.Y. The decedent was paid per diem of \$30 to be used for any purpose,

including purchasing meals. The company paid directly for the decedent's lodging. While on assignment, the decedent and his supervisor drove to a restaurant/bar after a working a shift in order to eat dinner and watch a baseball game. The decedent and his supervisor stayed at the restaurant after their meal and had a couple of drinks. While returning to their motel late that evening, an accident occurred when another vehicle struck their vehicle as the decedent's supervisor attempted to make a left hand turn. The decedent-employee was killed. Both the decedent and his supervisor were legally intoxicated.

The Court of Appeals granted benefits reasoning that "a traveling employee will be compensated under the Workers' Compensation Act for injuries received while returning to his hotel, while going to a restaurant or while returning to work after having made a detour for his own personal pleasure." *Id.* at 529, 477 S.E.2d at 679. Even though staying at a bar and watching a ball game would be considered a detour for personal pleasure, the decedent-employee was killed while returning to his motel. Sleeping in a motel and eating at restaurants are activities that the employer instructed the employee to do. The court, therefore, considered these activities to be in the course of decedent-employee's employment. Once the personal deviation had ended, the decedent-employee resumed employment related activities and rejoined the course of employment at the time of the accident. *Id.* at 530, 477 S.E. 2d at 680.

The Supreme Court limited the business trip exception in *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 364 S.E.2d 417 (1988). In *Roberts*, an employee was returning from a business trip in his own vehicle when he witnessed another car strike a pedestrian. The employee stopped to help the pedestrian and assisted by calling the authorities. The employee left the scene for five minutes, but then returned to help direct traffic. The employee himself was struck by a car while directing traffic. He died as a result of his injuries. The employee's family filed a claim for workers' compensation benefits contending that Burlington Industries, the decedent's employer, had benefitted from the goodwill that was generated by the many newspaper articles lauding the commendable behavior of the decedent. The plaintiffs argued that the going and coming rule should not bar recovery because the decedent was still in the course of his employment at the time of the injury.

The Supreme Court rejected the business trip exception argument and stated that the commendable act of a good citizen and Samaritan in stopping to render assistance to an apparent total stranger "had absolutely no rational relationship to his duties as a furniture designer for defendant-employer." *Id.* at 352, 364 S.E.2d at 419. As such, the activity in which the employee was engaged at the time of death was a risk to which members of the public are equally exposed and his claim therefore did not arise out of or in the course of his employment.

Dual Purpose Trips: Delineating Between When a Deviation Ends and a Special Errand Begins

The Dual Purpose Rule. In order for a deviation from the employer's premises to qualify as a special errand, the employer must receive a benefit from the deviation. See *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 493 S.E. 2d 305 (1997) (holding that employee's injury came under the special errand exception when he was involved in an automobile accident while

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taking his supervisor to the hospital during working hours). The dual purpose rule applies in North Carolina when "concurrently with an employee's usual trip to or from work, she performs some service for her employer which would otherwise necessitate a separate trip." *Massey v. Board of Education*, 204 N.C. 193, 167 S.E. 2d 695 (1933). In other words, if an employee is injured while performing a personal errand, but is within the "dual purpose rule," the injury by accident is considered to have arisen within the course and scope of employment and is therefore compensable. Where the employment necessitates travel, it has been held that the hazards of the route become the hazards of employment. *Williams v. Board of Education*, 1 N.C. App. 89, 160 S.E. 2d 102 (1968).

In *Humphrey v. Landry*, 251 N.C. 47, 51, 110 S.E. 2d 467, 470 (1959), the Supreme Court articulated the test for applying the dual purpose rule. The court stated that if the employee would have canceled the travel if the business no longer required him to take the trip, it is travel that arises out of and in the course of employment. If, on the other hand, the journey would have gone forward if the business purpose had been canceled, then the travel is personal and the risk is one that the ordinary public would face. *Id.* at 51, 110 S.E.2d at 470.

Creel v. Town of Dover, 126 N.C. App. 547, 486 S.E. 2d 478 (1997). The Court of Appeals recently addressed the dual purpose doctrine in *Creel* and held that a mayor who was injured while riding his bike to remove a stalled truck was within the special errand exception to the going and coming rule and was thus entitled to workers' compensation benefits. On the evening of Sept. 3, 1993, the mayor of the Town of Dover received a request from a city alderman to move a city-owned truck that was blocking traffic in Dover. The plaintiff possessed the keys to the truck and agreed to move the vehicle. The plaintiff left his house on a bicycle, but before reaching the city-owned truck, the plaintiff first stopped at his place of business and consumed an alcoholic beverage. The plaintiff then returned to his bicycle, but was thrown from the bike when he struck a mound of dirt. The Deputy Commissioner ruled that the plaintiff's injury arose out of his employment and that the defendants failed to prove that the plaintiff's intoxication was a proximate cause of his injury. Both the Full Commission and the Court of Appeals affirmed.

The Court of Appeals held that there was a reasonable relationship between the plaintiff's trip to move the city-owned truck and his employment as the mayor. The court rejected the going and coming rule and held that the mayor was on a special errand. In this case, the defendants argued that since plaintiff had "no fixed time and space limitations on his employment," he should not be able to take advantage of the special errand exception. The court noted that even if the plaintiff had no fixed time and place of employment, his journey to move the city-owned truck would nonetheless fall within the course of his employment since that particular duty exposed him to risks of travel. The Court of Appeals noted that the plaintiff would not be entitled to benefits if the plaintiff had engaged in a distinct departure on a personal errand, but in this case, since the plaintiff had ended his deviation and had resumed his employment activities when the injury occurred, his injury was compensable. *Id.* at 558, 486 S.E.2d at 484.

Two Broad Interpretations of the Special Errand Exception. In *Felton v. Hospital Guild of Thomasville, Inc.*, 57 N.C. App. 33, 291 S.E. 2d 158 (1982), the Court of Appeals applied the dual purpose rule and awarded benefits. The plaintiff was injured when she slipped on her driveway. The plaintiff was an employee of a hospitality shop. Every day, the plaintiff was required to pick up goods from the bakery on her way to work to sell in the shop. On this particular day, the plaintiff telephoned the local bakery to place the order. She left home shortly thereafter intending to take a less direct route to the hospitality shop so she could stop by the bakery. The plaintiff was about 30 feet from her front door and had not quite reached her car when she fell and fractured her hip.

The Court of Appeals held that the going and coming rule did not apply since plaintiff was on a special errand for her employer at the time of her injury. The Court of Appeals refused to institute a bright line test for determining when a special errand begins and ends. "Although such a rule does have the attribute of certainty, it cannot be attained at the expense of justice. In deciding questions about when a special errand begins or ends, each case must be determined upon its particular fact situation. No exact formula can be laid down which will automatically solve every case." *Id.* at 35, 291 S.E.2d at 159. The court went on to hold that "the proper rule of law to apply ... is not 'did the accident occur on the employee's own premises,' Rather, an accident arises out of employment when ... the obligations of employment put the employee in the position or at the place where the accident occurs." *Id.*

The court then applied the dual purpose rule and found that the purpose of the plaintiff's journey was twofold: she intended to proceed to work and she intended to proceed to the bakery to pick up the order for the day. The work of the employee, therefore, created the necessity for the travel and the business purpose of the trip was calculated to further the employer's business. The court held the plaintiff's claim compensable because "the hazards of the trip became the hazards of her employment." *Id.* at 38, 291 S.E.2d at 162.

Justice Whichard dissented because the plaintiff's hazard was a hazard faced equally by others and had nothing to do with the fact that she was going to the bakery. Justice Whichard explained the logical inconsistency with an example of two people both walking to their cars from their homes. Person A intends to perform a special errand for her employer, while Person B intends to drive straight to work. Both face the same hazards of walking from their homes to their vehicles, yet under this decision, Person A's injuries would be compensable and Person B's injuries would not. Justice Whichard also dissented in *Felton* because he felt that since the plaintiff's special errand had not yet commenced, the dual purpose doctrine was inapplicable on the grounds that when the plaintiff injured herself, she had not yet entered the scope and course of her employment for any business purpose. *Id.* at 40, 291 S.E. 2d at 162.

The Supreme Court broadly interpreted the dual purpose rule and the special errand exception in *Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 290 S.E. 2d 720 (1982), *rev'd* 306 N.C. 728, 295 S.E. 2d 473 (1982). In *Powers*, the plaintiff was an embalmer at a funeral home who was required to be on call for embalming emergencies and to comfort families at funerals. The plaintiff had just finished embalming a body and was arriving home from the funeral home around 2:30 a.m. He had intended to go inside and shower in order to wash off the embalming chemicals. The funeral home did not have a shower.

While the plaintiff was walking from his driveway to his home, his car rolled down an incline on the driveway and struck him as he approached the house. The plaintiff suffered two broken legs and two crushed ankles.

The Deputy Commissioner denied benefits on the theory that a special errand "only begins from the time the claimant physically leaves his property or premises ... and the journey only continues thereafter until the claimant physically returns to his property." *Powers*, 306 N.C. at 730, 295 S.E. 2d at 474-75.

The Full Commission and the Court of Appeals affirmed, but the Supreme Court reversed and found the plaintiff to be within the scope of employment. The Supreme Court held that the plaintiff's journey qualified as a special errand on this particular occasion because his duties did not end at the conclusion of the journey. The court reasoned that since the plaintiff was required to shower and change clothes after embalming a body and since there were no facilities at the funeral home to accommodate him, the plaintiff was still in the course of his employment when he was injured. *Id.* at 731, 295 S.E.2d at 473.

*The Special Errand Exception
Is Inconsistent with the Premises Exception*

The holding by the Court of Appeals in *Felton* and the Supreme Court's holding in *Powers* are conceptually inconsistent with the Supreme Court's interpretation of the premises exception. In *Eason* and *Royster*, *supra*, the Supreme Court refused to apply the test of whether the obligations of employment put the employee in the position or at the place where the accident occurred when determining whether an injury should fall within the premises exception. In *Royster* and *Eason*, benefits were denied to employees who were injured off-premises, yet who were on a necessary route to the employer's premises. The court took a minority position and drew a bright line test distinguishing between on-premises injuries and off-

premises injuries. This line of cases has effectively narrowed the premise exception to the going and coming rule.

The courts' holdings in *Felton* and *Powers*, however, have broadened the special errand exception by allowing benefits for injuries occurring off premises, as long as there is a "reasonable relationship" with the employee's employment. In *Felton*, the Court of Appeals allowed compensation when the employment put the employee at the site of the accident. The Supreme Court rejected this very rule in *Royster* when addressing the premises exception.

This broad interpretation of the special errand exception has the potential to swallow the going and coming rule. On the one hand, the Supreme Court is saying in *Royster* that it wants to limit employer liability by drawing a bright line on premises/off premises distinction. On the other hand, the court refuses to apply this same bright line on premises/off premises distinction with regard to the special errand exception. An employee is therefore conceivably entitled to compensation at anytime and anywhere as long as the injury has some "reasonable relationship" to a special errand of employment. The theory behind the going and coming rule is that employees should not be compensated for risks faced equally by the general public.

Many activities that occur off of an employer's premises may be thought of as special errands for the benefit of the employer, except of course, strictly driving one's vehicle directly to work and directly home again. Plaintiff's attorneys may therefore rely on the Supreme Court's broad interpretations of the special errand line of cases and argue that the claimant was involved in a special errand at the time of the injury. Defense attorneys can emphasize the court's narrow interpretation of the premises exception and the court's recent willingness to apply the going and coming rule.

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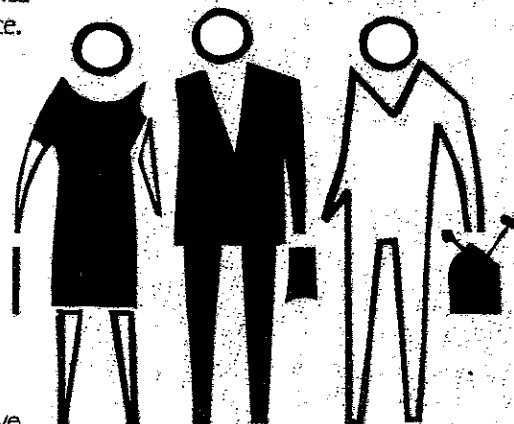
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The Transportation Exception

There have been very few cases addressing the transportation exception to the going and coming rule. The Supreme Court stated in 1950 that "where transportation is furnished in going to and from work, the injury sustained during that time is compensable ... whether the actual vehicle is furnished by the employer or whether the employer furnishes money for said transportation and leaves it to the employee to provide his own mode of transportation." *See Puett v. Bahnson Co.*, 231 N.C. 711, 712, 58 S.E.2d 633, 634 (1950).

Employer Covers the Cost of Transportation

Claims are compensable when an employee is injured while traveling to and from work in his own vehicle if the employer has arranged to compensate the employee for either his time or his transportation costs. *See Puett*, 231 N.C. at 712, 58 S.E.2d at 634. In *Puett*, the plaintiffs were employed by defendant-employer to install an air conditioning system in a cotton mill 15 or 20 miles from their home. They commuted back and forth from the cotton mill each day, using their personal vehicles and alternating among the personal vehicles of each of the three employees. The defendant-employer paid each of the three plaintiffs an additional amount of money each week to cover living expenses and the expense of traveling to and from the cotton mill, which was the place of employment. On the day of the accident, at about 6:30 or 7 a.m., while on their way to the cotton mill from their homes, the three employees were involved in a motor vehicle accident which resulted in injury to all three plaintiffs.

The N.C. Supreme Court held that the workers' compensation claims of the three plaintiff-employees were compensable as an exception to the going and coming rule since under the terms of the plaintiff's employment with defendant-employer, transportation allowances were made by the defendant-employer to cover the cost of such transportation. *Id.*

In *Kiger v. Bahnson Services Co.*, 260 N.C. 760, 133 S.E.2d 702 (1963), the Supreme Court held that the going and coming rule did not bar compensation to the estate of a worker killed while driving in his own vehicle from his home near Winston-Salem to a job site in Laurinburg. The employee's supervisor testified that a bus was available to take workers from Saxapahaw to the Laurinburg job site. Employees had a choice of selecting their own private vehicle or taking the bus. The employer would have paid for the bus fare from Saxapahaw to Laurinburg, but it would not pay for other transportation allowances if the employee selected his own vehicle. The employer, however, did pay for two hours of travel time regardless of whether the employee took the bus or his own vehicle.

The Supreme Court stated that the deceased worker's accident was attributable in part to his employment requirement of traveling to Laurinburg. The court considered the fact that the deceased worker was being paid for travel time and concluded that the injury "arose out of" employment since there was a

reasonable relationship between the fatal accident and the worker's employment. *Id.* at 762, 133 S.E.2d at 704.

In order for the claim to be found compensable on the basis of employer compensation for travel, it must be clear where the employee is going. In *Franklin v. Wilson County Board of Education*, 29 N.C. App. 491, 224 S.E.2d 657 (1976), the employee was a home economics teacher whose duties included going to the store to pick up supplies for her class. She was also required to teach at both the local high school and middle school. The employee would use her own vehicle for traveling between the two schools and for purchasing the supplies. The employee was paid a travel allowance of \$37 per month and was given a school credit card with which to purchase the home economics supplies. The employee's regular hours were 8 a.m. to 3:30 p.m.

On Nov. 22, 1972, the plaintiff taught her high school classes and then drove to the middle school to teach her classes there. The plaintiff spent the rest of the day at the middle school. That particular day was a payday. It was plaintiff's custom to travel from the middle school back to the high school to pick up her paycheck which would have been left in her mailbox after 1 p.m. The plaintiff picked up her paycheck at approximately 3:05 p.m. She then left the high school and was immediately struck by a tractor-trailer. The plaintiff died as a result of her injuries. A search of her purse and car revealed a receipt for home economics supplies and a cake pan, which was owned by the defendant-employer.

The Court of Appeals stated that this case did not fall within any exception to the going and coming rule simply because there was no evidence of where the decedent was going at the time of the accident. *Id.* at 494, 224 S.E.2d at 660. There was also no evidence that the decedent was performing any of her duties incident to employment at the time of the injury. Despite the fact that the decedent received travel pay, because there was no evidence indicating where she was going at the time of her accident, her death did not arise out of or in the course of her employment and was therefore not compensable.

Employer Furnishes Transportation

Where an employer provides a transportation conveyance to his employees as an incident to the contract of employment, and the accident occurs while going to or from work, then a claim may be compensable as arising out of and in the course of the employment. If the provision of the transportation is gratuitous or a mere accommodation, however, then the case comes under the general going-and-coming rule and the claim is not compensable. *Travelers Ins. Co. v. Curry*, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976).

In *Travelers*, the employer let one employee use a company motor vehicle to transport two other employees from Greensboro to Lexington. This motor vehicle was used regularly every day by the one employee to transport the two other employees to work in Lexington. The one employee that drove the company truck was compensated for this as part of his job. The other two employees were not paid for the time while they were commuting to work.

At 7 a.m. on the date of the accident, while the one employee was transporting the other two employees to the work site, a motor vehicle accident occurred injuring the two passenger

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employees. A lower court found that the transportation was not provided to the two injured employees pursuant to an express or implied term of a contract of employment, that the two employees were not entitled to the transportation furnished by the employer, and the two employees were not required by their employer to use such transportation in commuting to and from work. The lower court found that the transportation furnished by the employer was gratuitous and merely an accommodation. The lower court held that the injured employees were therefore not within the course and scope of their employment when the accident occurred. *Travelers*, 28 N.C. App. at 288, 221 S.E.2d at 78. The N.C. Court of Appeals affirmed the trial court's decision.

Conclusion

This article has explored the general going and coming rule which states that injuries sustained while an employee is traveling to and from work are not compensable because such injuries do not arise out of or in the course of employment. This rule, however, is subject to three exceptions. The "premises exception" grants compensation even though the employee has not yet commenced his specific job task if the injury occurred on property owned, maintained or controlled by the employer. This exception is strictly interpreted and does not pertain to injuries occurring on off-premises necessary routes of travel.

The special errand exception to the going and coming rule relates to instances when the employer exercises sufficient control over the employee so that the task can be determined to be a special errand for the benefit of the employer. This includes business trips, where an employee is deemed to be in continuous employment unless the employee deviates on a personal errand. Even if an employee deviates from employment, as soon as the employee begins to return to his employer's business, such as returning to a hotel, or traveling to and from meals, the employee regains the protection of the special errand exception. The

special errand applies even if the employee is engaged in activities both for his own purpose and for the employer's purpose. A special errand has no finite beginning or end, and employees are entitled to protection as long as the special errand bears a "reasonable relationship" to the employment.

Finally, injuries have been deemed compensable when, under the terms of the employment or as an incident to the contract of employment, allowances are made by the employer to cover the cost of such transportation. If an employer furnishes the transportation, it must be pursuant to an employment contract or agreement, and cannot be a mere gratuity, for the injury to fall within the transportation exception. On the other hand, as long as the employer is compensating an employee for his travel time or transportation expenses, any injury occurring while the employee travels to and from work in his own vehicle is compensable under the transportation exception as long as it can be proven where the employee was actually going.

The modern trend with regard to the going and coming rule is to narrowly apply the premises exception, but to broadly apply the special errand and transportation exceptions. The Supreme Court's most recent "going and coming" decision has taken a restrictive view in strictly applying the rule. *See Smallwood, supra*. There is precedent, however, that indicates that the exceptions may swallow the rule if those exceptions are interpreted too broadly.

At the one extreme is the Supreme Court holding in *Royster* where it refused to award benefits when an employee crossed a public road in order to get from the employer-owned parking lot to the employer-owned main facility. At the other extreme is the Supreme Court's holding in *Powers* where it granted benefits to an employee who was struck by his own car in his own driveway. Until these conceptual inconsistencies are resolved, the practitioner is left to his or her own creative devices in arguing a going and coming case. ♦

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