

hand on another crew who also lived in Pawnee Rock. Since becoming employed at Petromark on September 28, 2010, claimant always worked at job sites near Bazine.

Before Mr. LeMaster and claimant left the job site, claimant noticed Mr. LeMaster's 1980 Astro van had two low tires, which were filled with air from an air hose at the job site. Mr. LeMaster chose the route home to Pawnee Rock and at one point the back tire was low and a cigarette lighter air pump was used to add air. Mr. LeMaster and claimant both helped air up the tire as the hose from the cigarette lighter air pump was barely long enough to reach the tire. After the tire was filled with air, claimant did not put on his seat belt. A few miles later the tire blew out and the van rolled 2½ times when Mr. LeMaster, who was driving, lost control.

Claimant had serious injuries and was taken to the Larned, Kansas, airport where he was flown to Wichita for treatment. The evening of the accident, claimant called Kenny Roach from the hospital and reported the accident. Claimant called Mr. Roach again the next day after learning he had spinal damage and a compression fracture. Claimant's physician has indicated claimant cannot return to his job duties at this time. As of the date of the preliminary hearing, claimant has been off work due to his injuries.

The ALJ found pursuant to K.S.A. 44-508(f) claimant's injury did not arise out of and in the course of his employment because the accident occurred on claimant's way home after leaving his employment. In the Preliminary Hearing Order ALJ Moore provided a thorough analysis of the facts and the applicable law and determined that none of the recognized exceptions to K.S.A. 44-508(f) apply to the current case. He indicated K.S.A. 44-508(f) specifically provides that when one is injured while "going or coming" from work, the injury does not arise out of and in the course of the worker's employment.

Claimant relies on a series of cases that began with *Messenger*.¹ In *Messenger* the Kansas Court of Appeals applied an exception to the "going and coming" rule that allows workers compensation coverage where travel on public roadways is an integral or necessary part of the employment. An accident that occurred when Messenger was returning home from a temporary work site was held compensable because he was required to travel and provide his own transportation, he was compensated for his travel, and both Messenger and his employer benefitted from that travel arrangement. In holding that the "going and coming" rule did not apply, the Court of Appeals stressed the benefit that the employer derived from the travel arrangement.

Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the

¹ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan.1042 (1984).

employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.²

In *Kindel*,³ the Kansas Supreme Court approved the *Messenger* decision and stated:

Although K.S.A. 1991 Supp. 44-508(f), a codification of the longstanding “going and coming” rule, provides that injuries occurring while traveling to and from employment are generally not compensable, there is an exception which applies when travel upon the public roadways is an integral or necessary part of the employment. (Citations omitted.) Because *Kindel* and other Ferco employees were expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor, this case falls within the exception to the general rule.⁴

In a more recent decision, the Kansas Court of Appeals in *Brobst*⁵ reiterated that accidents occurring while going and coming from work are compensable where travel is either (a) intrinsic to the job or (b) required to complete some special work-related errand or trip. The Court of Appeals stated:

... Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself.

Under this third qualification to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of the employment. This third exception has been noted in several Kansas cases, many of which post-date the 1968 premises and special hazard amendments to the Workers Compensation Act.⁶ (Citations omitted.)

Respondent argues that claimant was injured after his shift at Petromark ended and, therefore, the injury did not arise out of and in the course of employment. Respondent notes the term “in the course of” refers to the time, place and circumstances under which the accident occurred, and claimant was not on the time clock, nor under the control of his employer. Respondent cites the “going and coming” rule contained in K.S.A. 44-508(f) and

² *Id.*, at 437.

³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁴ *Id.*, at 277.

⁵ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

⁶ *Id.*, at 773-774.

argues that none of the exceptions to the “going and coming” rule created by case law apply here.

Respondent also argues that as a consequence of the recent *Bergstrom*⁷ decision the only exceptions to the “going and coming” rule are the two specific exceptions enumerated in K.S.A. 44-508(f). In *Bergstrom*, the Kansas Supreme Court recently held:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.⁸

The court further held:

A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.⁹

Respondent further argues that the inherent travel and special purpose exceptions to the “going and coming” rule are judicially created exceptions and, applying the strict literal construction rule of *Bergstrom*, should no longer be precedential.

The inherent or integral travel and special purpose findings in the reported judicial cases were simply judicial determinations that the “going and coming” rule was not applicable because the workers in those cases were already in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. This distinction was accurately noted in the concurring opinion in *Halford*,¹⁰ where it was stated in pertinent part:

I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception. The statute provides that a worker is not covered “while the employee is on the way to assume the duties of employment.” K.S.A. 44-508(f). Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he

⁷ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

⁸ *Id.*, Syl. ¶ 1.

⁹ *Id.*, Syl. ¶ 2.

¹⁰ *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 942, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008).

or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment" – he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.

Moreover, the *Bergstrom* case neither construed K.S.A. 44-508(f) nor overruled any cases that have interpreted that statute and is factually distinguishable. Accordingly, this Board Member rejects respondent's argument that *Bergstrom* has overturned the exceptions created by *Messenger*.

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.¹¹

Claimant has failed to establish by a preponderance of the evidence that any of the exceptions to K.S.A. 2010 Supp. 44-508(f) apply to this case. Claimant made special arrangements to ride with Mr. LeMaster, a chain hand from another crew, from work to home to save claimant's wife from driving from Pawnee Rock to Great Bend. At the time of the accident, claimant was riding in a private vehicle driven by Mr. LeMaster. It is undisputed that at the time of the accident, claimant was on his way home after his workday ended, he was not on the time clock and neither he nor Mr. LeMaster were being reimbursed for their travel costs.

Normally claimant traveled to Great Bend to catch a ride to the job site with his driller. On the date of accident claimant chose to ride from Great Bend to the job site with Mr. Roach and from the job site home to Pawnee Rock with Mr. LeMaster because it benefitted him. Respondent had no control over claimant when he left the job site with Mr. LeMaster on the date of accident. Under these facts, traveling home to Pawnee Rock was not an inherent or integral part of claimant's employment, nor did it benefit respondent.

¹¹ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

In summary, this Board Member finds that none of the exceptions to K.S.A. 2010 Supp. 44-508(f) apply and the claimant's injuries did not arise out of and in the course of his employment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

WHEREFORE, the undersigned Board Member affirms the February 25, 2011, Preliminary Hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

¹² K.S.A. 44-534a.

¹³ K.S.A. 2010 Supp. 44-555c(k).