COMING AND GOING: COMMON DEFENSES UNDER THE KANSAS WORKERS COMPENSATION ACT

Presented by:

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Kansas Department of Labor
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DISCLAIMER: The opinions expressed in this presentation are my views, and mine alone, and do not necessarily represent the views of the Department of Labor, Division of Workers Compensation, or any other Administrative Law Judge.

For purposes of this discussion, I am construing the term “common defenses” broadly, and will touch on those elements of a claim most frequently challenged by defense counsel. “Defenses” in this context include both defenses and affirmative defenses.

In proceedings under the Workers Compensation Act, the burden of proof is on the Claimant to establish the claimant’s right to an award of compensation and to prove the various conditions upon which the claimant’s right depends. K.S.A. 2013 Supp. 44-501b(c). Matney v. Matney Chiropractic Clinic, 268 Kan. 336, 995 P.2d 871 (2000). “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 . . . K.S.A. 2013 Supp. 44-508(h). To persuade by the preponderance of the evidence requires the claimant to demonstrate the greater weight of evidence in view of all the facts and circumstances. In re Estate of Robinson, 236 Kan. 431, 620 P.2d 1383 (1984).

In order to receive workers compensation benefits, Claimant must show that her accidental

“Arising ‘out of’ and ‘in the course’ the employment, as used in our workers compensation act (K.S.A. 44-501, et seq) have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase ‘in the course of’ employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work and in his employer’s service. The phrase ‘out of’ the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises ‘out of’ employment if it arises out of the nature, condition, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, Syllabus Paragraph 1, 512 P.2d 497 (1973).”

Hormann, 236 Kansas at 197-98.

K.S.A. 2013 Supp. 44-508(f)(2) further provides, in relevant part

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
   (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
   (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
   (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:
   (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
   (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Within the “arising out of and in the course of employment” elements of the claim, there are additional “defenses,” in the sense that, if raised by the respondent/employer, the claimant must prove additional facts to recover workers compensation benefits

K.S.A. 2013 Supp. 44-501(a)(1) provides that “Compensation for an injury shall be disallowed if such injury to the employee results from:”
1. Self-inflicted Injury or Suicide

the employee's deliberate intention to cause such injury;

2. “Willful failure to use” either a guard or protection against injury required by statute or a “reasonable and proper guard and protection voluntarily furnished by the employer.
K.S.A. 2013 Supp. 44-501(a)(1)(B) and (C)

Note that the terms “deliberate” and “willful” are not defined in the Act.

3. “Reckless” violation of safety rules or regulations

Note that the term “reckless” is not defined in the Act.

4. Assaults by fellow employees/employer or Horseplay

[Compensation for an injury shall be disallowed if such injury to the employee results from] the employee’s voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise. K.S.A. 2013 Supp. 44-501(a)(1)(E)

5. Forbidden work vs. permitted work in a forbidden manner

6. Deviation from or abandonment of the employment

7. Going and Coming

K.S.A. 44-508(f)(3)(B) provides,

The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard
connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 44-508(f)(3)(B) is a codification of the “going and coming rule,” which has been a part of the workers compensation act since its inception. The rationale behind the rule is that, while commuting to and from work, the employee is exposed to no different or greater risks than any other member of the traveling public. Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994.)

Statutory Exceptions

The “going and coming rule,” as codified, has some exceptions: First, if the employee is still on the employer’s premises at the time of an accident, the rule does not apply. The most recent Kansas Supreme Court case that comprehensively interpreted the “premises exception” was Rinke v. Bank of America, 282 Kan. 746, 148 P.3d 553 (2007). In that case, an employee of the bank slipped and fell in a parking lot adjacent to the bank building. Neither the building nor the parking lot were owned by the bank. The Supreme Court determined that “substantial competent evidence” supported the ALJ’s and Board’s findings of fact, that the bank’s lease of a large portion of the parking lot and exercise of control over the majority of the parking lot, established that the parking lot was part of the bank’s premises. See also, Thompson v. Law Offices of Alan Joseph, supra, and Butera v. Fluor Daniel Construction, 31 Kan.App.2d 108, 61 P.3d 95 (2003; Review Denied April 29, 2003), where the court of appeals ruled that the “premises” exception to the “going and coming rule” extended to property of the principal/statutory employer. Since Rinke and Butera, the 2011 amendments to the Act added language requiring that the “premises [be] owned or under the exclusive control of the employer” for the “premises” exception to apply.

Second, if the employee is on the only available route to and from the employer’s premises and the route involves a special risk or hazard connected with the employment, that is not a risk to which the general public is exposed, and the route is not used by the public except in dealings with the employer, the “going and coming rule” does not apply. For a discussion of the “special risk or hazard” exception, see Chapman v. Beech Aircraft Corp., 258 Kan. 653, 907 P.2d 828 (1995). In Chapman, the employee was required to park in an employer owned parking lot, across a busy street from the plant, had to cross that street with the risks and dangers posed by the heavy traffic, and where the public only crossed that street at that location in dealing with the employer, the risk of injury from traffic was deemed to be a “special risk or hazard,” entitling the employee to compensation for injuries suffered after being hit by a car. In contrast, see Chapman v. Victory Sand and Stone Company [NOT the same “Chapman”], 197 Kan. 377, 416 P.2d 754
Chapman drove a truck hauling gravel, crushed rock and ready-mix concrete. The plant where he worked was somewhat isolated, near the river, northwest of Topeka. The only means of vehicle ingress/egress to the plant was an access road that crossed several railroad tracks. While the access road was constructed on a state right-of-way, by the state highway department, the crossing was built by the railroad. The road only went to the respondent’s premises. The public would only use the road in dealings with the respondent. Chapman was killed while driving to work one morning, when his vehicle was struck by a fast-moving train just outside the company premises. The workers compensation Act in 1966 did not contain the “only available route to and from the employer’s premises . . . [involving] a special risk or hazard” language. Chapman’s widow’s request for workers compensation benefits was denied under the “going and coming rule.” Chapman was held to be on the way to assume the duties of his employment, was not on premises owned by his employer, and the proximate cause of the accident was not the employer’s negligence.

Third, since emergency workers are expected to use haste when responding to the scene of an accident or calamity, they are deemed, by statute, to be in the course of their employment while so responding. See Estate of Soupene v. Lignitz, 265 Kan. 217, 960 P.2d 205 (1998), (discussed below).

Special errand, task or trip

Another exception to the going and coming rule is where, at the time of the accidental injury, the employee is performing some errand, special task or special trip for the employer. In Ridnour v. Kenneth R. Johnson, Inc., 34 Kan.App.2d 720, 124 P.3d 87 (2005), the employee was injured while on his way home to get some keys to open a warehouse so his crew could get inside to go to work. This case wasn’t really about going and coming, as he had already arrived at work, discovered he had forgotten his keys, and went back home to get them. He was not going home at the end of the day, but by retrieving those keys was performing an essential function of his job. Neither he nor his crew could work without those keys. In Mendoza v. DCS Sanitation, 37 Kan.App.2d 346, 152 P.3d 1270 (2007), Mendoza slipped and fell, injuring his ankle, when he went to pick up his paycheck. He had been instructed to pick up his check at a location different from where he customarily worked. Because Kansas “employers are require by statute to pay wages, . . .[w]here the employer has directed employees to pick up paychecks at a location separate and apart from the workplace, the employee’s trip to do so is a business mission or work-related errand that is integral to the employment.” 37 Kan.App.2d at 351.

“Judicially Created/Recognized” Exceptions*

Beyond the statutory exceptions to the “going and coming rule,” the courts have long recognized an exception where travel was intrinsic to the performance of the
job. In *Kennedy v. Hull & Dillon Packing Co.*, 130 Kan. 191, 285 P. 536 (1930), a traveling salesman was killed when his car came into contact with a downed power line, blown down by a passing storm. While the “going and coming rule” was not discussed by name, the employer sought to avoid liability by arguing that the employee had not yet reached the first town he was supposed to canvass for orders. The court characterized the question as whether the employee “was . . . within the allotted zone of his operations and in the course of his employment, so as to make the injury a compensable one.” The court emphasized that the employee was required to travel from town to town to perform his job, and was always traveling under the supervision of the employer.

In *Mitchell v. Mitchell Drilling Co.*, 154 Kan. 117, 114 P.2d 841 (1941), the first of the oil-field cases touching on the “going and coming rule,” the claimant was in fact the owner and president of the respondent, as well as its “tool pusher.” He was killed in a one-car accident after leaving one drilling site and heading for another. The decision mentioned, almost in passing, that he might have been going home to pick up a clean shirt, before proceeding to the next drilling site, but the focus of the decision was that whether traveling between wells or to the company yard, or to visit clients or prospective clients, “[a] necessary part of his employment consisted in traveling from well to well and to any other place at which he might desire to transact business pertaining to drilling activities. Manifestly, part of his business consisted of traveling the highways.”

In *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951), the “traveling as part of the employment” notion was extended to automobile mechanics returning home after taking a proficiency examination in another city who were killed in a traffic accident on the return trip. The court noted that it had been a custom for the employees to take the annual examination, the employer expected them to take it, and the certifications that followed successful completion of the proficiency examinations benefitted both the mechanics and the employer. Thus the examinations, and the trip necessary to take the examinations, were “contemplated by the employment itself.” Here, the “going and coming rule” was expressly mentioned, and the employer argued that the mechanics had completed the testing and were on their way home, such that the “going and coming rule” should bar a recovery. The court responded that “the entire undertaking is to be considered from a unitary standpoint rather than divisible,” such that the trip wasn’t over until the mechanics had returned home. *171 Kan. at 529.* See also, *Brobst v. Brighton Place North*, 24 Kan.App.2d 266, 955 P.2d 1315 (1997), where an LPN who attended a continuing education seminar stepped off a curb and twisted her ankle. Because the continuing education was necessary to her continued licensure as an LPN, she learned of the seminar due to a posting on the employer’s bulletin board, and the employer paid her tuition, traveling to and from the seminar was “intrinsic to the profession.”
Following *Blair*, came *Bell v. A. D. Allison Drilling Co.*, 175 Kan. 441, 264 P.2d 1069 (1953; rehearing denied 1954).  Bell, was an oilfield driller.  In oilfield parlance and practice, the owner of a potential well hires a driller to actually drill the well.  The driller is expected to assemble a crew.  The crew is customarily comprised of four individuals: the driller, who is in charge; a tool-pusher, who is second in charge; a derrick hand, and a deck hand or back-up hand.  The latter are often referred to as “roughnecks,” and they are responsible for most of the physical “brute labor” performed in the drilling operation.  The owner generally has no involvement in the selection of members of the crew, other than the driller.  When hiring the driller, the owner expects the driller to provide the crew.  In the oilpatch, drillers frequently travel to pick up their crew members, so that all arrive at the drilling site at the same time, and can begin to work at the same time.  Bell was killed in a car accident as he drove to collect members of his crew.  He had not yet arrived at the drilling site at the time of the accident, and was not yet being paid.  The court affirmed the Award of workers compensation benefits, relying upon these factors:

i. It is the custom of the employment that the driller hire and procure his own crew.

ii. It was expected, contemplated and assumed that the deceased would do so in this instance.

iii. The hiring of the crew by the deceased was beneficial to both employer and employee.

iv. The hiring of the crew by the deceased was a condition and obligation of the employment.

The court concluded that “there is a causal relationship between the employment and the fatal injury of the deceased.”

Next, came *La Rue v. Sierra Petroleum Co.*, 183 Kan. 153, 325 P.2d 59 (1958).  In *La Rue*, Robert Delaney, the driller, and Arther LaRue, a derrick hand, had just completed drilling a well for Sierra, and were scheduled to report to a new drilling site the next day.  Instead of staying in Lyons, where they had been staying while drilling at the just-completed well, they left and drove home.  Their destination was over a hundred miles from the well sites.  Both were injured in a one-car accident on the trip home, and LaRue died from his injuries.  Compensation was denied to LaRue, on the basis that his injuries did not arise out of and in the course of employment, as the accident happened after “leaving the duties of his employment.”  Critical to the denial of compensation were the following findings or considerations:

i. The decedent was not furnished transportation by the respondent as a part of or as an incident of the employment.

ii. The driller was not authorized by the respondent to provide
transportation to the decedent as a part of or as an incident of the employment.

iii. The driller did not furnish and provide transportation to the decedent as part of or as an incident of the employment, but the transportation was furnished purely as a personal matter between them, which had nothing to do with the respondent.

iv. The decedent was not under the direction and subject to the control of the respondent or the driller, or anyone else, after leaving the well site and heading home.

v. The trip home “was purely a personal mission having no connection with his employment, no work was being performed for the respondent, and no benefit was received by it by reason of the trip home.”

vi. At the time of the accident, the decedent was not moving to another location at the request of the employer, but rather was going home “after leaving the duties of his employment.”

vii. The proximate cause of the decedent's death was not the negligence of the respondent.

viii. The driller was not acting as the agent of, and was not within the scope of his employment or under the control of the respondent, at the time of the accident.

Hanson v. Zollars, 189 Kan. 699, 371 P.2d 357 (1962) was a civil case, where Hanson was injured in a car accident while a passenger in a truck driven by his foreman, on their way to work. The foreman was held to be acting in the course and scope of (arising out of and in the course of) his employment, in that he was driving a truck furnished by the employer, and “could be” continuously on call, and at the time of the accident “was acting as an agent of the company in the furtherance of its business.” Civil recovery was denied under the “fellow servant” doctrine.

Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973) was another oilfield case. Newman was an oilfield pumper who was employed by the owners of six separately owned oil and gas leases. He traveled between those wells on a daily basis, checking for proper operation and making repairs as needed. He was killed in a car accident while traveling between those leases. In finding that the “going and coming rule” did not apply, the commissioner determined that Newman was operating a route, and was thus analogous to a traveling salesman, and was operating a truck equipped with tools necessary to the servicing of oil wells. In affirming an Award of workers
compensation benefits, the court observed, “[a]n oil field pumper is ordinarily at work the moment he arrives at his pickup in the morning, and continues to be so until he returns from servicing the leases.” 212 Kan. @ 556. The court found that substantial competent evidence supported the findings of fact of the lower court, that “the nature of the decedent’s work was such that he was expected to use a pickup truck as part of his employment . . .” The court held,

If an employee is in the service of his employer at the time an accident occurs by reason of risk or hazard inherent in the use of the public road, it follows that the result injury or death arose out of the employment. 212 Kan. @ 569.

**Messenger v. Sage Drilling Co., 9 Kan.App.2d 435, 680 P.2d 556 (1984)** is often cited as the seminal precedent for the current interpretation of the “going and coming” rule, and the primary source for the judicially recognized exception to the “going and coming” rule, where “the operation of a motor vehicle on the public roadways is an integral part of the employment or is necessary to the employment.” Messenger, an oil field worker, was killed while traveling home from a “distant” well site. Evidence developed at trial established that the employer actively sought employees who were willing to work at “mobile sites”; that in contrast to the custom in the industry where drillers were paid to drive and by doing so provide an entire crew with transportation, crew members here had to be able to provide their own transportation; and that both the employer and the employees derived a benefit from the willingness to commute. In holding that Messenger’s accident arose out of and in the course of his employment, and was not barred by the “going and coming rule,” the court, in **Syllabus ¶ 4**, identified these relevant considerations:

In a workers’ compensation case, the record is examined, and it is held, where (1) employees are required to travel and to provide their own transportation, (2) the employees are compensated for this travel, and (3) both the employer and employees are benefitted by this arrangement, then such travel is a necessary incident to the employment, and there is a causal relationship between such employment and an accident occurring during such travels; thus the “going and coming” rule, K.S.A. 1983 Supp. 44-508(f) does not apply, and the court correctly awarded compensation.

While “the operation of a motor vehicle on the public roadways is an integral part of the employment or is necessary to the employment” language of **Messenger** is often cited by appellate courts, the criteria or test for determining whether travel is “integral” or “necessary” to the employment, found in **Syllabus ¶ 4**, is rarely discussed. Indeed, most courts choose to rely on the unspecified “mutual benefit” factor to find travel to be an incident of or necessary to the employment.
In *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995), the decedent was a construction worker who died in a one-vehicle wreck while returning home from a remote construction site. He was a passenger in a company vehicle driven by his supervisor. On the way from their homes in Salina, en route to a construction site in Sabetha, Kindel and his supervisor encountered a former co-worker. They made arrangements to meet after work at a Topeka strip club. After completing their work tasks in Sabetha, Kindel and his supervisor went to the Topeka strip club, where they spent four hours and both became very intoxicated. They then re-entered the company pickup and resumed the trip back to Salina. As a probable consequence of the driver’s intoxication, there was a one-vehicle accident and Kindel was killed, leaving a wife and minor children. The case was defended on theories of deviation from employment, abandonment of employment, intoxication, and the “going and coming rule.” The Supreme Court cited *Blair v. Shaw* and *Messenger v. Sage Drilling* as authority for the “exception” to the “going and coming rule” “when travel on the public roadways is an integral or necessary part of the employment.” The criteria relied upon by the *Messenger* court were not mentioned. The court concluded that,

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, the case falls within the exception to the general rule.

Note that the trip from Salina to Sabetha, and the return trip from Sabetha to Salina during which the accident occurred, appear, from the language of the decision, to have happened on the same day. Transportation in a company vehicle, a criteria not identified by the *Messenger* court, was essentially determinative. “In *Kindel*, we decided that an accident which occurred in a company vehicle transporting construction workers to a remote job site fell within this exception, even though the employees had stopped at a bar on the way home.” *Estate of Soupene v. Lignitz*, 265 Kan. 217, 223-224, 960 P.2d 205 (1998).

In *Estate of Soupene v. Lignitz*, a volunteer fireman died when his car collided with that of another fireman responding to the same call. The estate of the decedent fireman filed a civil action against the second fireman. In holding that the firemen were acting within the course and scope of their “employments” at the time of the accident (and thus “fellow servants,” such that a civil suit was precluded by the exclusive remedy of workers compensation), the court ruled that

The going and coming rule . . . does not apply if the making of the journey, or the special degree of inconvenience or urgency under which it is made, whether or not separately compensated for, is in itself a substantial part of the service for which the worker is
After the accident giving rise to this claim/suit, and while the suit was pending on appeal, after summary judgment had been granted in favor of Lignitz, the legislature amended the "going and coming rule" as codified in K.S.A. 44-508 to add the following language:

An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

Soupene’s estate argued that the statutory change demonstrated that the legislature intended to change the "going and coming rule" to except emergency workers en route to an emergency, and thus the exception did not apply at the time of the accident. If at the time of the accident the emergency workers had not arrived at work until they got to the scene of the emergency, then a civil action against another driver was not precluded by the exclusive remedy of workers compensation. The Supreme Court disagreed, and held that the amendment served only to clarify the law existing at the time of the accident. The court quoted 1 Larson’s Workers’ Compensation Law 1997), § 14.00, An injury is said to arise in the course of the employment when it takes place within the period of employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in something incidental thereto.

§ 15.00, also cited by the court, provides

The rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey, or the special degree of inconvenience or urgency under which it is made, whether or not separately compensated for, is in itself a substantial part of the service for which the worker is employed.

Since emergency workers are expected to get to the scene of the emergency as quickly as they can, the urgency of the trip brings them within the exception to the "going and coming rule."

Footnote: Soupene’s estate was so sure the estate was barred from a workers compensation recovery by the "going and coming rule," that the estate had settled its claim against the county for the sum of $3,000.00, before bringing suit against Lignitz.

In Butera v. Fluor Daniel Construction, 28 Kan.App.2d 542, 15 P.3d 278 (2001; Review Denied May 1, 2001), Butera was a construction worker. The nature of his work required that he be willing to temporarily relocate to
remote construction sites and find long-term lodging convenient to the site. His employment contract provided a stipend to cover food, lodging and driving costs. His employer, Fluor Daniel Construction, had contracted to perform some work at the Wolf Creek nuclear power plant. Butera lived in Cabool, Missouri, but during the job, he lived in a hotel in Garnett, Kansas, a 30 minute drive from Wolf Creek. He was injured one morning while driving to work, on the property of Wolf Creek, when he ran into a concrete barrier near an unlighted guard post. Workers compensation benefits were denied Butera because, in commuting from a hotel rather than his home, he was exposed to no more risks than any other member of the commuting public.

The court cited a number of factors for its determination that the going and coming rule precluded an award of benefits: First, “[t]ravel itself was not part of Butera’s job as a fitter, as it would be when one’s job is to pick up a crew [Bell] or visit accounts [Kennedy].” Second, Butera “was not specifically reimbursed for his commute.” Third, “his off-hours activities were not under Fluor’s supervision, and he was not expected to accomplish anything on behalf of Fluor during his off-time. Fourth, at the time of his injury, Butera “faced no greater risk than other commuters who were traveling from their permanent residence.” Fifth, Fluor did not enjoy some benefit over and above what if would have recieved had Butera been a local resident.”

Note that Butera also brought a workers compensation claim against Wolf Creek, on the theory that Wolf Creek was his statutory employer, even though Fluor Daniel Construction had workers compensation coverage. On remand, the WCAB held that Claimant could not recover from Fluor Daniel under the “premises” exception to the “going and coming rule,” because the accident did not happen on Fluor Daniels’ property.

In Butera v. Fluor Daniel Construction, 31 Kan.App.2d 108, 61 P.3d 95 (2003; Review Denied April 29, 2003), the court of appeals ruled that the “premises” exception to the “going and coming rule” extends to property of the principal/statutory employer, such that the “going and coming rule” did not apply to Butera, and he was entitled to benefits.

In Sumner v. Meier’s Ready Mix, Inc., 282 Kan. 283, 144 P.3d 668 (2006), Sumner was a truck driver. He drove a truck owned and provided by his employer. He was permitted to take the truck home at night, sometimes loaded to make a delivery the next morning, and sometimes unloaded. He was killed in a car accident while headed home near the end of his work day, with a loaded truck, to tend to an unspecified personal emergency, a deviation from his work duties that had been approved by his dispatcher. Had he been headed home at the end of his work day, when he had his accident, the court held he would have been entitled to benefits. But, because he was headed home for a personal errand at the time of the accident, benefits were denied. The court’s opinion failed to identify what the
emergency was, how long it would have taken to resolve the emergency and return to duty, or whether he would have been able to return to duty at all, meaning the trip home would have been effectively at the end of his work day.

**Query:** What about the unitary nature of the trip? Covered from door to door?

In *Halford v. Nowak Construction Co.*, 39 Kan.App.2d 935, 186 P.3d 206 (2008; Review Denied Nov. 4, 2008), Halford, a water and sewer supervisor for Nowak, was killed while driving a specially equipped truck that enabled him to refuel heavy equipment from the truck’s bed-mounted fuel tank. On the morning he was killed, he was driving to pick up his lead man before stopping at the shop to pick up supplies. Halford’s truck drifted off the side of the road, overturned, and he was killed. While Halford had a fixed job site for the immediate future, the Court of Appeals noted that “various job sites were expected to be served from time to time,” and Halford’s use of a specially-equipped company vehicle was a persuasive factor in determining whether driving was intrinsic to his employment. The Award of benefits was affirmed.

Of interest, the court’s opinion recognized that the “intrinsic to employment” exception was judicially-created. “The parties agree that the issue in this case centers on the application of this *judicially-created exception* to the “going and coming rule.” 39 Kan.App.2d at 939 (emphasis added). Judge Leben filed a concurring opinion in which he claimed that, rather than being “judicially-created,” the “intrinsic to employment” exception was not an exception at all, but rooted in the statute, in that “[w]here travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day’s work.” 39 Kan.App.2d at 942.

**Query:** If someone who drives for a living assumes the duties of employment as soon as he or she leaves home, when do those duties end? When the employee arrives back at home? If that analysis is correct, why wasn’t Meier covered until he got home?

**Query:** Taking Judge Leben’s statement at face value, where does the employee “assume the duties of employment”? When she puts on her shoes, walks toward the front door, descends the front steps, crosses the yard, or enters her car? When and where do the “duties of employment” end? When getting out of the car, crossing the yard, ascending the front steps, enters the front door, or takes her shoes off?

In *Scott v. Hughes*, 294 Kan. 403, 275 P.3d 890 (2012), the common-law spouse of a member of an oil drilling rig crew brought a tort action against the the rig’s driller Hughes, for Scott’s death as a result of a motor vehicle accident. Hughes was alleged to be intoxicated at the time of the accident.
After a complicated pre-trial process, with an interlocutory appeal, the Supreme Court held that even if Hughes was intoxicated, he did not lose his fellow servant immunity, even if intoxication might have cost him his own claim for workers compensation benefits. Even though Hughes may have been intoxicated, affecting his own right to workers compensation benefits, he was acting within the course and scope of his employment while driving and collecting an oil drilling rig’s crew, and was thus protected from a civil action by a coworker under fellow servant immunity of K.S.A. 44-501(b). As was common among oil field crews, crew members with valid drivers licenses took turns driving to and from the well site. Crew members were not paid for their time driving to and from the well site, and could choose to either drive themselves to/from the well site, or ride with the rest of the crew. Crew members were paid $15.00 “ride time” for each leg of the commute. The driver was also paid mileage. The well site location would change every 12 to 16 days.

The passengers in Hughes’ car at the time of the accident all brought tort actions against Hughes, and contended that they were not in the course and scope of their employments at the time of the accident, because they were not paid mileage, were not paid for their time, were not performing any duties for Respondent, and were asleep at the time of the accident. The Supreme Court determined that regardless of his alleged intoxication, if driving the crew to the well site was intrinsic to his employment, the fellow servant immunity attached to protect him from civil action by his passengers, and whether his passengers and coemployees were acting within the course and scope of their employments at the time was irrelevant. “It mattered not - on this particular, narrow, threshold issue - whether his passengers were or were not also within the course and scope of their employment at the time of the accident.” 294 Kan. @ 421.

The Supreme Court declined to offer a specific test as to whether travel was intrinsic to employment. “We decline to enunciate such a hard and fast rule today. Instead, we rely on our past oil field worker cases for pertinent factors guiding consideration of the proof necessary to demonstrate intrinsic travel meriting exception to the going and coming rule.” 294 Kan. @ 420.

In Craig v. Val Energy, Inc., 47 Kan.App.2d 164, 274 P.3d 650 (2013), Craig was an oil field driller whose responsibilities included driving his crew to and from the drilling site. He was paid mileage for transporting his crew members. On the date of accident, and for four days previously, the drilling rig was out of service, and he and his crew worked at the company shop, a fixed location. He was injured in a one-vehicle accident on the way home from the shop at the end of the work day. The court of appeals determined that the “intrinsic” exception to the “going and coming rule” was not an exception at all, but “a method to determine whether an employee has already assumed the duties of employment when he or she is going to or
returning from work.” 47 Kan.App.2d @ 168. Ultimately, the court of appeals held that (1) because Val Energy reimbursed Craig for his mileage, (2) the fixed location at which Craig was working was not permanent, and he had no permanent work site, (3) he transported at least one crew member to and from the shop, and (4) “despite the temporary change in location, it still appeared that Val Energy and Craig received a mutual benefit from the continued travel arrangement,” the “going and coming rule” did not apply. Craig was permitted benefits. The “mutual benefit from the continued travel arrangement” was not specifically identified. The court quoted extensively from Messenger and Butera in support of its decision.

In Williams v. Petromark Drilling, L.L.C., ______ Kan. _______, 326 P.3d 1057 (June 6, 2014), the Kansas Supreme Court reversed the Court of Appeals’ denial of workers compensation benefits. Williams was a back-up hand on an oil rig. Williams’ crew drilled oil wells within a 10-mile radius of Bazine, Kansas. It took about a week to drill a well, after which the rig would be dismantled and moved to another location. Williams lived in Pawnee Rock, a distance of about 50 miles from the area where the wells were being drilled. His job required that he travel from his home in Pawnee Rock to the drilling site. He could either drive himself to and from the well site, or avail himself of a ride with his driller to and from Great Bend, Kansas. He was not required to drive, but was required to travel, if he was to work on this crew. He was not paid for his travel time. His duties to his employer began when he arrived at the well site and ended when he left the well site. On the day of his accident, Claimant declined to ride home with his driller, but instead opted to ride home with a co-worker, who would drop him in Pawnee Rock, without the necessity of going to Great Bend and then getting a ride back to Pawnee Rock. On the way home, a tire blew out, there was a one-car accident, and Williams was injured. The Administrative Law Judge denied compensation on the basis of the “going and coming rule,” the WCAB reversed, and the Court of Appeals reversed the WCAB and reinstated the Award and decision of the ALJ. The Supreme Court reversed the Court of Appeals on the basis that “the evidence on whether Williams was at work or leaving work at the time of his injury was not amenable to only one factual finding. . . substantial competent evidence supported the Board’s factual finding in Williams’ favor.”

Williams acknowledged that he rode home with a coworkers “for his own convenience because the trip would have been shorter, and his wife would not have had to drive to Great Bend to pick him up.” The ALJ found

At the time of the accident giving rise to [Williams’] injuries, he had left work for the day and was on his way home, as a passenger in a co-worker’s vehicle. He was not being paid or performing any services or duties for his employer. His accident did not occur “in the course of” his employment. [His] duties on the drilling rig did not include
driving. [His] injuries did not “arise out of” his employment with Respondent.”

Even though [Williams] was an oilfield worker, travel was no more intrinsic to his employment than any other commuter on the highway. At the time of the accident, [Williams] was not traveling between well sites, and he was not performing any services for his employer or advancing his employer’s interests. He was simply on his way home at the end of the work day.

The Court of Appeals agreed with that analysis and reversed the WCAB’s grant of benefits. The Supreme Court reversed the Court of Appeals, writing that the Court of Appeals “crossed a line from evaluating this evidence in light of the record as a whole to test whether it supported the Board’s factfinding into ruling on a matter of law on evidence that was, although undisputed, conflicting under the governing statute.” The Supreme Court noted that the WCAB had determined that Williams’ job as an oil drilling crew member required that he travel to ever-changing remote drill sites, and that Williams would not have been employed if he was unwilling to travel to those sites. The Supreme Court acknowledged, but did not comment on, the ALJ’s findings. The Supreme Court did not offer a test or analysis as to when or whether a worker’s travel was “intrinsic” to the employment. The factors found to be determinative were:

He had to travel to changing drill sites

He would not have been hired if unwilling to travel.

Analysis

The criteria utilized by the Messenger court to determine whether driving was “intrinsic” to the employment have been all but abandoned.

Employees were required to travel and furnish their own transportation

Employees were compensated for the travel

Both the employer and employees are benefitted by this arrangement

What is the mutual benefit? How is it different from any other employment?

Based on the erosion of the Messenger analysis, those factors that, now, individually, will almost guarantee coverage by the Act and exclusion from the “going and coming rule”:

Travel is an element of the employment in some fashion

Oilfield worker
Drive or be a passenger in a company vehicle

Unknown, since the Supreme Court in *Williams* and *Scott* declined to offer a clear test or rule, are:

How much travel time or what distance converts an ordinary commute to “travel intrinsic to the employment”?  

Where and when do the duties of employment commence, and where and when do they end?  

What is the mutual benefit necessary to convert a commute to “travel intrinsic to the employment”?

Under the Supreme Court’s current “analysis,” *LaRue* was probably wrongly decided.

**Willful/Reckless failure to use a guard or safety device, or violate safety regulations**

K.S.A. 2013 Supp. 44-501 (a) provides

Compensation; disallowances; substance abuse testing; exceptions, pre-existing conditions; benefits reduced for certain retirement benefits.

(a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:

(A) The employee’s deliberate intention to cause such injury;
(B) the employee’s willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
(C) the employee’s willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
(D) the employee’s reckless violation of their employer’s workplace safety rules or regulations; or
(E) the employee’s voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

The terms “deliberate,” “willful,” “reckless,” and “voluntary” are not defined in the Act.

In *Thorn v. Zinc Co.*, 106 Kan. 73, 186 P. 972 (1920), Thorn was feeding ore into a crusher, when a piece of ore that was too large became caught between the rollers. He used a small stick to try and remove the stuck piece of ore, and the rollers grabbed the stick and pulled his hand into the machine, lacerating his finger. He had been provided a long-handled maul to break up pieces of ore, and had been instructed to shut down the machine before trying to remove pieces of ore stuck in the rollers. While Gen.Stat. 1915 §5896, Laws of 1917, chapter 226, §27 precluded an Award of benefits where there was a “willful failure to use a guard or protection . . . voluntarily furnished him by said employer,”
compensation was allowed. The court ruled that neither the maul nor the prominently placed sign that told Thorn to shut down the machine before trying to clear “choked” rollers constituted a “guard or protection” furnished by the employer. Thorn’s failure to comply with the sign’s admonishment was determined by the court as “clearly negligence, and might even be characterized as willful misconduct; but we conclude that it is not the kind of delinquency that was within the mind of the legislature” when it crafted the “willful failure” language of the statute. 186 P. @ 974.

In Bersch v. Morris & Co., 106 Kan. 800, 189 P.934 (1920), Bersch removed a guard so he could clean a machine. He then turned the machine on and dried it with a cloth without replacing the guards. The cloth he was using to dry the machine became caught in the machine, pulling his hand into the machine, causing injury. The court determined that the meaning of the word “willful,” as used in the Act,

is not necessarily fulfilled by voluntary and intentional omission, but includes the element of intractableness, the headstrong disposition to act by the rule of contradiction.

In Carter v. Koch Engineering, 12 Kan.App.2d 74, 735 P.2d 247 (1987; Review Denied May 15, 1987), Carter suffered severe injuries to his right hand when it was crushed by a punch press. Carter had operated the punch press, without being disciplined for a safety violation, for over six years prior to his accident. Material moving through the press would occasionally jam, and the operator would need to remove the jam to continue production. Koch Engineering had instructed its operators, including Carter, to turn off the press before attempting to clear a jam, to use “pincer pliers” to try and grab the blockage, and if it was necessary to remove the guard to access the inside of the machine, to insert a block to keep the press from closing. Carter was to contact a foreman if the pliers or block were not available. Carter did not shut off the machine before attempting to clear the jam and could not find a set-up block. He used a “little stick” he had found to try and push the blockage out of the way. When that was unsuccessful he stuck his hand in the press to remove the blockage. While he had adjusted the timer on the press to give him an interval within which to remove the blockage before the press again activated, it caught him by surprise and crushed his hand. The ALJ denied compensation, finding the failure to turn off the press and to use the set-up block were willful. The Director reversed and granted compensation. The Director’s grant of compensation was affirmed by the district court. The court of appeals cited Bersch, and noted that the district court, as fact finder, had found that Carter had “acted merely negligently or even with gross negligence, but something short of intractably, without yielding to reason, obstinately or perversely.” The court established a three-part test: First, a claimant’s violation of instructions, standing alone, is not enough to render conduct “willful,” as a matter of law. Second, for a violation to be “willful,” it must include the element of intractableness, the headstrong disposition to act by rule of contradiction. Third, the willfulness of the claimant’s acts is a question of fact for the factfinder to decide. 12 Kan.App.2d 74, Syl. ¶ 7.

In Baldwin v. Professional Lawn Care Services, (109,922; Unpublished), 318 P.3d 1019 (Kan.App. 2014), the court of appeals affirmed the denial of benefits to Baldwin, who suffered serious injuries when he fell from a 40-foot ladder while performing tree
trimming. The record established that Claimant was not wearing a hard hat, had not
harnessed himself to the tree, and his hard hat, lanyard, harness and climbing rope were
all in his vehicle. The ALJ denied compensation, finding that Baldwin’s refusal to use the
safety equipment or follow Respondent’s safety instructions and policies was a “willful
refutation” of those instructions and policies. The court cited Carter, and found that there
was substantial competent evidence to support the ALJ’s and Board’s factual finding that
Baldwin’s conduct was “willful.”

The court commented on, but did not decide, whether the historical interpretation of the
term “willful” would survive the Supreme Court’s mandate in Bergstrom v. Spears Mfg.,
289 Kan.605, 214 P.3d 676 (2009) to follow the clear language of the statute.

**ANALYSIS**

It must be noted that, despite several amendments to the Act since Bersch and
Thorn, the legislature has never provided a different definition of “willful.” Arguably, the
legislature, by failing to enact a different standard, has acquiesced in the Thorn definition
of “willful.” Therefore, to qualify as willful, there must be more than just a failure, or even
a refusal, to follow instructions or use a guard, protection or safety device either required
by law or voluntarily furnished by the employer. To satisfy the “intractable, headstrong”
requirement, there probably needs to be either previous violations or infractions,
confrontation over those violations or infractions, and a demonstrated pattern of acting
contrary to instructions. The 2013 amendments to the Act now authorize refusals to use
guards or safety devices, if the worker subjectively believes it is reasonable to do so under
the totality of the circumstances.

(2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply
when it was reasonable under the totality of the circumstances to not use such
equipment, or if the employer approved the work engaged in at the time of an
accident or injury to be performed without such equipment.


While the statute does not refer to the worker’s subjective assessment of the risks, allowing
the worker to consider whether the use of the guard or device is necessary under the
circumstances affords latitude that will make a finding of “willful” even more difficult.
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In General


Going and Coming

Blair v. Shaw, 171 Kan. 524, 233 P.2d 731 (1951)

**Willful/Reckless failure to use a guard or safety device, or violate safety regulations**

Thorn v. Edgar Zinc Co., 106 Kan. 73, 186 P. 972 (1920)
Bersch v. Morris & Co., 106 Kan. 800, 189 P. 934 (1920)
Baldwin v. Professional Lawn Services, Ct. of Appeals Dkt. No. 109,922 (2014 Unpublished)

Kevin Scott Moore v. Shawnee Mission Tree Service, Dkt. No. 1,030,847 (WCAB 2006)
Larry Eugene Freeman v. Paul Transportation, Dkt. No. 1,044,270 (WCAB 2009)
“Going and Coming” and other common defenses

Presented to the 40th Annual Workers Compensation Seminar, September 30, 2014, Overland Park, Kansas
By Bruce E. Moore, ALJ

Going and Coming . . .

Disclaimer: The opinions expressed during this presentation are mine, and mine alone, and do not necessarily reflect the views of the Department of Labor, Division of Workers Compensation, or any other Administrative Law Judge

Going and Coming . . .

• The most “common defense” asserted in proceedings before me is that Claimant has failed to sustain his or her burden of proof, as the claimant has the burden to establish each and every element of a claim.
Going and Coming . . .
• Personal injury
  • Lesion or change in physical structure
• Accident
• Repetitive Trauma
• Arising out of Employment
• Arising in Course of Employment

Going and Coming . . .
• A covered employment
  • Accident or repetitive trauma is the prevailing factor
    • Injury
    • Medical condition
    • Need for treatment
    • Impairment or disability

Going and Coming . . .
• Timely notice of accident or injury by repetitive trauma
• Quality of notice
• Average Gross Weekly Wage
• Nature and extent of impairment or disability
Going and Coming . . .

- There are a number of statutory defenses in K.S.A. 2013 Supp. 44-501, where the injury is caused by
  - Intentional infliction
  - Willful failure to use guard or protection
  - Reckless violation of safety rules or regulations

Going and Coming . . .

- Statutory defenses, continued
  - Voluntary participation in fighting or horseplay
  - Injury, disability or death contributed to by alcohol or drugs

Going and Coming . . .

- “Going and Coming rule”
  - Willful failure to use guard or device
Going and Coming . . .

- The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer’s negligence.


Going and Coming . . .

- While the statutory language seems clear on its face, a significant body of case law has developed on the issue of what it means to be “on the way to assume the duties of employment or after leaving such duties”

Going and Coming . . .

- The rationale behind the “going and coming rule” is that, while commuting to and from work, the employee is exposed to no different or greater risks than any other member of the traveling public.

- Thompson v. Law Offices of Alan Joseph
Going and Coming...

- Some employments, such as traveling salesmen and truck drivers, must travel as part of their job

- Kennedy v. Hull & Dillon Packing Co.

Going and Coming...

- An owner of an oil well drilling company, who also served as its “tool pusher,” was killed in a one-car accident while driving from one well site to another (?). Held: travel a necessary part of his business, and workers comp benefits awarded.

Going and Coming...

- “A necessary part of his employment consisted in traveling from well to well and to any other place at which he might desire to transact business pertaining to drilling activities.”

Going and Coming . . .

- Some people just commute to and from work
- Many employments fall in the middle

Going and Coming . . .

To determine whether employments in the “middle group” are within the “going and coming rule,” we must determine whether travel is “intrinsic to” the employment, or “an integral or necessary part of the employment.”
Going and Coming . . .

• Whether travel is “intrinsic”, “integral” or “necessary to the employment” must be determined on a case-by-case basis
• Unfortunately, the test for what is “intrinsic,” “integral,” or “necessary to the employment” tends to be subjective, and ever-evolving

Going and Coming . . .

• In Blair v. Shaw, auto mechanics employed by a Chevy dealership were killed in a car accident returning from an adjacent city, where they had taken a proficiency exam offered by Chevrolet.

Going and Coming . . .

• The dealership did not require the mechanics to take the proficiency test, did not pay them to do so, did not provide transportation, and had no control over them after they left work the day of the proficiency exam.
Going and Coming . . .
- It was a long-standing custom that the mechanics would take the test, and the dealership benefited by having factory certified mechanics.
- Held: by virtue of the “custom,” taking the test had become “contemplated by the employment itself.”

Going and Coming . . .
- In Bell v. A.D. Allison Drilling Co., benefits were awarded to an oil field driller killed in a motor vehicle accident while in the process of assembling his crew.

Going and Coming . . .
- It was a “custom of the employment” for the driller to assemble the crew.
- It was expected, contemplated, and assumed he would do so.
- The hiring of a crew was beneficial to both employer and employee.
- The hiring of the crew was an obligation of the employment.
Going and Coming . . .

- In *La Rue v. Sierra Petroleum Co.*, a member of an oil drilling crew was killed in a motor vehicle accident while traveling home from a remote well site, as a passenger in his driller’s car.
- Benefits were denied.

Going and Coming . . .

- Transportation was not furnished by the employment
- Driller not authorized to transport
- Furnishing of transportation not incident of employment but personal
- Decedent not under direction or control of employer or driller

Going and Coming . . .

- Trip home was “purely personal”
- At time of accident, not moving to another drilling site, but going home “after leaving duties of employment”
- Driller not employer’s agent at time of accident
- Employer not negligent
Going and Coming . . .
• In Hanson v. Zollars, a civil case, an employee was injured in an accident while riding to work in his foreman’s truck
• Held: Foreman acting within course and scope of employment while driving, and “Fellow Servant” doctrine barred civil action

Going and Coming . . .
• In Newman v. Bennett, oil field pumper who worked for six separately owned oil and gas leases, killed in accident while traveling between leases. All six owners ordered to contribute to pay benefits

Going and Coming . . .
• “An oil field pumper is ordinarily at work the moment he arrives at his pickup in the morning, and continues to be so until he returns from servicing the leases.”
Going and Coming . . .

- In Messenger v. Sage Drilling Co., an oil field worker was killed while traveling home from a distant well site.
- Held: travel on public roads is integral part or necessary part of employment. Benefits awarded.

Going and Coming . . .

- Three considerations identified by Messenger court:
  - Employees required to travel and to provide their own transportation
  - Employees are compensated for their travel
  - Both employer and employee benefit by this arrangement

Going and Coming . . .

- In Kindel v. Ferco Rental, Inc., a construction worker was killed in a one-vehicle accident while a passenger in his foreman’s company truck, returning from an out-of-town job.
- Held: Benefits awarded.
Going and Coming . . .

**Controlling factors were:**
- Supervisor driving
- Company truck
- Remote job site

Going and Coming . . .

- In *Estate of Soupene v. Lignitz*, two volunteer fire fighters collided while en route to a fire, and Soupene was killed. Soupene’s estate sued Lignitz.
- Held: Suit was barred by “Fellow Servant” doctrine, despite Soupene’s argument that the “going and coming rule” meant neither driver had yet assumed duties of employment.

Going and Coming . . .

- While case pending, legislature added language to **K.S.A. 44-508**.
- An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.
Going and Coming . . .

- In *Butera v. Fluor Daniel Construction (Butera I)*, Butera sent by Fluor to a remote location for a long-term job at Wolf Creek Power Plant. He was injured in a one-vehicle accident on the way to work, but while on Wolf Creek’s property.

- Butera was DENIED workers compensation benefits due to the “going and coming rule.”
  - Since he was staying through the week at a motel 30 miles from Wolf Creek, and not traveling long distances, he was just like any other commuter
  - Board’s grant of benefits reversed, and case remanded

Going and Coming . . .

- Butera II:
  - On remand, benefits denied despite “premises exception” to “going and coming rule,” because he was not on Fluor’s premises at time of accident
  - On appeal, Court of Appeals extended “premises” to include premises of statutory employer.
  - Benefits awarded
In *Sumner v. Meier's Ready Mix, Inc.*, Sumner was a truck driver who drove a truck owned and provided by Meier’s. He was permitted to and often did take the truck home at night, sometimes loaded to make a delivery the next day, sometimes unloaded.

Near the end of his work day, Sumner advised his dispatcher that he needed to go home for an emergency. His truck was already loaded for a delivery. It was unknown whether he would make the delivery that day or the next, depending on what it took to resolve the emergency.

While enroute home, Sumner killed in a crash.

Held: Benefits denied. Sumner on a personal errand at the time he drove home.
Going and Coming . . .

• In Halford v. Nowak Construction, Halford was killed on the way to work, in a one-vehicle accident, while driving a specially equipped truck owned by Nowak.

• Held: Benefits granted. Use of a company truck persuasive.

Going and Coming . . .

• In Scott v. Hughes, a civil action, Scott was killed while riding to work with Hughes, another member of his oilfield crew. Hughes (and the other members of the crew) contended they had not yet assumed the duties of employment and were asleep. They sued Hughes in tort.

• Held: Suit against Hughes barred by “Fellow Servant” doctrine, because Hughes, in transporting crew, was acting in the course and scope of his employment.

• Two comments of Supreme Court are noteworthy:
Going and Coming . . .

• “It mattered not . . . whether his passengers were or were not also within the course and scope of their employment at the time of the accident.”

Going and Coming . . .

• We decline to enunciate such a hard and fast rule [a test of when travel is intrinsic to employment] today. Instead, we rely on our past oil field worker cases for pertinent factors guiding consideration of the proof necessary to demonstrate intrinsic travel meriting exception to the going and coming rule.

Going and Coming . . .

• In Craig v. Val Energy, an oil field driller was injured in a one-vehicle accident on his way home at the end of the day. At the time, his rig was out of service, and he and his crew had been working at the shop, a fixed location.
• Held: Benefits awarded
Going and Coming . . .

- Val Energy paid mileage for trips to and from the shop
- Craig was still transporting at least one crew member to/from shop
- Fixed location not permanent; at some point, Craig would again travel

Going and Coming . . .

- In *Williams v. Petromark Drilling*, L.L.C., Williams was a member of an oilfield crew. He was injured on his way home at the end of the work day, while a passenger in a co-worker’s car. He had declined an offer of transportation by his driller.
- Held: Benefits awarded

Going and Coming . . .

- ALJ had denied benefits.
- Board reversed.
- Court of Appeals reversed Board and reinstated ALJ’s Award.
- Supreme Court reversed Court of Appeals, holding
Going and Coming...

* "The evidence on whether Williams was at work or leaving work at the time of his injury was not amenable to only one factual finding. ... Substantial competent evidence supported the Board's factual finding in Williams' favor."

Willful, Reckless...

- K.S.A. 2013 Supp. 44-501(a):
  - (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
    - (A) The employee's deliberate intention to cause such injury;
    - (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
    - (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
    - (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
    - (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.
Willful, Reckless . . .

- The terms “willful” and “reckless” are not defined in the Act.

Willful, Reckless . . .

- In Thorn v. Zinc. Co., an employee who knowingly removed a guard, in violation of the known rules, and stuck his hand in to remove a blockage, suffered a laceration to his finger when his hand got caught in a machine.
  
  - Held: Benefits Awarded

Willful, Reckless . . .

- Neither the maul provided by the employer to clear blockages nor the signage constituted a “guard or protection furnished by the employer”
- The failure to comply with the rules and signage was negligence and even willful misconduct, but “was not the kind of delinquency that” the legislature intended
Willful, Reckless . . .

• In Bersch v. Morris & Co., Bersch removed a guard so he could clean a machine. He then turned the machine on and used a cloth to dry the machine. The cloth became entangled in the machine, pulling his hand in.
• Held: Benefits Awarded

Willful, Reckless . . .

• In Carter v. Koch Engineering, Carter suffered a crush injury to his hand when it was caught in a punch press while attempting to clear a blockage. Carter knew if there was a blockage, he was to (1) turn the machine off, (2) use pliers to remove the blockage, and if he had to remove the guard, (3) he was put a block in place to keep the press from closing.

Willful, Reckless . . .

• Carter failed to:
  • Turn the machine off
  • Use pliers to remove the blockage
  • Insert a block to keep the press from closing
Held: Benefits Awarded
Willful, Reckless . . .

- Citing *Thorn* and *Bersch*, the court established a 3-part test:
  - A violation of instructions, standing alone is not “willful”
  - To be willful, there must be an element of intractableness
  - Willfulness is a question of fact

Willful, Reckless . . .

- In *Baldwin v. Professional Lawn Care Services*, Baldwin was injured when he fell from a 40-foot ladder while trimming a tree. At the time of the accident, he was not wearing a hardhat, and was not tethered to the tree.

Willful, Reckless . . .

- Baldwin’s hard hat, lanyard, harness and climbing rope were all found in his car.
- The decision is silent as to whether or to what extent there had been prior problems, but the court ruled there was substantial, competent evidence to support a finding that Baldwin’s conduct had been “willful”
Willful, Reckless . . .

• The court commented on, but did not decide, whether the case law interpretation of “willful” would survive Bergstrom.
• Despite the many amendments to the Act since Thorn and Bersch, the legislature has never offered a definition of “willful”.

Willful, Reckless . . .

• The 2011 Amendments to the Act added the following language to 44-501(a)(2):
  - Subparagraphs (B) and (C) of subsection (a) shall not apply when it is reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

Willful, Reckless . . .

• We’re done!
• Thanks.