



of parts for Employer. After doing so, he would have gone to Employer's premises, delivered an unused part from his prior project, and began preparing for his next project. The traveling employee doctrine establishes Defendants were liable for Claimant's injuries under the Idaho Workers' Compensation Law.

Defendants contend the coming and going rule precludes liability. Moreover, Claimant's status as an independent contractor precludes application of the traveling employee doctrine despite the fact that Surety contracted with Employer to cover Claimant knowing he was an independent contractor.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant and by Jerry "Skip" Ingle, who performed similar work for Employer, and Steven Stafford, Employer's service manager;
2. Claimant's exhibits 1 – 4; and
3. Defendants' exhibits A – C.

### **FINDINGS OF FACT**

1. Claimant worked as a service technician for Employer. Although he was an independent contractor, Claimant was covered by Employer's policy for worker's compensation insurance issued by Surety. Claimant's relationship to Employer was as an independent contractor because he was one of five or six people who handled overflow work. Employer used its employee service technicians first. Claimant's arrangement with Employer was subject to Claimant's availability at Claimant's discretion and to Employer's need for an additional service technician. Employer specified more and stricter rules for its employees than for the independent contractors.

### **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 2**

2. Claimant performed repair and warranty work mostly for Employer, mostly in Northern Nevada. Claimant would drive his motor home (“Winnebago”) to Employer’s premises, pick up whatever parts he would likely need, and drive to a customer’s mobile home to effect repairs. Employer usually scheduled jobs for several customers to be performed on a single trip.

3. The business agreement between Claimant and Employer was entirely oral. They had worked this way for about 10 years.

4. Claimant was not paid for the time driving to Employer’s premises or while on Employer’s premises gathering and loading parts. He was paid an hourly rate and mileage from the time he left Employer’s premises. The hourly rate differed depending upon whether he was driving or actually performing service work. When out overnight, Claimant was also paid a flat amount for sleeping in his Winnebago in lieu of paying for a motel. Claimant and other independent contractors were paid differently than regular employees. Claimant’s pay was designed and agreed upon to compensate him for the use of his own vehicle and for other reasons.

5. The point at which mileage pay stopped was not rigidly specified by the parties; it could be Employer’s premises in Caldwell or Claimant’s home in Melba. Employer’s premises were not available to Claimant 24 hours per day. Claimant’s and Employer’s business arrangement was based upon an “honor system.” The reasonable mileage Claimant recorded was paid without question. For example, if Claimant discovered he needed additional parts while working a project, he was not expected to charge mileage necessary to obtain those parts, but Mr. Stafford, Employer’s service manager, testified, “if he adds his mileage into that, I could care less.”

**FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 3**

6. Except for a very small number of items under warranty, Employer did not require a return of either unused parts or used parts from the customer's home. Employer did not specify any policy about parts disposal, except that Claimant was discouraged from leaving such waste at a customer's home. Employer did have dump bins on its premises. Claimant was allowed to salvage such parts for his own use or sale at his discretion or dispose of them at any reasonable location.

7. Claimant used a barn near Middleton to store used parts he wanted to salvage. Part of his route to Middleton coincides with his route from his home in Melba to Employer's premises in Caldwell; a small part of it – less than five miles of the roughly 40-mile distance between Claimant's home and Employer's premises – requires travel directly away from any reasonably direct route between his home and Employer's premises.

8. Claimant undertook a project for Employer. He loaded, drove, and serviced customers as usual. Once back in Idaho, he drove to Employer's premises in the vehicle he used for personal errands and delivered the paperwork necessary to get paid. As was his custom, he kept salvageable used parts and a new part that had been unused in his Winnebago until he was called for his next project. He still had some parts which needed disposal. About one week later – on June 18, 2003 – on his way to Employer's premises for his next project, Claimant intended to unload the salvageable parts at the Middleton barn. Claimant was traveling on the section of the route headed away from Employer's premises when he was involved in a motor vehicle accident. (The other motorist failed to yield.)

### **Discussion and Further Findings**

9. These facts impact Idaho Code § 72-229, the "coming and going" rule, the "traveling employee" doctrine, and the "unreasonable departure" exception to the traveling

employee doctrine. Under Idaho Code § 72-229, Defendants are estopped from raising a defense that Claimant was an independent contractor where Surety issued a policy and collected a premium which covered Claimant under Employer's worker's compensation insurance policy. Claimant suggests that because Claimant was an independent contractor, Employer's lack of control over details of his work expands coverage to include any method by which Claimant performed his work. Defendants suggest the traveling employee doctrine does not apply because Claimant was not an employee. Neither argument is persuasive. Surety's decision to write a policy covering certain of Employer's independent contractors neither expands nor ameliorates its liability regarding those workers vis-à-vis Employer's other covered workers. For purposes of establishing whether the accident is compensable, Claimant should be considered on an equal footing with any other employee of Employer performing similar work. Otherwise, uncertain limits of expanded coverage would have a chilling effect on an employer's and surety's willingness to cover such independent contractors. Idaho Code § 72-229 plainly estops Defendants from arguing coverage is more limited.

10. Idaho Code § 72-102(17)(a) specifies an injury must be caused by an accident "arising out of and in the course of" any employment covered by the worker's compensation law. Generally, workers traveling between home and work are not covered by application of the "coming and going" rule. *See generally, Pitkin v. Western Const.*, 112 Idaho 506, 733 P.2d 727 (1987); Case of Barker, 105 Idaho 108, 666 P.2d 635 (1983), appeal after remand 110 Idaho 871, 719 P.2d 1131. However, with some exceptions, a traveling employee is covered portal to portal while on a business trip. *See, Ridgeway v. Combined Ins. Cos. of America*, 98 Idaho 410, 565 P.2d 1367 (1977). The traveling employee doctrine is an exception to the coming and going rule. *See, Reinstein v. McGregor Land & Livestock Co.*, 126 Idaho 156, 879 P.2d 1089 (1994).

**FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 5**

Thus, if Claimant is a traveling employee, the coming and going rule does not apply to relieve Defendants of liability for travel between Claimant's home and Employer's premises. Moreover, an interruption of a business trip is insufficient, by itself, to negate coverage. Cheung v. Wasatch Electric, 136 Idaho 895, 42 P.3d 688 (2002). Further, whether a claimant received pay for a particular aspect of a trip is a factor, not by itself determinative, in analyzing whether coverage applies. Case of Barker, supra.

11. By application of Idaho Code § 72-229, Claimant was a traveling employee. He made trips on Employer's behalf. It was the nature of his job.

12. A closer question is when any trip began and ended. Claimant's pay did not begin until he drove a loaded vehicle from Employer's premises. Nevertheless, it would be unreasonable to claim that he was not in the course and scope of employment while he loaded the vehicle. Thus, pay is not a useful factor in assessing when any trip began.

13. While it may or may not matter in this instance when a trip began, the more direct analysis seems to require consideration of when a trip ended. At least three potential points could be defined as the end of Claimant's trip. The first potential end point of the trip is Claimant's home. Claimant's mileage pay ended at Claimant's home or Employer's premises at Claimant's actual driving discretion. There is no evidence Employer would have balked if he had driven to any reasonable dump site before he reached his home or Employer's premises and charged that mileage. Claimant usually dumped the waste afterward, and did not charge mileage for doing so. The end point of mileage pay is a factor in determining where a trip ended. For this trip, mileage pay ended at Claimant's home.

14. Here, Claimant's delivery of paperwork is also a potential end point of the trip. Completion and delivery of the relevant paperwork was a necessary part of the job. Claimant

could have driven the Winnebago and dumped waste and returned the part to Employer's premises at the same time. Whether he might have combined his salvage storage with his paperwork delivery does not materially help the analysis because Claimant's stated reasons for not combining the trips were reasonable. Moreover, it was consistent with Claimant's custom during his years of work for Employer.

15. A third potential end point of the trip would be the dumping of the waste at whatever reasonable location Claimant chose. Although he was not paid directly for it, dumping the waste was a necessary part of the job. If this point were to be determined to be the end of the trip, under the analysis of Cheung, *supra.*, the interruption of six days or so at his home would not negate compensability for an otherwise compensable accident. Similarly, a deviation of a few miles on a trip involving several hundred does not by itself constitute an unreasonable deviation; *a fortiori*, it is not unreasonable where a traveling employee is disposing of waste by salvage in a manner in which the employer had acquiesced. Under this analysis, Claimant's salvage choices would be a part of the dumping of waste whether the remainder was dumped at the barn or at Employer's premises afterward.

16. A fourth potential end point of the trip would be the return of the unused part. However, this potentiality is quickly dismissed. Employer had written off the part – a tub surround – and did not expect it returned. It was unlike the warranty parts which Employer did expect to receive on return. The presence of the tub surround in Claimant's Winnebago at the time of the accident is not sufficient to form a basis for establishing liability. Otherwise, a traveling employee could keep an employer's property in his vehicle to extend coverage indefinitely. Note that the third and fourth end points might be geographically the same if Claimant were to have dumped the waste at Employer's premises at the same time he returned

the tub surround.

17. The general tenor of the traveling employee cases, including those cited above, suggests that traveling employees are covered, with certain specific exceptions, for all reasonable activities – whether within the course and scope of the job or not – from portal to portal during a trip. Having found that the dumping of waste was a necessary part of the job and that Claimant did so according to his usual custom of over 10 years, one need not analyze whether Claimant's acts constituted a deviation from his job as a traveling employee. Nevertheless, whether Claimant's salvage is characterized as a slight deviation for personal reasons or a part of the job of dumping waste integral to a trip is immaterial. It was not unreasonable in extent or purpose for Claimant to drive to the barn near Middleton.

18. What makes this a closer case is Claimant's decision to drive to Employer's premises twice – once to deliver papers and once to dump waste/pick up a load for the next trip. That decision exposed Employer to liability an additional time for the extra miles between Claimant's home and Employer's premises, about 40 miles one way. That extra driving may have been unnecessary, but was not unreasonable.

19. At all relevant times, Claimant's driving was reasonably related to the job functions he was hired to perform. Therefore, despite an interruption, Claimant had not ended his trip at the time of the accident. Claimant remained a traveling employee and his accident occurred within the course and scope of his employment.

#### **CONCLUSION OF LAW**

Claimant suffered an accident which occurred within the course and scope of his employment for purposes of Idaho Workers' Compensation Law.

**RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 17<sup>TH</sup> day of March, 2005.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6<sup>TH</sup> day of MAY, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Richard S. Owen  
P.O. Box 278  
Nampa, ID 83653

Max M. Sheils Jr.  
P.O. Box 388  
Boise, ID 83701

db

/S/ \_\_\_\_\_



2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 6<sup>TH</sup> day of MAY, 2005.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Thomas E. Limbaugh, Chairman

/S/ \_\_\_\_\_  
R. D. Maynard, Commissioner

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

**Commissioner James F. Kile dissenting:**

After thoroughly reviewing the record and controlling case law in this matter, I respectfully dissent from the majority opinion. In my view, the majority improperly applies the “Coming and Going Rule” as established in Idaho. *Cheung v. Wasatch Electric*, 136 Idaho 895, 897, 42 P.3d 688, 690 (2002); *Clark v. Daniel Morine Const. Co.*, 98 Idaho 114, 559 P.2d 293 (1977).

**The Coming and Going Rule, Generally**

It is well settled in Idaho that a worker is not entitled to workers’ compensation benefits if he/she is injured while traveling to the work site from his/her residence. *Id.* It is also accepted that workers’ compensation coverage does not extend to a worker going back to his/her residence at the conclusion of work. *Id.* This principle results in a worker being ineligible for workers’ compensation coverage while coming to or going from the worksite.

Over time, several exceptions to the abovementioned rule have been established to soften the harsh application of this principle. These exceptions include:

1. Where the employee is on the employer’s premises in the vicinity of the actual situs of his employment;
2. Where going or returning in some transportation facility furnished by the employer;
3. When transversing the only means of ingress or egress, whether furnished by the employer or by some other party and used with the knowledge and consent of the employer;
4. Where doing some particular job for the employer even though the place where the accident occurred and the cause thereof would be common to any traveler; and

5. Where an employee is traveling to or from the employer's place of business upon some specific mission at his employer's request.

*Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951).

Therefore, unless the injured worker falls into one of the specific exceptions to the Coming and Going Rule, insurance coverage under the Idaho Workers' Compensation Act is not available.

### **The Coming and Going Rule, Specifically**

In my view of the record and legal standard, Claimant does not fit into one of the recognized exceptions.

1. Claimant had completed his job assignment upon return to his residence from the business trip. Any activity after this point was personal in nature until the Claimant set out on a new job assignment.

2. Even though Claimant was transporting worn-out parts from the customer's premises, he did so at his convenience and his schedule. Not only were the parts in his sole possession but Claimant had complete control over whether he would use the worn or used parts for himself, sell the parts and retain the proceeds, give the parts to someone else, or trash the parts. Claimant could have trashed the parts at any time throughout his trip prior to returning to his residence. Furthermore, at the time of the accident, Claimant was traveling to store the parts, not on his own property, but on a friend's property.

3. Claimant states he was "eventually" traveling to the worksite to begin another business trip after storing the used parts. This is a classic definition of "coming to work." Such an activity is not covered under Idaho workers' compensation law.

4. Claimant was not being paid either in wages or mileage when he was traveling to store the parts.

5. The most important factor that removes Claimant from compensation in this case is the time lag between the completion of his business trip and the activity leading to the accident and injury herein. Claimant was en-route to dispose of the used parts 6 days after finishing his prior business trip. Under the majority decision today, the retention of old, throw-away parts in a claimant's vehicle, will allow a worker to remain a "traveling worker" for as long as some small connection to the original business travel might exist. In my view, the lapse of 6 days places Claimant's travel into the category of a personal errand, which is not related to a business purpose. The employer's directive was to take the used or worn-out parts from the customer's residence, then dispose of them. Claimant had ample opportunities to complete this task before, or close to the time of, finishing his business trip at his residence. Thus, Claimant's actions at the time of the accident were personal and outside the scope of travel for which he was employed.

### **Conclusion**

Clearly, the views of all Commissioners are in the nature of defining the range or scope of a "traveling worker." We have all drawn an imaginary boundary line on this subject. In my view, the restrictions of the Coming and Going Rule dictate a narrow interpretation to enable employers to understand the breadth and scope of their workers' compensation insurance policies. In that event, appropriate decisions can be made by employers and workers to contract for the services and activities that fall within these limited boundaries.

An expanding line of coverage, or a meandering line of coverage in this case, creates confusion on the entire subject of the "traveling worker" within the Coming and Going Rule.

Furthermore, I disagree with the concept of allowing a traveling worker to retain his covered status for insurance purposes after clearly completing the fundamental tasks of the business contract for which he was hired. From the time Claimant arrived home until he was in the auto accident 6 days later, Claimant performed no activity closely related in time and space to his contractual duties with Employer. Therefore, Claimant's traveling employee status ended when he arrived home and ceased all business activity.

For the above reasons, I must respectfully dissent from the decision issued today.

Dated this 6<sup>TH</sup> day of May, 2005.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
James F. Kile, Commissioner

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on 6<sup>TH</sup> day of MAY, 2005, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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Max M. Sheils Jr.  
P.O. Box 388  
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db

/S/ \_\_\_\_\_