Kozeni, Brian, Dec'd

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Going and coming rule

A worker's after hours trip to work to lock the day's receipts in the safe comes within the special errand exception to the going and coming rule since his travel was the most substantial task performed, in terms of inconvenience, time, and effort. He was therefore in the course of employment at the time of his fatal accident en route to the employer's premises. ***….In re Brian Kozeni, Dec'd,*** **BIIA Dec., 63,062 (1983)**

Intoxication

Intoxication evidenced by a blood alcohol content of .16 did not remove the worker from the course of employment where the worker had an above average alcohol tolerance; normal demeanor, behavior, and speech; was "fully about his wits"; and had his job duties uppermost in his mind. ***….In re Brian Kozeni, Dec'd,*** **BIIA Dec., 63,062 (1983)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BRIAN KOZENI, DEC'D	)	**DOCKET NO. 63,062**
	)	
CLAIM NO. J-154796	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Brian Kozeni, Dec'd
(beneficiaries of Brian Kozeni), by
Gavin, Robinson, Kendrick, Redman and Mayes, per
Thomas Carrato

Employer, State of Washington Department of Parks and Recreation, by
The Attorney General, per
Robert Hargreaves, Assistant

Department of Labor and Industries, by
The Attorney General, per
Lawrence Sarjeant and Anthony B. Cannoro, Assistants

This is an appeal filed by the employer on October 1, 1982 from an order of the Department of Labor and Industries dated September 21, 1982, which adhered to the terms of orders dated August 30, 1982 approving the claim of the beneficiaries of Brian Kozeni, Deceased, for benefits under the Industrial Insurance Act. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department of Labor and Industries to a Proposed Decision and Order issued on July 29, 1983 in which the order of the Department dated September 21, 1982 was reversed, and remanded to the Department with instructions to issue an order denying the application for benefits under the Industrial Insurance Act filed by the dependents of Brian Kozeni.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

Brian Kozeni, the decedent herein, was in the employ of the State of Washington Department of Parks and Recreation as a park ranger at Yakima Sportsman's Park situated a few miles east of Yakima.

He and the park manager, David M. Thornton, resided on the park premises and were the only year-round employees at the park. During the summer months, park aides were employed to

assist in the park operations. Among the duties of a park aide was the collection of camping fees at the end of each day. The aide would place the fees collected, together with an accounting therefor, in a moneybag. The bag would then be taken to an office building situated in the central core area of the park, where it was turned over to either Mr. Thornton or Mr. Kozeni for deposit in the park safe. The safekeeping function was performed regularly at about 10:30 p.m. each night. Only Mr. Thornton or Mr. Kozeni performed this task as only they knew the combination to the safe. Extra compensation was granted for the performance of this function, in the form of what is termed "shift differential pay". However, it appears that it was not the practice of either of these men to make any claim for such extra compensation. Although we do not deem the factor of compensation critical to our determination, we do note that the decedent was paid shift differential pay for the day of his death.

It was the practice of Mr. Thornton and Mr. Kozeni to take turns performing the safekeeping function so that, barring any pre-arrangement between themselves to the contrary, each had the duty every other night. This meant that each performed this function during his off- duty hours inasmuch as their regular work shift was from 8 a.m. to 5 p.m. After finishing a regular work shift at 5:00 p.m., each was free to leave the park premises and go about his personal pursuits.

On August 11, 1982, Mr. Kozeni finished his regular work shift at 5:00 p.m., and proceeded to the Pour House Tavern situated on Keys Road approximately one-half mile south of Sportsman's Park. It was Mr. Kozeni's turn that evening to perform the safekeeping function. He stayed at the tavern, eating dinner, drinking beer and playing pool, until approximately 10:30 p.m., at which time he departed on his motorcycle to return to the park to lock up the day's receipts. On Keys Road (a public thoroughfare) at a point approximately two-hundred feet south of the park's entrance road, his motorcycle went out of control on a left-hand curve. The vehicle left the road, struck a tree, and Mr. Kozeni was killed.

A claim for death benefits was filed with the Department of Labor and industries on behalf of the decedent's two minor children. The Department determined that the decedent was acting in the course oG employment at the time of his fatal accident, and allowed the claim by its order dated September 21, 1982. The employer appeals the Department's determination on the ground that the "going and coming" rule precludes a finding that the decedent was acting in the course of employment at the time of his death.

It is well-established that a worker is not deemed to be "acting in the course of employment" while going to or from the "job site", as this latter term is defined by RCW 51.32.015. Flavorland Industries, Inc. v. Schumacher, 32 Wn. App. 428 (1982), and cases cited therein. Stated somewhat differently, going to and from work on the job site is the business of the employer (RCW 51.08.013), whereas going to and from work off the job site is the business of the employee. Flavorland, supra. This, however, is but a general rule -- one which has its most usual and obvious application to the everyday, routine commute to and from work. As with most general rules, it is subject to a number of exceptions. One of these exceptions is set forth in 1 Larson, Workmen's Compensation Law, Section 16.00, as follows:

> "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". (Emphasis added)

Encompassed within the above-stated exception is the so-called "special errand" rule which is set forth at Section 16.10 of Larson as follows:

> "When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself".

Thus, in Cymbor v. Binder Coal Company, 285 Pa. 440, 132 Atl. 363 (1926), where an electrician who worked in a mine during the day and had the additional duty of returning to the mine at 10:00 each evening to turn on a water pump, was run over by a train on his return trip home (he lived 1200 feet from the mine), it was held that the employee's journey to and from the mine each night was in the course of employment and the accident compensable on the ground that, as compared to the time and effort involved in simply turning on the water pump, the real work involved in such a task was the "going and coming". For a like holding based upon an identical rationale, see Traynor v. City of Buffalo, 203 N.Y. Supp. 590 (1924), wherein a city park employee had the additional duty of returning to the park each night after 9:00 p.m. To turn off the water fountain -- a task which consisted of simply tripping a lever -- and was run over by a car while returning home one evening.

Although we have uncovered no Washington case which turns squarely upon this "special errand" rule, that precept is recognized and alluded to by our Court of Appeals in Lang v. Department of Labor and Industries, 35 Wn. App. 259 (July 5, 1983 -- Supreme Court review denied October 28, 1983). In Lang the court stated:

> "It is true that a service for an employer may constitute a 'special service', even though it is not out of the ordinary. Binet v. Ocean Gate Board of Education, 90 N.J. Super. 571, 218 A. 2d 869 (1966). However, in order to qualify under this exception, the time and trouble of performing the special service must be so substantial that it constitutes an integral part of the service itself".

In Binet, supra, the death of a school principal was held to be in the course of employment and compensable where the decedent was killed in a car accident after having stopped off at a tavern on his way home from attending an evening P.T.A. meeting, even though he regularly attended such meetings and his attendance thereat was not mandatory. The court characterized his trip as a "special service" for the employer, and noted that to be "special", a service need not be "out of the ordinary, unusual or the source of extra risk". As to the school principal's intoxication, the court held that this would not constitute a bar to compensability, because it had not been shown that his intoxication was the "sole proximate cause" of the fatalaccident.

Returning to the case at hand, and in particular, to the safe- keeping function in question, it is obvious that it would take but a moment for the decedent to place the moneybag in the safe. The real labor -- in terms of inconvenience, time and effort -- was the interruption of the decedent's off-duty personal activities, and his having to return to the park office at 10:30 in the evening, after having already put in a full day's work at the park. Quite clearly, we think, the decedent's travel was a substantial -- indeed the most substantial -- part of the safekeeping function to be performed. Accordingly, we hold that the decedent was in the course of performing a special errand for his employer at the time of his death, thereby excepting him from the general rule which excludes coverage of an employee while traveling to and from work.

It is, however, the employer's position that even if it be assumed, arguendo, that the "special errand" rule of exception is applicable herein, compensability is foreclosed by reason of the decedent's intoxication (blood alcohol level of .16%), which, it is alleged, was the proximate cause of the decedent's accident. Thus, the employer argues, the decedent must be deemed to have

"abandoned" his employment by reason of his intoxication inasmuch as it prevented him from completing his return journey to the park.

The only evidence in the record which is directly addressed to the cause of the decedent's accident is the investigative report of the Washington State patrol (Exhibit No. 2 herein) which attributes the accident to the motorcycle kick-stand having come in contact with the pavement as the decedent leaned into a leftward curve. Whatever causal role the decedent's intoxication played in the accident, if any, can only be inferred from the blood alcohol level itself. Be that as it may, a causal inquiry with regard to the accident itself is pointless. Under our Act, there need not be a causal link between the accident or injury itself and the employment for compensability to obtain. Simply stated, ours is not an "arising out of employment" jurisdiction. Boeing v. Department of Labor and Industries, 22 Wn. 2d 423 (1945); Stertz v. Industrial Insurance Commission, 91 Wn. 588 (1916). Under our Act, to be compensable, an accident or injury need only be sustained in or during "the course of employment". Tilly v. Department of Labor and Industries, 52 Wn. 2d 148 (1958). Specifically, with regard to intoxication as it pertains to the concept of "course of employment", the rule which prevails in this state is stated in Flavorland, supra, to wit:

> "Intoxication is a defense, in the absence of an applicable statute, only when the claimant has become so intoxicated he abandons his employment." (Emphasis added)

In the case at hand, eyewitness testimony pictures the decedent's demeanor, behavior and speech as normal and sober at the time he departed the tavern for the park, at which time he was overheard to say that he had to return to the park to lock up the day's receipts. There is nothing in the evidence that would depict the decedent as being in a drunken or wanton state. To the contrary, it would appear that he was fully about his wits and that the safekeeping duty was uppermost in his mind that evening as the hour of 10:30 p.m. approached.

In this regard, it is to be noted that there is evidence from which it can be concluded that the decedent had an above-average tolerance for alcohol. We find that the decedent's level of intoxication clearly was not such that he could reasonably be deemed to have "abandoned" his employment.

In sum, we hold that the decedent was acting in the course of employment at the time of his death within the meaning of the Washington Workers' Compensation Act, and that the

Department's order allowing this claim for benefits on behalf of his minor children is correct and should be affirmed.

FINDINGS OF FACT

1. On August 13, 1982, an accident report was filed with the Department of Labor and Industries on behalf of Jenny Kozeni and Michael Kozeni, dependent children of Brian Kozeni, the decedent herein, alleging that Brian Kozeni had sustained a fatal injury on August 11, 1982, while in the course of his employment with the State of Washington Parks and Recreation Commission. On August 30, 1982, the Department issued an order finding that Brian Kozeni had sustained a fatal injury on August 11, 1982, while engaged in the course of his employment, and allowing the claim. By separate order dated August 30, 1982, the Department placed th decedent's dependent children on the pension rolls. On September 15, 1982, the employer filed a protest and request for reconsideration to the Department's orders of August 30, 1982. On September 21, 1982, the Department issued an order affirming its orders of August 30, 1982. On October 1, 1982, the employer filed a notice of appeal to the Board of Industrial Insurance Appeals, and on October 25, 1982, the Board issued an order granting the employer's appeal.

2. On August 11, 1982, at approximately 10:30 p.m., the decedent, Brian Kozeni, was killed as a result of a motorcycle accident which occurred on Keys Road, a public roadway, at a point approximately 200 feet south of the entrance road to Yakima Sportsman's Park, a state park located a few miles east of the city of Yakima.

3. The decedent was employed as a park ranger at Yakima Sportsman's Park. His regular work shift was from 8 a.m. to 5 p.m. He resided on the park premises, but was free after 5 p.m. each evening to leave the park premises and go about his personal pursuits. Approximately every other evening, at about 10:30 p.m., it was his duty to return to the central core area of the park and take receipt of the day's camping fee collections and deposit such fees in the park safe.

4. After finishing his regular work shift at 5 p.m. on August 11, 1982, the decedent went to the Pour House Tavern, which was located about half a mile south on Keys Road from Sportsman's park. At the tavern, he had dinner, drank beer, and played pool until his departure for the park at around 10:30 p.m.

5. At the time of the decedent's death on August 11, 1982, he was enroute back to the park for the specific purpose of locking up the day's camping receipts in the park safe. The safekeeping function itself took only a moment in terms of time inasmuch as it merely consisted of placing a moneybag in the park safe.

6. At the time of the decedent's death on August 11, 1982, his blood alcohol level was .16%. At the time the decedent left the tavern at or around 10:30 p.m. on August 11, 1982, he did not appear to be in a drunken state. His demeanor, speech and behavior appeared to be that of a normal person. The decedent had an above-average tolerance for alcohol.

7. In returning to Sportsman's Park on August 11, 1982 to place the day's fee collections in the park safe, Mr. Kozeni was acting at the direction of his employer and in furtherance of his employer's interests.

8. Mr. Kozeni's blood alcohol level the evening of August 11, 1982 did not so affect him as to cause him to abandon his job duties.

9. The decedent was entitled to "shift differential pay" whenever he performed the safekeeping function, and was awarded shift differential pay for August 11, 1982, the day of his death.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals had jurisdiction of the parties and subject matter of this appeal.

2. At the time of the decedent's death on August 11, 1982, he was acting in the course of employment within the meaning of the Washington Workers' Compensation Act.

3. The order of the Department of Labor and Industries dated September 21, 1982, allowing this claim and placing the decedent's dependent children on the pension rolls, is correct and should be affirmed.

It is so ORDERED.
Dated this 28th day of November, 1983.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
PHILLIP T. BORK Member