

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)*

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: BRIAN KOZENI, DEC'D**) **DOCKET NO. 63,062**
2)
3 **CLAIM NO. J-154796**) **DECISION AND ORDER**
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5 APPEARANCES:
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7 Claimant, Brian Kozeni, Dec'd
8 (beneficiaries of Brian Kozeni), by
9 Gavin, Robinson, Kendrick, Redman and Mayes, per
10 Thomas Carrato

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

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16 Department of Labor and Industries, by
17 The Attorney General, per
18 Lawrence Sarjeant and Anthony B. Cannoro, Assistants
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20 This is an appeal filed by the employer on October 1, 1982 from an order of the Department
21 of Labor and Industries dated September 21, 1982, which adhered to the terms of orders dated
22 August 30, 1982 approving the claim of the beneficiaries of Brian Kozeni, Deceased, for benefits
23 under the Industrial Insurance Act. **AFFIRMED.**
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26 **DECISION**
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28 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
29 and decision on timely Petitions for Review filed by the claimant and the Department of Labor and
30 Industries to a Proposed Decision and Order issued on July 29, 1983 in which the order of the
31 Department dated September 21, 1982 was reversed, and remanded to the Department with
32 instructions to issue an order denying the application for benefits under the Industrial Insurance Act
33 filed by the dependents of Brian Kozeni.
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36 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
37 no prejudicial error was committed and said rulings are hereby affirmed.
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39 Brian Kozeni, the decedent herein, was in the employ of the State of Washington
40 Department of Parks and Recreation as a park ranger at Yakima Sportsman's Park situated a few
41 miles east of Yakima.
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44 He and the park manager, David M. Thornton, resided on the park premises and were the
45 only year-round employees at the park. During the summer months, park aides were employed to
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1 assist in the park operations. Among the duties of a park aide was the collection of camping fees at
2 the end of each day. The aide would place the fees collected, together with an accounting therefor,
3 in a moneybag. The bag would then be taken to an office building situated in the central core area
4 of the park, where it was turned over to either Mr. Thornton or Mr. Kozeni for deposit in the park
5 safe. The safekeeping function was performed regularly at about 10:30 p.m. each night. Only Mr.
6 Thornton or Mr. Kozeni performed this task as only they knew the combination to the safe. Extra
7 compensation was granted for the performance of this function, in the form of what is termed "shift
8 differential pay". However, it appears that it was not the practice of either of these men to make
9 any claim for such extra compensation. Although we do not deem the factor of compensation
10 critical to our determination, we do note that the decedent was paid shift differential pay for the day
11 of his death.
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18 It was the practice of Mr. Thornton and Mr. Kozeni to take turns performing the safekeeping
19 function so that, barring any pre-arrangement between themselves to the contrary, each had the
20 duty every other night. This meant that each performed this function during his off- duty hours
21 inasmuch as their regular work shift was from 8 a.m. to 5 p.m. After finishing a regular work shift at
22 5:00 p.m., each was free to leave the park premises and go about his personal pursuits.
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25 On August 11, 1982, Mr. Kozeni finished his regular work shift at 5:00 p.m., and proceeded
26 to the Pour House Tavern situated on Keys Road approximately one-half mile south of Sportsman's
27 Park. It was Mr. Kozeni's turn that evening to perform the safekeeping function. He stayed at the
28 tavern, eating dinner, drinking beer and playing pool, until approximately 10:30 p.m., at which time
29 he departed on his motorcycle to return to the park to lock up the day's receipts. On Keys Road (a
30 public thoroughfare) at a point approximately two-hundred feet south of the park's entrance road,
31 his motorcycle went out of control on a left-hand curve. The vehicle left the road, struck a tree,
32 and Mr. Kozeni was killed.
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37 A claim for death benefits was filed with the Department of Labor and industries on behalf of
38 the decedent's two minor children. The Department determined that the decedent was acting in the
39 course of employment at the time of his fatal accident, and allowed the claim by its order dated
40 September 21, 1982. The employer appeals the Department's determination on the ground that the
41 "going and coming" rule precludes a finding that the decedent was acting in the course of
42 employment at the time of his death.
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1 It is well-established that a worker is not deemed to be "acting in the course of employment"
2 while going to or from the "job site", as this latter term is defined by RCW 51.32.015. Flavorland
3 Industries, Inc. v. Schumacher, 32 Wn. App. 428 (1982), and cases cited therein. Stated somewhat
4 differently, going to and from work on the job site is the business of the employer (RCW 51.08.013),
5 whereas going to and from work off the job site is the business of the employee. Flavorland, supra.
6 This, however, is but a general rule -- one which has its most usual and obvious application to the
7 everyday, routine commute to and from work. As with most general rules, it is subject to a number
8 of exceptions. One of these exceptions is set forth in 1 Larson, Workmen's Compensation Law,
9 Section 16.00, as follows:

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

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

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

31 Thus, in Cymbor v. Binder Coal Company, 285 Pa. 440, 132 Atl. 363 (1926), where an electrician
32 who worked in a mine during the day and had the additional duty of returning to the mine at 10:00
33 each evening to turn on a water pump, was run over by a train on his return trip home (he lived
34 1200 feet from the mine), it was held that the employee's journey to and from the mine each night
35 was in the course of employment and the accident compensable on the ground that, as compared
36 to the time and effort involved in simply turning on the water pump, the real work involved in such a
37 task was the "going and coming". For a like holding based upon an identical rationale, see Traynor
38 v. City of Buffalo, 203 N.Y. Supp. 590 (1924), wherein a city park employee had the additional duty
39 of returning to the park each night after 9:00 p.m. To turn off the water fountain -- a task which
40 consisted of simply tripping a lever -- and was run over by a car while returning home one evening.
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1 Although we have uncovered no Washington case which turns squarely upon this "special
2 errand" rule, that precept is recognized and alluded to by our Court of Appeals in Lang v.
3 Department of Labor and Industries, 35 Wn. App. 259 (July 5, 1983 -- Supreme Court review
4 denied October 28, 1983). In Lang the court stated:

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

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

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

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40 It is, however, the employer's position that even if it be assumed, arguendo, that the "special
41 errand" rule of exception is applicable herein, compensability is foreclosed by reason of the
42 decedent's intoxication (blood alcohol level of .16%), which, it is alleged, was the proximate cause
43 of the decedent's accident. Thus, the employer argues, the decedent must be deemed to have
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1 "abandoned" his employment by reason of his intoxication inasmuch as it prevented him from
2 completing his return journey to the park.
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4 The only evidence in the record which is directly addressed to the cause of the decedent's
5 accident is the investigative report of the Washington State patrol (Exhibit No. 2 herein) which
6 attributes the accident to the motorcycle kick-stand having come in contact with the pavement as
7 the decedent leaned into a leftward curve. Whatever causal role the decedent's intoxication played
8 in the accident, if any, can only be inferred from the blood alcohol level itself. Be that as it may, a
9 causal inquiry with regard to the accident itself is pointless. Under our Act, there need not be a
10 causal link between the accident or injury itself and the employment for compensability to obtain.
11 Simply stated, ours is not an "arising out of employment" jurisdiction. Boeing v. Department of
12 Labor and Industries, 22 Wn. 2d 423 (1945); Stertz v. Industrial Insurance Commission, 91 Wn.
13 588 (1916). Under our Act, to be compensable, an accident or injury need only be sustained in or
14 during "the course of employment". Tilly v. Department of Labor and Industries, 52 Wn. 2d 148
15 (1958). Specifically, with regard to intoxication as it pertains to the concept of "course of
16 employment", the rule which prevails in this state is stated in Flavorland, supra, to wit:
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18 "Intoxication is a defense, in the absence of an applicable statute, only
19 when the claimant has become so intoxicated he abandons his
20 employment." (Emphasis added)
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22 In the case at hand, eyewitness testimony pictures the decedent's demeanor, behavior and speech
23 as normal and sober at the time he departed the tavern for the park, at which time he was
24 overheard to say that he had to return to the park to lock up the day's receipts. There is nothing in
25 the evidence that would depict the decedent as being in a drunken or wanton state. To the
26 contrary, it would appear that he was fully about his wits and that the safekeeping duty was
27 uppermost in his mind that evening as the hour of 10:30 p.m. approached.
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29 In this regard, it is to be noted that there is evidence from which it can be concluded that the
30 decedent had an above-average tolerance for alcohol. We find that the decedent's level of
31 intoxication clearly was not such that he could reasonably be deemed to have "abandoned" his
32 employment.
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34 In sum, we hold that the decedent was acting in the course of employment at the time of his
35 death within the meaning of the Washington Workers' Compensation Act, and that the
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1 Department's order allowing this claim for benefits on behalf of his minor children is correct and
2 should be affirmed.
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4 **FINDINGS OF FACT**

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6 1. On August 13, 1982, an accident report was filed with the Department of
7 Labor and Industries on behalf of Jenny Kozeni and Michael Kozeni,
8 dependent children of Brian Kozeni, the decedent herein, alleging that
9 Brian Kozeni had sustained a fatal injury on August 11, 1982, while in
10 the course of his employment with the State of Washington Parks and
11 Recreation Commission. On August 30, 1982, the Department issued
12 an order finding that Brian Kozeni had sustained a fatal injury on August
13 11, 1982, while engaged in the course of his employment, and allowing
14 the claim. By separate order dated August 30, 1982, the Department
15 placed th decedent's dependent children on the pension rolls. On
16 September 15, 1982, the employer filed a protest and request for
17 reconsideration to the Department's orders of August 30, 1982. On
18 September 21, 1982, the Department issued an order affirming its
19 orders of August 30, 1982. On October 1, 1982, the employer filed a
20 notice of appeal to the Board of Industrial Insurance Appeals, and on
21 October 25, 1982, the Board issued an order granting the employer's
22 appeal.
- 23 2. On August 11, 1982, at approximately 10:30 p.m., the decedent, Brian
24 Kozeni, was killed as a result of a motorcycle accident which occurred
25 on Keys Road, a public roadway, at a point approximately 200 feet
26 south of the entrance road to Yakima Sportsman's Park, a state park
27 located a few miles east of the city of Yakima.
- 28 3. The decedent was employed as a park ranger at Yakima Sportsman's
29 Park. His regular work shift was from 8 a.m. to 5 p.m. He resided on
30 the park premises, but was free after 5 p.m. each evening to leave the
31 park premises and go about his personal pursuits. Approximately every
32 other evening, at about 10:30 p.m., it was his duty to return to the
33 central core area of the park and take receipt of the day's camping fee
34 collections and deposit such fees in the park safe.
- 35 4. After finishing his regular work shift at 5 p.m. on August 11, 1982, the
36 decedent went to the Pour House Tavern, which was located about half
37 a mile south on Keys Road from Sportsman's park. At the tavern, he
38 had dinner, drank beer, and played pool until his departure for the park
39 at around 10:30 p.m.
- 40 5. At the time of the decedent's death on August 11, 1982, he was enroute
41 back to the park for the specific purpose of locking up the day's camping
42 receipts in the park safe. The safekeeping function itself took only a
43 moment in terms of time inasmuch as it merely consisted of placing a
44 moneybag in the park safe.
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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