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NO. 74565-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JUSTIN D. BUCHANAN,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

- I. INTRODUCTION.....1
- II. ISSUE.....2
- III. STATEMENT OF THE CASE3
 - A. Buchanan Owned His Personal Tools and He Alone Controlled Their Use, Storage, and Transportation3
 - B. Buchanan Left His Tools at the Jobsite for His Own Personal Convenience, Which Did Not Benefit Madden4
 - C. Buchanan Was Injured While Commuting Home From a Former Jobsite After Retrieving His Personal Tools5
 - D. The Department Denied Buchanan’s Industrial Injury Claim Because He Was Not Injured in the Course of Employment and Its Decision Was Affirmed by the Board and the Superior Court6
- IV. STANDARD OF REVIEW.....7
- V. ARGUMENT9
 - A. Under the Going and Coming Rule, Buchanan Was Not Injured in the Course of Employment Because His Injury Occurred While He Was Commuting Home From a Former Jobsite.....10
 - B. The Dual Purpose Exception Does Not Apply Because Buchanan’s Commute Home After Retrieving His Personal Tools Did Not Serve a Business Purpose.....14
 - 1. The Dual Purpose Exception Does Not Apply if the Personal Purpose Was Sufficient Alone to Cause the Trip and if the Employer Would Not Have Required a Separate Trip Independent of the Commute15

2.	Buchanan’s Personal Purpose in Retrieving His Tools Was Sufficient Alone to Cause His Trip	17
3.	Madden Would Not Have Required a Separate Trip Independent of Buchanan’s Commute to Retrieve His Tools	18
4.	The Weight of Case Authority Demonstrates Coverage Was Properly Denied Under the Going and Coming Rule.....	20
5.	Buchanan’s Flawed Analysis Stems From Reliance on Cases that Do Not Implicate the Going and Coming Rule.....	24
C.	Buchanan’s Course of Employment Analysis Would Incorrectly Consume the Going and Coming Rule.....	27
D.	Buchanan Is Not Entitled to Attorney Fees	30
VI.	CONCLUSION	31

TABLE OF AUTHORITIES

Cases

<i>Ackley-Bell v. Seattle Sch. Dist. No. 1</i> , 87 Wn. App. 158, 940 P.2d 685 (1997).....	10
<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013).....	8
<i>Agric. Ins. Co. v. Dryden</i> , 398 S.W.2d 745, 747 (Tex. 1965).....	23
<i>Aloha Lumber Co. v. Dep't of Labor & Indus.</i> , 77 Wn.2d 763, 466 P.2d 151 (1970).....	14
<i>Ball-Foster Glass Container Co. v. Giovanelli</i> , 163 Wn.2d 133, 177 P.3d 692 (2008).....	14
<i>Belnap v. Boeing Co.</i> , 64 Wn. App. 212, 823 P.2d 528 (1992).....	passim
<i>Birklid v. Boeing Co.</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	29
<i>Breedlove v. Stout</i> , 104 Wn. App. 67, 14 P.3d 897 (2001).....	25
<i>Cochran Elec. Co. v. Mahoney</i> , 129 Wn. App. 687, 121 P.3d 747 (2005).....	passim
<i>Crabb v. Dep't of Labor & Indus.</i> , 181 Wn. App. 648, 326 P.3d 815 (2014).....	9
<i>Dep't of Labor & Indus. v. Rowley</i> , 185 Wn. App. 154, 340 P.3d 929 (2014) (denying worker's fee request where relief was remand to trial court), <i>aff'd in part, rev'd</i> <i>in part on other grounds</i> , 185 Wn.2d 186 (2016).....	31
<i>Dillon v. Dep't of Labor & Indus.</i> , 186 Wn. App. 1, 344 P.3d 1216 (2014).....	11

<i>Gorre v. City of Tacoma</i> , 184 Wn.2d 30, 357 P.3d 625 (2015).....	9
<i>Harris v. Dep’t of Labor & Indus.</i> , 120 Wn.2d 461, 843 P.2d 1056 (1993).....	9
<i>Harris v. State Workmen’s Comp. Com’r</i> , 158 W. Va. 66, 208 S.E.2d 291 (1974).....	23
<i>Hill v. Dep’t of Labor & Indus.</i> , 161 Wn. App. 286, 253 P.3d 430 (2011).....	8, 24
<i>Hobson v. Dep’t of Labor & Indus.</i> , 176 Wash. 23, 27 P.2d 1091 (1934)	24
<i>In re Carla Strane</i> , No. 90 5175, 1992 WL 117948, *2 (Wash. Bd. Ind. Ins. Appeals March 17, 1992).....	12
<i>In re Chad MacDonald</i> , No. 13 13100, 2014 WL 1398631, *5 (Wash. Bd. Ind. Ins. Appeals March 27, 2014).....	30
<i>In re Julie Trusley</i> No. 93 3124, 1994 WL 732115, *2 (Wash. Bd. Ind. Ins. Appeals Aug. 15, 1994).....	26
<i>In re Marlene Martin</i> , No. 85 2862, 1987 WL 61325,*2 (Wash. Bd. Ind. Ins. Appeals Feb. 11, 1987)..passim	
<i>In re Marlene Olsen</i> , No. 06 16795, 2007 WL 4986259 (Wash. Bd. Indus. Ins. Appeals Nov. 13, 2007)....	12
<i>In re Thomas Williams</i> , No. 00 11219, 2001 WL 1755668 (Wash. Bd. Indus. Ins. Appeals Dec. 20, 2001)	12
<i>Jones v. City of Olympia</i> , 171 Wn. App. 614, 287 P.3d 687 (2012).....	8
<i>Lang v. Dep’t of Labor & Indus.</i> , 35 Wn. App. 259, 665 P.2d 1386 (1983).....	20, 21, 22

<i>Leary v. Dep't of Labor & Indus.</i> , 18 Wn.2d 532, 140 P.2d 292 (1943).....	25
<i>Lenk v. Dep't of Labor & Indus.</i> , 3 Wn. App. 977, 478 P.2d 761 (1970).....	30
<i>Lunz v. Dep't of Labor & Indus.</i> , 50 Wn.2d 273, 310 P.2d 880 (1957).....	11
<i>MacKay v. Dep't of Labor & Indus.</i> , 181 Wash. 702, 44 P.2d 793 (1935)	25
<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wn. App. 677, 162 P.3d 450 (2007).....	7
<i>Marks' Dependents v. Gray</i> , 251 N.Y. 90, 167 N.E. 181 (1929).....	15
<i>McNew v. Puget Sound Pulp & Timber Co.</i> , 37 Wn.2d 495, 224 P.2d 627 (1950).....	15
<i>Pearson v. Dep't of Labor & Indus.</i> , 164 Wn. App. 426, 262 P.3d 837 (2011).....	30
<i>Puget Sound Energy, Inc. v. Lee</i> , 149 Wn. App. 866, 205 P.3d 979 (2009).....	12
<i>Raum v. City of Bellevue</i> , 171 Wn. App. 124, 286 P.3d 695 (2012).....	9
<i>Robinson v. Dep't of Labor & Indus.</i> , 181 Wn. App. 415, 326 P.3d 744, 750, review denied, 337 P.3d 325 (Wash. 2014).....	9
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	8
<i>Sacred Heart Med. Ctr. v. Knapp</i> , 172 Wn. App. 26, 288 P.3d 675 (2012).....	31

<i>Shelton v. Azar, Inc.</i> , 90 Wn. App. 923, 954 P.2d 352 (1998).....	13
<i>Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.</i> , 19 Wn. App. 800, 578 P.2d 59 (1978).....	11

Statutes

RCW 34.05.030	8
RCW 51.08.013	6, 10, 11, 28
RCW 51.08.013(2)(a)	12
RCW 51.08.013(3)(b)	12
RCW 51.32.010	10
RCW 51.32.015	11
RCW 51.36.040	11
RCW 51.52.130	30, 31
RCW 51.52.140	7, 8

Other Authorities

1 Arthur Larson, <i>Workmen's Compensation Law</i> § 12.02 (2012).....	25
1 Arthur Larson, <i>Workmen's Compensation Law</i> § 13.01(1) (2012).....	12, 13
1 Arthur Larson, <i>Workmen's Compensation Law</i> § 16.01-16.02 (2012).....	15

1 Arthur Larson, *Workmen's Compensation Law* § 16.09(1)
(2012) 16

1 Arthur Larson, *Workmen's Compensation Law* § 16.09(4)(a)
(2012)..... 12

I. INTRODUCTION

The Industrial Insurance Act does not protect against the perils of a worker's commute between home and work. Under the long-established "going and coming rule," injuries sustained while going to or coming from work are not within the course of employment and coverage is prohibited. This is true even though the trip to and from work benefits the employer, in general, by resulting in the worker's ability to work. Justin Buchanan seeks coverage for an injury that occurred on his commute home from a former jobsite after he retrieved his personal tools, which he stored there for his own convenience. Buchanan's injury undisputedly occurred during his commute home. The going and coming rule applies directly to this case and bars coverage.

The limited "dual purpose" exception to the going and coming rule does not apply here. That exception allows coverage only if the trip to or from work served both a personal and a business purpose, and the business purpose must be so unique or important to the employer that it would have required the same trip independent of the worker's commute. Buchanan did not serve a business purpose by retrieving his personal tools from a former jobsite. His employer, Madden Industrial Craftsmen, Inc., did not own, control, or otherwise finance those tools, and it did not request or require Buchanan to retrieve them. Buchanan's trip was based solely on

his personal convenience and interest in retrieving his own property. He would have made the trip regardless of his employment with Madden. And if he had chosen not to retrieve his tools that day, Madden would not and could not have required the same trip independent of Buchanan's commute. Like all commutes, Buchanan's trip would have resulted in his ability to work, in general, but that is not a sufficient business purpose to except this case from the going and coming rule.

The superior court and Board of Industrial Insurance Appeals correctly affirmed the Department's determination that Buchanan's injury did not occur within the course of employment under the going and coming rule. And this Court should affirm.

II. ISSUE

A worker's commute is not covered unless it served a business purpose such that the business purpose created the necessity for travel and the employer would have required the same trip independent of the commute. Did Buchanan's injury during his commute home from a former jobsite, after retrieving his personal tools for his own convenience, occur within the course of his employment?

III. STATEMENT OF THE CASE

A. **Buchanan Owned His Personal Tools and He Alone Controlled Their Use, Storage, and Transportation**

Madden is a business that places tradesmen with clients in need of temporary, skilled workers for various projects. BR 98, 157. Buchanan is a carpenter who was dispatched by Madden to work temporarily at various jobsites. BR 95-98. Madden operates essentially as a “middle person” by dispatching temporary workers to a client’s jobsite; it does not exercise direction or control of the workers’ daily schedule or control their work activities. BR 100-01, 124-25. Madden merely bills the client at an hourly rate for each dispatched worker and then pays the worker directly based on his hours worked. BR 101, 160. Buchanan could accept or decline any new carpentry project offered by Madden and occasionally he accepted work from other placement agencies. BR 99, 103.

Buchanan owned his own carpentry tools and he alone was responsible for them. BR 111-12. This is the industry standard for carpenters—they own and supply their own tools no matter who they work for. BR 104, 157. Consistent with that standard, Madden does not:

- supply, reimburse, or otherwise finance tools for carpenters it dispatches to its clients or

- control or monitor the use, storage, or transportation of tools by those carpenters.

BR 111-12, 157. Madden also does not compensate for the commute to or from a jobsite. BR 112.

B. Buchanan Left His Tools at the Jobsite for His Own Personal Convenience, Which Did Not Benefit Madden

As an industry practice, carpenters transport their individual tools to and from each jobsite each day. BR 114-15, 157. Buchanan, however, preferred to leave his tools at the jobsite overnight if there was a secure space. BR 114-15. Sometimes he left his tools overnight and sometimes he did not, depending on the jobsite. BR 111. He testified that leaving his tools at the jobsite was “best for me.” BR 103-04, 114-15. This was because his driver’s license was suspended so he commuted by public transportation to and from his residence in Federal Way. BR 108-09, 119-20. He chose to leave his tools at the jobsite, when possible, even though they had been stolen in the past and even though any replacement cost would not be reimbursed by Madden or any other employer. BR 150.

Buchanan was dispatched by Madden to work for several weeks at a home remodel in the Fremont area of Seattle. BR 118-19. Rather than commute to and from Fremont with his tools each day, Buchanan chose to leave his tools at the home overnight for his own personal convenience.

BR 114-15. This was not at the request or direction of Madden. BR 133, 157.

C. Buchanan Was Injured While Commuting Home From a Former Jobsite After Retrieving His Personal Tools

After working several weeks at the Fremont jobsite, Buchanan was released from the site around noon. BR 122-23. Assuming he would continue working at the jobsite the next day, Buchanan again left his tools at the jobsite for his own convenience and commuted to his residence in Federal Way. BR 122-23. Later that same day, Madden was informed that Buchanan was no longer needed at the Fremont job because the job was nearly complete. BR 130-32.

Madden contacted Buchanan around 3:00 pm to inform him of an opportunity for a new carpenter's project in Seattle that started the next day. BR 130-32. Buchanan accepted the new dispatch although he was not required to do so. BR 103, 132-33.

Madden did not direct Buchanan to go get his tools for the next day. BR 133. Indeed, Madden was unaware that he left his tools at the former jobsite. BR 133. Buchanan explained that was "because that's not [Madden's] responsibility, it is my responsibility . . . to bring my tools. So I didn't feel that [Madden] needed to know that I had to go back to the jobsite to pick up my tools so I could have my tools ready." BR 133.

Several hours after his work at the Fremont job concluded, Buchanan commuted from his residence back to Fremont to retrieve his tools. BR 133-34. He commuted by public transportation back to Fremont in the exact same route he would have taken during his normal commute. BR 133-34. He then picked up his tools from the jobsite and commuted back to his residence in Federal Way. BR 136. He received a ride from the homeowner to the transit center at Westlake Mall in downtown Seattle, but otherwise took the same route he would have taken during his regular commute home. BR 136. During the last leg of his commute home, Buchanan sustained a back injury. BR 139-40.

D. The Department Denied Buchanan's Industrial Injury Claim Because He Was Not Injured in the Course of Employment and Its Decision Was Affirmed by the Board and the Superior Court

Buchanan filed an industrial insurance claim, alleging he was injured while in the course of his employment with Madden. BR 166. The Department rejected the claim because at the time of the injury Buchanan was not in the course of his employment within the meaning of RCW 51.08.013. BR 39-40. Buchanan then appealed to the Board of Industrial Insurance Appeals, where each of the parties moved for summary judgment. BR 62-68, 171-78, 299-309. The industrial appeals judge granted summary judgment to the Department, reasoning this case fit

squarely within the “going and coming” rule that precludes coverage for injuries during the commute to and from work. CP 38-46. The industrial appeals judge recognized that Buchanan’s second trip to retrieve his tools did not differentiate his situation from the well-established rule:

Buchanan’s injury would not have been considered to have occurred in the course of employment if he had been injured transporting his tools with him on his initial trip home, even if immediately following his work hours. It would be incongruous that he should be in the course of employment when he is injured well after work hours while on a mission intending to solely facilitate his work the following day.

CP 44-45.

This decision became the final decision of the Board. CP 36; BR 1. Buchanan then appealed to the superior court. CP 1-2. The superior court similarly recognized that Buchanan was essentially arguing for a general “but for analysis” that would incorrectly bring every commute within the course of employment. RP 8-9. It granted summary judgment in favor of the Department. CP 53-55. Buchanan now appeals. CP 56.

IV. STANDARD OF REVIEW

In an appeal from a superior court’s decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep’t of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the decision of the trial court

rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.¹

Here, the superior court considered whether the Board's decision to grant summary judgment was correct. The appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013); *see also* RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases.").

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Here, both parties agree that there are no material facts in dispute and the dispositive issues are ones of law, which this Court reviews de novo. *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430 (2011); *see* App. Br. 1; BR 64. Although this Court may substitute its judgment for that of the Department, the Court defers to the Department's interpretation of the Industrial Insurance Act. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

The principle of liberal construction does not apply in this case. It is a well-settled rule that liberal construction applies in a workers' compensation case only if the statutory language is unambiguous. *See*

¹ The Administrative Procedures Act does not apply to workers' compensation cases. *Rogers*, 151 Wn. App. at 180; RCW 34.05.030.

Harris v. Dep't of Labor & Indus., 120 Wn.2d 461, 474, 843 P.2d 1056 (1993); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). The statute in this case is not ambiguous and Buchanan does not argue that it is. He nevertheless claims that liberal construction should broadly resolve all reasonable doubts in his favor. App. Br. 10. He cites to *Crabb v. Dep't of Labor & Indus.*, 181 Wn. App. 648, 658, 326 P.3d 815 (2014), for that proposition but, unlike here, that case involved interpretation of an ambiguous statute. *Id.* at 657.² Under the Industrial Insurance Act, Buchanan is held “to strict proof” of the right to receive benefits, and the strict standard of proof is not diminished by the rule of liberal construction. *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744, 750, *review denied*, 337 P.3d 325 (Wash. 2014) (citations omitted); *Harris*, 120 Wn.2d at 474.

V. ARGUMENT

Buchanan’s injury did not occur within the course of his employment because he was commuting home from a former jobsite. Under the Industrial Insurance Act, the well-established going and coming rule precludes coverage for injuries, like Buchanan’s, that occur during the

² *Crabb* is incorrect in suggesting that the only canon of statutory construction that applies is liberal construction because the Supreme Court uses other canons as well in construing ambiguous statutes. See *Gorre v. City of Tacoma*, 184 Wn.2d 30, 42, 357 P.3d 625 (2015) (resolved question of ambiguity under Industrial Insurance Act with legislative history).

commute to and from work. The going and coming rule is subject to a limited exception, known as the dual purpose exception, that provides coverage to workers when their commute serves both a personal and business purpose. But that exception does not apply here because Buchanan was not serving a business purpose for Madden when he carried personal tools home from a former jobsite after he chose to store them there for his personal convenience. The superior court and the Board correctly granted summary judgment in favor of the Department and this Court should affirm.

A. Under the Going and Coming Rule, Buchanan Was Not Injured in the Course of Employment Because His Injury Occurred While He Was Commuting Home From a Former Jobsite

Buchanan’s injury is not covered because the Industrial Insurance Act precludes coverage for injuries that occur during the ordinary commute to and from work. RCW 51.08.013; *Cochran Elec. Co. v. Mahoney*, 129 Wn. App. 687, 693-94, 121 P.3d 747 (2005). In order to receive workers’ compensation benefits, the worker must prove the injury occurred while acting “in the course of his or her employment.” RCW 51.32.010; *Ackley-Bell v. Seattle Sch. Dist. No. 1*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997). In defining “acting in the course of employment,” the Legislature generally covers only injuries occurring on the job site:

(1) “Acting in the course of employment” means the worker acting at his or her employer’s direction or in the furtherance of his or her employer’s business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

RCW 51.08.013. In limited circumstances, an offsite injury may be covered if the worker “was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer’s interest.”

Cochran, 129 Wn. App. at 693 (quoting *Lunz v. Dep’t of Labor & Indus.*, 50 Wn.2d 273, 278, 310 P.2d 880 (1957)).

Grounded in this statute, however, is the well-established rule that coverage is not allowed for injuries sustained off the jobsite while commuting to and from work—this is known as the “going and coming” rule. *Dillon v. Dep’t of Labor & Indus.*, 186 Wn. App. 1, 7, 344 P.3d 1216 (2014); *Cochran*, 129 Wn. App. at 693-94; *Superior Asphalt & Concrete Co. v. Dep’t of Labor & Indus.*, 19 Wn. App. 800, 802, 578 P.2d 59 (1978). Coverage is explicitly precluded even if the worker was injured

while commuting by an employer-sponsored or employer-provided alternative commute mode, like public transit. RCW 51.08.013(2)(a); RCW 51.08.013(3)(b). Coverage is also precluded even if the worker was transporting the tools of the employment. 1 Arthur Larson, *Workmen's Compensation Law* § 16.09(4)(a) (2012); see, e.g., *In re Marlene Martin*, No. 85 2862, 1987 WL 61325,*2 (Wash. Bd. Ind. Ins. Appeals Feb. 11, 1987) (not in the course of employment while transporting employer's mail during commute); *In re Carla Strane*, No. 90 5175, 1992 WL 117948, *2 (Wash. Bd. Ind. Ins. Appeals March 17, 1992) (not in the course of employment while transporting work files to new office location even though the employer "reaped a degree of benefit").³

The going and coming rule is based on the recognition that employment is always to some extent the cause of a worker's journey between home and work, but "workers' compensation was not intended to protect against all the perils of that journey." *Larson, supra, at § 13.01(1); Cochran*, 129 Wn. App. at 698-99. There is no ambiguity about this rule: Washington courts have confirmed this statute "clearly was intended to deny coverage to workers injured during ordinary trips to or from work[.]"

³ The court may consider the Board's significant and non-significant decisions as persuasive authority. See, e.g., *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 890, 205 P.3d 979 (2009) (citing *In re Marlene Olsen*, No. 06 16795, 2007 WL 4986259 (Wash. Bd. Indus. Ins. Appeals Nov. 13, 2007), and *In re Thomas Williams*, No. 00 11219, 2001 WL 1755668 (Wash. Bd. Indus. Ins. Appeals Dec. 20, 2001)).

Shelton v. Azar, Inc., 90 Wn. App. 923, 938, 954 P.2d 352 (1998); *see also* *Belnap v. Boeing Co.*, 64 Wn. App. 212, 222, 823 P.2d 528 (1992) (noting the “Legislature has enacted that which is now generally accepted as the going and coming rule.”). And courts nationwide have applied the rule “with a surprising degree of unanimity.” 1 Larson, *supra*, at § 13.01(1).

The starting point for this case is the undisputed fact that Buchanan was injured during his commute from work to home. At its core, this case is an ordinary going and coming case for which coverage is precluded. Buchanan muddles the analysis by emphasizing that he was injured in the final leg of his second commute home from the jobsite after he went to retrieve his personal tools for a new dispatch. *See* App. Br. 17. But the fact that he made a second trip to the jobsite and back home, after choosing to store his tools on-site in the first place, does not change the fundamental analysis here. The second commute was made only because Buchanan left his tools at the jobsite for his personal convenience—he alone owned and controlled the tools and he alone was responsible for their transportation. The injury in this case happened toward the end of a commute home from a jobsite. It was Buchanan’s second commute home of the day, but it was a commute nevertheless and falls squarely under the going and coming rule. Buchanan was not injured in the course of his employment.

The courts have recognized a few limited exceptions to the going and coming rule. *See, e.g., Aloha Lumber Co. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 766-67, 466 P.2d 151 (1970) (exception for injuries during commute in employer-furnished automobile); *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 142-43, 177 P.3d 692 (2008) (exception for “travelling employees,” who are in the course of employment continuously); *Belnap*, 64 Wn. App. at 222 (exception for employees on a “special errand” in which the journey itself is an inherent part of the work performed). None of these exceptions apply to Buchanan’s case and he does not argue otherwise. *See App. Br. 16.* Instead he attempts to rely on the dual purpose exception. *Cochran*, 129 Wn. App. at 695-96. But that exception also does not apply here because Buchanan was not serving a business purpose at the time of his injury.

B. The Dual Purpose Exception Does Not Apply Because Buchanan’s Commute Home After Retrieving His Personal Tools Did Not Serve a Business Purpose

The dual purpose exception to the going and coming rule does not apply because Buchanan’s return trip to the jobsite and second commute home did not serve a business purpose. Buchanan’s argument to the contrary misreads the well-established course of employment analysis, ignores the weight of consistent authority, and relies on cases that were not decided under the going and coming rule.

1. The Dual Purpose Exception Does Not Apply if the Personal Purpose Was Sufficient Alone to Cause the Trip and if the Employer Would Not Have Required a Separate Trip Independent of the Commute

The dual purpose exception may be applied when the employee is injured in transit to or from a location off the employer's premises and when the employee's presence at that location served both a business and personal purpose. *Cochran*, 129 Wn. App. at 695-96. This exception can arise in going and coming cases or, more generally, if the worker is otherwise injured while traveling off the employer's premises. *See* 1 Larson, *supra*, at § 16.01-16.02.

Judge Cardoza first articulated the analysis that Washington courts follow, namely that the business purpose must create the necessity for travel, independent of the dual personal purpose:

If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

Marks' Dependents v. Gray, 251 N.Y. 90, 93-94, 167 N.E. 181 (1929), *quoted in Cochran*, 129 Wn. App. at 696; *see also McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 499, 224 P.2d 627 (1950); *Martin*,

1987 WL 61325 at *2. In other words, if the personal purpose was sufficient alone to cause the trip, and if the trip would have been cancelled without that personal purpose, then the employee was not in the course of employment. *See Cochran*, 129 Wn. App. at 696.

When an employee is injured on the way home from a jobsite, the personal purpose is inherent to the employee's trip. If the employee claims there was also a simultaneous business purpose, the business purpose must be so unique or important to the employer that the employer would have required a separate trip, independent from the employee's personal commute, for that same business purpose:

[W]e start with a personal motive—that of getting (or coming from) home—which would have caused the employee to take the trip in any case. The question then becomes: was the business mission of such character or importance that it would have necessitated a trip by someone if this employee had not been able to handle it in combination with his homeward (or business-ward) journey?

1 Larson, *supra*, at § 16.09(1); *see Cochran*, 129 Wn. App. at 695-96; *Martin*, 1987 WL 61325 at *2. If the answer to the foregoing question is “no,” then the employee was not in the course of employment. 1 Larson, *supra*, at § 16.09(1); *see e.g., Martin*, 1987 WL 61325 at *2.

2. Buchanan’s Personal Purpose in Retrieving His Tools Was Sufficient Alone to Cause His Trip

The dual purpose exception does not apply to this case because Buchanan would have made the trip to retrieve his tools regardless of the new dispatch he accepted for the following morning. In other words, the personal purpose was sufficient alone to cause the trip and this does not satisfy the business purpose requirement of the dual purpose exception. *See Cochran*, 129 Wn. App. at 695-96; *Martin*, 1987 WL 61325 at *2. “Buchanan does not dispute that retrieving his tools . . . was something he needed to do in order to retrieve his own property.” App. Br. 23. Even if his employment relationship with Madden had been terminated, Buchanan would have returned to the Fremont jobsite to retrieve his tools. *See BR 115*. His choice to store them on-site in the first place, and then to retrieve them, furthered only his personal convenience. And his choice to retrieve his tools *that same day*, rather than the next (or any other) day, makes no difference here. Not only did Buchanan have sole control over his tools, but he also controlled whether to accept or decline the dispatch for the carpentry project starting the next day—he was not required by Madden to accept that dispatch, or any other. *BR 103*. His personal interest was the sole purpose of the second trip to the Fremont jobsite, and therefore the dual purpose exception does not apply.

3. Madden Would Not Have Required a Separate Trip Independent of Buchanan's Commute to Retrieve His Tools

The exception does not apply to this case because if Buchanan had chosen not to retrieve his tools that day, Madden would not have required a trip by someone else for that same purpose. Madden would not, and could not, have required someone else to make the trip because it neither owned nor controlled the tools. *See* BR 111-12, 157. The only trip that would have occurred by another employee would have been the ordinary, daily commute to the new jobsite that similarly falls under the going and coming rule. Buchanan attempts to avoid this bar to coverage by claiming there was an “urgency” created by the timing of the next job and that Madden therefore “needed him to be properly equipped to work the very next day.” App. Br. 23. But this reading is not supported by the record. To the contrary, Madden never requested or required the trip. BR 133, 157. Not only because Madden had no ownership or control over the tools, but also because Madden was unaware of his trip to retrieve them. Buchanan explained that was “because that’s not [Madden’s] responsibility, it is my responsibility . . . to bring my tools. So I didn’t feel that [Madden] needed to know that I had to go back to the jobsite to pick up my tools so I could have my tools ready.” BR 133. Any “urgency” was created Buchanan’s

desire to pick up his personal property, not any business purpose of Madden's.

Buchanan's control over his choice to accept or decline the dispatch further refutes his claim that it was a business purpose that necessitated the second trip independent of his personal interest. Madden did not require him to accept the new job, or any other job. Buchanan could have simply declined this particular dispatch given the personal inconvenience the commute would have posed for him. This demonstrates that retrieval of Buchanan's personal tools was not so unique or important to Madden that it would have necessitated a trip by someone else, independent of the normal going and coming to the jobsite. Buchanan's return trip to the Fremont jobsite was simply a natural, if inconvenient, consequence of his own choice to leave his tools at the jobsite because of his suspended driver's license.

Likewise, if he had been injured while regularly transporting his tools home in his own personal vehicle, as is the industry practice, rather than during the final leg of the arduous commute necessitated by his suspended license, he would have been no more within the course of employment. The fact that he engaged in a second commute does not transform the commute into a business trip. The superior court and the Board recognized the flaw in Buchanan's argument: because coverage

would have been plainly precluded if Buchanan had been injured transporting tools on his initial trip home, it would “be incongruous that he should be in the course of employment when he is injured well after work hours while on a mission intending to solely facilitate his work the following day.” CP 44-45, 53-55. The going and coming rule would preclude coverage if Buchanan transported his tools on the initial trip home, and the dual purpose exception does not change this analysis simply because he returned to make a second commute.

4. The Weight of Case Authority Demonstrates Coverage Was Properly Denied Under the Going and Coming Rule

A long line of relevant authorities demonstrates why the going and coming rule precludes coverage in this case. Washington courts do not find an employee was in the course of employment during a regular commute to or from work, unless the record clearly establishes that a business purpose would have necessitated a separate trip by some other employee. *Cochran*, 129 Wn. App. at 695-700; *see Belnap*, 64 Wn. App. at 221-25; *see also Lang v. Dep’t of Labor & Indus.*, 35 Wn. App. 259, 261-63, 665 P.2d 1386 (1983).

In *Belnap*, the Court held an employee who was paid his regular salary while serving on jury duty was not in the course of employment while traveling back to his jobsite after being released early from jury

service. *Belnap*, 64 Wn. App. at 221-25. Coverage was precluded under the going and coming rule because the employee's trip from the courthouse to the jobsite "was no more inherently a part of his service to [the employer] than would be an ordinary commute from his home[.]" *Id.* at 223. That same analysis precludes coverage here. Buchanan's journey to retrieve his personal tools was no more a part of his service to Madden than was his ordinary commute. His second trip to the Fremont jobsite was necessitated only because he stored his tools there for his personal convenience.

The Court has similarly denied coverage to a school soccer coach who was injured on the way home from school after performing additional work that he could have elected not to perform. *Lang*, 35 Wn. App. at 261-63. The coach in that case, similar to Buchanan, was injured while travelling home after a game that he was scheduled to attend was cancelled. *Id.* The coach was given the option to immediately return home from the game or remain until his players were able to get on to the bus. *Id.* at 260. He elected to stay with the children until they got on the bus, and then drove home. *Id.* He argued that his decision to remain until the players had boarded the bus brought his trip home within the course of employment under the special errand exception. *Id.* at 263. The *Lang* Court rejected that argument, explaining that "the time and trouble of

performing the special service must be so substantial that it constitutes an integral part of the service itself” and that working “slightly longer than was required” was not sufficient to change the commute into a special errand. *Id.* at 263. Here, the only service Buchanan performed as a result of his trip to his former jobsite was retrieving his own personal tools. The *Lang* case illustrates that Buchanan’s second commute home from the Fremont jobsite is no different from his ordinary commute even though it occurred sometime after his release from work earlier that day, and thus the going and coming rule applies.

Buchanan also relies on *Cochran*, but that case only confirms that Buchanan was not in the course of employment. App Br. 23-26. In that case, the dual purpose exception applied to a worker who was fatally injured on his bicycle while returning home after dropping off an employer-owned van for maintenance service. *Cochran*, 129 Wn. App. at 695-700. In contrast to Buchanan, the worker’s trip to drop off the van was required by the employer, was at the employer’s specific direction, and was in furtherance of the employer’s interests. *Id.* at 700. The worker there dropped the van off at the service station and then commuted home by bike—this departure from his regular commute was solely for the employer’s business purpose. *Cochran*, 129 Wn. App. at 695-96. The Court reasoned that he was in the course of employment because

“[n]othing in the record indicate[d] . . . that [the employee] would have taken the bike ride even in the absence of the errand to service the van.” *Id.* at 696. That is the dispositive analysis for the dual purpose exception and precludes coverage in Buchanan’s situation—there is no dispute in this case that Buchanan would have returned to the former jobsite to retrieve his personal tools even in the absence of the new job assignment the following morning.

In a workers’ compensation case that analyzed a virtually identical set of facts to this case, a court in Virginia held a temporary construction worker was not injured in the course of employment under the going and coming rule. *Harris v. State Workmen’s Comp. Com’r*, 158 W. Va. 66, 71, 208 S.E.2d 291 (1974). The construction worker in that case was injured while commuting home from a jobsite where work for the day had ended. *Id.* at 67. Like Buchanan, the employee was commuting home in order to retrieve tools that were necessary for a second job the employer had offered for the same day. *Id.* In analyzing the same legal question here, the Virginia court denied coverage because the employee was not required to return home for his tools; the employer had merely advised the employees that, if they wished, they could work at the second jobsite. *Harris*, 158 W. Va. at 71. The going and coming rule therefore precluded coverage, just as it does in Buchanan’s case. *Id.* at 69; *see also, e.g., Agric. Ins. Co. v.*

Dryden, 398 S.W.2d 745, 747 (Tex. 1965) (construction foreman not in the course of employment when injured during commute from home to jobsite while transporting carpenters' tools necessary for job).

5. Buchanan's Flawed Analysis Stems From Reliance on Cases that Do Not Implicate the Going and Coming Rule

The cases Buchanan relies on do not support his argument for coverage. The legal principles in this context are clearly defined and regularly applied to deny coverage in going and coming cases. Yet Buchanan obscures how the going and coming rule applies by citing to cases that do not implicate the rule. He relies extensively on *Hobson*, *Leary*, *Mackay*—none of which involved a commute to or from work, as this case does. App. Br. 18-22.

In *Hobson*, an employee who was on duty twenty-four hours daily as a watchman and repairman was killed on his employer's premises while driving an employer-owned vehicle. *Hobson v. Dep't of Labor & Indus.*, 176 Wash. 23, 24-26, 27 P.2d 1091 (1934). So the employee in *Hobson* was driving a vehicle, but not while commuting in a sense that implicated the going and coming rule. *Hobson*, 176 Wash. at 24-26. In contrast, Buchanan was neither on duty, on premises, or driving an employer-owned vehicle.

The employee in *Leary* was also on duty, as a gateman, when he suffered heart failure while using his own car to move a coworker's disabled vehicle. *Leary v. Dep't of Labor & Indus.*, 18 Wn.2d 532, 541-43, 140 P.2d 292 (1943). Not only was he on duty at the time, but he was also performing the very duties his employment required, at the jobsite, by clearing the gate entrance. *Id.* The analysis from *Leary* does not apply to Buchanan's commute that was off duty and off the jobsite, while carrying personal tools for which his employer had no responsibility.⁴

The injured employee in *Mackay* was also not commuting, but rather slipped and fell inside a repair shop. *MacKay v. Dep't of Labor & Indus.*, 181 Wash. 702, 705, 44 P.2d 793 (1935). He travelled to the repair shop because a tractor part became disabled while he was on the job and its repair was necessary for his employment duties. *MacKay*, 181 Wash. at 702-03. He also received compensation from the employer for the use and

⁴ Buchanan's reference to the *Leary* case, decided in 1943, incorporates a quotation from the Restatement of the Law of Agency describing principles of respondeat superior that are not applicable in this workers' compensation context. See Larson, *supra*, at § 12.02 (while the phrase "course of employment" is common between worker's compensation and vicarious tort liability, the legal inquiry is different). The current version of the Restatement of the Law of Agency disclaims against its use in worker's compensation cases: "workers'-compensation questions are beyond the scope of this Restatement." Restatement (Third) of Agency § 7.03 cmt. d (2016). Yet even under the principles of respondeat superior, employers are "insulate[d] . . . from liability for the negligent acts of their commuting employees under the theory that a workman is not, under ordinary circumstances, in the course of employment while going to or from his employer's place of business." *Breedlove v. Stout*, 104 Wn. App. 67, 69, 14 P.3d 897 (2001) (holding that employer was not liable for car accident caused by employee who returned to work after his shift ended to pick up a work-related item). The foundational premise of the going and coming rule extends even to tort law.

maintenance of the tractor. *Id.* In contrast, Buchanan was off work, uncompensated for his commute or his personal tools, and on his way home following his regular route after retrieving personal property. Neither *Hobson*, *Leary*, nor *Mackay* has any bearing on this going and coming case.

Buchanan also relies on a Board decision that was not decided under the going and coming rule or any of its exceptions. *See* App. Br. 28. In *In re Julie Trusley*, the Board determined that a teacher who was injured in the parking lot *after* arriving at the jobsite, while carrying job supplies essential to the performance of her job duties that day, was covered under the Act. No. 93 3124, 1994 WL 732115, *2 (Wash. Bd. Ind. Ins. Appeals Aug. 15, 1994). Unlike Buchanan's case, *Trusley* involved a standard course of employment injury occurring on the jobsite.

In the most instructive Board decision, the Board declined to apply the dual purpose exception to an employee who was injured during a commute while transporting her employer's mail. *Martin*, 1987 WL 61325 at *2. The employee intended to deposit the mail in conjunction with her ordinary commute to work but was injured along the way. *Id.* at *1. Consistent with the Court of Appeals' analysis in *Cochran*, the Board reasoned the injury was not compensable because the personal commuting trip would have gone forward even in the absence of the business errand

and the trip to deposit mail would not have been necessitated by any other employee. *Id.* at *2. The *Martin* decision rejected coverage based on the same practical concerns triggered by Buchanan’s flawed argument in this case:

Simply by carrying such work while engaged in their normal personal commute to and from their regular place of employment does not expand the Act’s coverage to such commuting. Such a result appears to be a ludicrous extension of the course of employment concept, with potentials for abuse and with far-reaching consequences.

Martin, 1987 WL 61325 at *2. As with the employee in *Martin*, simply carrying his tools while commuting home from a former jobsite does not bring Buchanan within the course of employment. If it did, then the going and coming rule would have no realistic meaning.

C. Buchanan’s Course of Employment Analysis Would Incorrectly Consume the Going and Coming Rule

There is no generalized exception to the going and coming rule that allows coverage anytime the commute happens to intersect with employment. Buchanan confuses the legal analysis in this case by essentially transforming the limited dual purpose exception into an oversimplified “but for” analysis that would apply coverage to all commuters carrying personal items that they use for work activities. While Buchanan correctly identifies the dual purpose exception as a possible exception to the going and coming rule in general, he then mistakenly

claims that furthering a business interest is an additional “exception” to the going and coming rule. App. Br. 16. The gravamen of his claim is that his employment financially benefited Madden in general, that retrieval of his tools was necessary for that employment, and therefore his commute benefitted Madden thus putting him in the course of employment. That is not correct.

All employees further their employers’ interests to some extent by arriving at work prepared but this does not bring every personal task necessary for that preparation within the course of employment. Instead the Legislature enacted RCW 51.08.013 to exclude coverage for injuries that occur during the work commute. And retrieving personal items that simply facilitate the ability to work does not change the nature of a commute—it is not within the course of employment. Buchanan’s trip to retrieve his personal tools from the jobsite was still a trip to and from work, even if he chose to retrieve them so he could accept the dispatch for the next day.

Buchanan’s claim that he was serving a business purpose or furthering a business interest when he carried home his personal tools, if accepted, would eviscerate the going and coming rule and replace it, wrongly, with a “but for” analysis. Madden did not create the necessity for Buchanan’s travel in any greater sense than employment, in general,

creates a necessity for any employee's commute to and from work each day. Buchanan's situation is no different than if he had left any other personal item behind that was necessary to participate in work activities. For example, he may not have been prepared to work the following day if he left his work boots or eye glasses at the jobsite (or anywhere else). Retrieval of such items are conceivably necessary for him to work, but such items, like his personal tools, are not by their nature so important *to Madden* that a trip would be required independent of Buchanan's personal interest or ability to make the trip himself. Buchanan's "but for" analysis does not distinguish his situation from the core principles that preclude coverage under the long-established going and coming rule and would render that rule meaningless—all employees would be in the course of employment merely by carrying a personal item to facilitate preparation for work during their ordinary journey to or from the workplace.

This approach would undermine the grand compromise between workers and their employers, in which it is "taken for granted that industrial insurance was not intended to protect workers against all the perils of that journey" to and from work. *Belnap*, 64 Wn. App. at 222; *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). The superior court and the Board both recognized the allowing coverage in Buchanan's situation would be incongruous with the fundamental going

and coming rule and correctly granted summary judgment for the Department.

D. Buchanan Is Not Entitled to Attorney Fees

Because Buchanan should not prevail, he is not entitled to attorney fees under RCW 51.52.130. Fees are awarded against the Department only if the worker requesting fees prevails in the action and “if the accident fund or medical aid fund is affected by the litigation.” *Pearson v. Dep’t of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). Even if Buchanan prevails in this appeal, he is not entitled to attorney fees because the accident fund or medical aid fund would not be affected. The superior court and Board decisions in this case were limited “to only the issue of whether the worker was acting in the course of his employment at the time of his injury, and not whether the claim should be allowed as an industrial injury.” BR 29, CP 54-55. The issue of claim allowance has not been adjudicated on a medical basis. *See In re Chad MacDonald*, No. 13 13100, 2014 WL 1398631, *5 (Wash. Bd. Ind. Ins. Appeals March 27, 2014). If Buchanan prevails in this appeal, the case should be remanded to the Department to determine whether the claim should be allowed as an industrial injury. *Id.*; *see also Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 983, 478 P.2d 761 (1970).

Remand for further consideration does not support a fee award because such an order would not affect the accident fund or medical aid fund. RCW 51.52.130; *Dep't of Labor & Indus. v. Rowley*, 185 Wn. App. 154, 170, 340 P.3d 929 (2014) (denying worker's fee request where relief was remand to trial court), *aff'd in part, rev'd in part on other grounds*, 185 Wn.2d 186 (2016); *see also Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 29, 288 P.3d 675 (2012) (finding the prevailing party's attorney was not entitled to fees where only relief was remand to director). This Court may not award fees in this case because, even if Buchanan prevails, it would not affect the accident or medical aid fund.

VI. CONCLUSION

Injuries that occur during a worker's commute to and from the jobsite are not within the course of employment under the longstanding going and coming rule. Buchanan's injury occurred during his regular commute home after retrieving tools that he left behind at a former jobsite for his own personal convenience. This Court should affirm the trial court.

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RESPECTFULLY SUBMITTED this 15th day of July, 2016.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, reading "Thomas V. Vogliano". The signature is written in a cursive style with a prominent initial "T" and a long, sweeping underline.

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JUSTIN D. BUCHANAN,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Brief of Respondent and this Certificate of Service in the below described manner.

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