

FILED

MAY 24 2006

CLERK OF SUPREME COURT
STATE OF WASHINGTON

ajl

NO. 77655-5

RECEIVED
05 MAY 24 PM 2:27
BY C. J. HERRITT

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

BALL-FOSTER GLASS CONTAINER CO.,

Petitioner,

v.

ALFRED GIOVANELLI and DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

DEPARTMENT'S SUPPLEMENTAL BRIEF

ROB MCKENNA
Attorney General

BEVERLY NORWOOD GOETZ
Senior Counsel
WSBA #8434
Office of the Attorney General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164-1012
(206) 464-7740

ORIGINAL

TABLE OF CONTENTS

I.	NATURE OF THE CASE.....	1
II.	ISSUES.....	1
	A. Was Giovanelli a “traveling employee”?.....	1
	B. Was Giovanelli injured during off-duty activity that was reasonable for him as a traveling employee?.....	1
III.	STATEMENT OF THE CASE	2
IV.	SUMMARY OF ARGUMENT.....	4
V.	ARGUMENT	5
	A. Giovanelli was a “traveling employee.”	5
	1. Application of the “traveling employee” rule here is consistent with the reasoning in other Washington cases and with workers’ compensation cases in other jurisdictions.	6
	2. <i>Shelton</i> is not distinguishable as a “going and coming” case.	8
	3. The <i>Shelton</i> case is not distinguishable based on permanency of employment relationship, nor on duration of a work trip.	9
	B. A reasonable personal errand undertaken by a “traveling employee” for his personal comfort does not demonstrate an intent to abandon the course of employment.	12
	C. Public policy does not militate against application of the traveling employee doctrine here; liberal construction, deference to agency construction, and fairness all favor its application.	15
VI.	CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Aloha Lumber Corp. v. Dep't of Labor & Indus.</i> , 77 Wn.2d 763, 466 P.2d 151 (1970).....	9
<i>Ball-Foster Glass Container Co. v. Giovanelli and Dep't of Labor & Indus.</i> , 128 Wn. App. 846, 117 P.3d 365 (2005).....	passim
<i>Bolin v. Dep't of Labor & Indus.</i> , 114 Wn.2d 70, 785 P.2d 805 (1990).....	16
<i>Burchfield v. Dep't of Labor & Indus.</i> , 165 Wash. 106, 4 P.2d 858 (1931)	7
<i>Burris v. General Ins. Co.</i> , 16 Wn. App. 73, 553 P.2d 125 (1976).....	7
<i>Cavalcante v. Lockheed Electronics Co.</i> , 204 A.2d 621 (N.J. Super.Ct. Law Div.1964)	14
<i>Chicago Bridge & Iron, Inc. v. Industrial Commission</i> , 248 Ill. App. 3d 687, 618 N.E.2d 1143 (1993)	passim
<i>Dep't of Labor & Indus. v. Johnson</i> , 84 Wn. App. 275, 928 P.2d 1138 (1996).....	15
<i>Dep't of Labor & Indus. v. Landon</i> , 117 Wn.2d 122, 814 P.2d 626 (1991).....	16
<i>Eversman v. Concrete Cutting & Breaking</i> , 614 N.W.2d 862 (Mich. 2000).....	16
<i>Garver v. Eastern Airlines</i> , 553 So.2d 263 (Fla. 1989)	14
<i>Hamilton v. Dep't of Labor & Indus.</i> , 77 Wn.2d 355, 461 P.2d 917 (1969).....	5, 9

<i>Hilding v. Dep't of Labor & Indus.</i> , 162 Wash. 186, 298 P. 321 (1931)	7
<i>Roadway Express, Inc. v. Workmen's Compensation Appeal Bd.</i> (<i>Seeley</i>), 532 A.2d 1257 (Pa. Commw.Ct.1987), appeal denied, 519 Pa. 662, 546 A.2d 623 (1988).....	14
<i>Robards v. New York Div. Elec. Prods., Inc.</i> , 307 N.Y.S.2d 599 (App.Div.1970).....	14
<i>Schneider v. United Whelan Drug Stores</i> , 135 N.Y.S.2d 875 (App.Div.1954).....	14
<i>Shelton v. Azar, Inc.</i> , 90 Wn. App. 923, 954 P.2d 352 (1998).....	passim
<i>Shoopman v. Calvo</i> , 63 Wn.2d 627, 388 P.2d 559 (1964).....	8
<i>Slaughter v. State Accident Ins. Fund Corp.</i> , 654 P.2d 1123 (Or.App.1982)	14
<i>Werden v. Ohio Bur. of Workers' Comp.</i> , 786 N.E.2d 107 (Ohio App. 2003).....	18
<i>Weyerhaeuser Company v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	16
<i>Wright v. Industrial Commission</i> , 62 Ill.2d 65, 338 N.E.2d 379, 381 (1975).....	11, 12

Statutes

RCW 51.08.013	5, 9
RCW 51.12.010	16
Title 51 RCW.....	6

Other Authorities

Arthur Larson & Lex K. Larson Larson's Workers' Compensation
Law 2, §13.01(1) §25.00 (2000) passim

I. NATURE OF THE CASE

This is a workers' compensation "course of employment" case. A self-insured employer challenges successive orders by the Department of Labor and Industries (Department), Board of Industrial Insurance Appeals (Board), King County Superior Court, and Court of Appeals directing the employer to accept Alfred Giovanelli's workers' compensation claim because he was a "traveling employee" when he was injured.

II. ISSUES

Giovanelli is a highly skilled firebrick mason that St. Gobain (formerly Ball Foster Glass Container Company) specially hired in Pennsylvania to travel to Washington to work on rebuilding its glass furnace. Giovanelli had worked for St. Gobain around the United States for years under a long-standing arrangement in which St. Gobain paid for his time and travel expenses both to and from the rebuild jobs, and per diem seven days per week for his personal expenses during the rebuilds. On a Sunday, a day off, Giovanelli decided to walk from his hotel to a nearby park. He was struck by a car as he crossed the street, and badly injured. Under these circumstances:

- A. **Was Giovanelli a "traveling employee"?**
- B. **Was Giovanelli injured during off-duty activity that was reasonable for him as a traveling employee?**

III. STATEMENT OF THE CASE

The life of a glass furnace is finite. Rebuilding a furnace is highly technical. Engineers begin planning the rebuilding project 15-18 months in advance. The actual rebuilding, done by highly skilled tradespeople, takes 25-50 days. BR Dirlam 70-71.¹

Giovanelli, a highly skilled and experienced firebrick mason, has a special relationship to St. Gobain. He lives in Pennsylvania but has worked regularly on St. Gobain's furnace rebuilds for many years. BR Champ 56-57; BR Giovanelli 11-14, 25. St. Gobain has eighteen plants nation-wide. It rebuilds from two to eight furnaces a year. BR Dirlam 77. Giovanelli traveled to five rebuilds for St. Gobain in 1998, three in 1999, five in 2000, and was on his third 2001 rebuild project in Seattle when injured. BR Smith 15, 27-28.

St. Gobain gave Giovanelli a schedule of upcoming furnace rebuilds so he could be ready when called. BR Giovanelli 15. For all the rebuilds, and the Seattle job here, St. Gobain's agent, Mr. Champ, would call Giovanelli at his home in Pennsylvania when it was time to go. BR Giovanelli 15, 27. Champ superintended the rebuilds, Giovanelli was his crew foreman. BR Champ 40, 56-57, 62; Giovanelli 27. St. Gobain

¹ Citations to the Certified Appeal Board Record will be as follows: for testimony "BR" followed by the name of the witness and the hearing or deposition transcript page number; for other matters "BR" and the large machine-stamped page number; for exhibits "BR Exhibit" and number.

required Giovanelli to make his airline reservations and car rental arrangements through its travel department. BR Ex. 8, p. 2. St. Gobain paid Giovanelli his hourly wage for eight hours while traveling to the furnace location, for eight hours traveling home when the rebuild was finished, and reimbursed his travel expenses. BR Smith 22-24; Ex. 1; Ex. 8, p. 2; Ex. 4.

Crews typically work long hours, six days a week, to get the furnace back in operation quickly. BR Giovanelli 20, 28; Champ 65; Dirlam 81; Smith 35. In addition to wages, for all seven days of the week, without restriction, St. Gobain paid Giovanelli per diem and provided a rental car. BR Giovanelli 19-20, 24-25, 28, 33; Champ 51-52, 58; Dirlam 75-76, 83; Smith 23-24, 30-31; Peters 19; Ex. 1; Ex. 8. St. Gobain placed no restrictions on Giovanelli's Sunday activities. Smith 17.

August 12, 2001 was a Sunday – a day off. Giovanelli and Champ decided to walk the two or three blocks from their hotel to a nearby park. BR Giovanelli 16; Champ 45. As they crossed the street, a car struck Giovanelli. BR Giovanelli 17.² He was seriously injured, and left permanently blind. BR Giovanelli at 17-18.

The Department ordered St. Gobain, to allow Giovanelli's claim for workers' compensation benefits. BR 41-42. St. Gobain appealed to

² St. Gobain asserts that Giovanelli crossed against the light. Petition for Review (Pet.) 5, 19. There is no evidence, however, to support this assertion.

the Board, which held hearings and then affirmed the Department's order. BR 1, 31-39. St. Gobain appealed to King County Superior Court, which granted summary judgment in favor of Giovanelli based on the "traveling employee" doctrine. CP 47. St Gobain appealed to the Court of Appeals, Division I, which affirmed the Superior Court. *Ball-Foster Glass Container Co. v. Giovanelli and Dep't of Labor & Indus.*, 128 Wn. App. 846, 117 P.3d 365 (2005).

IV. SUMMARY OF ARGUMENT

Under well-established workers' compensation principles and case law, a worker is a "traveling employee" when required to work for an employer away from home. The traveling employee is covered 24 hours a day, 7 days a week for injuries sustained during non-work activity that is *reasonably* incidental to personal comfort, and not so risky or foreign that it demonstrates an intent to abandon the scope of course-of-employment coverage. All tribunals below correctly determined that the specific circumstances surrounding Giovanelli's employment established that he was a "traveling employee," and therefore "in the course of employment" when injured, even though he was injured off the job.

V. ARGUMENT

The facts of this case fall well within the “traveling employee” doctrine. The Court of Appeals decision neither expands nor distorts the doctrine.

A. Giovanelli was a “traveling employee.”

Under Washington workers’ compensation law, an injured employee, to be eligible for coverage, must, at the time of injury, be at work for the employer, whether on or off the employer’s premises. RCW 51.08.013; *Hamilton v. Dep’t of Labor & Indus.*, 77 Wn.2d 355, 361, 461 P.2d 917 (1969). Coverage generally does not extend to a worker injured when not at work except under certain court-developed exceptions. St. Gobain recognizes that a well-established, court-developed exception to this general exclusion, applicable in Washington and other states, extends off-duty coverage to “traveling employees” – employees required by their employers to live away from home while carrying out a work project. Pet. 9-17. St. Gobain argues, however, that the Court of Appeals here misapplied the “traveling employee” rule in a way that “extends and distorts” Washington’s statutory definition of “course of employment,” and that application of the rule here is “unfair,” will result in a lack of “uniform[ity],” and is not consistent with state and national case law. Pet. 6, 9-17.

St. Gobain is wrong. Giovanelli's circumstances fall well within the "traveling employee" doctrine under long-established workers' compensation principles, and the rule itself properly balances the needs of the employer against the special risks and hardships encountered by traveling employees. *See infra* at 17-18.

1. Application of the "traveling employee" rule here is consistent with the reasoning in other Washington cases and with workers' compensation cases in other jurisdictions.

Shelton v. Azar, Inc., 90 Wn. App. 923, 954 P.2d 352 (1998), *Chicago Bridge & Iron, Inc. v. Industrial Commission*, 248 Ill. App. 3d 687, 618 N.E.2d 1143 (1993), and the rule of liberal construction all demonstrate that Giovanelli was a traveling employee covered under Title 51 RCW. The Court of Appeals decision, following analysis in *Shelton* and *Chicago Bridge*, and the many decisions cited in those cases, correctly applied the traveling employee doctrine here. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 850-55, 117 P.3d 365 (2005).

The *Shelton* Court explained that the reasoning in older Washington cases, though not squarely on point as "traveling employee" cases, was consistent with the "traveling employee" rule followed nationally – "that an employee traveling at the direction of his employer,

for a purpose that benefits the employer, is acting in the course of his employment” even though the injuries were not incurred on the job or while performing job duties.³ *Shelton*, 90 Wn. App. at 934-37. The traveling employee endures special inconvenience to further the employer’s business interests (90 Wn. App. at 933), and is exposed to greater hazards than a non-traveling worker (90 Wn. App. at 936).

St. Gobain fails to persuade that the outcome here is inconsistent with either *Shelton* or *Ball-Foster* or the other cases, both from Washington and other jurisdictions, relied on in those two decisions. Giovanelli’s continuing relationship to St. Gobain and the importance of his travel to St. Gobain’s business interests are indisputably demonstrated by the fact that all his travel expenses were reimbursed, that he was paid for the time spent traveling to and from the various St. Gobain plants, and that he received per diem and use of a rental car essentially from the time he left home until he returned home. *See supra* at 2-3. Equally indisputable – as a matter of law under the “traveling employee” rule – are the inconvenience of that travel from his Pennsylvania home, and the

³ To show Washington’s long recognition that employees injured while traveling to further the employer’s business are in the course of employment the *Shelton* Court referenced: *Hilding v. Dep’t of Labor & Indus.*, 162 Wash. 186, 173, 298 P. 321 (1931) (employee injured traveling between work in Spokane and work in Asotin for same employer); *Burriss v. General Ins. Co.*, 16 Wn. App. 73, 75, 553 P.2d 125 (1976) (injured while traveling from one work site to another at the direction of employer); *Burchfield v. Dep’t of Labor & Indus.*, 165 Wash. 106, 110-11, 4 P.2d 858 (1931) (skilled hatch tender injured while traveling among several ports regularly serviced by employer who also paid travel expenses between ports).

special hazards of living far from home for an extended period of time.

2. *Shelton* is not distinguishable as a “going and coming” case.

St. Gobain attempts to distinguish or dismiss *Shelton* by arguing that, notwithstanding its clear text otherwise, *Shelton* should be read not as a “traveling employee” case, but as a “going and coming” case.⁴ Pet. at 12-13. See *Shelton*, 90 Wn. App. at 937. St. Gobain’s attempt to rewrite *Shelton* should be rejected.⁵ The “going and coming” rule is a separate and distinct workers’ compensation construct not implicated here.

The “going and coming” rule, subject to certain recognized exceptions, bars industrial insurance coverage for workers who are injured while commuting to and from work.

[W]hile admittedly the employment is the cause of the worker’s journey between home and factory, it is generally taken for granted that workers’ compensation was not intended to protect against all the perils of that journey. . . .

⁴ St. Gobain also conclusorily asserts, without citation to any authority, that the course-of-employment determination in *Shelton* is distinguishable because that case was not a workers’ compensation case. Pet. at 10-11. It is illogical and unsupportable in law to contend that determination of the identical question in a non-workers’ compensation case is not precedent governing workers’ compensation cases. Cf. *Shoopman v. Calvo*, 63 Wn.2d 627, 630, 388 P.2d 559 (1964) (course of employment determination in workers’ compensation proceeding is binding in civil suit relating to same incident).

⁵ St. Gobain also asserts that all the cases cited as authority in *Shelton* (presumably St. Gobain includes the entire chapter of *Larson’s* workers’ compensation treatise on “Traveling Employees” cited in *Shelton* as well) can be viewed as “going and coming” cases. Pet. 12. This is not true of most of the cases cited in *Shelton*, and certainly is not true of the cases cited in the chapter of *Larson’s* that addresses the discrete category of “Traveling Employees.” See 2 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* (Larson’s), § 25.00 (2000),

Larson's, §13.01(1), pp.13-2-13-3; see also *Hamilton v. Dep't of Labor & Indus.*, 77 Wn.2d 355, 359-60, 462 P.2d 917 (1969); RCW 51.08.013. The bar is lifted if the specific facts of a case come within certain categories, one of which is that the worker is going to work or coming from work in employer-provided or paid-for transportation. See, e.g., *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 770, 466 P.2d 151 (1970). Because Reed and Shelton were injured when they were traveling in employer-provided transportation, i.e., a rental car, St Gobain asserts, wrongly, that the case was decided under the going and coming rule. Pet. at 12-13. Reed and Shelton, however, though riding in an employer-paid-for rental car, were neither "going to" work nor "coming from" work. They were en route to a hotel, not to the job. *Shelton*, 90 Wn. App. at 932-33. The workers in *Shelton*, like Giovanelli, were in the course of employment because they fit the well-established definition of "traveling employee."⁶ The "going and coming" rule was not implicated in *Shelton* and is not implicated here.

3. The *Shelton* case is not distinguishable based on permanency of employment relationship, nor on duration of a work trip.

St. Gobain also attempts to distinguish *Shelton* by arguing that

⁶ The *Ball-Foster* Court does suggest that the facts of *Shelton* did not strictly require it to adopt the "traveling employee" doctrine. 128 Wn. App. at 851. The Department disagrees, but notes that, in any event, the *Ball-Foster* Court correctly applied the doctrine in this case.

“Reed’s employment situation” was not analogous to Giovanelli’s. Pet. 11. St. Gobain essentially argues that a worker such as Giovanelli, hired to travel to another state for a temporary job, can never be a “traveling employee,” under workers’ compensation law. According to St. Gobain, only a “regular” worker (one with a permanent job or one of indefinite duration) sent on a business trip, or a worker whose regular job involves continuous travel, such as a trucker or a flight attendant, meets the definition of “traveling employee.” Pet. 12-14. St. Gobain cites to no cases, however, where such a distinction is drawn.

No “traveling employee” cases do make a distinction between a worker traveling away from home for a job that is time-limited, or temporary, and a worker whose job is open-ended, or permanent, or entails continuous travel. St. Gobain concedes that the worker in *Chicago Bridge* – as relied on by the *Ball-Foster* Court – was precisely the same kind of worker as Giovanelli, i.e., a worker hired to travel out of state for a time-limited job. Pet. 15. No distinction as to duration of job was drawn in *Chicago Bridge* (618 N.E.2d at 1148-49).⁷ The *Chicago Bridge* Court found coverage solely because he was a “traveling employee.” *Chicago*

⁷ Nor did the *Chicago Bridge* case turn, as St. Gobain suggests (Pet. 14), on the singular fact that the worker’s employer was reimbursing travel expenses. Under Illinois law, unlike Washington law, there is no exception to the going and coming rule based on reimbursement of travel expenses, the exception applies only if the worker is paid for time spent traveling. 618 N.E.2d at 1148.

Bridge 618 N.E.2d at 1148. A salient fact for the *Chicago Bridge* Court, as it should be here, was that a contract of hire, requiring travel, indeed travel either paid for or reimbursed by the employer, was entered into before the worker entered travel status, under a long-standing arrangement between the worker and the employer. *Chicago Bridge*, 618 N.E.2d at 1147-49; *Ball-Foster*, 128 Wn. App. at 852-53. Neither the decision in that case, nor the Court of Appeals decision in this case, represent any expansion of the “traveling employee” doctrine.

Nor is there any principled basis for excluding Giovanelli, or the *Chicago Bridge* worker, under the facts and circumstances unique to them both, from the “traveling employee” definition. That St. Gobain may not have enough furnace rebuild work to make it economically viable to keep a masonry crew permanently employed on a full-time basis does not mean, when it hires a masonry crew to travel to one of its plants because the special expertise needed to do the work is not locally available, that it can evade responsibility for workers’ compensation benefits when one of those traveling employees is injured. As the *Shelton* Court held, quoting *Wright v. Industrial Commission*, 62 Ill.2d 65, 338 N.E.2d 379, 381 (1975):

[There is] no rational basis to distinguish between the employee who is continuously traveling and one who travels to a distant job location only to return when the

work is completed. . . [i]t would be inconsistent to deprive an employee of benefits of workmen's compensation simply because he must travel to a specific location for a period of time to fulfill the terms of his employment and yet grant the benefits to another employee because he continuously travels.

Shelton, 90 Wn. App. at 936.

The respondents in *Shelton* further argued, as does St. Gobain here (Pet. 11), that a long-term, though temporary, assignment in another state means that the workers become workers of the new state and are not "traveling employees." *Id.* at 932, 936. The *Shelton* Court specifically rejected that argument. It pointed out that a majority of jurisdictions hold that employees whose work entails travel remain traveling employees throughout the duration of their trip. *Id.* at 936 (citing *Wright*, 338 N.E.2d at 381) (5 to 6 month assignment out of state does not change status); *see generally Larson's*, § 25.00, pp. 5-282-83 (2000).

The *Ball-Foster* Court's application of the "traveling employee" doctrine here is not a departure in any sense from the analysis in *Shelton*. Both cases correctly found that the workers were "traveling employees" and thus within the course of employment when injured.

B. A reasonable personal errand undertaken by a "traveling employee" for his personal comfort does not demonstrate an intent to abandon the course of employment.

St. Gobain concedes that the traveling employee doctrine extends

coverage to such activities as “sleeping in hotels or eating in restaurants.” Pet. 17 (citing *Larson’s* § 25.00).⁸ Common sense dictates the conclusion that a mere walk from one’s hotel to a nearby park, is no more a departure on a “distinctly personal activity” than sleeping in a hotel or eating in a restaurant. Nevertheless, St. Gobain asserts that this activity should be excluded on grounds that (1) Giovanelli walked against the light and thus was engaged in “inherently dangerous” activity (Pet. 19), and (2) Giovanelli’s walk to the park was a “non-essential personal errand” or “a purely recreational activity.” (Pet. 17-19).

First, nothing in the record shows that Giovanelli walked against the light. Giovanelli testified that he did have permission to walk. BR Giovanelli at 17. Champ did not notice. BR Champ at 47.

Second, St. Gobain’s argument for a subjective “non-essential personal errand” and/or “purely recreational activity” exception to coverage for traveling employees would appear to broadly exclude from coverage most personal errands and all recreational activity without regard for whether the errand or activity objectively demonstrated an intent to

⁸ St. Gobain notes that when injured Giovanelli was not on the job site, not doing a specific work task, and not acting at St. Gobain’s specific direction (Pet. 8) but concedes that these facts have no relevance for a “traveling employee.” Pet. 9-17. A worker in “traveling employee” status, who has not otherwise abandoned that status is, as a matter of law, furthering his employer’s interests *by virtue of his travel status alone* – not because of the particular nature of his activity at the time of injury. *Shelton*, 90 Wn. App. at 937; *Ball-Foster*, 128 Wn. App. at 854.

abandon the course of employment. The majority of jurisdictions apply a reasonableness test to determine whether the personal activity in question demonstrates such an intent. *See, e.g., Garver v. Eastern Airlines*, 553 So.2d 263 (Fla. 1989) and cases cited therein. Thus,

The rule that has evolved . . . and which is now generally applied in those jurisdictions addressing the issue is stated as follows: Where an employee, as part of his duties, is directed to remain in a particular place or locality until directed otherwise or for a specified length of time “the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any reasonable activity at that place, and if he does so the risk inherent in such activity is an incident of his employment.” [T]he test as to whether specific activities are considered to be within the scope of employment or purely personal activities is the reasonableness of such activities. Such an employee may satisfy physical needs including relaxation.

Garver, 553 So.2d at 267.⁹ *See also Larson’s*, § 25.00.

Nowhere does *St. Gobain* cite to any authority suggesting that a walk to a nearby park is an unreasonable activity for a “traveling employee.” Given the many “traveling employee” cases that find that

⁹ Citing: *Cavalcante v. Lockheed Electronics Co.*, 204 A.2d 621 (N.J. Super.Ct. Law Div.1964) (injured in auto accident following several hours of drinking and dancing); *Robards v. New York Div. Elec. Prods., Inc.*, 307 N.Y.S.2d 599 (App.Div.1970) (injured in auto accident following playing pool and drinking); *Schneider v. United Whelan Drug Stores*, 135 N.Y.S.2d 875 (App.Div.1954) (death benefits approved for next of kin of worker who drowned in boating accident during a layover); *Slaughter v. State Accident Ins. Fund Corp.*, 654 P.2d 1123 (Or.App.1982) (long-haul truck driver injured during fight in a bar during a layover); *Roadway Express, Inc. v. Workmen’s Compensation Appeal Bd. (Seeley)*, 532 A.2d 1257 (Pa. Commw.Ct.1987), appeal denied, 519 Pa. 662, 546 A.2d 623 (1988) (truck driver struck by motorist while walking across highway to his motel following several hours of drinking and eating at a bar-restaurant). *Id.* at 267.

activities far more personal and recreational do not take one outside the scope of coverage for a “traveling employee,” under a reasonableness analysis, there is no basis here for determining that the Court of Appeals decision in any way distorts the “traveling employee” doctrine.¹⁰ For every case cited by St. Gobain in support of its contention that Giovanelli had abandoned the course of employment status afforded a “traveling employee” by engaging in the personal activity of walking to a nearby park, several other cases may be cited for the opposite conclusion. *See Larson’s* § 25.00.

C. Public policy does not militate against application of the traveling employee doctrine here; liberal construction, deference to agency construction, and fairness all favor its application.

In what appears to be a public policy argument, St. Gobain suggests that under the Court of Appeals decision large numbers of highly skilled workers who perform specialized, short-term work 1) will come within the definition of “traveling employees,” 2) will become injured, and 3) will receive benefits not provided to the fixed, full-time, permanent

¹⁰ St. Gobain relies heavily on *Dep’t of Labor & Indus. v. Johnson*, 84 Wn. App. 275, 928 P.2d 1138 (1996) for the proposition that engaging in personal activity takes one out of the course of employment. Pet. 8, 17. The *Johnson* decision is not only irrelevant, it is also *sui generis*. Johnson, a State worker suspended with pay for disciplinary reasons, and ordered to stay home during regular work hours and do no State work, was injured doing a personal woodworking project. *Id.* at 277. He boldly applied for workers’ compensation claiming to be doing just as his employer ordered when he was injured. *Id.* The Court of Appeals rejected his strained argument. *Id.* at 280. *Johnson* thus has nothing to do with the “traveling employee” doctrine.

workforce in Washington. Pet. 16. There is nothing in the record, however, from which one can assess the validity of St. Gobain's speculative assertion.

Even assuming some support for such speculation, it must be remembered that the Industrial Insurance Act is to be liberally construed. RCW 51.12.010; *Bolin v. Dep't of Labor & Indus.*, 114 Wn.2d 70, 72, 785 P.2d 805 (1990) (relying on liberal construction standard in holding that juror was county employee and in course of employment when driving home from jury duty). "Denying benefits to employees simply because they leave their hotel rooms . . . while on a trip for their employers does not comport with [the liberal construction] principle." *Eversman v. Concrete Cutting & Breaking*, 614 N.W.2d 862, 872 (Mich. 2000) (Kelly, J., dissenting). Moreover, deference is given to interpretations of the Act by both the Department and the Board. *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991). St. Gobain should take its public policy argument to the Legislature.

St. Gobain is equally unpersuasive when it asserts that the Court of Appeals decision here results in an unfair disparity of treatment for traveling versus non-traveling workers. Pet. 17. St. Gobain overlooks that the court-developed "traveling employee" rule balances the employer's

special need for a mobile employee against the inherent unfairness that otherwise runs against the employee required to travel.

When a worker permanently residing in Washington in proximity to a permanent, full-time job has a regularly scheduled day off, that worker has a wide range of activities in which to engage, and significant control over risks of non-work activity. He or she may stay within the confines of home, may do household chores, yard work, take a family trip, or visit with nearby friends and family. This is not the case for the worker who has traveled far from home. The traveling employee cannot control risks to the same extent, the traveler's chores go undone, and friends and family are far away. One cannot work non-stop without respite, and a traveling employee cannot be expected to do nothing when not working. Indeed, St. Gobain's payment of per diem for days off, and the lack of restriction placed on Giovanelli's activities on days off, shows St. Gobain's recognition of the unique circumstances in which they place their travelers. At the same time, the reasonableness test imposed with respect to off-duty activities also protects the employer's interests. The Court of Appeals decision here is not unfair.

St. Gobain would have the Court infer, because there are few cases on all fours with the circumstances here, and in *Chicago Bridge*, that the decisions here and in *Chicago Bridge* are "unprecedented expansion[s]" of

the “traveling employee” doctrine. Pet. 16. It is just as reasonable to infer from the limited number of such cases, however, that the circumstances rarely arise, and, when they do, employers have not contested the right of such workers, enduring the inconvenience and hazards of travel, to coverage as “traveling employees.”

Workers’ compensation course-of-employment cases are very fact-specific. No one test to determine whether a claimant meets the criteria for coverage, under the totality of the circumstances, can apply to every factual scenario. *Werden v. Ohio Bur. of Workers’ Comp.*, 786 N.E.2d 107, 113 (Ohio App. 2003). Under the totality of the circumstances present in this case, however, the undisputed facts fully justify the identical determinations of the Department, the Board, the superior court, and the Court of Appeals that Giovanelli was, as a matter of law, a covered “traveling employee” when he was injured.

VI. CONCLUSION

Washington, as does a majority of jurisdictions, recognizes that when workers are required by their employers to travel to distant jobsites, unless they are pursuing a distinctly personal activity demonstrating an intent to abandon the course of employment, they are within the course of their employment throughout the trip. *Shelton*, 90 Wn. App. at 933-34, 938. Like the worker in *Chicago Bridge*, Giovanelli was a “traveling

employee”, not a local hire or an itinerant worker as contended by St. Gobain (Pet. at 2-3, 14-16), because he 1) was contacted by St. Gobain’s agent at home in Pennsylvania and offered work in Seattle, an offer he accepted, 2) was paid an hourly wage for his travel time to and from Seattle and reimbursed for expenses incurred while traveling, 3) had to make his travel arrangements through St. Gobain, and 4) received per diem, in addition to wages, for each day away from home including Sundays. Nor can it be seriously contended that a simple walk to a nearby park is not reasonably incidental to personal comfort, or is such a risky and foreign activity that it demonstrates an intent to abandon the scope of course-of-employment coverage. Accordingly, the Department requests that this Court affirm the Court of Appeals decision that affirmed the decisions of all of the tribunals below and allow Giovanelli’s claim.

RESPECTFULLY SUBMITTED this 23rd day of May, 2006.

ROB MCKENNA
Attorney General



Beverly Norwood Goetz
Senior Counsel
WSBA # 8434
Office of the Attorney General
900 Fourth Avenue #2000
Seattle, WA 98164-1012
(206) 464-6746