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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON

BALL FOSTER GLASS CONTAINER COMPANY,

Petitioner,

v.

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

Respondents.

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

The Washington Legislature made a policy decision to limit industrial insurance coverage to workers injured in the “course of employment.” RCW 51.08.013. This rule treats both businesses and workers fairly so that out-of-state workers who travel to Washington are not covered around-the-clock while Washington residents are covered only while in the course of their employment.

The Court of Appeals disregarded this legislative mandate and applied the “traveling employee” doctrine to hold that Giovanelli was covered by the Industrial Insurance Act when he was hit by a car on his way to a concert in a park on a Sunday. The “traveling employee” doctrine has not been adopted by this Court and should not be used to extend statutory coverage. Rather, industrial insurance coverage should remain dependent on the statutory criteria of “acting in the course of employment.”

Even if the Court chooses to adopt the “traveling employee doctrine,” Giovanelli is not entitled to coverage because (1) he was an “itinerant” worker who voluntarily relocated to accept suitable work and not the type of worker to whom this doctrine has been applied; and (2) Giovanelli was acting for his own personal benefit, and not the benefit of his employer, when he crossed the street against the light to attend a

concert in a park on a Sunday; consequently he falls outside the scope of the traveling employee doctrine.

## II. ISSUES PRESENTED FOR REVIEW

- A. Did the Court of Appeals err in concluding as a matter of law that Giovanelli was “in the course of employment” within the meaning of the industrial insurance act, RCW Title 51, when he was injured off of his employer’s premises on a scheduled day off?
- B. Did the Court of Appeals err in expanding the scope of the “traveling employee” doctrine in Washington to cases where an itinerant or transient worker is hired locally for a specific job and is neither a regular employee of the business on a business trip nor in the act of traveling at the time of injury?
- C. Assuming Giovanelli is a “traveling employee,” should his claim be rejected because he was pursuing a personal activity at the time of his injury?

## III. STATEMENT OF THE CASE

Alfred Giovanelli began working as a union bricklayer in 1955 and pursued that career for 46 years. BR Giovanelli at 11.<sup>1</sup> He eventually specialized as a firebrick mason and built furnaces for the glass and steel industries. *Id.* By 2001, Giovanelli was 66 years old and was semi-retired. *Id.* He had worked for only six weeks in 2001, prior to the car accident of August 12, 2001. BR Smith at 14-15.

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<sup>1</sup> Citations to the Certified Appeal Board Record (“CABR”) will be as follows: For testimony at hearing at the Board of Industrial Insurance Appeals on April 25, 2003, BR followed by the name of the witness and the hearing or deposition transcript page number; for other matters in the CABR BR and the large machine-stamped page number. Exhibits contained in the CABR will be referred to as BR exhibit and the number.

In August 2001, Saint Gobain hired union bricklayers to rebuild a glass furnace in Seattle. BR Smith at 8. Saint Gobain had a contract with the international bricklayer's union which dictated that half the masons on the project could be hired out of the local union hall and half of the masons would be referred by Sonny Champ Refractories, a company with which Saint Gobain contracted to provide labor and supervision for furnace rebuilds. BR Champ at 43, 62.

When the local and out-of-state masons showed up for work at the Seattle plant, they all completed new-hire paperwork. BR Smith at 9, BR Dirlim at 74. All of the employees were hired as Washington employees and deductions taken from paychecks were paid to Washington State. BR Champ at 43, 62. Saint Gobain also made direct contributions to the Local No. 1 bricklayers union. BR Smith at 9, BR Dirlim at 74. In addition, pursuant to the union contract, St. Gobain paid for travel to and from the jobsite for out-of-state masons. BR Ex. 8, BR Smith at 30. Finally, per the union contract, masons received a daily subsistence allowance of \$78 per day that could be used for any purpose. BR Ex. 8, BR Giovanelli at 20. Masons did not receive the same benefits as the Saint Gobain employees. Saint Gobain employees received fringe benefits such as medical, dental, life insurance, and 401K; masons were not entitled to

those same benefits. BR Smith at 9. Giovanelli also did *not* get reimbursed for actual costs of hotel and meals. BR Smith at 24.

Giovanelli was not scheduled to work on Sunday, August 12, 2001, the date of his injury. BR Giovanelli at 15-16. Although Giovanelli worked six days a week on the Saint Gobain job, he did not work on Sundays. BR Peters at 9. On that Sunday, he went to a flea market and later returned to his hotel room to watch NASCAR races. BR Champ at 45; BR Giovanelli at 16. He later decided to attend a concert in the park and left his hotel, which was not located near his employer's premises, to attend the concert. BR Champ at 45, BR Ex. 9 at 3. While crossing the street to go to the park, Giovanelli failed to determine whether he had the benefit of a signal, stepped into the street, and was struck by a car. BR Ex. 9 at 4, 7.

The Department of Labor and Industries accepted Giovanelli's claim for benefits. BR 41. Saint Gobain appealed to the Board of Industrial Insurance Appeals arguing that Giovanelli was not acting within the course of employment when he was hit by his car while attending a concert on his day off. BR 43. After hearings, the Board affirmed the Department's decision. BR 31-40. Saint Gobain appealed to the King County Superior Court, which granted summary judgment affirming the

Board decision. CP<sup>2</sup> 1, 23, 47. Saint Gobain appealed and the Court of Appeals, Division I, affirmed. *See* Appendix A.

#### IV. ARGUMENT

**A. The Court of Appeals erred in holding that Giovanelli was in the “course of employment” when he was injured.**

The Legislature limited industrial insurance coverage to those employees who are injured while in the course of employment. RCW 51.08.013(1). A worker is acting in the course of employment when he is:

acting at his or her employer’s direction or in the furtherance of his or her employee’s business, which shall include time spent going to and from work on the jobsite, as defined by 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.

RCW 51.08.013(1).

Case law interpreting this statute holds that a worker is acting in the course of employment when he is acting at his employer’s direction or in furtherance of his employer’s business. *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 940 P.2d 685 (1997). In *Hama Hama Logging Co. v. Dep’t of Labor & Indus.*, 157 Wn. 96, 288 P. 655 (1930), Mr. Spears, a logger, was required to sleep and board at a logging camp because the place where the work needed to be performed was in a very remote location. *Id.* at 97. The logging company maintained a speeder

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<sup>2</sup> The employer will use the initials CP to designate the clerk’s papers.

that would transport the workers to another camp or into town where they could enjoy a day of leisure. *Id.* On a Sunday, Mr. Spears took the speeder to Eldon for recreation. *Id.* On the trip, the speeder collided with a logging train and Mr. Spears was injured. *Id.* The Supreme Court held that Mr. Spears was not within the course of employment when the accident occurred and was not entitled to benefits – even though he was injured using his employer’s speeder. *Id.* at 99. Of importance to the court was that Mr. Spears was not on duty as he had concluded work at 5:00 p.m. on Saturday, the day before, and was not required to report to work until Monday at 7:30 a.m. *Id.* No one had supervision over him, he was not receiving pay when he was injured, and the trip was being commenced for his own personal reasons. *Id.*

The facts of *Hama Hama* are very similar to the Giovanelli case, and the holding in *Hama Hama* should apply. Giovanelli was not required to work the Sunday he was injured, he was not being paid to work on Sunday, and he went to the park to attend a concert for his own personal pleasure and not for the benefit of his employer. Giovanelli did not wear a pager and there is no evidence in the record to support an inference that he was required to be on duty that Sunday. BR Giovanelli at 31-3, BR Peters at 20. Giovanelli was doing something solely for his own benefit on his own time and thus was not injured in the course of employment.

In contrast, in *Ackley-Bell*, the court held the worker was within the course of her employment when she attended a union collective bargaining agreement meeting and was injured when she went to retrieve some boxes from another union member's car. 87 Wn. App. at 162. The court ruled that she was in the course of her employment because the union meeting was in furtherance of the employer's interest in promoting continued improvement of the relationship between public employees and their employers. *Id.* at 167. There is no evidence in the record that Giovanelli was doing anything in furtherance of his employer's interests by attending a concert in the park.

The Court of Appeals Division II in *Department of Labor & Indus. v. Charles Johnson*, 84 Wn. App. 275, 928 P.2d 1138 (1996), held that a Department of Corrections employee was not in the course of employment when the worker, who was on administrative leave for disciplinary reasons, accidentally amputated his fingers during his workshift while working on a personal project at home. *Id.* at 1139. The court commented that Washington's system does not have an "arising out of employment" requirement for determining coverage, thus cases from other jurisdictions are not helpful when determining when a worker is in the course of employment. *Id.*

To arrive at its holding, the *Johnson* Court relied on the reasoning in *Tipsword v. Dept' of Labor & Indus.*, 52 Wn.2d 79, 80, 323 P.2d 9 (1958). In *Tipsword*, the worker was employed as an oil truck driver and was injured when he walked across a bridge and came in contact with a high voltage cable on his way to eating his lunch in the shade away from the jobsite. *Id.* The Court determined that he was not in the course of employment when he was electrocuted even though the nature of the work required that the workers eat at the jobsite. *Id.* Even though RCW 51.32.015 has since been modified, the Court in *Johnson* held the reasoning in *Tipsword* is still valid and persuasive.

The *Johnson* court reflected that it is imperative to look at the employee's specific activity at the time of the injury. 184 Wn. App. at 280. In *Johnson*, the operation of the power saw was not required by his employment contract, his employer did not direct him to build the drawer, and the project was not in furtherance of the employer's interests. *Id.* at 280. This Court should continue to apply RCW 51.32.015 and hold that employers are only responsible for injuries that occur in the course of employment.

**B. The Court of Appeals erred in expanding the scope of the “traveling employee” doctrine in Washington to cases where an itinerant or transient worker is hired locally for a specific job and is neither a regular employee of the business on a business trip nor in the act of traveling at the time of injury.**

The “traveling employee” exception holds that employees who are required by their employers to travel to distant jobsites are within the course of their employment throughout the trip, unless they are pursuing a distinctly personal activity. *Shelton v. Azar*, 90 Wn. App. 923, 954 P.2d 352 (1998), citing Arthur & Lex Larson, *Larson, Workers’ Compensation Law* § 25 (1990). The traveling employee doctrine provides coverage for workers who are injured when, out of necessity for their job, they are sleeping in hotels or eating in restaurants. *Id.* The doctrine is predicated on the premise that injuries occurring during business travel while attending to reasonable necessities do not take the employee out of the scope of employment. *N&L Auto Parts Co. v. Doman*, 111 So. 2d 270, 271 (1959).

This Court has never adopted the “traveling employee” doctrine. Division I of the Court of Appeals adopted the doctrine in *Shelton*, in a case that merely extended the benefits of Washington law to out-of-state workers injured here. In *Shelton*, Reed and Shelton were coworkers in a California company who were sent by their employer to Washington on a business trip. *Id.* at 926. They flew to Seattle, rented a car which was

paid for by their employer, and were on their way to their hotel, also paid for by their employer, when they were hit by a taxi. Shelton was injured and received workers' compensation benefits. He then sued Reed and the driver of the taxi for negligence. *Id.* The court held that Reed was in the course of employment under the "traveling employee" doctrine, and thus was immune from liability for his co-worker's injuries under RCW 51.24.030(1). *Id.* at 931.

*Shelton* is factually distinguishable from *Giovanelli's* case. First, *Shelton* arose in the context of immunity for damages in a civil case, not a worker's claim for benefits. Further, the facts of Reed's employment situation are distinctly different from *Giovanelli's*. Reed and Shelton were California employees sent on a business trip to Washington State as part of their jobs for the California company. They are analogous to Saint Gobain employee Ernie Peters, who was on a business trip in Washington to supervise the rebuild project. BR Peters at 4. Reed and Shelton remained on the payroll in California during the trip and were expected to return to their regular jobs at the end of the trip. They were never Washington employees like the masons hired by Saint Gobain. In contrast, *Giovanelli* chose to come to Washington to obtain work, and he received incentive pay to come and hire on for the job. He was not a Saint Gobain employee at the time the work was offered, and was to be laid off at the end of the

Seattle project. The facts show that Giovanelli was a temporary or transient Washington employee, whereas Reed and Shelton were California employees.

Third, *Shelton*, like the cases it relied on, was a case in which the accident occurred while the employee was engaged in actual paid travel. Although Washington workers are generally not paid while “coming and going” to work, they are covered if that travel is paid for by the employer. See *Puget Sound Energy v. Adamo*, 113 Wn. App. 166, 52 P.3d 560 (2002); *Westinghouse Elec. Corp. v. Dep’t of Labor & Indus.*, 94 Wn.2d 875, 621 P.2d 147 (1980), *Aloha Lumber Corp. v. Dep’t of Labor & Indus.*, 77 Wn.2d 763, 466 P.2d 151 (1970). Thus, workers like Shelton and Reed who are traveling in a rental car provided by an employer are covered in Washington without the need to resort to the “traveling employee” doctrine. By using the “traveling employee” analysis, the Shelton decision merely concludes that the existing rule for Washington workers also applies to out-of-state workers temporarily here on business trips.

The *Shelton* decision did not give out-of-state employees greater benefits than Washington workers have under Washington law. In contrast, the Court of Appeals’ decision in *Giovanelli* extends greater scope of coverage to non-resident Washington workers than to similarly

situated Washington workers who reside here. Giovanelli's co-workers hired out of the local Seattle union hall surely were not covered during recreational activities on that same Sunday; they were only covered during the "course of employment." There is no policy reason why a tradesperson who accepts work beyond his home state should have a broader scope of coverage than his resident co-workers when he is engaged in recreational activity.

The Department, in its brief below, conceded that there was little Washington case law on point with regard to the traveling employee doctrine and relied upon the out-of-state case of *Chicago Bridge & Iron Inc., v. Indus. Comm'n*, 248 Ill. App. 3d 687, 618 N.E.2d 1143 (1993). *Chicago Bridge* is clearly distinguishable from Giovanelli. In *Chicago Bridge*, the claimant filed for benefits in his home state of Illinois, not in Michigan where he was injured. In this case, Giovanelli is not filing for benefits in Pennsylvania for an out-of-state business trip to Washington. Instead, he is seeking coverage in Washington; Giovanelli is a Washington worker seeking coverage in Washington, but to find such coverage would give him greater coverage than similar workers residing here.

In addition, the claimant in *Chicago Bridge* was engaged in the travel activity at the time of injury. He was in his car just 200 yards from the worksite and he was furthering the employer's business by carrying

tools to the work site. And finally, he was paid for travel mileage and so would have been covered in Washington without resort to the traveling employee doctrine. *See e.g., Aloha*, 77 Wn.2d at 766. As in *Shelton*, the worker's circumstances of employment in *Chicago Bridge* are different from Giovanelli's. One of the factors the court relied on in *Chicago Bridge* is that the claimant had worked exclusively for that employer for 19 years. *Id.* at 578. The court noted that a different result may have been reached if the worker was not working strictly for that employer for such a long period of time. *Id.*

Although Giovanelli had worked for Saint Gobain in the past, he was hired out of the union hall and had worked for other employers. BR Giovanelli at 12. Giovanelli was recruited by Sonny Champ, not by Saint Gobain. BR Giovanelli at 27. When Mr. Champ arrived in Seattle, he gave Ernie Peters, the project manager, a list of bricklayers that were expected to work, including Giovanelli, who was hired along with local masons as a Washington employee. Giovanelli was free to turn down this job. BR Dirlim at 73. Mr. Champ maintained a list of 60 to 65 masons for the very reason that many workers turned down the opportunity to work for a variety of reasons.

Because Saint Gobain hires masons from the union and because the hourly rates are set by local union contract where the work is to occur,

employers may offer pay incentives to draw workers to their projects. The union contract provides that a per diem will be paid "to help defer the costs of living away from home." BR Ex. 8. This per diem method of compensation distinguishes the masons from Saint Gobain employees on a business trip. In Giovanelli's case, travel pay and per diem were not paid in advance but rather paid to masons after arrival. BR Smith at 23. On the other hand, Saint Gobain employees on business trips charge travel expenses through the corporate office. Hotel and meal expenses are charged to their corporate American Express card and receipts submitted for payment. BR Smith at 24. BR Dirlim at 75. If a regular Saint Gobain employee chose to stay with a friend or relative on a trip, they are not paid for the cost of the hotel. BR Smith at 24. Yet, masons pocket their per diem even if they stay with a relative. *Id.*

In 2001, Giovanelli was a semi-retired mason who supplemented his income by working a few weeks a year. By traveling outside of Pennsylvania to find work, he could earn premium pay. BR Champ at 43. The fact that Saint Gobain offers economic incentives to ensure a sufficient work force in a particular locale does not render Giovanelli a traveling employee and not an itinerant worker. The payment of per diem, payment for traveling hours and travel costs to a fire brick mason are no different from other pay incentives: paying moving costs to lure an

executive or subsidizing temporary housing with per diem as incentive to farm workers to show up for a cherry harvest. Under the theory of the Court of Appeals decision in this case, subsidizing farm worker housing costs by paying per diem will result in full around-the-clock coverage, including recreational activities on days off, for workers who travel from California for the harvest, but not for resident Washington workers. We know that Washington workers are sometimes paid for housing and that the value of such payments are considered for purposes of time loss compensation. See, e.g., RCW 51.08.178; *Cockle v Department of Labor and Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001). Such payments have never expanded coverage beyond course of employment, however.

Giovanelli's activities of crossing the street on a Sunday afternoon to go to a concert in the park should not be covered to a greater extent than the local Seattle masons on the project who were hired at the same time for the same job. There is no doubt that if the local masons sustained the same injury on their day off, they would not be considered in the course of employment; neither should Giovanelli.

**C. Giovanelli was performing a distinctly personal activity at the time of his injury and was thus not covered by the traveling employee doctrine.**

The "traveling employee" doctrine extends coverage only to activities that are necessary as part of a business trip such as traveling by

rental car to a hotel, sleeping in a hotel, or eating at a restaurant. *Larsons, supra*, section 25. For instance, in *Toal Assoc. v. Workers' Comp. Appeal Bd.*, 814 A.2d 837, 842 (2003) the court held that an employee was covered by the traveling employee doctrine when he was injured taking a bath in his hotel. In *Hamm v. USF Red Star*, 727 N.Y.S.2d 714, 284 A.D.2d 793 (2001), the New York court found that an employee was entitled to workers' compensation benefits when he was crossing the street from the hotel to a restaurant to eat a meal.

In contrast, courts across the country have determined that the "traveling employee" doctrine does not apply when a worker is engaged in non-essential personal errands during their trip. In *Eversman v. Concrete Cutting & Breaking*, 463 Mich. 86, 614 N.W.2d 682 (2000) the worker's claim was denied when he was struck by a car while crossing a street after bar hopping. In another case, a worker's claim was denied when he was trying to find a place to watch a football game and he was killed crossing the service road near his motel. See, *Crofford v. JB Hunt Transp., Inc.*, 692 So. 2d 837 (1996). In facts similar to this case, in *Evans v. Consumer Programs Inc.*, 849 S.W.2d 183 (1993), the claim was denied while the traveling employee, who received a per diem, was injured in a car accident while sightseeing. The *Evans* court found that the excursion was for personal reasons and outside the scope of his employment. *Id.* at 188.

Similarly, in *Carr v. Workmen's Comp. App. Bd.*, 671 A.2d 780 (1995), the court denied the claim for injuries sustained while sightseeing and drinking on the grounds that the injury was not sustained in the course of employment. In *Wilson v. United Auto Worker' Int'l Union*, 441 S.W.2d 475 (1969), a claim for benefits was denied when a union representative was on an out-of-town trip and drowned in a local pool. It did not matter to the court that the worker received per diem expenses and was on call 24-hours per day in making the decision to deny benefits. *Id.*

**1. The Department's own WAC mandates that Giovanelli's claim should be denied.**

The Department has established criteria for determining when a worker is covered by industrial insurance while on travel status. WAC 296-27-01103 (f) provides:

**How do I decide whether an injury or illness is work-related if the employee is on travel status at the time the injury or illness occurs?** Injuries and illnesses that occur while an employee is on travel status are work-related if, at the time of the injury or illness, the employee was engaged in work activities "in the interest of the employer." Examples of such activities include travel to and from customer contacts, conducting job tasks, and entertaining or being entertained to transact, discuss, or promote business (work-related entertainment includes only entertainment activities being engaged in at the direction of the employer).

Injuries or illnesses that occur when the employee is on travel status do not have to be recorded if they meet one of the exceptions listed below.

If the employee has:

You may use the following to determine if an injury or illness is work-related.

- Checked into a hotel or motel for When a traveling employee checks in

one or more days

to a hotel, motel, or into another temporary residence, he or she establishes a "home away from home." You must evaluate the employee's activities after he or she checks into the hotel, motel, or other temporary residence for their work-relatedness in the same manner as you evaluate the activities of a nontraveling employee. When the employee checks into the temporary residence, he or she is considered to have left the work environment. When the employee begins work each day, he or she reenters the work environment. If the employee has established a "home away from home" and is reporting to a fixed worksite each day, you also do not consider injuries or illnesses work-related if they occur while the employee is commuting between the temporary residence and the job location.

• Taken a detour for personal reasons

Injuries or illnesses are not considered work-related if they occur while the employee is on a personal detour from a reasonably direct route of travel (e.g., has taken a side trip for personal reasons).

*Id.* (emphasis added).

Applying the department's own definition for determining whether a worker is covered while in a hotel, the WAC provides that a worker is not covered while on a personal detour. In this case, there is no argument that Giovanelli was on a personal trip on a Sunday afternoon to engage in

relaxation and entertainment. He falls within the department's own example of the type of activities that are not "within the scope of employment". The department's position on appeal is inconsistent with its own WAC and policy.

RCW 51.08.013(b) also supports Saint Gobain's position. The statute is clear that an employee's participation in social, recreational, athletic activities or events, and parties are not within the course of employment, unless the activity occurs during the employee's working hours, or the employee was paid to participate, or the employer directed the employee to participate, or the employee reasonably believed they were so directed. It is well-settled that Saint Gobain did not direct Giovanelli to attend the concert in the park nor did Saint Gobain pay for the concert in the park. Applying the plain language of the statute to the facts of this case, it is evident that Giovanelli was not within the course of employment when he walked across the street to attend a concert.

Unlike the workers in *Shelton, supra*, Giovanelli was not injured while traveling to this state or traveling to work from the airport or his hotel. He was not injured on the plane or in a rental car paid for by the employer. He was not injured in his hotel, eating a meal, or on his way to eating a meal. In short, he was not injured doing any activity necessitated by his travel status. It was a Sunday, his day off, he was free to do

anything he chose to do. He was injured while en route to a purely recreational activity. His employer had no control over what Giovanelli chose to do on his day off, and the activity that he chose had no business purpose.

The Department and Giovanelli argue that if an employee is "traveling" then he is covered twenty-four hours a day, seven days per week, for the duration of the trip, regardless of the nature of his activity. There is no authority in Washington law to hold that an employee is covered around-the-clock. The court in *Shelton* did not reach this issue because the employee was actually traveling to his hotel in a rental car paid for by his employer.

#### V. CONCLUSION

The employer requests that this Court reverse the Court of Appeal's decision and hold that Giovanelli was not acting in the course of his employment when he was walking to a concert in a park on a day off.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of May, 2006.

KEEHN ARVIDSON, PLLC

  
AMY ARVIDSON FILED AS ATTACHMENT  
WSBA# 20883 TO E-MAIL  
ATTORNEY FOR EMPLOYER

# APPENDIX A

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

BALL-FOSTER GLASS CONTAINER CO.,	)	DIVISION ONE
	)	
Appellant,	)	No. 54969-3-1
	)	
vs.	)	
	)	<b>PUBLISHED OPINION</b>
ALFRED GIOVANELLI and THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,	)	
	)	FILED: August 8, 2005
Respondents.	)	
	)	

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**BAKER, J.** — Alfred Giovanelli was a firebrick mason brought to Seattle by Ball-Foster Glass Container Company, a subsidiary of St. Gobain Corporation, to work on rebuilding a glass furnace. One Sunday when he was not working, Giovanelli set out to listen to music in a park near his hotel. On the way, he was hit by a car and gravely injured. The Department of Labor and Industries granted his claim for an industrial injury. St. Gobain unsuccessfully appealed to the Board of Industrial Insurance Appeals, then appealed to superior court and lost on summary judgment. St. Gobain argues that the court erred because issues of material fact exist. Because no issues of material fact exist, and because Giovanelli was acting in the course of employment when he was injured, we affirm.

I.

Alfred Gionavelli is a life-long resident of Bell Vernon, Pennsylvania. He worked most of his life as a mason, and in 1970 he began to specialize as a firebrick mason, which meant he built furnaces for glass and steel industries. Each job takes approximately three to seven weeks to complete. For the five years immediately before his accident, Giovanelli accepted only job offers from St. Gobain Corporation. In the year before his accident, Giovanelli worked on five furnaces for St. Gobain.

Royce "Sonny" Champ is the owner and sole employee of Sonny Champ Refractories. Sonny Champ Refractories provides St. Gobain with masons and supervisors for glass furnace rebuilds. Champ contacted Giovanelli and offered him a job working on a furnace in Seattle. Giovanelli accepted the position, but did not fill out paperwork until he arrived at the plant in Seattle. He and the other firebrick masons were hired as full-time, temporary employees of St. Gobain. They were paid from the Seattle plant's payroll. Deductions for unemployment tax were paid to Washington.

About three weeks into the Seattle job, Giovanelli was not scheduled to work on a Sunday. He watched television in his hotel room. He later went to a flea market and returned. Giovanelli and Champ decided to walk to a nearby park because they had seen a sign advertising music. On the way to the park, Giovanelli was hit by a car. He was seriously injured and left permanently blind.

Giovanelli applied for workers' compensation benefits, and the Department of Labor and Industries allowed the claim. St. Gobain appealed to

the Board of Industrial Insurance Appeals. Following a hearing, the industrial appeals judge issued a proposed decision and order affirming the Department's order. The judge stated that Giovanelli's employment circumstances with St. Gobain fell within the "traveling employee" doctrine. And as such, given the facts of his accident, his injury was covered as an industrial injury.

St. Gobain petitioned for review of the proposed decision and order, but the Board denied review and adopted the proposed decision and order as its final order. St. Gobain appealed to King County Superior Court. Giovanelli moved for summary judgment, which the court originally denied, but eventually granted. St. Gobain appeals.

## II.

"RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act."<sup>1</sup> Our inquiry is the same as that of the superior court "[w]hen a party appeals from a board decision, and the superior court grants summary judgment affirming that decision."<sup>2</sup> Summary judgment is properly granted when the evidence taken in the light most favorable to the non-moving party demonstrates no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>3</sup> Summary judgment is proper only if, from all the evidence, reasonable persons could reach but one

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<sup>1</sup> Stelter v. Dep't of Labor & Indus., 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

<sup>2</sup> Stelter, 147 Wn.2d at 707 (citing Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 451, 842 P.2d 956 (1993)).

<sup>3</sup> Stelter, 147 Wn.2d at 707 (citing CR 56(c); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993)).

conclusion.<sup>4</sup> And “[o]n issues of law, [we] may substitute [our] judgment for that of the agency; however, we accord great weight to the agency’s view of the law it administers.”<sup>5</sup>

St. Gobain argues that the court erred by granting summary judgment because several material facts were in dispute, including: 1) the nature and extent of Giovanelli’s pay; 2) whether he was a “local” hire; 3) whether he was a St. Gobain employee on a business trip; 4) whether his presence in Seattle on that Sunday was to accommodate St. Gobain or otherwise further St. Gobain’s interest; and 5) whether St. Gobain expected Giovanelli to remain in Seattle every Sunday to be available to work.

To determine whether material facts are in dispute, we must first decide under what theory to analyze Giovanelli’s case: the “traveling employee” doctrine, as did the Board, or some other theory like the “going and coming” rule.

It is well-established Washington law that “the guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.”<sup>6</sup> But the Act only provides coverage for industrial injuries incurred during the course of employment.<sup>7</sup>

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<sup>4</sup> Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

<sup>5</sup> Dep’t of Labor & Indus. v. Kantor, 94 Wn. App. 764, 772, 973 P.2d 30 (1999).

<sup>6</sup> Dennis v. Dep’t of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

<sup>7</sup> RCW 51.32.015; RCW 51.08.013.

In Shelton v. Azar, Inc.,<sup>8</sup> we recognized that the reasoning in Washington cases is consistent with the "traveling employee" rule.<sup>9</sup> Citing cases from multiple jurisdictions, we explained the rule as "[w]hen employees are required by their employers to travel to distant jobsites, courts generally hold that they are within the course of their employment throughout the trip, unless they are pursuing a distinctly personal activity . . . ."<sup>10</sup> We also quoted another iteration of the rule from Professor Larson's Law of Workmen's Compensation:

Employees whose work entails travel away from the employer's premises are held in the majority of jurisdiction[s] to be within the course of their employment continuously during the trip, except when a distinct department [sic] on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.<sup>11</sup>

Although the facts of Shelton did not strictly require us to adopt the doctrine, we follow Shelton and accept the "traveling employee" rule as consistent with Washington law. But before we apply the rule, we first must determine whether or not Giovanelli qualified as a "traveling employee."

The first three issues of material fact raised by St. Gobain relate to the question of whether or not Giovanelli was a "traveling employee." St. Gobain argues that the nature and extent of Giovanelli's pay is an issue of material fact. St. Gobain appears to argue that Giovanelli was not a traveling employee because he was paid from the local payroll, payroll taxes were paid in

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<sup>8</sup> 90 Wn. App. 923, 954 P.2d 352 (1998).

<sup>9</sup> Shelton, 90 Wn. App. at 932.

<sup>10</sup> Shelton, 90 Wn. App. at 933.

<sup>11</sup> Shelton, 90 Wn. App. at 933 (quoting Arthur Larson, Law of Workmen's Compensation § 25 (1990)).

Washington rather than Pennsylvania, and his expenses were paid in a different manner than were the expenses of permanent employees of St. Gobain.

Although these facts do distinguish Giovanelli from permanent employees who are required to travel at the behest of their employer, St. Gobain offers no authority that permanency of employment is a factor in the determination of whether an employee is a "traveling employee." Giovanelli was paid an hourly wage for eight hours to travel to Seattle. According to the mason's agreement, he was required to make his travel arrangements through St. Gobain. In addition to his regular wages, he received a per diem for each day away from home, including Sundays. The nature and extent of his pay did not create an issue of material fact because those facts lead to only one reasonable conclusion: he was a "traveling employee."

St. Gobain also argued that Giovanelli was an itinerant worker or a local hire, and thus not an employee on a business trip. But Giovanelli was not a wandering worker who happened to look for employment in our state. Instead, an agent of St. Gobain contacted him and offered him work in Seattle. Giovanelli accepted the offer. He traveled to Seattle at the expense of St. Gobain. He was paid for his travel time. These are not the type of arrangements made for an itinerant worker.

To determine whether or not Giovanelli was a local hire, we find instructive a similar analysis performed by the Appellate Court of Illinois in Chicago Bridge & Iron, Inc. v. Industrial Commission.<sup>12</sup> In Chicago Bridge, an employer contacted

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<sup>12</sup> 618 N.E.2d 1143 (1993).

an itinerant boilermaker-welder by telephone while the worker was in Illinois.<sup>13</sup> The employer offered the worker a job in Minnesota, and the worker accepted.<sup>14</sup> The court determined that the contract was made in Illinois because "[a] contract is made where the last act necessary to give it validity occurs."<sup>15</sup>

Similarly, Giovanelli was not a local hire. He was contacted before he came to Washington, and offered the job that he accepted. In Washington, "[t]he general rule is that a contract is considered as having been entered into at the place where the offer is accepted or where the last act necessary to a meeting of the minds or to complete the contract is performed."<sup>16</sup> We conclude that Giovanelli qualifies under the traveling employee rule.

During oral argument, St. Gobain raised the specter of an overexpansion of workers' compensation law under the "traveling employee" rule. St. Gobain argued that allowing Giovanelli workers' compensation under the rule would open the door to every itinerant worker staying on a farmer's "back 40." If indeed those farm workers are contacted in their homes by the farmer, offered a position which they accept, are transported to the farm, paid for their time while in transit, and paid a per diem while they are on the farm including for days off, then those farm workers should be covered by the "traveling employee" rule, as should Giovanelli.

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<sup>13</sup> Chicago Bridge, 618 N.E.2d at 1147.

<sup>14</sup> Chicago Bridge, 618 N.E.2d at 1147.

<sup>15</sup> Chicago Bridge, 618 N.E.2d at 1147 (citing F & E Erection Co. v. Industrial Comm'n, 514 N.E.2d 1147 (1987)).

<sup>16</sup> Norm Adver. v. Monroe St. Lumber Co., 25 Wn.2d 391, 396, 171 P.2d 177 (1946).

St. Gobain claims that material issues of fact exist concerning whether Giovanelli was in Seattle on the Sunday of the accident in order to further his employer's interest and whether St. Gobain expected Giovanelli to remain in Seattle every Sunday. Both of these issues relate to whether or not Giovanelli abandoned his course of employment.

Under Shelton, a "traveling employee" abandons the course of employment by engaging in a "distinctly personal activity."<sup>17</sup> St. Gobain argues that Giovanelli was not in Seattle to serve the purposes of the company, because he was on a day off. St. Gobain also makes much of the fact that he was headed to a nearby park to listen to music, even implying that because Giovanelli may have crossed the street against the light, he had abandoned the course of employment. We do not find any of these facts to be an issue in our consideration of whether or not Giovanelli had abandoned his course of employment.

In Shelton, we recognized that injuries arising out of necessary activities such as sleeping in hotels and eating in restaurants when away from home are compensable.<sup>18</sup> Similar to an employee sleeping in a hotel or eating in a restaurant, an employee, who is receiving a per diem and walks across a street near his hotel, is not departing on a "distinctly personal activity."

St. Gobain argues that Washington precedent set by a logging case from the 1930s requires us to conclude that Giovanelli was not acting in the course of

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<sup>17</sup> Shelton, 90 Wn. App. at 933.

<sup>18</sup> Shelton, 90 Wn. App. at 933.

employment. In Hama Hama Logging Co. v. Department of Labor and Industries,<sup>19</sup> our Supreme Court held that an employee of a logging company who lived at the logging camp during his employment was not injured in the course of employment when he was hurt during a trip on a company-owned, company employee-driven railroad speeder.<sup>20</sup> The court distinguished an employee injured while riding pursuant to his contract of employment from one who is merely permitted to ride in company-provided transportation free of charge for the employee's convenience.<sup>21</sup> The court commented that "[a] trip for the purpose of pleasure was not in any sense employment."<sup>22</sup>

But the decision in Hama Hama is inapposite to our analysis. Nowhere in the decision does the court consider the "traveling employee" rule. Further, although the employees were required to live at the camp, they often left on Saturday or Sunday morning and returned for work on Monday morning.<sup>23</sup> The claimant in Hama Hama was paid only for days that he worked, thus he received no stipend or per diem for days off.<sup>24</sup> On the other hand, as mentioned above, Giovanelli was paid a per diem for all days, including Sundays. He was also provided with a rental car and he was not prohibited from using the rental car on his days off. Given these differences in circumstances, we do not find the analysis in Hama Hama to be instructive.

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<sup>19</sup> 157 Wash. 96, 288 P. 655 (1930).

<sup>20</sup> Hama Hama, 157 Wash. at 97-98, 104.

<sup>21</sup> Hama Hama, 157 Wash. at 103.

<sup>22</sup> Hama Hama, 157 Wash. at 104.

<sup>23</sup> Hama Hama, 157 Wash. at 97-98.

<sup>24</sup> Hama Hama, 157 Wash. at 99.

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Giovanelli was a "traveling employee" who did not depart from the course of employment on a "distinctly personal activity." We therefore follow Shelton and affirm the Department's, Board's, and trial court's decision to grant Giovanelli's claim.

AFFIRMED.

WE CONCUR:

*[Signature]* ACS

*Baker*  
*Crowe*

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