WORKMEN'S COMPENSATION—EMPLOYEE, WHEN PAID A SUBSTANTIAL TRAVEL ALLOWANCE, IS COVERED BY WORKMEN'S COMPENSATION WHILE TRAVELING OUTSIDE CONTROL OF EMPLOYER TO A DISTANT JOB SITE. *Zenith National Ins. Co. v. Workmen's Compensation Appeals Board* (Cal. 1967).

The plaintiff, Lawrence De Carmo, was employed as a bricklayer by the Smiley Steel Construction Company at the job site 130 miles from his home. Residing near the job site during the week, De Carmo usually returned home on the weekends, either driving his own car or riding with one of his co-workers. The employer had no control over the employee's method of transportation or over the routes taken. On the weekend of June 20, 1965, De Carmo's car had broken down, so his superintendent arranged a ride for him with two co-workers. On this journey from his home to the job site the accident occurred in which De Carmo was injured and for which he claimed Workmen's Compensation.[1]

In determining the applicant's claim, the district court of appeal noted the following factors: (1) De Carmo's "time on the job" began when he arrived at the job site; and (2) in addition to his hourly wage, he was paid a per diem subsistence allowance of $10, which amounted to an incentive pay for out of town workers to cover their living and travel expenses. The employees were not paid this allowance for Saturdays or Sundays, nor was there any evidence that the amount bore a relation to their actual expenses. The court further found that De Carmo was not required to account for this allowance. On review to the California Supreme Court, *held*, award affirmed: An employee who receives a substantial travel allowance, as an inducement to accept employment at a distant job site, may recover under Workmen's Compensation for injuries sustained while traveling to and from work. *Zenith National Ins. Co. v. Workmen's Compensation Appeals Board*, 66 Adv. Cal. 996, 428 P.2d 606, 59 Cal. Rptr. 622 (1967).

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[1] CAL. LABOR CODE § 3753 (West 1955).

> The person entitled to compensation may, irrespective of any insurance or other contract, except as otherwise provided in this division, recover such compensation directly from the employer. In addition thereto, he may enforce in his own name, in the manner provided by this division the liability of any insurer either by making the insurer a party to the original application or by filing a separate application for any portion of such compensation.

In this particular case Zenith National Insurance, the employer's insurer and the Smiley Steel Construction Co., the employer, appealed the award by the Workmen's Compensation Appeal Board to the district court of appeal. Both De Carmo and the Workmen's Compensation Appeal Board were named as respondents in the action.

For an injury to be compensable under workmen's compensation law, it must have arisen out of and in the course of employment;[2] thus if an employee is injured while going to or returning from work, he is generally precluded from seeking redress under workmen's compensation law.[3] This rule is premised upon the theory that ordinarily the employment relationship is suspended from the time the employee leaves his work to go home until the time he resumes his work.

One of the first California cases to recognize this rule was *Ocean Accident and Guarantee Corp. v. Industrial Accident Comm'n.*[4] In that case the court held that the hazards encountered by an employee while going to or returning from work were not incident[5] to his employment but, rather, were the same hazards confronting the general public every day.

However, this rule has not remained without exception; and the California courts, in applying this exception, have used two approaches. The first approach is to find the employment relationship in existence at the time of the accident by virtue of an agreement which extends the relationship during the period of going to and coming from work. Courts utilizing the second approach adjudge the employment relationship to be in existence during this period because, first, the transportation to and from work is furnished by the employer as an incident of employment and, second, the employer retains control over the employee during this period.

Illustrative of the first approach are the decisions in *Breland v. Taylor*,[6] and *Kobe v. Industrial Accident Comm'n.*[7] In granting re-

2 CAL. LABOR CODE § 3600 (West 1955) (requiring that for liability to exist against an employer for an injured employee, the injury must have arisen "out of and in the course of the employment").

3 55 CAL. JUR. 2d *Workmen's Compensation* § 83 (1960). "The general rule is that injuries sustained by an employee while he is going to or returning from work are not compensable under the workmen's compensation law."

4 173 Cal. 313, 159 P. 1041 (1916) (an employee aboard a fishing tug, while seeking to return to his vessel after going ashore, fell into the bay between two boats and drowned).

5 The term "incident" is used to mean something that is connected with or inherent in the particular thing.

6 52 Cal. App. 2d 415, 126 P.2d 455 (1942) (Pennsylvania employer sent his employee to California where the employee was injured in an auto accident on the way to the job site from his California "home").

7 35 Cal. 2d 33, 215 P.2d 736 (1950). The employer paid his employees an additional hour's pay in pursuance to a union contract which required him to pay travel time to employees who traveled back and forth each day to jobs over 15 miles distant from the employer's place of business. The employee was injured while traveling to a roofing job in a town over 15 miles from the employer's place of business.

covery to injured employees, agreements were found which extended the employment relationship to include the intervals of going to and coming from work. By drawing an inference from the fact that the employer had paid the employee's transportation expenses, the *Breland* court found an implied agreement between the parties which incorporated the transportation time in the hours of employment. Similarly, in *Kobe*, it was held that where the employer compensates the employee for the time consumed in traveling to and from work, it may be inferred that there is an agreement that the employment relationship continued during that period.

In developing the other approach, California courts have also found that where the employee is using transportation furnished by the employer, and is under the control of the employer during the period of going and coming, the employment relationship is in existence. *Dominguez v. Pendola*[8] allowed recovery for an injury sustained by an employee while being conveyed to work in the employer's vehicle. Here transportation was furnished by the employer as an incident of the employment. The court reasoned that when the employee entered a vehicle provided by his employer for the purpose of transporting him to the place of employment, he entered the vehicle and was exposed to the dangers of travel, not as a member of the public but as an employee. Since the transportation was supplied by the employer, the risk involved was incident to the employment; consequently, the employee's injury arose "out of and in the course of employment." Thus it can be implied that the employment relationship was in existence at the time of the accident.

The basic exception arising from *Dominguez*—that injuries received by an employee while using employer furnished and controlled transportation in commuting to work are compensable—was followed in *Trussless Roof Co. v. Industrial Accident Comm'n.*[9] There, an employee, who had been injured while using transportation furnished and controlled by the employer during the period of going and coming, was allowed recovery. The employer had furnished the transportation as an incident of employment. However, it was argued that

[8] 46 Cal. App. 220, 188 P. 1025 (1920) (employee was injured when he was thrown from the bed of a truck supplied by his employer to transport employees to and from their homes to the reservoir where they were employed).

[9] 119 Cal. App. 91, 6 P.2d 254 (1931). The employees were injured in an auto accident. The car they were in was driven by a co-worker who was reimbursed by the employer for transporting the other employees. The employer had agreed to supply transportation to employees who lived beyond a certain distance.

because the vehicle used had not been the employer's, no control was retained over the employee during this period. In rejecting this argument, the court stated that the vehicle need not be the employer's for control to exist, and that the case came within the purview of the *Dominguez* exception to the going and coming rule.

While in *California Casualty Indemnity Exchange v. Industrial Accident Comm'n*,[10] there was no express agreement to furnish transportation, the court implied such an agreement because a car had been purchased and used by the employer to transport the employees. This agreement arose from the conduct of the parties which had indicated that the employment relationship was still in existence.

However, in *Westinghouse Electric Corp. v. Industrial Accident Comm'n*,[11] recovery was denied, where an employee had been injured while driving from his residence to his job site, because the employer had not had control over the means of applicant's transportation; rather, he simply paid what the employee's bus fare would have been. The payment of travel expenses alone, in this case, was not sufficient since the court stressed the requirement of employer control in finding that the transportation was in the course of employment.

While all of these cases allowed recovery because the employment relationship continued during the period of going and coming, the actual foundation for this continued relationship is based on the fact that the employer retained control during this period. This was clearly evident in *Westinghouse*, where the absence of control prevented recovery. In the previous cases granting recovery, there was either furnished and controlled transportation by the employer or an agreement that the employment relationship was to be in existence during the period of going and coming, in which case the employee was, in essence, under the control of the employer. In *Zenith*,[12] it was this very aspect of control, or rather the lack of it by the employer at the time of the accident, that the district court stressed in denying

10 21 Cal. 2d 461, 132 P.2d 815 (1942).

11 239 Cal. App. 2d 533, 48 Cal. Rptr. 758 (1966).

12 Zenith Nat'l Ins. Co. v. Workmen's Compensation Appeal Bd., 54 Cal. Rptr. 696 (D.C.A. 1966). The court felt that there was no rational basis for inferring that an employer had agreed that the employment relationship shall continue during weekend travel to and from a remote job site, from the fact that the employer pays a sum in addition to wages whether that sum is referred to as "subsistence," "bonus," "incentive" or "living and travel costs," where the employer retains no right of control of the activities of the employee and payment was not in discharge of an obligation to furnish transportation.

compensation for the applicant's injuries. Yet it was this requirement of control which the California Supreme Court discarded in affirming the award and allowing compensation for the applicant's injuries.[13]

The court set a new guideline for determining whether the injuries, sustained by an employee while traveling to or from work, are recoverable under Workmen's Compensation. This guideline resulted from the court's interpretation of the exception to the "going and coming" rule. It was held that the exception should not be limited only to situations in which there is some control by the employer over the employee during this period, but should be expanded to include situations in which: (1) extended cross-country travel is necessary to reach the job site;[14] and (2) the size of the travel allowance paid is a substantial inducement to accept employment. In establishing these criteria absent the requirement of control, the court relies heavily on *Cardillo v. Liberty Mutual Ins. Co.*,[15] where the Supreme Court of the United States held it erroneous to stress that before an injury arises out of and in the course of employment, the employer must have control over the acts and movements of the employee during the period of commuting to or from work. Yet in this case, the payment of the transportation costs was part of the employer's contractual obligation with the employee, and the payment of these costs alone without this obligation by the employer, might not have been enough to award recovery.[16] It is noteworthy that the California Supreme Court, while relying heavily on *Cardillo* in deciding *Zenith*, did not mention Cardillo's employer's obligation. Instead, the court seizes on *Cardillo* as a basis for the requirement that an extended distance must be involved. Further, the court sought to distinguish *Westinghouse*[17] on this ground.

Support for the *Zenith* court's decision to discard control as a

13 66 Adv. Cal. 996, 428 P.2d 606, 59 Cal. Rptr. 622 (1967).

14 The distance referred to here is the overall distance to the job site from the employee's home and not the distance the employee is from his home or the job site at the time of the accident.

15 330 U.S. 469 (1947). The employee was employed by a company whose place of business was in Washington, D.C., and whose job site was in Quantico, Virginia. A fixed sum was added per day to employee's pay as a travel expense. The transportation was actually provided by a car pool of the employees in which the employer acquiesced, but over which he had no control.

16 33 IOWA L. REV. 177-80 (1947) (the author suggests that emphasis in *Cardillo* was placed upon the obligation of the employer to furnish tranasportation).

17 239 Cal. App. 2d 533, 48 Cal. Rptr. 758 (1966) (the court felt that this case could have been decided on the basis that a local commute was involved and that the employer gave the employee only a nominal allowance for carfare).

determining factor, and to establish a further basis for recovery, can be found in various jurisdictions.[18] Although the court in its opinion relies heavily on *Cardillo*, the case of *Frick v. Rouse*[19] would give substantial support for the *Zenith* decision. In *Frick*, a construction worker on a job site, which was located a considerable distance from his home, was killed while traveling to work after spending a weekend at home. He had been paid an additional amount as travel subsistence while working away from home. The New York court held that the travel was incident to the employment and was certainly contemplated. Moreover, it was determined that the additional pay amounted to an inducement and an incentive, so that the death arose out of and in the course of employment and, was thus compensable. In this case there were present the same factors that the California court used in deciding *Zenith:* distance, substantial payment, and inducement.

Apparently, the California Supreme Court, in applying the judicial exception to the "going and coming rule," has in essence rejected the arbitrary and unfair requirement of employer control. In its place, it has instituted a more realistic test as to whether the injury arose out of and in the course of employment. Certainly, if the employee is controlled by the employer during this period, he should be considered in the course of employment. But the contention is that there are situations, as in *Zenith*, where the employer has no *actual* control over the employee during the "going and coming" period, and yet the journey to and from work should be considered part of the employment. This type of situation arises: (1) Where the journey to the employment site is a considerable distance, so that the employee is exposed to a greater risk than the ordinary man in his travel to work; and (2) where the employer himself has recognized this distance, and because of it, has induced the employee to take the employment by giving him a substantial amount of additional pay. A sound conclusion is that, in these circumstances, the employee should be con-

[18] 58 AM. JUR. *Workmen's Compensation* § 217 (1948). While control should be considered, it should not be decisive in determining whether an injury received while going to or returning from work is one arising out of and in the course of employment. *See* Neville v. Arthur Andersen & Co., 248 App. Div. 1994, 135 N.Y.S.2d 349 (1954). Applicant was allowed to recover where he was assigned to a job outside the city and his employer paid transportation charges in returning to the city for the weekend. Applicant drove his own car. The court held that under the terms of applicant's employment his job site created a necessity for travel and hence was in the course of employment. *See also* Pace v. Laurel Auto Parts, Inc., 238 Miss. 421, 118 So. 2d 871 (1960) (employee on a remote job site was paid an additional amount to cover transportation costs and he was allowed recovery for an injury sustained while driving to work).

[19] 19 App. Div. 2d 685, 240 N.Y.S.2d 1017 (1963) *cited in Zenith*, 66 Adv. Cal. at 1002, 428 P.2d at 610, 59 Cal. Rptr. at 626.

sidered in the course of his employment from the time the journey begins, since the particular conditions of the employment have made the travel an incident of the employment.

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