WORKERS' COMPENSATION—INJURIES SUSTAINED BY AN EMPLOYEE WHILE TRAVELING TO AND FROM WORK ARE COMPENSABLE AND WITHIN THE DUAL PURPOSE EXCEPTION TO THE GOING AND COMING RULE WHERE THE HOME HAS BEEN ESTABLISHED AS A SECOND JOBSITE, THE BUSINESS PURPOSE OF THE JOURNEY IS CONCURRENT WITH THAT OF THE PERSONAL PURPOSE AND THERE IS AN INCIDENTAL BENEFIT TO THE EMPLOYER.—*Bramall v. Workers' Compensation Appeals Board* (Cal. Ct. App. 1978).

Petitioner filed a worker's compensation claim for the injuries she dent while enroute from her place of employment to her home. As part of her duties she was required to translate depositions into English. She was traveling home for the purpose of translating some depositions and preparing dinner for her family when the accident occurred. The after-hours atmosphere of the office precluded the petitioner from translating the depositions there because an attorney from the law office where she worked often saw clients and received phone calls in the office at that time. The petitioner had regularly taken depositions home in the past. While not paid overtime for working at home, she did take time off, as well as longer breaks during the day as compensation for the work done at home.[1]

Petitioner filed a workers' compensation claim for the injuries she sustained in the automobile accident. The California Workers' Compensation judge held that the injury occurred in the course of employment. However, the Workers' Compensation Appeals Board, on reconsideration, determined that the homeward trip was governed by the "going and coming" rule and vacated the judge's decision. Petitioner sought review and annulment of the Board's decision. *Held,* annulled and remanded. Where the home has been established as a second jobsite because of circumstances of employment, a trip to and from work taken for both business and personal reasons, which involves some incidental benefit to the employer, is within the "dual purpose" exception to the "going and coming" rule. *Bramall v. Workers' Compensation Appeals Board,* 78 Cal. App. 3d 151, 144 Cal. Rptr. 105 (1978).

The basic purpose of workers' compensation is to remove the burden of employment related injury from the employee and place it upon the

1. In the past, petitioner's employer had instructed her to take depositions home. Bramall v. Workers' Comp. Appeals Bd., 78 Cal. App. 3d 151, 155, 144 Cal. Rptr. 105, 107 (1978).

employer.[2] Thus, workers' compensation is an attempt to achieve a balance between the interests of the employer and those of the employee: the employer has a desire to be protected from loss by injury that is not work related, while the employee seeks protection from loss by injury that is connected with his employment.[3] Consequently, as a general rule, workers' compensation does not protect an employee against the perils incurred while going to and from his place of employment, in the absence of special circumstances.[4] This is known as the "going and coming" rule. The theories advanced for this doctrine are: (1) that the employer has no control over the employee while the employee is traveling; (2) that the risks involved in traveling to and from work are no greater than those incurred by anyone who travels the roads for whatever purpose; and (3) that travel to and from work is too far removed from the production process to justify placing the ultimate costs of such injury upon the consumer.[5]

A brief discussion of the development and application of the "going and coming" rule in California is helpful to place *Bramall* in the proper perspective. In California, the "going and coming" rule was judicially created.[6] The rule was first recognized in *Ocean Accident and Guarantee Co. v. Industrial Accident Commission.*[7] The court in *Ocean* stated that for an injury to be compensable it must occur while an employee is "[P]erforming service growing out of and incidental to his employment and acting within the course of his employment."[8] Furthermore, the court reasoned that because the employee is not rendering any service to his

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2. Note, *The Going and Coming Rule*, 41 N.D.L. REV. 185, 193 (1965). The employer passes this expense on to those consumers who purchase the particular product or service which the employer supplies. *Id.* Workers' compensation is different from strict liability in its application of liability. Liability in the workers' compensation area is based on work related injury, rather than on fault, as in the case of tort liability. *See* I. A. LARSON, WORKMEN'S COMPENSATION § 2.20 (Desk Ed. 1977).

3. *See* Hinojosa v. Workmen's Comp. Appeals Bd., 8 Cal. 3d 150, 155, 501 P.2d 1176, 1181, 104 Cal. Rptr. 456, 461 (1972).

4. *See* LARSON, *supra* note 2, at § 15.11; Hinojosa v. Workmen's Comp. Appeals Bd., 8 Cal. 3d at 154, 501 P.2d at 1180, 104 Cal. Rptr. at 460.

5. Note, *The Going and Coming Rule*, 41 N.D.L. REV. 185, 193 (1965).

6. 78 Cal. App. 3d at 156, 144 Cal. Rptr. at 108. Unlike California, a number of states have enacted workers' compensation legislation embodying one of several variations of the "going and coming" rule. *See, e.g.*, CONN. GEN. STAT. § 31-285 (1975); KAN. STAT. § 44-508(k) (Supp. 1975); MASS. GEN. LAWS ch. 152, § 26 (1965); N.M. STAT. ANN. § 59-10-12.12 (1953). In New Jersey where the doctrine was also judicially created one court noted that such a rule was by no means compelled by the broad statutory language of "arising out of and in the course of employment" in the workers' compensation laws. *See* Watson v. Nassau Inn, 74 N.J. 155, 157, 376 A.2d 1215, 1217 (1977).

7. 173 Cal. 313, 159 P. 1041 (1916). In this case the court had to decide the issue of compensability for the death of a shipworker who fell into the bay and drowned on the way to his vessel. *Id.* at 313-14, 159 P. at 1041-42.

8. *Id.*

employer while going to or returning from work, those injuries which occur during that time are not compensable.[9]

However, as cases were decided, it became apparent that the standards mentioned above could not be precisely applied and, as a result, the courts began to move away from the principles set forth in *Ocean*.[10] In particular, the requirement that the employee be using an instrumentality of the employer to perform his task before an injury is covered met some disapproval. One court stated that "the right of compensation is by no means restricted to those cases where the injury occurs while the employee is actually presently manipulating the tools of his calling."[11] Another court noted that each case must be judged on its own facts.[12] Later, Justice Traynor, speaking for an unanimous court in *California Casualty Indemnity Exchange v. Industrial Accident Commission*[13] discarded the *Ocean* requirement that an employee must be performing service to the employer at the time of the injury to be eligible for compensation.[14]

Finally, the scope of workers' compensation was broadened further when the California Supreme Court held that any reasonable doubt as to the applicability of the "going and coming" rule must be resolved in the employee's favor.[15] As the result of these developments, it is clear that in California, the "going and coming" rule is not a rigid formula.[16]

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9. *Id.* at 816, 159 P. at 1044. Additionally, the court stated that before an employee is considered to be rendering services for his employer, he must proceed to use some instrumentality to perform his task. The court found support for this position in English case law. *Id. See* Kearon v. Kearon, 4 B.W.C.C. 435; Leach v. Oakley-St. & Co., 4 B.W.C.C. 91.

10. Judson Mfg. Co. v. Industrial Accident Comm'n., 181 Cal. 300, 184 P. 1 (1919).

11. *Id.* The court further held that there was no precise and comprehensive definition of the term service. In extending compensation the court held: "It seems to us, however, that when an employee has arrived at the premises of his employer, and is there for the purpose of immediately commencing his actual work, he is performing service incidental to his employment." *Id.* at 301, 184 P. at 2.

12. Makins v. Industrial Accident Comm'n., 198 Cal. 698, 703, 247 P. 202, 204 (1926). The court in *Makins* found support for this conclusion by reasoning that accidents are produced by so many varying circumstances that it is unlikely that two cases will arise that may be ruled by the same legal precedent. *Id.*

13. 21 Cal. 2d 461, 132 P.2d 815 (1942).

14. *Id.* at 464, 132 P.2d at 818. The employer in this case furnished transportation for its employees. The injury occurred during the journey home. In awarding compensation the court held that the transportation was incidental to employment, and that the danger from which the injury resulted was one that the employee was exposed to as a result of her particular employment. *Id.* at 465-67, 132 P.2d at 816-18.

15. California Casualty Indemnity Exchange v. Industrial Accident Comm'n., 21 Cal. 2d 751, 757, 135 P.2d 158, 164 (1943). The petitioner in this case suffered injuries outside the entrance of the employment premises. The court held: "The term 'employment' includes not only the doing of work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done." *Id.* at 753, 135 P.2d at 161.

16. Hinojosa v. Workmen's Comp. Appeals Bd., 8 Cal. 3d 150, 154, 501 P.2d 1176, 1180, 104 Cal. Rptr. 456, 460 (1972).

Even though the California courts have shown a tendency to cut back on the requirements which the claimant must satisfy before circumventing the application of the "going and coming" rule, they have additionally recognized that in certain instances, even though, theoretically, the "going and coming" rule would preclude recovery, the claimant should receive benefits anyway. As the result, numerous exceptions to the "going and coming" rule have been developed;[17] these exceptions further complicate any attempts to consistently apply this rule.[18]

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17. Note, *The Going and Coming Rule*, 41 N.D.L. REV. 185, 186 (1965). California courts have recognized several exceptions. *See, e.g.*, Hinojosa v. Workmen's Comp. Appeals Bd., 8 Cal. 3d 150, 159, 501 P.2d 1176, 1185, 104 Cal. Rptr. 456, 505 (1972) (job situation made employee's use of a car a requisite to employment thus an exception to the "going and coming" rule); Guest v. Workmen's Comp. Appeals Bd., 2 Cal. 2d 670, 672, 470 P.2d 1, 3, 87 Cal. Rptr. 193, 195 (1970) (facts of the case established the "special mission" exception where the employee performs some errand for his employer either on his way to work or on his way home from work); Hinman v. Westinghouse Elec. Co., 2 Cal. 3d 956, 959, 471 P.2d 988, 991, 88 Cal. Rptr. 188, 191 (1970) (the court held that there was an exception to the "going and coming" rule when the trip involved an incidental benefit to the employer, not common to commute trips by ordinary members of the workforce. In *Hinman* a union contract provided for payment of travel time to the employer. The court concluded that the employer had a substantial benefit because it gave him access to a larger labor market. *Id.* at 962, 471 P.2d at 991-92, 88 Cal. Rptr. at 191-92); Zenith Nat. Ins. Co. v. Workmen's Comp. Appeals Bd., 66 Cal. 2d 944, 947, 428 P.2d 606, 609, 59 Cal. Rptr. 622, 625 (1967) (an employer compensated employee for transportation expenses, and as such, an injury which occurred during that travel time was deemed to be included within the "travel expense" exception to the "going and coming" rule); Schreifer v. Industrial Accident Comm'n., 61 Cal. 2d 289, 391 P.2d 832, 38 Cal. Rptr. 352 (1964) (the lack of fixed work hours prompted the court to hold that the "going and coming" rule did not apply, and that even if it did, the "special mission" exception justified compensation); Huntsinger v. Fell, 22 Cal. App. 3d 803, 810, 99 Cal. Rptr. 666, 670 (1970) (the court held that when a business requires an employee to drive to and from the employment premises in order to have his vehicle available for company business during the day the risks of accidents in transit are risks incident to the business enterprise and therefore injuries incurred while making the trip to or from work are compensable).

Virtually all jurisdictions have recognized exceptions to the "going and coming" rule. *See, e.g.*, McClure v. Gen. Motors Corp., 402 Mich. 392, 262 N.W.2d 829 (1978) (employee was struck by an automobile while crossing the street during his uncompensated lunch hour, and the court held that the circumstances of employment placed the employee in the position where he was accidently injured); Wyatt v. Metropolitan Maintenance Co., 74 N.J. 167, 169, 376 A.2d 1222, 1224 (1977) (an employee's lunch break was sufficiently conditioned by time contraints and work obligations to set it apart from the ordinary trip home at the end of the day); Paige v. City of Rahway, 74 N.J. 177, 180, 376 A.2d 1226, 1229 (1977) (circumstances of employment put employee in position where he received injuries); Briggs v. American Biltrite, 74 N.J. 185, 376 A.2d 1231 (1977) (special errand); Geltman v. Reliable Linen Supply Co., 18 N.J. Misc. 423, 13 A.2d 844 (1940) (decedent was employed as a salesman and used his own car in the performance of his duties. He was involved in a traffic incident while on his way to visit customers. During a heated argument that ensued the decedent dropped dead from a lack of blood. The court held that since the decedent was driving his car in furtherance of his employer's business, his death was compensable).

18. The "going and coming" rule has not been consistently applied. *See* Horovitz, *Workmen's Compensation: Half Century of Developments*, 41 NEB. L. REV. 1 (1961). Horovitz states that the rule has been:

One of the exceptions which has developed is the "dual purpose" exception applicable to employees who perform work at home.[19] The "dual purpose" exception provides compensation for those injuries that occur while an employee is undertaking travel for both business and personal reasons.[20] Professor Larson, a noted author in the area of workers' compensation, has summarized the "dual purpose" doctrine as follows:

> Injury during a trip which serves both a business and a personal purpose is within the scope of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. This principle applies to out-of-town trips, to trips to and from work, and to miscellaneous errands such as visits to bars or restaurants motivated in part by an intention to transact business there.[21]

The rationale for awarding compensation on dual purpose trips is that there is some benefit to the employer, and thus the injury is work related.[22]

In order to apply the "dual purpose" rule in the situation where an employee does work at home, it is first necessary to establish the home as a second jobsite.[23] The courts have taken various approaches. In some instances the home has been established as a second jobsite by producing evidence which demonstrates that at the end of a journey there is specific work to be done at home. Thus, in *Proctor v. Hoage*[24] the home was established as a business situs where the claimant was instructed at the end of the working day to go home and complete a report by the following morning.[25]

In cases where there is no evidence that an employee is going home to do some specific work, other factors must be shown to establish the home as a second jobsite.[26] Three principal *indicia* are examined: (1) the

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A source of injustice to injured workers for many years. It has put upon them the burden of proving an exception to the narrow court made rule. It should be abandoned in favor of deciding liberally in each case whether the journey and the injury arose "in the course of" the employment. *Id.* at 52.

19. 78 Cal. App. 3d at 157, 144 Cal. Rptr. at 108.

20. *See* LARSON, *supra* note 2, at § 18.00.

21. *Id.*

22. Deterts v. Times Publishing Co., 552 P.2d 1033, 1036 (Colo. Ct. App. 1976).

23. *See* LARSON, *supra* note 2, at § 18.30.

24. 81 F.2d 555 (D.C. Cir. 1935).

25. *Id. Accord*, Levi v. Interstate Photo Supply Corp., 46 App. Div. 2d 951, 362 N.Y.S. 2d 70 (1974). In *Levi*, the decedent had been instructed that if he completed his work early enough he was to return to the office or to call his supervisor when he arrived home. The decedent decided to return home and was shot and killed in the hallway of his apartment building. *Id.* In awarding compensation to his descendants, the court held that: "His trip home was for the convenience of the employer since that was the only convenient site where he could continue to work for the rest of the day." *Id.* at 952, 362 N.Y.S. 2d at 72. *See* Berry's Coffee Shop, Inc. v. Palomba, 161 Colo. 269, 423 P.2d 2 (1967).

26. *See* LARSON, *supra* note 2, at § 18.30.

quantity and regularity of work performed at home; (2) the continuing presence of work equipment at home; and (3) special circumstances of the particular employment that make it necessary, not merely convenient, to work at home.[27]

The regularity of work performed at home has been sufficient to establish the home as a second jobsite in cases where a claims manager regularly took much of his work back to his motel room,[28] where a secretary did typing reports and made telephone appointments for her employer from her home[29] and where a milk truck driver made his daily reports at home.[30]

Additionally, the home has been established as a second jobsite in cases where an employer has installed office equipment at the employee's home and paid the recurring expenses of such equipment,[31] where work was mailed to the employee's home, where business calls were received at home and the employer provided the employee with a dictaphone for use at home[32] and where the employer installed a phone at the employee's home for business calls.[33]

Finally, circumstances of employment are important in establishing the home as a business situs where the conditions at work make it necessary to bring work home.[34] When the conditions of employment have not necessitated taking work home, compensation has been denied. Thus, in *Wilson v. Workers' Compensation Appeals Board*,[35] compensation was denied to a teacher when no claim was made that the facilities at school were insufficient to permit completion of her preparatory chores.

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27. *Id.*

28. American Mercury Ins. Co. v. Britton, 314 F.2d 285, 286 (D.C. Cir. 1963).

29. Tieran v. Potter, 281 App. Div. 787, 118 N.Y.S. 2d 431 (1953).

30. Allen's Dairy Prod. Co. v. Whittington's Dependents, 230 Miss. 285, 92 So. 2d 842 (1957).

31. Kaycee Coal Co. v. Short, 450 S.W.2d 262, 263 (Ky. 1970).

32. Cahill's Case, 295 Mass. 538, 540, 4 N.E.2d 332, 334 (1936).

33. Security Union Ins. Co. v. McClurkin, 35 S.W.2d 240, 242 (Tex. Civ. App. 1930).

34. Burchett v. Delton-Kellogg School, 378 Mich. 231, 232, 144 N.W.2d 337, 338 (1966). In *Burchett* the claimant, a teacher, was injured on her way home from school. The court, in holding that the "dual purpose" exception was applicable, emphasized various facts including the following: (1) the claimant had school papers with her; (2) there was no time at school to prepare lessons; (3) doing work at home was necessary to properly perform the regular duties at school; and (4) performing work at home was expected of all teachers. *Id.* at 232-33, 144 N.W.2d at 338-39. *See also* Goodrich v. Industrial Accident Comm'n., 22 Cal. 2d 604, 140 P.2d 405 (1943).

35. 16 Cal. 3d 181, 183, 545 P.2d 225, 227, 127 Cal. Rptr. 313, 315 (1976); O'Rourke v. Manuet Restaurant, Ivy House, 43 App. Div. 2d 659, 350 N.Y.S. 2d 22 (1973). In *O'Rourke*, the court noted that "[t]he home becomes a second place of employment, and thus travel thereto or therefrom [creates] a risk of employment, only where there is a pattern of doing work at home or the work is a special assignment." *Id.* at 661, 350 N.Y.S. 2d at 25. Syan v. Syan Bros., Inc., 225 S.C. 429, 430, 82 S.E.2d 794, 795 (1954) (there was no reason why employee could not have remained at work afterhours).

Once the home is established as a second jobsite the "dual purpose" test can be applied to a homeward journey taken by an employee for both personal and business purposes.[36] The "dual purpose" exception is applicable in most jurisdictions when the business and personal purposes for the trip are concurrent.[37] The "concurrent purpose" doctrine was first enunciated by Justice Cardozo in *Marks' Dependents v. Gray.*[38] In *Marks* the deceased had planned a personal journey to pick up his wife. His employer, hearing of the journey, asked him to stop at a nearby town and perform some minor work related duties. While traveling in his own car to the nearby town, the employee was fatally injured in an accident.[39] Justice Cardozo stated: "What concerns us here is whether the risks of travel are also risks of employment."[40] Specifically, Cardozo expressed the "concurrent purpose" test as follows:

> If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.[41]

In applying the "concurrent purpose" test in *Marks*, the court held that the employee was not on the road because of any employment duty. As such, the risk of travel was not deemed to be a risk of employment and compensation was denied.[42]

An important aspect of the Cardozo test is that it is not necessary, in the absence of evidence of the employee's personal purpose, to show that the business trip would have been taken by the particular employee at a particular time.[43] It is only necessary to show that, even if the injured employee had not performed the errand, some other employee would have. For example, in *Gingell v. Walters Contracting Corp.*,[44] an employee who was to pick up some materials for work while on his way home was awarded compensation for injuries he sustained during the journey. The court reasoned that if he had not picked up the materials someone else would have had to make the trip.[45] Therefore, it was clear

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36. *See* LARSON, *supra* note 2, at § 18.30.
37. *See id.* § 18.10.
38. 251 N.Y. 90, 167 N.E. 181 (1929).
39. *Id.* at 91, 167 N.E. at 182.
40. *Id.*
41. *Id.* at 92, 167 N.E. at 183.
42. *Id.*
43. *See* LARSON, *supra* note 2, at § 18.10.
44. 303 S.W.2d 683 (Mo. Ct. App. 1957).
45. *Id.* at 689. The court stated: "Was this mission of such character or importance that it would have necessitated a trip by someone if this employee had not been able or willing to handle it in combination with his homeward journey?" *Id.*

that the employment relationship created the necessity for travel.

Unfortunately, some courts including those in California, have erroneously referred to the Cardozo test as the "dominant purpose" test.[46] In *London Guarantee and Accident Co. v. Industrial Accident Commission*,[47] it was held that if an employee is going to or from his place of employment on a substantial mission for his employer and the mission was the major factor in the journey, an injury sustained by the employee during that mission would be under the coverage of workers' compensation. However, it is inaccurate to term Cardozo's test as the "dominant purpose" test. Once it has been determined that the business motive is concurrent with that of the personal motive there is no need to decide which motive is dominant.[48]

In essence then, under the "dual purpose" exception to the "going and coming" rule employees who do work at home are covered by workers' compensation while going to and from work when: (1) the home has been established as a second jobsite, and (2) the business purpose of the trip is concurrent with the personal purpose.[49]

Thus, the critical question faced by the court in *Bramall* was whether the facts of the case brought the petitioner's journey within the "dual purpose" exception to the "going and coming" rule.[50] Respondent, the Workers' Compensation Appeals Board, contended that the facts of the

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46. *See, e.g.*, Williams v. Hoyt Construction Co., Inc., 306 Minn. 59, ____, 237 N.W.2d 339, 346 (1975) (an employee is covered by workers' compensation if the business purpose in traveling is the dominant one); Scanlon v. Herald Co., 201 App. Div. 173, 194 N.Y.S. 663 (1922) (where an employee took material home for preparation during his dinner break and fell on his return to the plant, the court held the employee was serving his own personal end and was not in the course of employment); *In re* Smedley, 496 P.2d 793, 795 (Okla. 1972) (no evidence establishing that the deceased, while on a trip to the Bahamas, was engaged in any business for his employer); Sylvan v. Sylvan Bros., Inc., 225 S.C. 429, 82 S.E.2d 794 (1954) (taking work home was for employee's own convenience, and therefore, recovery was barred by the "going and coming" rule).

47. 190 Cal. 587, 213 P. 977 (1923). The inequity and absurdity of the "dominant purpose" test is clearly revealed in *London*. The claimant was employed as an assistant manager. Having a great deal of work to do for his employment and desiring a quieter place to work than the office, he took the work home with his employer's permission. The claimant completed his work and was leaving his home with the purpose of returning to work when he slipped and was injured. *Id.* The court held that: "[H]aving remained in his home after completion of the work for the purpose of taking his lunch, his object in going there was accomplished, and his service to his employer was not resumed until his return to his place of employment. . . ." *Id.* at 588, 213 P. at 978. The court concluded that carrying work to his main office was merely incidental to his main purpose of returning there. The court noted, however, that if the injury had occurred while the claimant was on his way home, and the claimant had intended to eat lunch after his return to the office, he would have been awarded compensation. *Id.*

48. *See* LARSON, *supra* note 2, at § 18.10.

49. *Id.*

50. 78 Cal. App. 3d 151, 144 Cal. Rptr. 105 (1978).

case paralleled those in *Wilson v. Workers' Compensation Appeals Board*[51] and did not constitute an exception to the "going and coming" rule.[52] In *Wilson* the claimant sustained an injury in an auto accident while on her way to work. Her car contained materials which she had worked on at home the previous evening. In denying compensation, the court in *Wilson* reasoned that the claimant's employment situation did not require that work be done at home. Thus, she failed to establish her home as a second jobsite, and as such, failed to establish that her injury fell outside the mandate of the "going and coming" rule.[53] The petitioner in *Bramall* contended that her situation was distinguishable from that in *Wilson* and that her injuries were compensable.[54] The *Bramall* court held that *Wilson* was not controlling.[55] It determined that *Wilson* could be distinguished from the circumstances found in *Bramall* because the claimant in *Wilson* had failed to establish her home as a second jobsite.[56]

After distinguishing *Wilson*, the *Bramall* court addressed the question of whether the "dual purpose" exception was applicable, by focusing on a number of factors: (1) the establishment of the home as a second jobsite and the requirement that the employee do work at home;[57] (2) the purpose of the trip;[58] and (3) the benefit to the employer.[59]

After considering the above factors, the *Bramall* court concluded that the petitioner had established her home as a second jobsite.[60] The court emphasized that the circumstances of her employment, not merely the convenience to her, necessitated doing the work at home.[61] The *Bramall* court relied on the second jobsite requirement as put forth by the California Supreme Court in *Wilson v. Workers' Compensation Appeals Board*.[62]

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51. 16 Cal. 3d 181, 545 P.2d 225, 127 Cal. Rptr. 313 (1976).
52. 78 Cal. App. 3d at 155, 144 Cal. Rptr. at 107.
53. 16 Cal. 3d 185, 545 P.2d 227, 127 Cal. Rptr. 315 (1976).
54. 78 Cal. App. 3d at 155, 144 Cal. Rptr. at 107.
55. *Id.* at 160, 144 Cal. Rptr. at 110.
56. *Id.*
57. *Id.* at 158, 144 Cal. Rptr. at 109.
58. *Id.* at 157, 144 Cal. Rptr. at 108.
59. *Id.* at 158, 144 Cal. Rptr. at 109.
60. *Id.* at 159, 144 Cal. Rptr. at 110.
61. *Id.*
62. 16 Cal. 3d at 184, 545 P.2d at 226, 127 Cal. Rptr. at 314. The California courts, at least by implication, foreclose recovery for incompetent employees who cannot function properly at work and thus must take their work home. This approach seems to follow that recently taken by the New Jersey Supreme Court in Sabat v. Fedders Corp., 75 N.J. 444, 383 A.2d 421 (1978):

> We note that Sabat's employment situation differs dramatically from that of employees who take work home out of a sense of self-imposed moral obligation or self-perceived necessity arising out of an inability to cope with their workload during the normal workday. The benefits of such activity are predominantly personal with only an incidental enhancement of the efficient functioning of the employer

In so relying, it placed emphasis on the fact that the interferences at the office at the end of the normal working day precluded the petitioner from properly performing her work there.[63] The court also found support for its decision in the fact that the petitioner regularly took work home, a practice which was approved by her employer.[64] The above factors led the court to find that there was an implied requirement to do work at home.[65]

Having concluded that the petitioner's home was a second jobsite, the *Bramall* court focused its attention on the purpose of her trip. In its analysis of the "dual purpose" exception, the court noted that the early California cases had relied on the "dominant purpose" test in determining whether the factual circumstances of a case brought it within the "dual purpose" exception.[66] However, the *Bramall* court also took cognizance of the fact that the "dominant purpose" test had not been strictly adhered to in all California cases.[67] For example, in *Goodrich v. Industrial Accident Commission*,[68] the court held that the business motive must be the major factor in a dual purpose journey. However, the court awarded compensation even though the test had not been strictly met. Thus, after examining prior California case law, the *Bramall* court held that the relative weight of business and personal motives was immaterial. It was sufficient that the business purpose was a concurrent motivation on a journey going to and coming from work.[69] Notwithstanding its statement

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enterprise. In such cases the work connection is, without more, too attenuated to justify the imposition of the costs of off-duty injuries on the employer.

Id. at 447 n.3, 383 A.2d at 424 n.3.

63. 78 Cal. App. 3d at 159, 144 Cal. Rptr. at 110.

64. *Id.* at 158, 144 Cal. Rptr. at 109. Another factor which the court relied on in reaching its decision was the fact that the petitioner took compensating time off and longer lunch periods to make up for the time worked at home. *Id.* at 159, 144 Cal. Rptr. at 110.

65. *Id.* at 160, 144 Cal. Rptr. at 110. The petitioner's employer testified that he expected her to fully and timely complete all the work he gave her, even if it required her to work beyond the normal workday. *Id.* at 158, 144 Cal. Rptr. at 109. The facts of the case also indicate that there was an urgency to complete the work because the deponent was a migrant farm laborer who was about to leave the area. *Id.* at 154, 144 Cal. Rptr. at 107.

66. *Id.* at 156, 144 Cal. Rptr. at 108. *See* London Guarantee and Accident Co. v. Industrial Accident Comm'n., 190 Cal. 587, 213 P. 977 (1923). *See also* note 46 *supra*.

67. 78 Cal. App. 3d at 157, 144 Cal. Rptr. at 108.

68. 22 Cal. 2d 604, 606, 140 P.2d 405, 407 (1943). Decedent was on his way home for the purpose of informing his wife that he would be working overtime and for the purpose of making a business call. *Id.* at 605, 140 P.2d at 406.

69. 78 Cal. App. 3d at 159, 144 Cal. Rptr. at 110. For the progression of California case law in this area see the following cases: Lockheed Aircraft Corp. v. Industrial Accident Comm'n, 28 Cal. 2d 756, 172 P.2d 1 (1946) (in affirming a compensation award the court held that when an employee combines his own business with that of his employer or attends to both at the same time, the court would not inquire into which business the employee was actually engaged in at the time of the injury); Dimmig v. Workmen's Comp. Appeals Bd., 6 Cal. 3d 860, 495 P.2d 433, 101 Cal. Rptr. 105 (1972) (injuries are compensable if incurred while the employee is doing those things that his contract expressly or impliedly authorize him to do).

that the relative weight of the business and personal motives was immaterial, the *Bramall* court applied the Cardozo "concurrent purpose" test,[70] and concluded that the petitioner would have made the trip home to pursue her employment duties even if the need to prepare dinner for her family had disappeared.[71] Therefore, the court found her injury compensable.

Additionally, the *Bramall* court noted that, traditionally, a common factor considered when applying the exceptions to the "going and coming" rule has been whether the employer has received a benefit as the result of the journey.[72] The court determined the basic question to be whether the journey involved an incidental benefit to the employer which was not common to ordinary trips taken by employees.[73] However, the court added a qualification by emphasizing that "some tidbit of work" done at home would not constitute a sufficient enough benefit to the employer to void the "going and coming" rule.[74] The court feared that in the absence of the above qualification, there would be a complete abandonment of the rule.[75] Finally, the court in *Bramall* stated that the benefit

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70. Other jurisdictions have also applied the "concurrent purpose" test. *See* Anchorage Roofing Co. Inc. v. Gonzales, 507 P.2d 501 (Alaska 1973) (compensation was awarded where claimant diverted from his business flight to survey terrain in anticipation of a future hunting trip); Berry's Coffee Shop Inc. v. Palomba, 161 Colo. 269, 423 P.2d 2 (1967) (express requirements of work created necessity of travel); True v. Longchamps Inc., 171 Conn. 476, 480, 370 A.2d 1018, 1020 (1976) (an injury is compensable if the employee is injured while using the highway in doing something incidental to his regular employment for the benefit of his employer, with the knowledge and approval of the employer); Dombach v. Olkon Corp., 163 Conn. 216, 221, 302 A.2d 270, 275 (1972) (no occasion to weigh business motives to determine which is dominant); Thomas v. Certified Refrigeration Inc., 392 Mich. 623, ____, 221 N.W.2d 378, 382 (1974) (although part of a trip was predominately personal the overall trip was made for both business and personal reasons); Rau v. Crest Fiberglass Indus., 275 Minn. 483, 486, 148 N.W.2d 149, 152 (1967) (the business purpose was deemed to be at least a concurrent cause of the trip and not merely incidental to personal activities); Gingell v. Walters Contracting Corp., 303 S.W.2d 683, 689 (Mo. Ct. App. 1957) (a concurrent purpose exists when the mission is of such a character that it would have necessitated a trip by someone else if the employee had not done it in combination with his homeward journey).

71. 78 Cal. App. 3d at 159, 144 Cal. Rptr. at 110. The Workers' Compensation Appeal Board had placed great weight on the petitioners statement: "For my own convenience I bring the work home rather than stay at the office late so that I will not be bothered." *Id.* The *Bramall* court held that, in interpreting the entire record, it was merely the petitioner's way of saying her decision to take the depositions home was motivated by both personal and business purposes. *Id.*

72. *Id.* at 156, 144 Cal. Rptr. at 108.

73. *Id.* at 157, 144 Cal. Rptr. at 109.

74. *Id.* at 158, 144 Cal. Rptr. at 109.

75. *Id.* The rationale is comparable to that stated in O'Rourke v. Manuet Restaurant, Ivy House, 43 App. Div. 2d 659, 350 N.Y.S.2d 22 (1973):

> [A] trip is not transformed into an employment errand merely because the employee happens to have in his possession some papers or other paraphernalia relating to his employment. If this were not the case, the rule that the risks of

to the employer must be conferred in the furtherance of an express or implied condition of employment.[76] Applying the foregoing principles, the court held that there was a direct and substantial benefit to the employer in having the depositions translated.[77]

The "dual purpose" test, as put forth in *Bramall*, is consistent with the progression of California case law.[78] *Bramall* clearly adopts the Cardozo test which, up to this point, had essentially been abandoned in California. However, the analysis and some of the conclusions of the court will greatly expand the "dual purpose" exception.[79] One such area of apparent expansion is the court's determination that the after-hours atmosphere at the office made it necessary for petitioner to take the depositions home for translation. Although there is support for the court's conclusion that the petitioner's home was a second jobsite, the court's determination that the after-hours atmosphere at the office precluded the petitioner from properly performing her work there is questionable. Since her employer was an attorney it can be assumed that

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travel to and from work are not the risks of employment would quickly become emasculated and an employee might even be covered while relaxing at home so long as he had brought the employer's papers or documents there.

Id. at 659, 350 N.Y.S. 2d at 24.

76. 78 Cal. App. 3d at 158, 144 Cal. Rptr. at 109. The express or implied conditions of employment have been used by other courts as a factor in determining whether or not an injury is compensable. *See* Hinojosa v. Workmen's Comp. Appeals Bd., 8 Cal. 3d 150, 169, 501 P.2d 1176, 1185, 104 Cal. Rptr. 456, 465 (1972) (employee impliedly required to bring automobile to and from job sites); Garzoli v. Workmen's Comp. Appeals Bd., 2 Cal. 3d 502, 504, 467 P.2d 833, 835, 86 Cal. Rptr. 1, 3 (1970) (police officer, who was injured on his journey home, was, as a practical matter, required to wear his official uniform and render assistance to members of the public); Guest v. Workmen's Comp. Appeals Bd., 2 Cal. 3d 670, 672, 470 P.2d 1, 3, 87 Cal. Rptr. 193, 194 (1970) (conduct was reasonably directed toward the fulfillment of employer's requirements); Zenith Nat. Ins. Co. v. Workmen's Comp. App. Bd., 66 Cal. 2d 944, 945, 428 P.2d 606, 607, 59 Cal. Rptr. 622, 623 (1967) (employer's knowledge that employee was making trips home on the weekend from a distant construction site); Reinert v. Indus. Accident Comm'n., 46 Cal. 2d 349-51, 294 P.2d 713-15 (1956) (injury is compensable while employee is doing these things which the contract of employment expressly or impliedly authorizes); Deterts v. Times Publishing Co., 552 P.2d 1033, 1036 (Colo. App. 1976) (a causal connection between claimant's duties relating to employment and the injury suffered); Dombach v. Olkon Corp., 163 Conn. 216, 219, 302 A.2d 270, 273 (1972) (an injury is compensable if the conditions under which it occurs is the result of a requirement of employment); Stellas v. Western Union Tel. Co., 16 N.J. Misc. 423, ____, 1 A.2d 335, 336 (Work. Comp. Bur. 1938) (employee need only be doing some act reasonably necessary and incidental to his employment). *But see* Industrial Comm'n v. Anderson, 69 Colo. 147, 149, 169 P. 135, 136 (1917) (performing work at home was in no sense a condition of employment).

77. 78 Cal. App. 3d at 159, 144 Cal. Rptr. at 110.

78. *See* note 68 *supra*.

79. For an excellent comparison of the change in judicial analysis, one should compare the facts of *Bramall* with those in Sylvan v. Sylvan Bros., Inc., 225 S.C. 429, 82 S.E.2d 794 (1954). The court in *Sylvan* clearly expressed its view of white collar employees who take work home. The court stated that it was common knowledge that such workers take work home merely for their personal convenience. *Id.* at 421, 82 S.E.2d at 796.

clients would come into the office and there would be telephone calls during the normal workday. It is difficult to conceive how the disturbances after normal office hours were any different from those during regular hours. However, in light of the fact that there has been a continuous erosion of the "going and coming" rule, the court's reliance on this questionable finding is not surprising.

In addition, the *Bramall* court's holding that there must be a direct and substantial benefit to the employer will also have an impact on future decisions. After *Bramall*, it will be difficult to conceive of a situation in which an employee takes work home and an incidental benefit is not found.[80] The only possible limitation on this potential expansion is that the *Bramall* court held that the benefit must be conferred in the furtherance of a condition of employment. The impact of this limitation is clearly seen in a decision subsequent to *Bramall*. In *Southern California Rapid Transit District, Inc. v. Workers' Compensation Appeals Board*,[81] the California Court of Appeals, Second District, placed a great deal of em-

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80. For a discussion of benefit to the employer see the following cases. Deterts v. Times Publishing Co., 552 P.2d 1033 (Colo. Ct. App. 1976) (newspaper boys were allowed to keep their bicycles at employer's premises during the day because of vandals at school. The claimant was injured when he brought the bicycle to the employer's premises. The court held that the storage was beneficial to the employer because it insured speedy delivery of papers); Bob Hagestad Porshe Audi, Inc. v. Industrial Comm'n., 503 P.2d 628 (Colo. Ct. App. 1972) (claimant, a service manager, drove a customer's car home overnight for the purpose of road-testing it under actual traffic conditions. This was normal procedure when nothing could be found wrong with an automobile in the shop. While using the car that evening to celebrate his wife's birthday, the claimant was injured in an accident. The court found from the facts that whenever the claimant was using this particular vehicle it was of benefit to his employer even though slight); True v. Longchamps, Inc., 171 Conn. 476, 370 A.2d 1018, 1018 (1976) (even though no benefit was found from the facts of the case the court stated "injury is compensable where the employee is injured while using the highway in doing something incidental to his regular employment, for the joint benefit of himself and his employer, with the knowledge and approval of the employer." *Id.* at ___, 370 A.2d at 1019); Dombach v. Olkon Corp., 163 Conn. 216, 220, 302 A.2d 270, 274 (1972) (even though an employee's intent is a factor to be considered, it is not the determinative test in deciding if there is benefit to the employer); Johnson v. McGehee Brothers Furniture Co., 256 So. 2d 741 (La. Ct. App. 1971) (decedent was employed as a route salesman and bill collector. He was furnished a vehicle which he was allowed to drive and keep at home. Decedent stopped at a bar on the way home and was later found dead in the employer's car after crashing into a tree. Facts failed to show that decedent was in any way engaged in a journey for the use and benefit of his employer at the time of the injury); Thomas v. Certified Refrigeration Inc., 392 Mich. 623, 221 N.W.2d 378 (1974) (employee was allowed to garage a company vehicle at his home. He was seriously injured on his way to work during a detour to deliver his daughter to school. The court found this to be a benefit to the employer in that the employee cared for the van at home); Rau v. Crest Fiberglass Indus., 275 Minn. 483, 485, 148 N.W.2d 149, 151 (1967) (compensation may be awarded even where the benefit of the journey appears to be greater for the employee); Watson v. Nassau Inn, 74 N.J. 155, 158, 376 A.2d 1215, 1218 (1977) (employer benefits do not necessarily exclude activities which primarily serve employee interests).

81. ___ Cal. App. ___, ___, 146 Cal. Rptr. 277, 280 (1978).

phasis on the requirements of an employee's duties. The court denied compensation to an employee who was injured in an automobile accident while returning home from a trip to his place of employment.[82] The employee had traveled to his place of employment to drop off a medical release form authorizing him to return to work. The court concluded that there was no employment duty imposed upon the employee by the express or implied conditions of his employment contract and that the delivery of the release was solely for the benefit of the employee.[83] Thus, it appears that the express or implied conditions of employment remain a viable limitation in awarding compensation in California.

The *Bramall* decision may also have an effect on subsequent decisions made in other states which adhere to the "going and coming" rule. For example, Iowa recognizes the "dual purpose" exception to the "going and coming" rule.[84] In *Pohler v. T. W. Snow Construction Co.*,[85] compensation was awarded when the decedent was struck and killed by a train after going into town for both business and personal reasons. Based on the facts of the case the court held that the principal reason for the journey was business.[86] In *Golay v. Keister Lumber Co.*,[87] the court applied the Cardozo test, but referred to the business purpose as being one of sufficient substance. It is conceivable that subsequent decisions in Iowa will rely on the Cardozo test as stated in *Bramall* without referring to the business purpose as the major or primary factor.[88] In so doing, Iowa would join the growing number of states which have recognized the inequities of the "dominant purpose" test.

Obviously, the *Bramall* decision is significant in a number of ways. It clearly adopts the Cardozo "concurrent purpose" test. As a result, employees who are injured in California while traveling for *both* business and personal reasons will no longer have to prove that the business purpose of the trip was the dominant purpose. Additionally, *Bramall* represents a continuation of the judicial erosion of the "going and coming" rule. Ultimately, *Bramall* will be used as a tool to extend

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82. *Id.* at ____ , 146 Cal. Rptr. at 278.

83. *Id.* at ____ , 146 Cal. Rptr. at 280. The court distinguished some previous cases on the fact that in those cases there was a statutory duty that the employee submit to medical care. *Id.* The court also distinguished *Bramall* as a "special mission" exception. *Id.* at ____ , 146 Cal. Rptr. at 282.

84. Iowa also recognizes other exceptions to the "going and coming" rule. *See, e.g.*, Kyle v. Green High School, 208 Iowa 1037, 226 N.W. 71 (1929); Pribly v. Standard Elec. Co., 246 Iowa 333, 67 N.W.2d 438 (1954). *See* Note, *Workers' Compensation in Iowa—The Going and Coming Rule and Its Exceptions*, 27 DRAKE L. REV. 688 (1978).

85. 239 Iowa 1018, 1020, 33 N.W.2d 416, 418 (1948).

86. *Id.* at 1019, 33 N.W.2d at 419.

87. 175 N.W.2d 385, 388 (Iowa 1970).

88. *See* Note, *Workers' Compensation in Iowa—The Going and Coming Rule and Its Exceptions*, 27 DRAKE L. REV. 688 (1978).

workers' compensation coverage to include injuries sustained while going to or coming from work where the circumstances of employment necessitate bringing work home and where there is a concurrent incidental benefit to the employer. As such, the workers' compensation laws will move one step closer to achieving the equitable goal of awarding compensation where it is *rightly* deserved.

Michael Mallaney

INCOME TAX—LIFE INSURANCE AGENTS' DEBIT BALANCES AND MORTGAGE ESCROW FUNDS ARE CONSIDERED ASSETS FOR TAX PURPOSES WHILE THE LOADING PORTION OF DUE AND DEFFERRED PREMIUMS ARE NOT ASSETS WITHIN THE MEANING OF THE LIFE INSURANCE COMPANY INCOME TAX AACT OF 1959.—*Bankers Life Co. v. United States* (8th Cir. 1978).

Bankers Life Company, a mutual life insurance company, brought an action in federal district court against the federal government for wrongful disallowance of its claim for income tax refunds.[1] The issue centered on the proper method of computing a company's income tax liability under the Internal Revenue Code as amended by the Life Insurance Company Income Tax Act of 1959. Specifically, the taxpayer claimed that due and deferred premiums,[2] agents' debit balances[3] and mortgage escrow funds[4] should not be considered assets in calculating its current earnings rate[5] within the meaning of section 805(b)(4) of the Code.[6] The district court held that mortgage escrow funds should not be

1. Bankers Life Co. v. United States, 412 F. Supp. 62 (S.D. Iowa 1976), *aff'd in part, rev'd in part*, Nos. 76-1787, 76-1840 (8th Cir., filed June 12, 1978), *rehearing granted* (submitted Oct. 18, 1978).

2. Due premium is a premium which is due and unpaid to the insurance company but is still within the 31-day grace period. Deferred premium is that portion of premium which falls due between December 31 of each calendar year and the anniversary date of the policy. *Id.* at 64. For a further discussion, *see* J. MACLEAN, LIFE INSURANCE 107-08 (9th ed. 1962); D. MCGILL, LIFE INSURANCE 214-16 (rev. ed. 1967); R. MEHR & R. OSLER, MODERN LIFE INSURANCE 169-70 (3d ed. 1967).

3. Agents' debit balances are used to attract prospective agents to the business of selling life insurance by making financial advances to new agents and charging the advances against the agents' anticipated future commissions. Bankers Life Co. v. United States, 412 F. Supp. at 70-71, *aff'd in part, rev'd in part*, Nos. 76-1787, 76-1840 (8th Cir., filed June 12, 1978), *rehearing granted* (submitted Oct. 18, 1978). For a further discussion, *see* MACLEAN, *supra* note 2, at 365-66; MCGILL, *supra* note 2, at 833-36; MEHR & OSLER, *supra* note 2, at 659, 661.

4. Mortgage escrow funds are payments by mortgagors to a mortgagee (or its correspondents) to provide a fund for the payment of property taxes, mortgage and casualty insurance premiums and special assessments when such obligations become due. Bankers Life Co. v. United States, 412 F. Supp. at 71-72, *aff'd in part, rev'd in part*, Nos. 76-1787, 76-1840 (8th Cir., filed June 12, 1978), *rehearing granted* (submitted Oct. 18, 1978). For a further discussion, *see* MACLEAN, *supra* note 2, at 292-98; MCGILL, *supra* note 2, at 667; MEHR & OSLER, *supra* note 2, at 340-41.

5. For a discussion of the significance of current earnings rate in calculating investment income, *see* note 29 and accompanying text *infra*.

6. Section 805(b)(4) reads as follows: