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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Petitioner,

v.

WORKERS' COMPENSATION
APPEALS BOARD and ROBERT
DECOURCEY, JR.,

Respondents.

E054153

OPINION

ORIGINAL PROCEEDINGS; petition for writ of review. Order annulled.

Charles S. Bentley, Patricia A. Brown, and Alan R. Canfield, for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

Straussner Sherman and Michael D. Treger for Respondent Robert Decourcey, Jr.

California Department of Corrections and Rehabilitation (CDCR) contends that the Workers' Compensation Appeals Board (Board) erred when it awarded benefits to applicant Robert Decourcey, Jr., (Decourcey) for injuries he sustained while driving to

work. The Board concluded his injuries were compensable because the special mission exception to the going and coming rule applied. We disagree and, accordingly, annul the Board's decision.

FACTS

Decourcey was a correctional officer employed by CDCR. He exchanged shifts with another employee and, while driving to work for that shift, he was involved in a single vehicle accident.

Decourcey filed a worker's compensation claim, which was denied based on the "going and coming" rule.

Decourcey worked at Pilot Rock Conservation Camp, a minimum security facility located at a relatively remote area of the San Bernardino Mountains. It houses between 70 to 92 inmates, but usually numbers around 85. The inmates do fire suppressant work. There are seven officers, one sergeant, and one lieutenant assigned to the Pilot Rock facility. There are three shifts and the officers rotate their shifts every three months. Officers sometimes swapped shifts. Sergeant Juncaj testified that swapping shifts benefited the employer by reducing possible overtime since he would have to call someone on the overtime list if an officer was not able to come in for his shift. It is also more efficient and makes his job easier. Juncaj further testified that it is mandatory for the camp to be fully staffed and that every shift is a special need. Although there is a form for swapping shifts, the form was never filled out at the three institutions where he had previously worked. Juncaj permitted the officers to perform swaps without first obtaining approval. The number of shifts varied depending on the time of the year.

Decourcey usually worked the third watch from 2:00 p.m. to 10:00 p.m. On the evening of January 6, 2009, correctional officer Floyd contacted Decourcey and asked him to work his shift from 6:00 a.m. to 2:00 p.m. so that he could take his grandmother to the hospital. Floyd would then work Decourcey's 2:00 p.m to 10:00 p.m. shift. Decourcey agreed.

Decourcey left his house at 4:30 a.m. on January 7, 2009, to work the morning shift. He said he intended to get there early to exchange information with the staff. The morning was cold and frosty, and he hit a patch of black ice and spun off into a ravine. He suffered severe injuries.

Decourcey testified that he swapped shifts about 10 times a year, sometimes at his request and sometimes at the request of others. He had worked the 6:00 a.m. to 2:00 p.m. shift before, the last time sometime after Christmas.

The Board found that the "special mission" exception to the going and coming rule applied because the swapping of the shifts was done with the implied approval of the employer and for the employer's financial benefit. Therefore, it concluded that two of the three tests required to meet the special mission exception applied. The additional test was whether the activity was extraordinary in relation to routine duties. Again, the Board found that this test was met because the staffing requirements of the camp, which required staffing of every shift, constituted a special need. The workers' compensation judge (WCJ) stated: "In addition, the change of shift from 2PM to the early morning hours forced [Decourcey] to drive in the dark, frosty, and cold weather leading to the accident caused by black ice. This is clearly unusual or extraordinary in comparison to

the employee's routine duties as [Decourcey] had been working the 2PM to 10PM shift and went in very early to accommodate the employer and to exchange information with the officer on the night shift who had been working a double shift.”

DISCUSSION

The basic “going and coming” rule provides that an employer is not liable for compensation for injuries occurring while the employee is en route to or from work. (*City of San Diego v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1385, 1387; see also 2 Witkin, Summary of Cal. Law (10th ed. 2005) Workers' Compensation, § 201, pp. 787-788.) It is beyond question that Decourcey was on his way to work when the accident occurred. While we defer to the Board's findings of fact if supported by substantial evidence, where, as here, there is no real dispute as to the facts, the question whether the injury was suffered in the course of employment is one of law subject to this court's de novo review. (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1290; *Dimmig v. Workmens' Comp. Appeals Board* (1972) 6 Cal.3d 860, 864.) Our task is not to reweigh the evidence, but to determine whether any exception to the “going and coming” rule applies based on the salient facts of this case. We conclude that these facts do not justify finding such an exception.

One of the exceptions to the “going and coming” rule is the “special mission or errand” exception, which the Board found to apply in this case. This exception provides that an injury suffered by an employee during his regular commute is compensable if he was also performing a special mission for his employer. (*General Ins. Co. v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 595, 601 (*General Ins.*.)

The employee's conduct is "special" if it is "extraordinary in relation to routine duties, not outside the scope of employment." (*Schreifer v. Industrial Acc. Com.* (1964) 61 Cal.2d 289, 295; *Los Angeles Jewish Community Council v. Industrial Acc. Com.* (1949) 94 Cal.App.2d 65.)

To support the existence of a special mission, the underlying activity must be (1) special, that is, extraordinary in relation to the employee's routine duties, (2) within the course of the employee's employment, and (3) the activity was undertaken at the express or implied request of the employer and for the employer's benefit. (*C. L. Pharris Sand & Gravel, Inc. v. Workers' Comp. Appeals Bd.* (1982) 138 Cal.App.3d 584, 590 (*C. L. Pharris*); *City of San Diego v. Workers' Comp. Appeals Bd.*, *supra*, 89 Cal.App.4th at p. 1388.) "The special activity need not be required by the employer as a condition of employment and need not be compulsory, but the mission must incidentally or indirectly contribute to the service and benefit of the employer." (*City of Los Angeles v. Workers' Comp. Appeals Bd. (DeLeon)* (2007) 157 Cal.App.4th 78, 85.)

Shift swapping was clearly of benefit to the employer in that it helped to ensure employees would be present for each shift without the supervisor having constantly to shuffle schedules to accommodate absences and, to an uncertain extent, it may have helped it to avoid incurring overtime payment. The employees themselves were also beneficiaries because they enjoyed the ability to adjust their work schedules to accommodate their personal needs. We cannot conclude that Decourcey was rendering extraordinary service to his employer simply by showing up for work in another's place to perform routine duties. Indeed, if the sergeant had notified Decourcey the previous

day that he had to work Floyd's shift the next morning, there would be no basis for finding that he was engaged in a special mission. (*Baroid v. Workers' Comp. Appeals Bd.* (1981) 121 Cal.App.3d 558, 571 (*Baroid*.) Characterizing every shift as a "special need" renders the concept of "special" meaningless. Employers, in general, require sufficient workers on hand to perform their jobs, but it does not follow that it is fulfilling a special need. If this need were used as the basis for the exception to the going and coming rule, then we would have to find that any officer driving to work for his regular shift was also engaged in a special mission. The going and coming rule would be swallowed up.

Thus, to determine whether the special mission exception applies in this case, we must look to those cases involving changes in the employee's work schedule, but beginning with the precept that the special mission rule is ordinarily held inapplicable when the only special component is the fact that the employee began work earlier or quit work later than usual. (*General Ins., supra*, 16 Cal.3d at p. 601.)

The first case we consider is *Schreifer v. Industrial Acc. Com., supra*, 61 Cal.2d 289. There, the injured employee was a police officer whose shift usually started at 7:00 p.m., but he received a call from his superior at 1:00 p.m. to report for duty " 'as soon as possible.' " He was involved in an automobile accident on his way to work. The court stated that in reporting to work hours ahead of his regularly scheduled shift, the officer was doing more than merely making services available at the place where they were needed. "Making the trip at that time was a special service. The telephonic order from his superior to report early was not the usual manner of scheduling duty hours.

There must have been some special need for Schreifer's services at that time." (*Id.* at pp. 294-295.) Unlike the instant case, Schreifer was responding to an emergency situation in response to an order from his superior that was not the usual manner of scheduling duty.

Los Angeles Jewish Community Council v. Industrial Acc. Com., *supra*, 94 Cal.App.2d 65, is similar. There, the decedent was a librarian. His usual hours of employment were from 2:00 p.m. to 6:00 p.m. on Mondays through Fridays. The library scheduled special activities for a particular week. The decedent was informed that he would be expected to attend evening activities, including activities on Saturday and Sunday. He attended the activities on the evenings of the week in question. On Saturday, a member of the library board telephoned him and requested that he come to the library earlier than usual that evening to inspect and discuss certain purchases. He was struck by a car while en route to the library about one-half hour earlier than he had gone on the prior evenings. The significant distinction justifying the finding of a special mission in that case was that the employee was requested to come to the library at an earlier hour than usual and he was being required to perform duties that were extraordinary for evening work, albeit part of his daytime duties.

Also, see *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (1980) 104 Cal.App.3d 528, where an employee was injured when he was attacked on his way home after he worked overtime. The court concluded that the resulting injury came within the special mission exception, but it was significant that his overtime duties lasted extremely

later than usual *and* that the work (a semiannual inventory) was not that which was typically performed.

Baroid, supra, 121 Cal.App.3d 558, found that the special mission exception did not apply in circumstances not dissimilar to our present case. There, the injured employee regularly began his workday at 8:00 a.m. He was frequently required to work additional hours, however, and was injured while on his way to a scheduled 5:00 a.m. assignment. The Court of Appeal annulled the Board's decision to award benefits: "[The] scope of applicant's employment duties contemplated *frequent* assignments at his customary place of employment which were outside of his regularly scheduled work shift. . . . [W]e cannot see how the injury can come within [the special mission] exception. . . . Applicant's duties to be performed on [the date he was injured] have not been shown to be unusual or extraordinary; no emergency or special circumstances concerning the work on [that date] have been shown. Rather the [schedule] appears consistent with the customary manner in which the employer's business operated." (*Id.* at p. 571.)

As *Baroid* discussed, there is a common thread in cases finding a special mission that "something about the location of the work, the nature of the work, or the hour the work was performed deviated from that which was the customary, fixed or usual norm." (*Baroid, supra*, 121 Cal.App.3d at p. 569.) While that court indicated that a special mission may arise from a change in the customary work hours, it concluded that exception did not apply even though the employee came to work earlier than usual. In reaching this conclusion the court pointed out that the nature of his employment

contemplated frequent assignments at his customary place of employment outside of his regularly scheduled work shift.

Similarly, in *Luna v. Workers' Comp. Appeals Bd.* (1988) 199 Cal.App.3d 77, a police officer was injured while driving his personal car to the police station at an earlier time than he normally reported for duty so that he could direct traffic for an annual art festival. The officer contended that he was entitled to workers' compensation benefits for his injuries because he was acting within the scope of his employment during the commute to the station pursuant to the special mission exception. The Court of Appeal rejected this contention, however, concluding that because officers' shifts were routinely extended to meet additional needs, the festival had been an annual event for more than 50 years, and officers were expected to work extra hours during the festival and received overtime pay for their efforts, the officer's commute was not an "unusual or special trip" that brought him outside the going and coming rule. (*Id.* at p. 83.) Correspondingly, in this case, there was nothing unusual about changing shifts; it was an accepted practice just as the officers' shifts in *Luna* were routinely extended to meet additional needs.

The dissent argues that our reliance on *Baroid* and *Luna* is misplaced. We fail to see any significant distinctions. In both those cases, the employees were engaged in their normal and customary duties and, although not working their routine hours, the changes were a customary and accepted aspect of their employers' operations. *City of San Diego v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1385, 1389, reaffirms this principle. There, the appellate court held that a police officer whose duties include testifying in court is not on a special mission while commuting from home to court to

testify. The evidence showed that officers were expected to testify, if subpoenaed to do so, in a proceeding out of his or her patrol work. The officer testified that he was subpoenaed to testify an average of one to two times a month, and there was evidence that it was not unusual for officers to testify on days they were not scheduled to report to the station.

In such cases as *Schriefer, Los Angeles Jewish etc. Council, and Safeway Stores*, the employee's trip to or from the job was prompted by an unusual occasion either in the nature of the work and/or hours that were not ordinarily a part of the employers' routine operations. As illustrated in *Baroid, Luna, and City of San Diego*, a mission is not special unless it is extraordinary or unusual. We agree with the dissent that the job or activity to which the employee in each of the latter cases was going was part and parcel of what they were hired to do. Contrary to the dissent, we believe working Floyd's shift was part and parcel of what Decourcey was hired to do. In the present case, however, it was not unusual for officers at this camp to work different shifts. Shifts were rotated every three months and swapping shifts was a generally accepted practice and consistent with the customary manner in which the camp operated. Decourcey swapped shifts about 10 times a year, and had worked this very shift only a few days before this incident. Decourcey was merely to perform routine duties during this shift¹; his choice to arrive early for his shift does not transform his commute into a special mission. (*General Insurance, supra*, 16 Cal.3d at p. 601.) We again point out that if the sergeant had called

¹ The second and third watches were essentially the same job, although there may be some differences in the duties between the two shifts.

Decourcey the day before and arranged for him to work Floyd's shift, there would be no question that it was not a special mission.² It would be virtually identical to the situation in *Baroid, supra*, 121 Cal.App.3d at p. 571. Nor was he called in by his supervisor to come in because of an emergency situation at the workplace, but at the request of a fellow employee to accommodate the latter's personal needs. Thus, while Decourcey's swapping shifts with Floyd was done with the implied approval and, we may concede for the purposes of this discussion, invitation of his employer, we cannot conclude that it provided an extraordinary service in relation to his usual duties.

Finally, by stressing the nature of the road conditions at the time Decourcey was driving to work, the Board has seemingly conflated the special risk exception to the going and coming rule with the special mission exception. In *General Ins., supra*, 16 Cal.3d 595, the Supreme Court described a two-prong test for finding a special risk: (1) but for the employment, the injured worker would not have been at the location where the injury occurred, and (2) the risk was distinctive from that of the public generally. (*Id.* at p. 601) In that case, the Supreme Court found no special risk exception when a worker was killed by a passing car as he exited his own car parked on a public street in front of the employer's premises. The court reasoned that the risk of being struck on a public street where parking is available to the general public is the type of risk to which the public is

² Without this practice of officers swapping shifts among themselves, Decourcey could have expected such calls from his sergeant considering the latter's testimony regarding the camp's staffing needs.

exposed daily and is not a risk distinctive in nature or quantitatively greater than the risks common to the public. (*Ibid.*)

We do not find the road conditions existing at the time of the commute to justify the application of the special risk exception. The risk he faced was no different than that of anyone else on that road that morning. We note that Decourcey's "regular" shift ended at 10:00 p.m., so that he would be driving home in the dark and, at that time of year, on the same cold and icy roads. We also point out that if it had been Floyd who had been injured during his regular commute, the going and coming rule would preclude recovery. Decourcey voluntarily agreed to work Floyd's shift, not because of the nature of the commute, but as a personal favor to accommodate Floyd's family obligations.

We recognize that the going and coming rule has often been criticized as harsh, and that "most attempts to exorcise or anesthetize the rule depart from or culminate in an invocation of Labor Code section 3202." (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd.*, (1985) 40 Cal.3d 345, 352.) Despite the criticism and calls for legislative reform, the rule has stood for nearly a century since *Ocean Accident etc. Co. v. Industrial Acc. Com.* (1916) 173 Cal. 313, because it sets a necessary boundary in delineating an employee's "scope of employment." (*Santa Rosa*, at p. 352; 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. ed. 2012) §4.150[2], pp. 4-165-4.168.) As this court explained in *C. L. Pharris, supra*, 138 Cal.App.3d at p. 593, "[b]y virtue of the going and coming rule the risks of the ordinary commute are left to coverage by automobile insurance." It would be anomalous to hold that an employee who has agreed to work the shift of another employee is entitled to workers' compensation

benefits for injuries received while traveling to work, whereas the other employee whose place he is taking would not be entitled to such benefits if injured during his commute. An agreement between two employees to exchange shifts cannot convert a routine commute into a special mission. While there are many exceptions to the going and coming rule, it would be an unwarranted expansion of either the special mission or the special risk exceptions to conclude that Decourcey in this case was in the course and scope of his employment at the time of the accident.

DISPOSITION

The order of the Board is annulled.

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RICHLI
Acting P. J.

I concur:

HOLLENHORST
J.

KING, J., Dissenting.

Following a day of testimony and full briefing by the parties, a Workers' Compensation Administrative Law Judge (WCJ) ruled that respondent Robert Decourcey, Jr.'s injuries were compensable and that the "going and coming rule" did not preclude recovery. I agree.

I take exception with the majority on a number of grounds. I believe the opinion omits important facts, the standard of review is not addressed, and the majority fails to appropriately apply the law to our facts.

I. FACTS

Decourcey had been employed by petitioner California Department of Corrections and Rehabilitation since April 1990. He had previously worked at Chuckawalla, Lancaster State Prison, and Sierra Conservation Fire Camp. At the time of his injury, he was working in Crestline at the Pilot Rock Conservation Camp (Pilot Rock). Pilot Rock houses approximately 85 inmates in dormitories; there is no fence. The inmates are low risk felony offenders and assist in fighting fires.

Six correctional officers, one sergeant, and one lieutenant were assigned to the facility. Usually, two individuals worked each shift. The shifts were: 6:00 a.m. to 2:00 p.m.; 2:00 p.m. to 10:00 p.m.; and 10:00 p.m. to 6:00 a.m. The facility needed to be fully staffed for each shift. If an officer could not make it to work, he could call in and the employer would order someone to fill the shift. Alternatively, the officer could swap

shifts with another officer; such shift swapping was authorized and encouraged by the employer.

At the time of the accident, Decourcey lived in Hesperia, and the only means of accessing the Pilot Rock facility was via Highway 138. Decourcey was scheduled to work the 2:00 p.m. to 10:00 p.m. shift on January 7, 2009. The preceding evening he received a call from fellow officer, Jeremy Floyd, who indicated he had to take his grandmother to the hospital and asked if Decourcey would trade shifts with him; Floyd indicated it was an emergency. Decourcey agreed to do so. On January 7, 2009, Decourcey left his house at approximately 4:30 a.m. At the time of the accident, it was dark, frosty, and cold. He was involved in a single car accident about one mile from the Pilot Rock facility.

Decourcey testified that prior to the accident he had swapped shifts on approximately 10 occasions. He did not know if his supervisor had been contacted about the present shift swap prior to the accident.

Don Juncaj testified that he was the sergeant at Pilot Rock and had been for about a year and a half. His job duties were to assist the lieutenant, who was the commander at the camp, and included supervising and managing the shift swap process. It was mandatory that the facility be fully staffed; “[e]very shift is a special need.” He testified that there was no formal procedure relative to the swapping of shifts. While there was a form that could be filled out, there was no need for it at Pilot Rock because of the facility’s size.

Juncaj encouraged shift swapping. He explained that if the officers did not voluntarily shift swap and one of them called in and indicated he was unable to work, he would have to call the next person on the overtime list and order them to come in. If he did order someone into work, the officer would be entitled to overtime, travel pay, and meal tickets. These are extra costs to the employer. Shift swapping by employees was thus encouraged because it saved the employer time and money, and was more efficient than the formal procedure for changing shifts. As Juncaj testified, preauthorizing employees to shift swap on their own makes “his budget look[] good at the end of the year.” Preauthorizing and encouraging workers to handle their shifts on their own thus saved the state money and benefited the state.

Juncaj further testified that on the day of the accident, Decourcey was scheduled for the 2:00 p.m. to 10:00 p.m. shift. When Floyd did not show up for work, he called Floyd’s home. After being told that Floyd had swapped shifts with Decourcey, Juncaj called Decourcey’s home. He was told that Decourcey had left for work about 5:00 a.m. Because neither Floyd nor Decourcey were available to cover the shift, Officer Dinaggio, who had worked the preceding shift, was paid overtime for covering Floyd’s shift.

II. WORKERS’ COMPENSATION APPEALS BOARD’S OPINION

As indicated by the WCJ, “[t]he facts are not in dispute.” Her four-page opinion concludes: “While normally the commute to work is not compensable based upon the going and coming rule there are exceptions to that rule. The ‘special mission’ exception has been explained by the courts first in *Dimming v. WCAB* (1972) 37 CCC 211 and then

in *C L Pharris Sand & Gravel, Inc. v. WCAB (Lindsey)* (1982) 47 CCC 1420. ‘The most important factor in determining whether the special mission exception rule is applicable is whether the activity was undertaken at the express or implied request of the employer or was a reasonable expectation of the employment. If so, the activity is no longer voluntary or for the employee’s convenience, but is a condition of the employment.’ *1-4 CA Law of Employee Injuries & Workers’ Comp §4.157[.]* [¶] Clearly the changing of the shifts was done with the implied approval of the employer and for the employer’s financial benefit. Those factors were credibly testified to by the supervisor Sergeant Juncaj. Therefore, two of the three tests required to meet the special mission exception to the going and coming rule have been met. The additional test is whether or not the activity was extraordinary in relation to routine duties. In this matter, Sergeant Juncaj testified that because of the staffing requirements for the camp which was a penal facility with a maximum of 8 correctional officers including supervisors to cover all staffing that every shift was a special need. . . . In addition, the change of shift from 2PM to the early morning hours forced the applicant to drive in the dark, frosty, and cold weather leading to the accident caused by black ice. This is clearly unusual or extraordinary in comparison to the employee’s routine duties as Mr. Decourcey had been working the 2PM to 10PM shift and went in very early to accommodate the employer and to exchange information with the officer on the night shift who had been working a double shift. [¶] . . . Therefore, the evidence supports the determination that the going and coming rule does not apply as all conditions of the special mission exception to the going and coming

rule have been met. Based upon the credible testimony of all of the witnesses, it is found that applicant sustained injury . . . arising out of and occurring in the course of employment on January 7, 2009.”

III. ANALYSIS

California’s Workers’ Compensation Act (the Act) provides: “Liability for the compensation provided by this division . . . shall . . . exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . where the following conditions of compensation concur: [¶] . . . [¶] (2) Where, at the time of injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment. [¶] (3) Where the injury is proximately caused by the employment, either with or without negligence.” (Lab. Code, § 3600, subd. (a)(2), (a)(3).) As provided by Labor Code section 3202: “This division . . . shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.”

“On appeal the reviewing court is bound by the factual findings and decision of the [Workers’ Compensation Appeals Board] if supported by substantial evidence. . . . [T]he reviewing court may not reweigh evidence or decide disputed facts.” (*Gaytan v. Workers’ Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214.) The Act is to “‘be liberally construed by the courts with the purpose of extending [its] benefits for the protection of persons injured in the course of their employment.’ This command governs

all aspects of workers' compensation; it applies to factual as well as statutory construction. [Citations.] Thus, '[i]f a provision in [the Act] may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construction is possible.' [Citation.]" (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.)¹

"In determining whether the going and coming rule bars compensation in a particular case, the courts must abide by the mandate of Labor Code section 3202, which provides that the Act 'shall be liberally construed' to protect the injured. Any doubts as to the rule's application are to be resolved in favor of coverage." (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 565, fn. omitted.)

Given our standard of review and the statutory dictate that the Act be liberally construed to protect the injured worker, I do not believe the WCJ erred in finding Decourcey's injury compensable. As expressed by the WCJ, Decourcey's shift swap was encouraged by his employer, it financially benefited his employer, and it fulfilled a special need at the facility.

¹ See *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369: "Under the power expressly granted to it by the California Constitution, the Legislature has established a complete system of workers' compensation, which is a subject of statewide concern. . . . The purpose of workers' compensation is to extend its benefits for the protection of persons injured on the job. [Citation.] To carry out this purpose, we must liberally construe the Labor Code in favor of the injured worker. [Citations.] This precept governs all aspects of workers' compensation, both factual and statutory." (*Id.* at pp. 1375-1376.)

“‘Ordinarily, under the going and coming rule, an injury which occurs while an employee is driving to or from work is not compensable. This rule, however, is subject to many exceptions.’ [Citation.]” (*Dimmig v. Workmen’s Comp. Appeals Bd.* (1972) 6 Cal.3d 860, 866.) “An exception has been created if the employee was engaged in a special mission for the employer during the commute. . . . The special activity need not be required by the employer as a condition of employment and need not be compulsory, but the mission must incidentally or indirectly contribute to the service and benefit of the employer.” (*City of Los Angeles v. Workers’ Comp. Appeals Bd.* (2007) 157 Cal.App.4th 78, 84-85.) As expressed in *C.L. Pharris Sand & Gravel, Inc. v. Workers’ Comp. Appeals Bd.* (1982) 138 Cal.App.3d 584 [Fourth Dist., Div. Two], “‘when the employee engages in a *special activity* which is *within the course of his employment*, and which is reasonably *undertaken at the request or invitation of the employer*, an injury suffered while traveling to and from the place of such activity is also within the course of employment and is compensable.’” (*Id.* at p. 590, cited with approval in *City of Los Angeles v. Workers’ Comp. Appeals Bd.*, *supra*, at p. 85.)

Petitioner argues that the special mission exception does not apply because Decourcey was not engaged in a special activity reasonably undertaken at the request or invitation of the employer. I disagree.²

² In this vein, petitioner submits that shift swapping was done by the employees solely for their own individual convenience and, as such, had no correlation to their employer’s job expectancy. While we do not quarrel with petitioner’s argument that some of the motivation relative to shift swapping may have been personal to the employees, that fact in and of itself does not preclude a finding that the injury arose out
[footnote continued on next page]

As acknowledged by both parties, the controlling case is *Schreifer v. Industrial Acc. Com.* (1964) 61 Cal.2d 289. There, the injured employee was a deputy sheriff who was injured on his way to work. He normally worked eight hours per day. His shift was designated on a bulletin board on the day preceding each shift. On the day in question, he was scheduled to work from 7:00 p.m. to 3:00 a.m. At 1:00 p.m., he received a call from the administrative sergeant, directing him to report for duty “as soon as possible”; no reason was given for the directive. On his way to work, he was involved in a car accident. In reversing the Industrial Accident Commission, the Supreme Court found that the going and coming rule did not bar compensation because the deputy was involved in a “special mission.” (*Id.* at pp. 290, 294.)

The *Schreifer* court focused its discussion on whether the deputy’s commute at a nonscheduled time was a *special activity*. The court stated that “[t]he special request for the unusual service is the decisive factor” and “the exception includes the regular trip at a special time.” (*Schreifer v. Industrial Acc. Com., supra*, 61 Cal.2d at pp. 291-292.) Or, as stated in another fashion, the exception is present if the employee is “coming from his

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of and occurred within the course and scope of employment. As expressed in *Bramall v. Workers’ Comp. Appeals Bd.* (1978) 78 Cal.App.3d 151, 156-158 [Fourth Dist., Div. Two], under certain circumstances, the dual purpose exception may apply to commutes to and from work. (See *Price v. Workers’ Comp. Appeals Bd., supra*, 37 Cal.3d at pp. 569-570.) While the shift swapping may provide some personal benefit to the respective employees, it is nonetheless clear that it fulfilled a special need of the employer and was extraordinary in relation to Decourcey’s routine duties.

home . . . on a special errand either as part of his regular duties or at a specific order or request of his employer” (*Id.* at p. 292.)

In concluding, the court indicated that the special mission exception applied. Schreifer, the court explained, “had scheduled hours of duty, set a day ahead. Here his schedule for the day in question had been posted. In reporting to work hours ahead of his regularly scheduled shift he was doing more than merely making his services available at the place where they were needed. Making the trip at that time was a special service. The telephonic order from his superior to report early was not the usual manner of scheduling duty hours. There must have been some special need for Schreifer’s services at that time. The fact that a particular mission is encompassed within the terms of hire, even contemplated at the time employment began, is not determinative. Nearly every employment relationship contemplates that extraordinary needs may arise and must be met. ‘Special’ means extraordinary in relation to routine duties, not outside the scope of the employment.” (*Schreifer v. Industrial Acc. Com.*, *supra*, 61 Cal.2d at pp. 294-295.)

As applied here, Decourcey’s trip was a special activity. The evidence demonstrated that he was scheduled to work the 2:00 p.m. to 10:00 p.m. shift. Pilot Rock had limited staffing: two supervisors and six officers. Given that they supervised 85 inmates, there was a need that the camp be staffed with two individuals on each shift. All persons working at the camp knew this. Floyd was unable to make the early shift because of an emergency involving his grandmother. At Floyd’s behest, Decourcey

agreed to cover Floyd's shift. Although Decourcey was injured while driving the same route as he normally drove, he was doing so at a special time.

While he was not ordered by a supervisor to cover Floyd's shift, this is truly a distinction without a difference. All the officers knew that each shift had to be covered by two persons. Juncaj testified that it was mandatory that the facility be fully staffed and that every shift was a "special need." There was no formal procedure relative to the swapping of shifts. He encouraged and preauthorized employees to handle the shift swap on their own to avoid the cost of paying overtime. If the officers did not voluntarily shift swap and one of them could not come in to work because of an emergency, he would call the next person on the overtime list and order them to come in.

Under *Schreifer*, Decourcey was most certainly performing a special activity that was not only encouraged and authorized by his employer, but was also for the direct benefit of his employer.

Further support for the proposition that Decourcey not being specifically ordered to fill Floyd's shift is a distinction without a difference can be found in *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (1980) 104 Cal.App.3d 528. There, the applicant was employed as a data processing clerk. His regular shift was from 3:00 p.m. to 11:15 p.m. On the day in question, rather than leaving at his ordinary time, he remained at work until 5:30 the next morning in order to help complete a semiannual grocery inventory. Upon arriving home and after exiting his vehicle, he was attacked and suffered injury. Relying primarily on *Schreifer*, the court affirmed the Board's finding of

compensability. In so holding, the court noted: “While performance of overtime work by an individual employee was considered voluntary, the employer’s need for *someone* to work overtime in order to complete the inventory seems clear. [Applicant] and two other data processing clerks rotated overtime among them, and [Applicant] testified that he stayed late because someone had to. Overtime work was not itself unusual for that shift, and [Applicant] himself had worked overtime on 15 occasions during the preceding 6 months” (*Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd.*, *supra*, at p. 537, fn. 4.) Thus, as in the present matter, while there was no evidence of a specific direct order to fill the shift, it is clear that it was a special need of the employer and *someone* had to do it.

Given that we “must abide by the mandate of Labor Code section 3202, which provides that the Act ‘shall be liberally construed’ to protect the injured” and “[a]ny doubts as to the [going and coming] rule’s application are to be resolved in favor of coverage” (*Price v. Workers’ Comp. Appeals Bd.*, *supra*, 37 Cal.3d at p. 565, fn. omitted), I conclude that the WCJ did not err in finding Decourcey’s injury compensable.

In support of its position, the majority relies primarily on three cases.

The first case relied upon by the majority is *Baroid v. Workers’ Comp. Appeals Bd.* (1981) 121 Cal.App.3d 558 (*Baroid*). There, the court found that the applicant’s injury was not compensable when he was injured in an automobile accident on the way to work. The employee’s normal shift was from 8:00 a.m. to 4:30 p.m. On the day in question, he was reporting to work at 5:00 a.m. to perform services that were part of his

daytime duties. Of significance to the *Baroid* decision, however, is that the employee was required as part of his employment to be available 24 hours per day; such is not the case here. As stated in *Baroid*: “The employer here is engaged in the business of supplying equipment to oil well drilling operations. Applicant’s routine work shift was 8 a.m. to 4:30 p.m., which is the employer’s only regular work shift. However, because of the nature of the employer’s business, employees were required to be available 24 hours a day; the employer operated around the clock. Applicant was therefore required to make himself available outside his regular work shift hours.” (*Id.* at p. 563.) “[T]he scope of applicant’s employment duties contemplated *frequent* assignments at his customary place of employment which were outside of his regularly scheduled work shift.” (*Id.* at p. 571.) These are not our facts. Here, it was not part of Decourcey’s employment that he be available 24 hours a day. It was only necessary that he be available to cover his assigned shift, whatever that may have been. Further, there was nothing about his employment that entailed him being frequently assigned outside of his scheduled shift.

After summarizing a number of cases in which the special mission exception was found to be present, the *Baroid* court indicated that “the common thread is that something about the location of the work, the nature of the work, or the hour the work was performed deviated from that which was the customary, fixed or usual norm.” (*Baroid, supra*, 121 Cal.App.3d at p. 569.) In the present setting we have just that. While the location and the nature of the work are the usual norm, the hours that the work was being performed was a deviation from Decourcey’s assigned work shift. As the *Baroid* court

pointed out in discussing *L. A. Jewish etc. Council v. Ind. Acc. Com.* (1949) 94 Cal.App.2d 65, in which the court found that the special mission exception was present, “[w]e only stress the point that there the employee, Rabbi Cohn, was making a trip to perform his usual duties at his customary fixed place of work as a librarian *but at an unusual hour.*” (*Baroid, supra*, at p. 570.)

Although the majority may rely on *Baroid* to support its conclusion, I believe a closer reading of the case supports the application of the special mission exception to the present matter.

The majority’s reliance on *Luna v. Workers’ Comp. Appeals Bd.* (1998) 199 Cal.App.3d 77 is also misplaced. There, Officer Luna was injured in an automobile accident while en route to the police station. His normal shift began at 11:30 p.m., but weeks earlier he had been notified to report at 10:00 p.m. to help with traffic for the annual Laguna Festival of Arts. Important to the decision is the court’s discussion that it was part of a Laguna Beach police officer’s employment duties to cover the annual event. As indicated, “[t]he festival has been an annual event since 1932. The chief of police testified shifts were routinely extended to meet the additional demands, and the 11:30 p.m. swing shift officers were instructed to report at 10 p.m. Officers checked in at the station as usual before proceeding to the nearby festival grounds. Luna concurred in his chief’s testimony and acknowledged all officers eventually worked extra hours during the festival and received overtime pay for their efforts. He was notified one or two weeks in advance of the extended schedule.” (*Id.* at p. 83.) Again, as in *Baroid*, Luna was not

involved in anything unusual as it related to his employment. As part of their assigned duties and as part of their employment with the police department, all officers worked extra hours during the annual Festival of Arts. There was nothing odd or unusual about the service that Luna was en route to perform and, given the annual Festival of Arts, there was nothing unusual about the hours. (*Luna v. Workers' Comp. Appeals Bd.*, *supra*, at p. 82.)

In *City of San Diego v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1385, also relied upon by the majority, the court held that a police officer injured in an accident on the way to court to testify was not on a special mission. As the court indicated, “[w]e hold that a police officer whose duties include testifying in court is not on a special mission while commuting from home to court to testify.” (*Id.* at p. 1387.) In explaining its holding, the court stated: “The record shows that it is an integral part of a San Diego patrol officer’s duties to testify, if subpoenaed to do so, in a proceeding arising out of his or her patrol work, and that such an officer testifies at such proceedings an average of twice a month. Molnar testified that he is subpoenaed to testify an average of one to two times per month. Testimony at the hearing also established that it is not unusual for officers to be called to testify on days when they are not scheduled to report to the station, and that the police department has various policies applicable to officers who testify on off-duty days. Pursuant to one such policy and a memorandum of understanding between the San Diego Police Officers Association and the San Diego Police Department, Molnar

received overtime compensation for testifying on an off-duty day.” (*Id.* at pp. 1388-1389.)

In sum, what the majority has done to support its position is simplistically cite to three cases in which the special mission exception was found not to apply. In doing so, it has wholly failed to discuss the rationale for the respective decisions and apply it to the present set of facts.

In each of the cases relied upon by the majority, the job or activity to which the employee was going was part and parcel of what they were hired to do. Thus, the special mission exception did not apply. Here, however, there is no evidence that working an unassigned shift was part and parcel of what Decourcey was hired to do. The cited cases simply have no application under our facts.

For the special mission exception to apply, the mission must incidentally or indirectly contribute to the service and benefit of the employer and must be requested or invited by the employer. Lastly, it must be a deviation from that which is part and parcel of the terms and conditions of employment—that is, the location of the work, the nature of the work, or the hour the work is to be done is different than that which was customary, fixed, or the usual norm.

Here, there is substantial evidence that shift swapping benefited the employer. It was encouraged and authorized by the powers that be. And, it was not part and parcel of what Decourcey had been hired to do; it was a deviation from his pre-assigned work schedule. The award should be affirmed.

KING

J.