COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015466-13**

Valerie Hatch	Employee
SHC Services Inc.	Employer
Ins. Co. State of PA/AIG Claims	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol, and Harpin)

This case was heard by Administrative Judge Vieira.

APPEARANCES
Michael C. Akashian, Esq., for the employee at hearing
Michael K. Landman, Esq., for the employee on appeal
Michael T. Henry, Esq., for the insurer

CALLIOTTE, J. The insurer appeals from a decision establishing liability for a June 24, 2013, industrial injury, and ordering payment of §§ 13 and 30 medical benefits. The insurer's primary argument is that the judge erred by failing to apply the "going and coming" rule to bar an award of compensation. We affirm.

The employee was seventy-one years old at the time of the hearing. She testified that, after working as a teacher for many years, she entered the nursing field at the age of sixty, and, in 2012, became board certified in psychiatric and mental health nursing. (Dec. 4.) At the time of her injury, she was working as a psychiatric nurse pursuant to a contract[1] with the employer, Supplemental Health Care Services (SHC). The employee, who lived in Danvers, Massachusetts, was assigned by the employer to work at the Brattleboro Retreat, a mental health facility in Brattleboro, Vermont, from May 25, 2013,

[1] The contract, signed only by the employee, was admitted as Exhibit 5. It contained a number of documents: 1) Employee Travel Agreement; 2) Schedule A – Rate Schedule; 3) Schedule B – Declaration of Permanent Tax Home; 4) Schedule C – Assignment Specific Requirements; and 5) Employee Travel Expense Reimbursement Policy – Supplement to Schedule B.

to August 24, 2013. (Dec. 4, 7.) She worked five days a week on the night shift, from eleven p.m. to seven-thirty a.m. At the beginning of her work week, she would drive from her home in Danvers to her job in Brattleboro. (Dec. 5.) She believed she was allotted expenses for lodging and meals for five days a week. Accordingly, she would book a hotel for five nights, and drive home to Danvers at the end of her work week to avoid having to pay for a hotel out of pocket. (Dec. 5; Tr. 13-15, 33, 34 36-37.) Although her contract provided that, in addition to her salary, she would receive a $123 per diem to cover expenses for lodging, meals and incidentals, she could not verify what she was actually paid because she never calculated it. She never put in for travel reimbursement because the policy was never made " 'too clear' " to her. (Dec. 6; Tr. 32.) She did not notify her employer when she traveled home to Massachusetts on her days off, nor did she believe she was required to do so. Moreover, she did not believe any "contingency [sic] was placed on her being able to travel back to Massachusetts on her off days." (Dec. 6-7.)

The employer's senior market manager, Haven Blais, testified that the employer, SHC, places nurses and allied health professionals in patient care assignments nationwide. SHC employs local contractors, who receive a straight hourly pay, and "travelers," who qualify for a tax-free per diem for meals and lodging if they meet the criteria for a "traveler" under the IRS guidelines. (Dec. 7; see Ex. 5, Schedule B and Supplement.) Ms. Blais testified she gave all of the "travelers" a seven-day per diem each week, unless she was notified they were traveling to their "permanent tax home." (Dec. 7-8.) She further testified the employer did not assume its contractors traveled anywhere during the contract period. (Dec. 8.) However, Ms. Blais admitted she would make exceptions, and pay the per diem on occasion, if she was notified by a nurse that she needed to go home to pick up clothes. In addition, there were instances when a nurse was traveling "for a birthday or retirement party" and the employer paid airfare in lieu of a per diem. (Dec. 9.) Because the employee never notified the employer she was returning to her home in Danvers, Ms. Blais paid her the per diem for seven days each week. With respect to mileage for travel, Ms. Blais believed the employer paid mileage

to the Brattleboro facility on a one-time basis up to $250, but admitted she could be wrong. (Dec. 7-9.)

On June 24, 2013, immediately after working the last night shift of her five-day work week, the employee began driving from Brattleboro to Danvers. On the way home, she was involved in a serious car accident, requiring that she undergo a number of surgeries. She woke up several weeks later at a rehabilitation facility with no memory of the accident. She was eventually discharged home with a walker and assistance from a registered nurse, physical therapist and occupational therapist. (Dec. 6.)

Following a § 10A conference, the judge ordered the insurer to pay the employee § 34 benefits from June 25, 2013, to date and continuing, as well as §§ 13 and 30 benefits. The insurer appealed, and the case came on for a hearing, at which disability and extent of incapacity were not contested. The only issue before the judge was liability, i.e., whether the "going and coming" rule applied to bar the employee from receiving compensation. (Dec. 3.)

The judge considered the testimony of the witnesses, as well as the employment contract, and concluded there was "no convincing dispositive evidence offered as to what the agreement was between the parties." (Dec. 12.) With respect to the employer's assertion that the contract required the employee to notify the employer each time she traveled to her home in Danvers so the employer could avoid paying her the $123 per diem, the judge found the "contract . . . is inconsistent with the Employer's behavior . . . ." (Dec. 11.) The contract provided, "[w]hen applicable an employee may receive a combined per diem housing, meals and incidental expense allowance based on facility location of $123.00 for each full day the employee is away from home and working on assignment pursuant to this agreement." Id.; (Ex. 5, Schedule A.) However, the employer paid the employee the per diem for seven days per week, even though it knew she was actually working only five days per week. (Dec. 11.)

With respect to the payment of a travel allowance or mileage, the judge found the contract unclear. Schedule A provides:

> Reimbursement will be made at the rate of $0.50 per mile, not to exceed $250.00 for travel to the facility to begin work under this agreement. Mileage reimbursements may be paid in advance, but are contingent upon the successful completion of this contract.

(Ex. 5; Schedule A.) The judge found, "It is unclear to me whether the second sentence is referencing the first sentence or whether the reimbursement referenced is in addition to the initial trip from Danvers, MA to Brattleboro, Vermont." (Dec. 11.) She further found that "Schedule B - Declaration of Permanent Tax Home" "sheds no further light on the agreement," insofar as it states, in part, " 'I agree to notify SHC if anytime during the assignment I am not considered a traveler.' " (Dec. 11-12; Ex. 5, Schedule B.)

The judge adopted the employee's testimony that "there was no contingency [sic] placed on her being able to travel back to Massachusetts on her days off and [she] does not believe she was required to report to the Employer each time she traveled to her home in Danvers." (Dec. 12.) Although Ms. Blais testified that the employer "does not assume its' [sic] employees will travel home during the contract period," the judge did not find that testimony credible. (Dec. 13.) She found the facts of the case "almost identical" to those in Swasey's Case, 8 Mass. App. Ct. 489 (1979). (Dec. 9.) There, a Massachusetts employer dispatched its employees in the engineering field to clients in other locations. The employee, who lived in Arlington, Massachusetts, was assigned by his employer to work on a project in Poughkeepsie, New York for three months. He was paid a per diem which he could apply to food and lodging, or to travel, or to a combination of both. Id. at 490-491. He returned to his home in Arlington every weekend, and was seriously injured while driving home at the end of his work week. Rejecting the insurer's argument that, because Swasey was traveling home for the sole purpose of visiting his family, he was precluded from receiving benefits by the "going and coming" rule, the court held:

> The evidence warranted a finding that Swasey's injury arose out of and in the course of his employment. The "going and coming" rule has no application to this case because when Swasey's employment is viewed in its entirety, his travel was of such a nature that it brings him within "that class of 'travelling workers not barred from receiving compensation." Wormstead [v. Town Manager of Saugus, 366 Mass 659, 667 (1975)]. Although Swasey's employment did not require

> continuous mobility, it did impel travel, and "where it appears that it was the employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment." Caron's Case, 351 Mass. [406, 409 (1966)]. . . . It was to the benefit of [the employer's] business interests that its employees travel, and it knew that its employees did not relocate their families with each assignment but would, instead, make periodic visits home. This is obvious from [the employer's] payment of a per diem amount for purposes of living or travel expenses, whichever the employee might choose. Swasey elected to do both, and the per diem compensation was sufficient to cover the costs of his choice. Although Swasey was not injured during the hours he worked at Poughkeepsie, he was injured while engaged in an activity which constituted a critical and substantial incident of his employment for which he received compensation. Therefore, Swasey's accident could properly be found to be within the "risk of the street while actually engaged . . . in the undertakings of his employer," that is, travelling from his IBM worksite (see Papanastassiou's Case, 362 Mass.[91,] 93, 94 [(1972)]), and we will not overturn the finding of the single member.

Swasey, supra, at 494.

The judge here found that, as in Swasey, when the employee's employment was " 'viewed in its entirety, [her] travel was of such a nature that it brings [her] within "that class of travelling workers not barred from receiving compensation." ' " (Dec. 12, quoting, Swasey, supra, quoting Wormstead, supra.) It was in the "nature of its business" for the employer in Swasey and the employer here to "assign and dispatch [employees] to distant areas to work on a specific project until completion." (Dec. 13.) And, as in Swasey, it was to the benefit of the employer's business that its employees travel. (Dec. 13.) Thus, the judge found the insurer liable for the employee's injuries. (Dec. 14.)

On appeal, the insurer makes two related arguments to support its contention that the judge erred by finding the "going and coming" rule did not bar compensation. First, the insurer argues that the employee was not a traveling employee, pursuant to the written contract between the parties, but had a fixed place of employment in Vermont. Second, the insurer maintains that Swasey's Case, supra, is distinguishable, and the judge erred by relying on it. We find no error.

The 'going and coming' rule bars compensation for injuries sustained when an employee travels to and from a single fixed place of employment. Wormstead, supra, at

666-667; Sheremeta v. Bartons Angels, 27 Mass. Workers' Comp. Rep. 155, 156 n. 1 (2013), and cases cited. However, the " 'going and coming rule' has little, if any application when a traveling employee is injured." Dean v. Access Nurses, Inc., 23 Mass. Workers' Comp. Rep. 303, 304-305 (2009), citing Frassa v. Caulfield, 22 Mass. App. Ct. 105, 109-112 (1986).

The insurer initially contends that the employee had "a fixed place of employment" in Brattleboro, because the parties had agreed she would remain at her assignment there until its completion, and, thus, she was merely commuting home from her fixed place of employment at the time of the accident. (Insurer br. 5.) This narrow reading is unsupported by the holdings in the most factually similar cases, Swasey's Case, supra, and Dean, supra. In both cases, the employees, who had been dispatched by their employers to distant locations and provided with allowances for meals, housing and/or travel, were considered traveling employees, not employees whose temporary employment location was a fixed place of employment. Dean, supra, involved a nurse who was placed on temporary assignment in Massachusetts from her home in California. We found her to be a traveling employee whose injuries, which occurred at the apartment complex rented by the employer as she left for work, were compensable. "Just as the payment of a per diem in Swasey brought the travel within the scope of his employment, here the employer's provision of the employee's living quarters made the risks encountered on that premises incidental to the employee's work." Id. at 306. These cases are distinguishable from those in which an employee is not relocated to a temporary home, but merely commutes, although a substantial distance, from her permanent home to her fixed job site. Cf. Viveiros v. GRF Constr. Corp., 12 Mass. Workers' Comp. Rep. 480, 482 (1998) (construction worker traveling two hours home from fixed jobsite was barred from compensation under the "going and coming" rule because length and duration of commute does not transform the employee into a "traveling employee").

The insurer then acknowledges that the employee was not actually required to remain in Brattleboro during the pendency of the contract, but "could depart and return home from the assignment," as long as she notified the employer, as required by her

employment contract, so it could cancel the $123 per diem payment. (Insurer br. 5.) It asserts:

> This agreement served to establish a fixed place of employment for the employee where she had declared Brattleboro, Vermont, as her temporary residence *for tax purposes in order to receive per diem payments for meals and lodging without deduction for taxes*. Ex. 5, 009. At no point prior to 6/24/13, did she renounce her status under this Declaration [of Permanent Tax Home] or notify the employer of her departure home to Massachusetts. The judge found the employee did not understand this was required of her. The judge, however, found there was a contract in place. The agreement was admitted for its full probative value. In the paragraph just above her signature line, the employee agreed to notify the employer if she left her temporary residence to return home.

(Insurer br. 5; emphasis added.) However, as the insurer acknowledges, the document it relies on is a checklist for determining whether the employee meets the *IRS* criteria for eligibility "to receive per diem payments for meals and lodging *without deduction for taxes.*" Id.; emphasis added. Thus, the employee's certification that she is considered "a traveler for this assignment *per the IRS guidelines,*" and her agreement "to notify SHC if anytime during the assignment I am not considered a *traveler,*" (Ex. 5, "Schedule B – Declaration of Permanent Tax Home;" emphasis added) must be viewed in context as pertaining to the meaning of the word "traveler" under the IRS guidelines. As the "Supplement to Schedule B," explains: The *IRS has specific qualifications that define a traveler*. This may, however, differ from how some of our clients, and certainly some of our competition, define a traveler." (Ex. 5, Supplement to Schedule B; emphasis added.)

Moreover, if an employee does not qualify as a "traveler" under IRS regulations, the consequence is that the employer is required to withhold payroll taxes, not that the employee is prohibited from traveling. The Supplement to Schedule B explains:

> As an Employer and an IRS Withholding Agent, the IRS requires that Supplemental Health Care ("Company") withhold payroll taxes on any payments to an employee, including travel expense reimbursements and housing benefits, unless the employee meets the qualification of a traveler as defined by the IRS.
>
> . . . .
>
> If the employee is not sleeping away from their home and duplicating lodging expenses, then they are not considered a traveler *according to the IRS* regardless of how far they travel to the work facility. Anytime an employee is driving from

> home to an assignment it is considered commuting (no matter how far) and *any reimbursement associated with this is always taxable.*
>
> . . . .
>
> If . . . the Company determines that the representation on the Schedule B or other documentation provided, does not validate the employee as a traveler, the Company will be required to treat the employee travel expense reimbursements and any travel benefits as income and *will withhold payroll taxes accordingly.*

(Ex. 5, Supplement to Schedule B; emphasis added.) Ms. Blais interpreted the contract to mean: "If we do pay a per diem and you travel back to your tax home, we are in violation of IRS tax guidelines." (Tr. 45.) However, Schedule B and its Supplement indicate only that, if an employee is not considered a "traveler" by the IRS, the employer is to withhold payroll taxes on the per diem; it does not prohibit an employer from paying a per diem or an employee from traveling.

Thus, the determination of whether the employee is a "traveler" under IRS guidelines is not dispositive of whether she is a "traveling employee" for purposes of eligibility for workers' compensation benefits. See Camargo v. Publishers Circulation Fulfillment, Inc., 30 Mass. Worker's Comp. Rep. 311, 321 (2016)(independent contractor statute, G. L. c. 149, § 148B(a)(1-3), does not apply to a determination under Chapter 152 of whether claimant is an employee or independent contractor). Rather, Chapter 152, § 26,[2] as interpreted by the courts and this board, establishes whether the employee is a

[2] General Laws c. 152, § 26, provides, in relevant part:

> If an employee . . . receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer . . . he shall be paid compensation by the insurer or self-insurer, as hereinafter provided; . . .

The "arising out of" and "street risk" standards are " 'closely related' and 'the controlling principles under each clause tend to converge,' McElroy's Case, 397 Mass. 742, 748 (1986), so that '[t]oday injuries resulting from a risk of the street are compensable under broad general principles construing "arising out of the employment." ' " Frechette v. Northeastern University, 21 Mass. Workers' Comp. Rep. 105, 108 (2007), quoting Nason, Koziol and Wall, Workers' Compensation, § 10.7 (3rd ed. 2003).

traveling employee to whom the going and coming rule has little application for purposes of eligibility for workers' compensation benefits.

This brings us to the insurer's second argument: that the judge erred by relying on Swasey's Case, supra, to find the employee's employment impelled her travel. The key differences between the facts in Swasey, and those here, according to the insurer, are that the insurer knew Swasey traveled home on weekends, and allowed him to use the per diem however he saw fit—for meals, lodging, travel or all of the above. Here, argues the insurer, the employer was not notified the employee was traveling home, and the per diem was payable only for the days she remained at her temporary residence in Brattleboro.

We do not think the issue of whether the employer had agreed to pay the per diem or mileage reimbursement[3] for the actual days the employee traveled home distinguishes her case in any significant way from Swasey's Case, supra. Swasey's per diem was based on the number of hours per week he worked, and did not include reimbursement for weekend time spent at home with his family. Here, the judge could not determine the terms of the agreement between the parties for payment of the per diem. However, whether, as the employee understood, her per diem was limited to the five days a week she worked, or, as Ms. Blais testified, it was based on the number of days she remained at her temporary residence, or it was simply paid for seven days per week, we do not see a meaningful difference in the rationale for payment. As in Swasey, the per diem was paid to allow the employee to work at a distance from her permanent home, which was not only a clear benefit to the employer's business, but a necessity to its operation.[4] (Dec. 9.)

[3] See Rose v. Kerins Concrete, 25 Mass. Workers' Comp. Rep. 271, 278 (2011), citing Dow v. Intercity Homemaker Serv., 3 Mass. Workers' Comp. Rep. 136 (1989)(lack of payment for travel home or for travel itself, although mitigating against compensability, is not dispositive).

[4] Moreover, because the employee was not required to submit receipts for meals and lodging, to the extent her actual expenses were lower than the per diem, she, like Swasey, could essentially use the per diem as she saw fit We note that Schedule B provides: "I also certify that while away from my permanent tax home, all travel allowances or reimbursements received by me will be used for temporary living expenses actually incurred." However, like the rest of Schedule B, this provision must be viewed in the context of its relevance to tax guidelines.

Just as Swasey's employment impelled his travel, making " 'the risk of the trip . . . a hazard of the employment, ' " Swasey, supra, quoting Caron's Case, supra, so did the employee's.

The insurer' s argument presupposes, however, that the employee's failure to notify the employer she was traveling home is fatal to her claim because, without such notice, the employer expected she would remain at her temporary residence in Vermont, and would thus pay the per diem. Again, the insurer relies on "Schedule B – Declaration of Permanent Tax Home," (Ex. 5.), which, as discussed above, deals with the requirements for an employee to qualify as a "traveler" under the IRS guidelines so the employer is not required to withhold payroll taxes. These documents do not prohibit travel without notice to, or permission from, the employer.

Even if the judge had accepted the insurer's argument that the contract required notice of travel, which she did not, the employee's failure to notify the employer before traveling home would not require a different result, as a matter of law. "[V]iolation of an employer rule will not bar receipt of compensation unless such violation is intentional on the employee's part, and the rule has been clearly communicated and enforced by the employer." Frechette v. Northeastern University, 21 Mass. Workers' Comp. Rep. 105, 111 (2007), citing Ferreira's Case, 294 Mass. 405, 406 (1936). In Frechette, we held that a campus police officer who had failed to follow his employer's undisputed policy of notifying the employer before he went on break off campus, was entitled to compensation for injuries suffered while returning to his assigned sector. We noted that the only statutory bar to compensation for an injury that otherwise arises out of and in the course of employment is § 27, which applies if the "employee is injured by reason of his serious and willful misconduct." Id. Here, the judge credited the employee's testimony that she believed she was not required to notify the employer, and that there were no conditions placed on her returning to her home in Massachusetts. (Dec. 12.) In addition, the judge permissibly found the contract itself unclear and the employer's actions inconsistent with

it.[5] Id. The judge's findings do not support a conclusion that the employee engaged in willful misconduct or intentional violation of a clearly-communicated rule, which would bar compensation.

The judge's reliance on Swasey's Case, supra, to find that, when the employee's "employment is viewed in its entirety," her travel brings her within the class of " 'travelling workers not barred from receiving compensation,' " id. at 494, quoting Wormstead, supra at 667, was neither an error of law nor arbitrary and capricious. Accordingly, we affirm the decision.

Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee in the amount of $1,613.55.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***May 25, 2017***

[5] We see no error in these findings. Piecing together the various parts of the contract is confusing, at best, particularly since much of it deals with compliance with IRS regulations. See discussion, supra. Ms. Blais admitted she did not understand parts of the contract, such as how the mileage reimbursement portion worked, nor did the employee. (Dec. 8, 10; see Ex. 5, Schedule C.) Moreover, the parties did not agree as to the conditions for payment of the per diem as described by the contract. (Dec. 5, 8-9.)