COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052343-99**

Brian Walsh	Employee
Hollstein Roofing, Inc.	Employer
Valley Forge Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Levine and McCarthy)

APPEARANCES
George G. Burke, Esq., for the employee
Martin T. Sullivan, Esq., for the insurer

WILSON, J. The insurer appeals an administrative judge's award of ongoing G. L. c. 152, § 34, benefits for temporary, total incapacity to the employee who, after the employer had told him that he would not be needed for work that day, was injured while helping to repair the employer's crane. Finding no error, we affirm the decision.

Brian Walsh, thirty-six years old at the time of the hearing, is a high school graduate. Beginning in the mid-1980's, he worked as a laborer for various companies, most recently as a laborer/roofer for the employer. (Dec. 4.) When he reported to work on the morning of December 31, 1999, David Hollstein, president of Hollstein Roofing, told him that "whatever cleanup work there was to be done had been assigned and that his services were not needed on that day." (Dec. 5.) As he left the office, the employee saw two other employees working in the yard. He helped them clean out a pick-up truck, and then decided to repair a crane in the yard. While one of the other employees extended the crane's boom, the employee climbed a ladder. As he reached toward the boom, he fell to the ground, hitting his head on the crane on the way down. The employee was taken to a local hospital and then transferred to Brigham and Women's Hospital, where an emergency craniotomy for excision of a hematoma was performed, during which part of

his skull was removed. In the ensuing months, he had three more surgeries for replacement of the right temporal bone flap, removal of the bone flap due to infection, and, finally, insertion of a prosthetic device into his skull. (Dec. 5.) Since the last surgery in the fall of 2000, he has experienced sporadic seizures, lack of balance, short-term memory loss, frequent confusion and disorientation, as well as back pain. (Dec. 6.)

The employee's claim was denied at a § 10A conference, and he appealed to a de novo hearing. Pursuant to § 11A, Dr. Michael Freed examined the employee on December 28, 2000. The judge allowed the parties to submit additional medical evidence to address the period prior to the impartial examination. Neither party deposed Dr. Freed. (Dec. 2-3.) Dr. Freed opined that the employee is totally disabled from jobs involving activities such as "climbing, driving or operating machinery, etc., because of his seizures and is disabled from more cognitive jobs because of his memory and cognitive deficits." (Dec. 6.)

In her decision, the judge noted that the parties did not dispute the occurrence of an injury on the employer's premises, nor did the doctors disagree concerning the severity of the employee's injury and resulting disability. The judge addressed the insurer's core defenses: 1) that the employee's injury did not arise out of and in the course of his employment, and 2) that he was intoxicated at the time of his injury and, thereby, barred from an award of benefits pursuant to § 27 of the Act.[1] (Dec. 6-7.) On the insurer's latter defense of willful misconduct, the judge found that, though the employee had been drinking the night before the accident, and might have been negligent in climbing a ladder the morning of the accident, his "actions did not rise to the level of quasi-criminal, willful and wanton conduct as contemplated by § 27." (Dec. 10.)

As for the first issue of whether the employee's injury arose out of and in the course of his employment, the judge found:

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[1] General Laws c. 152, § 27, provides:

> If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation; but this provision shall not bar compensation to his dependents if the injury results in death.

> In order for the employee to have sustained a compensable injury, he 'need not necessarily be engaged in the actual performance of work at the moment of injury. It is enough that he is upon his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment.' See Bradford's Case, 319 Mass. 621 (1946). It is not only injuries occurring during breaks in a regular work day, but also injuries occurring before or after work hours, that have been deemed compensable. See Rocheleau v. General Electric Co., 1 Mass. Workers' Comp. Rep. 392 (1987) (employee injured while on the employer's premises picking up a paycheck on the weekend)[.]
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> In this case, David Hollstein conceded that his company was open for business on December 31, 1999 and, accordingly, all employees were expected to report to work that morning. The employee was therefore legitimately on the employer's premises on the morning of the accident. In addition, he was engaged in activities consistent with his regular duties for the employer when he sustained the injury. I find that the employee was acting in good faith, in furtherance of the employer's business at the time of his injury. Although the general practice was that work had to be specifically assigned by Hollstein, the employee was under the impression that he could assist with the cleanup work and report his hours when he had finished. He came to work that morning, as he was required to do, and before leaving the premises observed work that needed to be done. He undertook to help with the cleanup and to repair the employer's crane, work which would normally be within the scope of his employment and work which was of benefit to the employer.
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> That the employee was working despite being told that his services were not needed is not fatal to his claim. I find that at the time of his injury, the employee was engaged in conduct consistent with and incidental to his employment and that his injury is compensable. See Rocheleau v. General Electric Co., [supra].

(Dec. 7-8.)[2] Accordingly, the judge found that the employee sustained a personal injury arising out of and in the course of his employment, and awarded him ongoing § 34 benefits beginning on December 31, 1999. (Dec. 11.)

The insurer makes three arguments. First, it asserts that the employee's injury did not arise "in the course and scope of" his employment. (Ins. brief 1, 4.) The insurer next

[2] The judge's findings are consistent with the employee's testimony that during the six or seven years that he worked "off and on" for the employer, it "was not uncommon" for workers to show up, be told there was no work, and then find work "out back" for which they were paid. (Mar. 15, 2001 Tr. 31-32.)

contends that the employee's injury was the result of his serious and willful misconduct, and that the judge erroneously sustained an objection to the insurer's cross-examination of the employee regarding his alcohol consumption prior to the injury. We summarily affirm the decision as to the latter two issues raised by the insurer. For the reasons set out below, we also affirm the judge's conclusion that the employee's injury arose out of and in the course of his employment.

We begin by noting that the issue as framed by the insurer—whether the injury arose "in the course and scope of his employment"—does not track the language of G. L. c. 152, § 26, which provides compensation for a personal injury "arising out of and in the course of " employment. Whether an employee is acting within the *scope* of his employment (a tort principle of narrower range applied to determine whether a master is liable for the negligence of a servant) is irrelevant in a compensation case, though sometimes the terms have been used interchangeably. See Mulford v. Mangano, 418 Mass. 407, 410-411 (1994). "[An employee's] activity may be beyond the scope of his authority, so that the employer could not be held liable to a third party for his negligence, but the employee himself may still be entitled to compensation if he is injured." L. Locke, Workmen's Compensation § 211 (2d ed. 1981), citing Sawyer's Case, 315 Mass. 75 (1943).[3]

We conduct our analysis of whether the employee's injury arose out of and in the course of his employment with the understanding that "[t]he work[ers'] compensation act is to be construed broadly to include as many employees as its terms will permit." Warren's Case, 326 Mass. 718, 719 (1951).

> "The determination whether an injury 'arose out of' and 'in the course of' employment is a question of fact to be decided by the [administrative judge] . . . . 'Arising out of' refers to the causal origin, . . . while 'in the course of' refers mainly to the time, place, and circumstances of the injury in relation to the employment." Larocque's Case, 31 Mass. App. Ct. 657, 658-659 . . . (1991), citing Zerofski's Case, 385 Mass. at 592 . . . , and Corraro's Case, 380 Mass. 357,

[3] The judge at one point referred to the "scope of his employment," (Dec. 8), but appeared to analyze the case under the correct principles of law.

> 359-361 (1980). An "[i]njury 'arises out of' employment if it is attributable to the 'nature, conditions, obligations or incidents of the employment; in other words, [to] employment looked at in any of its aspects.' " Zerofski's Case, 385 Mass. at 592. . . , quoting from Caswell's Case, 305 Mass. 500, 502 (1940).

Aetna Life and Cas. Ins. Co. v. Commonwealth, 50 Mass App. Ct. 373, 376 (2000) (citations omitted). This dual inquiry is best summarized as a search for "work-connection." Certainly, the distinction between "arising out of" and "in the course of" is not that clear-cut, and many cases are decided without dealing with the separate elements comprising the requirement. Hence, a strong showing of work-connection in one area may be enough to establish compensability even if work-connection is weak in another. Locke, supra at § 211.

The insurer does not quarrel with the general proposition that an injury may be compensable, despite the fact that the employee was not actually performing work duties at the time of the injury. See Bradford's Case, 319 Mass. 621 (1946). Nor does it contend that every injury occurring on an unscheduled work day is not compensable. See Rocheleau v. General Elec. Co., 1 Mass. Workers' Comp. Rep. 392, 394 (1987). In addition, it concedes that there are circumstances in which an accident occurring either before or after a day's employment will be compensable. Warren's Case, supra. (Ins. brief, 5.) Nonetheless, the insurer attempts to distinguish these cases by arguing that they involve employees who were on the job with the express or implied permission of the employer, whereas Mr. Walsh enjoyed no such permission. Indeed, the insurer argues, Mr. Walsh ignored the proscriptions of the employer when he went to work in the yard, and was thus attempting to expand the scope of his employment contract. See Belyea's Case, 355 Mass. 721 (1969). (Ins. brief, 6.) We disagree.

If the employee at the time of his injury was doing something which he was forbidden to do, he would not be entitled to compensation. Ferreira's Case, 294 Mass.

405, 406 (1936).[4] However, the judge here did not find that the employee had been forbidden to assist in the yard. Though David Hollstein testified that he told the employee to go home, (May 4, 2001 Tr. 31), the judge neither adopted this testimony nor found that the employee contravened an express directive. Rather, she found that Mr. Hollstein "told the employee that whatever cleanup work there was to be done had been assigned and that his services were not needed on that day." (Dec. 5.) This finding appears to be based on the employee's testimony that Mr. Hollstein "said that there was no work for you guys because it was a holiday. And there was no work for today. And so people who wanted to go home, could go home." (March 15, 2001 Tr. 28.) The judge concluded that the employee had been expected to report to work that morning and was, therefore, legitimately on the employer's premises. (Dec. 7.) Because credibility determinations are the sole province of the administrative judge when based on the evidence and reasonable inferences drawn therefrom, see Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001), we may not disturb this finding.

Additionally, the judge found that the employee was "under the impression" that he could assist with the cleanup work and then report his hours to the employer. (Dec. 8.) See supra note 2 and accompanying text. Contrary to the insurer's assertions, the employee's understanding of what was allowable is relevant. As in Ferreira, supra, despite the employer's testimony to the contrary:

> . . . [I]t could have been found that the employee *was not*, at the time of his injury, *doing something which had actually been forbidden* by the employer. Or it could have been found that even if there had been such a prohibition it *had not been communicated to the employee* and therefore was not binding on him.

Id. at 407 (emphasis added). Here, the judge assessed the evidence and did not find that the employer had prohibited the employee from performing the activities he was engaged

[4] Compare Sawyer's Case, supra at 79-80, where the court upheld the board's finding that the employer was liable to pay compensation for the death of the employee, a truck driver, even though it assumed that the employee had violated a rule prohibiting drivers from picking up passengers.

in at the time of his injury.

The insurer further argues that, even if the employee had misunderstood Mr. Hollstein's directive and genuinely believed that he could work without specific authorization, he was impermissibly attempting to expand the scope of his employment contract. However, as noted above, the employee's activities need not be within the "scope" of his work to be compensable. See Mulford, supra at 410-411. "[I]t is enough if he is on his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment." Bradford's Case, supra at 622. The judge specifically found that the cleanup and repair of the employer's crane was work which would normally be within the "scope" of the employee's work. (Dec. 8.)

Belyea's Case, supra, cited by the insurer, is inapposite. There, the court denied benefits to the wife of a truck driver who was killed while driving his truck, allegedly to the employer's garage, after spending three hours in a bar following a day of driving. Though the garage was only twenty minutes from the bar, the accident occurred two hours after the employee left the bar in an area that was not en route to the garage. The court upheld the judge's ruling that the employee's death did not arise out of and in the course of his employment, since there was no evidence on what errand the employee was engaged at the time of his death, and it was far from clear that he had regained the route he would have been expected to take to the garage. Id. at 723. By contrast, here it is undisputed that the activities performed by the employee were done on the employer's premises on a morning when the employee was expected to report to work. (Dec. 6, 7.) In addition, the judge specifically found that the activities the employee was engaged in at the time of his accident were consistent with his regular duties. (Dec 7.)

The judge's findings that Mr. Walsh was acting "in furtherance of the employer's business at the time of his injury," (Dec. 7), and was performing work "which was of benefit to the employer," (Dec. 8), further support her conclusion that the employee's injury arose out of and in the course of his employment. We look to Chapman's Case,

321 Mass. 705 (1947), where the court upheld an award of compensation to an employee who was injured on his unpaid lunch period while milling clapboards on the employer's equipment for a third person. As its reasons, the court held that the employer knew that the employee had performed such work in the past and had not forbidden him to do so, and that the work was of benefit to the employer. Id. at 708-709. The court contrasted a situation where the employee would not have been entitled to compensation:

> If the employee had voluntarily undertaken for his own personal reasons to make a few clapboards on his own time solely for the accommodation of a friend and the employer had had no interest therein and had derived no benefit therefrom, and in the absence of any evidence tending to show that such use of the machinery was contemplated by the terms of the employment, and if the employee had thereby sustained an injury, such injury as matter of law would not have arisen out of the employment.

Id. at 708. The court continued:

> Even if the employee was not to receive anything for milling these two pieces of lumber and in doing so he was accommodating [a third person], this would not bar him from compensation where it could be found that he was not doing the work in accordance with any gratuity or favor extended to him but that such work had become *at least* an incident of the employment, and that he was acting primarily and principally for the benefit of his employer within the sphere of his employment.
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> The mere fact that the performance of duties which resulted in injury to the employee occurred before or after regular working hours or during a lunch period would not bar him from compensation if his claim was otherwise compensable. Indeed, compensation for an injury which arose out of the actual performance of his work but outside the usual hours could hardly be denied in this Commonwealth where *it is well established that an employee is entitled to compensation for an injury sustained outside the regular hours even if at the time of his injury he was engaged in something which was only incidental to his employment*.

Id. at 710-711 (emphasis added; citations omitted). See also Hicks v. Boston Medical Ctr., 16 Mass. Workers' Comp. Rep. 426 (2002) (hospital EKG technician who voluntarily had flu shot administered by employer hospital on her lunch hour received an injury in the course of her employment when the shot resulted in blindness because

receipt of flu shot was an incident of her employment and a clear benefit to her employer).

Accordingly, we affirm the decision of the administrative judge awarding the employee § 34 temporary total incapacity benefits. Pursuant to G. L. c. 152, § 13A(6), employee's counsel is awarded a fee of $1,273.54.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **July 1, 2003**

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge