COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039446-98**

Dante DiFronzo	Employee
J.F. White/Slattery/Perini Joint Venture	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Maze-Rothstein and Wilson)

APPEARANCES
Leonard Y. Nason, Esq., for the employee at hearing and on appeal
Dorothy L. Gruenberg, Esq., for the employee on appeal
Michael P. Sams, Esq., for the insurer at hearing and on appeal
Christopher A. Kenney, Esq., for the insurer on appeal

CARROLL, J. The insurer appeals a decision in which an administrative judge awarded the employee workers' compensation benefits for an accident in which he was struck by a motor vehicle while working at a Central Artery Project ("Big Dig") construction site, in Boston. The judge also awarded a penalty of double back benefits, pursuant to § 14(1), based on her finding that the insurer had defended against the claim without reasonable grounds. Finally, the judge awarded the employee's attorney an increased fee under the provisions of § 13A(5), due to the complexity of the matter and the effort expended by the attorney. We affirm the principal award of benefits, reverse the § 14(1) penalty, and recommit the case for further findings on the attorney's fee.

The employee worked on the "Big Dig" in the area of the Freedom Trail and North Street, where his duties included setting up road and side walk detours, spraying down trucks and sweeping dirt and mud from the Freedom Trail. The employee's regular hours were 7:00 a.m. until 3:30 p.m., and he regularly worked overtime. The employee was required to work in the public ways, as the Freedom Trail ran between work zones where excavation was being performed. The entire aggregation of the "Big Dig" work

zones, along with the public streets and sidewalks running between them, is referred to as the "footprint" of the Central Artery Project. (Dec. 3-5.)

On the date of the injury, September 22, 1998, Dante DiFronzo had just finished his regular shift, when he headed across North Street to see if the foreman had any more work for him to do. As was customary, he would use a radio in one of the trucks parked in the work area abutting North Street to make that call. At approximately 3:40 p.m. Mr. DiFronzo was struck by a motor vehicle while crossing North Street, and sustained injuries to his head, shoulder, ribs, knee and back. (Dec. 3-5.)

The insurer resisted the employee's claim for workers' compensation benefits, and defended the claim on the basis that the employee's injury occurred after he had completed his work day, and was in North Street on his way to alight a bus, which stopped on that street adjacent to the work areas. (December 2, 1999 Tr. 64-65; February 17, 2000 Tr. 59-63.) The judge did not credit the insurer's version of the events, and instead adopted the employee's testimony that he was crossing North Street to call his supervisor about overtime. Certainly, this credibility assessment was the judge's to make. That credibility finding having been made, the law supports her conclusion that liability attached, as this "street risk" was within the employee's "Big Dig" employment in the North Street area. G.L. c. 152, § 26.[1] See Wormstead v. Town Manager of Saugus, 366 Mass. 659, 666-667 (1975) (determining that injury on break occurred while employee "was engaged in activities consistent with and helpful to the accomplishment" of the employer's functions, court ruled that injury was within "street risk"); Papanastassiou's Case, 362 Mass. 91, 93 (1972) (key question is whether the employment impelled the employee's "trip"). See also Paluccio v. Department of

[1] General Laws c. 152, § 26, provides, in pertinent 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, and whether within or without the commonwealth, he shall be paid compensation by the insurer . . . .

Revenue, 11 Mass. Workers' Comp. Rep. 325, 330-332 (1997) and cited cases; Rogers' Case, 318 Mass. 308, 309 (1945) (injury prior to work shift in employer's parking lot where employee parked his car, separated by public street from place of employment, not barred by going and coming rule); cf. L. Locke, Workmen's Compensation, § 263 (2d ed. 1981) (citing Rogers, supra, the treatise extrapolates: "An injury going from [the employer's] building to the [employer's] parking lot would be covered if incurred on the intervening public street"); Larson, 1 Workers' Compensation Law, § 13.01[4][a](2000) ("One category in which compensation is almost always awarded is that in which the employee travels along or across a public road between two portions of the employer's premises"). We affirm the judge's award of compensation benefits for the employee's injury as a result of being hit by a motor vehicle in North Street.

However, the judge's ruling on the employee's § 14(1) unreasonable defense claim does not follow from her liability determination.[2] The analysis of whether a defense interposed is reasonable or not is objective in nature: whether a prudent insurer would have resisted the claim based on the information available to it. Gonsalves v. IGS Store Fixtures, Inc., 13 Mass. Workers' Comp. Rep. 21, 24 (1999). The judge made findings:

> A cautious and prudent insurer would have made an investigation and learned that the employer's managerial personnel considered the aggregation of work zones and the public streets between them to be the "footprint" of the project, and considered the entire footprint to be the work site, and that the employer's Chief Operating Office considered the employee's injury to have occurred "within the limits of the project." In light of the fact that the nature of Big Dig work regularly

[2] General Laws c. 152, § 14(1), provides, in pertinent part:

> [I]f any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by an insurer without reasonable grounds:
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> (a) the whole cost of the proceedings shall be assessed upon the insurer; and
>
> (b) if a subsequent order requires that additional compensation be paid, a penalty of double back benefits of such amount shall be paid by the insurer to the employee . . . .

> exposes the workers to the risks of the street, it was unreasonable for the insurer to argue that the mere fact that the employee was injured on a public street barred recovery under the circumstances.
>
> Given the uncontroverted evidence, it was also unreasonable for the insurer to argue that the employee had ceased work at the time of his injury. Reporting to his foreman that he was leaving for the day was accepted custom for this job and the employer made a two-way radio available to the employee for that purpose. It provided a benefit to the employer and was clearly authorized by the employer.

(Dec. 9-10.)

The problem with the judge's analysis is that the evidence was not uncontroverted. As noted above, there was evidence that would have put the employee in North Street on his way to catch his bus home after his workday had ended.[3] This evidence, had it been credited, might have barred recovery for the accident, because the employment would no longer have impelled his crossing the street, and he would not have been acting in furtherance of the employer's interests. See Wormstead, supra; Papanastassiou, supra. The public street, on those facts, could have been seen as simply that, and the employee without any special status. No Massachusetts authority addresses the present situation, with an injury occurring in a public street that is not within the "premises" of the employer's construction sites (i.e. North Street was not under construction), but which is closely associated by its proximity, being abutted on either side by construction sites. And while there is plenty of authority for liability to extend to practically anything within the employer's premises, see, e.g., Milliman's Case, 295 Mass. 451, 453 (1936), we cannot say that the area of North Street within the footprint of the Big Dig was so necessarily and obviously part of the employer's premises – accepting *arguendo* that the employee was in the process of catching a bus – that a defense of the claim was unreasonable as a matter of law. See Larson, 1 Workers' Compensation Law, § 13.04 (2000), for a chaotic ride through the range of how "premises" has been interpreted in

[3] Likewise, although the record is clear that workers customarily did contact their foremen prior to leaving for the day, (February 16, 2000 Tr. 52), evidence also established that this was not a work requirement and that workers at times did leave without doing so. Id. at 45-47, 51-53.

going and coming cases throughout the country. With the law being as dissonant as it is in this area, we cannot see the appropriateness of a § 14(1) penalty for unreasonable defense. We therefore reverse the order of double back benefits pursuant to § 14(1).[4]

Finally, we turn to the issue of the judge's award of increased fee for the employee's attorney. The fee awarded, pursuant to § 13A(5), was $17,950.00.[5] (Dec. 11.) The judge reasoned:

> This case was much more complicated than the usual. It required 5 days of hearings, with extensive investigation and research. The employee's counsel submitted a comprehensive and helpful brief. He submitted time records showing the value of the attorney's effort on this case to be $17,950.00. The hourly rate for the principle [sic] attorney is set at $100, a more than reasonable rate given the attorney's skill and experience, and I find the other rates charged to be reasonable and the time spent to be reasonable.

(Dec. 10.) The attorney's itemized bill was not made an exhibit, but was appended as Exhibit C to the employee's closing argument. That it was what it purported to be was not challenged by the insurer. We, thus, take judicial notice of the bill.

The insurer challenges the award of an increased attorney's fee, without arguing anything more than summary assertions. The judge's determination that an increased hearing fee was due is a discretionary ruling, with which we are loath to interfere. Burnette v. Command Marketing Corp., 13 Mass. Workers' Comp. Rep. 56 (1999). Nonetheless, we are given pause by the amount of the award, and the fact that the figure adopted from the attorney's bill includes work arguably unassociated with the hearing. Most notable in this regard are the items in the bill which appear to reflect negotiation,

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[4] The employee asserts on appeal that the insurer has refused to pay the § 14(1) penalty. Assuming this to be true, we note in passing that our reversal of the penalty has no impact whatsoever on the employee's right to seek a further penalty for the "failure of [the] insurer to make all payments due an employee under the terms of an order [or] decision . . . ." G.L. c. 152, § 8(1).

[5] General Laws c. 152, § 13A (5), provides that the fee for the employee's prevailing at hearing may be increased or decreased "based on the complexity of the dispute or the effort expended by the attorney."

preparation for and the appearance at the § 15 third party settlement hearing, for which the attorney was paid a contingent fee of $6,666.66.[6] We also are not able to determine whether the judge's award was influenced by the employee's success on the § 14(1) unreasonable defense claim, which we have now reversed. See Sylvester v. Town of Brookline, 12 Mass. Workers' Comp. Rep. 227 (1998). We think it appropriate that the case be recommitted for the judge to make further findings on the appropriate amount of the increased fee payable under § 13A(5).

Accordingly, we affirm the award of compensation benefits, reverse the § 14(1) penalty, and, with respect to the attorney's fee, recommit the case for further findings consistent with this opinion.

As the employee has prevailed by sustaining the principal award of compensation, we award an attorney's fee under §13A(6) in the amount of $1,243.36.

So ordered.

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: May 8, 2001

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Sara Holmes Wilson
Administrative Law Judge

[6] We do think it curious, without implying a limitation imposed thereby, that the employee's attorney only requested an enhanced fee in the amount of $8,527.60 in his closing argument.