COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 041572-04

Deborah Dean	Employee
Access Nurses, Inc.	Employer
Commerce & Industry Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Fabricant)

The case was heard by Administrative Judge Heffernan.

APPEARANCES

Jonathan R. Harris, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
James E. Ramsey, Esq., for the insurer at hearing
William C. Harpin, Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision denying and dismissing her claim for benefits stemming from a fall on ice on her apartment's premises while leaving for work. Because she was employed as a traveling nurse, and was residing in an employer-provided apartment while on an assignment at Beverly Hospital, we conclude the employee's claim is compensable. We therefore reverse the decision, and recommit the case for further findings addressing the employee's claimed period of incapacity.

The employee, a resident of California, worked for Access Nurses, Inc., a nurse placement company. In August 2004, the employer assigned the employee to work for thirteen weeks as a full time surgical nurse at Beverly Hospital. The employment contract provided for relocation costs and required the employee to work a forty hour week at $30 per hour. (Dec. 3-4.) It also provided "[d]uring your assignment, you might be asked by the hospital to work as a charge nurse and/or be placed on-call." (Employee Ex. 1.) In accordance with its contractual obligation

to provide housing for the employee, the employer leased an apartment at Princeton Properties in Salem.[1] Id.

On November 15, 2004, the employee was scheduled to work her regular 7:00 a.m. to 3:30 p.m. shift. Upon leaving her apartment en route to work, she slipped on ice and fractured her right wrist. The judge concluded the employee's injury was not compensable by virtue of the "going and coming rule." He found:

> [A]lthough the employee's apartment was leased by the employer, the employee did not serve the employee in an "on call" capacity. This is significant given that the employee was not at the beck and call of the employer any differently than any other employee of the hospital not similarly situated in residency.
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> [A]s [the employee] exited the building and was injured, she was under no obligation to her employer, either as to where she was, where she went, or what she did. The fact that the injury occurred on property leased by the employer for the employee's personal benefit is not dispositive of the determination of whether the injury occurred in the course of her employment.
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> As to any other relevant factors for consideration, the employee was not engaged in activities consistent with and helpful to the accomplishment of her employer's functions, except to the extent that it would have benefited the employer if she showed up for work. To conclude that the employee's workday commenced when she left or was leaving her apartment would be contrary to law.

(Dec. 5-6.)

We disagree with the judge's analysis. As a traveling nurse, the employee was exempt from the standard rule that an injury which occurs while simply going to or coming home from work is not compensable under the act. The "going and coming rule" has little, if any, application when a traveling employee is injured. See Frassa v. Caulfield, 22 Mass. App. Ct. 105, 109-112

[1] At the inception of her assignment to work at Beverly Hospital, the employee understood she was required to live at Princeton Properties, even though she later realized the employer would have permitted other appropriate living arrangements. (Tr. 16, 43.)

(1986)(employees temporarily employed and lodged by employer within coverage of c. 152 when injured while on evening trip for personal entertainment). Here, the employee had moved into an employer-leased apartment on a temporary basis, having traveled from her home in California with the undisputed understanding that she was required to live there. (Ins. br. 4, 9.) These facts establish compensability, as the temporary nature of the employee's work, and her assignment cross country, exposed her to the risk of falling upon the icy steps on premises chosen and leased by her employer. "An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940).

This case is also similar to Swasey's Case, 8 Mass. App. Ct. 489 (1979). In that case, the employee, a resident of Arlington, Massachusetts, was hired to perform work on assignment in Poughkeepsie, N.Y. The employee was paid per diem compensation of up to $50 per week for room and board, or travel, or for a combination of both. The employee settled into a routine of working five days a week commuting from a rented room, and then driving home to Massachusetts every Friday night. During a trip home, the employee was injured in a motor vehicle accident. Id. at 490-491. The Appeals Court declined the insurer's invitation to bar the claim under the going and coming rule:

> 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 'traveling 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)]. Swasey was employed . . . to work on a specific project until completion or reassignment. It was to the benefit of [the employer's] business interests that its employees travel. . . . 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 hour 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.

Swasey, supra at 494.

The above reasoning is apt. The present employer paid to relocate the employee, and selected and paid for the employee's apartment, providing an obvious benefit to all concerned, to wit: stationing the employee within a reasonable proximity of the employer's client's business location. See Wormstead, supra at 664 (pertinent query for compensability, whether employee injured in "activities consistent with and helpful to the accomplishment of [the employer's] functions"); Kilcoyne's Case, 352 Mass. 572, 575 (1967)(injury to employee living on premises, though not required to do so and while off-duty, nevertheless compensable because such living arrangement was benefit to employer); Canavan's Case, 364 Mass. 762, 765-766 (1974)(same). 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.[2]

Finally, in Souza's Case, 316 Mass. 332 (1944), a traveling employee was killed in a fire while asleep at his customary lodging place which was convenient to, paid for, but *not* specifically selected by, his employer. The Souza court analyzed the compensability of the employee's death by inquiring, (1) whether the "employment brought him in contact with the risk that in fact caused" his death and (2) whether the payment for the lodging triggered the principle that compensability followed, "if 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." Id. at 334-335. The court concluded that both principles were satisfied. Id. at 337. While Souza was "on call," we do not perceive that factor as the *sine qua non* of its holding.[3] Here, as in Souza, the employer-provided lodging - incidental to her employment - brought the employee in contact with the risk of injury, and the act of exiting her apartment on her way to work was consistent

[2] Analogous are cases establishing compensability for injuries sustained upon the employee's arrival on premises attendant to the employer's workplace. See Rogers's Case, 318 Mass. 308, 309 (1945); Horan's Case, 346 Mass. 128, 129 (1963); Mikel v. M.B.T.A., 14 Mass. Workers' Comp. Rep. 84 (2000).

[3] Stated differently, had the employee instead perished in a fire at Princeton Properties, we do not believe she would be denied compensation under the rationale of Souza because she was not "on call."

with her contract of hire. Therefore, on the material facts as found by the judge, the employee's injury is compensable as a matter of law.

Accordingly, we reverse the decision and recommit the case for further findings on the extent of the employee's claimed incapacity.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: September 29, 2009