COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 045024-01**

Debra Powers	Employee
Suffolk County Sheriff's Department	Employer
City of Boston	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Costigan)

APPEARANCES
Michael C. Akashian, Esq., for the employee
Charles J. Abate, Esq., for the self-insurer

FABRICANT, J. The employee appeals from a decision in which an administrative judge denied and dismissed her claim for benefits resulting from a fall during a lunch break away from the employer's premises. We affirm the decision.

The employee, a corrections officer, went on her lunch break at 11:00 a.m. on December 29, 2001. She left the employer's facility to eat lunch in her truck, which was parked across the street. After finishing, she left the truck and headed back to work. As she walked across the public way, she felt light-headed. She tripped and fell on a curb as she attempted to step up to the sidewalk, injuring her left knee in the fall. No competent evidence regarding the ownership or control of the area where the employee injured herself was introduced at the hearing. (Dec. 4.)

The self-insurer paid the employee total incapacity benefits without accepting liability under the provisions of G. L. c. 152, §§ 7(1) and 8(1), commencing on December 30, 2001. At the end of the statutory 180 day period for payment of benefits without prejudice, the parties agreed in writing to an extension of those benefits for a period to end no later than December 23, 2002, as authorized by § 8(6).[1] On December 17, 2002,

[1] General Laws c. 152, § 8(6), provides:

Any one hundred eighty day payment without prejudice period herein provided may be extended to a period not to exceed one year by agreement of the parties provided that:

the self-insurer sent the employee notification that her benefits would be terminated on December 23, 2002, the agreed-upon last day of the extension period.[2] (Dec. 5.)

Upon termination of her benefits, the employee filed a claim for further benefits, also alleging an illegal discontinuance due to the failure of the self-insurer to provide seven days notice for the termination, as required by § 8(1). (Dec. 2.) At hearing the employee alleged that the self-insurer had accepted liability as a result of the improper termination of benefits. While the judge agreed that the termination notice fell short of the required seven days, she disagreed as to the consequence of that lapse, finding the employee's only remedy in § 8(5),[3] which provides for a penalty of twenty percent of any additional benefits found to be due. (Dec. 5.)

The judge, however, found no additional benefits were due:

(a) the agreement sets out the last day of such extension; and

(b) a conciliator, administrative judge, or administrative law judge approves such agreement as not detrimental to the employee's case.

All the provisions of subsection (1) of this section shall apply to any period of payment without prejudice extended as provided in this subsection. Any payment without prejudice under this section shall toll the statute of limitations pursuant to section forty-one.

[2] General Laws c. 152, § 8(1), provides, in pertinent part:

> An insurer which makes timely payments pursuant to subsection one of section seven, may make such payments for a period of one hundred eighty calendar days from the commencement of disability without affecting its right to contest any issue arising under this chapter. An insurer may terminate or modify payments at any time within such one hundred eighty day without penalty if such change is based on the actual income of the employee or if it gives the employee and the division of administration at least seven days written notice of its intent to stop or modify payments and contest any claim filed.

[3] Section 8(5) provides, in pertinent part:

> [I]f the insurer terminates, reduces, or fails to make any payments required under this chapter, and additional compensation is later ordered, the employee shall be paid by the insurer a penalty equal to twenty percent of the additional compensation due on the date of such finding. . . . No termination or modification of benefits not based on actual earnings or an order of the board shall be allowed without seven days written notice to the employee and the department.

> At the time of her injury, [the employee] was on her lunch break. The employee chose to leave the premises and eat in her truck, which was parked on the street. I do not find that she was encouraged, compelled or influenced by her employer to eat in her truck. She was returning to her employer's building when she fell, striking her knee on the curb. She did not sustain an injury on the employer's premises nor was she furthering the employer's business. . . . I find the employee has failed to prove that her injury arose out of or in the course of her employment.

(Dec. 5-6.)

We agree. When the employee left the premises of her fixed place of employment for her lunch break, the employer ceased to be responsible for the risks of injury that she might encounter. This case is governed by Sampson v. New England Tel. Co., 6 Mass. Workers' Comp. Rep. 220 (1992), in which we concluded that an employee's injury while on a coffee break off-premises did not arise out the her employment:

> Ms. Sampson at the time of the accident was engaged in an independent enterprise and the injury she suffered is beyond the risk that the employer is required to bear. The place where the injury occurred, the manner in which it happened, and the employee's activity at the time of the injury are less rather than more directly employment related. Accordingly, we affirm the decision of the administrative judge denying and dismissing the employee's claim.

Id. at 222.[4] See also Corraro's Case, 380 Mass. 357 (1987)(cited in Sampson, injury off-premises on public street during lunch break not compensable). We think Ms. Powers's case is indistinguishable from Ms. Sampson's. That she may have been closer to being on the employer's premises when the injury occurred than was Ms. Sampson – who was blocks away from her office – is of no consequence. See Barrett v. Suffolk County

[4] The Sampson decision quoted and endorsed the findings of the administrative judge:

> "Her leaving the premises to buy food for her own consumption was a personal, independent enterprise. Neither the employer nor the requirements of the employee's job required or created a need for this particular trip." . . . The employee, "while on break, was free to do whatever she chose, wherever she chose, however she chose, proved only that she report back at the time designated by the employer for the resumption [sic] its business affairs."

Sampson, supra at 222.

House of Correction, 10 Mass. Workers' Comp. Rep. 769, 771 (1996)(sidewalk in front of place of employment not part of employer's premises, and injury occurring while traveling to regular shift there not compensable). Cf. Palluccio v. Department of Revenue, 11 Mass. Workers' Comp. Rep. 325, 330-331 (1997)(lunch break injury compensable where courtyard in which injury occurred was under control of employer).

Regarding the issue of whether failure to provide a seven-day notice of termination of without-prejudice benefits resulted in an acceptance of this claim, we agree with the administrative judge that it did not. The pertinent statutes, §§ 8(1) and 8(5), are clear in the remedy afforded for the violation of the seven-day notice rule. The employee is entitled to a twenty percent penalty on compensation ordered thereafter; as none was ordered at the §10A conference or by §11 hearing decision, no penalty attaches. Bernier v. LeBaron Foundry, Inc., 16 Mass. Workers' Comp. Rep. 331, 334 (2002); Franco-Duraes v. Greater Lynn Mental Health, 13 Mass. Workers' Comp. Rep. 187, 190 n.4 (1999). This case is distinguishable from St. Marie v. Robert S. Brothers Lumber, 6 Mass. Workers' Comp. Rep. 155 (1992), in which we concluded that payment beyond the then sixty day without-prejudice period was an acceptance of liability. Here there was no payment beyond the without-prejudice extension.

Accordingly, the decision is affirmed.

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

Filed: ***May 12, 2006***