COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 051837-94**

Derick Fedders	Employee
Federated Systems Group	Employer
Federated Department Stores	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and Carroll)

APPEARANCES
Gregory J. Angelini, Esq., for the employee
Laurence J. Donoghue, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee compensation for an injury suffered while assisting motorists stranded off the traveled part of a highway. The employee worked as a field service technician, maintaining and repairing equipment in several of the employer's department stores. (Dec. 4.) At the time of his accident, the employee was travelling home from his last service call of the day. The self-insurer contends that the employee was barred from recovery by the going and coming rule, and, in the alternative, because the employee's actions in assisting the motorists did not arise out of his employment. We disagree with both contentions and affirm the decision.

The employee was assigned to the employer's Natick store as his home store, and unless he was told to go elsewhere for the start of the next day, the employee's usual routine was to start his day by reporting to the Natick store. He then would travel to and between several of the employer's locations repairing equipment. The employee was salaried; he provided on-call support, carried a pager, and used an employer-owned vehicle. The employee was reimbursed for his travel, except for 42 miles per day, which represented the round–trip distance between his house in Leominster and the Natick store. (Dec. 4-5, 8.)

On December 24, 1994, the employee traveled to the Natick store at the start of his workday. He then drove to the Somerville store in response to a call for service assistance. At about 2:00 p.m. the employee called his manager and told him that everything was set at the Somerville store. As it was Christmas Eve, the manager allowed the employee to leave work at 2:30 p.m., although the employee would be paid to 3:00 p.m. The employee left the Somerville store and traveled west on Route 2 toward Leominster. While on Route 2 in Ayer, the employee observed the vehicle in front of him strike a guard rail, go out of control and off the traveled way. The employee stopped to assist the passenger and driver of the vehicle. They needed no medical assistance, but they asked the employee to call for a tow truck. The employee returned to his car, and, using his cell phone, he called the police. After the employee returned to the disabled vehicle, it was struck by another vehicle; the disabled vehicle then struck the employee, who was on the side of the road. He received injuries primarily to his left hand and right knee. (Dec. 5-6.) The judge concluded that the employee suffered an industrial injury within the act, and awarded compensation benefits. (Dec. 9-12.)

The self-insurer argues that the employee was barred from receiving workers' compensation benefits by the application of the going and coming rule: "It is now elementary that the compensation act does not extend to cover employees going to and coming from their work." Chernick's Case, 286 Mass. 168, 172 (1934). Gwaltney's Case, 355 Mass. 333, 335 (1969). The self-insurer's argument fails, however, because an employee, such as Mr. Fedders, whose job it is to travel, is not subject to the going and coming rule in the following circumstances: when travelling from his home to his first destination, when travelling between destinations during the work day, and when travelling home from his last destination at the end of the work day. In Hamel's Case, 333 Mass. 628 (1956), the Supreme Judicial Court affirmed a single member's finding of liability. The Court explained:

> [The employee] was employed . . . as a house to house salesman. In making his calls he was authorized to use his employer's truck and to keep it at his home in Haverhill. His hours of employment were from 9 a.m. until his calls were completed. At the time of his death on April 13, 1954, he had been on his regular

> route and was on his way home at night after making a business call. While driving from Amesbury to Haverhill the truck overturned and he was killed. It could have been found from other evidence that at the time he was operating at an excessive speed. The single member found that, "Upon the aforesaid evidence" the injury which resulted in the employee's death arose out of and in the course of his employment.
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> [W]e think no further findings are necessary. See Cahill's Case, 295 Mass. 538 [1936]. It sufficiently appears that the employee, while engaged in the business affairs of his employer, received fatal injuries arising from a risk of the street.

Hamel, supra at 628-629. L. Locke, Workmen's Compensation, § 265 (2d. ed. 1981). The present case is indistinguishable from and therefore governed by Hamel. Mr. Fedders was a travelling employee injured while on his way home from his last business call. See also Dow v. Intercity Homemaker Service, 3 Mass. Workers' Comp. Rep. 136, 141 (1989)(Costigan, J., concurring)(supporting award of compensation for visiting nurse injured while travelling from her home to her first assignment of the day: "this peripatetic employee should be included in that class of 'travelling workers' not barred by the 'going and coming' rule from receiving compensation to which she is otherwise entitled"). Cf. Gwaltney's Case, supra (employee, injured en route to fixed place of employment from home, *prior to* travelling to his out-of-town appointments later that day, barred from compensation by going and coming rule). Peterson v. Preston Trucking Co., 11 Mass. Workers' Comp. Rep. 365 (1997)(going and coming rule applied to bar recovery where employee was injured while in effect going home from fixed place of employment).

The self-insurer's second argument is that the employee's act of assisting stranded motorists did not arise out of his employment. We disagree. Instead, we agree with the judge that D'Angeli's Case, 369 Mass. 812 (1976), applies:

> It is our present view that when a conscientious citizen is in the course of his employment and perceives an imminent danger to the public, as would appear to have been the case in this instance, his endeavor to alleviate the danger should be considered incidental to his employment. In holding that emergency public service may be warranted in the course of employment we are following good

> precedent. . . . "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." . . . [W]e think the same general principles are applicable to an employee seeking to alleviate an immediate danger to the public safety.

D'Angeli, supra at 816-817, quoting O'Leary v. Brown-Pacific-Maxon, Inc., 340 U. S. 504, 507 (1951). The present case is an instance of "[a]n attempt . . . , like a reasonable rescue effort," D'Angeli, supra at 818, that warranted the employee's intervention. A vehicle in front of the employee's vehicle spun out of control, struck the guard rail and went off the traveled way. (Dec. 5-6.) Since "emergency public service may be warranted," this "conscientious citizen['s] . . . endeavor to alleviate the danger should be considered incidental to his employment." D'Angeli, supra.[1]

Accordingly, we affirm the decision. Pursuant to § 13A(6), the self-insurer is ordered to pay the employee's counsel a fee of $1,285.63.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **January 8, 2002**

[1] The present case is not unlike O'Leary, supra, wherein the U.S. Supreme Court reinstated an award of compensation for an employee who drowned while trying to rescue two men from a channel. Mr. Fedders was injured as he tried to assist occupants of a vehicle which went out of control. As the SJC observed, "most cases [include] . . . a rescue of identifiable persons in imminent danger," D'Angeli, supra at 817, and such "a reasonable rescue effort" is a risk of the employment and covered by the act. Id. at 818.