COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039355-00**

Donna M. Burns	Employee
Massachusetts Bay Transportation Authority	Employer
Massachusetts Bay Transportation Authority	Self-insurer

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

APPEARANCES
Michael J. Powell, Esq., for the employee
Mark A. Teehan, Esq., for the self-insurer

COSTIGAN, J. The employee worked as a part-time bus operator for the employer. On October 12, 2000, she drove a route between Quincy and Mattapan. At approximately 6:00 P.M., she pulled into the Quincy T station for a rest break. She exited the bus in the parking lot, chocked the wheels on the passenger side of the bus, and re-entered the bus to retrieve her pocketbook before heading off to the ladies' room. Moving very quickly because of the distance to the ladies' room and because her break was short,[1] she stepped off the lowest step of the bus onto the walkway, a distance of about one and one-half feet, she felt her right foot crack and could not put weight back down on the foot completely. The employee reported her injury to an MBTA inspector and an ambulance was dispatched to transport her to Quincy Medical Center. (Dec. 4-5.) She underwent extensive medical treatment and testing, and never returned to work. (Dec. 5-6.) As ultimately diagnosed and opined by her treating physician, Dr. David Blaustein, the employee developed reflex sympathetic dystrophy of her right foot and

[1] The employee testified that the ladies' room was located in the inspector's booth, at the other end of the bus platform. She also testified that she arrived at the parking lot at approximately 6:04 p.m. and was scheduled to depart at 6:10 p.m. (Tr. 17-18.)

was totally disabled from and after the incident at work. (Dec. 8-10.)[2]

The administrative judge found that the employee sustained a compensable personal injury arising out of and in the course of her employment on October 12, 2000, and awarded her G. L. c. 152, § 34, temporary total incapacity benefits, and §§ 13 and 30 medical benefits, from and after that date. At hearing, the self-insurer had argued that under Zerofski's Case, 385 Mass. 590 (1982), the employee's injury was not compensable. The judge ruled otherwise, finding that

> [s]ince that injury occurred during a specific part of her driving duties, and was not a result of a cumulative activity such as walking (which would be common to all or most occupations), I am not persuaded by the self-insurer's argument that her injury is not compensable under the Zerofsky [sic] ruling.

(Dec. 9.)

On appeal, the self-insurer advances the same argument. It contends that the judge erred as a matter of law, see G. L. c. 152, § 11C, in finding that the employee sustained a compensable personal injury. The self-insurer argues that

> the . . . single act of stepping off of a bus, in these circumstances, was not a specific part of the employee's driving duties, as stated by the Administrative Judge . . . [W]ithout any exterior forces at work, such as slipping, twisting, stepping on a crack in the pavement or something of that nature, which would make the resulting pain suffered by the employee related to that specific act, *the act of stepping off of a bus is one that is a common, everyday occurrence and not specifically identifiable with the conditions of employment in this case.* Zerofski's Case, 385 Mass. 590, 596 (1982). The Self-Insurer submits that the act of stepping off of a bus is an act, such as walking or prolonged standing, that is too common an occurrence in everyday life to classify it as specifically identifiable with the occupation of a bus operator.

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[2] Based on the administrative judge's ruling that the medical issues presented by the employee's claim were complex, the parties were allowed to offer their own medical evidence in addition to the report and deposition testimony of the impartial medical examiner. See G. L. c. 152, § 11A(2). Because the self-insurer does not challenge the judge's adoption of Dr. Blaustein's opinion over that of the impartial medical examiner, nor does it dispute the judge's finding of ongoing total incapacity, we need not discuss the medical evidence.

(Self-insurer brief, 2; emphasis added.) We disagree, and affirm the judge's decision.

In Flaminio v. Central Motors, Inc., 17 Mass. Workers' Comp. Rep. ___ (February 19, 2003), we noted how the Zerofski court distinguished compensable from non-compensable injuries. The analysis bears repeating:

> Drawing from the nature of the purposes of the act as we have described them, and from the pattern of our decisions over the years, we arrive at the following restatement of the range of harm covered by the act. To be compensable, the harm must arise *either* from a specific incident or series of incidents at work, *or* from an identifiable condition that is not common and necessary to all or a great many occupations. The injury need not be unique to the trade, and need not, of course, result from the fault of the employer. But it must, in the sense we have described, be identified with the employment.

Flaminio, supra at ___, quoting Zerofski, supra at 594-595 (emphasis added.) When, as in this case, a specific event occurs at work, contrary to the self-insurer's argument, the employee need not show that the employment exposed her to an unusual risk greater than that experienced by the general public. Id. at 595 n.2. Once the first prong of Zerofski is satisfied -- when the judge finds that a specific incident or series of incidents occurred at work -- then the second prong -- "an identifiable condition that is not common and necessary to all or a great many occupations" -- simply does not come into play. Compare Jobst v. Gryko, 16 Mass. Workers' Comp. Rep. 125, 129-130 (2002)(judge failed to first address whether employee's cumulative work activities on date of alleged injury amounted to either a specific incident or series of injurious incidents).

Seeing no error in the judge's findings of fact and ruling of law, we affirm his decision. Pursuant to § 13A(6), the self-insurer is ordered to pay an attorney's fee of $1,273.54.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: **June 18, 2003**