COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 000108-97**

Georgianna Mikel	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

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

APPEARANCES
William J. Branca, Esq., for the employee
Mark A. Teehan, Esq., for the self-insurer

CARROLL, J. The employee, a bus driver for the M.B.T.A., appeals an administrative judge's denial of her claim for benefits resulting from injuries incurred while she was riding as a passenger on an out-of-service bus from an employee parking area to the M.B.T.A. station where she was to begin her shift. We conclude both that the administrative judge made findings which were unsupported by the evidence and contrary to law, and that the findings properly made require that the decision be reversed and that the stipulated benefits be awarded.

Georgianna Mikel, who was fifty-eight years old at the time of the hearing, had been a bus driver for the M.B.T.A. for ten years. (Dec. 3.) On January 13, 1997, she parked her car at the Bartlett Street Garage, a parking area specifically provided by her employer for employees. (Dec. 4.) Her shift was scheduled to begin approximately two miles away at the Forest Hills Station, where she would sign in and "swing on." (Dec. 3.) At the end of her shift, Ms. Mikel was to drive an empty bus back to the Bartlett Street Garage. As usual, she and six to eight other drivers boarded a "deadhead bus" (a bus with no paying customers) driven by another M.B.T.A. employee, and headed for the Forest Hills station. Id. All of the other employees got off the bus at the lower part of the station, but Ms. Mikel remained on the bus as it entered a public street while proceeding

toward the upper part of Forest Hills station. (Dec. 3, Tr. 9.) A few minutes before her shift was scheduled to begin, the bus rounded a corner before re-entering the Forest Hills Station, and the employee was thrown about inside the bus, breaking three ribs and bruising the tip of her spine. (Dec. 3.)

Ms. Mikel filed a claim for medical benefits and six months of temporary total incapacity benefits. Her claim was denied at conference, and she appealed to a hearing de novo. At the hearing, the parties stipulated to an employee/employer relationship, average weekly wage, date of injury and to a period of disability from January 13, 1997 until July 3, 1997. The only issue was whether Ms. Mikel's injury arose out of and in the course of her employment. (Dec. 2.)

In her hearing decision, the administrative judge again denied the employee's claim, finding that the provision of parking at the Bartlett Street Garage was not a benefit to the employer, (Dec. 4, 5), and that the provision of transportation from the Bartlett Street Garage to the Forest Hills Station was not an incident of employment. (Dec. 5, 6.) Thus, she concluded, the employee's injuries did not arise out of and in the course of her employment. (Dec. 6.) The judge reasoned that parking at Bartlett Street Garage was "just a matter of convenience" for the employee since she could have parked at Forest Hills Station, even though there were no spaces allotted for employee parking, and parking there was uncertain. (Dec. 5.) The judge found unpersuasive the employee's argument that allowing her to park at the garage benefited the employer because at the end of her shift she drove a deadhead bus back to Bartlett Street Garage. She found that "[s]pecifically, there was no proof proffered by way of a contract of hire or any other evidence indicating that part of Claimant's condition of hire or incident of work was that Self-Insurer would provide transportation to her or other employees before or after their work shifts." Id. The judge concluded that, "Free transportation undoubtedly was an attractive perk, but it was not an incident of employment." (Dec. 6.)

The employee appeals and contends, *inter alia,* that the judge made findings that were contrary to law. Specifically, the employee argues that the judge erred as a matter of law in finding that neither the provision of parking nor the provision of transportation

was an incident of employment. We agree with the employee that the provision of both parking and of transportation are incidents of employment. As such, the employee's accident arose out of and in the course of the employment as a matter of law. We therefore reverse the decision.

"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). Ordinarily, an injury occurring while the employee is going to and from a fixed place of work is not compensable. Gwaltney's Case, 355 Mass. 333, 335 (1969); Maguire's Case, 16 Mass. App. Ct. 337, 339 (1983). However, the courts have carved out numerous exceptions to this general rule. The underlying question is, "is the injury, on a common-sense view of all the circumstances, work-connected." L. Locke, Workmen's Compensation § 264 (2d. ed. 1981). The injury here occurred while the employee was riding in the employer's out-of-service bus from the employer's parking lot to the starting place of the employee's shift. Thus, the judge appropriately considered the fact that the employer provided both the parking and the transportation in reaching her decision. However, she misconstrued the law regarding whether parking was an incident of employment, and made erroneous findings on the issue of whether transportation was an implied part of the employee's contract of employment.

Where an employee is "upon his employer's premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment," Horan's Case, 346 Mass. 128, 129 (1963), the resulting injury is compensable. Parking lots owned or furnished by employers for the use of employees are considered to be the employer's premises. Rogers' Case, 318 Mass. 308 (1945); Horan's Case, supra at 129. In Rogers' Case, where the employee was injured in a parking lot provided by the employer, the court wrote:

> These facts require as a matter of law a decree for the employee. Although the employee was not obliged to come to work in an automobile, and the employer was not obliged by contract to furnish the "parking lot," yet it is plain that it did furnish the lot as an incident of the employment and that the employee, while

> actually on his employer's premises and on his way to the place where his day's work was to be performed by a route which he was permitted and expected to take, fell and was injured. It is of no consequence that a street intervened between the part of the employer's premises where the employee fell and the part where he was to work. . . . The injury arose out of and in the course of the employment.

Id. at 309 (emphasis added; citations omitted). See also Horan's Case, supra at 129 (heart attack suffered by employee before work as he ran across employer's parking lot, where he customarily parked was a personal injury).

The very fact of furnishing a parking lot for the use of its employees, thus, may make the provision of parking an incident of employment. Here, though Ms. Mikel was not explicitly required to park her car at the lot, she did so daily, was provided transportation from it to the Forest Hills Station, and brought a bus back to the lot at the end of her shift. Under these facts, the provision of parking to her was an incident of her employment.[1] We therefore reverse the judge's finding that the provision of parking was not a benefit to the employer, and conclude that it was an incident of employment.

Our inquiry does not end here, however, because Ms. Mikel was injured, not in her employer's parking lot, but while being transported from the parking lot to the place

[1] Had Ms. Mikel been injured in the employer's parking lot, it seems clear from the holdings in Rogers' Case and Horan's Case that her injury would have arisen out of and in the course of her employment, even though she had to travel on a public street to reach the place where her shift began. As the court in Rogers' Case noted, "It is of no consequence that a street intervened between the part of the employer's premises where the employee fell and the part where he was to work." Id. at 309. See also Locke, supra at § 263 ("An injury going from the building to the parking lot would be covered if incurred on the intervening public street, or even an intervening private way"). In Duggan v. M.B.T.A., 10 Mass. Workers' Comp. Rep. 848 (1996), the Board, following Rogers' Case, extended the protection of the Act to an M.B.T.A. bus driver, who had reported to work at an employer-provided garage, walked 200 yards down a public street to an M.B.T.A. station and was heading down the stairs to catch the subway to the location where his shift was to begin when he was injured. The board found that he was on the employer's premises, " 'occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment.' " Duggan, supra at 850, quoting Horan's Case, supra at 129. Like the employee here, Duggan was required to drive a bus back to the garage where he parked. Unlike Ms. Mikel, he actually signed in at the garage, though his shift apparently did not begin until he arrived at the location where he picked up his bus.

where she was actually to begin her shift by picking up her bus. The issue then becomes, was the provision of transportation a further incident of employment? The judge in the instant case relied on language from an early "going and coming" case in which the employer provided transportation to and from work:

> [T]he employer's liability . . . depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract.

Donovan's Case, 217 Mass. 76, 78 (1914) (emphasis added); see also Occean v. M.B.T.A., 10 Mass. Workers' Comp. Rep. 308, 311 (1996). (See Dec. 5.) However, the judge incorrectly applied the test set forth in Donovan's Case to the facts of Ms. Mikel's case. She found that "there was no proof proffered by way of a contract of hire or any other evidence indicating that part of Claimant's condition of hire or incident of work was that Self-Insurer would provide transportation to her or other employees before or after their work shifts." (Dec. 5.) To the contrary, the testimony supports only the conclusion that the provision of transportation from the employer's parking lot to the M.B.T.A. station where her shift was to begin was an implied term of her contract of employment.

An "implied contract" is "one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding." Black's Law Dictionary 323 (6th ed. 1990). The court in Sylvia's Case, 298 Mass. 27 (1937), described how an established practice condoned by the employer could become an incident of employment:

> We think that the habitual use by the employee of the employer's laundry, with the latter's permission, for the purpose of washing clothes soiled in the employer's service, in connection with the habitual use by other employees, could be found to have been more than a mere favor or gratuity, and that, as an established practice with possible elements of convenience and advantage on both sides, it could be

> found to have become by mutual understanding an incident of the employment itself.

Id. at 28. Similarly, here the habitual use by the employee and other employees of the employer's out-of-service bus, with the employer's permission, constituted transportation as an incident of employment. The employee's uncontroverted testimony was that when she got the job, she was told where the parking lot was, (Tr. 20), and that all the employees parked there. (Tr. 7.) Every day she rode from the Bartlett Street Garage to Forest Hills Station to pick up her bus. "And I waited for this guy that I rode with every day to get a ride to Forest Hills to get my bus." (Tr. 7.) The bus that carried her and other drivers was not in service. (Tr. 8). The only passengers were employees who had to "swing on" at Forest Hills. "I would refer to it as a bus that everybody that has to swing on at Forest Hills has to get on to go there . . . ." Id. Finally, she was required, as part of her job, to drive her bus back to the Bartlett Street Garage, where her car was parked and where she had gotten on the employer's out-of-service bus, at the end of her shift. (Tr. 12, 13, 22.) The insurer concedes this point in its brief to the reviewing board. (Insurer Brief, 3.) We conclude, as a matter of law, that an implied contract to provide transportation existed and that the transportation was therefore an incident of employment.[2]

We also note that the phrase "after the real beginning of employment" which is contained in Donovan's Case, supra at 78, does not bar receipt of compensation in situations such as Ms. Mikel's where the employee has not officially "signed in." Other

[2] Cases holding that the employee had failed to prove an implied contract for transportation of employment are distinguishable. See, e.g., Vallas v. Carzis, 331 Mass. 468 (1954) (where employee usually walked home from work but was often driven by the employer or another employee, there was no evidence to support an express or implied agreement that transportation was to be furnished to the employee or to show that she was entitled to transportation by virtue of her contract of employment); and Lee's Case, 279 Mass. 357 (1932) (though the employer knew the employee rode the employer's truck from the job site to a point near his home at various times, and had his consent to ride it at any time, the employee did not sustain his burden of proving that there was an implied contract for the provision of transportation). In neither of these cases does it appear that the provision of transportation home was a regular or habitual activity.

cases have made it clear that injuries are compensable which occur on the employer's premises before the official workday begins. See, e.g., Rogers' Case, supra, and Horan's Case, supra (both involving injuries on employer's parking lot before work). Even injuries which are not on the employer's premises, but on a route customarily followed by an employee to her workplace may be covered. Mahan's Case, 350 Mass. 777 (1966) (injury to newsstand operator while walking across an M.B.T.A. bus parking area, a route she had followed for 23 years, on the way to her newsstand on the T platform). Moreover, injuries to an employee outside of working hours are covered if the employment impelled the employee to make the trip. See, e.g., Caron's Case, 351 Mass. 406 (1966) (death of employee on his way home from an evening dinner meeting his employer directed him to attend); Papanastassiou's Case, 362 Mass. 91 (1972) (chemist injured while on his way back to the laboratory after supper to check on an experiment).

The start of the workday turns on the terms of the employment agreement, which are either express or implied by the conduct of the parties. The foregoing cases illustrated implied terms of employment. Here, we have another case of implied terms of employment, where the employer is providing a parking lot and transportation. The employee had arrived on the employer's premises (parking lot), had parked her car, had taken the employer's bus, which was available only to transport M.B.T.A. employees, had arrived a second time on the employer's premises (the lower part of Forest Hills station), when the bus turned onto a public street in order to reach the upstairs part of the same station where her shift would begin. These facts underscore that the provision of transportation was part of this employee's employment agreement. See Stamo v. Wiener, 328 Mass. 651 (1951)(rescript op.); Caira v. Caira, 296 Mass. 448, 448-449 (1937); Vogel's Case, 257 Mass. 3, 4-5 (1926). As a matter of law, the fact that the injury occurred while she was on a public street for a brief time on the way from one part of the employer's premises to the other does not bar compensation. See Rogers' Case, supra.

The judge relied on three reviewing board cases involving M.B.T.A. employees to find that transportation was not an incident of employment. Her reliance on these cases was misplaced, as they are distinguishable. In Hicks v. M.B.T.A., 5 Mass. Workers'

Comp. Rep. 401 (1991), and Andrade v. M.B.T.A., 3 Mass. Workers' Comp. Rep. 232 (1989), the Board affirmed decisions finding that fare collectors who were injured while commuting to work on public transportation via free passes provided by their employer were not entitled to benefits. The Board relied on the fact that these employees had fixed places of employment and fixed hours of work. Hicks, supra at 402; Andrade, supra at 233. Those cases further held that the risk to M.B.T.A. employees who commute to work on the M.B.T.A. is no different from the risk to any member of the public who commutes by public transportation. Hicks, supra at 403. However, here the employee was not going to work by public transportation, but by an out-of-service bus transporting only employees and originating in a parking lot provided by the employer solely for employees.[3] Furthermore, Ms. Mikel was not a fare collector with a fixed place of employment, but a bus driver, who reported to work at one place, drove her bus, and ended her day at another place. See Duggan, supra at 852. Thus, the rationale used in Hicks and Andrade to find that the provision of transportation was not an incident of employment is inapposite in the instant case.

The judge also relied on Occean v. M.B.T.A., 10 Mass. Workers' Comp. Rep. 308 (1996), which she said had facts almost identical to those in Ms. Mikel's case. (Dec. 4.) Though the facts are closer than those in Hicks or Andrade, there are significant differences, which also make the case distinguishable. In Occean, the employee, a bus driver, parked his car at an M.B.T.A. garage and got on a bus carrying paying passengers, heading toward the M.B.T.A. station where his shift was to start. The bus was hit by a truck, and the employee and other passengers were injured. The Board found that the decision in Hicks, supra, governed, and that providing the employee free transportation in the form of an M.B.T.A. pass did not convert his travel to work into an incident of employment, where the judge had made no findings to indicate that his travel advanced

[3] Gwaltney's Case, 355 Mass. 333 (1969), cited by the judge, (Dec. 6), is distinguishable in that the employee there parked in a public parking lot, not one provided solely for employees, and was injured while walking from that lot across a public way to his office.

the " 'business affairs or undertakings of his employer.' "[4] Occean, supra at 312. The differences between the facts in Occean and those of the instant case are that the employee in Occean was travelling on public transportation rather than on an out-of-service bus on which only other M.B.T.A. employees were riding, and the employee in Occean did not have to return a bus to the same parking area where he parked his car, as Ms. Mikel did. The judge considered the difference between an injury on an in-service and out-of-service bus to be insignificant, but, as discussed above, an employee commuting via a free pass provided by his employer, is in a very different position from an employee who is provided a parking area and then shuttled by transportation available only to employees to the place where her shift is to begin. The work-connection is much stronger in the latter instance than in the former. Thus, we conclude that the judge erred as a matter of law by failing to find that the subject transportation was an incident of employment.

Accordingly, we reverse the decision, and award benefits as stipulated. We award an attorney's fee for the hearing under § 13A(5) in the amount of $4,110.30.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

[4] The quoted phrase refers to the street risks doctrine under § 26: As Locke notes, this amendment, which went into effect in 1927, "was of great value for about 25 years, but more recent comprehensive interpretation of general principles of compensability has to a large extent superseded the special remedial legislation, making it unnecessary to treat street risks as a special category." Locke, supra at § 217.

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Susan Maze-Rothstein
Administrative Law Judge

MC/jdm
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