**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 11352-95**

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| Gregory Langadinos | Employee |
| One Stop Business Centers, Inc. | Employer |
| Wausau Insurance Co. | Insurer |

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

**APPEARANCES**
Gregory Langadinos, pro se on brief
Stephen H. Kantrovitz, Esq., for the employee at hearing
Lewis G. Evangelidis, Esq., for the insurer on brief
Ana Mari DeGaravilla, Esq., for the insurer at hearing

**MAZE-ROTHSTEIN, J.** The employee appeals from a decision that dismissed his claim for workers' compensation benefits stemming from injuries incurred as a result of a motor vehicle accident. The accident occurred as the employee was on his way home after leaving his fixed place of employment. We disagree with the employee's contention that the judge misapplied the going and coming rule, which bars compensation for those injured while travelling to and from their ordinary fixed place of employment. We affirm the decision.

Gregory Langadinos was a travelling sales representative for a business machines dealer. He drove his own car while conducting sales rounds. He reported to his employer's office in Burlington at 7:00 a.m. There he would meet with his supervisor and review the day's plan of sales appointments and activities. At the day's end, at about 4:00 p.m., Mr. Langadinos would return to the office, report to his supervisor, do necessary follow-up and plan the next day's schedule. (Dec. 4-5.) The employee testified that he would go home after an hour or two at the office, and do another one and a half to two hours of work each evening. (Dec. 5.) The employee received a base pay

of $300.00 per week, along with $50.00 for the weekly auto expenses. He would also receive commissions on any equipment that he sold. (Dec. 4.)

On June 6, 1995, the employee left the employer's office in Burlington around 5:15 p.m. and was driving home. The employee's automobile was struck from behind at an intersection, and he sustained injuries to his head, neck and back. The employee did not return to work, and filed a claim for workers' compensation benefits on April 14, 1997. (Dec. 5-6.)

The employee's claim went to hearing after a denial at conference. (Dec. 2.) In his decision, the judge made the following subsidiary findings of fact pertinent to the going and coming rule:

> Mr. Langadinos was indeed required to start his business day and complete his business day at the premises of One Stop Business Centers Incorporated in Burlington. As a novice salesman, who had just completed his ninety-day probationary period, Mr. Langadinos thus had a fixed place of employment where he was required to both start and end his business day. It was not disputed that Mr. Langadinos would leave that office to travel his assigned territory in Boston during the day and thus be exposed to "the hazards of the road" while doing so. Mr. Howe [the supervisor for the employer] stated that Mr. Langadinos was not required to perform any business activities at his home after the conclusion of the normal business day, since the company provided the time and facilities in Burlington for each salesman to complete their paperwork and prepare for the next business day. Mr. Howe . . . generally rebutted Mr. Langadinos' allegations about both the nature of the physical duties of the job and the issue of whether Mr. Langadinos was required to perform work at his home after hours. In all aspects where the testimony of Mr. Howe is in conflict with that of Mr. Langadinos, I expressly adopt the version provided by Mr. Howe. Even if I were to believe the testimony of Mr. Langadinos that he spent several hours at home preparing for the next business day from Monday through Thursday evenings – which I do not – I find that effort – assuming *arguendo* that it occurred – was undertaken of his own volition to help him meet the challenges of a new occupation and were for his own personal advantage and not for the benefit of his employer. For these reasons, the claimant has failed to demonstrate that any of the exceptions to the "coming and going (sic) rule" are applicable to the unique facts of the instant case . . . .
> I find that the motor vehicle accident of June 6, 1995 occurred while Mr. Langadinos was returning to his home after the conclusion of his normal business day at the premises of his employer in Burlington. As such, he was not actively engaged in the business of his employer at that time and his alleged activities at

> home do not cause that commute home to fall within any of the exceptions to the "coming and going" [sic] rule.

(Dec. 8-9; emphasis in original.) As a result the judge concluded that the employee's motor vehicle accident did not fall within the coverage of G. L. c. 152 and was not compensable. (Dec. 9.) The employee's claim was dismissed. (Dec. 14.) The employee appeals.

The employee contends that the judge misapplied the going and coming rule in reaching his conclusion that the employee's motor vehicle accident was not a personal injury under c. 152. The employee argues that because the employer paid him a travel allowance, and because he was taking work home with him when the accident occurred, the going and coming rule should not apply. We disagree. The case calls for a fairly basic application of the going and coming rule: "Ordinarily, injuries occurring while the employee is going to and from a fixed place of work are not compensable." Maguire's Case, 16 Mass. App. Ct. 337, 339 (1983).

The present case is governed by Gwaltney's Case, 355 Mass. 333 (1969). The employee here is like the travelling salesman in Gwaltney, who was injured on his way from his home to the office of his employer – his fixed place of employment – prior to going out on his sales rounds. The employer reimbursed Gwaltney for mileage and expenses when business called for him to use his car. Id. at 334-335. The court reasoned that, prior to his arrival at his fixed place of employment, the employee was indistinguishable from any other employee travelling to work.

> "It is now elementary that the Compensation Act . . . does not extend to cover employee's going to or coming from their work." Chernick's Case, 286 Mass. 168, 172 (1934). [Citations omitted.] The rule applies here. At the time of his accident Gwaltney was merely going to work as he normally and usually went to work. The expectation or likelihood that Gwaltney later in the day might use his car to visit out of town clients does not alter the factual situation that actually existed at the time of the accident. Evidence that [the employer] would reimburse Gwaltney for the parking fee and other expenses incurred if he later used his car for business visits to clients outside the city does not lead to a different result. The mishap occurred not only before any such use but before he had arrived at his

> place of employment. There is nothing to take the case out of the rule stated in Chernick's Case, supra.

Gwaltney, supra at 335. Likewise, there is nothing in the present case to exempt it from the ordinary bar to compensation posed by the going and coming rule. The employee was simply returning home from his fixed place of employment at the end of the workday, like any other worker. The fact that his employer paid him a travel allowance of $50.00 per week does not alter the application of the rule, just as the employer's payment of travel expenses and mileage in Gwaltney had no effect.[1] The test for compensability is whether the employment impelled the employee to make the trip. See Caron's Case, 351 Mass. 406 (1966). The judge correctly answered this query in the negative. Cf. Swasey's Case, 8 Mass. App. Ct. 489 (1979)(employee injured while travelling home from a long term but temporary assignment in New York for weekend, which injury the court ruled compensable in light of his employment contract and payment of per diem compensation and travel expenses). Because the employee's ordinary journey home from his fixed place of employment was not "impelled by his employment," and because Mr. Langadinos was not actually engaged in an activity connected to work specifically authorized or directed by his employer, his injury could not properly be found to be within the "risk of the street while actually engaged . . . in the undertakings of his employer." G.L. c. 152, § 26. See Swasey's Case, supra. There was no error.

As to Mr. Langadinos' argument that his trip home was work-related, because he was taking work home with him at the time of his injury, we are not persuaded. Most importantly, the judge did not credit the employee's testimony that he was going to

[1] Neither here nor in Gwaltney, supra, was it made clear in the evidence whether the employer paid for mileage between the home and the office, or whether it was only for the travel while actually out on the road visiting prospects and clients. Absent such evidence, there was no basis for the judge to find that the employer intended the weekly $50.00 travel allowance to cover travel to and from the office at the beginning and end of the workday. Cf. Dow v. Intercity Homemaker Service, 3 Mass. Workers' Comp. Rep. 136 (1989)($2.50 travel stipend specified by employer as reimbursement for each leg of trip between visiting nurse's home and her assigned

continue working when he arrived home, and credited instead the testimony of the supervisor that the employer required no such work at home. (Dec. 9.) Credibility assessments are solely the judge's to make. Lettich's Case, 403 Mass. 389, 394 (1988). We do note that, even if the employee's testimony as to working at home were credited, the result would not change. As aptly analyzed by the judge, the situation described by the employee does not make his trip home an undertaking of his employer; there was nothing in the employee's unauthorized preparation for the next day's work at home which made the trip home an incident of his employment. The case is unlike Papanastassiou's Case, 362 Mass. 91 (1972), in which a scientist was specifically authorized by his employer to conduct research work outside of standard working hours. That employee's death while travelling to the place of employment after normal working hours was compensable, as it was in fulfillment of his explicit obligations to the employer. Id. at 93-94. Mr. Langadinos' work at home, on the other hand, could certainly be found to be of his own personal concern. (Dec. 9.)

The employee raises two more concerns which lack merit. The employee contends that the judge failed to accommodate his non-work-related condition of attention deficit disorder. (Employee Brief 17-18.) The employee's argument is based on his tendency to be distracted due to that condition, which could have resulted in his perceived dissembling on the stand. (August 3, 1998 Tr. 68-72.) The employee complains that the judge ignored his disorder, particularly on the August 3, 1998 hearing date. On that day, the construction across the street from the department was enough of an imposition that the judge noted it on the record at the beginning of testimony. (August 3, 1998 Tr. 4.) There was some testimony regarding the employee's condition. (June 19, 1998 Tr. 41-43.) However, the employee never requested that the judge take any action whatsoever to accommodate his condition. Indeed, nothing was stated on the record to preserve the issue of accommodation for appellate review, even when the judge drew

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workplace determinative to board's conclusion that going and coming rule did not apply to injury occurring en route).

attention to the "distraction with the construction outside."[2] (August 3, 1998 Tr. 4.) While the employee may be correct that questions of reasonable accommodation under the Americans with Disabilities Act (42 U.S.C. 12131) can arise at department proceedings, and that judges must heed the requirements of that law, we do not impose upon judges a standard of prescience regarding those issues. Likewise, the employee's complaints as to the judge's lack of partiality was not raised below in a motion for recusal. Both issues are waived. See Rego v. ACT Manufacturing, 13 Mass. Workers' Comp. Rep. 83, 84 (1999); Martin v. Town of Swansea School Dept., 12 Mass. Workers' Comp. Rep. 447, 449-450 (1998).

The decision is affirmed.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

**Filed: July 5, 2000**

[2] The employee acknowledges the lack of any request to the judge regarding his disorder. (Employee Brief 5-6, 10.)