COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017265-96**

Irene Rouse	Employee
Greater Lynn Mental Health	Employer
Pilgrim Insurance	Insurer

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

APPEARANCES
Anne Gugino Carrigan, Esq., for the employee
James W. Stone, Esq., for the insurer

MAZE-ROTHSTEIN, J. After determining that the employee's slip and fall injury was barred by the coming and going rule, an administrative judge dismissed her claim for workers' compensation benefits. The judge found that the employee was merely commuting to her fixed place of employment. The employee argues that she was on her way to fill in on an extraordinary shift, due to a snowstorm when she fell on the ice. The employee considers this was a special trip, impelled by the employment, thereby defeating the going and coming rule. We agree and reverse the decision.

Irene Rouse, a certified home health aide, worked in an assisted living apartment building facility owned by the employer. Ms. Rouse was assigned to an individual resident named Karen, who lived alone, and needed one–on–one twenty-four hour supervision. The direct care consisted of a day program, followed by afternoon to evening in-home care and an overnight live-in staff member. (Dec. 4.) Only certain preferred aides could be assigned to Karen, one of whom was the employee. (Dec. 4-5.)

The employee worked fixed hours on the afternoon and evening shift Monday through Friday, either 2:00 p.m. to 10:00 p.m. or 3:00 p.m. to 11:00 p.m. Her duties included bathing, cooking, laundering, cleaning, personal care, shopping, dispensing medication and transporting Karen to doctor's appointments. The preferred aides caring

for Karen would occasionally need to fill in for each other. On occasion, Karen's day program was cancelled. The employee would then elect to work in the morning for the overnight live-in aide, Ginger Ward, who had another shift to cover in the morning. The employee was not required to perform such fill-in work. (Dec. 5.)

The winter of the employee's accident was snowy, and Karen's day program was cancelled a number of times due to inclement weather. As Karen could never be left alone, fill-in aides were an absolute necessity. Id. On March 7, 1996, a snowstorm began. When Ginger arrived to relieve the employee at Karen's between 10:00 and 11:00 p.m., they discussed what to do in the event the next day's program was cancelled due to the storm. Upon reflection, the employee felt that all the other preferred aides would be unavailable, because they would have their own clients to see and their own problems finding fill-ins due to the snow. The employee then agreed that Ginger should call her in the morning so that she could relieve Ginger around 9:00 a.m. The program director's approval was not necessary, as she had authorized Ginger to make such scheduling decisions. (Dec. 6.)

The next day, the day program was indeed cancelled, and Ginger called the employee around 7:30 a.m. to have her come in to cover from 9:00 a.m. to 2:00 p.m. Ms. Rouse went, but when her scheduled bus did not arrive after fifty minutes, she started walking. Approximately half-way to the residence, she slipped and fell on the icy street, sustaining a severe hyperextension injury to her right wrist with an open fracture of the distal third involving both bones. The fracture healed with a gross deformity and residual median nerve hypesthesia. (Dec. 7-8.) By stipulation, the employee's treating physician supplied the only medical evidence in the case.[1] He performed surgery, and followed the employee through her recovery. The doctor opined that the employee showed signs of reflex sympathetic dystrophy (RSD) as of six weeks post-surgery. The employee's RSD

[1] As the parties agreed that a closed period of partial disability, causally related to the employee's fall, was due upon a finding of liability, and disagreed only about the extent of the disability, § 11A physician's report was not required under 452 Code. Mass. Regs. § 1.10(6). (Dec. 3.)

symptoms persisted for a number of months, but she slowly improved. (Dec. 8.) By early 1997, the employee still had sensitivity to cold and only 50% of the normal flexibility in her wrist. As of May 1997, her doctor concluded that she was left with a permanent partial residual disability of ten to fifteen percent of the right upper extremity. The judge credited and adopted those opinions. (Dec. 9-10.)

The insurer resisted the employee's claim for workers' compensation benefits, on the basis of the going and coming rule: that a mere commuting to a fixed place of employment as a matter of law meant the employee's injury did not arise out of and in the course of the employment. (Dec. 2-3.) See Gwaltney's Case, 355 Mass. 333, 335 (1969)(injury occurring while employee was "merely going to work as he normally and usually went to work" was not compensable); G.L. c. 152, § 26.[2] The denial reflected the insurer's reasoning in the following pertinent findings:

> The employee here was not compelled by the terms of her employment to fill-in for Ms. Ward that day; it is clear that she could have refused and that Ms. Ward could have called and requested someone else. I do not find that under these circumstances the employee was subject to call.
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> [T]he central fact [is] that the employee was merely commuting to her employer's premises when the injury occurred. The employee did not regularly work outside of the facility . . . . There is no evidence that the employee was paid any kind of travel allowance. The possibility of falling on an icy street is an ordinary risk of the street.
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> The Act is not intended to provide coverage where an employee has a fixed place of employment and is going to and from work. In order to be compensable, the duties of an employee must require him or her to be on the street either during working hours or when the employee leaves on a "mission" from the place of the employment necessitated by that employment, that is, he or she is actually

[2] G.L. c. 152, § 26, amended by St. 1991, c. 398, § 40, provides, in pertinent part:

> If an employee . . . receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer or self-insurer, as hereinafter provided . . . .

> engaged in the business affairs of the employer. The employee is not a visiting nurse, the very nature of whose job compels travel to clients and where travel is incidental to the employment and is sometimes reimbursed. The employee cannot argue that she was impelled by her employment to be on the icy street any more than any other employee who is travelling to work on any given day was. I find that the employee was not actually engaged in the business affairs or undertakings or her employer when she fell. I concluded that the employee's injury is not compensable within the meaning of section 26 of the Act.

(Dec. 12-14.) The employee on appeal challenges this reasoning and conclusion. We agree that the decision is contrary to law.

Did the employment, in fact, impel the employee – a preferred aide qualified to care for Karen – to travel in order to fill in the shift left unattended due to the weather-related cancellation of Karen's day program, pursuant to an authorized request of the overnight attendant? (Dec. 6.) See Caron's Case, 351 Mass. 406, 409 (1996). We are convinced that the employment did so impel the employee under the circumstances of this case.

"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." Papanastassiou's Case, 362 Mass. 91, 93 (1972). Here the dispositive facts of the employment looked at inclusively are that Karen could not be left unattended; that Karen's apartment was the employee's fixed place of employment; that Ginger Ward, the overnight attendant, was authorized by the program director to make schedule changes as necessary; that the employee was aware that the snowstorm presented coverage problems for the employer's entire program; and that she responded to Ginger's request with this exigency in mind. (Dec. 6-7.) As against these facts the insurer argues that the employee was not required as a condition of her employment to accept fill-in work if it was offered, and that she was merely commuting to work as she normally did. (Dec. 5.)

At the outset, the employee rightly points to the plain and primary meaning of "impel:" "To urge to action through moral pressure. . . ." American Heritage Dictionary, 2 ed. 1985. By contrast the definition of the more familiar "compel" means: "To force,

drive, or constrain. To necessitate or pressure by force; exact." Id. Though closely aligned impel connotes the softer end of the spectrum in causing action to happen. We think that the Supreme Judicial Court's use of "impel" in Caron's Case, supra (test is whether "the employment . . . *impelled* the employee to make the trip"), is informative. (Emphasis added.) The reference to moral obligation – duty – that impulsion denotes is lacking in compulsion. One might say that every day's regular commute to work is one that is compelled by the necessity of earning a living. On the other hand, such commute might not be morally impelled at all. The present case underscores an important distinction in the exceptions to the going and coming rule, which must accommodate coverage for this employee "going the extra mile" on behalf of her employer, in order to fulfill that employer's obligations to its clients.

Papanastassiou's Case, 362 Mass. 91 (1972), governs the present appeal. Mr. Papanastassiou, a research chemist, started an experiment at work that required periodic readings. As necessary, the employee would work on his experiments after normal work hours. The employer expected the employee to be professionally responsible and to ensure the success of his experiments. Id. at 92-93. The court ruled that the employee's death on his way back to the workplace to check his readings one fateful evening was not rendered non-compensable by the going and coming rule:

> "Although each case must be decided on its [own] facts, where it appears that it was the employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment." Caron's Case, 351 Mass. 406, 409. Upon the facts presented here, we believe a finding was warranted that the decedent's employment "impelled" him to make the trip which ultimately led to his death. The decedent was a research chemist and was employed to conduct experiments and, as an incident thereto, he was required to do whatever he judged necessary to assure the success of his experiments. Although a salaried employee, in carrying out his duties, he was free to come and go as he pleased, and he had his employer's authorization to conduct work outside of the standard working hours. On the day of the accident the decedent had not completed a particular experiment within the standard working hour, and in the exercise of his professional judgment, in order to achieve a successful result, he decided to return to complete the experiment after hours in the evening rather than to wait for the start of the next working day. Since the trip to the laboratory was in the fulfillment of the decedent's obligations to his employer and otherwise in accordance with the terms

> of his employment, it follows that he was on an "undertaking" of his employer. The instant case is thus clearly distinguishable from cases such as . . . Gwaltney's Case 355 Mass. 333, where the employees were merely going to or coming from the places of business of their employers.

Papanastassiou, supra at 93-94.

Similarly, the nature of Ms. Rouse's work "impelled" her misadventure in the snowstorm. The special circumstances of Papanastassiou required working after hours; so too Ms. Rouse's work entailed special circumstances that the employer was required to fill on behalf of its client, Karen. Although the particular "requirements" of each case differ, the obligations attendant on each employee's professionalism are analogous. In Papanastassiou, the employer "expected of him that his professional performance would be to do whatever was necessary to be done." Id. at 92. While it is true, in the present case, that the employer did not specifically expect this employee to fill in the particular shift,[3] the employee was one of the few "preferred" aides who could handle Karen, which client the employer was required to attend twenty-four hours a day. We think the employee's dutiful response to the employer-authorized request for assistance in meeting its obligations must merit the same treatment as the court accorded to Papanastassiou: The employee's special trip to the fixed place of her employer was not a matter of "merely going to work as [she] normally and usually went to work." Gwaltney, supra.

Insofar as the judge in the present case reasoned that someone else could have performed the duty, (Dec. 12), Mr. Papanastassiou, the research chemist, might have had his assistant go in to make the reading, or he could have gone in early the next morning, closer to normal work hours. See Papanastassiou supra at 92. However, as the Supreme Judicial Court refrained from such speculations, the judge here should have also eschewed conjecture. The Papanastassiou court regarded the professional conduct of the employee on its own terms, without musing about the possibilities that the particular

[3] Had the employee been required to cover the shift, the case would have been a very simple application of the "on call" exception to the going and coming rule. See Rupp's Case, 352 Mass. 658, 659-660 (1967).

street risk might have been avoided, had the employee decided to go about his business in a different manner. We see no reason to treat the present professionally responsible employee any differently. Moreover, the judge implicitly relies on Caron's Case, supra, in reasoning that, where a non-travelling employee has a fixed place of employment, the street risk is compensable only where "employee *leaves* on a 'mission' from the place of employment necessitated by the employment." (Dec.13; emphasis added.) Mr. Caron left his place of employment to go to a work-related dinner function after which he was killed in an automobile accident. See id. at 409. However, we see no reason to read Caron overly narrowly.[4] The issue is whether the employee is on a special mission authorized by the employer – *impelled by the employment* – not his or her commute to the regular fixed workplace at the regular time. The present employee meets this test.

The insurer places weight on Peterson v. Preston Trucking Co., 11 Mass. Workers' Comp. Rep. 365 (1997), that denied compensability for an employee's injury while staying in a motel in order to avoid a snowstorm and ensure his timely arrival at work the next day. The case is inapposite. Mr. Peterson had engaged in his own problem solving inhered to his regular commute; there was no corresponding benefit to the employer beyond the employee's usual and expected timeliness. Id. at 367. Here the benefit to the employer in having the five hours of coverage for its client – which coverage was an absolute necessity – was well beyond any corresponding benefit to the employee. See Beardsworth v. No. Middlesex Sch. Dist., 11 Mass. Workers' Comp. Rep. 513 (1997)(test is whether, at the time of injury, employee is actively engaged in employer business). Beyond the occurrence of a snowstorm in each case, Peterson is irrelevant here.

Finally, we comment briefly on what might be seen as the "volunteer" quality of the employee's conduct. The Appeals Court barred compensation for a firefighter, who volunteered for special detail work at Wellesley College, where considerable construction

[4] Nor did the Papanastassiou court deem it appropriate to apply the earlier Caron opinion in such a restrictive manner, since the research chemist was also not leaving his workplace on a work-related mission, but going to the workplace on such a mission.

was taking place. Domingo v. Town of Wellesley, 44 Mass. App. Ct. 793, 795 (1998). The employee was on a list for such special details on days off. He took the opportunity for the detail work at the college when his name reached the top of the list, and he was then injured coming home afterwards. Id. The court's reasoning is inapplicable to the present case, because the employer in Domingo derived little real benefit from that employee's taking that particular assignment: Just the opposite, "his name had reached the top of the volunteer list, and he was offered the special detail available that day." Id. at 795. This plum assignment was clearly sought after by the firefighters, the employment did not impel it and it does not equate with the present employee's professional response to the employer's dire need causing her to brave the snow to cover a critical – and not easily covered – shift for the employer.

Accordingly, on the facts of this case we reverse the decision on the issue of the going and coming rule bar to compensability. We award the claimed § 34 benefits for the period, March 8, 1996 until May 1, 1997 as found by the judge, based on the opinion of the § 11A physician. (Dec. 9-10.) As the authoring judge no longer serves in the department, we transfer the case to the senior judge for recommittal to a new administrative judge for a new decision on the extent of incapacity from May 2, 1997 until February 7, 1998. (Dec. 2.)

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: January 7, 2002

Sara Holmes Wilson
Administrative Law Judge