COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 027383-03**

James A. Verderico, Jr.	Employee
Harvard University	Employer
Harvard University	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Horan)

APPEARANCES
Morgan J. Gray, Esq., for the employee at hearing and on brief
Kerry G. Nero, Esq., for the employee on brief
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

COSTIGAN, J. The employee appeals from an administrative judge's decision denying and dismissing his claim for workers' compensation benefits based on the so-called "going and coming" rule. The judge found that the motor vehicle accident in which the employee was injured occurred while he was commuting from home to work a two hour detail for his employer, and therefore his resulting injuries did not arise out of and in the course of his employment. We affirm the decision.

The employee worked as a police officer for Harvard University for several years prior to the events of July 22, 2003. On that date, his work assignment was to patrol the Longwood Avenue/Harvard Medical School area in Boston, and his regular shift was to begin at 4:00 p.m. That morning he was required to report to the university's police headquarters in Cambridge for a 9:00 a.m. meeting. Pursuant to the collective bargaining agreement, the employee was guaranteed four hours' pay for attending the meeting, regardless of how long it actually lasted. The meeting ended between 11:00 and 11:30 a.m. (Dec. 3.)

After the meeting, the employee was free to go anywhere and do whatever he wished. Before leaving the building, he walked down the hall to the detail

office, and signed up for a detail assignment in the medical school area where he was scheduled to work later that day. The detail he took was from 1:00 p.m. to 3:00 p.m. The employee then drove home to Dorchester, changed into his uniform, and left to drive to his detail. At approximately 12:30 p.m., he was involved in a motor vehicle accident and sustained injuries which resulted in his losing thirty-three days of work. (Id.)

At hearing, the self-insurer argued, and the administrative judge agreed, that on those facts, the employee's claim fell squarely within the going and coming rule, barring recovery under the act for injuries sustained while commuting to or from a fixed place of employment. (Dec. 4-5.) See Gwaltney's Case, 355 Mass. 333 (1969). As he did at hearing, the employee advances several theories of recovery based on recognized exceptions to the going and coming rule. We address them in order.

The "On the Clock" Argument

The employee maintains that because the motor vehicle accident occurred within the four-hour period for which he was paid that morning, he was "on the clock" and, therefore, in the scope of his employment at the time of the motor vehicle accident. We disagree that the guarantee of four hours' pay for attending the meeting kept the employee within the scope of his employment for that entire period of time.

As the judge correctly found, the happenstance that the employee was on paid status at the time of the accident did not change the critical fact that, at least by the time he exited police headquarters and headed home, he was under no obligation to his employer, either as to where he was, where he went, or what he did. The fact that the injury occurred during a period for which the employee was paid is but one of several factors pertinent to, but not dispositive of, the determination of whether an injury occurs "in the course of employment." Wormstead v. Town Manager of Saugus, 366 Mass. 659, 664 (1975). As to the

other factors identified in Wormstead, the employee was not on call at the time of the accident, nor was he engaged in activities consistent with and helpful to the accomplishment of his employer's functions, except to the extent that "it benefits an employer when its employee shows up for work." Brown v. All Care Resources, 18 Mass. Workers' Comp. Rep. 277, 284 (2004). Under the employee's theory, he would have been covered by the act for a slip and fall while changing his clothes at home prior to departing by car for his detail assignment. We will not go so far.

The "Street Risks" Argument

The employee also argues that because he was in uniform, and carrying his weapon, at the time of the accident, his travel from home to the extra paid detail falls within the "street risk" doctrine of § 26.[1] Again, we disagree. Although Mr. Verderico worked for a private employer, this case is factually similar, in pertinent respects, to Domingo v. Town of Wellesley, 44 Mass. App. Ct. 793 (1998), which involved a firefighter, employed by a municipality, who was injured in an automobile accident on his way home after working a paid detail. The court held Domingo had,

> volunteered for a special detail for which he was remunerated over and above his regular pay. He was not "assigned to special duty by his superior

[1] General Laws c. 152, § 26, provides, in pertinent part:

> If an employee who has not given notice of his claim of common law rights of action under section twenty-four, or who has given such notice and waived the same, 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* . . . he shall be paid compensation by the insurer or self-insurer. . . . For the purposes of this section any person, while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's general authorization or approval, *in the performance of work in connection with the business affairs or undertakings of his employer* . . . shall be conclusively presumed to be an employee. . . .

(Emphases added.)

> officer." G. L. c. 41, § 111F. He was not on call, or actually working at a special detail, or otherwise engaged in any activity consistent with his duties . . . when he was injured. Contrast Politano v. Board of Selectmen of Nahant, 12 Mass. App. Ct. 738 (1981)(police officer in a bar brawl when working on special detail); Yates v. Salem, 342 Mass. 460 (1961)(police officer on special detail injured while directing traffic).

Domingo, supra at 797-798.

Just as the claimant firefighter in Domingo was found to have been outside the scope of his employment when injured, id. at 798, the employee here was likewise outside the coverage of our workers' compensation act when the motor vehicle accident occurred. The employee's regular shift at the medical school area in Boston did not start until 4:00 p.m. The detail shift from 1:00 p.m. to 3:00 p.m., to which he was travelling from home at the time of the motor vehicle accident, was voluntary, and he was paid over and above his regular pay. (Dec. 5; Tr. 15.) At the time of the accident, the employee was not on a special errand undertaken with the expectation and authorization of his employer. Cf. Papanastassiou's Case, 362 Mass. 91 (1972).[2] Thus, the "street risk" was entirely the employee's,

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[2] The employee cites Rouse v. Greater Lynn Mental Health, 16 Mass. Workers' Comp. Rep. 7 (2002), *aff'd sub nom.* Rouse's Case, Appeals Court No. 02-J-0048 (slip op.) (March 3, 2004), as support for his claim. The facts in Rouse, however, are distinguishable. There a home health aide fell on her way to cover the employer's obligation to care for a client who was homebound due to a snowstorm. Ms. Rouse made that special trip due to the moral imperative to take care of the client, as she was one of a select few nurses preferred by the employer to handle that client; therefore, we held that the work impelled her trip. Rouse, supra at 11-13. See Caron's Case, 351 Mass. 406, 409 (1966). The employee argues that he, too, was a "preferred" employee, having been specially selected to attend the morning meeting. (Employee br. 9; Tr. 11.) The hole in the employee's argument is that he was not injured while driving from his home to the meeting, or from the meeting back to his home.

Thus, Grant v. Spectraguard, Inc., 9 Mass. Workers' Comp. Rep. 763 (1995), also relied on by the employee, likewise offers no support for his claim. There we concluded that an employee injured *on his way home* from an off-site training session was covered by c. 152. Id. at 766-767. Had this employee been injured on his way home from the specially scheduled morning meeting in Cambridge, Grant might dictate a different result, but such are not the facts here. See also, Allen v. Board of Selectmen of Weymouth, 15 Mass. App. Ct. 1009 (1983)(police officer, required by employer to testify

having nothing to do with his employer, and his injuries fell outside of the purview of G. L. c. 152, § 26.

The "Travelling Employee" Argument

The employee argues that he is a police officer "with duties strikingly similar to officers employed by public entities." He is responsibile for the care, safety and oversight of a certain area; is armed during the performance his duties; has powers of arrest; and has the designation of Special Middlesex and Suffolk County Sheriff and Special State Police Officer. (Employee br. 10-11.) Thus, in a variation on his "street risks" argument, the employee again relies on Wormstead, supra, to argue that he is a travelling employee entitled to benefits:

> Since a police officer can serve in some capacity anywhere in a community, we believe he should be included in that class of "traveling workers" not barred from receiving compensation to which he is otherwise entitled by the "going and coming" rule.

Id. at 667. Although both the employee and Captain Wormstead were being paid for the time during which they were injured, in other significant respects, Wormstead is factually distinguishable from the employee's claim.[3]

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in court on day off, and injured driving home from court, entitled to benefits as "special mission" benefitting employer not completed until he reached home). Mr. Verderico arrived home safely from the meeting, and later was commuting to a separately paid detail, neither required nor even encouraged by his employer, for the sole purpose of enhancing his earnings. (Dec. 5.)

[3] In Wormstead, the police captain, after working the first three hours of his scheduled shift, was driving back to the police station following an employer-authorized lunch break at his home, the schedule for which had been established by the chief of police. Wormstead was on call during his entire lunch period, and had to leave word where he could be reached in an emergency. It was found that he often performed police functions, such as making arrests, while on his lunch break, and that the lunch period was part of his regular forty-hour work week. At the time of the motor vehicle accident, Wormstead was carrying some police investigation papers from home back to the police station. Wormstead, supra at 662, 664-665. Moreover, the court noted:

> While a police officer in theory may be on call twenty-four hours a day, we do not suggest here than an officer injured while completely on his own time and

The administrative judge found that the employee, at the time of his motor vehicle accident, was not on a special trip authorized by the employer, even though he was then on paid status, and that the facts of his case did not fall within any other exception to the "going and coming" rule. We agree. Accordingly, we affirm the judge's decision denying and dismissing the employee's claim.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **October 5, 2006** Mark D. Horan
Administrative Law Judge

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engaged in no activity related in any way to his police duties can be said to have sustained his injury while in the performance of his duty.

Id. at 665, n.6. In the instant case, notwithstanding the earlier events of the morning, when the employee departed his home and began driving to his paid detail assignment, he was undertaking nothing more than an ordinary commute to a fixed place of employment. It is "elementary that the compensation act does not extend to cover employees going to and coming from their work." Gwaltney's Case, supra at 335; Chernick's Case, 286 Mass. 168, 172 (1934). Cf. Fedders v. Federated Systems Group, 16 Mass. Workers' Comp. Rep. 15, 17 (2002)(field service technician, whose job involved travelling to several of employer's department stores, injured on trip home; entitled to benefits under travelling employee exception to going and coming rule).