COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010721-01**

Joan E. Brown	Employee
All Care Resources	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, McCarthy & Levine [1])

APPEARANCES

Kevin T. Daly, Esq., for the employee

Michael K. Landman, Esq., for the insurer

COSTIGAN, J. The insurer appeals from an administrative judge's finding that the employee sustained a compensable work-related injury when she slipped and fell while clearing ice from her automobile in the driveway of her residence. The employee, a visiting licensed practical nurse, was preparing to drive to her first patient assignment of the day when the accident occurred. Based on the very facts found by the judge, we hold, as a matter of law, that the employee's injury did not arise out of and in the course of her employment, nor did it arise out of an ordinary risk of the street, as defined in G. L. c. 152, § 26. [2] Accordingly, we reverse the judge's decision.

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[1] Judge Levine no longer serves on the reviewing board.

[2] General Laws c. 152, § 26, as amended by St. 1991, c. 398, § 40, sets forth a two-prong test for compensability, providing in pertinent part:

> If an employee who has not given notice of his claim of common law rights of action under section twenty-four . . . 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, as hereinafter provided . . . . 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,

The employee, age sixty-nine at the time of the hearing, had worked as a licensed practical nurse (LPN) since August 1984. She worked for All Care Resources for some eleven years before retiring in 1998. She then continued to work for the employer as a visiting LPN, on a part-time schedule. Her duties were to see eight patients per day, on Tuesdays and Wednesdays. Those patients lived near the employee's home. (Dec. 2-3.)

The judge made the following findings of fact pertinent to the issue on appeal:

> [The employee's] usual practice, approved by the employer, was to telephone the employer on Monday afternoon to get her assignments for Tuesday. On Tuesday mornings, she would leave her home to travel directly to the first patient. After finishing her assignments on Tuesday afternoon, the employee drove to the employer's office in Peabody to complete paperwork and get her Wednesday assignments. On Wednesday mornings she would go directly from her home to the first patient. The employee was paid an hourly rate based on seeing eight patients per day during a period of seven and a half hours. Although the employee's actual hours were longer, she did not receive additional compensation. The employer paid a travel allowance based on mileage traveled from the first patient's home to the employer's office at the end of the day.
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> Normally the employee would arrive at the first patient's home between 7:15 and 7:30 a.m. This was required because the patient had to be cared for before home health aides arrived.
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> On March 27, 2001, the employee left her apartment at about 7:00 a.m. and walked to her automobile so that she could drive to see her first patient. There had been an ice storm. While cleaning ice from her car, [3] the employee slipped and

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> in the performance of work in connection with the business affairs or undertakings of his employer . . . who . . . receives a personal injury, shall be conclusively presumed to be an employee.

(Emphasis added.)

[3] The judge mischaracterized the employee's testimony. Ms. Brown testified that she had opened her car door and was getting in to turn on the defroster. (Tr. 14, 31.) She was "half in and half out," (Tr. 15, 31), with her hand on top of the driver's side window,

> fell, fracturing her left hip. She was taken to a hospital and underwent hip replacement surgery. After one week at a rehabilitation hospital, the employee was discharged to her home.

(Dec. 3.)

The employee filed a claim for total and partial incapacity benefits and medical benefits. The insurer resisted the claim, and following a § 10A conference, the judge awarded a closed period of § 34 total incapacity benefits. Both parties appealed to a de novo evidentiary hearing, at which the insurer raised the sole issue of liability, that is, it denied that the employee had sustained a compensable personal injury. (Dec. 2.)

The judge disagreed with the insurer's contention that the employee's injury was not compensable under c. 152 because she had not yet begun her work at the time she fell in her driveway:

> Although the "going and coming" rule provides that an employee may not receive benefits on account of injuries sustained while going to, or coming from, work, it does not apply if the employee does not have a fixed place of employment. Instead, the analysis turns upon whether the injury arises out of the nature, conditions, obligations or incidents of the employment. Therefore, the question is whether the employee's workday had begun, when she was clearing ice from her vehicle preparatory to driving to her first patient. [Citation omitted]. I conclude that when the employee left her apartment on the morning of March 27, 2001, she was embarking upon her work for the employer and following a procedure that had been approved by the employer. Clearing ice from her vehicle was a necessary incident of traveling to her first patient, and making the journey from her apartment to the first patient was a part of the service for which the employer hired the employee.

(Dec. 4.) Based on that analysis, the judge found that the employee had sustained a compensable work-related injury and resulting disability, for which she awarded a closed period of total incapacity benefits under § 34, ongoing partial incapacity benefits under § 35, and medical benefits under §§ 13 and 30. (Dec. 5.) We reverse her decision.

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when she slipped and fell. (Tr. 14, 31.) She had not turned on the ignition before she fell. (Tr. 31.)

As did the administrative judge, we reject the insurer's argument that the employee's claim is barred by the so-called "going and coming rule." It is "elementary that the compensation act does not extend to cover employees going to and coming from their work." Gwaltney's Case, 355 Mass. 333, 335 (1969); Chernick's Case 286 Mass. 168, 172 (1934). However, an employee, like Ms. Brown, whose job entails travel, is not subject to the so-called "going and coming rule" in the following circumstances: when travelling from her home to her first destination of the work day, Dow v. Intercity Homemaker Serv., 3 Mass. Workers' Comp. Rep. 136, 140-141 (1989)(Costigan, J., concurring); when travelling between destinations during the work day, Higgins' Case, 284 Mass. 345 (1933); and when travelling home from the last destination of the work day, Caron's Case, 351 Mass. 406 (1966); Hamel's Case, 333 Mass. 628 (1956); Harvey's Case, 295 Mass. 300 (1936); Swasey's Case, 8 Mass. App. Ct. 489 (1979). See, generally, Fedders v. Federated Sys. Group, 16 Mass. Workers' Comp. Rep. 15, 16-17 (2002). In each of these cases, however, the employee was "travelling," and thus exposed to the "ordinary risks of the street" contemplated in § 26. We have no such "travel" here.

Section 26's reference to the "street" traditionally has been understood to refer to public ways. See Papanastassiou's Case, 362 Mass. 91, 93-94 (1972); Caron, supra at 409; Hamel, supra at 629; Harvey, supra at 304. Had Ms. Brown been injured as a result of the "ordinary risks of the street," while travelling on a public way, either by foot or by motorized transportation, directly to her first patient of the day, thereby in furtherance of the "business affairs or undertakings of her employer," her injury could be deemed compensable under the second prong of § 26, see footnote 2 supra, even though the employer did not pay her a travel allowance for mileage from her home to her first patient, (Dec. 3), and did not commence her hourly wages until she reached the home of her first patient of the day. (Tr. 46.) See Dow, supra; but see Smith's Case, 326 Mass. 160 (1950)(woman employed to do housework at homes of aged people on welfare, was injured on a public sidewalk on way to home where she was to work entire day; court held that home was a definite "place of employment" and her claim was barred under going and coming rule).

We see no basis for expanding the term "street" to include a private driveway, and indeed the judge did not do so. She did not conclude that the employee's injury was compensable under the "ordinary risks of the street" provisions of § 26. Rather, the judge found that when the employee left her apartment on the morning of March 27, 2001, she was "embarking upon her work for the employer and following a procedure that had been

approved by the employer," and that "clearing ice from her vehicle was a necessary incident of traveling to her first patient." (Dec. 4.) For those reasons, the judge concluded that the employee's injury did arise out of and in the course of her employment, thereby satisfying the first prong of compensability under § 26, because it arose "out of the nature, conditions, obligations or incidents of the employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940). [4] We disagree.

In Wormstead v. Town Manager of Saugus, 366 Mass. 659, 664 (1975), the Supreme Judicial Court identified several factors particularly pertinent to, but not necessarily dispositive of, the determination of whether an injury occurs "in the course of employment." The trier of fact must consider whether the injury occurred, 1) during a period for which the employee was being paid; or 2) when she was on call; or 3) while

[4] We have said that "if an employee is injured while . . . engaged in authorized activities consistent with and helpful to the accomplishment of the employer's functions, an injury may be compensable even though the employee is not actually working 'on the clock' or being paid at the time." Scaltreto v. Foreign Auto Parts, 9 Mass. Workers' Comp. Rep. 484, 487, citing Wormstead v. Town Manager of Saugus, 366 Mass. 659, 664-665 (1975). The judge cited to our decision in Scaltreto as authority for her finding of compensability. (Dec. 4.) That case is of questionable precedential value, however, in that Mr. Scaltreto was injured in a motor vehicle accident while driving in his employer's truck en route from his home to his fixed place of employment. We held that use of the employer's truck may have been a "perk" to the employee but that the employer also derived a benefit from having the truck safeguarded after business hours, and available for the employee to use "on call" to pick up parts on his way to work, if necessary. Id. at 488. Here, the judge made no finding that the employer benefited from the employee keeping her personal car at her apartment building, nor did she find that the employee was "on call" before or after her scheduled work hours. Indeed, there was no evidence to support such findings. In other cases dealing with injuries occurring before actual work commences, the general rule is that an accident which occurs in (or even crossing the street from) a parking lot owned by the employer is compensable, even though the employee had a fixed place of employment and the accident happened outside of work hours. See Warren's Case, 326 Mass. 718, 720-721 (1951); Murphy v. Miettinen, 317 Mass. 633, 635 (1945); Rogers's Case, 318 Mass. 308, 309 (1945). In these cases, the rationale supporting compensability -- that the "employee on his way to work had reached a parking lot furnished by the employer," Warren, supra -- would exclude an employee whose accident occurred prior to turning into the parking lot. See also Barrett v. Suffolk County House of Correction, 10 Mass. Workers' Comp. Rep. 769, 770-771 (1996)(fall on public sidewalk outside place of employment while going to work not compensable).

she was engaged in activities consistent with and helpful to the accomplishment of her employer's functions.

Here, both the employee and the employer testified, and the judge found, that the employee was paid for seven and one-half hours of work per day, which commenced when she arrived at her first patient assignment of the day. (Dec. 3; Tr. 23, 46-47, 49.)

The judge did not find that the employee was "on call" while at home and, indeed, the employee does not claim that she was. Lastly, even given the judge's finding that by going directly from home to her first assignment of the day, the employee was following "a procedure that had been approved by the employer," (Dec. 4), her conclusion that the employee's work day commenced when she left her apartment on the morning of March 27, 2001 is contrary to law.

Under limited circumstances, an injury sustained by a travelling employee outside the "ordinary risks of the street" can be compensable. See Souza's Case, 316 Mass. 332 (1944)(death of travelling employee killed in fire in rooming house where he was staying overnight held compensable); Cahill's Case, 295 Mass. 538 (1936)(travelling claim adjuster twisted knee getting out of his car at home; injury held compensable because he was "on call" at all hours while at home); Rupp's Case, 352 Mass. 658 (1957)(visiting nurse fell during working hours but off employer's premises on way home due to winter storm; injury held compensable as she was to remain on call until usual quitting time).

Although none of those circumstances is present in this case, under the judge's theory of compensability, everything the employee did preparatory to travelling to her first patient would be an incident of her employment. No logical distinction could be drawn between exiting her apartment building and, for example, arising from bed, or showering, or walking out of her apartment into the hallway. All such activities are aimed at getting her to work and thus, in a tenuous way, they all are incidental to her employment. Moreover, it seems self-evident that it benefits an employer when its employee shows up for work. However, we will not expand the holding in Caswell that far. There has to be a stronger nexus, even for travelling employees.

We hold that on the facts of this case, even though the performance of her job required the employee to travel, the line of compensability must be drawn at the point when her travel would have commenced -- when she entered on to a public way for the purpose of

going to work. Accordingly, we reverse the administrative judge's decision and deny and dismiss the employee's claim.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: November 18, 2004