

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 034473-10**

Joanne Sheremeta  
Bartons Angels  
Dorchester Mutual Insurance Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Harpin, Fabricant and Levine)

The case was heard by Administrative Judge Poulter.

**APPEARANCES**

Frederica H. McCarthy, Esq., for the employee  
Joseph S. Buckley, Jr., Esq., for the insurer

**HARPIN, J.** In this case we are called on to determine the correctness of a decision finding that an employee suffered a compensable injury driving home after completing an extra work assignment. For the reasons that follow, we affirm the decision.

The parties filed an Agreed Statement of Facts, which was adopted by the judge. (Dec. 3-4) Those facts are as follows.

The employee worked as a home health care giver for the employer, a Northampton company providing such services to clients in their private residences and other locations. The employer's offices were located in Northampton, but the employee did not usually travel to there. Consequently, she did not have a fixed place of employment. As a condition of her employment, the employee was required to have a driver's license and an automobile. (Dec. 3.)

The employee's duties required her to travel directly from her home to the home of the assigned client, and then back to her home, unless she had multiple clients assigned that day, in which case she might go from one client to the next. She might also have a break between clients. The employee was paid on an hourly basis, but was not paid for her travel time to or from her place of work, nor was she paid for her mileage while

traveling to and from the client's home, unless the client was referred by the Commonwealth. (Dec. 3-4.)

On November 22, 2010, the employee worked in the morning at an "unrelated location." (Dec. 4.) She then returned to her home. Later in the day she received a phone call at her home from the employer, asking if she would provide home health care services to a client at a private home in Granby, because the employee originally scheduled was unable to work. This was not a Commonwealth referred case. The employee agreed and traveled from her home directly to the residence in Granby, where she provided the health services. The employee did not travel to the employer's place of business in Northampton before going to Granby. (Dec. 4.)

After caring for the client in Granby, the employee began to drive directly to her home, without deviating from that route. While in transit the employee's car was struck by another car, causing the employee to sustain injuries. (Dec. 4.)

In her hearing decision the judge found the employee's accident did not fall within the "coming and going" rule,<sup>1</sup> as the employee did not have a fixed place of employment and was compensated for her travel time depending on the nature of the assigned case. (Dec. 5.) The insurer concedes this issue on appeal: "The insurer does not dispute that, given the parameters of the employee's job, she does not come within the 'going and coming' rule." (Ins. br. 7.) Having made that concession, the insurer's further argument that the employee's injury did not fall within certain exceptions to the rule, and thus was not compensable, is moot. Either the employee's actions fell within the rule or they did not. If they did not, then no argument on the circumstances of the employee's travel can

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<sup>1</sup> The "going and coming" rule, which bars compensation, applies to injuries sustained when an employee travels to and from a single fixed place of employment. Gwaltney's Case, 355 Mass. 333, 335 (1969); Smith's Case, 326 Mass. 160, 162 (1950). Employees are not subject to the "going and coming" rule if they are a so-called "traveling employees," where they have no one fixed place of employment but travel between multiple job locations. Hamel's Case, 333 Mass. 628, 629 (1956). In such a situation they are considered to be engaged in their employment from the time they begin traveling to their first job destination, while traveling between job destinations, and while traveling home from their last job location. Id.; Verderico's Case, 70 Mass. App. Ct. 1105 (2007)(Memorandum and Order Rule 1:28).

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sustain the insurer's appeal. By not challenging the judge's finding on the rule, the insurer has waived all other issues that assume at the outset that the rule applies. Meyer v. Wagner, 429 Mass. 410, 411 n. 1 (1999); Dennen v. Addison Gilbert Hosp., 5 Mass. Workers' Comp. Rep. 289, 292 n. 4 (1991)(issue not raised on appeal is deemed waived). Whether or not an exception to the rule was properly utilized is irrelevant if the rule was not applicable in the first place.

We therefore affirm the judge's decision on the compensable nature of the employee's injury. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of \$1,563.91.

So ordered.

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William C. Harpin  
Administrative Law Judge

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Bernard W. Fabricant  
Administrative Law Judge

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Frederick E. Levine  
Administrative Law Judge

Filed: **September 10, 2013**