

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF INDUSTRIAL ACCIDENTS  
BOARD NO. 031456-22**

Joel De Oliveira  
Jack's Abby Brewing, LLC  
MEMIC Indemnity Company

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Fabiszewski, Long and O'Leary)

The case was heard by Administrative Judge McGrath.

**APPEARANCES**  
Kevin Kam, Esq., for the employee  
Donald E. Hamill, Jr., Esq., for the insurer

**FABISZEWSKI, J.** The employee appeals from the administrative judge's decision denying and dismissing the employee's claim for §34 temporary total incapacity benefits, medical benefits pursuant to §§13 and 30, and interest pursuant to §50. The employee raises three issues on appeal: 1) whether the administrative judge erred in finding the employee's injury to be non-compensable; 2) whether the insurer's affirmative defense pursuant to §27 fails as a matter of law; and 3) whether the decision requires reversal as a matter of law permitting the reviewing board to order benefits. For the reasons set forth below, we reverse the decision that the employee's injury was not within the scope of his employment and recommit the case to the administrative judge to determine whether §27 is applicable.

The facts pertinent to the issues raised on appeal are summarized below. The employer operates a brewery and beer hall in a single large building. There are several entrances to the building, including a kitchen entrance, office door and warehouse door. The kitchen entrance is typically unlocked for employees at 8:00 a.m. Some employees have key cards, which permit them to access the

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building at any time. Employees without key cards who wish to access the building before 8:00 a.m. must either contact someone in the building or someone with a key card to let them in. (Dec. 5.)

The employee, who was 63 years old at the time of hearing, worked for the employer in the kitchen, doing prep work, cleaning and accepting deliveries. (Dec. 4.) The employee's regular shift began at 9:00 a.m. (Dec. 5.) On occasion, the employee started work early, arriving around 8:00 a.m., and entered through an open gate in the fence around the beer garden. The employee clocked in using the employer's computer when he began working, and despite being told by his supervisor that he should not report to work early, he was always paid for the time for which he was clocked in.

On September 16, 2022, the employee arrived at work prior to 7:00 a.m., which was earlier than his scheduled shift at 9:00 a.m. (Dec. 5.) When he arrived, the gate in the fence around the beer garden was locked, so he attempted to climb the fence surrounding the beer garden, slipped and fell approximately eight feet. (Dec. 6.) The employee was taken by ambulance to the hospital, where he was diagnosed with a right intertrochanteric hip fracture.

On November 11, 2022, the employee filed a claim seeking §34 temporary total incapacity benefits from September 16, 2022, and continuing, plus medical benefits and attorney fees pursuant to §§13, 13A. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). On February 13, 2023, the administrative judge issued a §10A conference order denying the employee's claim for benefits. (Dec. 2.) The employee filed a timely appeal. The parties opted out of the §11A medical examination. A hearing *de novo* was held on October 18 and 27, 2023. On

February 12, 2024, the administrative judge issued a hearing decision denying and dismissing the employee's claim for benefits.<sup>1</sup> (Dec. 7.)

On appeal, the employee argues that the administrative judge erred in finding that the employee's injury did not arise out of his employment and asks that the Reviewing Board reverse the decision and order benefits as a matter of law. The employee also argues that the insurer's §27 defense fails as a matter of law. (Employee br. 31.) The insurer asserts that the employee's injury was outside of the course and scope of employment and, therefore, is not compensable. (Ins. br. 5, 6.) For the reasons set forth below, we agree with the employee that his injury arose out of his employment as a matter of law and remand the case to the administrative judge to make findings of fact and rulings of law on the §27 defense raised by the insurer.

G.L. c. §26, provides, in relevant part:

[i]f an employee...receives a personal injury arising out of and in the course of 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...shall be paid compensation by the insurer...

An injury is considered to arise out of the employment if it can be ascribed to "the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940). "The question is not whether an employee's employment exposed him to a peculiar risk of injury, but whether 'his employment brought him in contact with the risk that in fact caused his [injury].'" Butterworth v. Town of Winchester, 22 Mass. Workers' Comp. Rep. 225, 228 (2008), quoting Souza's Case, 316 Mass. 332, 334 (1994). See, Vaz's Case, 342 Mass. 495 (1961)(employee entitled to compensation even though injured on break in area of employer's premises where he was not permitted).

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<sup>1</sup> In his decision, the administrative judge noted that because he found the employee's injury was not compensable, he did not reach the Insurer's §27 defense. (Dec. 7.)

This includes an injury that occurs outside of scheduled work hours “if the employee at the time of the injury was engaged in the furtherance of his employer’s business or in pursuit of some benefit to his employer.” Butterworth at 228, quoting Larocque’s Case, 31 Mass. App. Ct. 657, 660 (1991), citing Chapman’s Case, 321 Mass. 705, 710 (1947) and Canavan’s Case, 364 Mass. 762, 765 (1974). The employee is not required to be “engaged in the actual performance of work at the moment of injury. It is enough if he is upon his employer’s premises occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment.” Souza’s Case, 316 Mass. 332, 335 (1944). See Palluccio v. Department of Revenue, 11 Mass. Workers’ Comp. Rep. 325 (1997) (injury that occurred on employer’s courtyard/mezzanine found compensable). “While on the employer’s premises, an employee may be within his employment for a reasonable time before he begins work or after he stops work”. Duggan v. M.B.T.A., 10 Mass. Workers’ Comp. Rep. 848, 850 (1996), citing Murphy v. Miettinen, 317 Mass. 633, 635 (1945).

The employee argues that he met his burden in establishing that the injury “‘arose out of’ and was ‘in the course of’ his employment.” (Employee br. 6.) The employee points out that he arrived “at the [e]mployer’s premises with the intent of working...attempted to reach his worksite via his usual point of access...[and] was injured when this attempt to get into the building went awry.” Id. The insurer asserts that because the employee was not injured in the performance of his direct duties, and because the employee’s decision to climb the fence was not a “reasonable incidental” activity or only a “minor [deviation] from one,” then the employee’s claim is not compensable. (Ins. br. 6.) We agree with the employee. There is no dispute that the employee was on the employer’s premises at the time of injury. (Employee br. 6; Ins. br. 6.) The judge found that the employee’s purpose for being present on the employer’s premises was to work. (Dec. 5, 7.)

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Additionally finding that the employee “decided to climb over the gate rather walk the approximately 150 feet to the front door because he had been told not to clock in early.” (Dec. 7.) Contrary to the administrative judge’s finding that the “employee’s fault or lack of fault in climbing the fence is not a part of my analysis,” the administrative judge appears to blame the employee for the employee’s decision to climb the fence, concluding that “his climbing the fence did not arise out of his employment rather it arose out of his desire to clock in for work two hours early.” (Dec. 7.) As we stated in Butterworth, “fault plays no role in determining whether an injury arises out of and in the course of employment, unless the employee is found guilty of serious and willful misconduct under §27.” Butterworth at 228. For these reasons, we reverse the administrative judge’s decision and find as a threshold matter that the employee’s injury arose out of and in the course of his employment as a matter of law.


Lastly, the administrative judge expressly stated that he did not reach the insurer’s §27 defense. (Dec. 7, fn. 1.) “Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision.” G.L. c. 152, §11B. Here “[t]he decision fails to meet the requisites of §11B, where a judge must identify the issues and decide each based on adequate subsidiary findings of fact grounded in the evidence.” Ramm v. Commonwealth Gas Co./NSTAR Electric Gas, 33 Mass. Workers’ Comp. Rep. 183, 187 (2019)(citations omitted). The employee urges us to find that the insurer’s §27 defense fails as a matter of law and requests that we order benefits for the employee. (Employee br. 25, 27.) Although the employee’s arguments with respect to the insurer’s §27 defense “may have merit, . . . we do not address them at this time because the matter must be recommitted for further findings. Until that occurs, the application of the relevant law to the facts must wait.” Vargas v. General Electric, 33 Mass. Workers’ Comp. Rep. 29, 33 (2019). Because the administrative judge did not make any findings of fact or rulings of

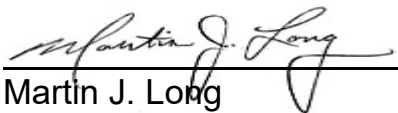
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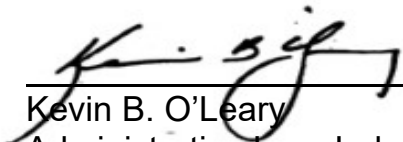
law regarding the insurer's §27 defense, we recommit the case to the administrative judge to address this issue.

Accordingly, we reverse the judge's decision that the employee was not acting within the course of his employment at the time of injury and recommit this case for findings of fact and rulings of law on the insurer's §27 defense. Because the employee appealed the hearing decision and prevailed, pursuant to G.L. c. 152, §13A(7), the employee's counsel should submit a fee agreement for review and approval.

So ordered.

  
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Karen S. Fabiszewski  
Administrative Law Judge

  
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Martin J. Long  
Administrative Law Judge

  
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Kevin B. O'Leary  
Administrative Law Judge

Filed: **March 30, 2026**