COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 065930-92**

Jon Ford	Employee
Baer's Cycle Sales	Employer
Workers' Comp. Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Barry E. O'Connor, Esq., for the Employee
Richard Goldman, Esq. and Andrew Levine, Esq., for the Insurer at hearing
Danielle L. Salvucci, Esq., and Vincent F. Massey, Esq., for the Insurer on appeal

SMITH, J. The employee appeals the decision of an administrative judge denying his original liability claim for a motorcycle accident. Because the judge erroneously required proof of the employer's "clear affirmative approval" of the trip, we reverse the decision and recommit the case.

The employee, Jon Ford, was employed by Baer's Cycle as a sales associate. (Dec. 3.) Ford was a very aggressive salesperson. His normal working hours were from 10:00 a.m. to 5:00 p.m.; however, his employer gave him more leeway than the other salespersons. (Dec. 3.) Although not specifically authorized to engage in selling off the premises of the employer, Ford testified that informal discussions with his sales manager/part owner had occurred regarding "outside prospecting." (Dec. 5; Tr. 32-33, 36-39.) The sales manager testified that the employer had an unwritten policy to allow demonstration rides only from the dealership. (Dec. 5; Tr. 103-104.) [1] It was unclear if Ford was ever told of this policy. (Dec. 5.)

[1] The demonstration ride waiver forms, admitted as Ex. 5, appear to be designed for signature by a customer. They do not appear aimed at employees. In any event, "[n]o agreement by any employee to waive his right to compensation shall be valid." G.L. c. 152, § 46.

On June 3, 1992, Ford demonstrated a motorcycle to a potential buyer while off the employer's premises and outside of his normal working hours. (Dec. 2, 4-5.) Although Ford had intended to pick up some beer while riding the motorcycle, the primary purpose of the ride was to demonstrate the employer's motorcycle to a prospective buyer. (Dec. 4.) While demonstrating the motorcycle, Ford was involved in an accident in which he sustained devastating injuries. (Dec. 5.) He was hospitalized for two months and has undergone numerous reconstructive surgeries. At the time of the hearing, Ford had undergone sixteen such procedures. (Dec. 2.)

Ford filed a claim for § 34 benefits and the matter was conferenced before an administrative judge. An order was issued in which Ford's claim was denied. Ford timely appealed to a hearing de novo. (Dec. 2.) On November 1, 1994, the matter was heard before the same administrative judge. (Dec. 1.) After hearing, the judge denied Ford's claim, holding as a matter of law that it was not compensable.

The judge concluded that § 26 entails a two-prong test: a) arising out of and in the course of employment; or b) arising out of an ordinary risk of the street while actually engaged, with the employer's authorization, in the business affairs or undertakings of the employer. He wrote: "If a personal injury is shown under either one of these prongs, it is then compensable." (Dec. 6.) Finding that the first prong was not applicable to the facts, the administrative judge proceeded to the second-prong. (Dec. 6.) The administrative judge determined that the second-prong required that the employer's affirmative authorization or approval. (Dec. 9.)

Upon review of the evidence, the judge determined that Ford was clearly engaged in sales activity and that this activity may have resulted in a benefit to his employer. However, the administrative judge also determined that Ford was acting without the clear, affirmative approval of the employer. Further, the judge stated that although there may have been some general talk about outside prospecting, there was no discussion or permission for actual demonstrations outside of

Ford's normal work schedule while off the employer's premises. (Dec. 10.) Unconvinced that the employer gave its express approval for the trip, the administrative judge denied Ford's claim for benefits. (Dec. 11.) We have the case on appeal by Ford.

Prior to 1927, compensation for a street injury was barred unless the street was found in effect to be an employee's place of work.[2] In adding the second prong to § 26, the 1927 Legislature merely enlarged the scope of injuries which could be found to 'arise out of and in the course of ' employment. Simmons's Case, 341 Mass. 319, 321 (1960); Higgins's Case, 284 Mass. 345 (1933). To properly apply the first prong of § 26, the judge must determine whether "there was a causal relation between the employment and the injury which was not so remote as to preclude a legitimate inference that the risk which resulted in the injury was incidental to the character of the employment, or to the conditions of the employment which exposed the workman to the injury." Keaney's Case, 232 Mass. 532, 534 (1919). Did this employee by virtue of the nature of his work continually stand in danger of receiving an injury from accidents resulting from exposure to the risks of the street? See Moran's Case, 234 Mass. 566, 568 (1920).

Contrary to the judge's analysis, there is no clear-cut distinction between the first and second prong of § 26. Locke, Workmen's Compensation, § 217 (2d ed. 1981). Facts supporting an award for an accident occurring in the street under the first prong will also support an award under the second. It is settled law that 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. Wormstead v. Town Manager of Saugus, 366 Mass. 659, 664 (1975). Did the employment impel the trip? Caron's Case, 351 Mass.

[2] "The 1927 amendment [to § 26] was of great value for about 25 years, but the more recent comprehensive interpretation of general principles of compensability has to a large extent superseded the special remedial legislation, making it unnecessary to treat street risks as a special category." Locke, Workmen's Compensation supra.

406, 409 (1966); Papanastassiou's Case, 362 Mass. 91, 93 (1972). Was the motorcycle an appliance of the employer's business being used in the business's behalf? See Pelletier's Case, 269 Mass. 490, 492 (1929); compare Levin v. Twin Tanners, 318 Mass. 13 (1945). Did the employer compensate the employee for the activity in which he was injured? See Wormstead, supra, at 644. If the judge finds that the employee, while engaged in the business affairs of his employer, received injuries arising from a risk of the street, then the claim is compensable even if the employee's conduct was negligent. Hamel's Case, 333 Mass. 628, 630 (1956); Caron's Case, 351 Mass. at 410 (the fact that the employee had been drinking did not prevent the award). If the employee was engaged in an activity wholly beyond the scope of his employment for some purpose entirely his own, the claim must be denied. Chapman's Case, 321 Mass. 705, 708-711 (1947).

Ford contends that the administrative judge erred as a matter of law when he interpreted § 26 to require specific authorization or approval as a prerequisite for compensation benefits. (Employee's brief, 11.) We agree. Authorization may be inferred, as well as expressly given. McElroy's Case, 397 Mass. 743, 749 (1986), and Beardsworth v. North Middlesex Regional Sch. Dist., 11 Mass. Workers' Comp. Rep. 513, 516 (1997). The fact that the injury occurred away from the automobile showroom, outside of working hours, is not determinative. See Wormstead, supra, 366 Mass. 659; Swasey's Case, 8 Mass. App. Ct. 489, 493-494 (1979).

Because the denial of compensation is based on an erroneous interpretation of § 26, we reverse it. As the record does not compel either an award or denial of compensation as a matter of law, we recommit the case for further findings of fact and conclusions of law consistent with this opinion.

So ordered.

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Suzanne E. K. Smith
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: May 11, 1999