COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 015395-95**

Joseph F. Kelly	Employee
Environmental Careers Organization, Inc.	Employer
Commercial Union Insurance	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Jeffrey Petrucelly, Esq., for the employee
John J. Canniff, Esq., for the insurer

MCCARTHY, J. In April 1994, Joseph F. Kelly, then aged twenty-five, started working forty hours a week as a computer specialist intern as a special employee at the United States Geological Service (USGS) in Marlborough, Mass. At the same time he was taking courses at Framingham State College. He anticipated receiving his degree in computer science in May 1995. (Dec. 9.)

On February 28, 1995, after working a full day for USGS, Kelly drove to Framingham State College where he was enrolled in an evening course in "Microsoft." (Dec. 12.) "The employee's supervisor and project officer at USGS was Jeff Strause." (Dec. 10.) "In late 1994 Mr. Strause signed a request for a course for the employee in Microsoft Windows programming at Framingham State College for the semester beginning January 1995 and ending in May 1995. Payment for tuition, books and the registration fee was authorized by USGS for the course." (Dec. 10.) While walking on the sidewalk by Foster Hall to the college at about 7:15 p.m., an eighteen-foot tree branch fell, striking Kelly on the head knocking him to the ground. He was taken by ambulance to a local hospital with severe back pain and an open compound fracture of his left leg. He underwent an open fracture reduction with internal fixation of metal rods and screws, in the course of two surgeries a week apart. He was hospitalized for thirteen days and

then treated at home with physical therapy. The attending physician, Dr. Brassard opined that Kelly was totally incapacitated from work from February 28, 1995 until May 30, 1995. At the time of the hearing Kelly still experienced leg pain and walked with a limp. (Dec. 12.) The insurer disputes none of these findings.

Mr. Kelly filed a claim seeking a three month closed period of weekly incapacity benefits under § 34, payment of medical expenses under § 30 and interest under § 50 of the Act. Citing § 26, the insurer denied liability asserting that the injury did not arise out of or in the course of business or out of an ordinary risk of the street while on the business of the employer.[1] The claim was denied at conference and returned back to the same administrative judge for a full evidentiary hearing. In a decision filed October 5, 1998, the judge denied the claim; we have the case on appeal by the employee. For reasons which follow, we reverse and award the claimed benefits.

The reasoning which led the administrative judge to deny Mr. Kelly's claim springs from the circumstances which brought him to USGS. They may be gleaned from the judge's decision. Environmental Careers Organization, Inc. (ECO) is a non-profit organization which "provides career training opportunities to students or recent graduates who wish to gain practical experience working in their chosen field or profession." (Dec. 6.)[2] ECO matches suitable applicants with so-called sponsor organizations. For these services, sponsors pay ECO an amount sufficient to allow ECO to pay the salary of the persons placed as well as ECO's management fee. (Dec. 6.) ECO does not provide any training to the applicants. "ECO neither requires nor expects the sponsor organization to provide off-site training in the form of academic courses or other professional courses.

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[1] Section 26 provides in pertinent part as follows:

> If an employee . . . 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 as hereinafter provided . . . .

[2] These services are in fact provided through Environmental Placement Services (EPS) a wholly owned subsidiary of ECO. For reasons of clarity and simplicity, we will ignore the parent-child relationship between ECO and EPS and simply refer to ECO.

Any such arrangements would be made solely by the sponsor and the individual. ECO neither encourages nor discourages such arrangements." (Dec. 7.)

"According to the Handbook given by ECO to its associates, day-to-day supervision of a project rests with the sponsor. ECO does not conduct on-site evaluations or supervise." (Dec. 8.) ECO applicants submit time sheets to ECO which in turn, pays the applicants after appropriate state and federal tax withholding. With this backdrop the judge turned to Mr. Kelly's particular arrangement.

> In early 1994, the employee was looking for a full-time position while going to school at night. At this point his planned graduation had been deferred to May 1994. The employee's goal was to advance his career in computer technology and its applicability to various industries, including the environmental field. He attempted to apply to the United States Geographical Survey (USGS) through a professor at school, but when that was unsuccessful, in March 1994 he applied to ECO to be an associate. The employee was awarded an Environmental Careers Organization project and became an ECO associate. He was to be an intern with USGS in Marlborough for 25 weeks from April 11, 1994 to September 30, 1994.

(Dec. 8, 9.) USGS had requested an ECO associate to assist in performing system administration of a sophisticated set of computer systems. The project authorization expressly provided for in-house training resources and hands-on experience. (Dec. 9.) Kelly was paid a weekly stipend of $396.80 and ECO was paid a management fee of $3,800.00 (Dec. 9.) The employee generally worked from 9 a.m. to 5 p.m. His duties included fixing printers, managing and maintaining hardware and software, writing programs and providing support for seventy Unix personal computers and other types of data entry machines. (Dec. 10.) The initial twenty five-week project was extended from October 1, 1994 and eventually to September 30, 1995. As noted earlier, Kelly's supervisor and project officer was Jeff Strause and it was Strause who signed a request for a course for the employee in Microsoft Windows at Framingham State College, with tuition, books and registration to be paid for by USGS.

At the outset of her analysis, the hearing judge pointed out that the insurer did not dispute the manner of the injury or the extent of incapacity. She then noted that the test

of compensability is whether at the time of the accident the employee was actively engaged in his employer's business. (Dec. 14.) The judge then concluded that the claim must be denied because Kelly was not engaged in the business affairs or undertakings of ECO at the time of the injury nor was the activity authorized even implicitly by ECO. (Dec. 14.) (emphases added). This conclusion is erroneous because it ignores the relationship between Kelly and USGS and thus overlooks the law with respect to general and special employment.[3] An employee may be lent or assigned to another to perform certain work. The lending employer is known as the general employer and the receiving party is the special employer.

In 1969 the definition of "Employer" found at § 1(5) was amended to "include both the general employer and the special employer in any case where both relationships exist with respect to an employee."[4] For the relation of employer and employee to arise with the special employer, there must be a contract of service, express or implied. This is usually a question of fact. The lent employee must also become subject to the special employer's direction and control. The test is whether, in the particular service which he is engaged to perform, the employee continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired. Galloway's Case, 354 Mass. 427 (1968). See also Ledbetter v. Foster Electric Company, Inc., 357 Mass. 780 (1970); Sawtelle v. Mystic Valley Gas Co., 1 Mass. App. Ct. 672 (1974).

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[3] See generally, L. Locke, Workmen's Compensation §§ 150 –152 (2d ed. 1981).

[4] Section 18 was also amended as follows:

> In any case where there shall exist with respect to an employee a general employer and a special employer relationship, as between the general employer and the special employer, the liability for the payment of compensation for the injury shall be borne by the general employer or its insurer, and the special employer or its insurer shall be liable for such payment if the parties have so agreed or if the general employer shall not be an insured or insured person under this chapter.

Based on the facts either found or undisputed in the case at hand, there is no doubt that Kelly agreed to be and in fact was under the direction and control of USGS.

The factual pattern here is stronger than the facts in Beardsworth v. North Middlesex Regional School District, 11 Mass. Workers' Comp. Rep. 513, 516 (1997). Beardsworth was an elementary school teacher who was injured while traveling during her lunch hour to purchase Valentine's Day candy for her classes. She did this on her own initiative, on her lunch hour with her own money and without reimbursement by the school. In affirming an award of compensation, the Board held that the Valentine's candy "furthered the employer's objective as contained in the school curriculum" and thus benefited the employer. See Ford's Case, 13 Mass. Workers' Comp. Rep. __ (May 11, 1999). 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). Here, Mr. Kelly found himself at the Framingham State College Campus at the time of his injury because he was taking a course expressly authorized by his supervisor at USGS and paid for by that organization. Those facts alone require the conclusion that the injuries arose out of and in the course of Kelly's employment. The finding that Kelly never actually used the Microsoft package at USGS does not alter this conclusion as there is neither an allegation nor a scintilla of evidence that Kelly's supervisor acted wrongfully in authorizing and paying for the course.

Accordingly, we reverse the finding of the hearing judge. The insurer is directed to pay the claimed period of § 34, medical bills under § 30, employee counsel's hearing fee under § 13A(5) together with attendant costs, and interest under § 50.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: February 14, 2000

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge