COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036645-06**

Justin Rose	Employee
Kerins Concrete	Employer
Granite State Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Costigan and Horan)

The case was heard by Administrative Judge McManus.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Lori J. Harling, Esq., for the insurer at hearing
Erin M. Mullen, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from the administrative judge's decision denying his claim that injuries he sustained in a motor vehicle accident while driving from his home to a job site were compensable under G. L. c. 152. The judge found that because neither the employee's "place of business" nor his "work hours" were fixed, his claim was not barred by the so-called "going and coming" rule.[1] She concluded, however, that although the employee's job involved travel to and from job sites which differed day to day, such travel was equivalent to commuting, and did not bring him under the purview of the "ordinary risk of the street" provisions of G. L. c. 152, § 26[2], for the purpose of coverage. Based on Smith's Case, 326 Mass. 160

[1] "When an Employee has a fixed place of business and/or fixed work hours, injuries incurred while going to or coming from work, are not compensable and would generally be barred by the established 'Coming and Going' rule, **Gwaltney's Case**, 355 Mass. 333 (1969)." (Dec. 12.)(bold in original.)

[2] General Laws c. 152, § 26, provides, in pertinent part:

> 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

(1950), we agree, and affirm the decision denying and dismissing the employee's claim.

> The proscription to compensability under the going and coming rule is well-established. Injuries occurring while an employee is travelling to and from a fixed place of employment are generally not compensable. Chernick's Case, 286 Mass. 168, 172 (1934). Nonetheless, § 26 of the Act does confer compensability where the injury is shown to be "arising out of an ordinary risk of the street while [the employee is] actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer." The test is whether it appears that the employment impelled the employee to make the trip, in the sense that the employee's duties require the travel and he is actively engaged in the employer's business when injured, in which case the risk of the trip is a hazard of the employment. See Caron's Case, 351 Mass. 406, 409 (1966); Chernick's Case, 286 Mass At 172.

Viveiros v. GRF Constr. Corp., 12 Mass. Workers' Comp. Rep. 480, 481 (1998), *aff'd* Viveiros v. GRF Constr. Corp., 98-J-884 (single justice opinion filed March 13, 2000)(alteration in original).

The employee had worked one day for the employer, a concrete and cement fabrication company, prior to his October 31, 2006 motor vehicle accident. On his first day on the job, the employee worked at a job site in Lowell and traveled there in his own vehicle from his home in Mashpee. On the drive home, the employee had a flat tire and, because another tire was very worn, he decided he would need to purchase two new tires before driving his vehicle again. (Dec. 4.) On October 31, 2006, his second day on the job, a co-worker, Jason Cardoza, picked the employee up at his mother's home in Falmouth. Using Cardoza's truck, the men commenced their drive to that day's job site in Lexington, with the employee behind the wheel, because Cardoza was tired. Within minutes of their departure, another vehicle crossed the center line and struck Cardoza's truck head on. The employee sustained multiple injuries, including fractures of the left radius and ulnar bones, a left hand tendon injury and a lacerated spleen. (Dec. 4-6, 7-10.)

> employer, and whether within or without the commonwealth, he shall be paid compensation. . . .

In December 2006, the employee filed a claim for benefits, which the insurer denied. Following a § 10A conference, the insurer was ordered to pay maximum partial incapacity benefits of $540 per week under §35, and medical benefits pursuant to § 30, from and after the March 2, 2007 conference date.[3] Both parties appealed. The evidentiary hearing took place on January 18, 2008 and April 18, 2008.[4]

The employee testified that after noting the problems with his tires on October 30, 2006, he called his supervisor, Niles Andrade, to advise he might be late for work the next day. (Tr. I, 16-17, 45-46.) Both the employee and Jason Cardoza testified that Andrade called each of them, and arranged for Cardoza to pick up the employee the next morning. (Dec. 4; Tr. I, 17-19, 46, 92-94, 105.) Cardoza, who was a working concrete and cement mason foreman for the employer, (Dec. 10), also testified that on the day of the accident, he was transporting tools owned by his employer in his truck. (Tr. I, 91; Dec. 10.) Their collective testimony seemingly supports the employee's argument that he was "actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer," so as to place him in the course of his employment, and render his injuries compensable under § 26.

The judge, however, did not credit that testimony. Instead, she credited the testimony of supervisor Niles Andrade, that he did not speak with either the employee or Cardoza on the evening of October 30, 2006, and did not arrange for Cardoza to pick up the employee on the morning of October 31, 2006. Instead, Andrade first heard of the employee's plans to ride with Cardoza when he called the employee that morning to see if he was going to work that day. (Dec. 11-12.)

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[3] In her decision, the judge incorrectly stated the subject of the conference was the insurer's complaint for modification of weekly compensation. This was inconsistent with her identification of "liability" as one of the insurer's defenses, and an issue in controversy. (Dec. 2-3.) Moreover, given the nature of the litigation, we infer the parties did not, as the judge's decision reflects, stipulate to "an *industrial injury* date of 10/31/06." (Dec. 3; emphasis added.)

[4] References in this decision to the January 18, 2008 hearing are designated, "Tr. I," and to the April 18, 2008 hearing, "Tr. II." The judge erroneously identified the first hearing date as January 18, 2007, which we view as a harmless scrivener's error. (Dec. 2.)

The judge also credited Andrade's testimony that the employer did not have employees transport company equipment in their vehicles; that he was the only employee reimbursed for travel time; and that he received reimbursement only for the time he spent traveling *between* work sites.[5] (Dec. 11-12.) The employee's testimony that he was paid for travel time, was instructed by his supervisor to travel with Cardoza, and was hauling the employer's equipment in Cardoza's truck, was not credited. (Dec. 5, 10.)

Contrary to the insurer's contention on appeal, the judge agreed with the employee and concluded that the so-called "going and coming rule," barring recovery for injuries sustained while going to or coming from a fixed place of employment, did not apply here because the employee lacked a fixed place of employment. (Dec. 12.) However, she also found:

> [I]t is necessary to determine whether despite this fact, the incurred injuries are compensable and in keeping with the developing case law. In this case at hand, although the Employee's position entailed traveling to different work sites almost daily, and so [he] was arguably, exposed to the "risks of the street," the ability to travel was part of the Employer's expectations on the Employee and his ability to work. **Smith's Case**, 326 Mass. [160] (1950).
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> Further, in performing the analysis required by **Wormstead v. Town Manager of Saugus**, 366 Mass. 659 (1975), the administrative judge must determine if the injury occurred during the time the Employee was paid, second, when he/she was on call, and lastly, whether the Employee was engaged in activities consistent with and helpful to the accomplishment of his/her Employer's functions. In the present case, this accident occurred during the normal course of the Employee's commute to a regular work day, not on a special call or in

[5] Both the employee and Jason Cardoza testified they could be required to work at different job sites during any work day. (Tr. I, 22-23, 97, 99.) Niles Andrade, however, testified that, as supervisor, he was the only employee traveling between job sites on any given day. (Tr. II, 34-35.) The judge did not make a specific subsidiary finding on this issue, but found Andrade "credible and adopt[ed] his testimony as such." (Dec. 12.) In any event, the possibility that the employee might travel between two job sites during the work day (he had not done so on October 30, 2006) does not mean he entered the scope of his employment when he left his mother's home on the morning of October 31, 2006. See Gwaltney's Case, supra.

> furtherance of the Employer's business and the Employee was not being paid for the time in which he traveled to work. **Joan E. Brown vs. All Care Resources**, [18 Mass. Workers' Comp. Rep. 277 (2004).]
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> Lastly, I do not find that the Employee and/or the co-employee Cardoza were involved in a special errand for this Employer or that the Employer asked the co-employee to drive the Employee to work the morning of the accident, arguably creating a special errand, which might bring this claim into the realm of compensability under the "special errand" exception.

(Dec. 12-13; bold in original.) The judge therefore concluded the employee's injuries did not arise out of and in the course of his employment, and appropriately she denied and dismissed his claim. (Dec. 13.)

Our dissenting colleague endorses the employee's argument that he falls within the coverage of "traveling employees" under the act. See Dow v. Intercity Homemaker Serv., 3 Mass. Workers' Comp. Rep. 136, 140-141 (1989)(Costigan, J., concurring)(visiting nurse properly characterized as a "traveling employee," falling within "ordinary risk of street" clause of § 26); Fedders v. Federated Sys. Group, 16 Mass Workers' Comp. Rep. 15 (2002)(traveling repairman's injury compensable); see also Hamel's Case, 333 Mass. 628 (1956)(house to house salesman's injury compensable). What the dissent and the employee fail to acknowledge is that unlike the employees in the above-cited cases, the *performance* of this employee's work did not involve travel beyond his commute to and from work.

In Dow, supra, the employee provided home health care to clients. She was not paid wages until she arrived at the first client home of the day, but her employer did pay her a fixed travel allowance "without regard to the amount of travel her work assignments entailed or how she travelled to and from her assigned workplaces." Dow, supra at 141 (Costigan, J., concurring). In her concurrence, Judge Costigan noted that "by paying the travel allowance, the employer acknowledged that travel was an integral part of the employee's work exposing her to the risks of the street contemplated in § 26 of the Act. . . . Simply stated, the employee's work placed her at greater risk than that faced by the average commuter and the employer recognized that risk by paying her a travel allowance." Id. at 141.

In Fedders, supra, the employee's work day commenced when he reported to his employer's store in Natick. He then would spend the day traveling to and between several of the employer's locations repairing equipment. The employee was salaried; he provided on-call support, carried a pager and used an employer-owned vehicle. The employee was reimbursed for his travel, except for the round trip mileage between his home and the Natick store. Id. at 16.

In Hamel, supra, the employee worked as a house-to-house salesman. He was authorized to use his employer's truck in making the house calls, and to keep the truck at his home. His hours of employment were from 9:00 a.m. until he completed his calls. He was killed in a motor vehicle accident while driving home. Id. at 628-629.

Contrary to the dissent's view, the mere fact that the employee did not have a fixed place of employment to which he reported every work day of every week, does not mean, as a matter of law, that he was a "traveling employee." It is not an "either/or" proposition. While the employee's commute from home may have varied daily due to the changing job sites,[6] he does not fit the model of the traveling employee as reflected in Dow, supra, Fedders, supra, and Hamel, supra. In those cases, the work performed by those employees entailed traveling to and between numerous work-related destinations within a single work day. Mr. Rose, on the other hand, traveled to only one destination on October 30, 2006, and was traveling to only one destination, the Lexington job site, on the day of the motor vehicle accident.

In Smith's Case, supra, the court considered similar circumstances for an employee whose work required her to travel from her home to a different destination each day. Id. at 161. The court, while not addressing the case in terms of a "fixed" place of employment for each day, nonetheless denied compensation:

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[6] The dissent considers the judge's finding that "the Employee's position entailed traveling to different work sites almost daily," (Dec. 12-13), as a constructive finding the employee was a traveling employee. We disagree. The fairer reading of that finding is that the employee's position entailed *commuting* to different work sites almost daily.

> The fact that the claimant was to work at Mrs. Petit's probably for only one day does not affect the situation. The unit time of her employment appears to have been a working day of a certain number of hours, all of which were to be spent at one definite place. While obviously her employer contemplated that she must use the streets to arrive at her assigned place of work, that would be also be true if she were employed in some factory for one, two or more days. She was not engaged in her employer's business in going to the place where she would begin to earn her wages.
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> . . .
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> This is not a case where the duties of the employee in travelling or in making various calls in different places require him to be on and about the streets during working hours.

Id. at 162-163. (Citations omitted.) The present case is indistinguishable,[7] and we disagree with the dissent's suggestion that the Smith holding is "obsolete," in part because we now have a "modern version of the 'going and coming rule.' "

Moreover, the lack of payment for travel time or for the travel itself, as found by the judge, while not dispositive, (see Dow, supra), is also a factor mitigating against compensability. Finally, consistent with the judge's credibility findings, there was no applicable "special errand" exception in this case. Contrast Rouse v. Greater Lynn Mental Health, 16 Mass. Workers' Comp. Rep. 7, 11-13 (2002)(employee nurse taking on extraordinary duty of covering services for client during snowstorm, when normal care schedule was disrupted; slip and fall en route compensable).

In Viveiros, supra, at 481-482, we concluded that the going and coming rule applied to a construction worker "traveling home from his employment, a fixed jobsite in Connecticut, in a private vehicle. . . ." We noted that the length and

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[7] In footnote 11, infra, the dissent suggests that because the employee's job, in the future, might have required him to travel between two job sites on a given day, he was a "traveling employee," entitled to portal to portal coverage. See Donovan's Case, 217 Mass. 76 (1914). This ignores the fact that the employee did no such traveling on the one day he worked, and was not engaged in traveling between job sites on the date of injury. Moreover, the fact that supervisor Andrade, who was responsible for overseeing all of the employer's job sites on any given day, or even Jason Cardoza, a working foreman, might have been required to travel between job sites, does not permit the inference that the employee, as a general laborer, would likewise be required to move between job sites.

duration of the employee's commute (a two hour trip from West Hartford to Fall River, Massachusetts) did not "convert this employee to a traveling employee of the sort for whom the risks of the road are an incident of employment." Id. at 482. Although the employee here, by virtue of the brevity of his employment, had not achieved a similar long-term place of employment, we see the instant case as falling within the orbit of such construction worker cases, if not precisely under the going and coming rule. See also Isokungos v. Seppela Aho Constr., 2 Mass. Workers' Comp. Rep. 154 (1988).[8]

The test for compensability is whether the employment has impelled the employee to make the trip, in the sense that the employee's job duties require the travel and he is actively engaged in the employer's business when injured. Caron's Case, 351 Mass. 406, 409 (1966); Chernick's Case, 286 Mass. 168, 172 (1934). This employee's travel was in the nature of a commute from his home to that day's assigned jobsite, and at the time and place of the motor vehicle accident, the employee faced no greater risk of the street than any other commuter. As such, the employee failed to prove that his injury arose out of and in the course of his employment.

The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **August 11, 2011**

[8] In Isokungos, the employee was injured while he traveled forty-five miles from his home to a construction site where he had worked for several months, with a stipend for travel over forty miles. We affirmed the judge's denial of the claim, likening the travel to a commute from home to a fixed place of employment. Id. at 155-156.

HORAN, J., (dissenting). Because the judge, and the majority, base their decisions on a misapplication of the modern version of the "going and coming" rule, and § 26, to the facts as found, I dissent.

The parties do not dispute, and the judge found, that the employee's first day of work as a cement finisher for the employer was October 30, 2006, at a jobsite in Lowell.[9] As the majority notes, the judge credited the testimony of Mr. Andrade. Based on his testimony, the judge found the employee's "employment would be day to day, and at different locations."[10] (Dec. 11.) She also found the employee's work hours were not fixed. (Dec. 11-12; Tr. II, 37-38.) There is no dispute that on the employee's second day of work he and Mr. Cardoza were scheduled to work at a jobsite in Lexington. (Tr. II, 35.) The judge noted: "[i]t is acknowledged that the Employee was seriously injured in a motor vehicle accident on October 31, 2006, while en route to a job site for this Employer." (Dec. 12.) She then found: "[i]n the instant case, neither the place of business nor the work hours were fixed. . . ." Id. Based on that finding, supported amply by the evidence, the judge properly concluded the "going and coming" rule did *not* operate as a bar to the compensability of the employee's claim, as "the Employee's *position entailed traveling* to *different work sites* almost daily," and the "*ability to travel was part of the Employer's expectations* on the Employee and his ability to work." (Dec. 12-13)(emphasis added.)

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[9] There is no evidence, and no argument advanced by the insurer, that the Lowell jobsite was also the employer's premises. The Lowell location is consistently referred to as a "jobsite" by the judge and Mr. Andrade. (Dec. 11-12; Tr. II, 15-16). Mr. Andrade testified the employer's main office is in Walpole, and that employees "just go to the site," and *not* to the office, before or after work. (Tr. II, 38.)

[10] When asked "how many job sites could be running at one time," Mr. Andrade replied, "[u]sually it's one or two jobs a day." (Tr. II, 11.) In her subsidiary findings of fact, the judge noted that Mr. Cardoza revealed that "it was not unusual to go to different job sites during the course on [sic] any given day." (Dec. 10.) Although the judge did not expressly make a finding on the matter, it is conceivable that the employee would have to shuttle between jobsites on the same day – if not on the date of injury itself. In any event, the majority's reliance on Gwaltney's Case, supra, misses the mark, as the employee in that case had a fixed place of employment, and was injured en route to work during his ordinary commute.

Thus, it cannot be denied the judge concluded the employee was a traveling employee, who had no fixed place of employment and no fixed hours of work. This finding, in concert with the judge's acknowledgement that the employee was injured "while en route to a job site for this Employer," (Dec. 12), required a finding of compensability under the act in the absence of other findings which would operate to invalidate its coverage.[11]

There was nothing ordinary about the employee's commute because he had no fixed place and no fixed hours of employment. "[N]umerous cases establish that an employee who has no single, fixed place of business is, for obvious reasons, generally exempt from the 'going and coming' rule." Wormstead, supra at 666-667 (and cases cited). Because his employer ordered him to travel to a different destination each day (causing him to depart from home at different times), the employee was exposed to a different "street risk" each day. G. L. c. 152, § 26. The risks attendant to his work-related travel were not increased, nor diminished, by whether he would be obligated to travel between jobsites later in the day. As the court held in Swasey's Case, 8 Mass. App. Ct. 489, 494 (1979), "[a]lthough Swasey's employment did not require continuous mobility,[12] it did impel travel, and 'where it appears that it was the

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[11] Such as a finding that the employee deviated from his assigned route for personal reasons, see, e.g., Belyea's Case, 355 Mass. 721 (1969), Cassidy v. Fall River Hous. Auth., 25 Mass. Workers' Comp. Rep. ___ (March 28, 2011), or engaged in serious and willful misconduct causative of his industrial injury. See G. L. c. 152, § 27. The insurer did not raise § 27 in defense of the claim.

[12] Swasey, working for a company based in Waltham, Massachusetts, was injured in an automobile accident while returning home from a week's worth of work at one out-of-state jobsite. Swasey, supra at 490-491. Even though Mr. Swasey travelled only between home and one jobsite each week, the court, citing Wormstead (and failing to mention Smith), had no difficulty concluding that his employment-related "travel was of such a nature" as to exempt him from the application of the going and coming rule. Id. at 494. The only material difference between the facts of Swasey and this case is that Mr. Swasey was injured driving home from his assigned jobsite, and Mr. Rose was injured driving to his assigned jobsite. Moreover, if the one jobsite in Swasey did not constitute a "fixed place" of employment, how can it be said that Mr. Rose's jobsite was a fixed place of employment given that he, unlike Mr. Swasey, was obligated to travel to a different work destination each day and at varying times?

employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment.'" quoting Caron's Case, supra at 409.

Once the judge concluded the employee had no fixed place or hours of employment, no further inquiry was required. Instead, she proceeded to scrutinize the compensability of the employee's claim by focusing on the factors enumerated in Wormstead, supra. That case dealt with consideration of facts necessary to *exempt* the plaintiff's claim from the operation of the "going and coming" rule, because, unlike the employee here, the plaintiff in Wormstead *had* fixed hours *and* a fixed place of employment.[13] Given her findings that the employee had no fixed place or fixed hours of employment, and that he was a traveling worker, the judge's Wormstead analysis was unnecessary.[14]

The judge also relied on Smith's Case, 326 Mass. 160 (1950), and Brown v. All Care Resources, 18 Mass. Workers' Comp. Rep. 277 (2004), in support of her denial and dismissal of the employee's claim. The majority also relies on Smith, but makes no mention of Brown. I address these cases in turn.

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[13] In Wormstead, the court addressed whether a police officer's injury, sustained while driving back to his assigned station from his lunch break, was compensable under G. L. c. 41, § 111F. Although the plaintiff in Wormstead had a tour of duty from 5 P.M. to 1 A.M. at the Saugus police station, (fixed hours and a fixed place of employment), the court opted for a broader construction of the phrase "in the performance of his duty" in c. 41, § 111F, to one more "comparable to the words 'arising out of and in the course of his employment' contained in § 26 of the Workmen's Compensation Act. . . ." 366 Mass. at 663. The court pointed out the employee's lunch period was part of his paid forty-hour work week, took "notice that a police officer, although he may have a primary place of duty (as the plaintiff here did), is engaged in a somewhat peripatetic occupation" and "included [Wormstead] in that class of 'traveling workers' not barred from receiving compensation to which he is otherwise entitled by the 'going and coming' rule." Id. at 667.

[14] The judge also concluded: "[l]astly, I do not find that the Employee . . . [was] involved in a special errand . . . or that the Employer asked the co-employee to drive the Employee to work the morning of the accident. . . ." (Dec. 12.) The "special errand" rule is a recognized exception to the "going and coming" rule. Again, once the judge found the "going and coming" rule inapplicable to the facts as found, it was error for her to invalidate the claim based on a consideration of whether any of the rule's exceptions applied. In so doing, the judge placed a burden of proof on the employee higher than what the law requires.

In Smith, as the majority concedes, the court did not consider what constituted a "single, fixed" place of employment in applying the "going and coming" rule. The modern parameters of the rule, established twenty-five years *after* Smith, include the concept of a "single, fixed place of business" and "fixed hours." Wormstead, supra at 666. In any event, the court's decision in Smith was appropriately criticized long ago by at least one renowned commentator: "[h]ere [in Smith] the *risk of injury during travel was a particular hazard of a job that obliged the employee to go to a different place each day* . . . [t]he hazards of such employment, like that of a salesman or insurance collector, *should entitle the employee to protection from the risks of travel from the moment he leaves home until he returns at the end of the day.*" L. Locke, Workmen's Compensation § 264, at 307 (2nd ed. 1981)(emphasis added). I concur with this assessment, and conclude the holding in Smith has long been obsolete, as the most recent restatement of the "going and coming" rule conditions its application upon whether the employee has a "single, fixed place" and "fixed hours" of employment. See Wormstead, supra at 666, and discussion, infra.

The judge's reliance upon Brown, supra, is misplaced. Based on the facts found, Brown is entirely supportive of the employee's claim. In Brown, the employee worked as a part-time visiting nurse. Brown, supra at 279. On the morning of her accident, she left her house intent on traveling to the house of her first patient. Id. at 280. While attempting to remove ice from the windshield of her car, which was parked in her driveway, the employee fell and fractured her hip. Id. Cognizant of Smith,[15] the board held:

> 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*

[15] See Brown, supra at 282.

> *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.

Brown, supra at 281 (emphasis added). The board concluded Brown's claim was outside of the protection afforded by the "risk of the street" provision in § 26, and reversed the award of benefits because she was injured on her private driveway, and not on a public way. "We see no basis for expanding the term 'street' to include a private driveway. . . ." Id. at 282. The rationale of Brown clearly implies that *had* the employee been injured en route to work on a public way, her case would have been compensable. In this case, it is undisputed the employee was not required to report to the employer's premises in Walpole, and was injured on a public way traveling to that day's jobsite; thus, the risks associated with his travel were ordained exclusively by his employer. Accordingly, there being no other findings sufficient to defeat it, see footnote 3, supra, the employee's claim is compensable.

In addition, the majority's characterization of this case as "falling within the orbit of such construction worker cases" where the "going and coming" rule has barred recovery is problematic on two levels.[16] First, it simply ignores the undisputed

[16] In support of their position, the majority relies upon Isokungos, supra, and Viveiros, supra. The employee in Isokungos did not raise the issue of whether he had a "fixed place" of employment, and in fact had traveled to and from the same location for five months. Isokungos, supra at 155. The decision does not mention whether the employee had ever worked at a different location. In Viveiros, the employee argued only that because he worked a considerable distance from his home, and enjoyed a food allowance, his case should not have been denied on "going and coming" rule grounds. Viveiros, supra at 481-

facts of the case. Indeed, the majority acts *ultra vires* by setting aside the factual findings of the judge that are supported, if not compelled by, the evidence, to wit: that the employee had no fixed hours, (Dec. 12.), and that his "employment would be day to day, and at different locations." (Dec. 11.) By ignoring these findings, the majority avoids any serious discussion of the meaning of the phrase, "single, fixed place," as contemplated by the "going and coming" rule. See Wormstead, supra. Apparently, the majority believes the phrase, "single, fixed place," means *any* work destination.[17] In other words, because every work location has a fixed place on a map, each location qualifies as a "fixed" place of work. Such a construction renders the word "fixed" superfluous, and would support a denial of compensability if, for example, Mr. Rose was required to drive to a jobsite in Lexington, Kentucky, instead of Lexington, Massachusetts.[18] Instead, the phrase "fixed place" is best understood, in the context of addressing compensability, as differentiating between situations where an employee generally reports for work at the same place and time daily, and one who does not.

Second, construction and other blue collar workers deserve as much protection under the act as a white collar worker who, in spite of having a fixed place of employment, enjoys compensation coverage from portal to portal for all risks of injury reasonably associated with out of office business travel. E.g., Caron's Case, supra. In short, the compensability inquiry should focus on whether the employment places him "at greater risk than that faced by the average commuter. . . ." Dow, supra at 141. The inquiry should not be whether the employer paid a mileage reimbursement, salary, or an hourly wage to the employee for his travel — any more

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482. The employee in Viveiros mounted no challenge to the finding that he had a "fixed place" of employment. Id.

[17] The majority characterizes the employee's commute as one "from his home to *that day's assigned jobsite*." (emphasis added).

[18] As Lexington, Kentucky, is no less a "single, fixed place" than our beloved Lexington.

than the compensability of an injury sustained by an employee on vacation should turn on whether his employer paid for it. Such considerations do not bear upon the street risks encountered by traveling employees, just as the payment of a mileage reimbursement for, or salary or hourly paid during, an employee's ordinary commute to a fixed place of work are irrelevant to the hazards associated with that trip.

Simply stated "where it was the employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment." L.Y. Nason, C.W. Koziol & R.A. Wall, Workers' Compensation § 12.5 at 387 (3rd ed. 2003). Here, there is no debating that the employee encountered "an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer. . . ." G. L. c. 152, § 26.[19] The employer not only "authorized" the employee to travel to the Lexington jobsite, he *ordered* the employee to do so. For the same reason, it cannot be reasonably denied the employee was "actually engaged," on these facts, in his employer's "business affairs or undertakings," as the purpose of his trip was no less business related than an out of office trip, made at an employer's behest, by an employee with a fixed place of work. See, e.g., Caron's Case, supra (employee killed returning home from off premises company dinner meeting deemed compensable).[20]

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[19] See Simmons's Case, 341 Mass. 319, 321 (1960)("Prior to St. 1927, c. 309, § 3, which inserted the street risk clause, the view had prevailed that injuries to an employee while using the streets in the course of his employment arose, not out of his employment, but rather out of the risks peculiar to public travel, common to every traveler. Colarullo's Case, 258 Mass. 521 [1927]. There was an exception where the street was in effect the employee's workshop and hence offered risks peculiar to the employment. Keaney's Case, 232 Mass. 532 [1919]. Egan's Case, 331 Mass. 11, 14 [1954]. It has been suggested that the effect of the 1927 amendment was to put ordinary street risk injuries, that is those not peculiar to the employment (see Higgins's Case, 284 Mass. 345, 350 [1933], into the category of compensable risks because they arise out of and in the course of employment. . . .").

[20] I therefore reject the majority's view that the employee "does not fit the model of the traveling employee as embodied by employees such as Dow and Fedders, supra. In those cases, the work performed by those employees (traveling to and between numerous work-related destinations within a single work day) brought them within the coverage of the 'ordinary risk of the street while actually engaged . . . in the [employer's] business affairs'

Though not articulated in our caselaw, I believe the justification for the "going and coming rule" is partly grounded in the reality that it is the employee who establishes his ordinary daily commute, and its attendant risks, by choosing where he is going to live. As the employer has no general right to dictate where an employee lives, the employer should not, in turn, bear the burden of the risks associated with the employee's chosen route to the employer's workplace. Thus, when an employer orders an employee to travel to a different location daily, it is entirely justifiable to place the burden of the risk of injury on the employer's insurer, as in that circumstance it is the employer, and the employment, which exposes the employee to something beyond the risks associated with an ordinary commute. Here, unlike the employee in Haslam's Case, 451 Mass. 101, 112 (2008), Mr. Rose *was* "driving from a location that his employer required him to visit." He was *not* "driving home from his fixed place of work as he usually did." Id.

I am mindful there is general agreement among the bench and bar that the caselaw in this area can be confusing. It is sometimes difficult to reconcile the holdings in our appellate decisions where the "going and coming" rule has either been applied, or rejected, and I will not attempt to do so here. However, precedents like Smith, supra,[21] run counter to the spirit of myriad subsequent decisions expanding the boundaries of workers' compensation coverage, see, e.g., McElroy's Case, 397 Mass. 743 (1986)(injuries sustained by employee traveling to doctor's office to treat for work related injury deemed compensable); Albanese's Case, 378 Mass. 14, 18

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clause of § 26." Whether the employee would have actually traveled between work sites (had he safely arrived in Lexington on the date of injury) does not alter, in my view, that he was exposed to the risks of street travel en route to that day's first worksite. See Dow, supra (traveling employee sustained compensable injuries when struck by car on a public way traveling from home to first work appointment).

[21] See also Collier's Case, 331 Mass. 374 (1954)(employee attacked away from employer's premises by a drunk patron following her refusal to serve him liquor was denied compensation). The validity of the holding in Collier was recently called into question by the Supreme Judicial Court in Bisazza's Case, 452 Mass. 593, 600 n.3 (2008).

(1979)(series of specific stressful incidents caused compensable personal injury); Rupp's Case, 352 Mass. 658 (1967)(employee injuries sustained during trip home were compensable as she was to remain "on call"), and are blind to the reality of the risks taken by an increasingly mobile and flexible workforce. See Swasey's Case, supra (injuries sustained in accident on travel home from out of state assignment compensable; "going and coming" rule inapplicable as employee was a traveling worker).[22]

Public policy considerations further justify the imposition of liability on insurers of employers who order their employees to travel hither and thither on a daily basis. Denying coverage to these injured workers most often results in their reliance upon public assistance for financial support. It also exposes the injured worker to tort liability for injuries suffered by co-workers who may be carpooling with them to work (which would be the result here, if the denial of benefits is not reversed). Why should the Commonwealth, and the injured worker, bear the financial burden of injuries arising from the risks associated with work-related travel that is beyond the ordinary daily commute? Is not that risk more justifiably placed on the insurers of employers whose businesses cannot function without a traveling workforce? I think so.

[22] The majority's holding countenances the following. A home health aide typically leaves his home in Worcester and travels downtown, at the same time and on the same route, to work at three residences each day. On Monday morning, he is injured when struck by an automobile en route to the first residence; he has suffered a compensable injury. A construction worker is required to leave his home in Worcester and to travel on consecutive days to Adams, Newburyport, Dennis, Lenox and Boston. He is not told until the day before where and when he is to report to work, or by what time. He is injured in an automobile accident traveling back from one of these destinations after an arduous day of work; his case is not compensable. How can it be said that the construction worker has an ordinary commute, and the home health aide does not? How can it be said that the nature of the home health aide's employment exposes him to a greater risk of injury than that of the construction worker? The justification for this dichotomy escapes me.

Accordingly, I would reverse the decision and recommit the case to the judge for further findings of fact on all remaining issues.

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Mark D. Horan
Administrative Law Judge