COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024824-07**

Leonard Howze, Jr.	Employee
Massachusetts Bay Transportation Authority	Employer
Massachusetts Bay Transportation Authority	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Lewenberg.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Ronald L. St. Pierre, Esq., for the self-insurer at hearing
Ronald N. Sullivan, Esq., for the self-insurer on appeal

FABRICANT, J. The self-insurer appeals from an administrative judge's decision finding it liable for injuries the employee, a bus driver, suffered on a public street while trying to switch from a bus on which he was a passenger, to a bus he was scheduled to drive. The self-insurer maintains the judge's conclusion that the employee's injuries arose "in the course of his employment,"[1] is unsupported by the evidence and contrary to law. We disagree and affirm the decision.

The relevant facts as found by the judge are as follow:

> Employee began work for the MBTA as a bus operator in June, 2005. He drove a bus on the #28 route between Ruggles Station and Mattapan Station. He had a split shift. At 12:30 p.m. he "swung on" the bus at the Mattapan Station and drove the route and eventually "swung off" at the Ruggles Station. During the second part of his shift he "swung on" at the Ruggles Station and at the end of the shift drove the bus to the garage for storage at the end of the day. Employee park[s] his car at the lot at Ruggles in the morning and usually takes a regular public accessible #28 bus to Mattapan Station where he meets the bus that he is scheduled to drive. He signs in upon boarding that bus at Mattapan and then is on the clock. When he ends the first part of his shift he gives his bus to another driver at Ruggles and "swings off." He then drives his car to the garage where he will end his second shift and then

[1] See G. L. c. 152, § 26.

> takes a bus back to Ruggles where he meets the bus that he will drive and "swings on." At the end of the second portion of his shift he drives the bus to the garage and drives home in his car. If he parked his car at Mattapan in the morning he would have to get back to it between shifts or at the end of the day. These scenarios are problematic due to timing and lack of availability of transportation after his shift.

(Dec. 5.) The judge credited the employee's testimony "regarding the reasons for his parking and travel arrangements necessitated by his 'swing on' and 'swing off' locations and schedule. . . ." (Dec. 6.)

The judge found that on August 11, 2007, "the employee was departing a #28 bus to board the #28 bus that he was to 'swing on' to when he was tripped by a passenger's foot and flew out the door and landed on the ground injuring both wrists and right shoulder." (Dec. 7.) The judge found the injury compensable as "the use of the system to accommodate this schedule was a condition of his employment and that he was in the course of his employment while riding the system between his car and the 'swing on' site." Id.

On appeal, the self-insurer first argues that the judge's factual findings are not supported by the evidence. The self-insurer contends the judge erroneously characterized the employee's "swing on" site at the start of his shift as Mattapan Station when, in fact, it was Ruggles Station. There is no merit to this argument, as testimony of both the employee and the self-insurer's witnesses supports the judge's finding. (Tr. I, 61, 66-67; Tr. II, 10.) See Mikel v. M.B.T.A., 14 Mass. Workers' Comp. Rep. 84, 89 (2000)("swing on" referring to first bus which employees drove to start shift, not transportation from parking lot to that bus).

The self-insurer also contends the judge misinterpreted testimony with respect to the employee's route which, it maintains, began and ended at Mattapan Station. However, the judge's findings that the employee started the first half of his shift at Mattapan Station, and ended the second half of his shift at an unidentified garage, mirror the employee's unrebutted testimony. (Tr. I, 47-50.)

Next, the self-insurer argues there is no evidence the parking lot at Ruggles was owned or controlled by the MBTA, and thus there is no evidence to support the judge's finding the employee "availed himself of MBTA parking at Ruggles." (Dec. 6.) Because the judge does not explain what he meant by "MBTA parking," we do not know whether he inferred the parking area was controlled by the employer or reserved specifically for employees. Although there is no evidence on this issue, as discussed below, we do not consider the question of whether parking was an incident of employment dispositive of whether the employee's injury arose out of and in the course of his employment, since we hold that the employee's transportation in the manner found was incidental to it.

Finally, the self-insurer argues the judge erred in inferring "that the MBTA, when configuring its schedule, anticipated that the employee would be required to develop such a route utilizing their [sic] service to arrive and leave at his assigned time and location." (Dec. 7.) We see no error. A judge's findings, including all rational inferences permitted by the evidence, will be upheld unless a different finding is required as a matter of law. Sawyer's Case, 315 Mass. 75, 76 (1943); Dickie v. Kesseli and Morse, Inc., 23 Mass. Workers' Comp. Rep. 275, 279 (2009). In addition, credibility determinations are the sole province of the hearing judge and will not be disturbed as long as they are based on facts, and reasonable inferences drawn from them. Lettich's Case, 403 Mass. 389, 394 (1988); Frechette v. Northeastern Univ., 21 Mass. Workers' Comp. Rep. 105, 110 (2007). Here, the judge credited the employee's testimony that he had to design the parking and travel arrangements described in order to arrive at each portion of his assigned split shift on time and still be able to pick up his car at the end of his shift. (Dec. 6.) The employee testified, without contradiction, and the judge found, that he "usually" took a #28 bus from Ruggles to Mattapan Station. (Dec. 5.) The self-insurer presented no testimony or other evidence that the employer was unaware, or disapproved of, these arrangements. See Mahan's Case, 350 Mass. 77 (1966)(injury suffered on employee's usual route between employer's bus parking garage and newsstand on station platform where

employee worked was compensable where there was no evidence employee had ever been instructed or forbidden to take route to work she habitually took).

We turn now to the self-insurer's argument that the judge's decision was contrary to law. The self-insurer argues that the application of the "going and coming rule" bars compensation. However, the "going and coming" rule is inapplicable here as the judge based his decision on the conclusion that the "use of the system," (i.e. the provision of transportation), was a condition of employment. (Dec. 7.) The self-insurer challenges this finding[2] and argues that our decision in Occean v. M.B.T.A., 10 Mass. Workers' Comp. Rep. 308 (1996), is most factually analogous to the instant case, requiring reversal. We disagree.

In Occean, we affirmed a judge's decision that an employee, a bus driver, was not in the course of his employment when he was injured while commuting on a public bus from a garage to a location where his shift was to begin. However, there was no evidence in Occean suggesting that the employee's parking at the Charlestown bus garage, prior to his embarking on the system to get to his shift, was in contemplation of the arrangement of his work-day, such as is the case here. Again, this employee's parking at Ruggles enabled him to pick up his car where his first shift concluded, and then drive it to the garage at which he would end his second shift, at a time when transportation was no longer available. Thus, Occean is simply not germane to the travel and parking arrangements addressed in the present case.

More on point is Duggan v. M.B.T.A., 10 Mass. Workers' Comp. Rep. 848 (1996), in which we concluded that injuries suffered by a bus driver while walking from an employer-provided parking lot to the MBTA station where he was to catch the subway to start his shift at another station arose out of and in the course of his employment. Alternatively, under the second clause of § 26, we concluded that the

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[2] Since the issue in cases where the employee is injured while on a conveyance provided by the employer on his commute to or from work is more appropriately framed as whether transportation is an "incident" of employment, we examine whether the judge's findings and reasonable inferences support such a conclusion. See Nason, Koziol and Wall, § 12.5, p. 386-387 (3rd ed. 2003).

risk of the trip was a hazard of the employment when the employee was on the route permitted or expected to be taken.

> [I]t was the employment that impelled the employee's trip to pick up the bus away from his assigned location. The employee was required to travel as an obligation of employment between two different locations, to sign in at the Cabot Garage, pick up his bus at Kenmore Station, and then to return it to the Cabot Garage at the end of the shift.

Duggan, supra at 852-853.

Like the bus drivers in Duggan and Mikel, the employee here was required to begin his shift at one location (Mattapan Station), drive his bus, swing off and then on at another location (Ruggles Station), drive the bus again after his break, and ultimately return the bus at the end of his shift to yet another location (the garage). As the judge found, he had no alternative but to develop a route utilizing the employer's service in order to accommodate the different starting and ending points of his split shift, and the judge reasonably inferred the employer anticipated he would do so. (Dec. 6-7.) Therefore, it was his employment which "impelled" his trip, and the risk of that trip was a "hazard of the employment." Duggan, supra at 852.

Insofar as the self-insurer makes various other arguments based on subtle factual distinctions between the present case and the governing case law, e.g., the employee caught a different bus than the one he normally caught, and his injury was not compensable as he was trying to "track down" his usual #28 bus on the public streets, we have considered them and find them unpersuasive.

We affirm the decision. Pursuant to § 13A(6), the self-insurer shall pay employee's counsel a fee in the amount of $1,497.28.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: