

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 038582-01

Michael Haslam
Modern Continental Construction Co.
National Union Fire Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Carroll, Horan and Costigan)

APPEARANCES

Gerald A. Feld, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on appeal
Shawn F. Mullen, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision of an administrative judge awarding compensation to an employee of the "Big Dig" who was injured when he fell asleep while driving home after working twenty-seven straight hours. The insurer first argues that the "going and coming" rule bars compensation where work-induced fatigue causes an injury during the employee's commute. The insurer also challenges the judge's authority to file an amendment to his decision reserving the employee's right to present further evidence establishing his entitlement to the "prevailing wage." In addition, the insurer maintains that the judge erred by failing to rule on a post-hearing motion to compel further evidence. Finally, the insurer claims the judge erred by taking judicial notice of the fact that the Central Artery/Third Harbor Tunnel Project (the "Big Dig") is a public works project. We summarily affirm the decision as to the last issue. McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285, 289 (1997), *aff'd sub nom. McCarty's Case*, 445 Mass. 361 (2005). For the following reasons, we also affirm the original decision and its amendment in all other respects.

The employee was a working foreman who supervised a crew of carpenters on the "Big Dig." (Dec. 5, 7.) On Thursday, August 2, 2001, the employee worked approximately 15 hours and, after only 3 ½ hours of sleep, returned to work at 5:00 a.m. on Friday, August

3. (Dec. 6-7.) That day, he and his crew were building forms so that concrete could be poured for road supports. (Dec. 7.) The pour was delayed due to rain as well as problems with earlier work done by the ironworkers, and finally got underway around 1:00 a.m. The employee stayed until the work was completed at 8:00 a.m. on Saturday, August 4, because:

[I]t was *required* that at least a rudimentary carpenter crew, including a foreman, be there through the pour. Though he allowed that overtime was not compulsory, the night crew had been laid off and there was no relief. He testified to having wanted to get out of the overtime, but to "sucking it up" and continuing because the job had to be done and because he felt there could be repercussions up to the possible loss of his job if the work was not completed on schedule.

(Dec. 7.)(Emphasis added.) David Arruda, the construction supervisor on the job during the last seventeen hours the employee worked, (Dec. 7-8), "corroborated that it is *necessary* to have carpenters present while the pour is going on, that carpenters *must* be there to observe, tighten up forms, and deal with the situation in case of a blow out." (Dec. 7; September 24, 2002 Tr. 161, hereinafter referred to as "Tr. II.")(Emphasis added.)¹

¹ Mr. Arruda's later testimony acknowledged that the employee needed to be at the job site until the pour was complete. He was asked on cross-examination:

Q: How do you view workers working overtime?

A: If you don't have to work overtime, you shouldn't work overtime. There's smart overtime which is necessary overtime and there's foolish overtime which is not necessary. But if you can get something done within the workable shift, which is an eight-hour shift, then, just like anything else, work your eight hours and go home.

Q: You don't know whether his overtime was smart or stupid overtime or not-

A: No. No. He had a job to do. He had to keep an eye on the forms -

(Tr. II, 169.)

Around 8:15 a.m. on August 4, after working 27 consecutive hours, the employee attempted to drive home. He fell asleep and hit a utility pole, fracturing two fingers of his left hand and some ribs, and suffering injuries to his right ankle and foot. He had two hand surgeries, in which screws were inserted into his fingers, and one surgery on his ankle. (Dec. 6, 8.)

Following the issuance of a § 10A conference order awarding closed periods of § 34 and § 35 benefits, both parties appealed to a de novo hearing. (Dec. 2-3). An impartial physician examined the employee pursuant to § 11A. The judge allowed the parties to submit additional medical evidence, in part, to address the complex issue of whether fatigue from the job played a role in the accident. (Dec. 4.)

In his decision of March 8, 2004, the judge adopted the opinion of Dr. Auerbach, a neurologist retained by the employee, who opined that the employee's falling asleep at the wheel and the resulting motor vehicle accident were caused by an extended period of sleep deprivation related to the employee having worked an extraordinary number of hours immediately prior to his accident. (Dec. 11, 13.) The judge concluded, "With such *extreme circumstances* as these, and with such a *clear, direct connection* between the extreme circumstances and the ultimate accident, this incident is different and distinct from those situations appropriately within the going and coming rule." (Dec. 13.)(Emphasis added.) He explained:

Here, I find that the particular circumstances that gave rise to Michael Haslam's motor vehicle accident and his resultant injuries have sufficient nexus to his work immediately prior so as to warrant the accident being deemed an industrial accident. Mr. Haslam was not merely commuting home. Mr. Haslam was driving home in a totally exhausted state that came about as a result of his having had major sleep deprivation due to his having worked for some 27 straight hours. Dr. Auerbach was of the opinion that this extended period of sleep deprivation was the cause of Mr. Haslam's falling asleep at the wheel. I adopt that opinion. . . .

Thus, even though the motor vehicle accident occurred during Mr. Haslam's commute, I find here that the physical state that caused the accident *arose directly out of and had presented itself while he was still on the job*. Mr. Haslam described himself as feeling totally exhausted while still on the jobsite [sic], even before his commute began. That utter exhaustion, due to work-caused sleep deprivation, clearly arose out of and in the course of his employment. His falling asleep at the

wheel and being involved in the one-car motor vehicle accident were both directly related to and the result of the lingering effects of that utter exhaustion that first presented itself on the job. That is the nexus to the employment.

(Dec. 13-14.) (Emphasis added.)

Adopting the incapacity opinion of Dr. Sand, the employee's treating orthopedist, the judge found the employee totally disabled from the date of injury until May 21, 2002, and partially disabled thereafter, with an earning capacity of \$600 per week. (Dec. 16-17.) Since the "Big Dig" was a public works project, see McCarty, supra, the employee claimed that the "prevailing wage" laws entitled him to have certain fringe benefits included in the calculation of his average weekly wage. See G.L. c. 149, §§26 and 27. However, the judge found the employee had not produced the necessary documentation from the Commissioner of Labor and Workforce Development that a prevailing wage had been established for his position. See Kelly v. Modern Continental, 17 Mass. Workers' Comp. Rep. 172, 176-177 (2003). Since Kelly was decided after the record was closed, the judge retained jurisdiction for sixty days to allow the employee to produce the requisite evidence. In the meantime, the judge based the employee's weekly benefits on his regular wages, absent the additional fringe benefits the prevailing wage law would allow. (Dec. 14-15.)

On March 31, 2004, after filing several post-hearing motions, the insurer appealed the decision to the reviewing board.² Disagreeing that the judge could retain jurisdiction, the

² Subsequent to the issuance of the decision on March 8, 2004, the insurer filed a motion with the judge and with the senior judge to re-open the record because the decision was incomplete as to average weekly wage, and because the judge had not ruled on the insurer's motion filed on February 3, 2004, (a year after written closing arguments were submitted), seeking to compel further evidence regarding the employee's post-hearing earnings. At the same time, the insurer filed a motion to void the hearing decision. On March 24, the senior judge wrote that only the administrative judge had the discretion to act on the motions, and the insurer's recourse was to appeal to the reviewing board. The administrative judge denied the insurer's motions by letter that same day. The insurer appealed the decision on March 31, 2005. In addition, on March 31, the insurer filed a motion for expedited appeal and oral argument and for stay of the order to pay benefits pending appeal. Those motions were heard by an administrative law judge and denied.

insurer refused to provide the employee with information he had requested to prove entitlement to the prevailing wage. (Amendment Dec., 2.) On April 9, 2004, to avoid a protracted dispute over whether he had authority to retain jurisdiction, the judge issued an amendment to his decision, striking that part of his original decision retaining jurisdiction, and replacing it with a paragraph allowing the employee to file a new claim on average weekly wage. Id. The insurer also appealed the amendment to the decision.³

The insurer first argues that the employee's injury is not compensable because it does not fall within any recognized exception to the "going and coming rule." That rule provides that where the employee has a fixed place of employment and fixed hours of work, injuries going to and from work do not ordinarily arise in the course of employment. Gwaltney's Case, 355 Mass. 333, 335 (1969); Nason, Koziol and Wall, Workers' Compensation § 12.2 (3rd ed. 2003). The insurer recognizes an exception where the employee is "impelled" by his employment to make the trip, see Caron's Case, 351 Mass. 406 (1966), but argues that was not the case here. Moreover, the insurer maintains that out-of-state cases awarding compensation where work-induced fatigue caused the injury are distinguishable. In those cases, the employer "required" the employee to work overtime, while here, the insurer argues, the overtime was not mandatory. In addition, the insurer argues that fatigue is a condition common to all or a great many occupations and any injury resulting from it would be non-compensable under the "wear and tear" doctrine. See Zerofski's Case, 385 Mass. 590 (1982). We do not believe the judge's decision was arbitrary and capricious or incorrect as a matter of law. We therefore affirm it.

The basic inquiry in determining whether an injury arises out of and in the course of employment is whether the injury, in a common-sense view of all the circumstances, is work-connected. Nason, Koziol and Wall, supra at § 12.1. Each case must be decided on its facts by the administrative judge. Caron's Case, supra at 409. Thus, "as the facts

We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

³ On April 8, 2004, the employee mailed to the administrative judge documents which he said would satisfy the prevailing wage requirements. This letter apparently crossed in the mail with the April 9 amendment decision. By letter on April 16, 2004, the employee indicated that, consistent with the judge's holding in the amendment, he would file a claim on the average weekly wage issue.

change, so do the results of the work connection calculus." Hicks's Case, 62 Mass. App. Ct. 755, 764 (2005). "Arising out of" generally refers to the causal origin, while "in the course of" refers mainly to the time, place, and circumstances of the injury. Aetna Life & Casualty Ins. Co. v. Commonwealth, 50 Mass. App. Ct. 373, 376 (2000), citing Larocque's Case, 31 Mass. App. Ct. 657, 658-659 (1991). In most "going and coming" cases, the focus is on whether the "time, place and circumstances of the injury" are closely related to the employment. However,

If a connection between an injury and the employment is firmly established by showing that the physical cause of the injury and the activity in which the employee was engaged arose out of his employment, it will almost necessarily follow that the injury arose in the course of employment.

Nason, Koziol and Wall, supra at § 12.1. Thus, the strength of the causal connection to work may tip the balance toward compensability. Id. at § 12.4. ⁴ See, e.g., Papanastassiou's Case, 362 Mass. 91 (1972)(discussed *infra*).

This is a case of first impression in Massachusetts. However, both federal and state courts in other jurisdictions have approved an exception to the going and coming rule where overtime becomes so great as to markedly increase fatigue, thereby making the homeward trip more hazardous. See 1 Larson's Workers' Compensation Law, § 14.05(4). In Van Devander v. Heller, 405 F.2d 1108 (D.C. Ct. App. 1968), the seminal case in this area, Judge Warren Burger wrote the opinion upholding a finding that an employee, who fell asleep while driving home after working approximately 26 hours, was entitled to compensation under the Longshoremen's and Harbor Worker's Compensation Act:

An examination of the "coming and going" cases discloses that the denial of compensation is predicated upon a finding that "ordinarily the hazards [the employees] encounter in such journeys are not incident to the employer's business." This speaks to the *ordinary*, the usual, the normal, the routine hazards which would attend travel between any two points rather than unusual hazards arising out of the foreseeable and abnormal consequences of requiring an employee to remain at his work for 26 hours. Where the hazard of the journey, as

⁴ It has been suggested that the "going and coming rule" is so riddled with exceptions that it should be abandoned and each case decided on its merits. Nason, Koziol and Wall, supra at § 12.2.

here, "arises" out of and in the course of extraordinary demands of employment there is a discernible causal relationship upon which to justify the administrative tribunal in attributing the hazard to the employment and hence responsibility for the resultant injury. Continuous work assignment by the employer of this employee for 26 hours was an extraordinary demand and foreseeably exposed the employee to the kind of risk which led to his injury.

Id. at 1110 (italics in original)(underlining added)(citations omitted).

Similarly, in Snowbarger v. Tri-County Electric Cooperative, 793 S.W. 2d 348 (Mo. S.Ct. 1990), the court held that an employee's accident when he fell asleep on the way home arose "in the course and scope of his employment:"

[The employee] encountered an abnormal exposure to an employment- related peril because he had worked for 86 of the 100.5 hours preceding his fatal accident; his physical exhaustion engendered an unusual risk of an automobile accident. The condition was incident to his employment because the work was at the bidding and for the benefit of his employer.

Id. at 350. In Hed v. Brockway Glass Co., 244 N.W. 2d 28 (Minn. 1976), the court affirmed an award of compensation where it could be reasonably inferred the employee's loss of consciousness before losing control of his car on the way home was caused by fatigue resulting from employment. See also Deland v. Hutchings Psychiatric Center, 611 N.Y.S. 2d 44 (1994)(court noted substantial authority from state and federal courts upholding compensation where employee who worked overtime fell asleep and was injured on commute, but remanded case for explanation of why contrary precedent within jurisdiction was not followed).

Other jurisdictions have also acknowledged this exception to the general rule, but have found it not applicable because the employee did not work enough hours to increase the hazard of the trip home. See Pappas v. Sports Services, Inc., 68 Mich. App. 423 (1976)(15-hour shift did not substantially increase employee's fatigue and thereby the hazard of the trip home); Depew v. Crocodile Enterprises, Inc., 63 Cal. App. 4th 480 (1998)(same, in context of wrongful death action against employer). One jurisdiction rejected a widow's claim that her husband's death on his commute home following an 18-hour shift was caused by work-induced fatigue because the medical evidence pointed to cardiopulmonary arrest, rather than fatigue, as the cause of the car crash. Clinton v.

American Mut. Liab. Ins. Co., 422 So. 2d 570 (1982). By contrast, here, the medical evidence adopted by the judge clearly indicated that work-induced fatigue was a direct cause of the accident, and the judge found the number of hours the employee worked was "extraordinary." (Dec. 11, 13.) Thus, the employee's accident "arose directly out of and had presented itself while he was still on the job." (Dec. 14.)

The insurer argues, however, that Van Devander and its progeny are distinguishable because, in those cases, overtime was required by the employer, whereas here, the employer did not order Mr. Haslam to work overtime. As the insurer has recognized, the Massachusetts courts and this board have held under the so-called "special errand" exception to the going and coming rule that an injury commuting to or from work may be compensable where the employee is "impelled" by his employment, not "compelled" by his employer, to make a hazardous trip. In Caron's Case, *supra*, the court stated:

[I]n certain circumstances, the employee relationship is not suspended when the employee leaves his place of employment on a mission which was necessitated by his employment, even if the mission is performed outside normal working hours. Although each case must be decided on its facts, where it appears that it was the employment which *impelled* the employee to make the trip, *the risk of the trip is a hazard of the employment*.

Id. at 409 (emphasis added)(citations omitted). There, the court held compensable the death of an employee who was killed on the way home from a company dinner meeting his supervisor had instructed him to attend.

In Papanastassiou's Case, *supra*, the court went a step further, holding that a research chemist's "employment 'impelled' him to make the trip" to the laboratory outside his regular hours, even though the employer did not ask or order him to return to the laboratory. Since the employee had his employer's "authorization to conduct work outside of the standard working hours" and "[s]ince the trip to the laboratory was *in fulfillment of the decedent's obligations to his employer* and otherwise in accordance with the terms of his employment, it follows that he was on an 'undertaking' of his employer." Id. at 93-94 (emphasis added).

In both Caron's Case and Papanastassiou's Case, the court relied on the second clause of G.L. c. 152, § 26, setting out the "street risk" doctrine, rather than the "arising out of and in the course of employment" clause preceding it. The second clause of § 26 authorizes

compensation for an employee's injuries "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." In McElroy's Case, 397 Mass. 743 (1986), the court held that an "employer's authorization" could be "*inferred both from its conduct and from its statutory duty to pay for the employee's medical treatment.*" *Id.* at 749 (emphasis added). Thus, an employee's injury on the way to the doctor for treatment of prior work-related injuries was compensable, though the trip was not expressly authorized, because the self-insurer, by its conduct, authorized the employee's treatment: the employer knew the employee was being treated by the doctor he was going to see at the time of the accident, and failed to direct him to forego treatment or see a different doctor.⁵

In these "street risk" cases, the work activities did not directly contribute to the employees' commuting accidents, as they did here. Nevertheless, the courts held the resulting injuries compensable where the employment impelled the journey, and the activities necessitating the commuting were authorized though not necessarily ordered by the employer. As we recognized in Rouse v. Greater Lynn Mental Health, 16 Mass. Workers' Comp. Rep. 7, 11 (2002), *aff'd sub nom. Rouse's Case*, Appeals Court No. 02-J-0048 (March 3, 2004) (unpublished decision), the word "impel" denotes obligation, duty, "going the extra mile," rather than compulsion. In Rouse, we held that a home health aide injured on the way to work an extra shift was entitled to compensation, even though she was not ordered to work the shift:

While it is true . . . that the employer did not specifically expect this employee to fill in the particular shift, the employee was one of the few 'preferred' aides who could handle [the client], which client the employer was required to attend twenty-four hours a day. We think the employee's dutiful response to the employer-authorized request for assistance in meeting its obligations must merit the same treatment as the court accorded to Papanastassiou: The employee's special trip to

⁵ In McElroy's Case, 397 Mass. 743 (1986), the court noted that other jurisdictions which have allowed benefits in similar situations have done so under the "arising out of and in the course of his employment" language in their statutes. The "street risk" provision is "closely related to" the "arising out of" language and the principles under each clause "tend to converge." Thus, a slightly different, though related, analysis ensues under the "street risk" provision of the Massachusetts statute. *Id.* at 748-749.

the fixed place of her employer was not a matter of 'merely going to work as [she] normally and usually went to work."

Id. at 12 (footnote omitted)(citation omitted).

Similarly, here the employee, though not ordered to work overtime, was nevertheless "impelled by his employment" to continue working until the concrete pour was finished, 27 hours after his shift began. Both he and David Arruda, the construction supervisor, testified that it was necessary for carpenters to be present during a concrete pour. The pour was delayed beyond the employee's shift due to circumstances beyond his control. Since the night crew of carpenters had been laid off, no carpenter's crew was coming in to relieve him. As the foreman of the crew of carpenters assigned to work during the pour, the employee felt obligated to stay until the pour was completed. Arruda, the construction supervisor, who was on the site with the employee from 3:00 p.m. on August 3rd until the work was completed the next morning, impliedly authorized the employee's overtime by allowing him to continue to work, by not providing any relief,⁶ and by paying him for the overtime.⁷ (Dec. 7.)⁸

⁶ See note 1, *infra*.

⁷ The employer has not challenged its obligation to pay the employee for the overtime worked on the dates in question, and, in fact, the company's records indicate it paid the employee for 26 ½ hours work between 5:00 a.m. on Friday, August 3, 2001, and 8:00 a.m. on Saturday, August 4, 2001. (Tr. II, 68-69.)

⁸ In Hicks's Case, *supra*, the appeals court held that an employer need not compel its employee (a health care worker providing direct patient care) to have a flu shot for her optic neuritis resulting from that shot to be compensable. Where the shot was both encouraged (though not required) by the employer and offered on its premises, its receipt was an incident of employment which provided a clear benefit to the employer. "Under these unique circumstances, no greater encouragement or compulsion by the employer was required in order to conclude, as a matter of law, that the flu shot arose out of and in the course of the employment." Id. at 767. We think our holding here is consistent with the court's approach in finding employer authorization or encouragement of a beneficial activity enough to make the resulting injury compensable. Compare Hammond's Case, 62 Mass. App. Ct. 684 (2004), where the court reversed an award of compensation to an employee, an event coordinator of a ski trip, who was injured while skiing. The court

The work-connection here is more "compelling" than in Rouse, Papanastassiou, and other cases cited above, in that, not only was the employee, in fulfilling his obligation to his employer, impelled by his employment to work extra hours to the point of exhaustion, but the extraordinary demands of the employee's work activities were a direct cause of his injury. Thus, the judge was correct that:

[The employee's] utter exhaustion due to work-caused sleep deprivation, clearly arose out of and in the course of his employment. His falling asleep at the wheel and being involved in the one-car motor vehicle accident were both directly related to and the result of the lingering effects of that utter exhaustion that first presented itself on the job. That is the nexus to employment.

(Dec. 14.)

The insurer also argues that since fatigue is a condition common to every occupation, injuries resulting from fatigue should not be compensable under the "wear and tear" doctrine of Zerofski's Case, 385 Mass. 590 (1982). The insurer misconstrues the holding of that case. There, the court held that mere "wear and tear" resulting from "a long period," (generally interpreted as years) of performing activities common to many jobs, does not satisfy the test of compensability. Id. at 593-596. Instead, "the harm must arise either *from a specific incident or series of incidents at work, or from an identifiable condition that is not common and necessary to all or a great many occupations.*" Id. at 594-595 (emphasis added). Conditions of employment, to which this analysis applies, are the employee's work activities. See Aetna Life and Casualty Ins. Co., supra at 378.⁹

held that the mere fact that the employer had authorized the employee to ski and paid for her lift ticket and equipment was insufficient. "There must be an objective element of compulsion on the part of the employer in order for an employee's participation in such an activity to fall outside of the exclusion set out in G.L. c. 152, § 1(7A)," id. at 686, which makes purely voluntary recreational activities non-compensable, even if the employer pays for them. There is no statutory provision applicable here which would similarly bar compensation.

⁹ " 'It is the work activity qua "identifiable condition that is not common and necessary to all or a great many occupations" that is the sole focus of the analysis as to the occurrence of a work injury, not its effect on the employee.' " Aetna Life and Casualty Ins. Co., supra at 378, quoting Diliberto v. New England Elec. Co., 11 Mass Workers' Comp. Rep. 123, 134 (1997), quoting Zerofski's Case, supra at 594-595.

Fatigue is not a condition of employment, but a result of those conditions. Thus, the question is whether the activities the employee performed as a working foreman for 27 hours are "too common among necessary human activities to constitute identifiable conditions of employment." Zerofski, *supra* at 596. Only a limited number of activities, such as prolonged standing and walking, sitting in one position, and frequent bending, have been found to satisfy this criteria. See Thibeault v. Sure Management Oil and Chemical Corp., 18 Mass. Workers' Comp. Rep. 130, 136 (2004). The employee's strenuous activities over 27 hours can, in no way, be seen in the same light as those conditions of employment which have resulted in mere "wear and tear." ¹⁰ In fact, the employee's work activities can also be viewed as a "series of incidents" having the cumulative effect of causing extreme fatigue, under the first prong of the Zerofski test.

The insurer argues that our decision here will open a "Pandora's box" of awards to fatigued employees since many, if not most, employees are tired at the end of the day. We see little danger of that. As Judge Burger stated in Van Devander, *supra*, compensation is reserved for situations where "the hazard of the journey, as here, 'arises' out of and in the course of extraordinary demands of employment." *Id.* at 1110. It is up to the administrative judge to determine when those demands are extraordinary. ¹¹ The judge here found that Mr. Haslam had worked an "extraordinary number of hours [27] immediately prior to his accident," and characterized the circumstances leading up to it as

¹⁰ Mr. Haslam is a working foreman who gets down in the hole. (Tr. II, 74.) Among the activities at work that led to his fatigue were the following: he set up/jacked up the traveling forms (50 foot steel forms weighing 60-70 pounds a piece), built a bulkhead in front of the travelers to hold the concrete in, (Tr. II, 40, 56, 74), finished setting the travelers, "we had to Mickey Mouse it", and put the grade strips and the waterproofing on top of the pour and blocked holes. (Tr. II, 41, 71.) In addition to lifting, a lot of crawling was involved. (Tr. II, 57.) A problem with the ironwork had been discovered - the steel was six (6) inches too high. (Tr. II, 40-43.) While that was being fixed, the employee had to take the top part of the forms down for the steel to be dropped down, and then wrap around the steel again. (Tr. II, 75.) Rain added to the difficulty of the job as it came down on top of the walls the employee was building. (Tr. II, 41, 42, 73).

¹¹ Courts have generally found no causal nexus between work and the fatigue causing the injury where the amount of time worked was not so great as to be likely to cause a hazardous trip home. See Pappas v. Sports Services, Inc., *supra*; Depew v. Crocodile Enterprises, Inc., *supra*. But see Hed v. Brockway Glass Co., *supra* (9 ½ hour shift sufficient to increase hazard of trip).

"extreme." (Dec. 13.) There is nothing arbitrary or incorrect as a matter of law about that determination. We therefore affirm it. See G.L. c. 152, § 11C.

The insurer next argues that principles of res judicata bar the issuance of the amendment to the decision in which the judge reserved the employee's right to relitigate the issue of whether he was entitled to the "prevailing wage." We disagree. The insurer does not argue the judge abused his discretion by retaining jurisdiction for sixty days after the issuance of his original March 8, 2004 decision to allow the employee an opportunity to introduce additional evidence on the prevailing wage. (Dec. 14-15, 18.) See Kelly v. Modern Continental, supra at 177-178. Indeed, we have approved a judge's authority to retain jurisdiction in a similar situation. In Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20 (1993), confronted with what she considered to be an incomplete record concerning the causal relationship of the employee's disability after a certain date, a judge issued her decision but, sua sponte, reserved the employee's right to introduce additional evidence on the issue. We likened the retention of jurisdiction to the "judge granting a motion to reopen the record, granting a continuance, examining a witness or otherwise taking steps to promote the development of a complete factual record. All are within the judge's authority 'to do justice.' " Saez, supra at 23, quoting Quincy Trust Co. v. Taylor, 317 Mass. 195, 198 (1944). We found, however, that the judge had erred by failing to place any time limitation on the submission of evidence. Here, the judge placed a reasonable limitation of sixty days on the employee's ability to introduce the necessary prevailing wage information.¹²

¹² The judge reasoned that Kelly, supra, which was decided after the close of evidence in the instant hearing, clarified that Lozowski v. C.H. Sweeney & Sons, Inc., 16 Mass. Workers' Comp. Rep. 338, 340 (2002) mandated such documentation as a " 'predicate for the application of the prevailing wage.' " (Dec. 15, quoting Lozowski, supra at 340.) Thus, the judge concluded that "fairness would indicate that the claimant be allowed the opportunity to meet this newly-announced requirement." (Dec. 15.). The insurer argues that Kelly, supra did not establish any new requirements for proving that the prevailing wage applies to a particular position. See Lozowski, supra at 340; Construction Indus. of Mass. v. Commissioner of Labor & Indus., 406 Mass. 162, 170 (1989). However, since the judge may hold the record open where he perceives an incompleteness, it is not relevant whether the law was clear as to the method of proving entitlement to the prevailing wage prior to the issuance of Kelly, supra.

Since the judge had authority to retain jurisdiction over the prevailing wage issue, the insurer's argument that the original decision has res judicata effect as to average weekly wage is misplaced. The doctrine of res judicata " 'makes a valid, *final* judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action.' " Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 251 (1999), quoting Heacock v. Heacock, 402 Mass. 21, 23-24 (1988)(emphasis added). The March 8, 2004 decision was not a final decision on average weekly wage, so the decision has no res judicata effect as to that issue.¹³

Moreover, the judge issued the amendment because he did not believe the evidence could be adduced within sixty days due to the insurer's refusal to provide the employee with requested information necessary to prove entitlement to the prevailing wage.

(Amendment Dec. 2.) The judge concluded that "the interests of justice, economy, and [his] earlier articulated concern for fairness" were best served by amending the original decision to reserve the employee's right to raise a new claim as to average weekly wage. Id. We agree. See Davis v. Boston Elevated Railway, 235 Mass. 482, 496 (1920)(judge's action reflects the "absence of arbitrary determination, capricious disposition or whimsical thinking").

Finally, the insurer claims the judge violated its due process rights by failing to hear and rule on its February 3, 2004 motion to compel further evidence regarding the employee's post-hearing earnings. The insurer maintains that the judge erred by scheduling a status conference on the motion (made a year after written closings were submitted) and then presenting the parties with a completed decision rather than hearing the motion. With further information, the insurer contends, it could have convinced the judge the employee was not incapacitated. We disagree that the insurer had a due process right to have the

¹³ The situation here is distinguishable from that in Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep. 285 (2004), where we held that a judge has no jurisdiction over a case once a decision has issued and a party has appealed. There "the administrative judge *did not retain jurisdiction* over the case after the appeal had been filed, and his reopening or reconsideration of the claim to render a new order of benefits under those circumstances was contrary to law. § 11C" Id. at 287 (emphasis added).

motion acted upon, or that the judge conferred on the insurer some due process right merely by scheduling a status conference.

There can be no dispute that the judge had the discretion to deny the self-insurer's motion. Weitkunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256-257 (2003), citing Kerr v. Palmieri, 325 Mass. 554, 557 (1950)(granting motion to permit additional evidence after trial closed rests with discretion of judge). Indeed, the insurer complains only that due process mandates that the judge hear and rule on the motion. Under the circumstances, we disagree. Board hearings are, of course, subject to constitutional due process requirements entitling a party to a hearing at which he may present and rebut evidence, examine and cross-examine witnesses, know what evidence is presented against him, and develop a record for appellate review. Haley's Case, 356 Mass. 678 (1970). However, the insurer had a full opportunity to present its case at hearing, and, prior to the close of evidence, did not complain that it had been denied such a right. At the time of the motion, the record had been closed for over a year, and the motion did not request that the record be re-opened. It merely sought to "compel the employee to provide detailed information as to the employers, earnings, nature of work performed with regard to all of his earning since the date of injury." (Insurer's Motion to Compel Further Evidence Regarding Earnings, dated February 3, 2004.) In the absence of a request to re-open the hearing, we are hard-pressed to see what advantage the insurer hoped to gain. See Day v. Thomas Gallagher Co., 19 Mass. Workers' Comp. Rep. 160 (2005)(judge did not abuse discretion by denying employee's post-hearing motion to declare impartial report inadequate, particularly where the employee did not even request to have record re-opened). If there was any error, it was harmless.

Moreover, even if the motion is viewed as a request to re-open the record, it does not satisfy the criteria for doing so, in that it requests, at least in part, evidence which was available to the insurer at the time of hearing, i.e., information on the employee's earnings from the date of injury. See McElhinney v. Mass. Bay Transp. Auth., 9 Mass. Workers' Comp. Rep. 349, 352 (1995)(request to re-open a hearing will not be granted unless the evidence was not available to the party seeking a new trial at the original hearing by the exercise of reasonable diligence). Though the better practice would have been to issue a ruling, see Kulisich v. Greater Lowell Family YMCA, 16 Mass. Workers' Comp. Rep. 270, 273 (2002), not doing so is not fatal to the decision. In fact, failure to rule on a

motion may be considered a denial of that motion, Monahan v. Sears, Robuck & Co., 4 Mass. Workers' Comp. Rep. 31, 34 n.6 (1990), and we consider it as such here.¹⁴

Finally, the judge's determination that the employee had the not-inconsequential earning capacity of \$600 was thoughtful and well-supported by the evidence. Based on Dr. Sand's opinion that the employee was permanently partially disabled, unable to be on his feet for extended periods, unable to walk on uneven terrain, climb, or crawl, and permanently requires the use of a brace, the judge found that the employee could do light carpentry work and assigned him the \$600 per week earning capacity.¹⁵ (Dec. 16-17). The judge clearly did not believe any further evidence on earning capacity was necessary for him to make a full and fair decision, nor do we.¹⁶

Accordingly, we affirm the judge's original decision of March 8, 2004, as well as his amendment decision of April 9, 2004. Pursuant to the provisions of § 13A(6), the insurer is directed to pay employee's counsel a fee of \$1,357.64.

So ordered.

Martine Carroll
Administrative Law Judge

¹⁴ We note that the judge denied the insurer's post-decision March 12, 2004 motion to re-open the record to allow further evidence on the employee's earning capacity. (See Rulings on Motions, dated March 24, 2004.) In that motion, the insurer also complained that the judge erred by failing to act on its February 3, 2004 motion. (Insurer's Motion to Re-Open Record, March 12, 2004.)

¹⁵ The employee had provided the insurer with an earnings report pursuant to § 11D showing earnings of \$400 per week between November 2002 and May 2003, and indicated that he was self-employed. The insurer complained in its February 3, 2004 motion that it lacked detail as to the name of the employers or the nature of the work performed.

¹⁶ Since the employee has filed a new claim to submit the necessary prevailing wage documentation, the insurer will have the opportunity to bring a motion to compel evidence on the employee's earnings in that proceeding. Alternatively, it may file a complaint to modify or discontinue benefits, at which time it may seek to obtain further evidence regarding the employee's actual earnings.

HORAN, J., (concurring). I agree the decision should be affirmed. I write separately to address only the issue of compensability.

I do not believe the "going and coming rule" was intended to bar compensation where, as here, there is a direct connection between the employee's work and the resulting harm. The rule has long been applied to bar claims for injuries sustained by employees, with fixed hours and places of employment, during their normal commute to and from work. However, the rule presupposes that, normally under such circumstances, the work activity has not increased the risk typically encountered during an ordinary commute. Thus, the rule should have no application where an employee, while driving home, is injured after losing consciousness from the effects of inhaling noxious fumes at work. Nor should it apply if an employee suffers an injury upon losing control of her car due to a work-related heart attack or stroke. In these circumstances, as here, there is a clear and direct causal link between the employment and the resulting injury.

Our Supreme Judicial Court's "restatement of the range of harm covered by the act" in Zerofski's Case supports this result. 385 Mass. 590, 594 (1982). "Much of the responsibility for separating injuries that are sufficiently work-related from those that are not rests with the Industrial Accident Board, which must determine as a matter of fact whether a casual connection exists between employment and injury." Id. citing McManus's Case, 328 Mass. 171, 173 (1951) and Brzozowski's Case, 328 Mass. 113, 115-116 (1951). In this case, the administrative judge found the employee's 27 hour work marathon caused him to suffer from extreme fatigue, which undoubtedly exposed him to an unusual risk of injury during his commute from work. There is a direct cause between the employee's work, his diminished capacity to safely operate his automobile, and his resulting injuries and disability. The evidence, including expert medical testimony, supports the judge's factual findings.

I acknowledge the Zerofski court noted the "causation in fact" test would not apply if the employee's injury also resulted from "wear and tear." Zerofski, supra. Stated differently, such injury would not be compensable if it resulted from an activity such as "[p]rolonged standing or walking." Id. at 596. This is because those activities are "too common among necessary human activities to constitute [an] identifiable condition of employment." Id. at 596; see Adams v. Contributory Retirement Appeal Bd., 414 Mass. 360 (1993)(frequent bending over a long period of time, without more, did not render back condition compensable under G. L. c. 32). A careful reading of Zerofski suggests this exception

should be narrowly construed. First, the cases cited therein involve *normal* "wear and tear" over a number of *months or years*. Spalla's Case, 320 Mass. 416 (1946); Doyle's Case, 269 Mass. 310 (1929); Burns's Case, 266 Mass. 516 (1929). Second, the court cites favorably to decisions affirming compensability in cases where injuries developed gradually as a result of *particular working conditions*. Pell v. New Bedford Gas & Edison Light Co., 325 Mass. 239 (1950); Sullivan's Case, 265 Mass. 497 (1929); Hurle's Case, 217 Mass. 223 (1914). The judge properly found the employee's injuries resulted from the "extreme circumstances" of 27 consecutive hours of carpentry work, causing the employee to depart the job-site "in a totally exhausted state," which in turn caused his injuries upon "falling asleep at the wheel." (Dec. 13.) Thus, the "wear and tear" exception to the "causation in fact" test does not operate to invalidate Mr. Haslam's claim.

I would affirm the decision based on the "causation in fact" test enunciated in Zerofski, and draw further support from Judge Burger's opinion in the Van Devander case: "Where the hazard of the journey, as here, "arises" out of and in the course of extraordinary demands of employment there is a discernable causal relationship upon which to . . . [attribute] the hazard to the employment and hence responsibility for the resultant injury." 405 F.2d 1108, 1110.

Mark D. Horan
Administrative Law Judge

Filed: February 28, 2006

COSTIGAN, J. (dissenting in part and concurring in part)

The majority and the concurrence ¹⁷ conclude, for different reasons, that the employee's motor vehicle accident during his commute home arose out of and in the course of his employment, and that his resulting injuries are compensable under c. 152. I disagree with both rationales, and dissent from their conclusion as to compensability.

¹⁷ The opinions of Judges Carroll and Horan constitute the majority holding that the employee's injuries are compensable. In this dissent, certain specific references to the majority decision are to Judge Carroll's opinion, while others refer to Judge Horan's concurrence.

First, I do not join in the majority's endorsement of the suggestion that the so-called "going and coming rule" "is so riddled with exceptions that it should be abandoned and each case decided on its merits." See footnote 4, supra. If the rule were actually so riddled, the employee's claim would not have presented an issue of first impression in the Commonwealth, and the majority would not have had to "riddle" further to create not only another exception to that rule, but also a new concept of what constitutes a compensable personal injury under our statute.

I disagree that the employee's claim falls under the "trip impelled by the employment" exception to the going and coming rule. In a certain sense, unless an individual either works at home or is a travelling employee, one's employment necessarily "impels" the commuting trip from home to work and from work back to home. An employee injured during that commute must show more in order to escape application of the "going and coming" rule. Therefore, the majority expands the scope of the exception: Mr. Haslam's employment did not impel him to make the trip, *per se*, but rather impelled him to make the trip in a condition of extreme fatigue resulting from his long hours at work, thus exposing him to a greater "risk of the street" under § 26¹⁸ than on his ordinary commute home. In my view, the plain language of the statute does not permit such a construction.

The majority first applies an "impel vs. compel" test, not to the employee's trip home, but to the overtime he worked prior to the motor vehicle accident. By drawing a semantic distinction between "impel" and "compel," the majority sidesteps the fact that the very cases it relies on are factually distinguishable in one crucial aspect: employer requirement or request that the employee remain at work.¹⁹ The judge mischaracterized the evidence

¹⁸ General Laws c. 152, § 26, as most recently amended by St. 1991, c. 398, § 40, provides, in pertinent part:

If an employee . . . receives a personal injury . . . 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. . . .

¹⁹ See Van Devander, supra at 1110(26-hour continuous work *assignment by the employer* exposed employee to unusual hazards travelling home); Snowbarger, supra at 349(employee worked 86 of 100.5 hours preceding fatal automobile accident; "the overtime work was *required by his employer*. . ."); Hed, supra at 29(employee *required*

when he found, "Haslam indicated that it was required that at least a rudimentary carpenter crew, including a foreman, be there through the [concrete] pour." (Dec. 7.) The employee testified only that "there has to be a -- *a carpenter has to be there* while the concrete's being poured, to the finish. In case something happens, if there's a blowout or something, you have to repair it. *I had to be there. There was nobody else there to finish what I was doing, till about 8:00 [a.m.].*" (Tr. 44.) (Emphasis added.) The employee acknowledged, however, that no one ordered him to stay, (Tr. 44, 75), and that under his union's contract with the employer, overtime work could not be required by the employer. (Tr. 75-77.) He testified, and the judge found, that he "sucked it up and drove on because if I didn't finish it I probably wouldn't have had a job." (Dec. 7; Tr. 43.) The employee admitted, however, that four men from his crew left work at the usual end of their shift, and suffered no job repercussions for doing so. (Tr. 76.)

Most significantly, the employee contradicted his own testimony that "[t]here was nobody else there to finish" what he was doing until he was relieved on Saturday morning. (Tr. 44.) When questioned about the time book he maintained showing the hours worked by him and each member of his carpenters' crew, the employee testified that all of the men but Rich worked only until approximately 3:30 p.m. on Friday, August 3rd, and that "Rich is the one that worked with me," on Friday into Saturday. (Tr. 62.) He acknowledged that there were only two men [he and Rich] who worked that long shift -- "[t]he only two that would." (Tr. 70.)

David Arruda, the construction supervisor on the night shift, testified that after starting work on Friday afternoon, he was told there were *some carpenters* left over from the day shift. (Tr. 159-160; emphasis added.) Arruda testified that in such a situation, if any worker was fatigued, he (Arruda) would be approached by the foreman and would give the worker the option of staying on the job or going home. He testified the employee never contacted him to ask for assistance or report that he was tired. If he had, "there was a slew of people" to fall back on, and Arruda could have made phone calls to get more

by employer to lay firebrick in hot glass furnace for longer than usual hours). (Emphases added.) Compare General Ins. Co. of America v. Workers' Comp. App. Bd., 16 Cal. 3d 595 (1976)(special risk exception to going and coming rule not applicable to employee who travelled to work earlier than usual to prepare coffee for co-workers, when he was struck and killed after parking car on public street near employer's premises).

personnel to the job site. (Tr. 164-165.) To the extent the judge relied on the employee's testimony to find the requisite element of employer request or requirement that the employee work the extended shift he did, in my opinion, he erred in doing so.²⁰

There is no evidence here that Mr. Haslam's employer required or requested that he remain at work beyond the usual end of his shift on August 3, 2001, or that he work any overtime, let alone almost eighteen hours of it.²¹ Therefore, the majority suggests that even in the absence of employer requirement or request, a trip may nevertheless be impelled by the employment if the employee undertakes the trip with his employer's "authorization" or implicit permission. The majority notes that in Papanastassiou, *supra*, the employee, though not asked or ordered to return to the laboratory outside of regular work hours, was nonetheless "authorized" to do so by the employer, to fulfill his work obligations. Thus, his trip from home back to the laboratory after his regular work day was "an undertaking" for his employer's benefit. Likewise, in Rouse, *supra*, a home health aide returning to work from her home to cover an extra shift did so with her employer's implicit authorization, in fulfillment of an obligation of her employment.

It is noteworthy that unlike the facts here, both of these cases involved employees *returning* to their workplace to perform additional work. If the motor vehicle accidents had occurred while these employees were driving home, these cases might have been decided differently, even if the evidence indicated a subsequent return to work outside of regular work hours was planned or even likely.²² Simply put, under no permissible

²⁰ The standard for determining whether employer request or requirement is involved should not be a purely subjective one. Just as "the nature of an employee's participation in a recreational activity . . . must be weighed on an objective standard," Bengston's Case, 34 Mass. App. Ct. 239 (1993), here the judge's reliance on the employee's purely subjective perceptions was error. *Id.* at 244-245. See, also, Hammond's Case, *supra*. Mr. Haslam's subjective perception that his job might be in jeopardy if he did not stay beyond his regular shift is insufficient to prove that his employer requested or required that he remain at work for almost eighteen hours beyond his usual day's work. Indeed, as discussed *supra*, there was substantial evidence to the contrary.

²¹ The fact, cited by the majority, that the employer paid the employee for the overtime reflects what the law and the union contract mandated, not employer requirement or request that he work the overtime.

²² In Gwaltney's Case, *supra*, the court held the going and coming rule barred benefits to an investment counsellor who was injured on a public street while walking from a

construction of the terms does Mr. Haslam's commute home on the morning of the car accident constitute a "special errand" or "mission" on behalf of his employer.

I turn to the issue of work-related fatigue, and to the concurrence's causation in fact analysis. The concurrence posits that because the employee's fatigue was, in fact, caused solely by his work, and the fatigue caused the motor vehicle accident and his resulting injuries, he is entitled to benefits. I respectfully disagree. In my view, work-related fatigue is not the kind of "harm" which our courts have construed as either constituting, or giving rise to, a compensable personal injury.

The words "personal injury" have been defined to include "whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability." Burns's Case, 218 Mass. 8, 12 (1914). In my view, the majority misapprehends the import of Zerofski's Case, supra. Zerofski does far more than

parking garage to his office; the prospect that he would use his car later in the day for business-related travel did not bring his commute to work within the scope of his employment. In Caron's Case, supra, the employee was travelling home from a company dinner meeting at which business was discussed and drinks were imbibed. In addressing the employee's subsequent fatal motor vehicle accident, the court framed the fundamental question presented by the dependents' claim as "whether it could be found that Caron had the status of an 'employee' at the time of the collision." The court applied the provisions of § 26 that,

. . . any person, while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's general authorization or approval, in the performance of work in connection with the business affairs or undertakings of his employer . . . and while so performing such work, receives a personal injury," is conclusively presumed to be an employee.

The court held that the employee's "homeward bound trip could be found to have been an essential part of his mission," that is, that his employment impelled the trip. Id. at 410. Tested against the statutory criteria, on the facts found by the administrative judge, Mr. Haslam's commute home was not a trip impelled by his employment.

exclude "wear and tear" injuries from compensability -- it defines what constitutes a compensable personal injury:

To be compensable, the harm must arise either from *a specific incident or series of incidents at work*, or from *an identifiable condition that is not common and necessary to all or a great many occupations*. The injury need not be unique to the trade . . . [b]ut it must, in the sense we have described, be identified with the employment.

Id. at 594-595. (Footnotes omitted; emphasis added.)

Under Zerofski, the first prong of compensability requires a "specific incident," that is, that something happen to an employee *at work*. In my opinion, that "something" has to be more than simply being at work and working, even for a long period of time. The examples noted by the concurrence are illustrative. When exposure to noxious fumes at work causes an employee to lose consciousness while driving home, the resulting injury is compensable, because the harm arose from a specific incident at work, the exposure, even though it manifested itself after work and off the employer's premises. Likewise, if heavy lifting at work results in a myocardial infarction or stroke after the employee has left work, even when he is at home, the harm -- the initial insult to the cardiovascular system -- arose from a specific incident or series of incidents at work. In my view, fatigue from working simply does not stand on the same footing.²³ Working, even for a long period of time, is not an incident or series of incidents at work -- it is work, it is the employment itself.

As to the second prong of Zerofski, working twenty-seven hours straight is clearly at the far end of the spectrum, but working long hours with resulting fatigue, be it physical or mental or both, is not only a common experience shared by those who work, it is undoubtedly a universal one. Granted, the fatigue at issue here is not the same as in Zerofski -- bodily wear and tear occurring over a long period of time -- but there is a commonality of character:

²³ Although the majority recites at length the employee's testimony relative to the physical tasks he performed during his extended shift, the medical opinion of the employee's expert neurologist, adopted by the judge, was that an extended period of sleep deprivation (not physical exertion) caused the fatigue which caused the employee to fall asleep while driving. (Dec. 10-11.)

In some cases work may be a contributing cause of injury, but only to the extent that a great many activities pursued in its place would have contributed. *When this is so, causation in fact is an inadequate test.*

Id. at 594 (emphasis added.)

If, as the concurrence proposes, causation in fact is an adequate test, judges are consigned to the daunting task of drawing a bright line as to how many extra hours of work would be sufficient to render resulting fatigue an incident or condition or obligation of employment. Fatigue, however, is ephemeral in nature, and what constitutes extraordinary fatigue, resulting from "extreme" work circumstances, is entirely relative. In this arena, to say that each case must be decided on its facts by the administrative judge is too facile, and invites arbitrary, inconsistent and widely disparate results, as the few cases addressing this issue reflect.²⁴

The administrative judge found that Mr. Haslam's working twenty-seven hours over his last, extended shift was "extraordinary," constituting "extreme circumstances." (Dec. 13.) It may be true that for employees accustomed to working eight to ten hours per day, twenty-seven hours of continuous work is indeed extraordinary.²⁵ However, is it any less

²⁴ A small minority of jurisdictions have decided the issue differently than does the majority. In Setley v. Workers' Comp. App. Bd, 69 Pa. Commw. 241 (1982), an employee, required by his employer to complete two eight-hour shifts within a twenty-four hour period, fell asleep at the wheel driving home. He was seriously injured in the resulting motor vehicle accident. The court held his injuries, even if related to fatigue from long work hours, did not occur in the course of his employment, and thus were not compensable. See, also, Pappas, supra (five to seven hours overtime worked by employee not so great as to increase employee's fatigue substantially; injuries sustained in motor vehicle accident when employee fell asleep at wheel held not compensable). But see Hed, supra (9 ½ hour shift sufficient to increase hazard of trip home).

²⁵ The employee's wage records, however, reflect that he worked copious amounts of overtime in most of the ten weeks preceding his injury. In at least two of those weeks, his earnings exceeded his pay for the week ending August 5, 2001. (Joint Ex. 1.) His "Hours Worked History," (Employee Ex. 2), reflects that he routinely worked more than forty hours per week, e.g., 74.5 hours in the week ending June 17, 2001; 67.5 hours in the week ending June 24, 2001; and 79.0 hours in the week ending July 15, 2001, compared

extraordinary and fatigue-producing for a full-time, "nine to five" employee to work several hours of overtime each day for a two week period? Under the concurrence's analysis, is there any valid reason to distinguish acute from short-term but cumulative fatigue, or physical fatigue from mental fatigue or distraction?

Consider this scenario. The comptroller of a manufacturing company learns that an external audit of the company's books is to be conducted. In preparation, he works many hours of overtime in the two weeks preceding the audit. On the last day before the audit, after working six hours beyond his usual eight-hour work schedule, the employee is driving home, mentally fatigued and pre-occupied, thinking about the impending audit. He runs a stop sign and is injured in the ensuing collision with another car. Are his injuries compensable? Under the majority's holding, they are, because his job impelled him to make the usual commute home while tired and distracted. Under the concurrence's holding, causation in fact suffices. Again, I disagree.

Moreover, is it any less fatiguing for a part-time worker accustomed to working only four hours per day to work eight or ten hours instead? And does the majority's holding stand as only a new exception to the going and coming rule, with limited application? I think not. For example, a part-time retail clerk, accustomed to working only four hours per day, volunteers to work double shifts for two weeks during store inventory. On the last such day worked, the employee arrives home from work, exhausted from her two-week double work schedule; she puts a pan of food on the stove to warm, sits down to watch television, falls asleep in a chair, and sustains serious burns in a fire that results when the pan of food on the stove ignites. It is not disputed that her fatigue was directly caused by working double shifts for two weeks. Are her injuries compensable? Under the majority's holding, arguably they are, because there is a "sufficient nexus" between her work

to 65.5 hours in the week ending August 5, 2001. On August 3, 2001, the day before his twenty-seven hour stint, the employee worked over fifteen hours, from 5:00 a.m. to 8:30 p.m. Although he got only three and one-half hours of sleep, from midnight to 3:30 a.m., the employee felt fine when he reported for work on the morning of August 4, 2001. (Dec. 6; Tr. 38.) These records call into question whether the time the employee spent at work prior to the motor vehicle accident was as extraordinary as the administrative judge determined.

activities and falling asleep at home. I do not think our legislature ever intended such a result.

I agree with the majority that the judge acted properly in taking judicial notice of the fact that the Central Artery/Third Harbor Tunnel project -- the so-called "Big Dig" -- is a public works project governed by §§ 26 and 27 of chapter 149. That fact, however, did not relieve the employee of proving what the applicable prevailing wage was for carpenters on that project. He failed to do so, not once but twice. In my opinion, the judge erred as a matter of law in retaining jurisdiction and reserving to the employee a second chance to meet that burden of proof. The reason he gave for doing so ²⁶ reflects a misunderstanding of the law at that time. The judge wrote:

As Kelly v. Modern Continental was published after the close of evidence in this hearing, fairness would indicate that the claimant be allowed the opportunity to meet this newly-announced requirement. Therefore, I will allow the claimant sixty (60) days to do what he will to produce additional evidence to address that requirement. I will retain jurisdiction over this matter so as to allow for my consideration of such additional evidence as might be submitted. . . .

(Dec. 15.) Contrary to the judge's characterization, this burden of proof was not a "newly-announced requirement." In Lozowski, *supra*, at 340, *aff'd* Mass. Appeals Court, No. 02-J-523, slip op. (January 31, 2005), we held that "[a] predicate for the application of the prevailing wage under G. L. c. 149, §§ 26 and 27, is the establishment of the prevailing wage for the subject project by the Commissioner of the Department of Labor and Workforce Development." Thus, the employee's burden of proof -- that such a prevailing wage had been established, and what that wage was -- was well-defined and established before the close of the evidence. The judge failed to acknowledge this and, in turn, erred in excusing the employee's failure to satisfy that burden. ²⁷ Moreover, once the insurer

²⁶ The discovery dispute cited by the administrative judge in his April 9, 2004 amended decision was not the stated basis for the judge's initial retention of jurisdiction.

²⁷ Ironically, in his amended decision filed on April 9, 2004, the judge noted that due to disputes between the parties as to post-hearing discovery requests, he was surrendering jurisdiction over the prevailing wage issue without finding in the employee's favor, but he again reserved to the employee the right to bring a new claim.

filed its appeal to the reviewing board from the judge's March 8, 2004 decision,²⁸ the administrative judge no longer had jurisdiction over the case. There is no concurrent jurisdiction between an administrative judge and the reviewing board. Davis, supra at 286-288.

I agree with the majority that an administrative judge has broad discretion in setting procedure for matters assigned to his docket, and on determinations of record closure. Weitkunat, Jr., supra, citing Kerr supra. The judge here, acting permissibly within his sound discretion, could have denied the insurer's late-filed motion for additional evidence, but the parties were entitled to a ruling on the motion prior to the filing of the decision. See Dunn v. U.S. Art Co., 18 Mass. Workers' Comp. Rep. 123, 125 (2004). Instead, the judge scheduled what was to be a status conference on the insurer's motion; failed to address the motion at the proceeding he scheduled; and filed his hearing decision instead. Even if the insurer's due process rights were not violated, I do not agree that a judge's discretion allows for such caprice.

In summary, the employee's commute home does not fall under any exception to the "going and coming" rule. Work-related fatigue, by itself, is not the kind of "harm" contemplated by our statute as either constituting, or giving rise to, a compensable personal injury. The act of working, even for long hours, does not constitute a specific incident or an identifiable condition of employment. It is employment, and causally related fatigue is simply too common and necessary an experience among those who work. The cases cited by the majority are underwhelming authority for the proposition urged by the employee, and I am not persuaded that our statute contemplates the result reached by such a small minority of jurisdictions, by the administrative judge, and by the majority.

For these reasons, I respectfully dissent from the majority opinion. I would reverse the decision of the administrative judge and vacate his award of benefits.

Patricia A. Costigan
Administrative Law Judge

²⁸ Upon review of the documents in the board file, I note that the insurer's appeal, dated March 31, 2004, was received by the department on April 6, 2004, three days prior to the judge's filing of his amended decision.

Michael Haslam
Board No. 038582-01

Filed: February 28, 2006