COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 044246-05

Robert Butterworth	Employee
Town of Winchester	Employer
Massachusetts Education and Govt. Assn. SIG	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Fabricant)

APPEARANCES

Richard Schwartz, Esq., for the employee at hearing
Alan S. Pierce, Esq., for the employee on appeal
Peter Harney, Esq., for the insurer at hearing
Warren A. Richards, Esq., for the insurer on appeal
Karen S. Hambleton, Esq., for the insurer at oral argument

McCARTHY, J. The employee appeals from an administrative judge's decision holding he did not suffer a compensable injury when he fell down his basement stairs on the way to make work-related telephone calls from his home office. For the following reasons, we reverse the decision, and recommit the case for further findings and additional testimony as necessary to address the remaining issues.

Robert Butterworth, age sixty-four at the time of hearing, was hired as the boys' tennis coach for Winchester High School on April 5, 2005. One of his duties was to phone in the results of tennis matches to several newspapers. This had to be accomplished by approximately 9:00 p.m. the day of the matches in order for the results to appear in the newspapers the following day. The employee had never discussed with his supervisor, the athletic director, the location from which the calls were to be made.[1] (Dec. 3-4.)

[1] The employee testified that although the athletic director had given him a handbook which stated he was required to call in the match results, neither the athletic director nor the handbook specified that he call from the high school, or that he call at a specific time. He had tried calling from the high school, but found if he called in immediately after the matches were over, he had

On April 25, 2005, the Winchester High School teams played Stoneham High School at Winchester's home facility, which was a private club approximately a mile from the high school. (Tr. 15.) The matches concluded sometime between 5:00 and 5:30 p.m., after which the employee checked to make sure the gates were locked, answered parents' questions, and, when everyone had gone, drove to his home in Beverly. (Tr. 16.) The employee then had dinner, and afterward headed down to his home office in the basement with the intention of telephoning the match results to the newspapers.[2] As he descended the stairs, his tennis equipment bag, which he was carrying on one shoulder, caught on a shelf, causing the employee to fall down the stairs and hyper-extend his right knee. (Dec. 4.) The employee was taken to Beverly Hospital, treated and released. On April 28, 2005, he had right knee surgery. He missed only one or two days from work. (Dec. 4-5.

The employee's claim for §§ 13 and 30 benefits was denied following a § 10A conference. The employee appealed to hearing, where he was the only witness. In his decision, the judge concluded that:

> [T]he Employee's fall at his home on April 25, 2005 was not a work related injury. I find that the circumstances that led to his injury on that date were the result of his own doing and not that of his employment. I further find that the injury sustained by the Employee on April 25, 2005 resulted from being exposed to a risk of his home as opposed to any risk of his employment.

(Dec. 6.) Accordingly, the judge denied and dismissed the employee's claim. Id.

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trouble getting through because there were so many other coaches calling the newspapers. Additionally, it was more difficult "traffic-wise" if he delayed his trip home. He had called in the results from home before April 25, 2005, and found calling from home worked better than calling immediately after the matches, because he was able to get through to the newspapers and have the results published. When there were away matches, it was too noisy to call from the bus, which he rode back to the high school with the players. (Tr. 12-15.)

[2] The employee testified that his home office was associated with his job as tennis coach and contained materials for that job, as well as personal files. (Tr. 17.) Although the employee had made calls to the newspapers from the high school, there was no testimony as to whether he had an office there, or what his hours of work were.

The employee appeals, arguing the judge erred as a matter of law in holding, in essence, that the employee's injury did not arise out of and in the course of his employment. The insurer maintains that the employee was not "impelled" to call in the match results from his home, and therefore his knee injury did not arise out of and in the course of his employment. We agree with the employee.

The judge's reasons for denying the employee's claim misapprehend the issue and the law. First, his finding that "the circumstances that led to his injury . . . were the result of his own doing," (Dec. 6), seems to fault the employee for his injury. However, fault plays no role in determining whether an injury arises out of and in the course of employment, unless the employee is found guilty of serious and willful misconduct under § 27, an allegation which has not been raised here. See Dillon's Case, 324 Mass. 102, 107 (1949); Talbot v. Department of Correction, 22 Mass. Workers' Comp. Rep. 43, 47 n.4 (2008).

The judge's other reason for denying the employee's claim - - that his injury "resulted from being exposed to a risk of his home as opposed to any risk of his employment," (Dec. 6) - - is also off the mark. The fact that an injury occurs at home does not necessarily mean it did not arise out of and in the course of employment. "An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Caswell's Case, 305 Mass. 500, 502 (1940). It arises "in the course of employment" "[e]ven though [it] occurs off the employer's premises or outside normal working hours . . . if the employee at the time of the injury was engaged in the furtherance of his employer's business or in pursuit of some benefit to his employer." Larocque's Case, 31 Mass. App. Ct. 657, 660 (1991), citing Chapman's Case, 321 Mass. 705, 710 (1947) and Canavan's Case, 364 Mass. 762, 765 (1974). See also D'Angeli's Case, 369 Mass. 819, 816 (1976)(Employee need not be engaged in actual performance of his duties at moment of injury. "All that is required is that his activity be incidental to and not inconsistent with his employment.") The question is not whether an employee's employment exposed him to a peculiar risk of injury, but whether "his employment brought him in contact with the risk that in fact caused his [injury]." Souza's Case, 316 Mass. 332, 334 (1944); Nason, Koziol and Wall, Workers' Compensation, § 10.2, pp. 299-300 (3 rd ed. 2003).

Cases dealing with injuries to an employee at home illustrate these principles, although they were decided before the principles were clearly enunciated. Over seventy years ago, in Soares's Case, 270 Mass. 3 (1930), the court held that an employee's death at home in his kitchen arose out of and in the course of employment, where the employee was cleaning a blowtorch which he intended to use the next day as part of his job to thaw out pipes: "[I]n thawing the pipes *or*

preparing for this work, he was engaged in the employment of plumbing and . . . his injury arose out of it." Id. at 7. (Emphasis added). In Cahill's Case, 295 Mass. 538 (1936), the Supreme Judicial Court held that an employee's injuries in his driveway at home arose out of and in the course of his employment, where the employee, an insurance adjuster, had two offices, one of them in his home, and, at the time of his injury, was intending to perform work for the employer at home. The employee "was still engaged in the performance of the duties of his employment, though on his own premises." Id. at 542.

Here, the critical question of whether the employee was undertaking an activity incidental to his employment must be answered in the affirmative. The employee was always required to call in the results of the tennis matches before 9:00 p.m. on the day of the matches, and he was injured while on the way to his office basement to perform that aspect of his job.[3] The insurer does not dispute these findings. Rather, the insurer contends that the employee's injury did not arise out of and in the course of his employment because he "was not impelled to make the phone calls on behalf of his employer at home." (Ins. br. 3.) However, in the cases relied on by the insurer, the employee was injured while traveling to or from the workplace. See, e.g., Papanastassiou's Case, 362 Mass. 91 (1972)(death of research chemist while returning to work to complete experiment was compensable where employee was required to do whatever he judged necessary to assure the success of his experiments); Rouse v. Greater Lynn Mental Health, 16 Mass. Workers' Comp. Rep. 7 (2002), aff'd, Appeals Ct. No. 2002-J-0048 (March 3, 2004)(home health aide's injury while walking to patient's house to provide care during snowstorm, to fulfill employer's obligations to its clients, was compensable). The issue in these cases was whether the employee was impelled by his employment to make the trip leading to his injury.[4]

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[3] Although some of the judge's findings border on recitations of testimony, there is no indication the judge discredited the employee's testimony, which was unrebutted. Payton v. Saint Gobain Norton Co., 21 Mass Workers' Comp. Rep. 297, 306 (2007), citing May's Case, 67 Mass. App. Ct. 209, 213-214 (2006)(record did not support self-insurer's argument that judge discredited employee's testimony where judge did not find events recounted by employee did not occur, and specifically credited evidence that employee caused two supervisors to be disciplined). Moreover, on appeal, the insurer challenges neither the facts found by the judge nor the employee's unrebutted testimony.

[4] It is by now well-accepted that generally "compensation for an injury arising out of and in the course of employment 'does not extend to cover employees going to and coming from their work.' " Haslam's Case, 451 Mass. 101, 101-102 (2008), citing Wormstead v. Town Manager of

By contrast, here, the employee was not injured while traveling between the high school and the location of a tennis match, or on his commute home from either a match location or the high school. The employee was injured at his home as he was preparing to perform work which had to be done that evening. We therefore need not address whether he was injured on a journey "impelled" by his employment. Cases involving injuries during travel are relevant insofar as they shed light on the construction of the "arising out of and in the course of" clause,[5] but they cannot

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Saugus, 366 Mass. 659, 666 (1975). In Haslam's Case, supra, which the insurer cited at oral argument, the court held the going and coming rule applied to bar compensation to an employee injured on his commute home after falling asleep at the wheel due to exhaustion caused by working excessive overtime. The court held that the employee had not met his burden to show he was required by his employer, and thus "impelled," to work overtime. Id. at 108. Moreover, the employee, at the time of injury, "was not fulfilling any obligation to his employer, but was merely driving home from work. Id. at 111-112. Here, the employee was acting to fulfill an obligation to his employer when he was injured, and his injury did not occur during his commute, but while he was already at home preparing to make *required* work-related telephone calls.

In Murphy v. Micro Technology Solutions, 21 Mass. Workers' Comp. Rep. 153 (2007), aff'd Appeals Ct. No. 2007-P-1069 (May 1, 2008), also relied on by the insurer, we held that an employee who was injured on his way to pick up his son from a day care center, after he had pulled into a rest stop to make a work-related telephone call, was barred from receiving compensation by the "going and coming rule." The employee had simply resumed his trip home at the time of his injury. We rejected the employee's argument that "but for" his stop to make the work-related call, he would not have been at the place where the accident occurred. We stated, however: "Had the employee been injured while stopped and involved in making or receiving these calls, he would have an argument as to his entitlement to compensation. . . ." Id. at 155. The circumstances of Mr. Butterworth's injury are closer to the potentially compensable situation posited by the reviewing board, where the employee was engaged in an activity in furtherance of his employer's interests, than to the actual scenario presented in Murphy.

[5] In Wormstead's Case, 366 Mass. 659, 664 (1975), for example, the court instructed that, in determining whether an injury arises out of and in the course of an employee's employment, there are several relevant, though not dispositive, factors: whether the employee's injury "occurred during a period (1) for which he was being paid, (2) when he was on call and (3) while he was engaged in activities consistent with and helpful to the accomplishment of [his job

be read to stand for the proposition that the employee must be "impelled by his employment" to make work-related telephone calls from his home.

Rather, based on the general principles of compensability discussed infra, we conclude that the employee's injury arose out of and in the course of his employment. The employee had never been instructed regarding the location from which the calls to the newspapers were to be made, or precisely when they were to be made, but clearly he was required to call the newspapers in time for the match results to be timely published. Therefore, we infer he was given discretion to determine when and from where to make the calls to achieve the required results. See Papanastassiou's Case, supra (employee "was required to do whatever he judged necessary to assure the success of his experiments"). Particularly given that there was no evidence the employee even had another office from which to make the calls, or that he had specific hours of work, this inference is unavoidable. When the employee fell down the stairs on the way to make the required work-related calls, he was undoubtedly acting in furtherance of his employer's interests, and for his employer's benefit. Cf. Larocque's Case, supra (employee who suffered myocardial infarction at home two weeks after being discharged by employer, and a few minutes after work-related telephone calls, was not performing any work for his employer or engaging in any activity for benefit of employer at the time of injury, and therefore was not "in the course of [his] employment"). Mr. Butterworth's actions at the time of injury were clearly incidental to his employment, D'Angeli's Case, supra, and exposed him to the risk of injury which, in fact, occurred. Souza's Case, supra.

Based on the very facts found by the administrative judge, we hold as a matter of law that the employee's injuries at home arose out of and in the course of his employment. We reverse the judge's decision, and recommit this case to him so that he may address the other issues raised by the parties: causal relationship, including § 1(7A); proper notice; and entitlement to medical benefits. If the employee prevails at hearing on recomittal the judge should establish the amount of the legal fee to be paid by the insurer under § 13A(5).

So ordered.

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duties]." Not all of these factors need be present for an injury to be compensable. Id. at 664-665. In the instant case, the employee was clearly engaged in activities consistent with and helpful to the accomplishment of his duties.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***September 24, 2008***