COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034342-96**

Romauld Chery	Employee
Pine Street Inn	Employer
Mass. Bay SIG	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Maze-Rothstein)

APPEARANCES
Michael C. Akashian, Esq., for the employee
James W. Stone, Esq., for the insurer

CARROLL, J. The insurer appeals the administrative judge's award of a closed period of benefits to a homeless man employed in a transitional job and also a beneficiary of a housing program offered by the employer. The insurer contends that the employee should be barred from compensation because his injury, which was the result of an argument with a co-employee, did not arise out of or in the course of his employment and because he engaged in serious and wilful misconduct. In the alternative, the insurer argues that the case should be recommitted because the administrative judge failed to make adequate subsidiary findings of fact. Finding no error, we affirm the decision of the administrative judge.

Romauld Chery, who was 34 years old at the time of the hearing, is a native of Haiti; he has one dependent child. He has a seventh grade education and prior experience as a farm worker, tagger and warehouse employee, taxi driver and dispatcher. (Dec. 2-3.) The Pine Street Inn, a charitable organization dedicated to helping the homeless, hired the employee as a warehouse worker in February of 1996 as part of a transitional job and housing program it offered to homeless persons. (Dec. 3.) The employee's job involved loading and unloading trucks for seven hours a day and required that he lift 50 to 80 pounds. Id. The employer provided the employee and his co-workers

with living quarters on the employer's property in Quincy. The employer also provided a bus to transport the employees from their Quincy residence to the employer's warehouse in Boston where they worked. Id.

On July 9, 1996, while at work, the employee got into an argument with a co-worker arising out of the co-worker's putting aside for himself an iron that had been unloaded from a truck. Although the employer had a policy that workers could put items aside for personal use and pay for them later, the employee objected to the co-worker's actions and moved the iron. The co-worker confronted the employee, and an argument ensued. A supervisor intervened and temporarily ended the argument. Id.

Just before 3:30 p.m. on that day, the employee punched out of work and walked across the street from the employer's warehouse to a designated location on a public street to wait for the bus provided by the employer to transport its employees to and from work. While waiting for the bus, the employee met the co-worker with whom he had earlier argued, and the two again exchanged words. The co-worker struck the employee, who fell to the ground complaining of pain in his right knee. Id. A nurse employed by the employer examined the employee, and he was seen later that day at Boston City Hospital. (Dec. 4.) After receiving various treatments, he underwent arthroscopic surgery at Massachusetts General Hospital on October 23, 1996. Though still experiencing pain and popping in his knee, the employee, on July 1, 1997, began working three days a week as a dispatcher earning $150.00 per week. Id. His average weekly wage as an employee of Pine Street Inn was $108.46. (Dec. 2.)

The employee's claim for benefits was denied following a § 10A conference held on December 12, 1996. The employee appealed to a hearing *de novo*, which was held on August 4, 1997 and September 16, 1997. (Dec. 1, 2.) At the hearing, the report of the impartial medical examiner, Dr. John C. Molloy, was admitted into evidence under § 11A. Dr. Molloy diagnosed the employee with a torn right medial meniscus and a torn right anterior cruciate ligament, and found him to be status post medial meniscectomy. (Dec. 4.) Dr. Molloy concluded that the employee's injury was causally related to the assault by his co-worker, and that he remained medically disabled from performing the

duties of his job with the employer because of the injury. Dr. Molloy opined that the employee would probably need further surgery to correct the instability caused by the torn anterior cruciate ligament, but he nevertheless felt that the employee could perform sedentary work. (Dec. 4-5.)

The administrative judge found that the employee's injury arose out of and in the course of his employment with the employer. (Dec. 5.) Although she was unable to determine whether the employee or the co-worker was the more verbally aggressive, (Dec. 3), the judge found that the altercation began during work and arose out of a difference of opinion concerning permissible conduct at work. (Dec. 5.) She further found that transportation of the employee from the workplace to the residence provided by the employer was incidental to his employment, and that, while he was waiting at a location assigned by the employer for a bus to take him to that residence, the employee was still within the scope of his employment. Id. The judge further found that the employee did not engage in serious and wilful misconduct so as to bar his recovery under § 27. (Dec. 5-6.)

Although Dr. Molloy opined that the employee was partially medically disabled, the judge found the employee to be totally incapacitated under § 34. She based this finding in part on the fact that the anterior cruciate ligament repair had not been performed at the time of the impartial examination, and, given that fact, together with consideration of the employee's age, education, background, training, work experience, mental ability and other capacities, reasonably inferred that the employee obtained employment as soon as he was able. (Dec. 7.)[1] She therefore awarded him § 34 temporary total incapacity benefits from July 9, 1996 until June 30, 1997 in the amount of his average weekly wage of $108.46, plus $6.00 dependency benefits per week. Id.[2]

[1] In its brief, the insurer does not raise, as an issue, the judge's findings on disability/incapacity.

[2] Because the employee's average weekly wage is less than the minimum compensation rate, the § 34 rate is the employee's average weekly wage. (Dec. 7.) G.L. c. 152 § 34. See Betances v. Consolidated Serv. Corp., 11 Mass. Workers' Comp. Rep. 65 (1997).

On appeal, the insurer makes three arguments. First, it argues that, as a matter of law, the employee's injury did not arise out of and in the course of his employment. (Insurer's Br. i.) The insurer's second argument is that the employee committed § 27 serious and wilful misconduct. Id. Thirdly, the insurer claims that the judge's findings are deficient. Id.[3] The first two issues are dispositive of the case.

Addressing that part of the first issue properly before us, we begin by noting that an injury is compensable if it arises "out of and in the course of . . . employment." G.L. c. 152, § 26.[4] "While the words 'arising out of' refer to the physical cause of the injury and the activity of the employee, the words 'in the course of' refer mainly to the time, place and circumstances of the injury." Locke, supra, § 261, at 298. See also Larocque's Case, 31 Mass. App. Ct. 657, 658-659 (1991). Generally, the determination of whether an employee's injury arises out of his employment is a question of fact. Corraro's Case, 380 Mass. 357, 359 (1980). In a situation where an employee is injured in a fight in

[3] Related to the first and third issues on appeal, the insurer argues that the relationship between the employee and Pine Street Inn is unique in that Mr. Chery's employment was incidental to the housing and counseling services rather than the other way around. (Insurer's Br. 8.) Elsewhere, the insurer states that all witnesses agree that the relationship between the employee and Pine Street Inn is one of client and service provider. (Insurer's Br. 4-5.) With respect to this multi-relationship argument made by the insurer, we note that it was first put forth on appeal and that the issue was never presented explicitly, or even implicitly, to the judge and need not be addressed by us. See Albert v. Municipal Court of the City of Boston, 388 Mass. 491, 492-494 (1983); Sykes v. Blue Hill Girl Scout Council, 9 Mass. App. Ct. 861, 862 (1980). Nevertheless, we do point out that the parties stipulated to an employer/employee relationship. (Dec. 2; August 4, 1997, Tr. 4.) Further, the judge made specific findings regarding the altercation and found that it arose out of a difference of opinion concerning conduct at work. (Dec. 3, 5.)

[4] General Laws c. 152, § 26, also provides that an injury is compensable if it arises "out of an ordinary risk of the street while [the employee is] actually engaged . . . in the business affairs or undertakings of his employer." Although there is no clear-cut distinction between the two alternative bases of compensation allowed by § 26, the administrative judge analyzed this case under the first alternative method of determining whether the employee's injury is compensable. See L. Locke, Workmen's Compensation § 217 (2d ed. 1981); Ford v. Baer's Cycle Sales 13 Mass. Workers' Comp. Rep. _____ (May 11, 1999). We think this analysis was appropriate, even though the injury occurred on a public street, because an assault by a co-worker while the employee was waiting at a bus stop designated by the employer for the employer's bus to take him to a residence provided by the employer is not merely an "ordinary risk of the street" because of the "work-connection" discussed above. See Locke, supra § 261, at 298.

which he is the aggressor, the judge could still find that the injury arose out of his employment "if it can be seen that the whole affair had its origin in the nature and conditions of the employment, so that the employment bore to it the relation of cause to effect." Dillon's Case, 324 Mass. 102, 107 (1949). The court in Dillon also stated:

> We think it is possible for an injury to arise out of the employment in the broad sense of the workmen's compensation law . . . even though the injured employee struck the first blow. We must constantly remind ourselves that in compensation cases fault is not a determining factor, whether it be that of the employee alone or that of the employee contributing with the fault of others, unless it amounts to the "serious and wilful misconduct" of the employee which by § 27 . . . bars all relief to him. Apart from serious and wilful misconduct, the question is whether the injury occurred in the line of consequences resulting from the circumstances and conditions of the employment, and not who was to blame for it.

Id. at 106.

Here, the judge found that "[t]he altercation began during work and arose out of a difference of opinion concerning permissible conduct at work." (Dec. 5.) The co-worker's conduct, to which the employee objected, was the co-worker's appropriation of an iron that had been unloaded from a truck. (Dec. 3.) We may not disturb the factual findings of the administrative judge unless they are unsupported by the evidence. Reppucci v. Ace Generator Co., 9 Mass. Workers' Comp. Rep. 257, 258 (1995). There was ample evidence in the employee's testimony, which the judge was entitled to credit, that the argument began at work over a work-related issue,[5] and was resumed at the bus

[5] The insurer contends that the argument was over a "personal item." (Insurer's Br. 8.) However, as noted above, this contention is contrary to the judge's findings. In addition to finding that the argument was over permissible conduct at work, the judge also found that the employer had a "policy that workers are allowed to put items aside for personal use and pay for them later. . . ." (Dec. 3.) Thus, even though the co-worker's intention was to make the iron his personal property, the dispute over his method of appropriating it was not a personal one over a purely personal item. The employer's policy of allowing workers to put aside items for themselves and pay for them later seems to have become an incident of employment, and is somewhat analogous to the situation in Sylvia's Case, 298 Mass. 27 (1937), where the court held that "the habitual use by the employee of the employer's laundry, with the latter's permission, for the purpose of washing clothes soiled in the employer's service, in connection with the habitual use by other employees, could be found to have been more than a mere favor or gratuity, and that, as an established practice with possible elements of convenience and advantage on both sides, it could

stop. It is irrelevant that the judge was unable to determine who the verbal aggressor was, since, even if the employee had been the aggressor, she could still have found him entitled to compensation. Dillon's Case, supra. In fact, although the judge found the co-worker, who knocked the employee to the ground, had precipitated the physical violence, (Dec. 3), we repeat that, "even where the employee himself strikes the first blow, that fact does not break the connection between the employment and the injury, if it can be seen that the whole affair had its origin in the nature and conditions of the employment . . . ." Dillon's Case, supra at 107.[6]

An injury may arise " 'in the course of' " an employee's employment, even though he is not engaged in the actual performance of his duties at the moment of the injury. " 'All that is required is that his activity be incidental to and not inconsistent with his employment.' " D'Angeli's Case, 369 Mass. 812, 816 (1976), quoting Bator's Case, 338 Mass. 104, 106 (1958). Stated otherwise, "[t]he 'obligations or conditions' of employment [must] create the 'zone of special danger' out of which the injury arose." Id. at 817, citing O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 506-507 (1951).

Where the employer provides transportation to and from work for the employee as one of the express or implied terms of the contract of employment, it has long been held that an injury, which occurs while the employee is being so transported, arises in the course of his employment. See, e.g., Donovan's Case, 217 Mass. 17 (1914); Vogel's Case, 257 Mass. 3, 4-5 (1926). Where an employee was struck by a car while waiting on the employer's property by the side of the road for the employer's truck to come and take

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be found to have become by mutual understanding an incident of the employment itself." Id. at 28.

[6] The insurer argues that the judge's subsidiary findings of fact are inadequate to determine whether correct principles of law have been applied. The insurer maintains that the judge failed to deal with what happened in the fight at the bus stop stating only that she could not determine who was the most verbally aggressive participant. Such a finding does not equal a finding that the argument arose out of the employment, claims the insurer. For the above stated reasons, this argument has no merit. The judge's findings are adequate for us to tell that she has applied correct principles of law. Cf. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3 (1993).

him home, it was held that transportation to and from work was an incident of his employment, and the injury arose out of and in the course of his employment. Milliman's Case, 295 Mass. 451 (1936). The court stated, "[t]he risk of injury while he was so waiting was a hazard to which his employment exposed him." Id. at 453. Where, in the case at bar, the employee was waiting on public property in a location designated by his employer for transportation provided by his employer to take him from work to his residence, which was also provided by the employer, the transportation itself, and the arrangements for it, were "incidental to the employment" and created a "zone of special danger." See D'Angeli's Case, supra at 816-817; Mahan's Case, 350 Mass. 777 (1966) (employee of news company injured walking to work on property designated in contract between employer and transit authority, allowing employee's free admittance to the transit premises, was entitled to compensation). See also Ware's Case, 361 Mass. 885, 885-886 (1972); Sundine's Case, 218 Mass. 1, 4-5 (1914); Pallucio v. Dept. of Revenue, 11 Mass. Workers' Comp. Rep. 326, 327-328, 331 (1997), discussing Sundine's Case and Mahan's Case, supra. We find no error in the judge's ruling that the employee's injury arose out of and in the course of his employment.

The insurer's second argument is that the employee should be barred from receipt of benefits under § 27 for serious and wilful misconduct.[7] The insurer basically argues that the employee provoked his co-worker into a physical confrontation, which was an act he knew or should have known would create an unreasonably high risk of bodily harm and involve a high degree of probability that substantial harm will result.[8] See Smith v. Raytheon, 9 Mass. Workers' Comp. Rep. 477, 480-481 (1995).

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[7] General Laws c. 152, § 27, provides: "If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation . . . ."

[8] The employee and co-worker argued at work earlier in the day over the co-worker's appropriation of the iron and no physical action was taken by either, (Dec. 3); it would seem, therefore, unlikely that the employee should have known that continued words "would create an unreasonably high risk of bodily harm and involve a high degree of probability that substantial harm [would] result." Smith, supra at 480-481.

The court in Dillon's Case, supra, in upholding a finding of no § 27 violation where the employee struck the first blow and started the fight, stated:

> The question is not whether there was evidence of serious and wilful misconduct. The question is whether the subsidiary findings establish such conduct as a matter of law. In order to bar the employee his conduct must be both serious and wilful. The word serious refers to the conduct itself and not to its consequences. Wilful implies intent or such recklessness, as is the equivalent of intent.

Id. at 110. The judge here did not find that the employee provoked his co-worker into attacking him, as the insurer argues. In fact, although the insurer has the burden of proof on the § 27 affirmative defense, see Locke, supra at § 502; Shaw's Supermarkets, Inc. v. Delgiacco, 410 Mass. 840, 845 (1991), the judge was unable to determine who started the argument at the bus stop, but did find that the co-worker struck the employee. These subsidiary findings do not compel a finding of serious and wilful misconduct as a matter of law. We therefore uphold her finding that § 27 does not bar the employee's recovery.

The decision of the administrative judge is affirmed. Pursuant to § 13A(6), the employee's counsel is awarded a fee of $1,193.20.

So ordered.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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