COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 027202-93**
Salvatore Cicerone	Employee
Claire Cicerone	Claimant
Quincy Adams Restaurant & Pub, Inc.	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
Jonathan D. Light, Esq., for the claimant
Mark J. Kelly, Esq., for the insurer
Ronald W. Rice, Esq., for the employer

MCCARTHY, J. After thirty years of working as a baker and restaurant kitchen helper, Salvatore Cicerone retired in 1990. Then in November 1992, he returned to the work force doing part-time janitorial work for Quincy Adams Restaurant and Pub, Inc. (Adams Restaurant). (Dec. 4.) On Sunday evening, January 17, 1993, Mr. Cicerone was found by a co-employee lying on snow next to a dumpster suffering from what was later determined to be a comminuted fracture of his left tibia. Cicerone's jacket was found inside an adjacent two family dwelling. The dumpster was used by Adams Restaurant and was situated between the restaurant and the adjacent two family dwelling. We note from the record that title to the dwelling stands in the name of a trust. Patrick Fallon, the "principal" of Adams Restaurant, was also a trustee of the realty trust. (Dec. 4, 5; Employee Ex. 14.)

Mr. Cicerone underwent open reduction and internal fixation of his left tibia. Aside from "possible cellulitis" which required a course of prophylactic antibiotics, his recovery was uneventful. He was cleared to return to work on June 13, 1993. (Dec. 5.)

Mr. Cicerone had multiple heart and lung problems unrelated to his employment. He experienced several attacks of severe shortness of breath while recuperating from his leg injury and was hospitalized with such an attack on July 11, 1993. He remained hospitalized until his death from pulmonary edema and chronic obstructive lung disease on July 18, 1993. (Dec. 5.)

After determining that Adams Restaurant did not have workers' compensation insurance, the employee's widow filed a claim for a closed period of § 34 weekly temporary, total incapacity benefits and § 31 death benefits against the Workers' Compensation Trust Fund ("Fund"). The claim was denied at conference and the Fund's motion to join the employer as a party was allowed.[1] The claimant widow appealed to a full evidentiary hearing.

The pivotal issue at hearing was whether Mr. Cicerone's leg injury arose out of and in the course of his employment for Adams Restaurant. The judge found that the two-family dwelling adjacent to the restaurant was "under common ownership with the employer" and that Patrick Fallon, the restaurant's principal, frequently used another restaurant employee, Randolph Ash, to paint or show the dwelling units of the two-family dwelling. It was Mr. Ash who found the employee by the dumpster on January 17, 1993. (Dec. 4.)

The judge further stated,

> *According to Mr. Fallon*, he had lent the employee $50 and the employee was repaying that loan in his spare time by cleaning the dwelling unit. Mr. Fallon asked the employee to put his medical costs on his personal medical insurance. However, he paid the employee his weekly pay from the time he was injured until he returned to work.
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> Several employees of the employer *testified* that the employee was not working at the employer the night of January 17, 1993 and that the employee worked mornings on Tuesday, Wednesday and Thursday. *According to the claimant*, the employee told her he worked mornings and sometimes evenings at the restaurant, and she had driven him there on occasions in the evening so he could work.

[1] Section 65(13) allows for joinder of an uninsured employer upon motion of the claimant or the Fund.

> *I find that the employee was not performing his usual work for the employer on the night of January 17, 1993, however, he was acting at the request of Mr. Fallon in cleaning out the dwelling unit when he fell and broke his leg*. (Emphasis added.)

(Dec. 4-5.) The judge next turned to the conflicting testimony of the medical experts. Rejecting the opinion of Dr. Lawrence Baker, a board certified internist, the judge adopted the opinion of Dr. Scott B. Lutch, the treating cardiologist. Dr. Lutch was unable to causally relate Mr. Cicerone's death on July 18, 1993, to the broken leg suffered on January 17, 1993.

Based on these findings, the judge concluded:

> This case presents a close question of whether the employee's injury arose out of and in the course of his employment with the employer. I recognize that when an employee is requested by his employer to perform work that is outside the scope of his usual job and the employee is injured while performing that work, he is entitled to benefits. *See Collins' Dependents Case*, 342 Mass. 389 (1961). Moreover, the fact that the employee payed (sic) the employee for the period he was out of work is powerful evidence that the employee was injured in the course of his employment. I am therefore persuaded that the employee was injured in the course of his employment on January 17, 1993.

(Dec. 6.) The judge went on to deny the widow's claim for benefits under § 31, as well as the § 34 claim (presumably because the employer paid the employee for the time he was out of work), but directed payment of reasonable and necessary medical expenses for the leg injury under § 30. (Dec. 7.)

We have the case on appeal by the employer who argues that the injury did not arise out of and in the course of employment. The employer contends that the judge made erroneous findings with respect to the relationship between Mr. Fallon and the restaurant and Mr. Fallon and the Trust. Further, the employer maintains that Collins' Case, supra, relied upon by the judge, is not controlling.

First, though the judge's findings do not precisely define the legal relationship between Mr. Fallon and the restaurant, or Mr. Fallon and the realty trust, this lack of clarity is of no consequence. The issue here is whether the injury

to Mr. Cicerone arose out of and in the course of his employment with Adams Restaurant. This case was not presented, nor do we view it, as a "dual employment" situation where Mr. Cicerone was concurrently working for both the restaurant and the realty trust. See 2 A. Larson, Workers' Compensation Law § 27.04[2] (1999). Compare Quebec's Case, 247 Mass. 80 (1923) (where the employee was working for a corporation and a trust in which the trustees of the trust and the controlling stockholders of the corporation were the same people, the court found the corporation and trust distinct legal entities for the purpose of determining the employee's average weekly wage). Mr. Cicerone had only one job, and that was with the restaurant. Clearly the judge considered Mr. Fallon to be the supervisor of Mr. Cicerone at the restaurant. (Dec. 4-5.) Thus, no further analysis of the exact relationship between Mr. Fallon and either the restaurant or the realty trust was necessary.

We find no merit in the employer's second argument that Collins' Case, supra, is inapposite. However, because there are inadequate subsidiary findings to enable us to determine whether the judge correctly applied the law, the case must be recommitted.

To be compensable an injury must arise out of and in the course of employment. Caswell's Case, 305 Mass. 500, 502 (1940). The generally accepted principle is that "[w]hen any person in authority directs an employee to run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable." Larson, supra, § 27.04[1]. In Massachusetts, that principle has been codified by G.L. c. 152, § 26, which reads, in relevant part:

> [A]ny person who, while engaged in the usual course of his trade, business, profession or occupation, is ordered by an employer, or by a person exercising superintendence on behalf of such employer, to perform work which is not in the usual course of such work, trade, business profession or occupation, and while so performing such work, receives a personal injury, shall be conclusively presumed to be an employee . . . .

In Collins' Case, 342 Mass. 389 (1961), relied on by the judge, the court based its decision affirming an award of compensation on the above-quoted portion of § 26. In that case, the superintendent of the city's forestry department requested that his foreman deliver some coal to the superintendent's private residence. The foreman, who was the employee's boss, took the employee along to help him, and, in the course of this work, the employee suffered a fatal heart attack. The court found that the "request" was equivalent to an order under § 26, Collins', supra at 390, and opined:

> The true aim of the statute is to save employees, public or private, covered by the act from an 'intolerable dilemma': without such a statutory provision an employee who complied with such an order would forfeit his compensation protection; if he did not comply, he might well be subjected to unpleasant consequences. See Larson, Workmen's Compensation Law, § 27.40. The beneficent purpose of the statute should not be permitted to fail because of the possibility of abuse by those in public supervisory positions. The risk of the decision to obey or not to obey the order should not fall on the employee. Rather, the responsibility for the validity of the order should remain with the supervisor who issues it.

Collins' Case, supra at 392. The language used by the court makes it clear that § 26 was designed to be broadly construed to protect an employee who faces the threat of termination or other consequences if he refuses to do his employer's bidding, even if the requested task is outside the normal course of his duties. "The technical reason for [this policy] is that, whatever the normal course of employment may be, the employer and his supervisory staff have it within their power to enlarge that course by assigning tasks outside the usual area. If they do not assign these tasks on the strength of the employer-employee relation on which compensability depends, then what is the source of authority by which the task is assigned?" Larson, supra, § 27.04[4].

Here, the judge found that the employee "was acting at the request of Mr. Fallon in cleaning out the dwelling unit when he fell and broke his leg." (Dec. 5.) However, this finding is insufficient to enable us to determine whether the law has been properly applied, because this case is complicated by the fact that there was testimony that a relationship other than an employer-employee relationship may have induced the employee to work on the apartment. In other words, there is another potential "source of

authority" based on which the employee could have been cleaning out the apartment. Mr. Fallon testified that he had loaned the employee money which the employee was repaying by performing work on the apartment. If the employee was working to repay a debt, his injury would not arise in the course of his employment. However, the judge made no finding regarding whether the employee was repaying a loan to Mr. Fallon by cleaning out the apartment, or whether he was acting at the request of Mr. Fallon to perform work outside his usual work simply because Mr. Fallon asked him to do so on the strength of his position as Mr. Cicerone's boss.[2] Instead, the judge merely recited testimony of Mr. Fallon, who proposed the loan scenario, and testimony by the employee's widow, who indicated that her husband told her he worked mornings and sometimes evenings at the restaurant.[3] (Dec. 4.)

It is the duty of an administrative judge to make such specific and definite findings, based on the evidence, as will enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993), citing Zucchi's Case, 310 Mass. 130, 133 (1941). Recitations of testimony without clear subsidiary findings of fact do not enable this board to make that determination. Katz-Kelley v. General Elec. Co., 10 Mass. Workers' Comp. Rep. 691, 693 (1995), citing Judkins' Case, 315 Mass. 226, 227 (1943); and Messersmith's Case, 340 Mass. 117, 119 (1959).

[2] We note that we do not consider determinative of the claimant's right to compensation whether the employee was actually scheduled to work at the restaurant on the night in question. The broad beneficent policy underlying the cited portion of § 26 makes compensable injuries incurred as a result of the employee complying with his employer's orders to perform work outside the usual course of his work. In addition, injuries outside of working hours have been covered in other contexts. See, e.g., Papanastassiou's Case, 362 Mass. 19 (1972) (chemist injured while on his way back to the laboratory after supper to check on an experiment); Horan's Case, 346 Mass. 128 (1963) (employee suffered heart attack as he ran across employer's parking lot before work).

[3] The claimant also testified that her husband told her that he was "working" or "at work" at the time of the fall. (1/26/98 Tr. 21.)

Accordingly, we recommit the case for further subsidiary findings of fact and conclusions of law consonant with this opinion.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: February 29, 2000

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge