COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037527-04**

Daniel Frechette	Employee
Northeastern University	Employer
Northeastern University	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Horan and Costigan)

APPEARANCES
William E. Howell, Esq., for the employee
Joseph B. Bertrand, Esq., for the self-insurer

CARROLL, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee, a campus police officer, workers' compensation benefits for an injury sustained while responding to a radio dispatch in his cruiser. We affirm the decision for the reasons that follow.

At the time of the hearing, Daniel Frechette was a twenty-six year veteran police officer for Northeastern University. His duties include operating a police cruiser, patrolling and protecting college property, enforcing university parking regulations, and conducting criminal investigations. While patrolling in the cruiser, the employee necessarily travels on the public streets of the City of Boston. (Dec. 3.)

On the date of injury, November 24, 2004, the employee was assigned to patrol the sector known as Columbus south. (Dec. 3; Tr. 23.) At some point during his tour of duty, Officer Frechette took a coffee break at the Exxon station at Park Drive and Boylston Street, which, though outside his sector by a few blocks, was the "approved and acknowledged location by the employer for such breaks." (Dec. 4.) Officers are still on duty while they are on break. Id. The employer's policy was that officers were to call in to the dispatcher before going to the Exxon station for breaks. This rule was to prevent more than one officer

from being at the coffee shop at one time, and to keep officers from spending excessive amounts of time there. Officers would indeed call in before going to the Exxon station "most of the times." (Tr. 46.) On the day of his injury, the employee forgot to inform the dispatcher that he was going to the Exxon station. (Dec. 3-4; Tr. 10, 23, 51.)

While coming back from the Exxon station, the employee received a radio dispatch to report to Camden Street, which was within his assigned sector, to investigate an incident. (Dec. 4; Tr. 8.) The employee acknowledged the dispatch, and drove directly toward Camden Street in his cruiser. On the way there, the cruiser slid on an icy street, and Mr. Frechette was injured[1] when he struck a stone wall. (Dec. 4.) The employer suspended the employee for eight days due to his failure to call in prior to taking his break. Id.

The judge concluded that the employee's injury arose out of and in the course of his employment, as he was on duty, traveling in the employer's vehicle, responding to a radio dispatch, and reporting to an incident in his assigned sector of the university, i.e., "acting on his employer's campus business during his paid shift." (Dec. 4-5.) He did not credit testimony from an employer witness that officers were required to seek permission before going on break to the Exxon station. (Dec. 3.) He concluded:

> I find the employer's stated "break" policy, although unwritten, was that shift officers like Mr. Frechette, were permitted during their shift to go to the Exxon station at Park Drive and Boylston Street, Boston, for coffee or food breaks. I find the employee's failure to notify the dispatcher in advance of receiving the transmission is immaterial in my finding of liability against the employer on these facts.

[1] As a result of the accident he was hospitalized and recovered sufficiently to return to work -–first to light duty, then to full time duty within a few months. (Dec. 4.) There is no dispute as to the extent of disability/incapacity or the amount of benefits awarded at conference. (Dec. 5.) The award at hearing was from November 30, 2004 to February 3, 2005. (Dec. 6.)

(Dec. 5.) The judge further found that it was "not relevant" that the employee was suspended from work for eight days for not calling in before his break. (Dec. 4.)

The self-insurer contends the judge's finding that the employee did not need express permission to go on break to the Exxon station was not supported by the evidence. The self-insurer further maintains that, because the employee did not obtain the required permission to leave the campus for a break, his injury while responding to a police dispatch did not arise out of "an ordinary risk of the street while actually engaged, with his employer's authorization in the business affairs or undertaking of his employer," as defined in G. L. c. 152, § 26. [2] The self-insurer urges recommittal because the judge did not specifically address the applicability of this so-called "street risk" doctrine under § 26. We disagree with the insurer's arguments, and affirm the decision.

First, we see no error in the judge basing his findings on the "arising out of and in the course of employment" portion of § 26 rather than the "street risk" section immediately following it. The two provisions are "closely related" and "the controlling principles under each clause tend to converge." McElroy's Case, 397 Mass. 743, 748 (1986), so that "[t]oday injuries from a risk of the street are compensable under broad general principles construing "arising out of the employment." Nason, Koziol and Wall, Workers' Compensation § 10.7 (3rd ed. 2003). See also Simmons's Case, 341 Mass. 319, 321-322 (1960)(due to close relationship between two clauses within § 26, it is unnecessary to make a precise construction or recommit case for analysis under "street risk" clause, even though

[2] General Laws c. 152, § 26, provides, in pertinent part:

> If an employee … receives a personal injury arising out of and in the course of his employment, or 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, and whether within or without the commonwealth, he shall be paid compensation by the insurer or self-insurer. . . .

it is applicable). At any rate, to the extent the two standards diverge, the circumstances of the employee's injury satisfy both standards.

For guidance in the analysis of this case, we turn to the Supreme Judicial Court's decision in Wormstead v. Town Manager of Saugus, 366 Mass. 659 (1975). In Wormstead, the court noted that police officers are traveling employees and, thus not subject to the "going and coming rule," which bars compensation for injuries going to and from work unless the employee is on the employer's premises.[3] Id. at 666; see also Gardner v. City of Peabody, 23 Mass. App. Ct. 168 (1986). The court found the phrase, "in the performance of his duty," in G. L. c. 41, § 111F, comparable to the "arising out of and in the course of his employment" language of G. L. c. 152, § 26, and held compensable injuries suffered by a police officer returning to the police station from his paid lunch break with investigation reports:

> In looking at the [employee's] employment in all of its aspects [Caswell's Case, 305 Mass. 500, 502 (1940)], . . . we perceive several factors particularly pertinent to our decision. Among these factors are that 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 police functions.

Id. at 664. In later cases, the courts have refused to take "too rigid" a view of the Wormstead factors, and have instead expanded the principles it enunciated. See Allen v. Board of Selectmen of Weymouth, 15 Mass. App. Ct. 1009 (1983)(police officer injured while driving his own car home by a reasonably direct route, after testifying in court, was entitled to compensation); Gardner, supra (police officer

[3] Thus, cases holding that employees with fixed places of employment and fixed hours of work are not entitled to compensation if they are injured on the public ways while returning from lunch or coffee breaks, are inapposite, since they are based on the application of the "going and coming" rule, not applicable here. See, e.g., Diaz v. Omni Spectra, 4 Mass. Workers' Comp. Rep. 153 (1990); Sampson v. New England Tel. & Tel. Co., 6 Mass. Workers' Comp. Rep. 220 (1992).

injured on his way to work, outside his assigned area was entitled to compensation).[4]

The self-insurer does not dispute that the first two Wormstead factors -- that the employee was being paid and that he was on call[5] at the time of his injury -- are satisfied. Rather, it argues that, at the time of the accident, the employee was not "engaged in activities consistent with and helpful to the accomplishment of police functions" -- the third Wormstead factor -- because, at the time he responded to the dispatch, he was off-campus on an unauthorized coffee break. (Insurer br. 6.) The self-insurer confuses the "employer's authorization in the business affairs or undertaking of his employer" in § 26, with "authorization" to take a break. There can be no question that the employee was engaged, "with his employer's *authorization* in the business affairs or undertakings of his employer," § 26 (emphasis added); the employer dispatched the on-duty employee to the scene of a crime from an approved break location. The self-insurer argues essentially that: 1) the judge erred by finding that the employee was not required to receive permission to go on break to the Exxon station; and that 2) violation of the rule requiring permission to leave campus bars the employee from compensation. We disagree. We further disagree that violation of the employer's

[4] Clickner v. City of Lowell, 422 Mass. 539 (1996), cited by the self-insurer, is inapposite. In Clickner, the court found that a police officer who was in an accident on the way to work while intoxicated and attempting to respond to a page, was not "acting within the scope of his office or employment" within the meaning of the Massachusetts Tort Claims Act, G. L. c. 258, §2. As we have noted, this tort principle is of a narrower range than the "arising out of and in the course of employment" standard and is irrelevant in a compensation case. See Walsh v. Hollstein Roofing, Inc., 17 Mass. Workers' Comp. Rep. 333, 337 (2003); Nason, Koziol and Wall, § 10.1.

[5] The evidence was that officers are still on duty while they are on break. The judge, in fact, found that the employee was "on duty" during his break. (Dec. 3-4.) He had his radio on and acknowledged the radio dispatch and was authorized to use, and was using, the police cruiser. (Dec. 4.) As part of his duties he was required to respond to the dispatch. (Tr. 64-65.) Certainly, being "on duty" encompasses, and is broader than, being "on call."

policy that the employee notify the employer before going on break bars his entitlement to compensation.[6]

A judge's credibility determinations are immune from appellate review as long as they are based on the evidence and reasonable inferences drawn therefrom. Raczkowski v. Center For Extended Care, 18 Mass. Workers' Comp. Rep. 289, 291 (2004); see Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). Here, there is evidence from which the judge could have inferred that the employer did not, as a matter of fact, enforce or communicate the policy requiring that employees seek permission prior to going off campus, at least with respect to taking breaks at the Exxon station.[7] The judge credited the testimony of Officers Martinez and Jolliffe, who testified only that the policy was that employees call before they left for break, not that they call for permission to go on break at the Exxon station. (Tr. 42; 45-46.) Officer Martinez testified only that he called "most of the times," (Tr. 46), from which the judge could reasonably infer that there were times when he did not call. The statement these two officers submitted, (Ex. 7), which was credited by the judge, does not indicate that permission to go to the Exxon station was required. Rather, it indicates that, in the two weeks before the employee's injury, the shift supervisors told the employees it was permissible for officers to go to the Exxon station as long as no other officers were there, and as long as they returned right away. Id. The judge rejected, as he was free to do, the testimony of the employer's witness: "I do not credit the testimony of James Ferrier that express permission was required *in this instance* before the employee went for coffee on November 24, 2004." (Dec. 3.) See Ferreira's Case, 294 Mass.

[6] Whether the employer required permission or notification is essentially irrelevant to the employee's entitlement to compensation, under the circumstances. See *infra* and footnote 9.

[7] The rule the self-insurer alleges the employee violated is contained in Article XV of the union contract. Among the examples of conduct, which may result in disciplinary action, is: "Leaving University premises without permission prior to the end of the employee's assigned shift (including any overtime assignment)."

405, 406 (1936)(court upheld award of compensation where judge rejected evidence which would warrant conclusion that employee, at the time of injury, was doing something he was forbidden to do, and instead, credited evidence to the contrary). There was thus no error in the judge's finding that officers were not required, under the established practice, to request permission before going to the Exxon station for break.[8]

The employee does not dispute that the employer's policy was that he notify the dispatcher before going on break to the Exxon station.[9] (Employee br. 3.) However, violation of that policy does not, under the circumstances, bar him from entitlement to compensation. It is significant that the only statutory bar to compensation is contained in § 27, and applies if the "employee is injured by reason of his serious and wilful misconduct." See Nason, Koziol and Wall, supra at § 20.5. The self-insurer has not raised § 27, nor do we see how it would apply to these facts. Absent serious and willful misconduct, neither employee fault, see Dillon's Case, 324 Mass. 102 (1949), nor negligence, see Hamel's Case, 333 Mass. 628 (1956), acts as a bar to compensation. See Nason, Koziol and Wall, supra at §§ 20.2 and 20.4. Similarly, violation of an employer rule will not bar receipt of compensation unless such violation is intentional on the employee's part, and the rule has been clearly communicated and enforced by the employer. Ferreira's Case, supra.[10] Neither was true here: the employee simply forgot to

[8] There is no dispute that the collective bargaining agreement indicated that employees could be disciplined for leaving campus without permission, (Ex. 3), or that the employee was aware of this contract provision. (Tr. 21-22). However, the issue here is the enforcement of this policy with respect to breaks at this particular location.

[9] The judge found only that the employer "requested" that employees notify the dispatcher as to their locations. (Dec. 3-4.)

[10] The effect of a rule violation has been explained thus:

> So long as the employee is engaged in the work for which he was hired, or some activity reasonably incidental to the employment, he remains entitled to compensation even if his injury occurs when he is violating some governmental

notify the dispatcher, (Dec. 4), and employees called before going on break only "most of the times." (Tr. 46.) See Demetre's Case, 322 Mass. 95 (1947)(injury arose out of and in the course of employment where employee, though possibly negligent, did not willfully violate an employer rule); Vaz's Case, 342 Mass. 495 (1961)(though there was evidence employee violated an employer rule, injury arose out of and in the course of employment where judge adopted evidence that rule was not always followed). Moreover, the employee's failure to notify his dispatcher had no real bearing on the accident.[11] See Sawyer's Case, 315 Mass.

> statute or ordinance or some private rule or prohibition laid down by the employer as to the method by which he is to perform his work. . . .
>
> On the other hand, if the employee's injury is "the result of his doing something which he had been forbidden to do, he would not be entitled to compensation, since his injury could not be found to have arisen out of his employment." The bark of this sweeping formulation is worse than its bite. To defeat recovery, the insurer must show that the employee intentionally violated a known order. But even if the employee was injured while doing something which had been forbidden by the employer, he will not be barred if he can show that the rule had not been communicated to the employee and was therefore not binding on him. Or if there had once been a rule, and it had not been enforced by the employer but allowed to become a dead letter at the time of the accident.

Nason, Koziol and Wall, supra at § 20.4 (3rd ed. 2003)(footnotes omitted).

[11] There was no evidence that there were other campus police officers at the Exxon when the employee arrived there. In other words, the very reason for the rule requiring the employee to call in was not at play. (Tr. 50-52). Thus, the employee's failure to call in and notify the dispatcher did not affect in any way the events that ensued; had he notified the employer, the employee would still have gone to the Exxon station and would have needed to return to campus in exactly the same way.

Inasmuch as the dissent maintains that the dispatcher would have called officers other than the employee had he known the employee was out of his sector, we point out that this was indisputably a general call that was, in fact, made to officers other than the employee. (Tr. 30-31.) As to the dissent's speculation that the accident occurred due to the employee's speeding, we note that the evidence was only that the employee was "hurrying back" to his sector. (Tr. 36, 56; Ex. 6.) We do not agree that "hurrying back" necessarily means that the employee was speeding, or that he would have done anything differently had he called the dispatcher prior to the Exxon station, or that if he were speeding, it would have barred receipt of compensation. See Hamel's Case, supra (even

75, 80 (1943)(truck driver employee's violation of rule prohibiting passengers did not bar receipt of compensation; it "could be found to be no more than a condition or attendant circumstance of the accident"). As long as the employee is doing the work for which he was hired, and the injury is causally related to that work, the resulting injuries will be compensable. Id.; Nason, Koziol and Wall, supra at § 20.4.

Our dissenting colleague, citing the totally dissimilar factual scenario of Belyea's Case, 355 Mass. 721 (1969), argues that the employee deviated from his employment by leaving his sector without notifying the dispatcher, the deviation from employment had not been cured when he responded to the dispatch, and the employee is thus not entitled to compensation. The administrative judge did not find a 'deviation' from employment, nor do we. Although the terms "break" and "permission" for the "break" are used, the fact is Officer Frechette never left the sphere of his employment. He went for coffee in an approved location, during which he remained on duty. He could be reached by radio, and he could, and did, respond in the same way as if he had received specific permission to be at the Exxon. He followed a "direct route" (Dec. 4) to the dispatched location. He in every way conformed to expectations of his job. The scenario leading to the incident in the case before us was clearly contemplated by this employer, contrary to that in Belyea's Case.[12]

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if employee had been driving at excessive speed, his death would have arisen out of and in the course of his employment).

[12] In Belyea, the employee truck driver, at the end of his day's deliveries, spent three hours at a tavern eating and drinking. He left intoxicated, ostensibly to return the truck to the company garage (a twenty-minute drive). Two hours later he was involved in a fatal accident. The court reversed an award of compensation, stating that there was no evidence from which it could be inferred that the site of the accident was on the way back to the garage. The employee had not "regained the route which he might be expected to take to his business destination." Id. at 723.

The facts of the case before us do not equate to a deviation and, if they did, do not come close to the significant and substantial deviation which defeated recovery in

Both law and policy favor coverage of injuries sustained as a consequence of an officer's swift and dutiful response to a radio dispatch, even when it might shine a light on an infraction of an employment rule. This is preferable to the self-insurer's mechanical elevation of an employment rule over the time-honored Caswell calculus: "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."[13] Caswell's Case, 305 Mass. 500, 502 (1940).

We affirm the decision, and award an attorney's fee under § 13A (6) in the amount of $1,407.15.

So ordered.

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Martine Carroll
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

Filed: **April 17, 2007**

COSTIGAN, J., dissenting. In my view, when the employee drove out of his assigned sector without notifying the police dispatcher, he deviated from the course of his employment. As it is undisputed that he had not re-entered his

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Belyea, supra, or Webb's Case, 318 Mass. 357 (1995) (messenger fatally injured following circuitous route over rooftops, making extended physical departure from sphere of his employment, involving a significant period of time, and subjecting himself to serious hazards not part of his employment).

[13] Although not necessary for a determination of this case, we note that the circumstances of the injury here also invoke the policy concerns that underlie the Good Samaritan-based rule in D'Angeli's Case, 369 Mass. 812 (1976). There, the court stated that "when a conscientious citizen is in the course of his employment and perceives an imminent danger to the public . . . his endeavor to alleviate the danger should be considered incidental to his employment," and thus compensable. Id. at 816.

assigned sector at the time of the accident, the deviation had not been cured, and the employee was not in the course of his employment when injured. Therefore, he is not entitled to benefits under the act, Belyea's (dependents') Case, 355 Mass. 721 (1969), and I respectfully dissent from the majority's conclusion to the contrary.

The majority concludes the employee was not engaged in a deviation at the time of the accident, but suggests that if he was, it was an insignificant, unsubstantial deviation which did not take him out of the course of his employment. See footnote 11, supra. I disagree that there are degrees of deviation, only the more extreme of which render an injury non-compensable. An unequivocal finding of a deviation precludes the finding of an industrial injury arising out of and in the course of employment. DeCouto v. Town of Wareham, 2 Mass. Workers' Comp. Rep. 131, 132 (1988). Of course, the administrative judge here did not find a deviation. Indeed, the word "deviation" does not appear in the judge's decision. In my view, the judge made findings unsupported by any evidence, and used those findings to avoid analyzing that crucial aspect of the "in the course of employment" issue before him. He wrote:

> I accept that [the employee's] assigned tour that day was the Columbus Avenue south sector and that Camden Street was within that sector. I further find that the coffee shop was outside the sector, but it was customary and usual and approved by supervisors, for university officers to go there for coffee and food breaks. I find the testimony of Officers Martinez and Jolliffe to be credible and persuasive and consistent and in accordance with the contents of Exhibit #7. *I do not credit the testimony of James Ferrier that express permission was required in this instance before the employee went for coffee on November 24, 2004. I infer and find that the employer requested that officers notify the dispatcher where they were located and that such officer remained on duty during his/her break.* I find that the coffee shop where the employee was when he was dispatched to go to Camden Street was the approved and acknowledged location by the employer for such breaks and proximate to the employer's campus property.

(Dec. 3-4; emphasis added.)

Generally, an administrative judge's credibility determinations as to witnesses testifying in person before him are immune from appellate review, *as long as they are based on the evidence of record*. Mulkern v. Massachusetts Turnpike Auth., 20 Mass. Workers' Comp. Rep. 187, 199 (2006), citing LaGrasso v. Olympic Delivery Serv., Inc., 18 Mass. Workers' Comp. Rep. 48, 52 (2004). (Emphasis added.) In this case, however, there is not a scintilla of evidence that the call-in policy was not strictly enforced, or that it was enforced inconsistently, or that it had not been communicated to the employee. Cf. Walsh v. Hollstein Roofing, Inc., supra; Ferreira's Case, supra. The employee testified that he was *required* by the administrative rules of the campus police to call in to the dispatcher before going to get coffee. (Tr. 10, 32.) He acknowledged that under the collective bargaining agreement between the employer and his union, absent a direct order, he was not permitted to leave the employer's premises, i.e., the campus, without permission prior to the end of his assigned shift. (Tr. 21-22.) It is a well-established rule of evidence that a party is bound by his testimony concerning, *inter alia*, his knowledge, motives and purposes, even in the face of other, more favorable evidence. Waltz v. Colonial Gas Co., 2 Mass. Workers' Comp. Rep. 151 (1988), citing Laffey v. Mullen, 275 Mass. 277, 278 (1931). See, also, Fraser v. Fraser, 334 Mass. 4, 6 (1956), and P. J. Liacos, Massachusetts Evidence § 2.11 at 39-40 (7th ed. 1999).

Here, however, there was no more favorable evidence to the employee. Both witnesses called by the employee, and deemed credible by the judge, confirmed the policy was as testified to by the employee.[14] Therefore, in my

[14] Rachel Jolliffe, a fellow university police officer, agreed that it was "policy and procedure to call off if you will be leaving the sector," and that she would call in if she was going off campus to get coffee. (Tr. 41-42.) Barry Martinez, another university police officer, confirmed that calling in before going on a coffee break was required. (Tr. 46.) That he did so only "most of the times," id., does not mean the policy was not strictly enforced by the employer, only that his transgressions, unlike the employee's, were not discovered by the employer. Officers Jolliffe and Martinez signed a statement, offered by the employee into evidence, that read:

opinion, it was arbitrary and capricious for the judge to discredit James Ferrier's testimony about the employer's policy, when there was *no* evidence, testimonial or documentary, which contradicted that testimony. Cf. Ferreira's Case, supra (single member of industrial accident board free to reject supervisor's testimony that employee was injured performing forbidden activities when there was conflicting evidence). The judge's inference that the call-in was merely a request by the employer, not a requirement, is simply impermissible. The importance of the call-in policy to the employer's police functions, including the safety and protection of all persons on the university's campus, is reflected in the inclusion in the collective bargaining agreement of specific disciplinary action for violation of the policy. See Ex. 7.[15]

> To Whom It May Concern,
>
> During the night shift roll calls, in the two weeks prior to and through November 25, 2004, the Sgts. told the shift the following:
> The shift supervisors stated that it was o.k. for the shift officers to go to Exxon, meaning the Exxon gas station at the corner of Park Drive and Boylston Street which contains a Dunkin Donuts shop, *as long as no other NUPD officers were already there.* The NUPD officers, it was stated by the sgts., were to obtain their food or coffee and return right away.

(Ex. 7; emphasis added.) No fair reading of this statement permits the conclusion, drawn by the judge, that notifying the dispatcher was optional on the part of any officer. There was uncontroverted testimony by James Ferrier that whether another officer was already at the Exxon station could be determined, in advance of going to the station, only by contacting the dispatcher for permission to go to the station. (Tr. 63.) According to his own testimony, the employee did not do so and, therefore, he could not have known whether any other officers were already at the station when he left his sector to go there. Moreover, I disagree with the majority's statement, without supporting citation, that the self-insurer concedes the employee was "on call" at the Exxon station. It seems to me that on call status is inextricably linked to an employer's knowledge of an employee's whereabouts and circumstances. Being on call is not elective on the part of employees. The self-insurer acknowledges only that the employee was on duty in his specific sector before leaving the sector to go to the Exxon station. (Self-ins. br. 1-2.)

[15] I agree with my colleagues and with the administrative judge, that the employee's violation of the collective bargaining agreement, and his resulting suspension, are not, by themselves, dispositive of the issues presented under c. 152. I do think, however, that the inclusion in the union contract of an express prohibition against "[l]eaving University

The majority acknowledges that "[t]he employer's policy was that officers were to call in to the dispatcher before going to the Exxon station for breaks," and that on the date of injury, the employee did not do so. The administrative judge and the majority treat as dispositive of the "course of employment" issue the fact that the Exxon station was an employer-approved site for coffee breaks. Indeed, that fact is not disputed by the self-insurer. That does not mean, however, that campus police officers were free to leave their assigned sectors and go to that site whenever they chose, without notification to and authorization by the dispatcher.[16] The uncontroverted evidence is they were not.[17]

Lastly, I disagree with the majority that D'Angeli's Case, supra,[18] is applicable to the circumstances of the employee's injury. It seems to me untenable to suggest that Officer Frechette, while in neglect of his duty as a Northeastern University campus police officer, nevertheless assumed the role of a

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premises without permission prior to the end of the employee's assigned shift," (Ex. 3), directly contradicts the judge's "request versus requirement" finding, and underscores the importance of officer compliance with the notification policy. In other words, it defines the scope and sphere of employment. "The work[ers'] compensation act indeed should be liberally construed, yet contracts for personal service are not thereby abrogated nor is the employer thereby restricted from enlarging or diminishing his business, and from extending or limiting accordingly the field of employment." Borin's Case, 227 Mass. 452 (1917).

[16] The majority's reliance on Wormstead, supra, is misplaced. In that case, a police captain, after working the first three hours of his scheduled shift, was driving back to the police station following an employer-authorized lunch break at his home, the schedule for which had been established by the chief of police. Id at 662. By his own admission, Officer Frechette's coffee break was not so authorized. (Tr. 10, 21-22.)

[17] Insofar as the majority's suggests that only notification, not authorization, was required, it implies that the dispatcher and supervisor were without authority to order officers not to go on break at any given time. There is not a scintilla of evidence to support that suggestion.

[18] D'Angeli is distinguishable at least because the employee there "was incontestably *traveling in the course of his employment* when he encountered the hazard he sought to remedy. . . ." Id. at 818. (Emphasis added.) That, of course, is the very contest involved in the self-insurer's defense of the employee's claim.

"conscientious citizen" attempting to alleviate an imminent danger to the public, when he responded to the dispatcher's call, and is therefore entitled to coverage under the act. In contravention of his employer's policy and procedure, the employee had "left [his] Columbus Avenue patrol sector, and indeed left the campus entirely, without requesting prior permission from [his] supervisor as required by written department policy. . . ." (Ex. 6.) He did not notify the dispatcher of his location when he arrived at the Exxon station or when he responded to the radio call to go to Camden Street.

The judge's finding and the majority's view notwithstanding, at the time of the accident, the employee was *not* operating his police cruiser with "his employer's general authorization or approval." See G. L. c. 152, § 26. To the contrary, he was forbidden to leave his sector without permission, and thus forbidden to go to the Exxon station without permission. The employer had no idea Officer Frechette had left its premises -- the campus -- or that when called by radio, he would be responding from outside his assigned sector. His deviation from the course and sphere of his employment is not mitigated by the fact that he acknowledged the radio transmission of a crime in progress and was following a direct route back to a location within his sector, (Dec. 4), because, by his own admission, he was still three (Tr. 26-27) or four (Tr. 9) or five (Tr. 23) blocks away from his sector when the accident occurred.[19]

[19] In footnote 10, supra, the majority states that "the [employee's] failure to call in and notify the dispatcher did not affect in any way the events that ensued," and he "would still have gone to the Exxon station and would have needed to return to the campus in exactly the same way." This is rank speculation. Even assuming the judge was correct in finding that campus police officers remained on duty during breaks, (Dec. 4), the evidence does not permit an inference that the employee would have been dispatched to Camden Street at all, had the dispatcher known he was starting out from the Exxon station. It is telling that when the employee responded to the radio call about a crime in progress on Camden Street, he did not reveal to the dispatcher that he was outside his sector, at the Exxon station. Moreover, the evidence reflects that the employee was disciplined for, *inter alia*, reckless operation of a vehicle, i.e., travelling at a high rate of speed from outside his sector and losing control of his cruiser as a result, when the

Because the employee deviated from the course of his employment, and had not cured the deviation by regaining his sector at the time of the accident, he is not entitled to workers' compensation benefits. Accordingly, I would reverse the judge's decision as a matter of law.

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Patricia A. Costigan
Administrative Law Judge

Filed: **April 17, 2007**

accident occurred. (Tr. 12, 36, 56; Ex. 6.) The employee did not appeal his suspension. (Tr. 36.)