COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007037-18**

Xiuhua Feng[1]	Claimant
Yong Zheng (Deceased)	Employee
Ming G. Chen	Employer
Workers Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol, and Calliotte)

The case was heard by Administrative Judge Spinale.

APPEARANCES
Richard H. Schwartz, Esq., for the claimant
Kathleen G. McNeill, Esq., for the Workers' Compensation Trust Fund

FABRICANT, J. The claimant appeals from a decision in which the administrative judge denied a claim for survivor spouse benefits, pursuant to G. L. c. 152, § 31, originating from a fatal motor vehicle accident while the employee was being transported from a jobsite by the alleged employer. The judge found that the "going and coming rule" applied to bar the claim because the employee's accident occurred during a commute from his workplace, his job duties neither required him to travel nor impelled him to make the trip, and he was not actually engaged, with the employer's authorization, in the business affairs or undertakings of employment. G. L. c. 152, § 26.[2] For the reasons that follow, we reverse in part, and recommit the case for further findings.

[1] The claimant, Xiuhua Feng, is the wife of the decedent employee, Yong Zheng (hereinafter, "employee"), and is the only party seeking benefits. Regardless, she has not previously been identified as such, and does not appear in prior file captions. Although Attorney Schwartz was clearly acting on the claimant's behalf, the judge's decision does not identify him as the claimant's representative. We herein correct these oversights.

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

The credited hearing testimony of co-worker Zhang Fang Wang is that the employer contacted him on January 9, 2018, to perform construction work. The employer met Mr. Wang, the employee, and another individual at a designated location in Chinatown. From there the employer drove them to a Chinese restaurant in New Hampshire in his construction van. The van contained various renovating tools and only two seats, so the employee sat behind the driver on the floor. (Dec. 4.) Upon their arrival at the work site, all four men performed renovation work installing sheet rock. (Dec. 4-5; Tr. 22, 34.)

Mr. Wang further testified that at approximately 5:00 p.m., all four men left the restaurant in the van, and at approximately 5:50 p.m. the van was involved in a motor vehicle accident near a New Hampshire toll booth. Upon regaining consciousness in the hospital, he was told that the employee had died. (Dec. 5.)

The judge also credited the testimony of the employee's widow, claimant Xiuhua Feng, that the employee had worked for employer Chen for about ten days prior to the accident, at different job sites. On the date of the accident, the employee left his Quincy home at 7:00 a.m. and "[t]ook the T" to Chinatown. (Tr. 55.) She did not know where the employee worked prior to the day of the accident but did know that on that day he worked somewhere in New Hampshire. She further confirmed a post-accident payment to her by the employer of $2,000 cash for nine days of her husband's work, as well as a $30,000 payment for funeral and other expenses. (Dec. 6.)

The judge also found that the employee worked in construction "performing whatever tasks the boss asked him to do," including "renovating, painting and sheet-rocking." The length and duration of each job varied and the employee worked, on

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> 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 . . . .

average, six days per week from 2013 until December 25, 2017, and was paid in cash. (Dec. 7.)

The claimant's § 31 claim for survivor's benefits was denied at the § 10A conference on July 11, 2018. The claimant filed a timely appeal, and a hearing *de novo* was commenced on October 10, 2018.[3] (Dec. 2.)

Ultimately, the judge dismissed the case, writing:

> The going and coming rule has little, if any application when a traveling employee is injured. Hatch v. SHC Services, Inc., 31 Mass. Workers' Comp. Rep. 75, (2017), quoting Dean v. Access Nurses Inc, 23 Mass. Workers' Comp. Rep. 303, 304-305 (2009), citing Frassa v. Caulfield, 22 Mass. App. Ct. 105, 109-112 (1986). However, in instances such as the case at bar, where the performance of the employee's work does not involve travel beyond his commute to and from work, the issue is obfuscated. See Rose [v. Kerins Concrete, 25 Mass. Workers' Comp. Rep. 271,] 276 [(2011)].
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> Injuries to home health aides, repairmen who travel between several employer locations repairing equipment and house to house salesmen, have all been deemed to be compensable when injured either going or coming to work. See Dow v. Intercity Homemaker Serv., 3 Mass. Workers' Comp. Rep. 136, 140-141 (1989); Fedders v. Federated Sys. Group, 16 Mass. Workers' Comp. Rep. 15 (2002); and Hamel's Case,

[3] At issue were claims for § 31 benefits from January 10, 2018, to date and continuing, § 7A, § 26, § 36 and funeral expenses. The Workers' Compensation Trust Fund (WCTF) raised issues of liability, disability and extent thereof, causal relationship, entitlement to §§ 13 and 30 benefits, § 7A, § 26, § 31, § 36, funeral expenses [pursuant to § 33], § 65(2)(i), employee/employer relationship, status of a $30,000.00 payment to claimant, and average weekly wage. (Dec. 3.) Herein, we address only, 1) the issue decided by the judge that the employee's injury did not arise out of and in the course of his employment; and, 2) the applicability of 454 Code Mass. Regs 27.04 (4)(c) as argued by the claimant.

We note the WCTF raised as a defense the threshold issue of whether the deceased was an employee or an independent contractor. The judge's findings of fact imply that he reached the conclusion that the deceased was an employee, since he addressed the issue of whether the injury arose out of or in the course of the employment. This, of course, would be completely unnecessary if the deceased was an independent contractor. The WCTF did not appeal, or otherwise argue that this implicit finding was incorrect. We therefore consider the issue waived.

> 333 Mass. 628 (1956). However, all of those jobs involved travel as part of the performance of the Employee's job duties.
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> It is the performance of the Employee's duties that trigger exceptions to the going and coming rule. In this case, the Deceased was a laborer whose job duties on the date of the injury involved hanging sheetrock and performing demolition at a restaurant location in New Hampshire. There was no travel, other than the commute to and from New Hampshire, involved in the performance of the Deceased's job duties…The act of hanging sheetrock and demolition-his job duties-did not require the Deceased to travel.

(Dec. 8.)

In his legal analysis, the judge also found persuasive the line of cases allowing benefits when an employee is impelled to make the trip "in fulfillment of the decedent's obligations to his employer" while engaged in activity connected to work, specifically authorized and directed by his employer. See Swasey's Case, 8 Mass. App. Ct., 489, 494 (1979); Papanastassiou's Case, 362 Mass 91, 93-94 (1972); Langadinos v. One Stop Business Centers, 14 Mass. Workers' Comp. Rep. 268 (2000). (Dec. 9.)

Based upon his legal analysis of Swasey, supra, and similarly reasoned cases, the judge dismissed the employee's claim as barred by the 'going and coming' rule, finding the employee "was not engaged in an activity that constituted a critical and substantial incident of his employment for which he received compensation," as he "was merely commuting home at the time of the accident." (Dec. 9-10).

However, the cited cases are inapposite to the issue at hand, as they deal with "traveling employees." The judge failed to consider whether, in the instant case, transportation was simply an incident of his employment. If it was an incident of the employment, the claim would be compensable as an injury arising "out of and in the course of" employment, even though the employee is not engaged in the actual performance of his duties at the moment of the injury. "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, 301 Mass 500, 502 (1940).

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, occurring while the employee is so transported, arises in the course of his employment.[4] In Donovan's Case, 217 Mass. 76, 78 (1914), the

[4] We discern no evidence indicating that the employee knew the location of the worksite on the day of the accident, nor that he would have been able to transport himself to that site in any event. Co-employee and fellow passenger Zhang Fang Wang testified that he did not even know what town the worksite was in. (Tr. 22.) The Employee's widow, claimant Xiuhua Feng, testified that prior to the accident, her husband did not work in a fixed location for this employer, and was usually transported to his job:

> Q. Okay. And do you know where your husband was working?
> A. It was not a fixed location. And he mentioned that he finished a Chinatown project and he wasn't sure where he was going next.
> Q. Okay. So do you know whether he worked in New Hampshire for Mr. Chen before January 9th?
> A. I'm not sure. He went one or two days. He didn't tell me where he went.
> Q. Okay. And what time did he leave the house on January 9, 2018?
> A. 7:00 a.m. He left at 7:00 a.m. He used to be picked up at his door, outside his door, but on that day he needed to travel to Chinatown to be picked up.

(Tr. 54-55.) Later, the claimant testified that the day before the accident, January 8, 2018, the alleged employer, Chen, also gave her husband a ride to the workplace:

> Q. … So your husband worked in New Hampshire on January 8, 2018, the day before the accident, correct?
> A. Yes.
> Q. And isn't it true that he got a ride to New Hampshire from a man named Tu the day before the accident?
> A. So on January 8 it was also Chen Ming who gave the ride.
> Q. Well, didn't you previously testify that your husband took the T to Chinatown?
> A. Yes. Yes, he took - - went to Chinatown to take his ride.
> . . .
> Q. And you and your husband didn't discuss where he worked in New Hampshire on January 8th, 2018?
> A. He don't know. He takes the ride there. He comes back. Even he don't know.

(Tr. 67-78.) The inference here, without any contradictory evidence, is that the employer made the provided transportation a condition of employment upon hiring the employee, at least for the New Hampshire job.

court explained that, when the employee is traveling to and from work in a vehicle or other conveyance provided by the employer, the insurer's liability "depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the *implied* or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract." Id. at 78.[5]

We have also found that transportation specifically reserved solely for employees may be deemed an incident of employment as a matter of law. Mikel v. M.B.T.A., 14 Mass. Workers' Comp. Rep. 84 (2000). The common thread connecting these "incident of employment" cases is that the transportation has not just been *offered* by the employer, but that the facts fairly lead to the conclusion that the employer's *expectation* is that the employee will use that transportation.[6] As the facts here indicate, without refutation, that the employer expected his workers actually required that transportation be provided to and from a heretofore unknown worksite,

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[5] In Donovan, the court found:

> [T]ransportation was 'incidental to [the employee's] employment' fairly mean[ing], in the connection in which it was used, that it was one of the incidents of his employment; an accessory, collateral or subsidiary part of his contract of employment, added to the principal part of that contract as a minor, but nonetheless a real, feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. This is especially so where none of the provisions of the contract have been shown by either party, but everything is left to be inferred from their conduct.

Donovan, supra at 78.

[6] These elements are absent from Rose v. Kerins Concrete, 25 Mass. Workers' Comp. Rep. 271 (2011), *aff'd* Rose's Case, 81 Mass. App. Ct. 1138 (2012)(Memorandum and Decision Pursuant to Rule 1.28), relied on by the WCTF. There it was not established that the employer had provided transportation, and, in any event, the employee made his own travel arrangements to the worksite.

we hold that said transportation was, as a matter of law, an incident of the employment.

We next address the claimant's argument that 454 Code Mass. Regs 27.04 (4)(c) is applicable to her claim. (Claimant br. 7.) The regulation provides in pertinent part: "If an employer requires an employee to report to a location other than the work site or to report to a specified location to take transportation, compensable work time begins at the reporting time and includes subsequent travel to and from the work site." The Trust Fund counters that 454 CMR 27.04(4)(c) applies to the Minimum Fair Wages Act, G.L. c. 151 and is not applicable to G.L. c. 152. (Trust Fund br. 11-13.) We agree. Although the claimant's assertion may be somewhat instructive by analogy, the argument ultimately fails simply because 454 CMR 27.04 (4)(c) is a Labor regulation. Although the apparent intent and wording of the regulation would appear to apply to these facts, the regulation itself is neither enforceable by the Board nor dispositive of liability under Chapter 152. See Hatch, supra (determination of whether employee is a "traveler" under IRS guidelines is not dispositive of whether she is a "traveling employee" for purposes of eligibility for workers' compensation benefits).

Accordingly, we reverse the finding that the claimant's case is barred by the "going and coming" rule, and instead hold that the employee's fatal accident occurred during travel that was an incident of the employment. We further recommit the case to the administrative judge to make specific findings of fact regarding all other outstanding issues not addressed in this decision.

Because the claimant appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Claimant's counsel must submit to this board for review a duly executed fee agreement between claimant and counsel. No fee shall be due and collected from the claimant unless and until the fee agreement is received and approved by this board.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **June 22, 2020**