By order of the Court, DENIED. *Presiding Judge Robert C. Naraja*

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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

VIANA IKEDA, **Plaintiff,** **vs.** **K.S. CHANG CORPORATION, d/b/a I-Mart,** **Defendant.**	**CIVIL ACTION NO. 10-0328** **ORDER DENYING MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER came before the Court on November 28, 2012 at 9:00 a.m. in Courtroom 202A for a motion to dismiss. Defendant K.S. Chang Corporation, dba I-Mart ("Defendant" or "I-Mart"), was represented by David G. Banes, Esq., and his law firm, O'Connor, Berman, Dotts & Banes. Plaintiff Viana Ikeda ("Plaintiff" or "Ikeda") was represented by Victorino DLG. Torres, Esq. Defendant brought a motion to dismiss for want of jurisdiction, claiming that Plaintiff's exclusive remedy lies with the Worker's Compensation Commission ("the Commission") pursuant to 4 CMC section 9301 *et seq*.

Based on the papers submitted and arguments of counsel, the Court hereby DENIES Defendant's motion to dismiss.

II. BACKGROUND

This is a personal injury case in which Plaintiff is suing her former employer, I-Mart, for a slip-and-fall injury she sustained on I-Mart's premises. On November 12, 2008, Plaintiff, while employed at I-Mart as a full-time cashier, visited I-Mart on her day off to shop for groceries. She used store credit made available to her based on her status as an employee of

Defendant's store. While at the store, she checked her work schedule because she wanted to switch shifts with a co-worker so she could attend a funeral the next day.[1] Afterwards, Plaintiff exited I-Mart through the main, public entrance where she slipped and fell, injuring her left ankle and left knee.

III. LEGAL STANDARD

A motion to dismiss for lack of subject matter jurisdiction is governed by Rule 12(b)(1) of the Commonwealth Rules of Civil Procedure. "When ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court must accept as true the complaint's undisputed factual allegations and construe the facts in the light most favorable to plaintiff." *Atalig v. Commonwealth Election Comm'n*, 2006 MP 1 ¶ 16 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). If the court determines it has no jurisdiction over the subject matter then the case shall be dismissed. *Id*.

IV. DISCUSSION

The Legislature established the Commonwealth Workers' Compensation Law ("CWCL") by PL 6-33 in 1989. The CWCL provides exclusive compensation for the "disability or death of an employee, but only if the disability or death results from an injury or illness arising out of and in the course of employment." 4 CMC §§ 9303(a), 9305. "[Workers' compensation laws] essentially [are] remedial, social legislation designed to protect workers and their families from various hardships that result from employment-related injuries." *Livering v. Richardson's Rest*., 823 A.2d 687, 691 (Md. Ct. App. 2003) (citation omitted).[2]

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[1] During oral argument, Defendant highlighted some apparent inconsistencies among statements contained in the second amended complaint ("SAC"), Plaintiff's first amended responses to Defendant's first set of interrogatories ("FAR"), and Plaintiff's declaration. Defendant contended that Plaintiff's declaration was a "sham" pleading and should be stricken as self-serving and contradictory. In reviewing the alleged inconsistent statements, the Court finds that Plaintiff's declaration statement, "I did not go to the store to look at my work schedule[,]" is consistent with her previous statements. (Pl.'s Decl. at 2, ¶5.) Plaintiff has always maintained that she went to the store to purchase groceries. (SAC at 2, ¶7); (Def.'s FAR No. 7.) However, the Court finds that any inference from Plaintiff's declaration that Plaintiff never looked at her work schedule is contradictory to her earlier statements that she did in fact look at her schedule. Consequently, the Court dismisses the factual assertion that Plaintiff never looked at her work schedule. *See State v. Schenectady Chemicals, Inc*., 459 N.Y.S.2d 971, 974 (N.Y. Sup. Ct. 1983).

[2] PL 6-33 provides no policy statement for the CWCL. However, workers' compensation laws in nearly all U.S. jurisdictions generally adhere to the same policy considerations and legal standards. When there is no dispositive Commonwealth authority on an issue, we may look to persuasive authority from other jurisdictions. 7 CMC §

The provisions "should be construed liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes." *Id*.; *see also Santos v. Public Sch. Sys*., 2002 MP 12 ¶ 29 (citing 4 CMC § 9329).

Defendant argues that Plaintiff's personal injury claim should be dismissed because: (A) the Commission has exclusive jurisdiction to determine whether Plaintiff's injuries are compensable under the CWCL, and (B) Plaintiff's injuries "ar[ose] out of and in the course of employment," barring her personal injury claim under the exclusive remedy provision of the CWCL. (Def.'s Mot. to Dismiss at 10, 14-16.)

A. THE SUPERIOR COURT HAS JURISDICTION TO DETERMINE WHETHER THE COMMONWEALTH WORKERS' COMPENSATION LAW COVERS PLAINTIFF'S INJURIES.

The CWCL allows an injured employee to "elect to claim compensation under [the CWCL], or to maintain an action at law for damages on account of such injury or death." 4 CMC § 9305. Although it may be determined that Plaintiff's remedy is available exclusively under the CWCL, Plaintiff has the option to seek such determination from the Commission or the trial court. Many other courts similarly recognize concurrent jurisdiction in the workers' compensation tribunal and trial court to determine whether they have jurisdiction to consider an employee's personal injury claim.[3]

Even those courts that generally defer exclusive jurisdiction to the workers' compensation tribunal usually recognize concurrent jurisdiction with the trial court when the claim presents only a question of law with no material facts in dispute.[4] *See, e.g., Merez v.*

2401; *see also, e.g., Hee v. Oh*, 2011 MP 18 ¶ 11 (seeking guidance from other jurisdictions . . . when "no Commonwealth case . . . addresses this issue").

[3] *Anderson v. Gailey*, 555 P.2d 144, 156 (Idaho 1976) (holding that "the Industrial Commission and the district court . . . have concurrent jurisdiction to determine whether they have jurisdiction to consider the claim or hear the case.") (citing *Scott v. Industrial Accident Commission*, 293 P.2d 18, 22 (Cal. 1956)); *but see Merez v. Squire Court Ltd. P'ship*., 114 S.W.3d 184, 187 (Ark. 2003) ("[T]he commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact but one of law, such as an intentional tort.") (citations omitted).

[4] There is no factual dispute in the instant case. Both parties agree on the material facts that Plaintiff went to her place of employment, I-Mart, on her day off to buy groceries and, while there, checked her work schedule. As she was leaving the store, she fell and injured herself on the premises. The facts are clear and undisputed so the case presents primarily a question of law that the Superior Court and the Commission have the power to decide regardless of which jurisdiction's rule this Court adopts.

Squire Court Ltd. P'ship, 114 S.W.3d 184, 187 (Ark. 2003) (quotation omitted); *Zarka v. Burger King*, 522 N.W.2d 650, 652 (Mich. Ct. App. 1994) ("The question whether plaintiff's injury arose out of and in the course of employment may be a question of law or one primarily of fact, or a mixed question of law and fact. (citation omitted). Thus, where the facts are undisputed, the question is one of law for the courts to decide."); *Francek v. KDE, Inc*., 1998 Mich. App. LEXIS 2134 at *3 (unpublished) (cited by Defendant). This Court finds that the Commission and trial court have concurrent jurisdiction to determine whether an injured employee's remedy is exclusively covered by the CWCL, and either tribunal's finding is res judicata in any subsequent proceeding involving the same parties and claims.[5]

B. PLAINTIFF'S INJURY DID NOT ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT.

An employee's injury sustained on the employer's premises is not per se covered by workers' compensation laws. *See MacDonald v. Michigan Bell Tel. Co*., 348 N.W.2d 12, 14 (Mich. Ct. App. 1984) (citation omitted); *Felton v. Hospital Guild of Thomasville, Inc*., 291 S.E.2d 158, 160 (N.C. Ct. App. 1982). Rather, the test is whether the employee's disability or death resulted from an injury or illness "arising out of and in the course of employment." 4 CMC § 9303(a); *see Santos v. Public Sch. Sys.*, 2002 MP 12 ¶ 26. The CWCL's exclusive remedy provision applies only when the separate and distinct elements of (1) "arising out of" and (2) "in the course of" employment are satisfied. *See id*.; *Gallimore v. Marilyn's Shoes*, 233 S.E.2d 529, 531 (N.C. 1977); *Livering v. Richardson's Rest*., 823 A.2d 687, 693 (Md. Ct. App. 2003).

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[5] The California Supreme Court held:

> The determinations of the commission, like those of the superior court, are res judicata in all subsequent proceedings, including court actions, between the same parties or those privy to them. (Citations omitted). Thus, if there is a final determination as to the matter of coverage (i.e. jurisdiction) in either the commission or the superior court proceedings, such determination will be res judicata in subsequent proceedings before the other tribunal between the same parties or those privy to them.

Scott v. Industrial Accident Commission, 293 P.2d 18, 22 (Cal. 1956).

1. Arising Out Of Employment

"Generally, an accident will arise out of employment 'when there is a casual relationship between the injury and the employment.'" *Santos*, 2002 MP 12 ¶ 26 (quoting *Buzcyznski v. Indus. Comm'n of Utah*, 934 P.2d 1169, 1172 (Utah Ct. App. 1997)). The injury need not be "caused by the employment; rather, the employment 'is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion.'" *Id*. (quoting *Buzcyznski*, 934 P.2d at 1172). In other words, "an injury arises out of employment when it results from some obligation, condition, or incident of employment." *Livering*, 823 A.2d at 692.

In *Santos*, the CNMI Supreme Court held that an employee's death arose out of and in the course of her employment when she suffered a heart attack at a Tinian nightclub during a business trip. *Id*. ¶ 29. The Court applied the "traveling employee rule" that generally views traveling employees as acting "within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." *Id*. ¶ 28. In reaching its holding, the Court reasoned that the ***employment placed the employee on Tinian***, and dancing at the nightclub was reasonably incidental to employment because the employer "had to contemplate that [the employee] would participate in some recreation while on Tinian for the scheduled workshops." *Id*. ¶ 42. Therefore, it was fair to require the employer to compensate the employee for her injuries under the CWCL. *Id*.

The basis for the "traveling employee rule" applied in *Santos* is analogous to the "positional-risk test" used in *Livering* to determine when an injury "arises out of" employment. 823 A.2d at 692.[6] The positional-risk test is essentially a "but for" test. "An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and

[6] The "traveling employee rule" and the "positional-risk test" are essentially the same test but are used in different contexts. *See Mulready v. University Research Corp*., 756 A.2d 575, 579 (Md. 2000) (relied upon by both *Santos* and *Livering*). The positional-risk test is more appropriate for the instant case because Plaintiff was not injured during a work-sponsored trip, but rather, was injured during a personal errand at her employer's store.

obligations of the ***employment placed [the employee] in the position where he [or she] was injured***."[7] *Id*. (quotation omitted) (emphasis added).

In *Livering*, an employee visited her employer's restaurant on her day off purely to check her work schedule.[8] As soon as she finished checking her schedule, she proceeded to exit the restaurant when she slipped and fell. *Id*. at 690. The court held that the employee's slip-and-fall injury arose out of her employment because "[s]he would not have been injured but for the fact that she visited the restaurant to confirm her schedule." *Id*. at 695. She visited the restaurant to confirm her schedule because the employer often changed it.[9] The employer's common practice of changing the work schedule represented an incident or condition of employment that placed the employee on the premises to check her work schedule. *Id*.

Although the facts between *Livering* and the case at bar are very similar, they are also distinguishable in certain material aspects that accounts for the different conclusions. Unlike *Livering*, Plaintiff visited her employer's store for a personal errand - grocery shopping. Plaintiff checked her work schedule on the premises only out of convenience since she was already on site for shopping. It appears under the circumstances that checking her work schedule was merely an incidental purpose for her visit to I-Mart. For instance, there is no evidence that Plaintiff attempted to check her schedule prior to visiting the store such as by calling or emailing her employer, supervisor or a co-worker. There is also no evidence that it

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[7] *Livering* also discussed another test, the "increased risk test," which several jurisdictions use. It is a narrower test that "requires that 'the employee be exposed to a quantitatively greater degree of risk than the general public.'" *Id*. at 692; *see also Lewis v. Houma Indus*., 818 So. 2d 956, 958 (La. Ct. App. 2002) ("An injury arises out of employment if the risk from which the injury resulted was greater for the employee than for a person not engaged in the employment."). Here, Plaintiff's injury occurred just outside the main entrance of the store that is a public area where customers frequently enter. Plaintiff's status as an I-Mart employee did not increase the risk of her injury because she was injured while walking out of the store after shopping like every other customer. *Cf. Sparrow v. La Cachet, Inc*., 702 A.2d 503, 506 (N.J. App. Div. 1997) ("We conclude that plaintiff's accident arose from a 'personal risk' because she had a facial at her employer's beauty salon solely for her own personal benefit.").

[8] The employee was running personal errands around town at the time she visited her employer's restaurant, but she entered the restaurant with the sole purpose to confirm her work schedule. *Id*. at 690. She did not eat at the restaurant nor perform any other personal errands there.

[9] "In the three weeks of her employment prior to [the injury], [the employee's] schedule had changed at least twice. On one occasion, she was late for work when her employer changed her starting time from noon to 7:00 a.m., and her employer inquired into her tardiness." *Id*. at 690.

is required, necessary, important or customary for employees to come to work to check their schedules. *But c.f. Livering*, 823 A.2d at 692 (noting that the injured employee had no phone and it was customary for employees to come to work to check their work schedules). Unlike *Livering*, no condition or incident of employment placed Plaintiff at her place of employment to check her work schedule.

It is significant to note that the facts, construed in a light most favorable to Plaintiff, show that Plaintiff's primary purpose for visiting I-Mart was to shop for groceries, and checking her work schedule was incidental. Contrary to Defendant's oral argument, *Livering* did not hold that any work-related purpose, however minor or incidental, is sufficient to trigger worker's compensation. If the employee would not have been injured but for the work-related purpose, then worker's compensation is triggered. *Id*. at 692-93. Conversely, if the employee would have been injured irrespective of the work-related purpose, worker's compensation does not apply. *Id*.

This position-risk test articulated in *Livering* is in line with the majority of jurisdictions that follow the dual-purpose rule. *See Felton v. Hospital Guide of Thomasville, Inc*., 291 S.E.2d 158, 161 (N.C. Ct. App. 1982) (The basic dual-purpose rule [is] accepted by the great majority of jurisdictions[.]"); *Schultz v. Industrial Com*., 475 N.E.2d 547, 549 (Ill. Ct. App. 1984).

> An injury arises out of and in the course of employment under the dual-purpose rule if it is incurred during a "business trip." When a trip serves both business and personal purposes, it is personal if the trip would have been made even absent the business purpose but would not have been made absent the personal purpose. Conversely, it is a business trip if the trip would have been made absent the personal purpose, because the service performed for the employer during the trip would have caused the trip to be made even if it had not coincided with the employee's personal journey.

Schultz, 475 N.E.2d at 549. In *Schultz*, a worker's compensation claimant was hit by a car while running personal errands and on his way to mail reports for his work. *Id*. The claimant was denied worker's compensation coverage because "the business purpose of the trip was

merely incidental to the personal purpose." *Id*. Like *Schultz*, checking Plaintiff's work schedule was merely incidental to the personal purpose of grocery shopping. Therefore, Plaintiff would have been injured regardless of whether she checked her schedule because she was at I-Mart to shop for groceries.

The instant case is more analogous to *Morris v. Workers' Comp. Appeal Bd*., 879 A.2d 869, 871-72 (Penn. Commw. Ct. 2005), in which the court held that an employee's slip-and-fall injury sustained at her place of employment, Walmart, did not arise out of and in the course of employment. There, the employee was shopping at Walmart, using an employee discount,[10] when she slipped and fell in the store. *Id*. at 871. The injury occurred before the beginning of her work shift; however, the employee intended to remain at Walmart to begin her shift later that day. *Id*. In essence, the employee performed a personal errand – shopping – and out of convenience to avoid a second trip to the store, she intended to remain on the premises to begin her work shift. *See id*. Similarly, here, Plaintiff went to her place of employment for shopping and, out of convenience since she was at her work, checked her schedule. In both cases, the employees went to their employers' stores "only as [] member[s] of the general public" to shop, and not because their employment placed them there. *See id*.

2. In The Course Of Employment

The element, "in the course of," for the exclusive remedy provision under the CWCL refers to "'the time and place of the injury.'" *Santos*, 2002 MP 12 ¶ 27 (quoting *Western Airlines v. Workers' Compensation Appeals Board*, 202 Cal. Rptr. 74, 75 (Cal. Ct. App. 1984)). "An injury is in the course of employment 'when it occurs during the period of employment at a place where the employee reasonably may be in performance of his or her duties and while fulfilling those duties or engaged in something incident thereto." *Livering*, 823 A.2d at 693 (quotation omitted). Generally, an off-duty employee's injury sustained at his

[10] The court held that an employee who uses an employee discount while shopping during her non-work hours does not necessarily act within the course of her employment. *Id*.; *see Floyd v. Taco Mayo/Accord Human Resources*, 58 P.3d 197, 198 (Okla. 2002) ("We reject the notion that the fringe benefit provided by Floyd's employer, a free meal, converted her personal decision to stay and eat that free meal into a duty of her employment or an incident to it, which would subject her employer to liability.").

or her place of employment is covered by workers' compensation if it occurred soon before or soon after work,[11] or during a paid or unpaid lunch break.[12] An injury that occurs on an employee's day off may still be in the course of employment if, at the time of the injury, the employee was engaged in an activity incident to his or her employment. *See id*.

Defendant contends that checking a work schedule is incident to one's employment; therefore, Plaintiff's injury that occurred soon after she checked her schedule was in the course of employment. The Court agrees that under certain circumstances checking one's work schedule is in the course of employment. *See Livering*, 823 A.2d at 695-96 ("***[U]nder the circumstances***, checking her schedule when there was a reasonable chance that the schedule had changed benefitted her employer and was in incident of her employment.") (emphasis added). The circumstances differ between *Livering* and the instant case because in *Livering* the employee's schedule changed often and caused her to be late on at least one prior occasion for which she was reprimanded by her employer. Here, in contrast, the circumstances surrounding Plaintiff's employment did not require, encourage, or make it likely for her to visit I-Mart to check her schedule.[13]

Similarly, under *certain circumstances*, checking a work schedule is akin to picking up a paycheck that falls within the course of employment. *Livering*, 823 A.2d at 694; *FRANCEK v. KDE*, Inc., 1998 Mich. App. at *3 (unpublished). Most of the cases cited by Defendant that held picking up a paycheck arises out of and in the course of employment noted that the procedure was either expressly required or authorized by the employer or was common practice among the employees.[14] Under such circumstances, the employment places the

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[11] *Rose v. Cadillac Fairview Shopping Ctr. Properties*, 668 A.2d 782, 788 (Del. 1995); *Briley v. Farm Fresh, Inc.*, 396 S.E.2d 835, 836 (Va. 1990); *Serean v. Kaiser Aluminum & Chem. Co*., 277 So. 2d 732 (La. Ct. App. 1973); *Gaughan v. Industrial Comm'n*, 516 P.2d 1232, 1233 (Ariz. Ct. App. 1973).

[12] *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534, 536 (Mo. 1996); *Solet v. K-Mart Corp*., 555 So. 2d 35, 38 (La. Ct. App. 1989); *but see Giebel v. Workmen's Compensation Appeal Bd*., 399 A.2d 152, 153 (Penn. Commw. Ct. 1979).

[13] There is no evidence that Plaintiff's, or any other I-Mart employee's, schedules often change without notice. Also, the fact that she wanted to check her schedule in order to switch shifts with a different employee so she could attend a funeral did not benefit the employer unlike confirming when to show up to work on time.

[14] *Hoffman v. Workers' Comp. Appeal Bd*., 741 A.2d 1286, 1288 (Penn. 1999) ("[A]n employee's presence at the workplace to obtain a paycheck pursuant to an ***employer-approved practice*** bears a sufficient relationship to a

employees at work to pick up their paychecks, or at least the employer must contemplate that its employees will come to work to pick up their paychecks. Here, while it would not be surprising to Defendant to learn that one of its employees came to work to check the work schedule, it is unlikely Defendant would consciously contemplate its employees doing so without a formal policy or customary practice like that which typically governs employees' receipt of their paychecks.

In addition to *Livering*, Defendant relies heavily on *FRANCEK* that held an employee's injury was covered by worker's compensation when the employee slipped and fell at his place of business while there to check his work schedule and eat lunch. Just as with *Livering*, the facts in *FRANCEK* are very similar to the instant case except for two fundamental differences relied upon in its holding.[15] First, in *FRANCEK*, the plaintiff "was injured in a part of the restaurant not generally accessible to anyone except for defendant's employees." *Id*. at *2, *3. Second, the injury occurred when the plaintiff was "en route to check his work schedule." *Id*. Here, Plaintiff was injured in a public area while exiting the store after she finished shopping for herself. The two main pieces of the holding in *FRANCEK* are lacking in the case at bar, making the cases distinguishable.

In conclusion, Plaintiff was at the place of injury, I-Mart, as a customer to shop on her day off. Her employment did not place her there. *But c.f. Santos*, 2002 MP 12 ¶ 42. Since she

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necessary affair of the employer (payment of due wages) to fall within the course of employment.") (emphasis added); *Phelps v. Dispatch Printing Co*., 2010 Ohio 2423 ¶ 2 (Ohio Ct. App. 2010) ("The Dispatch ***authorized*** employees to obtain their paychecks in person on the Dispatch premises rather than having their paychecks mailed or directly deposited with a financial institution, and Phelps' ***normal practice*** was to personally pick up his paychecks.") (emphasis added); *Hirschle v. Mabe*, 2009 Ohio 1949 ¶ 2 (Ohio Ct. App. 2009) ("[Employer] has a ***formal policy*** that allows each of its employees to . . . pick up [their] paychecks at its offices on Thursday afternoon, the day before payday.") (emphasis added); *Nunn v. First Healthcare Corp*., 2004 Ky. App. Unpub. LEXIS 553 *10 ("Many of these cases involved situations where the employee either was ***required*** to pick up his paycheck at the employer's place of business ***or it was a customary practice*** to do so.") (emphasis added).

[15] *FRANCEK* concluded:

> Nor did the injury occur in a part of the restaurant normally accessible to the restaurant's customers. Because plaintiff was en route to check his schedule at the time of his injury, we find that the plaintiff's injury occurred 'within the course, the flow, and route' of his employment.

Id. at *3 (quoting *MacDonald v. Michigan Bell Telephone Co*., 348 N.W.2d 12, 14 (Mich. Ct. App. 1984)).

was already at I-Mart, she briefly checked her work schedule for her own personal benefit because she wanted to change shifts with a co-worker in order to attend a funeral the following day. She did not check her work schedule in order to know when to show up to work on time. The main purpose of her trip to I-Mart was to shop; therefore, she would have been injured regardless of whether she checked her schedule. *C.f. Morris*, 879 A.2d at 871. Finally, Plaintiff was injured just outside the main entrance of the store where the general public accesses to enter and exit the store.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is hereby **DENIED**.

IT IS SO ORDERED this 6th day of December, 2012.

/s/
ROBERT C. NARAJA, Presiding Judge