IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

REGIS INSURANCE COMPANY,	:	OCTOBER TERM, 2005
Plaintiff,	:	
v.	:	No. 4110
SLACK'S HOAGIE SHACK, CORP.,	:	
M&R HOAGIES, INC. d/b/a SLACKS	:	(Commerce Program)
HOAGIE SHACK, MICHAEL GOLDNER,	:	
d/b/a SLACK'S HOAGIE SHACK and	:	Control Numbers 090012,100112
KAREN MCALLISTER		
Defendants.	:	

O R D E R

AND NOW, this 6TH day of March 2007, upon consideration of plaintiff Regis Insurance Company's Motion for Summary Judgment, defendants' Michael Goldner and M&R Hoagies, Inc.'s Cross Motion for Summary Judgment, the responses in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion, it is **ORDERED** that plaintiff's Motion for Summary Judgment is **Granted.** Regis Insurance Company does **not** have a duty to indemnify M&R Hoagies, Inc. and Michael Goldner in connection with the matter of Karen McAllister v. Slack's Hoagie Shack Corp; et. al. Philadelphia Court of Common Pleas, April Term 2005 No. 1328 arising out of the Ms. McAllister's accident of December 14, 2004.

It is further **ORDERED** that defendants' cross Motion for Summary Judgment is D**enied**.

BY THE COURT,

_____
ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

REGIS INSURANCE COMPANY,	:	OCTOBER TERM, 2005
Plaintiff,	:	
v.	:	No. 4110
SLACK'S HOAGIE SHACK, CORP.,	:	
M&R HOAGIES, INC. d/b/a SLACKS	:	(Commerce Program)
HOAGIE SHACK, MICHAEL GOLDNER,	:	
d/b/a SLACK'S HOAGIE SHACK and	:	Control Numbers 090012, 100112
KAREN MCALLISTER	:	
Defendants.	:	

……

O P I N I O N

Albert W. Sheppard, Jr., J. ……..…… March 6, 2007

This declaratory judgment action arises from a slip and fall accident occurring on December 17, 2004 at the premises of Slack's Hoagie Shack, located at 41 Snyder Plaza in Philadelphia, Pennsylvania. Presently before the court is plaintiff Regis Insurance Company's Motion for Summary Judgment and Defendant M&R Hoagies, Inc. d/b/a Slacks Hoagie Shack and Michael Goldner's Cross Motion for Summary Judgment. For the reasons discussed, plaintiff's Motion for Summary Judgment is granted and defendants' Motion for Summary Judgment is denied.

BACKGROUND

Between October 2003 and the spring of 2004, defendant M&R Hoagies, Inc. did business as Slack's Hoagie House in the Snyder Plaza. Michael Goldner operated the business. McAllister was hired by Slack's Hoagie House in April 2004 to prepare and slice lunch meat, lettuce, tomato and to sweep, mop and wipe the machines down. On December 17, 2004, when McAllister arrived for work, the manager on duty told McAllister to leave and directed her not to proceed to the back room because he believed her to be intoxicated. McAllister apparently ignored this directive and proceeded to the back room to clock in where she slipped and fell on water. At the time of the accident Slacks Hoagie Shack Corporation, M&R Hoagies and Michael Goldner did not have Workers Compensation Insurance.

In October 2005, McAllister instituted suit in the Philadelphia court of Common Pleas (C.C.P. No. 0510-0328) against Slack's Hoagie Shack Corporation, M&R Hoagies, Inc. d/b/a Slack's Hoagie Shack and Michael Goldner d/b/a Slack's Hoagie Shack seeking damages for injuries sustained when she slipped and fell. The Complaint filed by McAllister alleges that she was a business invitee on the premises.

At the time of the incident, a Regis Special Multi-Peril policy of insurance, No. RM 127060 effective November 17, 2004 to November 17, 2005 to Slack's Hoagie Shack Corporation and M&R Hoagie, Inc. covering the premises located at 41 Snyder Plaza was extant. Regis defended the underlying action under a reservation of rights. On or about October 2005, Regis instituted this Declaratory Action in order to determine whether or not it owes a duty to defend and/or a duty to indemnify defendants Goldner,

M&R and Slack's in the suit instituted by McAllister.[1]

DISCUSSION

As noted, the duty to defend issue is moot in that the underlying case has been settled. Accordingly, the court will not discuss that concept.

The operative issue presented is whether Regis has a duty to indemnify these defendants. An insurer's duty to indemnify is separate and distinct from its duty to defend. Board of Public Education of School District of Pittsburgh v. National Union Fire Ins. Co., 709 A.2d 910, 913 (Pa. Super. 1998). Unlike the duty to defend, the duty to indemnify cannot be determined merely on the basis of whether the factual allegations of the complaint potentially state a claim against the insured. Rather, there must be a determination that the insurer's policy actually covers a claimed incident. Am. States Ins. Co. v. State Auto Ins. Co., 721 A.2d 56, 63 (Pa. Super. 1998). The insurer's obligation to indemnify an insured is properly before this court in this declaratory judgment proceeding. *See* Harleysville Mutual Insurance Co. v. Madision, 415 Pa. Super. 361, 366, 609 A.2d 564, 566 (1992).

Here, the policy issued by Regis contains certain exclusions as part of the Comprehensive General liability Insurance Coverage Part, Form L 6395a (Ed. 1-73), which state, in part:

> **Exclusions**
>
> This insurance does not apply:
>
> x x x x
>
> (i) to any obligation for which the **insured** or any carrier as his insurer may be held liable under any workmen's compensation,

[1] Just recently, the underlying case was settled.

unemployment compensation or disability benefits law, or under any similar law;

(j) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured** or to any obligation of the **insured** to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the **insured** under the incidental contract;

(Exhibit "B" to Plaintiff's Mt. for SJ.).

At the time of the injury, McAllister was an employee of Slack's Hoagie House, the insured and her injury arose during the course and scope of her employment. An injury is deemed within the scope of employment under two possible situations. The first is where the employee while injured is actually engaged in furtherance of the employer's business or affairs. Morris v. Workers' Compensation Appeal Board (Wal-mart Stores, Inc.), 879 A.2d 869 (Pa. Cmwlth. 2005). Alternatively, an employee who is not actually engaged in the furtherance of her employer's business or affairs is eligible for workers' compensation benefits if: (1) she is on premises "occupied or under the control of the employer, or upon which the employer's business or affairs are being carried on"; (2) she is required by the nature of her employment to be on the premises; and (3) she sustains injuries "caused by the condition of the premises or by operation of the employer's business or affairs thereon." Id.

At the time of the injury, although McAllister was just arriving for her shift and had not commenced working, she was on defendants' premises. At the time of the fall, McAllister was on her way to the time clock to clock in and change her shoes to begin her shift. Hence, McAllister's injury occurred during the course and scope of her employment. The fact that she was directed to leave the premises due to a suspicion of intoxication does change her status from that of an employee to that of a business invitee

or trespasser. Violation of a positive order intimately connected with the employee's work duties is likened to a negligent act thereby entitling a claimant to compensation. *See* Dickey v. Pittsburgh & L.E.R. Co., 297 Pa. 172, 175, 146 A. 543, 544 (1929) *cf.* Nevin Trucking v. Workmen's Compensation Appeal Bd., 667 A.2d 262, 269-270 (Pa. Commw. Ct. 1995)(violation of a positive work order not intimately connected with the employee's work duties is not entitled to compensation). Nor does it change the fact that she was injured during the course and scope of her employment. An employee who arrives on her employer's premises for work but who has not yet assumed her duties is acting within the course and scope of her employment. Consequently, exclusions (i) and (j) in the Regis policy bar coverage for McAllister's claim.[2]

CONCLUSION

For the foregoing reasons, plaintiff Regis Insurance Company's Motion for Summary Judgment is **granted.** Regis Insurance Company does not have a duty to indemnify M&R Hoagies, Inc. and Michael Goldner in connection with the matter of Karen McAllister v. Slack's Hoagie Shack Corp; *et. al.* Philadelphia Court of Common Pleas, April Term 2005 No. 1328 arising out of the Ms. McAllister's accident of December 14, 2004. Defendants' cross Motion for Summary Judgment is **denied**.

An order contemporaneous with this Opinion will be issued.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[2] The fact that defendants did not maintain workers' compensation insurance does not alter this result. Liability insurance policies are not fallbacks for employers who have failed to maintain mandated workers' compensation insurance. Inman v. Nationwide Mut. Ins. Co., 433 Pa. Super. 534, 538-39, 641 A.2d 329, 331 (1994).