BRB No. 00-0446

PERRY L. MIXON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FORT JAMES CORPORATION	)	DATE ISSUED: Jan. 12, 2001
	)	
and	)	
	)	
CONSTITUTION STATE SERVICES COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Peter W. Preston and Meagan A. Flynn (Preston Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Decision (99-LHC-1593) of Administrative Law Judge Daniel L. Stewart rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a pallet repairman, alleged he injured his right knee on September 2, 1998, in a fall in employer's parking lot 10 to 15 minutes before his shift was to begin. The administrative law judge granted employer's motion for summary decision, concluding that

claimant did not establish the second prong of his *prima facie* case, *i.e.*, "working conditions" which could have caused his injury. Consequently, the administrative law judge canceled the scheduled hearing.

On appeal, claimant challenges the administrative law judge's Order Granting Employer's Motion for Summary Decision. Employer responds in support of the administrative law judge's Order to which claimant replied.

Claimant contends that the administrative law judge erred in granting employer's motion for summary decision because there are genuine issues of material fact with regard to whether claimant's injury arose out of and in the course of his employment. Any party may move for summary decision, at least twenty days before the hearing, where there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 3-4 (1990); 29 C.F.R. §§18.40, 18.41. To defeat a motion for summary judgment, the party opposing the motion must establish the existence of a genuine issue of material fact, which is defined as a fact which affects the outcome of the litigation. *See Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Hall*, 24 BRBS at 4. In determining the propriety of a summary decision, the administrative law judge must draw all reasonable inferences in favor of the party opposing the motion. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Dunn*, 33 BRBS at 207.

An injury occurs in the "course of employment" if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Generally, injuries sustained by employees on their way to or from work are not compensable (the "coming and going rule"). *See, e.g.*, *Sawyer v. Tideland Welding Service*, 16 BRBS 344, 345 (1984). An employee is allowed a reasonable time before work to enter employer's premises; injuries occurring on the premises during this time arise within the scope of employment, and the "coming and going rule" does not apply. 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §§13.01-13.05 (2000); *see generally Trimble v. Army & Air Force Exchange Service*, 32 BRBS 239 (1998); *Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch*, 23 BRBS 175 (1990). Thus, a claimant who is injured immediately before or after work in a parking lot owned by employer may be within the course of employment. *See Alston v. Safeway Stores, Inc.*, 19 BRBS 86 (1986). In addition, where the "coming and going rule" applies, several exceptions have been recognized, including where the employer controls claimant's journey to work. *See Cardillo v. Liberty Mutual Ins. Co.*,

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[1]No evidence, other than claimant's deposition, was admitted into the record. Apparently, claimant's claim is for periods of temporary total and partial disability benefits from the date of injury on September 2, 1998, to his return to his usual work with employer on January 19, 1999. Employer did not pay any disability or medical benefits.

330 U.S. 469 (1947); *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982).

An injury "arises out of employment" if it is caused by an accident at work or is due to conditions of employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Section 20(a) of the Act, 33 U.S.C. §920(a), presumes, in the absence of substantial evidence to the contrary, that claimant's injury arises out of and in the course of his employment. *Durrah*, 760 F.2d 322, 17 BRBS 95(CRT). In order to invoke the Section 20(a) presumption, claimant must establish his *prima facie* case by proving two elements: the existence of a harm and the occurrence of an accident or the existence of working conditions which could have caused the harm. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

In his Order, the administrative law judge did not address the threshold issue of whether claimant's injury occurred in the course of his employment, which was an issue raised by employer in its motion for summary decision. Employer argued that claimant was not entitled to benefits as his injury did not occur in the course of his employment, asserting the "coming and going rule" applies since claimant was on his way to work and no exceptions to the "coming and going rule," including the "control" exception, apply. In response, claimant asserted that his injury did occur during the course and scope of his employment since the "coming and going rule" does not apply as employer owns and is responsible for its parking lot and he was allowed a reasonable amount of time, here 10 to 15 minutes, before his shift was to begin to enter employer's premises.

Initially, the issue of whether claimant's injury occurred in the course of his employment is not appropriate for summary decision in this case. Viewing the record in the light most favorable to the party opposing the motion, claimant established the existence of a genuine issue of material fact sufficient to bring his injury within the course of employment. Claimant's contention that the "coming and going rule" does not apply where employer owns the premises, including a parking lot, and an employee enters these premises a reasonable amount of time before work is a correct statement of law. *See Alston*, 19 BRBS at 88, n.1; *see also Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99 (CRT)(4th Cir. 1998); *Sharib v. Navy Exchange Service*, 32 BRBS 281 (1998); *Trimble*, 32 BRBS 239 (injuries sustained going to work covered under the Act as employer exercised control over the employees' journey to work even though it did not own the premises where the injuries occurred). Since claimant's claim was based on the assertion that he was injured in employer's parking lot shortly before work, these facts must be accepted in viewing the case in the light most favorable to claimant for purposes of deciding on summary disposition. As acceptance of such facts on their face brings claimant within the course of employment, a summary decision cannot be entered against him on this issue. *See generally Dunn*, 33 BRBS at 204; 29 C.F.R. §§18.40, 18.41. Moreover, while the only indication that employer owns the premises is claimant's assertion in his response to employer's motion for summary decision and his brief on appeal, that suffices to preclude the administrative law judge from granting employer's motion for summary decision. In addition, Section 20(a) applies, placing the

burden on employer to present evidence contrary to the claim, such as evidence that the parking lot where claimant allegedly tripped and fell was not owned by employer or part of its premises.

Moreover, we reverse the administrative law judge's grant of summary decision on the issue of the work-relatedness of claimant's knee injury, as claimant raised a genuine issue of material fact, and as the administrative law judge erred on a matter of law. In his Order, the administrative law judge concluded that claimant could not establish the "working conditions" prong of his *prima facie* case. Specifically, the administrative law judge stated that claimant "has not introduced sufficient evidence to support [his] assertion" that he tripped and fell, as claimant did not establish some condition in the parking lot that caused him to trip and fall. Order at 4. Claimant correctly contends that he is not required to prove the existence of such a condition, but only that an "accident" in fact occurred. Thus, the administrative law judge erred in requiring that claimant demonstrate that he tripped over something in the parking lot. *See* 33 U.S.C. §904(b) ("Compensation shall be payable irrespective of fault as a cause for the injury"). It is sufficient for purposes of invoking the Section 20(a) presumption that claimant demonstrate only that he in fact fell at work. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *see generally U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631. Claimant's uncontradicted testimony that he tripped and fell in employer's parking lot 10 to 15 minutes before his shift was to begin is sufficient to establish that an "accident" in fact occurred which could have caused his injury. *See* Cl. Depo. at 11, 14, 16-20; *see generally* *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). Inasmuch as it is uncontested that claimant sustained a harm to his knee, we reverse the administrative law judge's grant of summary judgment, and we hold that, if these facts are proven, the Section 20(a) presumption is invoked as to the issue of whether claimant's injury arose out of his employment.

The case is remanded to the administrative law judge so that the parties may submit evidence on the issues in this case, including the course of employment and employer's burden of production under the Section 20(a) presumption. *See generally* *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert.*

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[2]Section 20(a) is invoked upon proof that an accident occurred or working conditions existed which could have caused the injury. The "working conditions" prong applies most commonly where claimant suffers an occupational disease allegedly due to exposure to injurious stimuli, and this exposure is the "working condition."

[3]Claimant's testimony is corroborated by Dr. Rusch's report of September 23, 1998, wherein the physician reports that claimant stated that he injured his right knee after tripping at work on September 2, 1998. Moreover, as claimant had a previous right knee injury and surgery in 1994, the aggravation rule is implicated. *See* *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

denied, 120 S.Ct. 1239 (2000). In rendering a decision on remand, the administrative law judge must consider the evidence in accordance with applicable law and provide a fully reasoned analysis of the issues consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c). 33 U.S.C. §919(d).

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Decision is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge