BRB No. 93-2108

WILMA TRIMBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:_____
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Alan J. Shapiro (Shapiro, Kendis & Associates), Cleveland, Ohio, for claimant.

William M. Newman, Jr. (Boehl, Stopher & Graves), Louisville, Kentucky, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-02626) of Administrative Law Judge Richard E. Huddleston 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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, on March 5, 1988, slipped on wet, ice-covered pavement adjacent to the employee-designated entrance door of employer's facility.[1] This entrance door is connected to a parking lot, where claimant was instructed to park, by the sidewalk on which claimant fell. As a result of her fall, claimant sustained injuries to her right foot and hand, lower back, and right shoulder, and subsequently suffered from severe headaches. Employer voluntarily paid temporary total disability benefits for the period March 5, 1988, to April 25, 1991, *see* 33 U.S.C. §908(b), as well as medical benefits. 33 U.S.C. §907. Claimant has not returned to her regular employment since the date of her work injury.

In his Decision and Order, the administrative law judge, after finding that claimant's injuries occurred prior to her arrival on employer's premises, denied claimant's claim for benefits on the grounds that claimant's injuries did not occur in the scope and course of her employment. In this regard, the administrative law judge determined that, contrary to claimant's assertions, the "zone of special danger" exception to the "coming and going" rule was inapplicable to claims arising under the Act. Accordingly, the administrative law judge denied the instant claim.

On appeal, claimant challenges the administrative law judge's denial of her claim, specifically alleging that she was injured in the course of her employment within the meaning of the Act because employer, in designating the parking lot where employees were to park their vehicles, placed her in a "zone of special danger." Employer responds, urging affirmance of the administrative law judge's denial of benefits.

It is well-established that for an injury to be considered to arise in the course of employment, it must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2). *See, e.g., Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73, 75 (1984). Generally, injuries sustained by employees on their way to or from work are not compensable, as travelling to and from work is not within the scope of the employees' employment. *See, e.g., Sawyer v. Tideland Welding Service*, 16 BRBS 344, 345 (1984). Several exceptions to the so-called "coming and going" rule have been recognized, however, in situations where "the hazards of the journey may fairly be regarded as the hazards of the service." *See Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 479, 67 S.Ct. 801, 807-808 (1947).

We reject claimant's contention that the administrative law judge erred in determining that the "zone of special danger" exception to the "coming and going" rule is inapplicable in this case, which arises under the Nonappropriated Fund Instrumentalities Act. The Board has limited application of the "zone of special danger" doctrine to the Defense Base Act and cases arising under the District of Columbia Workers' Compensation Act. *See Harris v. England Air Force Base*, 23 BRBS 175 (1990); *McNamara v. Mac's Pipe & Drum, Inc.*, 21 BRBS 111 (1988). The "zone of

[1]The administrative law judge found that it is undisputed that employer is a nonappropriated fund activity with civilian personnel and that the grounds and the buildings are owned by Wright Patterson Air Force Base.

special danger" test was formulated in cases arising under the Defense Base Act where the circumstances of the employee's employment place the employee in a foreign setting where he is exposed to dangerous conditions; such a situation is not analogous to that in this case.[2] Accordingly, for the reasons set forth in *Harris*, we affirm the administrative law judge's conclusion that the "zone of special danger" exception is inapplicable in the instant case. *See Harris*, 23 BRBS at 175; *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989).

We note, however, that although claimant specifically raised and argued the "coming and going" rule, the administrative law judge did not address whether the evidence of record is sufficient to satisfy any of the exceptions to that rule. The United States Supreme Court has recognized various exceptions to the "coming and going rule," which include situations where:

(a) the employer pays for the employee's travel expenses, or furnishes the transportation;
(b) the employer controls the journey;
(c) the employee is on a special errand for the employer; or
(d) the employee is subject to emergency calls.

Cardillo, 330 U.S. at 469, 67 S.Ct. at 801; *see Perkins v. Marine Terminal Corp.*, 673 F.2d 1097, 1102, 14 BRBS 771, 774 (9th Cir. 1982). In the instant case, claimant has submitted evidence which, if credited, may satisfy one of the exceptions to the "coming and going" rule recognized by the Supreme Court. Specifically, claimant testified that employer, during its orientation program, instructed its employees to park their vehicles in the parking lot located behind its building and to enter the rear door which was accessible from that lot. *See* EX 9 at 17-19. Mr. Douglas Logan, employer's operations manager, similarly testified that the only employee entrance to employer's facility was located in the rear of the building, that employer's customers would "absolutely not " use this entrance, and that the parking lot is utilized by both employees and vendors servicing employer's store. *See* EX 1 at 6-10.[3] This evidence is relevant to employer's control of that part of the journey where claimant was injured. Accordingly, as the administrative law judge did not consider this evidence in light of the exceptions recognized by the Supreme Court, we vacate the administrative law judge's denial of benefits and remand the case to the administrative law judge for reconsideration of the evidence of record; specifically, on remand, the administrative law judge must determine whether any of the exceptions to the coming and going rule apply to the circumstances of this case. *See Cardillo*, 330 U.S. at 469, 67 S.Ct. at 801.

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[2]Claimant asserts that since the "zone of special danger" test is applied in cases under the District of Columbia Workers' Compensation Act, workers in other parts of the United States are also entitled to its application. However, the Board applies this test in D.C. Act cases because we are bound by the decisions of the United States Court of Appeals for the District of Columbia Circuit, and that court has held it applicable. *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95 (CRT) (D.C. Cir. 1985); *see Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988) (zone of special danger exception applied to claimant employed in D.C. who was injured in Peru).

[3]Mr. Logan testified that even though "the Base" retains custodial and maintenance upkeep duties of the employee parking lot, his staff "would shovel and salt the walks" because employer "had people coming in at 5:00 in the morning." *See* EX 1 at 6-7, 10-11, 14.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge