

BRB No. 98-0525

LINDA SHARIB)
)
 Claimant-Petitioner) DATE ISSUED: Dec. 17, 1998
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 v.)
)
 NAVY EXCHANGE)
 SERVICE)
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 and)
)
 CRAWFORD & COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Joseph F. Manes (Manes & Manes), Millwood, New York, for claimant.

Francis M. Womack III (Weber, Goldstein, Greenberg and Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-0967) of Administrative Law Judge Ralph A. Romano denying benefits 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, employed as a program analyst at the Navy Exchange Service

(NEXCOM) facility at Fort Wadsworth, Staten Island, New York, sustained injuries to her right leg as a result of a fall which occurred on April 25, 1994. Specifically, claimant was injured on her way to work in the morning when she fell into an obscured rut in a grass area abutting a partially destroyed walkway as she proceeded from the parking area to her office, Building 208. Claimant thereafter filed a claim for benefits under the Act. In response, employer argued that claimant's injury did not occur in the course of her employment.¹

In his decision, the administrative law judge determined that as employer did not own or maintain the parking lot and accompanying area at which claimant's injury occurred, the claim is barred by the "coming and going" rule. Consequently, benefits were denied on the ground that claimant's injury did not occur in the course of her employment.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant asserts that the administrative law judge erred in applying the "coming and going" rule to bar entitlement to benefits in this case. Claimant maintains that as employer unquestionably impeded and destroyed the most direct, normal, and reasonable route to claimant's work station, *i.e.*, the sidewalk leading to Building 208, and also created the hazard, *i.e.*, the ruts in the grass next to the sidewalk, on the alternate route chosen by claimant to proceed to Building 208, which ultimately caused claimant's injury, the instant case falls beyond the application of the "coming and going" rule. In support of her position, claimant forwards that at the very least, every employee should have the right to safe egress and ingress to the work site,² and consequently, she should be entitled to coverage

¹The parties stipulated that claimant sustained a 16.25 percent permanent partial disability to her right leg as a result of the subject accidental fall.

²Claimant notes that New York state has long considered safe ingress and

under the Act when an employer creates a hazardous condition.

In the instant case, the administrative law judge credited the unrefuted testimony of Mr. Stoecker, employer's Director of Risk Management, that employer did not own the buildings or any of the grounds surrounding the buildings at Fort Wadsworth. The administrative law judge then found that employer's designation of the parking lot and its direction that claimant park in this lot does not rise to the level of control necessary to impute ownership upon employer for purposes of coverage under the Act, as there is no evidence suggesting that this arrangement was other than for claimant's convenience. In addition, the administrative law judge found that there is no evidence that employer exercised substantial, or any, control over the maintenance of the parking lot or area surrounding the building, and thus, found no support for claimant's proposition that because employer's moving vehicles damaged the property, it should have been considered as having the requisite "control" to exclude application of the "coming and going" rule by finding that the injury occurred on employer's premises. Decision and Order at 5.

gress from a work site as a factor in determining compensability for workers' compensation and urges the Board to similarly accept such a proposition. Specifically, claimant cites several New York state decisions as the basis for her argument that the Board should extend coverage to employees who utilize the only normal, direct and reasonable access to the work site and are injured as a result of adverse conditions created by employer on said route.

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). *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95 (CRT)(D.C. Cir. 1985). Generally, injuries sustained by employees on their way to or from work are not compensable, as traveling 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). However, once an employee arrives on her employer's premises, the so called "coming and going" rule no longer precludes recovery of workers' compensation benefits.³ "As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and from work before or after working hours . . . are compensable." 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §15.00 *et seq.* (1997) (emphasis added); see *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99 (CRT)(4th Cir. 1998); *Durrah*, 760 F.2d at 322, 17 BRBS at 95 (CRT).

³We note that the question of whether claimant's injury occurred on employer's premises, which is the context of claimant's argument in the instant appeal, as opposed to whether the "employer control" exception to the coming and going rule applies, are similar in nature as the resolution of both questions turns on the degree of control exercised by employer. See *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99 (CRT)(4th Cir. 1998); *Trimble v. Army & Air Force Exchange*, BRBS , BRB No. 98-198 (Oct. 14, 1998). Inasmuch as claimant's contentions on appeal argue for coverage based on the fact that claimant's injury occurred on employer's premises, we shall consider this basis for compensability under the Act and, thus, will forgo any detailed consideration of the coming and going rule and its accompanying exceptions.

In *Shivers*, the claimant, who worked for an entity operating on nonappropriated funds, slipped and fell in the employee parking lot opposite the employer's employee entrance. *Shivers*, 144 F.3d at 322, 32 BRBS at 99 (CRT). The United States Court of Appeals for the Fourth Circuit held that although the employer did not own the parking lot where claimant was injured, employer directed its employees to park there and had an active hand in controlling the lot and maintaining the grounds and sidewalks around the office building, such that the parking lot was part of the employer's premises for purposes of recovery under the Act. *Shivers*, 144 F.3d at 325, 32 BRBS at 101 (CRT). See also *Trimble v. Army & Air Force Exchange Service*, ___ BRBS ___, BRB No. 98-198 (Oct. 14, 1998).

We hold, on the facts of this case, that claimant's injury occurred on employer's "premises," and thus, we reverse the denial of benefits. Claimant testified that she was required by her employer to park in a designated parking lot behind her office building, Building 208. Hearing Transcript (HT) at 15. The record establishes that in undertaking a move of its operation from Fort Wadsworth, employer parked large moving trucks atop the curb, sidewalk and surrounding area, up to the doors of Building 208, over the course of several months' time. HT at 18. More importantly, although employer may not be responsible for the maintenance of the area surrounding its building as there is no evidence of record on this issue either way, it is nevertheless responsible for the deteriorated condition of that area, as moving trucks caused the destruction of the sidewalk and the ruts in the surrounding grass area where claimant's injury occurred. Consequently, the instant case includes an affirmative act on the part of employer in operating its business, which created a risk of employment not shared with the public. See generally *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *Trimble*, slip op at 3. This establishes that employer exercised sufficient control over the area in which claimant's injury occurred, such that the area in question is to be considered part of employer's premises. The coming and going rule is therefore not applicable to the instant case as claimant's injury occurred on employer's premises. *Shivers*, 144 F.3d at 325, 32 BRBS at 101 (CRT). Thus, contrary to the administrative law judge's decision, claimant's injury did occur in the course of her employment and she is accordingly entitled to benefits under the Act. We must therefore reverse the administrative law judge's finding that claimant's claim is barred by application of the coming and going rule, and remand the instant case for the calculation of an award based upon the parties' stipulation that claimant sustained a 16.25 percent permanent partial disability to her right leg as a result of the accidental fall.⁴

⁴In light of our disposition of the instant case, we need not address claimant's

alternative argument for finding entitlement under the Act.

Accordingly, the administrative law judge's Decision and Order denying benefits is reversed and the case is remanded for an entrance of an award in compliance with the parties' stipulations.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge