BRB No. 12-0322

SIDNEY WEBSTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	DATE ISSUED: 01/29/2013
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom & Sinins), Hoboken, New Jersey, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-00185) of Administrative Law Judge Adele Higgins Odegard 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 findings of fact and conclusions of law of the administrative law judge if they 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 worked part-time for the Morale, Welfare and Recreation Program (MWR, employer), a nonappropriated funds entity, at the U.S. Army facility in Mannheim, Germany. After finishing work on March 3, 2009, claimant left his primary place of employment, Building 696, in route to his vehicle when, as a result of a stumble and fall accident in the parking lot, he sustained injuries to his neck and upper back. Claimant filed a claim for benefits and the parties subsequently agreed, before the

administrative law judge, to limit the initial adjudication of the claim to the issue of whether claimant's injury "arose out of and in the course of his employment."

The administrative law judge found that claimant was not on employer's premises at the time of his injury as the record establishes that the site of the accident, the parking lot, was not owned or controlled by employer. Specifically, the administrative law judge found that employer did not exert sufficient control over claimant's use of the parking lot, or assume sufficient responsibility over its upkeep and maintenance, for the parking lot to be considered part of employer's "premises." The administrative law judge also rejected claimant's contention that his injury comes within an exception to the "coming and going rule." Therefore, the administrative law judge denied the claim for benefits as claimant's injury did not occur within the course of his employment.

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

Claimant contends the administrative law judge erred in finding that his injury did not occur in the course of his employment. Claimant avers that employer had sufficient control over the parking lot to either render the "coming and going" rule inapplicable or to fit this case within an exception to that rule. Claimant further contends that the facts of this case are similar to those in *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99(CRT) (4th Cir. 1998), *Trimble v. Army & Air Force Exchange Service*, 32 BRBS 239 (1998), and *Sharib v. Navy Exchange Service*, 32 BRBS 281 (1998). He thus asserts that the administrative law judge erred in finding that the evidence does not establish that the parking lot was part of employer's "premises."

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. 33 U.S.C. §902(2); *see, e.g., Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985). The Section 20(a), 33 U.S.C. §920(a), presumption applies to this issue. *See, e.g., Boyd v. Ceres Terminals*, 30 BRBS 218 (1996); *Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73 (1984). 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 employee's employment and employees are subjected to hazards to which the general public is exposed. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1979); *see, e.g., King v. Unique Temporaries, Inc.*, 15 BRBS 94 (1981). Thus, employees going to and from work who are injured on public sidewalks or in parking lots that are not owned or controlled by employer are not within the course of their employment, unless an exception to the coming and going rule applies. *Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986).

The cases upon which claimant relies are distinguishable from the facts of his case. In *Shivers*, 144 F.3d 322, 32 BRBS 99(CRT), the United States Court of Appeals for the Fourth Circuit addressed the boundaries of an employer's premises in a case in which the claimant, who worked for an entity operating on nonappropriated funds, fell on a grassy median adjacent to the employee parking lot opposite the employee entrance. The employer did not own the property and was not responsible for major structural repairs, but it did maintain the property for the exclusive use of its employees. Specifically, the employer issued parking decals to its employees, patrolled the lot, and used its own towing service to remove cars without the required decals. Additionally, the employer used its employees to maintain the grounds around its building and the parking lot by mowing the grassy area where the claimant fell, picking up trash, and salting the sidewalks from the employer's building to the parking lot when it snowed. The Fourth Circuit held that although the employer did not own the parking lot where the claimant was injured, employer directed its employees to park there and had an active hand in controlling the lot, such that the parking lot was part of the employer's premises for purposes of the Act's course-of-employment requirement and therefore, that the claimant's injury occurred in the course of her employment. *Shivers*, 144 F.3d at 325, 32 BRBS at 101(CRT).

In *Sharib*, 32 BRBS 281, the claimant was injured at Fort Wadsworth, New York, outside of the MWR employer's building. The Board held that the claimant's injury occurred on the employer's "premises" and, thus, reversed the administrative law judge's finding that claimant's injury on her way to work did not occur in the course of her employment. Specifically, the Board held that although the employer was not responsible for the maintenance of the area surrounding its building, as there was no evidence of record on this issue either way, it nevertheless was responsible for the deteriorated condition of that area, as moving trucks used by the employer to relocate its operation caused the destruction of the sidewalk and the ruts in the surrounding grass area where the claimant's injury occurred. In this regard, the Board noted that the case involved an affirmative act on the part of the employer in operating its business, which created a risk of employment not shared with the public. Employer's conduct established that the employer exercised sufficient control over the area where the claimant's injury occurred such that the area should be considered part of the employer's premises. Consequently, under these specific circumstances, the Board held that the coming and going rule was inapplicable and that the claimant's injury was incurred in the course of her employment. *Sharib*, 32 BRBS 281.

In *Trimble*, 32 BRBS 239, the claimant injured herself on an ice-covered sidewalk adjacent to the employee-designated entrance door of the MWR employer's facility at an air force base. The Board held that since employer exercised control over the area where the claimant was injured, claimant's injury arose in the course of her employment. Specifically, the Board noted that employer designated the parking lot and entrance which its employees were to use, and the administrative law judge credited testimony that

employer maintained the sidewalk. In so holding, the Board applied the rationale of the Fourth Circuit in *Shivers*, 144 F.3d 322, 32 BRBS 99(CRT).

In contrast to these cases, in *Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch*, 23 BRBS 175 (1990), and *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989), the Board affirmed findings that injuries occurring in parking lots on air force bases did not occur on the MWR employers' premises. In *Cantrell*, the claimant, a cashier for a restaurant located on the grounds of the air force base, tripped and fell while walking from a parking lot within the base gate to the restaurant. The Board affirmed the administrative law judge's finding that since claimant's injury occurred one-half block from employer's actual location, claimant was not on employer's premises at the time of injury, and therefore, the coming and going rule applied. *Cantrell*, 22 BRBS 372. Similarly, in *Harris*, employer's operation was located on the grounds of the air force base, and the claimant, after working her shift, suffered an injury when she fell while walking to her car in a parking lot which was adjacent to employer's building. In reversing the award of benefits, the Board held that the parking lot was not part of employer's premises, as employer was a separate entity from the base and lacked control over or responsibility for the condition of the area surrounding the building it occupied, including the parking lot where claimant was injured. As in *Cantrell*, the Board concluded that the claimant's injury occurred outside the time and space boundaries of employment, and that no exception to the coming and going rule was applicable. *Harris*, 23 BRBS 175.

In this case, the administrative law judge found there is no evidence that employer was responsible for the upkeep and maintenance of the parking lot opposite Building 696. In this regard, the administrative law judge found that both claimant and Ms. Guzman, employer's facility director at the time of claimant's injury, testified that other people were responsible for maintenance of the parking lot. Specifically, Ms. Guzman stated that it was "a contracting company" called "DPW" that "maintains the entire concern," including cleaning the streets and the parking lots. CX 13, Dep. at 19, 50-52. Claimant stated that there was a particular individual who did tasks such as snow removal and general maintenance of the facility and parking lots. CX 12, Dep. at 37-40. The administrative law judge further noted that while both claimant and Ms. Guzman testified that, on occasion, employees would pick up trash in the lot, neither one indicated that employer required or even suggested that its employees engage in any maintenance activity beyond picking up trash.[1]

[1]In particular, the administrative law judge found that there is no evidence that employees ever repaired the lot or shoveled snow.

Based on this evidence, the administrative law judge found that employer's responsibility for the parking lot was minimal and involved nothing more than "beautification" on an occasional or incidental basis. Additionally, the administrative law judge found that Ms. Guzman's uncontradicted testimony establishes that the parking was open to anyone and that persons other than those working for employer routinely used it such that the administrative law judge could not conclude that employer dictated where claimant was to park. She thus found that employer did not assume sufficient responsibility over the upkeep and maintenance of the parking lot or exert sufficient control over claimant's use of the parking lot for it to be deemed employer's premises. The administrative law judge therefore distinguished *Shivers*, *Trimble*, and *Sharib* and found the case is akin to *Cantrell* and *Harris.*

The Board is not empowered to reweigh the evidence, and the administrative law judge's weighing of the evidence must be affirmed if it is rational and supported by substantial evidence. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge thoroughly addressed the evidence of record, *see* Decision and Order at 4-7, specifically addressing the testimony of claimant and Ms. Guzman, and rationally credited the statements of Ms. Guzman, as corroborated in part by those of claimant, in finding that the parking lot was not part of employer's "premises." Moreover, as the administrative law judge found, Decision and Order at 9 n.10, none of the exceptions to the "coming and going" rule which have been recognized in situations where "the hazards of the journey may fairly be regarded as the hazards of the service," exist in this case.[2] *Cardillo*, 330 U.S. at 479. As the administrative law judge's finding that claimant's injury did not occur within the "space" boundaries of his employment nor within an exception to the coming and going rule is supported by substantial evidence, we affirm the denial of the claim as claimant's injury did not occur in the course of his employment. 33 U.S.C. §902(2); *Harris*, 23 BRBS 175; *Cantrell*, 22 BRBS 372.

Moreover, we reject claimant's assertion that he is an employee of the United States Department of the Army, as opposed to the MWR, such that his accident occurred on the premises of his employer. As the administrative law judge properly found, the record establishes that claimant is an employee of the Army's MWR organization, *see*

[2]Specifically, there is no evidence that: (a) employer paid for the employee's travel expenses or furnished the transportation; (b) employer controlled the journey; (c) claimant was on a special errand for employer; or (d) claimant was subject to emergency calls. *Cardillo*, 330 U.S. at 480; *Shivers*, 144 F.3d 322, 32 BRBS 99(CRT); *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982); *Broderick v. Electric Boat Corp.*, 35 BRBS 33 (2001).

CX 13 at 5, which the parties stipulated is a nonappropriated fund instrumentality.[3] In *Harris*, the Board explained that while the employer, the England Air Force Base Nonappropriated Fund Financial Management Branch, "is located on the base, *it is a separate entity* operating on nonappropriated funds." *Harris*, 23 BRBS at 178 (emphasis added). Furthermore, the administrative law judge properly stated that, if, as claimant suggested, his employer were the United States Army rather than the MWR, he would not be entitled to recover any benefits under the Act.[4] 5 U.S.C. §§2105(c), 8171-8173; *Utria v. U.S. Marine Exchange*, 7 BRBS 387, 388 (1978). Therefore, as 1) MWR is claimant's employer; (2) MWR is a nonappropriated fund entity; and 3) claimant was not injured on MWR's premises as he walked to his car after work, we affirm the denial of benefits under the Act as claimant was not injured in the course of his employment.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[3]"Nonappropriated fund instrumentalities," such as retail and recreational activities on military installations, are not funded by congressional appropriations, and their expenses, including the salaries of their employees, are paid out of earnings generated by the activities. *See A.P. [Panaganiban] v. Navy Exchange Service Command*, 43 BRBS 123 (2009).

[4]Rather, claimant's workers' compensation remedy would fall under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §8101 *et seq.* Employees of MWR entities are specifically excluded from recovering under the FECA. 5 U.S.C. §2105(c); *see Vilanova v. United States*, 851 F.2d 1, 2 n.2 (1st Cir. 1988); *Johnson v. United States*, 600 F.2d 1218, 1221 (6th Cir. 1979); *Army & Air Force Exchange Service v. Hanson*, 360 F.Supp. 258, 260 (D. Haw. 1970).