U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0253

ROMEL E. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PORTS AMERICA, INCORPORATED	)	
	)	DATE ISSUED: 05/08/2020
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Employer/Carrier's Motion for Reconsideration of Order Denying Employer/Carrier's Motion for Summary Decision of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan Israel, Jacksonville, Florida, for claimant.

Mark K. Eckels (Boyd & Jenerette), Jacksonville, Florida, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals the Order Granting Employer/Carrier's Motion for Reconsideration of Order Denying Employer/Carrier's Motion for Summary Decision ("Order") (2016-LHC-00496) of Administrative Law Judge Peter B. Silvain, Jr., rendered

on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was hired to work a four-hour shift for employer on September 11, 2015, beginning at 5 a.m. Order at 2. He and his crew were to tie-up a vessel arriving at the port. *Id.* Employer allowed the crew to leave the port after the tie-up was completed, subject to recall during the remainder of the shift if the vessel needed to be moved or retied. *Id.* at 3. The vessel was secured by approximately 6 a.m., and claimant departed. *Id.* A train struck his private vehicle as he left work. *Id.* at 4.[2]

Claimant filed a claim under the Act for benefits for his injury. Employer filed a motion for summary decision, contending claimant's injury did not occur in the course of his employment by virtue of the "coming and going rule," which, absent certain exceptions, precludes compensability for injuries while traveling to or from work. Claimant did not respond that he was injured on a covered situs. Instead, he asserted only that he fit under an exception to the rule because employer paid him for his whole shift regardless of when he left and imposed restrictions on him during the recall period. Claimant's Response to Employer/Carrier's Motion for Reconsideration at 1-2 (unpaginated). Claimant asserted no other basis for coverage. *Id.* The administrative law judge rejected claimant's contentions, finding them legally insufficient to establish an exception to the coming and going rule. He granted employer's motion for summary decision and denied the claim.

Claimant generally repeats his arguments on appeal. Employer responds the administrative law judge's decision should be affirmed. We agree with employer.[3]

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[1] The administrative law judge initially denied employer's motion for summary decision because it failed to demonstrate the absence of a genuine issue of material fact. Employer refiled its motion with additional documentation as a motion for reconsideration.

[2] These facts are taken exclusively from the statement of undisputed facts in the administrative law judge's order. Claimant did not contest these facts below, nor does he dispute them on appeal. *See, e.g.*, Claimant's Response to Employer/Carrier's Motion for Reconsideration ("The facts in this case do not appear to be in dispute, thus making Summary Decision an appropriate vehicle."); Claimant's Brief at 1 ("The Order under review sets for (sic) the undisputed facts.").

[3] Notably, employer also appended to its response brief a motion to strike claimant's petition because it was filed out of time. In its June 25, 2019 Order, the Board denied

An administrative law judge may grant summary decision when no genuine issues of material fact exist and a party is entitled to a decision as a matter of law. 29 C.F.R. §18.72; *see, e.g., Cathey v. Serv. Employees Int'l, Inc.*, 46 BRBS 69 (2012), *clarified on recon.*, 47 BRBS 9 (2013). Claimant reiterates no facts are in dispute, Claimant's Brief at 1 (unpaginated), and does not contend -- as he did not in response to the summary decision motion -- that his accident occurred on a covered situs. *Id.* Instead, he solely argues once again that "where an employee is engaged to perform work for a specific time, is required to be available during the entire specific time period, and is paid for the entire period" the employee "should be found to be in the course and scope of his employment" as an exception to the coming and going rule. *Id.* at 2. Claimant is incorrect.

The United States Supreme Court has recognized narrow exceptions to the rule where: (1) the employer contracts to and does provide transportation to and from work; (2) the employer requires the employee to travel; (3) the employee is performing something incidental to his employment with the knowledge and approval of the employer; or (4) the employee is subject to emergency calls, as in the case of firemen. *Cardillo v. Liberty Mutual Ins.*, 330 U.S. 469, 479 (1947); *see Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982); *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS 83 (2015); *Broderick v. Electric Boat Corp.*, 35 BRBS 33 (2001). Here, the administrative law judge correctly rejected claimant's contention that his on-call status and accompanying restrictions qualified him for the "emergency call" exception for two reasons.[4]

First, the administrative law judge correctly found claimant was not responding to employer's recall at the time of the accident. Order at 3. Claimant's injury occurred while he was on a personal mission after the end of his shift, not while returning to work. *Id.*

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employer's motion and accepted claimant's late pleading. *Johnson v. Ports America, Inc.*, BRB No. 19-0253 (June 25, 2019) (Order). The Board also denied employer's motion to dismiss on the basis of Section 33(g), 33 U.S.C. §933(g). Employer contended claimant is not entitled to benefits under Section 33(g) because he entered into a third-party settlement without obtaining employer/carrier's prior written approval. The Board stated this issue was not before the administrative law judge nor is there any record evidence pertaining to the applicability of Section 33(g). Consequently, the Board cannot consider that issue. 20 C.F.R. §802.301(b).

[4] Claimant does not dispute that the first three exceptions are inapplicable: he does not contend that employer furnished his transportation, paid his transportation costs, or controlled his journey. Order at 6. Instead, after receiving the "all clear" to leave the port, claimant drove his personal vehicle exclusively for his own needs and at his own expense. *Id.*

And although claimant technically was subject to recall should the ship unexpectedly become unmoored, in his 25 years of employment he had never been summoned back to work. *Id*. Hornbook law thus fundamentally distinguishes claimant, who was (at most) subject to general recall, from an employee responding to an employer's actual emergency call:

> The circumstance that the employee is "subject to call" should not be given any independent importance in the narrow field of going to and from work; the important questions are whether the employee was in fact on an errand pursuant to call, and what kind of errand it was. . . . A *fortiori*, the mere fact that an employee is generally on call should not make a special errand of a normal going and coming trip that is not in response to a special call.

Lex K. Larson and Thomas A. Robinson, *Larson's Workers' Compensation Law*, § 14.05[6] (2019). Simply being hypothetically subject to recall does not qualify claimant for the emergency call exception to the coming and going rule. *Id.*

Second, the administrative law judge correctly held paid "on-call status" and its accompanying restrictions are insufficient to establish an exception to the coming and going rule. Order at 7, citing *Oliver v. Murry's Steaks*, 17 BRBS 105, 107 n.3 (1985) (specifically noting that "*on-call status by itself is not enough*" to trigger an exception to the coming and going rule) (emphasis added); *see also Foster v. Massey*, 407 F.2d 343, 344 (D.C. Cir. 1968) (noting a salaried employee is not considered to be in the course of employment for 24 hours a day and "the same reasoning applies to a guaranteed wage" provided to on-call employee); *Boudreaux*, 49 BRBS at 87 (recognizing that exceptions to the coming and going rule have been limited to situations in which "the hazards of the journey may be fairly regarded as the hazards of the service") (citation omitted).

The administrative law judge correctly found the facts as conceded by claimant in response to employer's summary judgment motion do not fit within any of the recognized exceptions to the coming-and-going rule. *See Cardillo*, 330 U.S. at 480. Claimant does not contend his accident occurred on a covered situs on appeal and makes no other allegations of error.[5]

[5] While acknowledging claimant did not establish an exception to the coming and going rule, our dissenting colleague argues we should nonetheless reverse the administrative law judge and find, as a matter of law, that claimant's accident instead occurred on a covered situs. Although it could be true claimant's accident occurred on a covered situs, the Board's procedural rules impose certain threshold requirements for alleging specific error before addressing an issue, including presenting "an argument with respect to each issue presented," "a short conclusion stating the precise result the petitioner

Accordingly, we affirm the administrative law judge's Order Granting Employer/Carrier's Motion for Reconsideration of Order Denying Employer/Carrier's Motion for Summary Decision.[6]

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seeks," and "any authorities upon which the petition relies to support such proposed result." 20 C.F.R. §802.211(b); *see, e.g.*, *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015). Claimant plainly does not contend in this appeal his accident occurred on a covered situs -- let alone meet the minimum briefing requirements to address the issue. Claimant's Brief at 2-3. And there is no plain error of law in the Order to justify the Board's raising an issue not contemplated by the parties. *See Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting).

Moreover, because the parties never addressed the situs issue below -- beyond simply agreeing claimant was injured leaving work on a personal mission -- the factual inquiry establishing the location of the accident and the physical layout and purpose of the area necessary to establish it as one covered situs was not conducted. The administrative law judge's single unsupported statement (in dicta) that the accident occurred within a "terminal," is not enough to conclude the entirety of Blount Island is a covered situs simply because it contains terminals and port facilities. *See, e.g. Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 513-514 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981) ("The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area[,]" instead "[a]ll circumstances must be examined."). Accepting our colleague's conclusory assumptions regarding the layout and function of the island, the location of the accident, and the credibility of claimant's testimony in the first instance -- based on an unconstrained review of the record -- thus would completely eviscerate our statutory scope of review. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991) ("The Board does not have the authority to engage in a de novo review of the evidence or to substitute its views for those of the ALJ."); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982) (noting that the record was "too incomplete" to "justify an attempt" to affirm and holding it "inappropriate for the Board to supplement an incomplete record.").

[6] Notably, if claimant believes his accident occurred on a covered situs, he is not without a remedy. The proper avenue to establish the facts necessary to make that determination is through modification, not judicial fiat. *See* 33 U.S.C. §922; *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968) (modification extends to any mistaken determinations of fact). Similarly, employer is free to submit evidence regarding claimant's alleged settlement with a third party that it believes bars recovery under the Act. *Shoemaker v.*

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's holding that benefits are precluded under the "coming and going" rule on the basis that claimant was injured while traveling between his work and home. To the contrary, claimant was injured on a covered situs, by a hazard unique to his longshore employment, while still on-the-clock and being paid an hourly wage. His injury was incidental to his longshore employment and thus is compensable under the Longshore Act.

Background

Claimant has worked at the Port of Jacksonville for more than twenty-five years, performing all manner of longshore work. Cl. Depos. at 13-16; Emp. Motion for Summary Decision at 2. Although his primary job is a lashing supervisor, on the date of injury he was hired by employer to work on a ship-tying crew at Berth 20 of the Blount Island Marine Terminal. Cl. Depos. at 14-15; Emp. Motion for Summary Decision at 2. He has performed this job approximately 40 times throughout his career for various employers. Cl. Depos. at 14-15.

Under the terms of this employment, claimant was paid for a full four-hour shift beginning at 5:00 a.m. Cl. Depos. at 16-17, 22; Emp. Motion for Summary Decision at 2. His specific duty that day was tying an automobile-carrying vessel to the pier at Berth 20 when it came into the terminal, and retying it if it came unmoored. Cl. Depos. at 14-16. As was normal for this type of job, once the vessel was initially secured – a process that took about an hour – he and the other members of the crew were given the "all clear" to

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Schiavone & Sons, Inc., 20 BRBS 214 (1988); *Woods v. Bethlehem Steel Corp*., 17 BRBS 243 (1985).

leave, but were subject to being called back during the remainder of the four-hour shift to re-tie the vessel if needed. *Id*. Regardless of whether they were called back to the terminal, claimant and the rest of the crew were paid for the duration of the shift.

While subject to call back, claimant was permitted to run basic errands but could not do anything that would interfere with his duty to return to the terminal. He specifically chose to work the 5:00 a.m. to 9:00 a.m. shift that day so that he could attend a doctor's appointment at 10:00 a.m. or 11:00 a.m. without interfering with his work obligations. Cl. Depos. at 24. In the meantime, he planned to return home to await instructions on whether to return to the terminal and "maybe" take his son to school or do "whatever is needed at the house." *Id*. at 25, 31.

Claimant was unable to return home that morning, however. He did not make it out of the terminal, or even off the Berth 20 pier. Instead, he tied the vessel, received the "all clear" to leave, loaded his equipment into his car which was parked nearby on the pier, and, after driving 100 to 150 yards, was struck by a train while attempting to exit the pier into the common area of the terminal. Cl. Depos. at 23-28; Emp. Motion for Summary Decision at 1-4.

Claimant filed a claim under the Longshore Act alleging injuries to his back, neck, and shoulder. On employer's motion for summary decision, the administrative law judge dismissed the claim, holding that the coming and going rule precludes coverage as a matter of law. Order at 9. Although claimant was injured "within the confines of the marine terminal," the administrative law judge found that he had already left employer's "premises" within the terminal and thus had "embark[ed] upon a personal mission" at the time he was struck by the train. *Id*. at 6, 9. He therefore concluded claimant "was not in the course of employment at the time of his injury." *Id*. at 9.

Discussion

Under the Longshore Act, an employee may recover benefits for injuries "arising out of and in the course of employment." 33 U.S.C. §902(2). Thus, to be compensable, the injury 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.[7] *Durrah v.*

[7] Arising "out of" employment "refers to injury causation," while arising "in the course of" employment "refers to the time, place, and circumstances of the injury." *Durrah v. Washington Metro. Area Transit Auth.*, 760 F.2d 322, 324 n.2 (D.C. Cir. 1985) (*quoting U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982)).

Washington Metro. Area Transit Auth., 760 F.2d 322 (D.C. Cir. 1985). Employees are entitled to a presumption that their injuries arise out of and in the course of employment, with the burden shifting to the employer to produce substantial evidence "severing the link between employment circumstances and injury." *Id.*, 760 F.2d at 325-326; *see U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 611 (1982).

Employer argues that claimant's injury is excluded from coverage because he is subject to the coming and going rule. Emp. Br. at 7-8. Under this rule, the presumed connection between employment and injury may be severed when the employee is injured while traveling between his home and his regular place of work. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947). The rationale for excluding such injuries is that they "are said not to arise out of and in the course of employment; rather they arise out of the ordinary hazards of the journey, hazards which are faced by all travelers and which are unrelated to the employer's business." *Id*.

Application of the coming and going rule, however, has several significant limitations. Most pertinent to this appeal, "Once an employee arrives on her employer's premises . . . the coming and going rule no longer precludes recovery of workers' compensation benefits."[8] *Shivers v. Navy Exch.*, 144 F.3d 322, 324 (1998); *Sharib v. Navy Exch. Serv.*, 32 BRBS 281 (1998). The leading treatise in the field confirms:

> 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 or at lunchtime are compensable, but if the injury occurs off the premises, it is not compensable, subject to several exceptions.

Lex K. Larson and Thomas A. Robinson, *Larson's Workers' Compensation Law* § 13.00 (2019). According to *Larson's*, the rule providing workers' compensation coverage to employees traveling to and from work while on the employer's premises "has been arrived at . . . with a surprising degree of unanimity." *Id.* at § 13.01[1]. The "logic in the rule" is that unlike cases in which employees are injured on public streets by hazards faced by the

[8] Additional limitations to the coming and going rule include "at least" four exceptions where an employee's injury while traveling to or from work arises from hazards that "may fairly be regarded as the hazards of the service." *Cardillo*, 330 U.S. at 479-480.

general public, "while the employee is on the employer's premises, the connection with the employment environment is physical and tangible." *Id.* at § 13.01[2][a].

Employer tacitly acknowledges this significant limitation by asserting claimant was not actually injured on its premises. The crux of this argument is that although claimant's injury occurred at the Blount Island Marine Terminal, claimant cannot recover under the Longshore Act because his injury did not occur on the specific section of the terminal leased by employer, the Berth 20 pier. Employer's argument, and the administrative law judge's acceptance thereof, misconstrues the law.

Claimant's injury indisputably occurred within a marine "terminal," a specifically enumerated situs under the Longshore Act. 33 U.S.C. §903(a) ("compensation shall be payable . . . if the disability or death results from an injury occurring upon the navigable waters of the United States [] including any adjoining . . . terminal"). That terminal adjoins navigable waters and serves the maritime purpose of loading and unloading vessels, and therefore is a covered situs.[9] *See International-Matex Tank Terminals v. Director, OWCP*

[9] The majority concedes that the Blount Island Marine Terminal "could be" a covered situs under the Act, but nevertheless suggests that rendering such a holding at this juncture is the product of an "unconstrained" evaluation of the evidence that "eviscerates" the Board's standard of review. *See supra* at pp. 4-5 n.5. To the contrary, the administrative law judge's findings command the result. Although the situs inquiry "is ordinarily a mixed question of law and fact," *New Orleans Depot Services, Inc. v. Director, OWCP* [*Zepeda*], 718 F.3d 384, 387 (5th Cir. 2013) (en banc), where the facts are not in dispute, coverage is "'an issue of statutory construction and legislative intent,' and should be reviewed as a pure question of law." *Id*. (*quoting Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 305 (1983)); *Wood Group Prod. Servs. v. Director, OWCP* [*Malta*], 930 F.3d 733, 736 (5th Cir. 2019). The administrative law judge found that the Blount Island Marine Terminal is comprised of "port facilities" that are owned by Jacksonville Port Authority (JaxPort) but "operated by the local stevedores." Order at 2. Employer, "a stevedore and terminal operator company," leased the Berth 20 pier from JaxPort. *Id*. It hired claimant "as part of a ship-tying crew, which is responsible for the mooring of vessels as they arrive at the port." *Id*. On the day of his injury, claimant finished tying the vessel to the pier at Berth 20 and "began driving off of the port complex" when he was struck by a train. *Id*. at 3. Based on the location of the train tracks, the administrative law judge concluded there is "no dispute" that claimant's injury occurred while he "was still within the confines of the *marine terminal*." *Id.* at 6 (emphasis added). No further fact-finding regarding the "layout" of the Blount Island Marine Terminal is necessary to conclude that it meets the definition of a "terminal" and thus is a covered situs under the Act.

[*Victorian*], 943 F.3d 278, 286-287 (5th Cir. 2019) (setting forth established definitions of marine "terminal"). Furthermore, the entirety of that location is covered under the Act, including the pier leased by employer and the "common area" of the terminal where employer alleges claimant was injured. *See Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). As the United States Court of Appeals for the Fourth Circuit explained in *Sidwell*:

> [I]t is not unusual for marine terminals to cover many hundreds of acres. Such terminals are covered in their entirety. It is not necessary that the precise location of an injury be used for loading and unloading operations . . . ; it suffices that the overall area which includes the location is part of a terminal adjoining water.

71 F.3d at 1140 n.11. A claimant injured on a covered situs is not required to further establish that his injury occurred on the specific tract leased by his employer, and neither

employer nor the administrative law judge cites any Longshore Act precedent to support that proposition.[10]

Even if there was legal merit to employer's argument,[11] its assertion that claimant was not injured on the section of the terminal it leases, the Berth 20 pier, is unsupported by the facts. On his claim form, claimant identified the "exact place where [the] accident occurred" as "Blount Island Berth 20." Emp. Motion for Summary Decision at ex. E. He stated the accident occurred when "leaving berth 20 after tying up [a] vessel[.]" *Id*. At his deposition, when employer's counsel asked him whether he was "driving off the Port . . . when the accident happened,"[12] claimant responded, "Yeah, leaving the pier." Cl. Depos.

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[10] Employer's reliance on *Harris v. England Air Force Base Nonappropriated Fund Financial Mgmt. Branch*, 23 BRBS 175 (1990), for the proposition that the Board "has refused to otherwise construe 'situs' and 'premises' as synonymous" is misplaced. That case involved application of the coming and going rule to a claim filed by a payroll clerk for a civilian accounting service under the Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. §8171 *et seq*. Unlike the Longshore Act, which explicitly extends coverage to injuries occurring anywhere on a specifically-enumerated situs, 33 U.S.C. §903(a), NFIA neither defines a covered situs nor includes the entirety of a military base within such a definition. Instead, it treats the operations of nonappropriated fund instrumentalities as explicitly distinct from the military instillations on which they are located. *See* 5 U.S.C. §2105(c); *A.P.* [*Panaganiban*] *v. Navy Exch. Serv. Command*, 43 BRBS 123 (2009). Thus, the Board was not confronted with the question of whether a covered "situs" is synonymous with an employer's "premises." Rather, the lack of specifically-enumerated situses in NFIA necessitated an inquiry into whether the injury occurred within the space boundaries of the employment, i.e., on the employer's premises as opposed to a distinctly separate common area of the military installation not under its control. Such a delineation under the Longshore Act, however, would be inconsistent with the statute itself. *See Sidwell*, 71 F.3d 1134.

[11] Employer's argument also implies that its pier operations are somehow unrelated to the overall operations of the terminal within which the pier is located. This contention defies the common understanding of terminal operations, *see Sidwell*, 71 F.3d at 1140 n.11, and employer has not set forth any facts or arguments to support such a finding.

[12] Employer's counsel consistently used the term "Port" in reference to both the entirety of the Blount Island Marine Terminal and the specific pier leased by employer where claimant tied the vessel. *See, e.g.*, Cl. Depos. at 12 (general reference to claimant's work "on the Port"), 17 (specific reference to claimant's work "actually on the Port tying up the vessel").

at 25. Later in the deposition, claimant's counsel asked whether the accident occurred "on or off the pier," to which claimant replied "Yeah, it was leaving the pier. Yeah, it was at the pier." *Id*. at 56-57. Seeking additional clarity, claimant's counsel asked, "So you were still on the pier when you were struck?" *Id*. at 57. Claimant replied, "Yes, sir, at Berth 20." *Id*. After that exchange, employer's counsel did not ask claimant any further questions regarding the location of his injury or introduce any evidence undermining his testimony that he was "still on the pier" and "at Berth 20" when he was hit by the train.[13] As a "pier" is also an enumerated situs under the Act, 33 U.S.C. §903(a), the coming and going rule does not preclude coverage even accepting employer's mistaken belief that the entirety of the terminal is not a covered situs.

Apart from its argument that coverage is precluded by the coming and going rule, employer does not, and indeed cannot, argue that claimant's injury is unrelated to his work. There is little question that getting struck by a train while attempting to drive off a pier into the common area of a marine terminal is not among the "ordinary hazards of the journey . . . which are faced by all travelers and which are unrelated to the employer's business." *Cardillo,* 330 U.S. at 479; *see Cudahy Packing Co. of Nebraska v. Parramore,* 263 U.S. 418, 424 (1923) (claimant struck by train on his way to work; injury held work-related where "the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly . . ."); *see also Larson's* at § 4.01 ("risks distinctly associated with the employment" include "all the things that can go wrong around a modern" industrial site).

Although not a prerequisite to coverage, the fact that claimant was still on-the-clock and being paid an hourly wage at the time of the collision strengthens the connection between his injury and his employment tying a vessel to the pier. *Parramore,* 263 U.S. at 426 (employee must be afforded "a reasonable interval of time" for entry upon and departure from the premises); *Durrah*, 760 F.2d at 326 n.6 ("The sometimes *recherché* distinctions invoked to resolve obscure cases should not cloud analysis where the employee is injured in the course of work-incidental conduct on the employer's premises during working hours."); *see also Larson's* at § 13.00 (injuries attempting to depart from

[13] Employer introduced a police report identifying the location of the collision as "the Intersection of 9600 Blount Island Blvd. and 5000 Intermodal Dr." Emp. Motion for Summary Decision at ex. A. Claimant's testimony is the only evidence in the record addressing whether this specific location is part of the Berth 20 pier.

employer's premises "after working hours" covered), § 14.06[1] at n. 1 (emphasizing "strong connection between payment for time and continuance of course of employment").

Because employer has not set forth a legal basis for applying the coming and going rule to claimant's workplace injury, it has failed to rebut the presumption that the injury arose out of and in the course of his employment.[14] 33 U.S.C. §§902(2), 920(a); *Shivers*, 144 F.3d 322; *Durrah*, 760 F.2d 322; *see also U.S. Indus./Fed. Sheet Metal, Inc.*, 455 U.S. 608. I therefore would reverse the administrative law judge's grant of summary decision to employer and remand the claim for consideration of any remaining disputed issues.[15] *Wilson v. Boeing Co.*, 52 BRBS 7 (2018) (summary decision appropriate only where the moving party is entitled "as a matter of law"); 29 C.F.R. §18.72.

For these reasons, I dissent.

GREG J. BUZZARD
Administrative Appeals Judge

[14] Claimant did not concede, either before the administrative law judge or in his brief to the Board, that his injury is covered only as an exception to the coming and going rule. Before the administrative law judge, he set forth a prima facie case that his claim is within the scope of the Longshore Act, *see* Emp. Motion for Summary Decision at ex. B; Cl. Depos. at 23-28, 57, and in responding to employer's motion for summary decision, he disputed employer's contention that no exceptions to the coming and going rule apply. Cl. Resp. to Emp. Motion for Recon. at 1-2. To the Board, he reiterates that he was injured "leaving employer's premises" after performing his work assignment, was on-the-clock and being paid at the time, and thus was injured "in the course and scope of his employment." Cl. Br. at 2. He further argues that the cases on which the administrative law judge relied to find his injury outside the scope of employment are distinguishable on the facts. *Id*. The issues addressed in this dissent are therefore sufficiently raised and properly before the Board. *See* 20 C.F.R. §802.211.

[15] Because the coming and going rule does not apply, the Board need not address whether claimant's injury otherwise meets any of the exceptions to the rule.