BRB No. 00-0704

WALTER F. BRODERICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: April 6, 2001
	)	
Self-Insured	)	
Employer-Petitioner)		DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Diane M. Broderick (Murphy and Beane), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (98-LHC-1694) of Administrative Law Judge David W. Di Nardi 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). 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).

The facts in this case are not in dispute. Employer has a van pool operation, known as Van Tran, which was set up as a not-for-profit venture. The operation was started in 1977 as a result of the energy crisis, to alleviate parking congestion at employer's facility, and to aid those employees without reliable transportation to the shipyard. Employer owns or leases the

vans, maintains the vans, and provides insurance and special parking spots for the vans at its facility. Those employees who participate in the program have a set amount deducted from their paychecks to cover the salaries of those who administer the program and the costs of maintaining the vans.[1] Maintenance on the vans occurs during the work day. Employer monitors its costs associated with Van Tran, and adjusts the employees' weekly fees in order to maintain the self-sufficiency of the program. The riders separately reimburse the driver for gasoline costs.[2] The driver is not paid to drive the van, but does not have to pay any fees. The drivers, who are employees of employer's shipyard, must pass employer's screening and physical examinations necessary for a commercial driver's license. The rules governing the van pool were drafted by employer's legal department, and employer refers prospective riders to drivers with openings. Specific vans are assigned to specific routes, but the exact route to be traveled is arranged between the driver and the passengers. Employees are not paid while they are commuting to and from work in the van pools.

On November 13, 1990, claimant sustained injuries in an accident on Interstate 95 southbound while he was on his way home from work in a Van Tran van. Claimant filed a claim under the Act, as well as a claim under the Connecticut Workers' Compensation Act. On February 10, 1992, a voluntary agreement was approved under the state law whereby claimant received benefits for a 13 percent impairment of the lumbar spine. EX 3. On April 8, 1993, claimant was awarded additional benefits under the state law from October 14, 1992, to April 12, 1993.[3] EX 4. Employer sought a credit under the Longshore Act for amounts

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[1]Many employees continue this payroll deduction while they are on vacation in order to avoid losing their spots in the van pool.

[2]The drivers are able to receive reimbursement for the gas money through a state program. When the reimbursement check is received, the passengers do not have to pay for gas for a few weeks.

[3]In July 25, 1991, claimant filed suit in New London Superior Court against the driver

paid to claimant under the state act, pursuant to Section 3(e), 33 U.S.C. §903(e).

In his decision, the administrative law judge found that claimant's injury occurred in the course of his employment under the "employer's conveyance" exception to the "coming and going" rule, as employer controls every part of the Van Tran program except for the exact routes to be traveled. The administrative law judge further found that claimant's claim was timely filed under Section 13 of the Act, 33 U.S.C. §913, and that claimant is entitled to temporary total disability benefits from November 20, 1990 through July 1, 1991, and to permanent total disability benefits from July 2, 1991 through January 30, 1994, and from August 8, 1997 through March 10, 1998. Employer was awarded Section 8(f) relief, 33 U.S.C. §908(f), and a credit of $34,160.19 for benefits paid under the state act, 33 U.S.C. §903(e).

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of the car that hit the van. Employer intervened in that action, seeking reimbursement of the benefits paid under the state workers' compensation scheme, on the ground that claimant's injury occurred in the course of his employment. Claimant settled the suit for $20,000, and claimant paid employer $6,666.66 to settle its workers' compensation lien. EX 6, 7.

On appeal, employer contests the administrative law judge's finding that claimant's injury occurred in the course of his employment.[4] Specifically, employer contends that the administrative law judge erred in finding that an exception to the coming and going rule applies in this case. Claimant responds, urging affirmance.

Generally, injuries sustained by an employee on his way to or from work are not compensable, as traveling to and from work is not within the scope of the employee's employment (the coming and going rule). *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947). The exceptions to this general rule result from situations where "the hazards of the journey may fairly be regarded as the hazards of the service." *Id.* at 479. The coming and going rule does not preclude coverage where: (1) the employee is paid for the trip to and from work either through actual payment or the provision of a vehicle (trip payment exception); (2) the employer controls the journey; or (3) the employee is on a special errand for the employer. *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982); *Foster v. Massey*, 407 F.2d 343 (D.C. Cir. 1968); *Ward v. Cardillo,* 135 F.2d 260 (D.C. Cir. 1943). Relevant to the instant case is the second exception, employer's control over the journey

[4]We note that the administrative law judge addressed whether claimant established the status and situs requirements for coverage under the Act, 33 U.S.C. §§902(3), 903(a), and found that both requirements were satisfied. Although employer raised the issue of "jurisdiction" before the administrative law judge, it is clear from its context that employer was referring to the course of employment issue and not to the Act's coverage provisions. *See* Tr. at 28; Emp. Post-hearing Brief. Similarly, employer's reference in its brief on appeal to the Board to "jurisdiction" refers to the course of employment issue. Thus, we have no occasion to address any issues relating to whether the coverage requirements are satisfied in this case. *See Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982) (parties may waive right to contest coverage issues).

through the furnishing of transportation (as opposed to the employer's provision of a vehicle for the employee's use). In particular, this exception is known as the "employer's conveyance" exception:

> If the trip to and from work is made in a truck, bus, van, car, or other vehicle under the control of the employer, an injury during that trip is incurred in the course of employment . . . The reason for [this] rule depends upon the extension of risks [of employment] under the employer's control.

1 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW, §15.01 (2000);[5] *see also Ward*, 135 F.2d at 262.

This case presents an issue of first impression under the Longshore Act. Cases arising under state workers' compensation statutes presenting facts similar to those in the case at bar, however, have uniformly found the injured employee covered

[5]Contrary to employer's contention, the administrative law judge did not find the "trip payment" exception applicable to this case. Employer goes through various factors which it states militates against a finding that this exception applies. Although the case law discussing the "trip payment" exception often overlaps with the "employer's conveyance" exception," *see, e.g., Watson v. Grimm*, 200 Md. 461, 90 A.2d 180 (1952), the administrative law judge did not discuss the "trip payment" exception, and the basis for extending the "course of employment" in the two exceptions is different. *See* 1 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW, §15.01 (2000).

under the workers' compensation law.[6] As we will discuss, the case law from various states generally applies the same factors to the determination of whether the employer's conveyance exception applies to a van pool program. Finding this law instructive, and the administrative law judge's findings consistent with this law, we affirm the administrative law judge's conclusion that claimant's injury occurred in the course of his employment.

Contrary to two of employer's contentions, the facts that the employer is not contractually obligated to provide the transportation and that the employees pay for the service are not sufficient to take the injuries outside the course of employment. *Lee v. BSI Temporaries, Inc.*, 114 Md. App. 1, 688 A.2d 968 (Md. Ct. Spec. App. 1997); *Securex v. Couto*, 627 So.2d 595 (Fla. Dist. Ct. App.1993); *Peski v. Todd & Brown,* 158 F.2d 59 (7th Cir. 1946); *Neyland v. Maryland Casualty Co.*, 28 So.2d 351 (La. Ct. App. 1946); 1 LARSON, §15.02 (2000). In *Lee*, 114 Md.App. 1, 688 A.2d 968, the employer contracted with a bus company to transport its employees to the work site from their homes throughout the Baltimore area. Only employer's employees could ride the bus, though they were not obligated to do so. Those who chose to participate in the program had $5 deducted from their paychecks; these funds were roughly equal to the cost of the contract with the bus company. The Maryland Court of Special Appeals discussed the Larson treatise at length, as well as cases arising in other jurisdictions, and made the following statement:

> In sum, therefore, the employer conveyance exception allows for the compensation of employees who are injured while riding in a conveyance that is under the control of the employer when such transportation is incidental to the employment as a result of an express or implied agreement, or by custom or continued practice of the parties,

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[6]Some states, however, have a statutory provision prohibiting recovery for injuries sustained commuting to and from work in an employer-supplied conveyance. *See, e.g.,* 39 M.R.S.A. §51(2) (Maine), discussed in *Croteau-Robinson v. Merrill Trust/Fleet Bank*, 669 A.2d 763 (Me. 1996), and W.S.A. §102.03 (Wisconsin), discussed in *Doering v. State of Wisconsin Labor & Industry Review Comm'n*, 187 Wis.2d 472, 523 N.W.2d 142 (Wis. Ct. App. 1994).

> without regard to whether the transportation is provided for free or paid for by the employee and whether alternate forms of transportation are available.

Id., 114 Md.App. at 15, 688 A.2d at 975. The court then turned to the issue of whether the bus was under the employer's control, and found that it was. The court noted that the bus was neither owned by employer nor driven by its employees, but that employer regulated the times and routes of the bus and prohibited non-employees from riding, including other workers from the same facility. The court also relied on the fact that employer subsidized any shortfall when the employees' payments were insufficient to pay the bus company. Finally, the court relied on the fact that the bus service benefitted employer by ensuring that employees arrived to work on time and by providing reliable transportation to those who otherwise lacked such. The court therefore held that employer is liable for workers' compensation benefits to an employee injured when the bus struck a curb.

The New York case of *Schauder v. Pfeifer*, 173 A.D.2d 598, 570 N.Y.S.2d 179 (N.Y. App. Div. 1991), also is illustrative. The claimant was a passenger in a van owned by her employer, which was operated by a co-employee. The employer supplied the van, assisted in forming and maintaining the van pool, and collected payment from employees who used the van pool. The court held that the employer had assumed an obligation to transport its employees to and from work, and that therefore the claimant's sole remedy was that provided by the workers' compensation scheme. *See also Constantine v. Sperry Corp.*, 149 A.D.2d 394, 539 N.Y.S.2d 499 (N.Y. App. Div. 1989).

An Arizona case factually similar to the case at bar placed greater emphasis on the benefits to the employer of the transportation program. *Smithey v. Hansberger*, 189 Ariz. 103, 938 P.2d 498 (Ariz. Ct. App. 1996). The employer operated a van pool program to transport its employees to the work site 50 miles from Phoenix. The employer purchased the vans, set the rules for use of the vans, employed a staff to supervise the program, and hired mechanics to maintain, repair and refuel the vehicles. Riders were assigned to various vans by employer's staff, who also coordinated the routes and stops. The van pool program benefitted employer by: assisting it in recruiting and maintaining qualified employees, helping it to comply with Arizona laws concerning air quality, reducing congestion on the one road leading to employer's facility, developing good relationships between employees and keeping morale high, and ensuring on-time arrivals to work. The court applied this law to the case: "The employer's conveyance exception applies when the employer provides transportation to the employee and the travel time appears to benefit the employer." *Id.,* 189 Ariz. at 107, 938 P.2d at 502. The court

noted the degree of control employer exercised over the van pools, but hinged its holding on the fact that employer furnished the vehicles and benefitted from the employees' participation in the program. The court held that the conveyance exception applied and that the workers' compensation remedy was the exclusive means of recovery for a passenger injured in a van accident.

Employer maintains that it does not exert sufficient control over the Van Tran program because it does not designate the exact routes traveled by the vans. The administrative law judge found that employer exercises control over the entire Van Tran program, except for determining the specific routes traveled by each van, through an office created especially for this purpose. Specifically, he found that this office oversees the paperwork for the payroll deductions, sets the rates for participation in the van pool program in order to cover costs, screens the drivers, records gasoline charges in case a dispute arises, posts openings for drivers, directs potential riders to routes with openings, and authorizes new routes if there is sufficient demand. The administrative law judge found the most important factors to be that employer leases or owns the vans, assigns specific vans to specific routes, and provides the insurance, maintenance, and repair for the vans. Decision and Order at 21-22. Citing *Lee,* 114 Md. App. 1, 688 A.2d 968, and *Schauder,* 173 A.D.2d 598, 570 N.Y.S.2d 179, the administrative law judge concluded that the degree of control exercised by employer over the Van Tran program is more than sufficient for the "employer's conveyance" exception to the coming and going rule to apply, and that claimant therefore was injured in the course of his employment. Inasmuch as the administrative law judge's findings of fact, and legal conclusions drawn therefrom, are rational, supported by substantial evidence, and in accordance with law, we affirm the finding that employer exercises sufficient control over the Van Tran program such that the "employer's conveyance" exception applies.

Moreover, the evidence of record supports the legal conclusion that the van pool program benefits employer. *See Lee*, 114 Md. App. at 17, 688 A.2d at 976; *Smithey,* 189 Ariz. at 107, 938 P.2d at 502. Employer set up the program initially due to the energy crisis in the 1970's and to alleviate parking problems at a time when employer had many more employees than parking spaces. The program provides transportation to those employees without a driver's license or a car in order that employer may remain fully staffed. *See* Tr. at 76, 94. Contrary to employer's contention, the fact that the program is of benefit to the employees does not require a finding that the program does not benefit employer. *Lee*, 114 Md. App. at 17, 688 A.2d at 976. Therefore, as the Van Tran program is controlled by and benefits employer, we affirm the administrative law judge's finding that claimant's injury occurred in the course of his employment.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge