U.S. Department of Labor

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

BRB No. 19-0238

YVONNE HART	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 08/30/2019
DEPARTMENT OF THE ARMY/NAF	)	
	)	
and	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer/Carrier's Renewed Motion for Summary Decision of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

David M. Snyder (Chasen Boscolo Injury Lawyers), Greenbelt, Maryland, for claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for employer/carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Granting Employer/Carrier's Renewed Motion for Summary Decision (2018-LHC-00922) of Administrative Law Judge Larry S. Merck rendered on a claim filed pursuant to 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 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 worked for employer as a child and youth program assistant at the Cody Child Development Center (CDC) at Joint Base Myer-Henderson Hall. On the morning of April 20, 2017, on her way to work after being dropped off by the bus, claimant went through the security checkpoint and walked to the CDC. In doing so, she walked on a grassy area along the side of the baseball field and slipped and fell, injuring her right ankle. EX 14 at 32-33.

Claimant filed a claim for benefits for her injury. Employer filed a motion for summary decision, contending claimant's injury did not occur in the course of her employment. The administrative law judge denied employer's motion because it was premature and additional discovery was needed. Thereafter, employer filed a renewed motion for summary decision. Claimant opposed the renewed motion for summary decision, contending that an issue of material fact existed regarding the "safest route" to the CDC and that the area where she fell had a sufficient connection to employer that it should be considered part of employer's premises for purposes of her claim.

The administrative law judge found the undisputed facts demonstrate that claimant's injury did not occur in the course of her employment because she was not working at the time of the injury, employer did not own or maintain the location where the injury occurred, and employer did not dictate the course or method by which claimant must arrive or depart work. Decision and Order at 8. He further found claimant's assertions regarding the safest route to the CDC were irrelevant to whether claimant's injury occurred in the course of her employment. *Id.* at 9. He concluded that claimant's injury did not occur in the course of her employment and therefore her injury is not compensable under the Act. *See id.* The administrative law judge therefore granted employer's renewed motion for summary decision.

Claimant appeals the administrative law judge's decision, asserting her injury should be covered under an exception to the "coming and going" rule because employer regularly used the field where she was injured and it was expected that employer's employees would have to use the grassy area in order to reach the CDC. Claimant also contends employer had some control over the area in which she fell. Employer filed a response brief, urging affirmance of the administrative law judge's Decision and Order.

In determining whether to grant a motion for summary decision, the fact-finder must determine, after reviewing the evidence in the light most favorable to the non-moving

party, whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.72; *Morgan v. Cascade Gen., Inc.*, 40 BRBS 9 (2006). In order for an injury to be compensable, it must arise in the course of employment. 33 U.S.C. §902(2). An injury occurs in the course of employment if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *Wilson v. Washington Metro. Area Transit Auth.*, 16 BRBS 73 (1984). Generally, injuries that occur on an employee's way to and from work are not considered to arise in the course of employment. *See Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947). Exceptions to this "coming and going" rule apply where: (a) employer pays 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. *Id.*; *Trimble v. Army & Air Force Exch. Serv.*, 32 BRBS 239 (1998).

It is uncontested that claimant was not working at the time of her injury as she had not yet "clocked in" for the beginning of her shift. *See* Decision and Order at 6. In addition, there is no contention that employer paid claimant's travel expenses, furnished her transportation, or that she was performing an errand for employer at the time of her injury. The parties' dispute centers solely on whether the injury occurred on employer's premises so that employer could be said to "control the journey" under the second exception to the "coming and going" rule.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, addressed the "coming and going" rule in *Shivers v. Navy Exch.*, 144 F.3d 322, 32 BRBS 99(CRT) (4th Cir. 1998). That case involved a claimant who sustained an injury when she fell on a median strip of grass by a parking lot opposite the employee entrance to the Navy Exchange. The Fourth Circuit held the parking lot was part of employer's premises even though the lot was not owned by employer because employer specifically directed its employees to park in the lot and actively engaged in maintenance of the lot. *Id.*, 144 F.3d at 323, 32 BRBS at 100(CRT). In *Trimble v. Army & Air Force Exch. Serv.*, 32 BRBS 239 (1998), the Board followed *Shivers* and held that a claimant injured on an ice-covered sidewalk adjacent to the employee-designated entrance door of employer's facility was in the course of her employment. The employer exercised control over the area where claimant was injured by designating the parking lot its employees were to use and the administrative law judge credited testimony that employer maintained the sidewalk. In *Sharib v. Navy Exch. Serv. Command*, 32 BRBS 281 (1998), the Board held that employer exercised sufficient control over the area in which claimant was injured because it was responsible for the deterioration of the sidewalk and adjacent grassy areas. In contrast, if an employee is injured on her way to work in an area not under employer's ownership or control, the injury does not occur in the course of employment. *Harris v.*

England Air Force Base Nonappropriated Fund Fin. Mgmt. Branch, 23 BRBS 175 (1990); *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989).

We reject claimant's contention that the administrative law judge erred in finding this case distinguishable from *Shivers* and in concluding claimant's injury did not occur in the course of her employment. The administrative law judge's finding that employer did not own the location where claimant fell is supported by the exhibits supporting employer's motion for summary decision. Claimant failed to raise the existence of a genuine issue of material fact in this regard. *See* 29 C.F.R. §18.72(c), (e). It is undisputed that the Department of Defense, not employer (the NAF entity), owns the field where claimant was injured. Although Richard Burton, former director of the CDC, initially indicated on the "Injury Check List" that employer owned and maintained the area where claimant was injured, *see* EX A at 3, he later clarified that although he had assumed that employer owned the area in which claimant fell (because employer sometimes used the field), it is actually owned by the Department of Defense.[1] EX 16 at 1-2. The evidence also establishes that employer used the field itself only for special events and was required to sign up for each use with the Department of Defense. CX 1 at 1; *see Harris*, 23 BRBS 175 (reversing finding that an injury occurring in the parking lot of an Air Force base was compensable as the lot was not part of the employer's premises and it lacked control over or responsibility for the lot). Claimant did not oppose employer's motion for summary decision with any evidence that employer controls or maintains the grassy area or field.

Moreover, claimant did not identify any employer policies regarding the means or route by which its employees were to arrive at the CDC. Claimant testified in her deposition that she chose to walk on the grassy area because she did not want to walk on the asphalt where cars drove, but she did not dispute that she could have avoided walking on the grass. EX 14 at 17-21, 26-27. Mr. Burton confirmed there was no set method or route for the employees' arrival at work and they were not required to walk across the field. EX 15 at 1-2. Indeed, claimant conceded this point in her opposition to employer's motion

[1] Contrary to claimant's contention, Mr. Burton's mistaken belief as to the ownership of the field is not sufficient to establish that a question of material fact exists as to whether the field was so intertwined with the day care center's activities that it should be considered part of employer's premises. We also disagree with the dissent's characterization of Mr. Burton's statements as "uncontradicted" evidence that employer, Army/NAF, maintained the field. Mr. Burton clarified that he had been mistaken as to the field's ownership and confirmed that employer only "sometimes used the field." EX 16 at 1-2. Claimant did not supply any contrary evidence as to the ownership or maintenance of the area where she fell. *See* 29 C.F.R. §18.72(c), (e).

for summary decision.[2] Cl. Opp. Br. at 6. Thus, the administrative law judge's finding that employer did not "control the journey" is supported by the evidence. He properly found that inquiries concerning the "safest route" to the CDC do not affect application of the "coming and going" rule where employer controls neither the premises nor the journey.[3] Decision and Order at 9; *see generally Broderick v. Elec. Boat Corp.*, 35 BRBS 33 (2001) (affirming finding that claimant's injury occurred in the course of employment where it was sustained in a vehicle under the control of employer through a van pool program that was under employer's control).

We therefore affirm the administrative law judge's conclusion that none of the exceptions to the "coming and going" rule applies. Claimant was not on employer's premises at the time of her injury nor did employer exercise any control over claimant's journey to or from work. *See Harris*, 23 BRBS 175; *Cantrell*, 22 BRBS 372. Claimant has not established that any questions of material fact existed so as to preclude summary decision in employer's favor. 29 C.F.R. §18.72(c), (e); *see Buck v. Gen. Dynamics*

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[2] Claimant testified in her deposition that she could drive to work and park in the parking lot inside the security gate, or take the bus and walk through the security gate and to the CDC by way of the grassy area or the street (no sidewalks). EX 14 at 14, 16.

[3] We believe our dissenting colleague's opinion on the issue of the "safest route" oversteps the bounds of our review authority. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As discussed, there is no evidence in this case that employer directed its employees to approach the CDC in any particular manner, a fact claimant concedes ("Employer did not direct [her] means of arriving to the building in which she worked"). Cl. Opp. Br. at 6. Moreover, *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 426 (1923), a case claimant did not cite to the Board, is factually distinct from this case. Parramore had to cross three sets of railroad tracks on the only means of ingress to his place of employment. While claimant, and our colleague, have opinions as to the relative danger of the options available to her, there is no evidence of record that she was compelled to use the route she did and that the route was inherently dangerous. The holding in *Parramore* is premised on the fact that the claimant's "employment itself involved peculiar and abnormal exposure to a common peril," which is absent in this case. *Id.*, 263 U.S. at 425. Claimant had more than one option of approaching the CDC upon arriving on the bus. EX 14 at 14, 16. The administrative law judge noted claimant's belief that she chose the safest route, but he reasonably concluded that this is "necessarily a subjective determination, and does not impact the application of the coming and going rule." Decision and Order at 9. This finding is left to the administrative law judge's discretion and the Board is not free to set it aside because it is not contrary to law on the facts presented here.

Corp./Elec. Boat Div., 37 BRBS 53 (2003). As claimant's injury did not occur in the course of her employment, employer was entitled to a decision in its favor as a matter of law. Thus, we affirm the denial of claimant's claim.

Accordingly, the administrative law judge's Decision and Order Granting Employer/Carrier's Renewed Motion for Summary Decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits. Because Ms. Hart's injury occurred in the course of her employment, I would reverse the administrative law judge's finding to the contrary and remand the claim for consideration of any remaining disputed issues.

Ms. Hart was employed as a child and youth program assistant at the Cody Child Development Center (CDC) at Joint Base Myer-Henderson Hall. On the morning of April 20, 2017, she traveled to work by bus and, after being dropped off on a nearby street corner, walked a short distance to the entrance of the base. After passing through a required security checkpoint, Ms. Hart entered the military base and proceeded to walk across a field, the most direct route to the CDC from the checkpoint. She did not walk directly on the grass but used a "made path" that had been worn from regular use by other individuals who used this same field as a passageway. Ms. Hart ultimately suffered various injuries after falling in a hole, twisting her foot, flipping over, and falling down.

Ms. Hart explained that she chose to walk on the path in the field because the only other available route from the checkpoint to the CDC was a heavily-trafficked road with no sidewalks. She stated she "didn't think it was the safest thing for [her] to do[.]" EX 14 at 5. Rather than walking alongside the moving vehicles, she "used wisdom." *Id.* at 6.

When asked again why she did not "walk[] on the road with the cars," she stated, "I took the safest route." *Id.* at 8.

As the majority indicates, injuries that occur on an employee's way to or from work generally are not considered to arise in the course of employment and thus are not covered under the Act. *See Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947). The administrative law judge's finding that no exceptions to the "coming and going" rule apply to claimant's case, however, is in error.

One such exception applies where an employee is injured on land not owned by the employer, but the employer maintains or otherwise exercises some control over the property. *See Shivers v. Navy Exch.*, 144 F.3d 322, 32 BRBS 99(CRT) (4th Cir. 1998) (coverage exists where employer did not own but performed basic maintenance of the parking lot where the employee was injured); *Trimble v. Army & Air Force Exch. Serv.*, 32 BRBS 239 (1998) (coverage exists where employer did not own but performed basic maintenance of sidewalk where employee was injured); *Sharib v. Navy Exch. Serv. Command*, 32 BRBS 281 (1998) (coverage exists where employer did not own but was responsible for the deterioration of the sidewalk and adjacent grassy areas on which the claimant was injured).

The facts in this case reflect that employer, Army/NAF, used the field for work-related functions. Richard Burton, former Director of the CDC, completed an Army/NAF Parking Lot Injury Checklist on which he stated that employer, and not the Department of Defense, owned the field on which claimant was injured and was responsible for the field's maintenance. EX A at 3. Mr. Burton thereafter submitted a supplemental affidavit disavowing his statement that employer owned the field ("[S]ince Army/NAF sometimes used the field, I just assumed [incorrectly] that Army/NAF owned the field."). EX 16 at 1-2. He did not, however, provide any such clarifications or disavowal of his statement that Army/NAF was responsible for maintenance of the field, despite the opportunity to do so. To the extent Mr. Burton provided uncontradicted statements that Army/NAF used and maintained the field where claimant was injured, the administrative law judge's finding regarding the inapplicability of the exceptions identified in *Shivers*, *Trimble*, and *Sharib* cannot be affirmed.

More importantly, the United States Supreme Court has recognized an exception to the "coming and going" rule where an employee is injured while traveling to work on the "only practicable route of immediate ingress or egress," regardless of whether the employer owns or maintains the property. *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S.

418, 426 (1923); *see also Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947) (citing the *Parramore* exception with approval in Longshore Act case).

There, claimant Parramore was killed while crossing a train track that intersected with the only public road leading to his employer's worksite. Even though Parramore was traveling to work when the accident occurred (and thus presumably was subject to the "coming and going" rule), the Court reasoned that his death arose in the course of his employment because the worksite "was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard." *Parramore*, 263 U.S. at 426. "He had no other choice than to go over the railway tracks in order to get to his work; and he was in effect invited by his employer to do so." *Id*.

The circumstances of Ms. Hart's injury are similar to those in *Parramore*. As permitted by her employer, claimant took the bus to work, exited the bus, walked a short distance to the military base, and entered on foot through a required security checkpoint. From there, employer provided her with two options. The first, a highly impracticable and hazardous route, would have required Ms. Hart to walk alongside moving vehicles on a busy road with no sidewalks. She rationally described this route as unsafe, and instead opted to take the only other available route: walking along a well-worn path in a field used by her employer for work-related functions and by other pedestrians as a passageway.[4]

Claimant cannot be faulted for choosing the safer of two routes to work. Nor can employer be relieved of liability simply because it offered a second, more dangerous option. The unacceptable hazard of walking in traffic with no sidewalk left Ms. Hart with "no other choice" than to walk across the field where she was ultimately injured. *Parramore*, 263 U.S. at 426. Like claimant Parramore, she was "in effect invited by [her] employer to do so." *Id.* This is not a case where Ms. Hart "assumed [her] own risk in

[4] I dispute the administrative law judge's assessment that a third route was available to claimant: walking through "an asphalt parking lot." Decision and Order at 9. As claimant's testimony reflects, she could only access that portion of the parking lot after having already embarked on her walk through the field on which she was injured. EX 14 at 26. Employer's counsel asked her if she could have left the path sometime before the point of her injury to access the asphalt parking lot, to which she replied, "no, I couldn't have gotten off right here because all of this [area] is a hill and grassy area as well." *Id*. at 29. She explained it would have been impracticable for her to exit the path where the ground is level and closer to her destination, in favor of walking on a hilly, grassy area that is further from the CDC. *Id*. at 26-30

subjecting [herself] to the hazards of the highway."[5] *Cardillo*, 330 U.S. at 473. Rather, the hazards of Ms. Hart's journey "may fairly be regarded as the hazards of the service."[6] *Id.* at 479.

For these reasons, I would hold that Ms. Hart's accident occurred in the course of her employment. Thus, I would reverse the administrative law judge's finding that her injuries are not covered under the Act and would remand the claim for consideration of any remaining disputed issues.

GREG J. BUZZARD
Administrative Appeals Judge

[5] Claimant was traveling to work by bus because she does not own a car. Any suggestion that her injury resulted from her "decision" to take the bus instead of a car stretches the "coming and going" rule beyond its limits. Claimant was not injured on the bus or as a result of her bus ride. She was injured after entering the military base through a required security checkpoint, walking on a worn path through a field used by employer for work functions and other pedestrians as a passageway. Ms. Hart's use of this field was not simply a choice; it was necessitated by the dangerous conditions on the only other route available: a frequently trafficked road with no sidewalk.

[6] It is also insignificant that claimant had not yet "clocked in" to work at the time of her injury. As the Supreme Court explained in *Parramore*, the fact that the accident occurred a few minutes prior to the start of the work day is of "no importance" because "[t]he employment contemplated [the claimant's] entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose." *Parramore*, 263 U.S. at 426.