BRB No. 09-0409

S.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AIR FORCE INSURANCE FUND	)	DATE ISSUED: 10/16/2009
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Alan J. Shapiro (Shapiro, Shapiro & Shapiro Co., L.P.A.) Warrensville Heights, Ohio, for claimant.

Gregory D. Cox (Air Force Services Agency), San Antonio, Texas, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-01310) of Administrative Law Judge Donald W. Mosser 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a cook at the Wright Patterson Air Force Base child care center, a nonappropriated funds entity. On Friday, March 3, 2006, claimant attended a follow-up appointment with her physician for an injury she had previously sustained to her back. Claimant then spoke to a supervisor at work regarding the availability of light-duty jobs and any required paperwork. Claimant agreed to complete the paperwork the

following Monday. She arrived at the work site on March 6, 2006, and presented leave slips for her absences on March 2-3, 2006 and March 6-10, 2006. She requested to speak with her supervisor but was told that the supervisor would not be available that day. Claimant returned the next day to meet with the supervisor. After entering the child care center building, claimant was told that she must move her car from a space reserved for parents to an unreserved parking space. While returning to the building after moving her car, claimant slipped on ice in the parking lot and broke her wrist. She sought medical treatment and subsequently filed a claim for temporary total disability benefits under the Act. Employer filed a motion for summary decision on the ground that claimant was not injured in the course and scope of her employment.

The administrative law judge granted employer's motion for summary decision. The administrative law judge found that claimant was not on employer's premises at the time of her injury as claimant failed to refute employer's evidence that the parking lot was not owned or controlled by employer. In addition, the administrative law judge found that claimant was on leave status at the time of her injury. Thus, the administrative law judge found that claimant's injury did not occur in the course of her employment. The administrative law judge also rejected claimant's contention that she was on a "special errand" for employer such that her injury comes within an exception to the "coming and going rule." Therefore, the administrative law judge denied the claim for benefits.

On appeal, claimant contends that the administrative law judge erred in finding that her injury did not occur within the course and scope of her employment. Claimant asserts that employer controlled the parking lot as it specifically told her to move her car to a designated spot. In addition, claimant contends that her leave status is immaterial as she is an "employee" and thought she had to speak to employer personally about light-duty positions. Employer responds, urging affirmance of the administrative law judge's decision.

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 are exposed. *See, e.g., King v. Unique Temporaries, Inc.*, 15 BRBS 94 (1981). Thus,

employees who are injured on public sidewalks or in parking lots that are not owned or controlled by employer while on their way to and from work 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). Once the employee enters employer's premises, the "coming and going" rule no longer applies. *Sharib v. Navy Exchange Service*, 32 BRBS 281 (1998).

Claimant's appeal raises the issue of whether she was injured on employer's premises. Claimant 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), and thus, that the administrative law judge erred in finding the evidence does not establish that employer had sufficient control over the parking lot such that it was part of employer's "premises." In *Shivers*, 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 that lead 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 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 recovery under the Act. *Shivers*, 144 F.3d at 325, 32 BRBS at 101(CRT); *see also Sharib*, 32 BRBS 281 (employer responsible for deteriorated condition of the parking lot); *Trimble v. Army & Air Force Exchange Service*, 32 BRBS 239 (1998) (employer directed employees to particular parking lot and shoveled snow from and salted sidewalk where claimant fell, even though not obligated to do so).

In contrast, 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 did not occur on the employer's premises. In *Cantrell*, the claimant, a cashier for a restaurant located on the grounds of Wright-Patterson 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. Similarly, in *Harris,* employer's operation was located on the grounds of England 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.

In this case, the administrative law judge discussed this case precedent in view of the facts presented. He found that the government owns the child care center and employee parking lots on the base and that the governmental entity's real property building manager is responsible for maintenance of the parking lot and the removal of snow and ice. Emp. Mot. For Summ. Dec. at Ex. 4. The administrative law judge rejected claimant's contention that employer controlled the parking lot because it restricted the use of some of the spaces. Specifically, the administrative law judge found that claimant offered no evidence that employer, as opposed to the Air Force Base, mandated that its employees utilize a particular parking lot or entrance, or asserted any other control over the lot, notwithstanding claimant's statement that a supervisor told her to move her car out of a parent parking space. Therefore, the administrative law judge concluded that *Shivers* is inapplicable to this case and that the case is most similar to *Cantrell* and *Harris.* Thus, the administrative law judge found that as claimant was not injured on premises under employer's control, she was not in the "space" boundaries of employment, pursuant to the "coming and going" rule.

We affirm this finding. With its motion for summary decision, employer offered evidence that employer neither owns nor controls the parking lots near the child care center. In order to defeat a motion for summary decision, the party opposing the motion must establish the existence of genuine issue of material fact. 29 C.F.R. §§18.40, 18.41; *see, e.g., B.E. v. Electric Boat Corp.*, 42 BRBS 35 (2008). In this case, the administrative law judge found that claimant did not offer any evidence that employer asserted control over the parking lots such that they could be considered employer's premises. He rationally found that the direction that claimant move her car to an unrestricted space does not establish employer's actual control over the parking lots. Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's injury did not occur on employer's premises.[1] *See Harris*, 23 BRBS 175;

[1] As we affirm the administrative law judge's finding that claimant's injury did not occur on employer's premises, and thus is not covered under the Act, we need not

Cantrell, 22 BRBS at 375. Consequently, contrary to claimant's contention, the "coming and going" rule applies. *Id*.

Claimant also contends that the administrative law judge erred in rejecting her contention that her injury should be covered under the Act as she was on a "special errand" for employer at the time of the accident. Several exceptions to the "coming and going" rule have been recognized in situations where "the hazards of the journey may fairly be regarded as the hazards of the service." *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 479 (1947). The exceptions to the "coming and going" rule include situations where: (a) the employer pays for 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. *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).

The administrative law judge found that claimant was not on a special errand for employer when she went to employer's facility as she was on a personal errand to meet with her supervisor to discuss light-duty jobs.[2] The administrative law judge found there was no evidence that the meeting was mandated or scheduled for that date, and, in fact, claimant's supervisor was not available to meet with her that day. Moreover, the administrative law judge found that claimant had provided employer with the required paperwork for her sick leave the day before the accident, and thus her presence there was not necessary or required.[3] A "special errand" must serve the business needs of the employer and generally involves the employee's being sent off the premises at the behest of the employer. *See* Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation Law* §14.05 (2008). In this case, the administrative law judge rationally found that claimant did not establish the requirement of this exemption from the coming and going

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address claimant's contention that the administrative law judge erred in finding that claimant's injury did not occur within the time boundaries of her employment.

[2] The administrative law judge also noted that claimant has not asserted that employer furnished transportation or travel expenses, or that claimant was subject to emergency calls. In addition, the administrative law judge reiterated his finding that employer did not maintain control over the parking lot or sidewalks leading to the building, and did not otherwise control the journey that its employees took to work. Decision and Order at 5 n.6.

[3] We note that there is no evidence that claimant's prior back injury was work-related.

rule. *See generally Palumbo*, 18 BRBS 33 (at time of injury claimant not yet subject to the obligations and conditions of employment); *King*, 15 BRBS 94. As the administrative law judge's finding that claimant's injury did not occur within the "space" boundaries of her employment nor within an exception to the coming and going rule is supported by substantial evidence, we affirm the denial of benefits as claimant's injury did not occur in the course of her employment. *Cantrell*, 22 BRBS 372.

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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge