U.S. Department of Labor

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

BRB No. 22-0234

JOHN McCLUNG Claimant-Respondent v. COMMANDER NAVY INSTALLATION COMMAND and CONTRACT CLAIMS SERVICES, INCORPORATED (CCSI) Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 8/15/2023 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Jason T. Ellis (Rudolph, Israel & Ellis, P.A.), Jacksonville, Florida, for Claimant.

James M. Mesnard (Postol Law Firm, P.C.), McLean, Virginia, for Employer/Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer/Carrier ("Employer") appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Awarding Benefits (2020-LHC-00370) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Non-appropriated Fund Instrumentalities Act, 5 U.S.C. §§8171 *et seq.* We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This claim concerns a slip and fall during a lunch break that occurred in the parking lot directly in front of an office leased to Employer but owned by the Navy. The ALJ found Employer exerted enough control over the lot to assume liability under the Act pursuant to *Trimble v. Army and Air Force Exchange Service*, 32 BRBS 239, 241 (1998), in which the Benefits Review Board found an employer liable as a matter of law where it occasionally shoveled snow from a parking lot sidewalk owned and maintained by the Air Force. Agreeing with the Director, Office of Workers' Compensation Programs (Director), on behalf of the Department of Labor, that the ALJ acted well within her wide discretion in finding this case comparable to *Trimble* on the facts as she determined them, we affirm her decision.[1]

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's injury occurred in Tennessee. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

Claimant's Injury

Claimant works as a computer specialist for Morale, Welfare, and Recreation (MWR), a division of the Commander Navy Installation Command (Employer), a Non-appropriated Fund (NAF) entity, on a naval base in Millington, Tennessee. Hearing Transcript (HT) at 15, 17-18, 44, 66. His office is located on the base in the Lassen Building. *Id*. at 18, 67. He works in the IT department, controlling operating systems for MWR's entities. *Id*. at 17.

On September 17, 2019, Claimant used his lunch break to go for a jog around the base, which was a typical activity for him. *Id*. at 22, 27, 47, 105. Nearing the end of his run, he approached the building through the main parking lot, where he tripped on a crack in the asphalt and fell. *Id*. at 27; Claimant's Exhibit (CX) 14F-G; CX 16.

An ambulance transported Claimant to the hospital where a doctor diagnosed and treated him for a fractured humerus of the right shoulder. HT at 29; Employer's Exhibit (EX) 9 at 1-8. Shortly thereafter, an orthopedic surgeon examined him and advised him not to work for at least 60 days. HT at 30; CX 4 at 38, 67; EX 10 at 1-2.

Claimant returned to his regular employment on November 15, 2019. EX 17 at 2. On November 17, 2019, however, doctors treated him for esophageal bleeding, which resulted from his daily use of non-steroidal anti-inflammatory drugs (NSAIDs) for pain management related to his shoulder injury. HT at 36-37; CX 3 at 1, 4. The hospital discharged him on November 19, 2019, *id.*, and he subsequently returned to his usual employment on November 25, 2019. EX 17 at 2. Since that time, he has worked continuously without accommodation. HT at 38-39.

Claimant filed a claim seeking temporary total disability (TTD) benefits from the date of his injury until his return to work, as well as reimbursement of medical expenses for treatment of both his right shoulder injury and esophageal bleeding. CX 1. A telephonic hearing took place on September 16, 2020, with the parties primarily disputing whether Claimant's injury occurred within the course and scope of his employment. HT at 5-6. The ALJ issued a Decision and Order Awarding Benefits (D&O) on February 28, 2022, finding Claimant's fall occurred in the course and scope of his employment. D&O at 31.

The ALJ's Findings of Fact and Conclusion of Law

The ALJ found Claimant, like most employees at the Lassen Building, parked in the main lot directly in front of the building, adhering to Employer's notification that the lot was available for employee parking, although there are two rarely-filled overflow lots also available. D&O at 4, 7, 13, 23. Other entities besides Employer have offices in the Lassen

Building, but the lot does not have assigned spots except for some high-ranking officials. *Id*. at 4, 7, 9, 23; HT at 19-20, 23-24. Although the Navy maintains the lot, Employer directs its employees to notify two of Employer's officials, Kelly Powell and Dan Kondziela, of any parking lot maintenance that is required. D&O at 5, 9, 22. Without such employee reports, the ALJ determined the Navy does not resolve any maintenance issues, including fixing potential tripping hazards. *Id*. at 9, 22-23; HT at 26, 96-97.[2]

The ALJ similarly determined the public generally does not have access to the lot or the Lassen Building, nor does there appear to be any reason why anyone other than employees of the building's tenants would park there. D&O at 4-5, 9, 23. To gain access to the base, employees have to pass through two gates with identification checks. To gain access to the Lassen Building within the base, employees further must use a card reader affixed to the entrance. *Id.* at 5.[3]

The ALJ also determined Employer encourages exercise during employees' lunch breaks, and several employees routinely go for jogs as a result. D&O 4, 26-27; HT at 21-22, 54-55. Employer's health and wellness program handout specifically states employees "may use non-duty time, which can include lunch periods, to participate in an exercise program," and Employer "strongly encouraged" supervisors to be lenient in applying the 30-minute lunch-break time to allow for exercise. D&O at 18, 26-27; EX 19. And while Employer does not pay employees for their lunch period, it also does not require employees to clock in or out when leaving for or returning from lunch. D&O at 13; EX 23 at pp.35-36. Indeed, Employer's handbook states that employees are considered on duty and covered by workers' compensation from when they report for duty until the time they leave at the end of working hours. D&O at 7, 24-25.

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[2] Sandy New, Human Resources (HR) Director for Employer, testified that if she came across maintenance or repair issues in either the building or the parking lot, she would first attempt to report it to the base commander or to public works. HT at 96. But if either of those entities could not be reached, she would contact Kelly Powell, who works for Employer as deputy to the supervisor over Employer's organization on the base. HT 96. Claimant confirmed he would contact Mr. Powell if he encountered an issue requiring maintenance or repair in either the Lassen building or the parking lot. HT at 25-26. He agreed Employer's employees were the "eyes and ears" when it came to reporting issues requiring maintenance and repair. Ms. New likewise agreed if an employee did not report an issue, it likely would not get resolved. HT at 97-98.

[3] Notably, the ALJ found that for public visitors to gain access to the Lassen building, they must be identified at the gates, and then met and escorted by employees of Employer. D&O at 5.

Based on these facts, the ALJ determined Claimant's injury occurred within the course of his employment because Employer exhibited significant enough control over the parking lot to consider it part of Employer's space. D&O at 21-23. The ALJ concluded Claimant's lunch break fell within the time boundaries of his employment because Employer's communications indicated it considered employees on lunch breaks to be on duty and because Claimant's injury occurred within a reasonable period -- the ALJ estimated it as "no more than a minute or so" -- before he entered the Lassen Building. D&O at 23-25.

In doing so, the ALJ found two slip and fall parking lot cases particularly "instructive": *Shivers v. Navy Exchange*, 144 F.3d 322, 325, 32 BRBS 99, 101(CRT) (4th Cir. 1998), and *Trimble*, 32 BRBS 239. The ALJ noted that in *Shivers*, the United States Court of Appeals for the Fourth Circuit reasoned that the employer exerted enough control over a parking lot for liability to arise where it directed employees to park in the lot, posted a notice that parking was for employees only, and hired staff to patrol it and tow unauthorized vehicles. D&O at 22. She reasoned in this case that while Employer's notifying its employees of their ability to park right in front of the building and its directive to report any maintenance issues on their own might not be quite as comparable to *Shivers*, "the level of control exercised by the employer in *Shivers* is not the minimum required to bring a property, not owned by an employer, into the employer's constructive premises." *Id.*[4]

The ALJ then analogized this case to the Board's binding precedent in *Trimble*. D&O at 22-23. In *Trimble*, the Board determined as a matter of law that the employer exerted enough control for liability to arise over a sidewalk next to a parking lot the Air Force indisputably owned and maintained. *Trimble*, 32 BRBS at 242. The ALJ accurately noted the Board held that despite the base being legally responsible for snow and ice removal, the employer's voluntary directive to its own employees to occasionally shovel snow leading to the employer's entrance distinguished it from prior Board cases "where the employer had no control at all." D&O at 22. Thus, the ALJ concluded "Employer's level of control over the maintenance of the parking lot is shy of that which the Employer in *Shivers* exercised but is comparable with that which the employer in *Trimble* exercised." *Id.* She therefore found Employer exhibited enough control over the maintenance of the parking lot for it to be considered part of Employer's premises under existing law. *Id.* at

[4] Notably, like this case, *Trimble* also arose in the Sixth Circuit. After noting the absence of Sixth Circuit cases on the issue, the Board applied portions of the *Shivers* decision to find sufficient employer control over the parking lot for liability to arise. *Trimble*, 32 BRBS at 242.

23. Further, she found the accident occurred within the time boundaries of Claimant's employment at the time of his fall. *Id.* at 23-25.[5]

Employer appeals, contending the ALJ erred in finding Claimant's injury occurred in the course and scope of his employment. According to Employer, the ALJ's decision must be reversed because the injury occurred off Employer's premises and during an unpaid lunch break, and therefore, Employer argues, the injury did not occur within the space or time boundaries of Claimant's employment. Employer also asserts Claimant was not performing an employment-related activity at the time of his injury.

Claimant and the Director, on behalf of the Department of Labor, respond, urging affirmance. They argue the weighing of evidence relating to whether an injury occurred on an employer's premises falls within an ALJ's broad discretion, and the Board can only disturb an ALJ's finding if it is patently unreasonable. Given that high standard, they argue the ALJ acted well-within her discretion in finding *Trimble* controlling.

Discussion

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) presumption, 33 U.S.C. §920(a), 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 usually is not within the scope of employment because employees are subjected only 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

[5] Having determined Claimant's injury occurred within the course and scope of his employment, the ALJ found Claimant established a prima facie case of compensability for his right shoulder injury, 33 U.S.C. §920(a), which Employer failed to rebut, and his esophageal bleeding was "a compensable derivative injury" naturally and unavoidably resulting from his right shoulder injury. D&O at 27-29. The ALJ awarded TTD benefits from September 18, 2019 through November 14, 2019, and from November 16, 2019 through November 25, 2019, as well as reimbursement of reasonable and necessary medical expenses related to both Claimant's right shoulder injury and esophageal bleeding. *Id*. at 31-32. Employer does not challenge these findings.

injured on public sidewalks or in parking lots that are not owned or controlled by employer are not within the course of their employment, by virtue of the so called "coming and going" rule. *Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986).

But the rule has exceptions. "An employee is allowed a reasonable time before and after work to enter and exit employer's premises; injuries occurring on the premises during this time arise within the scope of employment." *Trimble*, 32 BRBS at 242 (citing *Larson's Workers' Compensation Law* §15.42(a)). And particularly, "a parking lot maintained by an employer for its employees should be considered part of that employer's premises for the purposes of the LWHCA's course-of-employment requirement." *Shivers*, 144 F.3d at 324, 32 BRBS at 100(CRT); *accord Trimble*, 32 BRBS at 243. The United States Supreme Court has further recognized some specific common law exceptions to the rule.[6] But regardless of whether the inquiry concerns if the area comprises part of the employer's premises or fits under another exception to the coming and going rule, the Board has recognized "the critical issue" is the same: "the degree of control exercised by employer." *Trimble*, 32 BRBS at 243, n.2.[7]

We agree with Claimant and the Department of Labor that substantial evidence supports the ALJ's finding the parking lot comprises part of Employer's premises under *Trimble's* binding precedent. As the Director notes, the weighing of evidence relating to whether an injury occurred on an employer's premises falls within an ALJ's discretion, and the Board can disturb those findings *only* if they are "inherently incredible, patently

[6] There are four exceptions to the coming and going rule: 1) when the employer pays for travel expenses or provides transportation; 2) when the employer controls the employee's journey; 3) when the employer sends the employee on a special errand; and 4) when the employer requires the employee to be available for emergency calls. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 480 (1947).

[7] Our dissenting colleague first appears to argue the ALJ erred by conflating premises liability with exceptions to the coming and going rule, *see* Dissenting Opinion at 14, but then apparently admits the Board's precedent analyzes the issues under the same level of control standard, *id.*, before once again appearing to assert a material distinction between the two to attempt to distinguish *Trimble*. *Id.* ("*Trimble* was not a premises case, it cannot be relied upon to find the location of Claimant's injury constituted Employer's premises."). Our colleague's take notwithstanding, Board precedent is unequivocal: "the distinction is not material as both questions turn on the degree of control exercised by employer, which is the critical issue [in *Trimble*] and in *Shivers*." *Trimble*, 32 BRBS at 243, n.2.

unreasonable, or unsupported by substantial evidence." *Cantrell v. Base Restaurant, Wright-Paterson Air Force Base,* 22 BRBS 372, 375 (1989).

This plainly is not such a case. With that high bar in mind, it cannot be contended that reasonable sense did not guide the ALJ's conclusion that these facts are comparable to those in *Trimble*.

As the ALJ recognized, the caselaw indicates two aspects of control that are relevant to the parking lot inquiry: control over who may park in the lot and control over the maintenance of it. D&O at 22-23. While, as the ALJ further recognized, Employer arguably did not maintain as much control over who may park in the lot as in *Trimble*, the layout and purpose of the lots in both cases are not so dissimilar to make any comparison patently unreasonable. In *Trimble*, the employer, during its orientation program, "instructed" its employees to park in the lot behind its building, and the lot was used only by employees and vendors and not available to other members of the public. 32 BRBS at 243. By contrast, Employer here "notified" its employees of their ability to park in the lot directly in front of the building where Claimant fell, and the lot's layout and the processes for entering both the base and the Lassen Building effectively ensures parking lot hazards mostly involve the building's tenants. In that respect, the lots in both cases "created a risk of employment not shared by the public," thereby demonstrating "control over that part of the journey where claimant was injured." *Trimble,* 32 BRBS at 243 (citing *Cardillo* 330 U.S. at 469).[8]

Moreover, as the ALJ further reasoned, the lots in both cases are similarly situated in terms of the level of employer control over maintenance. In *Trimble,* while the Air Force retained the legal duty to remove snow and ice from the lot, the employer still voluntarily shoveled snow and ice on an ad hoc basis. *Id.* Here, while the Navy retained the legal duty to repair the lot, Employer still directed its employees to report any maintenance issues -- and the ALJ, as sole factfinder, found no repairs occurred without such notice. D&O at 22-23. Notably, in both cases the injury at issue involved aspects of the lot over which the employers exerted some specific control: in *Trimble,* the claimant slipped on the ice-

[8] Our dissenting colleague takes issue with the ALJ's finding that Employer "notified" its employees the lot was for employee parking. In her view, as a factfinder, she would have found Employer did not notify its employees that the lot was for employee parking -- and the fact the lot was not "designated" for such purposes, alone, serves as the sole basis for her to reverse the ALJ's decision. But in the same footnote our colleague evaluates the facts, she explicitly acknowledges Employer's Director of Human Resources agreed the lot was both "designated" for employee parking and the main lot for such parking. *See* Dissenting Opinion at 17, n.11.

covered sidewalk the employer occasionally shoveled and salted, 32 BRBS at 243, and here Claimant tripped over a crack in the pavement, a tripping hazard that Employer was responsible for reporting. D&O at 22-23.

Pursuant to *Trimble*, we agree with the Department of Labor that the ALJ's determination "squarely positions Claimant's injury in the lot as outside the coming and going rule bar." Director's Brief at 6. But even if we ultimately disagreed with that position, it cannot legitimately be said that the ALJ's conclusion that the lot comprised part of Employer's space is "inherently incredible" or "patently unreasonable." *See, e.g., Elkins v. Sec'y of HHS*, 658 F.2d 437, 439 (6th Cir.) (1981) ("If the [ALJ's] findings are supported by substantial evidence, we must affirm the ALJ's decision, even though as triers of fact we might have arrived at a different result."); Director's Brief at 7 ("the ALJ's analogy to *Trimble* is not so unreasonable to fall outside the ALJ's broad discretion.").[9]

[9] Our dissenting colleague goes to great lengths to reweigh the evidence to ultimately conclude that if she were the ALJ she would have come to a different conclusion on these facts. But not only does that analysis engage in an extensive and improper reweighing of evidence -- while simultaneously raising many arguments not asserted by any party -- it further contains errors of fact and law.

First, it examines an extensive range of cases, rather than focusing on *Trimble*, the one case the ALJ properly determined was dispositive. Instead of explaining how the ALJ erred under that controlling precedent, our colleague spends considerable -- and in our view unwarranted -- effort comparing this case to *Shivers* and unpublished Board cases (along with *Sharib v. Navy Exch. Serv.*, 32 BRBS 281 (1998), which does not appear to be particularly relevant except to indicate that the level of control in each case is factually specific). *Shivers* is an out of circuit case and, like the unpublished Board cases cited, not precedential. On the other hand, *Trimble* both arose in the Sixth Circuit and is controlling. As a practical matter, the ALJ explicitly acknowledged the level of control here fell short of that found in *Shivers* but was comparable to *Trimble* -- so accepting our colleague's similar conclusion as true, it is hard to envision how it affects the ALJ's analysis. Moreover, even a cursory review of the unpublished cases our colleague cites does not establish the ALJ significantly deviated from *Trimble*, as our colleague claims, but rather confirms ALJ discretion in weighing the facts that establish control.

Second, and equally fundamental, while acknowledging the proper standard of review at the outset -- the ALJ's finding must be affirmed unless found "patently unreasonable" -- our colleague subsequently casts it aside and does not even attempt to apply it. While it may be true our colleague would find another conclusion better supported by the evidence, that lands far short of establishing the ALJ's determination as irrational

So too the ALJ's conclusion that the accident occurred within the time boundaries of Claimant's employment. Recreational activities qualify as within the course of employment if, in relevant part, "they have achieved some standing as a custom or practice either in the industry generally or in the particular workplace." *Sheerer v. Bath Iron Works Corp.*, 35 BRBS (2001). As the ALJ recognized, both general acceptance and particular acceptance apply here. D&O at 25-27.

Generally, courts have long held lunch time jogs occur within the course of employment. 2 *Larson's Workers' Compensation Law* § 21[1][a] (2000); *see also Vaccaro v. Sperry Rand Corp.*, 83 A.D. 2d 678 (N.Y. App. Div. 1981). Particularly, the ALJ considered the specific circumstances of Claimant's employment -- including Employer's longstanding practice, the employee handbook that encouraged lunch time exercise, and Employer's actual knowledge that Claimant routinely ran through the lot on his lunch break -- and permissibly determined his lunch time jogs are part of his employment under the "particular customs and practices at the individual worksite." *Sheerer*, 35 BRBS at 46; D&O at 26.

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or "patently unreasonable." *See Elkins*, 658 F.2d at 439 ("If the [ALJ's] findings are supported by substantial evidence, we must affirm the ALJ's decision, even though as triers of fact we might have arrived at a different result."). Indeed, finding the employer liable as a matter of law in *Trimble*, and then reversing the ALJ here on similar facts to absolve Employer as a matter of law would eliminate the ALJ's role rather than accepting her undeniably wide discretion.

Finally, our dissenting colleague injects concepts into this opinion that simply are not there to attempt to create a parade of horribles and establish that the opinion significantly expands employer liability. That is a mischaracterization. We agree with the Department of Labor and hold only that the ALJ properly acted within her discretion in finding the facts in this case similar enough to *Trimble* for Employer's liability to arise. And as is obvious from both the ALJ's decision and this opinion, that plainly does not come close "to finding the entire base would effectively be within the space boundaries of the course of employment inquiry." *See* Dissenting Opinion at 18, n.13. Rather, as the Board has long held under the Non-appropriated Fund Instrumentalities Act, whether an injury occurred on an employer's premises or as an exception to the coming and going rule is a factually specific inquiry that falls within an ALJ's discretion, and the Board can only disturb those findings if they are "inherently incredible, patently unreasonable, or unsupported by substantial evidence." *Cantrell v. Base Restaurant, Wright-Paterson Air Force Base*, 22 BRBS 372, 375 (1989) (emphasis added). Here they were not.

Employer's arguments on appeal do not affect this analysis. Citing cases that predate *Trimble*, Employer, like our colleague, generally requests we disregard the ALJ's factual findings and reexamine or reweigh the evidence. *See, e.g.*, Emp. Reply Br. at 4-6 (citing the hearing transcript and exhibits to challenge the ALJ's finding that it has some control over the lot). But "to the extent [Employer] asks [the Board] to reweigh evidence, we generally leave credibility determinations to the ALJ's expertise so long as the ALJ acted reasonably." *Island Creek Kentucky Mining Co. v. Gamblin*, 2023 WL 2733530 *2 (6th Cir. March 31, 2023) (citation omitted); *see also Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Compton v. Avondale Indus., Inc.*, 33 BRBS 174 (1999). As we have already discussed, we find the ALJ's credibility findings well within her wide discretion here.

Moreover, Employer's attempt to distinguish the authority the ALJ relied on as a matter of law is equally unpersuasive. Employer's argument that it does not control employees' time during their lunch breaks does not take into account the relevant standard, which is whether exercise is an established custom, not whether Employer requires it. *Sheerer*, 35 BRBS at 46. Employer further argues it did not benefit from Claimant's activity, but, as *Sheerer* held, the Act does not require that "the employee must have at the time of injury been benefiting the employer." *Id.* As the Director notes, it "is enough that Claimant's injury occurred during an activity that is part of employment under the 'particular customs and practices at the individual worksite.'" Director's Brief at 9 (citing *Sheerer*, 35 BRBS at 46). And as the ALJ permissibly found, it was.[10]

[10] Moreover, as the Director notes, Employer does not specifically challenge the ALJ's finding that Claimant's injury occurred during the less than one minute it would have taken Claimant to reenter the space boundaries of his employment. Directors Brief at 8, n3; D&O at 25. "Instead, it contends Claimant was not injured on its premises, and that Claimant's lunch break is outside the time scope of employment." *Id.* Thus, while we need not reach the issue since we have concluded the lot is part of Employer's premises, we nevertheless would affirm the alternative finding that Claimant was entitled a reasonable period to come and go if the lot was not part of Employer's premises as another reasonable exercise of discretion. *Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 519 (6th Cir. 2001) ("Substantial evidence is such evidence as a reasonable mind might accept to support a conclusion.").

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the award of benefits. The ALJ erred by incorrectly applying the law to the facts of this case; however, even if she had properly applied the law, substantial evidence does not support a finding that Claimant's injury occurred within the course of his employment. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Consequently, I would reverse the Decision and Order Awarding Benefits (D&O).

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). 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. *Durrah v. Washington Metropolitan Area Transit Authority*, 760 F.2d 322, 17 BRBS 95(CRT) (D.C. Cir. 1985); *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Generally, injuries sustained by employees on their way to or from work are not compensable (the "coming and going rule"). *See, e.g., Sawyer v. Tideland Welding Service*, 16 BRBS 344, 345 (1984).

However, there are exceptions to the coming and going rule. The first is when the injury occurs on the employer's premises. *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99(CRT) (4th Cir. 1998). Notably, property not owned by an employer can become that employer's premises if it is "'*maintained by an employer for its employees*.'" *Id.* at 324, 32 BRBS 101(CRT) (quoting 1 *Larson's Workers' Compensation Law* § 15.42(a)) (emphasis in decision). For instance, in *Shivers*, the United States Court of Appeals for the Fourth Circuit held evidence of the employer's "designation, operation, and control of the employee lot" exhibited a sufficient level of control over the area such that the lot should

be considered part of employer's premises, and therefore exempt from the coming and going rule. *Id*., 144 F.3d at 324-325, 32 BRBS at 100-101(CRT).

The second exception to the coming and going rule applies when 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). In *Cardillo*, the United States Supreme Court recognized at least four sets of circumstances under which this second exception applies, all of which involve a level of employer control: 1) when the employer pays for travel expenses or provides transportation; 2) when the employer controls the employee's journey; 3) when the employer sends the employee on a special errand; or 4) when the employer requires the employee to be available for emergency calls. *Id*. at 480; D&O at 21. Under this exception to the coming and going rule, some particular circumstance of an employee's employment exposes him to a risk outside of the "ordinary hazards" encountered by "all travelers" while traveling to and from work. *Id*. at 479.

In the case before us, the ALJ found Claimant's injury exempt from the coming and going rule under the premises exception. D&O at 23. Relying primarily on *Trimble v. Army & Air Force Exch. Serv.*, 32 BRBS 239 (1998), the ALJ concluded:

> The parking lot adjacent to the Lassen Building is Employer's premises because Employer at least partially controls an employee's journey through the parking lot due to its acceptance of responsibility for reporting maintenance.

D&O at 23. However, *Trimble* is not a premises-exception case; it is an employer-control exception case. *Trimble*, 32 BRBS at 242 n.2. The Board pointed out this distinction by differentiating the issue before it ("whether the employer control exception to the coming and going rule applies") from the issue decided by the Fourth Circuit in *Shivers*, 144 F.3d 322, 32 BRBS 100(CRT) ("whether the parking lot was part of employer's premises."). *Id*. Nevertheless, as both inquiries depended on a showing of employer control, the Board adopted the Fourth Circuit's reasoning in *Shivers*, which it found "compelling." *Id*.

The *Trimble* Board then identified the ALJ's factual findings that demonstrated employer control: the employer instructed its employees to park in the lot behind its facility and to enter through the rear door; the lot was specifically designated for employees and not for employer's customers; the entrance used by employees was not used by customers; the lot was used only by employees and vendors; and the employer directed employees to remove snow and ice from the sidewalk because some employees had to arrive at 5:00 a.m. *Trimble*, 32 BRBS at 242. Based on this evidence, the Board held the employer exercised control over the area of injury similar to that exhibited in *Shivers* and also controlled its employee's journey to and from work thereby creating "a risk of employment not shared with the public" in accordance with the second *Cardillo* exception. *Id*. It did not explicitly

hold this evidence converted the base-owned sidewalk into employer's premises (as the Fourth Circuit did in *Shivers*); rather, it held the cumulative evidence of the employer's control over the area of injury was sufficient to exempt the injured employee from the coming and going rule, and thus the injury occurred in the course of employment. *Trimble*, 32 BRBS at 242-243.

In the case before us, the ALJ likened Employer's "acceptance of responsibility for reporting maintenance" to the employer's maintenance-related control in *Trimble*, finding this similarity established employer "at least partially" controlled employee's journey such that the lot in which Claimant was injured became Employer's premises. D&O at 22-23. However, as *Trimble* was not a premises case, it cannot be relied upon to find the location of Claimant's injury constituted Employer's premises. Moreover, in *Trimble*, the evidence of employer's maintenance-related control – the directive to shovel snow off the sidewalk – was evidence of control over the area of injury, not evidence of employer control over the journey. *Trimble*, 32 BRBS at 242. The ALJ's conclusion erroneously conflates the premises exception to the coming and going rule with *Cardillo*'s control over the journey exception, and thus represents an incorrect application of the law.

Nevertheless, as the Board stated in *Trimble*, both the premises exception and *Cardillo*'s hazards of the journey exceptions to the coming and going rule hinge on an employer's control (*Trimble*, 32 BRBS at 242 n.2) and therefore it is possible the ALJ's incorrect application of the law could constitute harmless error, if her conclusion after weighing evidence of employer's control in this case is supported by substantial evidence and is neither inherently incredible nor patently unreasonable. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33 (2016); *Cantrell v. Base Restaurant, Wright-Paterson Air Force Base*, 22 BRBS 372, 375 (1989); *Pardee v. Army and Air Force Exchange Service*, 13 BRBS 1130 (1981); *Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127 (1979). However, in this instance, I do not believe there is sufficient evidence of employer control over the area of injury under the Board's holdings in *Trimble* and *Sharib v. Navy Exch. Serv.*, 32 BRBS 281 (1998), to support the ALJ's finding that the parking lot where Claimant fell constituted Employer's premises, thus exempting Claimant's injury from the coming and going rule.

The ALJ correctly inquired into whether Claimant's injury comes within the premises exception to the coming and going rule in accordance with the Fourth Circuit's holding in *Shivers*. D&O at 22. In *Shivers*, the claimant slipped and fell while walking across a median strip of grass in the parking lot opposite her workplace. *Shivers*, 144 F.3d at 323, 32 BRBS at 99-100(CRT). The Fourth Circuit found the lot where the claimant was injured, although owned by the Navy, constituted Employer's premises based on the ALJ's factual findings demonstrating the employer's control over the parking lot. For instance, the employer exerted significant control over who could and could not use the

lot: the lot was designated exclusively as an employee parking lot, the employer posted signs with notices of all parking restrictions as well as warnings that violators would be removed, the employer issued parking decals to those allowed to park in the lot, the employer employed persons to patrol the lot and to tow illegally parked cars, and the employer prohibited its employees from parking in a different lot unless the employee-designated lot was full. Moreover, although the Navy performed maintenance work involving major structural repairs, the employer instructed its employees to maintain the appearance of the parking lot by mowing the grass (including the median strip where the injured employee fell), picking up trash, operating a street sweeper, and salting sidewalks when it snowed. The Fourth Circuit held evidence of the employer's "designation, operation, and control of the employee lot" exhibited a sufficient level of control over the area such that the lot should be considered part of employer's premises, and therefore exempt from the coming and going rule. *Id*., 144 F.3d at 324-325, 32 BRBS at 100-101(CRT).

Although *Trimble* was not a premises case, as explained above, the Board found the employer exerted control over the area of injury similar to that exerted in *Shivers*, by both controlling where its employees parked and directing its employees to shovel and salt the sidewalk leading to the employee entrance. *Trimble*, 32 BRBS at 242. Adopting the reasoning as set forth in *Shivers*, these facts established "designation, operation, and control of the employee lot," *Shivers*, 144 F.2d at 325, 32 BRBS at 101(CRT), and thus Claimant's injury was exempt from the coming and going rule by virtue of the employer-control exception. *Trimble*, 32 BRBS at 242-243.

Shortly after *Trimble*'s issuance, the Board had the opportunity to address the premises exception to the coming and going rule in in *Sharib v. Navy Exch. Serv.*, 32 BRBS 281 (1998), binding Board precedent conspicuously absent from the ALJ's application of the premises exception to the facts before her, considering it is the only published Board decision to discuss the premises exception to the coming and going rule since the issuance of *Trimble*. In *Sharib*, the claimant was injured when she fell in an obscured rut in a grassy area abutting the partially destroyed sidewalk leading from a designated employee parking lot to the employer's facility. *Id*. at 281, 283. It was undisputed the Navy, not the employer, owned the buildings and grounds. *Id*. at 282. The record was silent as to whether the employer had any responsibility for maintaining the area surrounding the employer's facility; however, it did show the employer was in the process of moving and over the course of several months had parked large moving trucks on the curb, sidewalk, and surrounding area up to the entrance of its facility. *Id*. at 283. The Board held the employer, by causing the deterioration of the sidewalk and grass over which the employee was required to travel to arrive at work, had committed an "affirmative act…in operating its business, which created a risk of employment not shared with the public." *Id*. (citing *Cardillo*, 330 U.S. at 469, and *Trimble*, 32 BRBS at 242). This active control over the

condition of the site of injury, in conjunction with the designated parking, which placed employees at the site of injury, established employer control such that the area should be considered part of the employer's premises, and thus exempt from the coming and going rule. *Id*.

In the case on appeal, the ALJ acknowledged there was no evidence of employer control over the lot's use. D&O at 23. Rather, the ALJ focused exclusively on evidence of Employer's control over the lot's condition. The ALJ credited Claimant's testimony that employees were the "eyes and ears of the parking lot" (D&O at 22) and credited the testimony of Employer's HR Director that if an employee did not report an issue, it would not be resolved. D&O at 9, 23. However, this oversight was passive: the Navy, not Employer, was responsible for maintenance of the parking lot; if an issue arose on the base (including the lot in question), the commanding officer of the base would contact the public works division which would then either perform the required maintenance itself or hire a third party to perform the maintenance. D&O at 7, 13, 15, 22.

Based on this evidence, the ALJ rationally found "Employer's level of control over the maintenance of the parking lot is shy of that which the employer in *Shivers* exercised." D&O at 22. However, she found Employer's "acceptance of responsibility for reporting maintenance" to be comparable to the employer's directive in *Trimble* that its employees "shovel snow and salt sidewalks," and therefore sufficient to establish employer control over the area of injury such that the parking lot where Claimant fell constituted Employer's premises. D&O at 22-23. Even accepting this finding as within the ALJ's discretion, it is a misapplication of the law of *Trimble* and *Sharib*, which required more than just maintenance-related control, but also collective evidence of "designation" and "operation" in accordance with the reasoning of *Shivers*, 144 F.2d at 325, 32 BRBS at 101(CRT).

In *Trimble* and *Sharib*, it was not simply the employers' acceptance of responsibility for the condition of the site of injury that resulted in the establishment of the employers' control over the areas but also the designation of parking, and in *Trimble*, the additional designation of an employee-only entrance, which placed employees in the area of injury, thereby "creat[ing] a risk of employment not shared with the public." *Sharib*, 32 BRBS at 283; *Trimble*, 32 BRBS at 242. This is supported by the Fourth Circuit's reasoning in *Shivers*, which the *Trimble* Board formally adopted, *Trimble*, 32 BRBS at 242 n.2, that employer control is demonstrated through "designation, operation, *and* control of the employee lot." *Shivers*, 144 F.2d at 325, 32 BRBS at 101(CRT) (emphasis added).

Here, there are no employment designations related to parking or entrances placing Claimant in the area of his injury. The ALJ found "Employer does not require employees to park in any specific employee lots," "employees are free to park anywhere on the base," and "employees of all entities that occupy the Lassen Building, not just those who work

for Employer, use employee lots." D&O at 23.[11] The ALJ acknowledged this important distinction, but erroneously disregarded it. D&O at 23. As demonstrated above, maintenance-related control, without an employment-related requirement placing employees at the location of injury (demonstrated through designation of parking and/or entrances) is insufficient to establish the level of control necessary to exempt employees from the coming and going rule.[12] Applied to the facts of this case, due to the absence of

[11] The ALJ found "Employer's notifying employees of the employee lots," along with the reporting requirement, rendered the lot Employer's premises. D&O at 23. However, the record does not support a finding that any such notification ever occurred. Rather, Ms. New testified there was "no written documentation of guidance for employees regarding where to park" (D&O at 13 (citing EX 23 at 33-34)), and although she agreed with counsel when asked whether the lot adjacent to the Lassen Building was the "main" lot, HT at 100 ("Q: The main parking lot that is utilized by CNIC employees would be the parking lot directly adjacent to the Lassen Building; is that correct? A: Yes.") and was "designated" as employee parking, EX 23 at 18 ("Q: And the parking lot directly adjacent and to the west of the building is designated as a parking area for employees -- for your employees to park, correct? A: Correct."), she consistently testified the parking lot was not for the exclusive use of MWR employees, and employees were free to park anywhere on base. D&O at 7, 13, 15; HT at 67-69, 100; EX 23 at 15-18, 60-61.

[12] Significantly, the Board has consistently held this position since issuing *Trimble* and *Sharib*, in several unpublished decisions. Although without precedential value, it is important to point out the majority's holding in this case represents a significant deviation in the application of *Trimble* to "coming and going" cases on military bases. *West v. Navy Exchange Command*, BRB No. 03-0636 (Jun. 22, 2004) (the employer demonstrated both designation-related control, by designating which spaces in the lot were for employees, issuing parking decals, and enforcing consequences for failure to follow parking rules, and maintenance-related control, by replacing curbstones and picking up debris; the Board upheld the ALJ's determination the employer demonstrated sufficient control over the lot such that it was its premises); *S.R. v. Air Force Ins. Fund*, BRB No. 09-0409 (Oct. 16, 2009) (evidence of restricted use of some spaces in the lot and the employer's directive to the claimant to move her vehicle out of one of those restricted spots was insufficient to demonstrate employer control, when there was no evidence of designated employee-only parking or entrances, and no evidence the employer performed any maintenance of the parking lot); *Webster v. Army Central Ins.* Fund, BRB No. 12-0322 (Jan. 29, 2013) (insufficient evidence of employer control as the parking lot was open to anyone on base and employees would only occasionally pick up trash in the lot on a voluntary basis); *Hart v. Dept. of Army/NAF*, BRB No. 19-0238 (Aug. 30, 2019) (the claimant was injured on a grassy area while walking from a bus stop outside of the base to her workplace inside the

Employer designations as to where Claimant parked and where he entered the Lassen Building, there were no employment-related directives that he be at the site of injury as he returned to work, and thus the risks he encountered as he completed his jog through the parking lot, including the crack in the asphalt that caused him to fall, were not risks unique to his employment, but were "ordinary" hazards faced by "all travelers," employees and non-employees alike.[13] *Trimble*, 32 BRBS at 242; *see Cardillo*, 330 U.S. at 479.

Although it was within the ALJ's discretion to find the maintenance-related control exhibited by Employer "comparable" to that exerted by the employer in *Trimble* (D&O at 22), the absence of any designation of parking, a fact established by the ALJ (*Id*. at 23), renders *Trimble* inapplicable to the facts herein. Consequently, the ALJ's determination that Employer exerted sufficient control over the parking lot such that it was Employer's premises is not supported by substantial evidence or in accordance with the law and should be reversed. *O'Keeffe*, 380 U.S. 359; *Cantrell*, 22 BRBS at 375.

In sum, the ALJ incorrectly applied the law to the facts of this case. The ALJ's conclusion that Employer exerted sufficient control over the area of injury such that it was Employer's premises, and thus exempted from the coming and going rule, is not supported by substantial evidence or in accordance with the law. *O'Keeffe*, 380 U.S. 359; *Cantrell*, 22 BRBS at 375; *Shivers*, 144 F.3d 322, 32 BRBS 99(CRT); *Trimble*, 32 BRBS 239.

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base; the injury was not in course of employment when the employer did not own or maintain the grassy lot and exercised no control over how the claimant got to work).

[13] The majority erroneously holds the parking lot hazards encountered by Lassen Building tenants generally, whether employees of Employer or not, constitute unique employment-related risks because of the security measures required to get on the base and in the building. Majority Opinion at 4, 8. This is in direct contravention to *Cardillo*, which held an injury occurring on the way to or from work should only be exempt from the coming and going rule when particular employment-related circumstances expose the injured employee to extraordinary risks not encountered by "all travelers." *Cardillo*, 330 U.S. at 479. Further, under the majority's holding, the "public" referenced by the Board in *Trimble* is converted to those without access to the military base. So defined, "risks not shared with the public" would encompass any hazard encountered on the base, despite an employee's shared exposure to these risks with all other non-employees also working on the base. In other words, the entire base would effectively be within the space boundaries of the course of employment inquiry, thereby undermining prior Board decisions wherein it specifically held injuries occurring on military bases did not occur within the space boundaries of employment. *See e.g., 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).

Accordingly, as the injury did not occur on Employer's premises and as Employer did not exercise sufficient control over the accident area such that the premises exception to the coming and going rule applies, Claimant's injury did not occur in the course of his employment as a matter of law; the Decision and Order Awarding Benefits should be reversed, and benefits should be denied.

MELISSA LIN JONES
Administrative Appeals Judge