BRB No. 03-0636

VIRGINIA WEST	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE COMMAND	)	DATE ISSUED: JUN 22, 2004
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Michael J. Stebbins, Pensacola, Florida, for claimant.

R. John Barrett (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-0528) of Administrative Law Judge C. Richard Avery 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 was a fabric worker at the Officer Candidate School Tailor Shop, a Navy Exchange facility, at the Naval Air Station Pensacola. Each day, she showed an identification badge to enter the base, and she parked in an area adjacent to Building 634, which housed the tailor shop. Her parking decal permitted her to park in either the employee-designated lot or the customer-employee lot adjacent to the building. Cl. Ex. H at 5, 7-10; Tr. at 13, 16, 27, 33. On October 6, 2000, claimant arrived at work

approximately five minutes before she could clock-in. As she walked away from her car, she stepped on a piece of construction debris, PVC piping, and fell, injuring her knee.[1] She was taken to the hospital and underwent surgery. Although claimant returned to alternate employment, she did not return to work for employer after her injury.[2] Her knee condition reached maximum medical improvement in 2001, and the parties agree she has a 21 percent impairment of the left leg; however, claimant continues to treat with her doctor as the knee pain necessitates. Claimant filed this claim for benefits, and employer disputed liability and has not paid any benefits.

The only issue in dispute in this case is whether the "coming and going" rule applies to bar claimant from receiving benefits. The administrative law judge set forth the evidence and the relevant law related to the "coming and going" rule, and he found that the parking lot where claimant was injured "was sufficiently connected" to employer's facility, and, thus, was a part of employer's premises. The administrative law judge stated that claimant established an exception to the "coming and going" rule because, despite not owning the parking lot, employer actively exercised control over the area. Decision and Order at 2, 7. Employer challenges the decision, contending the administrative law judge should have applied the "coming and going" rule to this case and arguing that this case is distinguishable from *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99(CRT) (4th Cir. 1998), and similar cases holding the employer liable for injuries occurring in parking lots. Claimant responds, urging the Board to affirm the administrative law judge's finding and the resulting award of benefits.

To "arise in the course of employment," an injury must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment pursuant to Section 2(2) of the Act. 33 U.S.C. §902(2); *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. *See, e.g., Sawyer v. Tideland Welding Service*, 16 BRBS 344, 345 (1984). However, an employee is allowed a reasonable time before and after work to enter and exit the

[1]At the time of claimant's injury, the Navy was in the midst of converting a large portion of Building 634 into the new library and education center for the Officer Candidate School.

[2]Claimant felt she was able to return to her former job in November 2000, but employer would not allow claimant to return until she was released to full work capacity, and by then, claimant felt she had exhausted her attempts to return. Tr. at 23-26.

employer's premises; injuries occurring on the premises during this time arise within the scope of employment, and the "coming and going" rule does not apply. 1 Arthur Larson & Lex. K. Larson, *Larson's Workers' Compensation Law* §15.00 (1997). In addition, 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).

Employer asserts that the instant case is analogous to *Harris v. England Air Force Base Non-Appropriated Fund Financial Mgmt. Branch*, 23 BRBS 175 (1990), and *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989), wherein the Board held that a payroll clerk and a restaurant cashier, both of whom were injured while walking between their cars and their places of employment on military bases, were not entitled to benefits under the Act by application of the "coming and going" rule. *Harris*, 23 BRBS at 176, 178; *Cantrell*, 22 BRBS at 373-375; *see also Palumbo v. Port Houston Terminal, Inc.*, 18 BRBS 33 (1986). While there are similarities between *Harris*, *Cantrell* and the instant case,[3] the administrative law judge rationally found that there are also valid distinctions thereby warranting a finding of coverage in this case. Substantial evidence and more recent case law support the administrative law judge's determination that the "coming and going" rule does not bar claimant's entitlement to benefits; therefore, we affirm the award of benefits.

In this case, claimant worked in a building and parked in a parking lot owned by the Navy. She had a decal on her car that permitted her to park in one of two contiguous parking areas adjacent to the building. Cl. Exs. G at 6-7, 28-29, H at 10, M; Tr. at 18, 33, 35, 40-41. Employer was not responsible for maintaining or repairing the parking lot, but the administrative law judge found that it voluntarily took on the tasks of "maintaining the appearance" of the parking lot and of replacing the curbstones which identified employee, customer and vendor parking spaces. Cl. Exs. B, G at 6, 8-9, 19-20, 33-35, Exh. A, H at 9, 12-14; Emp. Ex. 8; Tr. at 16-17, 35-37, 40-42. During the time claimant worked at the tailor shop, a contractor hired by the Navy was renovating a large part of Building 634, converting it into a library and education center. The contractor placed a dumpster in the parking lot, taking up some of the employee spaces, and the contractor

[3]For example, the claimants were employees of non-appropriated fund entities that did not own the parking lot or sidewalk on which the claimants were injured.

was responsible for cleaning up construction debris and emptying the dumpster. Tr. at 34, 43.

The administrative law judge considered the law pertaining to the "coming and going" rule. He noted that the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has not addressed this issue, but that the United States Court of Appeals for the Fourth Circuit rendered a decision in a similar case. *Shivers*, 144 F.3d 322, 32 BRBS 99(CRT); *see also* S*harib v. Navy Exchange Service*, 32 BRBS 281 (1998); *Trimble v. Army & Air Force Exchange Service*, 32 BRBS 239 (1998). In *Shivers*, the claimant worked as a sales clerk at the Navy Exchange located in a mall on the Norfolk Naval Base. She parked her car in the lot opposite the employee entrance, stepped onto a median strip of grass and fell. The Fourth Circuit held that the Navy Exchange actively maintained and controlled the lot because it posted signs designating the lot for the exclusive use of its employees, it issued parking decals, it patrolled the lot and hired its own towing service, and it directed its employees to perform work, such as mowing, trash removal, street sweeping, salting and shoveling, to maintain the appearance and safety of the lot. The court found that the Navy Exchange's actions and its directions to its employees established its control over the lot and constituted an exception to the "coming and going" rule. *Shivers*, 144 F.3d at 325, 32 BRBS 99-101(CRT).

After applying the facts of this case to the law set forth in *Shivers*, the administrative law judge found that employer "informally maintained" the parking lot by replacing curbstones and picking up debris. He found that employer also designated spaces, issued decals, and warned of the consequences of non-compliance with parking rules. He stated that there was only one entrance to the OCS Tailor Shop for the employees, and, on the day she was injured, claimant parked and proceeded toward that entrance. Decision and Order at 7. The administrative law judge determined that major maintenance was performed by the Navy but that the "day to day maintenance was performed by Employer." *Id.* Finally, although he noted the differences, the administrative law judge concluded there were enough similarities between this case and *Shivers* to hold employer liable for claimant's injury, as employer actively controlled the parking lot. *Id.*

As the administrative law judge is charged with weighing the evidence, we hold that his conclusion in this case is rational and is supported by substantial evidence of record. The administrative law judge relied on employer's designation of parking spaces, replacement of curbstones and voluntary pick-up of debris to establish employer's active control over the lot. Employer undisputedly performed these activities, and the administrative law judge reasonably concluded that neither public usage nor employer's

lack of ownership or formal maintenance duties negated the control employer exerted. *Trimble*, 32 BRBS at 242-243. Therefore, we affirm the administrative law judge's decision that claimant's injury occurred during the course of her employment.

Accordingly, the administrative law judge's Decision and Order 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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BETTY JEAN HALL
Administrative Appeals Judge