BRB No. 98-0198

WILMA TRIMBLE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Oct. 14, 1998
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE	)	
	)	
	)	
and	)	
	)	
EMPLOYER'S SELF-INSURANCE SERVICE	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John J. Osterhage, Crestview Hills, Kentucky, for claimant.

Douglas A. U'Sellis, Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-2626) of Administrative Law Judge Richard E. Huddleston 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time this case is before the Board. To recapitulate the facts, claimant, on March 5, 1988, slipped on a wet, ice-covered sidewalk adjacent to the employee-designated entrance door of employer's facility.[1] This entrance door is connected to a parking lot, where claimant was instructed to park, by the sidewalk on which claimant fell. As a result of her fall, claimant sustained injuries to her right foot and hand, lower back, and right shoulder, and subsequently suffered from severe headaches. Employer voluntarily paid temporary total disability benefits for the period March 5, 1988, to April 25, 1991, *see* 33 U.S.C. §908(b), as well as medical benefits. 33 U.S.C. §907. Claimant has not returned to her regular employment since the date of her work injury.

In his initial Decision and Order, the administrative law judge, after finding that claimant's injuries occurred prior to her arrival on employer's premises, denied claimant's claim for benefits on the grounds that claimant's injuries did not occur in the scope and course of her employment. In this regard, the administrative law judge determined that, contrary to claimant's assertions, the "zone of special danger" doctrine was inapplicable to claims arising under the Act. Accordingly, the administrative law judge denied the instant claim.

On appeal, the Board affirmed the administrative law judge's finding that the "zone of special danger" doctrine was inapplicable since the instant case arises under the Nonappropriated Fund Instrumentalities Act, not the Defense Base Act. The Board noted, however, that while claimant raised and argued the coming and going rule, the administrative law judge did not address whether the evidence of record is sufficient to satisfy any of the exceptions to that rule. Specifically, the Board stated that claimant's testimony and the testimony of Mr. Douglas Logan, employer's operations manager, were relevant to the issue of employer's control of that part of claimant's journey where she was injured, one of the exceptions to the coming and going rule. Thus, the Board remanded the case for further proceedings, instructing the administrative law judge to determine whether any of the exceptions to the coming and going rule apply to the circumstances of this case. *Trimble v.*

[1]The administrative law judge found that it is undisputed that employer is a nonappropriated fund activity with civilian personnel and that the grounds and the buildings are owned by Wright-Patterson Air Force Base.

Army and Air Force Exchange Service, BRB No. 93-2108 (May 30, 1996)(unpublished).

On remand, the administrative law judge acknowledged the general rule that injuries sustained by employees going to or coming from work are not compensable and further determined that none of the four exceptions to the coming and going rule applies in this case. Thus, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's denial of benefits, contending that she was injured in the course of her employment within the meaning of the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

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 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 question. *See, e.g., Boyd v. Ceres Terminals*, 30 BRBS 218 (1996); *Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73, 75 (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 employees' employment. *See, e.g., Sawyer v. Tideland Welding Service*, 16 BRBS 344, 345 (1984). 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, and the "coming and going rule" does not apply. 1 Arthur Larson & Lex R. Larson, *Larson's Workers' Compensation Law* §15.00 (1997). In addition, where the rule does apply, several exceptions have been recognized in situations where "the hazards of the journey may fairly be regarded as the hazards of the service." *See Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 479 (1947). The exceptions to the "coming and going rule" recognized by the Supreme Court 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 469; *see Perkins v. Marine Terminal Corp.*, 673 F.2d 1097, 1102, 14 BRBS 771, 774 (9th Cir. 1982). In this case, the Board remanded the case for the administrative law judge to address employer's control of the site of claimant's injury.

In denying benefits to claimant because her injury did not occur in the course and scope of her employment, the administrative law judge found that the sidewalk

on which claimant fell was not part of employer's premises but, rather, that Wright-Patterson Air Force Base owns this property and is responsible for its upkeep. The administrative law judge acknowledged that employer's employees sometimes shovel and salt the pavement where claimant fell, but found that these actions were undertaken on a voluntary basis. Relying on *Cantrell v. Base Restaurant, Wright-Patterson Air Force Base*, 22 BRBS 372 (1989), and *McDuffie v. Army & Air Force Exchange Service*, BRB No. 96-0825 (Jan. 27, 1997) (unpublished), the administrative law judge found that since employer had no control over, or responsibility for, the condition of the area surrounding the building employer occupied, including the parking lot, employer had no control over claimant's journey so as to come under the second exception to the coming and going rule. Claimant challenges these findings, specifically asserting that the administrative law judge erred in finding that employer did not exercise sufficient control over the sidewalk where she was injured such that the "control" exception to the coming and going rule did not apply. Claimant alternatively argues that since employer dictated the route claimant had to use in order to gain access to her work place, employer had control over claimant's journey, regardless of whether it had control over the sidewalk itself, and therefore, contrary to the administrative law judge's determination, claimant did come under the second exception to the coming and going rule. For the reasons that follow, we reverse the administrative law judge's determination that claimant's injury did not arise in the course of her employment.

This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has yet to specifically address the issue presented in the case at bar. However, in a case whose factual scenario mirrors the facts presented herein, the United States Court of Appeals for the Fourth Circuit recently addressed the boundaries of an employer's premises under the Act. In *Shivers v. Navy Exchange*, 144 F.3d 322, 32 BRBS 99 (CRT)(4th Cir. 1998), the claimant, who worked for an entity operating on nonappropriated funds, slipped and fell in the employee parking lot opposite the employer's employee entrance. The employer did not own the property on which the parking lot was located 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 grass, 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).

We find the reasoning of the Fourth Circuit in *Shivers* compelling and thus apply the rationale contained therein to the facts contained in the instant case.[2] Claimant herein testified that employer, during its orientation program, instructed its employees to park their vehicles in the parking lot located behind its building and to enter the rear door which was accessible from that lot. *See* Emp. Ex. 9 at 17-19. Claimant stated that this parking lot was specifically designated for employees and not for employer's customers. *See* Tr. at 20-21. Mr. Logan corroborated claimant's testimony, stating that the only employee entrance to employer's facility was located in the rear of the building, that employer's customers would "absolutely not" use this entrance, and that the parking lot was utilized only by employer's employees and vendors servicing employer's store. *See* Emp. Ex. 1 at 6-10. In addition, the administrative law judge credited Mr. Logan's testimony that while Wright-Patterson Air Force Base was responsible for snow and ice removal of the employee parking lot and sidewalks, he directed his staff to shovel and salt the sidewalk leading to the employee entrance because employer had people arriving to work at 5:00 in the morning. *Id.* at 6-7, 10-11, 14. Thus, as in *Shivers*, employer in the case at bar exercised control over where claimant parked and, be it voluntary or not, did in fact maintain control over the condition of the area where claimant sustained her injury. The requirement that employer's employees use the employee designated parking lot and the employee entrance created a risk of employment not shared with the public, and thus, demonstrates employer's control of that part of the journey where claimant was injured. *See Cardillo*, 330 U.S. at 469. We therefore hold that the credited evidence in the instant case establishes that claimant's injury occurred in the course of her employment.

[2]We note that the specific issue in *Shivers* was whether the parking lot was part of employer's premises, while that raised here is whether the employer control exception to the coming and going rule applies. This distinction is not material as both questions turn on the degree of control exercised by employer, which is the critical issue here and in *Shivers.*

In reaching this conclusion, we hold that, contrary to employer's assertion, *Cantrell,* 22 BRBS at 372, and *Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch*, 23 BRBS 175 (1990)*,* are distinguishable from the instant case. 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 within the base, but a 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. In addition, after noting that the employer did not tell the claimant to park in any particular area, the Board affirmed the administrative law judge's finding that none of the exceptions to 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 administrative law judge's 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. Unlike the employers in *Cantrell* and *Harris*, however, it is uncontroverted that employer herein did exercise control over where its employees parked and maintained responsibility for the condition of the area where claimant was injured. This designation of a specific parking lot to be used by its employees, and control over the sidewalk where claimant suffered her injury, provides the key distinction between the instant case and the Board decisions in *Cantrell* and *Harris*.[3]

[3]The instant case is also distinguished from *McDuffie*. In *McDuffie*, an unpublished decision, the Board denied coverage to an employee of the Army and Air Force Exchange Service at Wright-Patterson Air Force Base who slipped and fell in the primary employee parking lot. In that case, the administrative law judge accepted the parties' stipulation that the parking lot was not part of employer's premises, and the evidence showed that while employer's employees salted the walkway from the parking lot to the store entrance, employer did not use its employees to remove snow from the parking lot where claimant was injured. Thus, the Board affirmed the administrative law judge's finding that the "control" exception to the coming and going rule was not applicable. *McDuffie v. Army & Air Force Exchange Service*, BRB No. 96-0825 (Jan. 27, 1997)(unpublished). In contrast, claimant in the instant case sustained her injury on the sidewalk just outside of the employee entrance, an area where employer did use its employees for maintenance

See Shivers, 144 F.3d at 325, 32 BRBS at 101 (CRT).

Lastly, our holding herein is in conformance with the well-established principle that an injury occurring on an area maintained by the employer is compensable. *See* 1 Arthur Larson & Lex K. Larson*, Larson's Workers' Compensation Law* §§15.00, 15.42 (1997); *see, e.g., Alston v. Safeway Stores, Inc.*, 19 BRBS 86, 88 n.1 (1986)(injury on employee designated parking lot compensable); *see also Ramos v. M & F Fashions, Inc.*, 713 A.2d 486 (N.J. 1998)(injury on freight elevator used by employer for conducting business compensable);[4] *Bechtel Construction Co. v. Lehning*, 684 So.2d 334 (Fla. 1996)(injury on perimeter road within employer's control compensable); *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534 (Mo. 1996)(*en banc*)(injury on designated employee's parking lot not owned by employer compensable); *Dickson v. Silva*, 880 S.W.2d 785 (Tex. 1993)(injury on access route closely related to employer's premises compensable); *Neely v. G.W. Morrison, Inc.*, 79 A.D.2d 803, 435 N.Y.S.2d 103 (1980)(injury on alleyway adjacent to employer's entrance compensable).[5]

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purposes.

[4]Under the New Jersey workers' compensation scheme, the court stated: "When an employer uses a common area for business purposes, the common area is, by virtue of the use, subject to the employer's control and considered part of the employer's premises." *Ramos*, 713 A.2d at 491.

[5]In *Neely*, the state court noted that even though the employer did not own the

alleyway adjacent to its location, by requiring its employees to use the alleyway as a means of entrance to its premises constituted a risk of employment not shared by the public generally. "When the employee advances to the point where he is engaging in an act or series of acts which are part and parcel of the entrance into the employment premises, the test of compensability is whether there is such a relationship existing between the accident and the employment as to bring the former within the range of the latter . . . or stated differently, whether the accident happened as an incident and risk of employment . . ." *Husted v. Seneca Steel Service, Inc.*, 41 N.Y.2d 140, 144, 391 N.Y.S.2d 78, 359 N.E.2d 673 (1976).

For the foregoing reasons, we hold that, as employer exercised control over the area where claimant's injury occurred, claimant's injury arose in the course of her employment. We therefore reverse the administrative law judge's finding on this issue, and we remand the case for consideration of the remaining issues.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is reversed, and the case is remanded for consideration of the remaining issues.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge