GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-017

MYRA ACOSTA,
Claimant–Respondent,

v.

IL CREATION, INC., and ZURICH AMERICAN INSURANCE COMPANY,
Employer/Carrier - Petitioner

Appeal from a January 31, 2013 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 12-431, OWC No. 681972

Carlos A. Espinosa, Esquire, for the Claimant/Respondent
Mark W. Bertram, Esquire, for the Employer-Carrier/Petitioner

Before: HENRY W. MCCOY, HEATHER C. LESLIE, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant[1] worked as a cashier in Employer's café located in the lobby of an office building downtown and parked each work day in the underground parking garage. On February 9, 2012, Claimant had clocked out from work and was walking down the stairs leading to the parking garage when she tripped and fell injuring her lower back and right ankle. Claimant filed a claim for wage loss benefits for the period February 9, 2012 to April 2, 2012.

[1] While correctly identified in the caption, Claimant was incorrectly named as "Michelle Morrow" in the "Statement of the Case" section.

Following a formal hearing, a Compensation Order (CO) was issued on January 31, 2013 granting Claimant's claim for relief.[2] The presiding administrative law judge (ALJ) determined that Claimant was doing something incidental to her employment, that her injuries arose out of and in the course of her employment, and therefore were compensable. Employer timely appealed with Claimant filing in opposition.

On appeal, Employer argues that the ALJ has misapplied the law regarding the positional risk test and any recognized exceptions because there was no condition or obligation of Claimant's work that required her to use the stairs leading to the parking garage. Claimant argues to the contrary urging that the CO be affirmed. After reviewing the record and the competing arguments, we REVERSE and REMAND.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[3] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order (CO) that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In the instant matter, Employer takes no exception to the ALJ's determination that Claimant invoked the presumption of compensability and that Employer in turn presented evidence to rebut the presumption thus requiring the evidence to be weighed without benefit of the presumption and leaving Claimant with the requirement to show by a preponderance of the evidence that her injury arose out of and in the course of her employment. It was in this posture that the ALJ turned to the application of the positional risk test to determine Claimant's entitlement to the requested disability benefits.

We note for the record that the ALJ made the determination that Claimant invoked the presumption by making an initial demonstration of the two basic facts required, that is of a work-related event, activity, or requirement which has the potential of resulting in or contributing to the death or disability.[4] The ALJ made this determination and then applied the positional risk test when the test should have been used to determine whether the presumption had been invoked because it is only with the proper application of the test that it can be determined that a work-related event that arose out of and in the course of employment has occurred.

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[2] *Acosta v. Il Creation, Inc*., AHD No. 12-431, OWC No. 681972 (January 31, 2013).

[3] "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

[4] See *Ferreira v. DOES,* 531 A.2d 651 (D.C. 1987).

It is now generally accepted that for an employee's injury to have arisen out of the employment, the obligations or conditions of employment must have exposed the employee to the risks or dangers connected with the injury.[5] As the D.C. Court of Appeals later clarified, "an injury arises out of employment so long as it would not have happened *but for* the fact that conditions and obligations of the employment placed claimant in a position where he was injured."[6] Further, the Court stated that the determination of whether an injury took place in the course of employment is made on the basis of "the time, place and circumstances under which the injury occurred. [A]n accident occurs 'in the course of employment' when it takes place within the period of employment, at a place where the employee may reasonably be expected to be, and while he or she is reasonably fulfilling duties of his or her employment or doing something reasonably incidental thereto."[7] Employer argues the ALJ misapplied this test and we agree.

The ALJ found that Employer's café where Claimant worked was located in the lobby of a downtown office building and that Claimant drove to work daily and parked in the office building's underground parking garage. Claimant daily used a stairwell that provided direct access between the building lobby and the garage. The ALJ also found that other café employees also parked in the garage and that while Employer required three employees to park in the garage, Claimant was not one of the employees required to do so.

As to the alleged work injury, the ALJ found that on February 9, 2012, Claimant had ended her work shift, clocked out, and walked across the lobby to the stairwell leading to the underground garage where she slipped and fell on the stairs injuring her back and right ankle. The ALJ found Claimant to be within the time and place where she was expected to be to leave work and it was incidental to her employment duties to travel from the parking garage to the café by way of the stairs to reach her workplace. Employer argues to the contrary that neither the conditions nor obligations of her employment required Claimant to use those stairs. We agree.

Using the "but for" analysis under *Grayson*, *supra*, the inquiry becomes whether the injury incurred by Claimant would not have occurred but for the fact that conditions and obligations of her employment placed her in the position where she was injured. This standard requires a finding that the injury resulted from a risk incidental to the environment in which Claimant was placed by her employment. In reviewing the evidence presented, the facts as found by the ALJ in this matter do not support such a finding.

There is no evidence in this case that Employer placed any conditions on Claimant as to how she was to arrive or leave the workplace. There is no evidence to support the ALJ's finding that she was expected by Employer to use the stairwell linking the underground garage to the building lobby. The only evidence in the record of an expectation by Employer, and as found by the ALJ, was that three employees were required by Employer to park in the garage. However, Claimant was not one those employees. In addition, as Employer imposed no requirement that

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[5] *Grayson v. DOES*, 516 A.2d 909, 911 (D.C. 1986).

[6] *Bentt v. DOES*, 979 A.2d 1226, 1232 (D.C. 2009) (quoting *Clark v. DOES*, 743 A.2d 722, 727 (D.C. 2000)).

[7] *Id.* at 1234-35, (quoting *Kolson v. DOES*, 699 A.2d 357, 361 (D.C. 1997)).

Claimant drive to work, park in the garage, or use the stairs at issue[8], the finding that the injury was an incident of her employment duties is not supported by substantial evidence.

The ALJ also endeavored to apply exceptions to the "but for" rule by applying the "proximity or threshold" and "expected or usual means of access" and the "parking lot" exceptions to find that Claimant's injury arose out of employment. Unfortunately, the ALJ's favorable application of these exceptions does not withstand scrutiny. Employer's knowledge that Claimant regularly used the underground garage and used a particular stairwell to access the lobby did not make Employer responsible. As previously noted, the stairs taken by Claimant were not the only means of access/egress available to Claimant and more importantly, neither the parking garage nor the stairwell was owned, operated, or maintained by Employer for its employees. With the exception of the three employees required to park in the garage, Employer derived no direct or incidental benefit from any their other employees using the underground garage.

As Employer adroitly points out, the circumstances of this case lend themselves appropriately to the "going and coming rule". This general rule is such that the occurrence of employee injuries sustained off the work premise, while enroute to or from work, do not fall within the category of injuries "in the course of employment."[9] An exception to this rule is made for the traveling employee who is exposed to greater risk by virtue of their employment and the theory of compensability is expand in recognition of the greater risk of injury.[10] Further, the traveling employee exception is applied to those employees whose work entails travel away from the employer's premises and thus are deemed to be within the course of their employment continuously during the trip, except when a distinct departure for purely personal reasons is shown.[11] There is nothing in the instant record to suggest that Claimant was or could qualify as a traveling employee and application of the going and coming rule would preclude the injury being compensable.

In the instant case however, the ALJ made much of the fact that Claimant's injury, which occurred in a common area of the office building where Employer's business was located, still placed Claimant within the time and space where she was reasonably expected to be, such that the injury arose in the course of her employment. The ALJ's analysis is not in accordance with the law in this jurisdiction.

The issue before the CRB thus becomes whether Claimant's injury that occurred in the stairwell leading to the parking area after she left work arises out of and in the course of employment. This analysis involves considering the time of the accident and the location of the accident.

As to the time of the accident, we agree with those courts that have held that there is no such thing as 'instantaneous exit.' That is, an employee has a reasonable time after concluding

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[8] Employer's witness, Jose Lopez, the general manager, testified without contradiction that there was another stairwell and elevators that could be used to access the garage from the lobby.

[9] *Kolson, supra*, 699 A.2d at 359, quoting *Grayson, supra*, 516 A.2d at 911.

[10] See *Kolson, supra*.

[11] *Id*., quoting *2 Larson's The Law of Workmen's Compensation*, § 25.00 (1997).

work to absent herself from the employer's premises.[12] Claimant testified that she fell about 1 or 2 minutes after she left her employer's premises. We find Claimant's accident occurred within a reasonable time after quitting work and her claim is not foreclosed because she fell one or two minutes after leaving work.

As to the location of the accident, Claimant testified that she fell after she crossed the lobby and began walking down the stairs in the stairwell leading to the underground parking area. There is no dispute that Claimant did not fall on the employer's premises. The issue then is whether the location where Claimant fell is considered an extension of the employer's premises.

The CRB has previously acknowledged an exception to the going and coming rule where the injury is sustained while on the employer's premises in the course of going to or coming from work. Premises, however, are not necessarily synonymous with the term "property of the employer", but are more dependent on the relationship of the property to the employment.[13]

The facts as found by the ALJ here do not meet this exception. We find that the location of the accident is not an extension of the employer's premises. The location, across the lobby and in the stairwell, is not sufficiently close to the employer's premises to be considered an extension of those premises. Stated another way, the situs of injury was not on property owned by employer, nor was it in such proximity and relation to the employer as to be in practical effect the employer's premises.[14]

Only three employees were required to use the parking garage. There was no finding, even as to these three employees, that the use of the stairwell where Claimant's injury occurred was used exclusively or principally for Employer's convenience. In spite of the ALJ's reasoning, there is nothing in the record showing any benefit, direct or incidental, that Employer derived from Claimant's use of the stairwell.

In addition, while we have held that the injury occurred within a reasonable time after quitting work, there is no evidence or findings that the injury occurred in the performance of an activity related to Claimant's employment. We therefore see no basis for a determination that the

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[12] See *Barnes v. Stokes*, 233 Va. 249, 252; 355 S.E.2d 330, 331 (1987), *Brown v. Reed*, 209 Va. 562, 565; 165 S.E.2d 394, 397 (1969).

[13] *Gardner v. Department of Corrections,* CRB No. 08-197, AHD No. PBL 06-055, DCP No. 761032-0003-2006-0050, at 4 (April 9, 2009).

[14] Prior decisions have not always been consistent. For example, in *Newton v. National Older Workers Career Center,* Dir. Dkt. No. 99-53, OHA No. 93-321, OWC No. 527743 (August 9 1999), the claimant was injured in a fall on a public sidewalk, about 10 steps from an access alley leading to her work site. One reason her claim was denied was because she was not on employer's premises.

However, in a 1994 decision, *Harding v. Research & Evaluation*, Dir. Dkt. No. 91-53; H&AS No. 901-879; OWC No. 0197623 (July 26,1994), the Director held the claimant, who worked on the second floor of an office building, was on the employer's premises when she fell on the steps leading to the building where she worked.

Also, in the 2009 public sector case, *Gardner v. Department of Corrections*, *supra*. the CRB held that the public street next to the employer's building was not part of the employer's premises and adopted the view of one of its predecessors, the Employee's Compensation Appeals Board that to be considered part of the employing establishment's premises, the public space in which the injury occurred must be used exclusively or principally used by the employees for the convenience of the employing establishment.

injury arose out of employment because there has been no demonstration that it resulted from a risk created by the employment, as Claimant was not a traveling employee, but merely in the process of going home from work.

CONCLUSION AND ORDER

The award of benefits in the Compensation Order of January 31, 2013 is not supported by substantial evidence and is not in accordance with the law. The CO is REVERSED, VACATED and REMANDED with instructions to apply the going and coming rule of the positional risk test so as to deny the claim for relief as it is the only resolution that would be consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

May 14, 2013
DATE