

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-130

KEITH A. WILLIAMSON,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer—Respondent.

Appeal of a July 22, 2015 Compensation Order by
Administrative Law Judge Douglas A. Seymour.
AHD No. 15-179, OWC No. 724779

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JAN 8 PM 11 28

(Issued January 8, 2016)

Matthew Peffer for Claimant
Mark H. Dho for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts of the case are uncontested and sufficiently summarized in the Compensation Order (CO) under review:

Claimant, 52 years old, has been employed by the Washington Metropolitan Area Transit Authority (hereinafter, WMATA) as a bus operator for 12 years. Claimant worked Monday through Friday, drove various routes, and was paid for his entire shift, which could run 8, 9, or 10 hours. Claimant received a 20 minute paid break during each shift. HT 13-15.

On January 27, 2015, claimant began his work day at 5:00 a.m. at "Veterans Metro Center", where he began the D-8 route, which had its terminus at Union Station. Later that morning, at approximately 10:10 a.m., Claimant completed a D-8 route at Union Station, parked his bus at either Massachusetts Avenue and North Capital, or at First Avenue and

Massachusetts Avenue, and began his break. Claimant had between 20 and 30 minutes to wait for his "street relief" i.e., the bus on which he would begin his next route, the D-6. Claimant went into Union Station and used the restroom. Claimant then went back outside to wait for his next bus but came back into Union Station to get out of the cold, and to "... stay warm." Claimant had a choice of either walking around or going through Union Station to get to his next assignment. HT 15-18, 21, 22, 25-29.

After he came back inside Union Station, claimant sat down in a chair outside Potbelly's to wait for his next bus. Claimant did not eat anything from Potbelly's that morning. Claimant had eaten a sandwich, that he had brought to work, earlier in his break while walking. HT 27, 28, 30.

As Claimant sat down in a wrought iron chair, it collapsed, and he fell onto the floor. Claimant called his Division after the incident and was taken by ambulance to George Washington University Hospital, where he underwent x-rays and received medical treatment. Claimant then came under the care of Drs. Mininberg and Fechter. Claimant returned back to work three weeks later. HT 19, 23, 24. CE 1, 2. (Footnote omitted.)

CO at 2-3.

A full evidentiary hearing occurred on June 16, 2015. Claimant sought an award of temporary total disability benefits from January 27, 2015 through February 16, 2015, payment of causally related medical benefits and interest. The CO, issued on July 22, 2015, denied Claimant's claim for relief, finding the injury did not arise out of or in the course of Claimant's employment.

Claimant timely appealed the decision. Claimant argues that the "evidence only allows one possible conclusion: that Mr. Williamson's injury arose out of and in the course of employment." Claimant's memorandum, unnumbered at 3.

Employer opposes Claimant's Application for Review, arguing the CO is supported by the substantial evidence and should be affirmed as a matter of law.

ANALYSIS¹

As both parties correctly note, the District of Columbia has adopted the "positional risk" doctrine.² As stated in *Jones v. D.C. Office of Unified Communications*:

¹ The scope of review by the CRB is generally 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. See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm a Compensation Order 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

The District of Columbia has adopted the “positional risk” doctrine in defining and analyzing whether an alleged cause of an injury under its workers’ compensation laws “arises out of a claimant’s employment. See, *Clark v. District of Columbia Department of Employment Services*, 743 A.2d 722 (D.C. 2000). The positional risk doctrine is summarized in the leading treatise on workers’ compensation law at 1 LARSON’S WORKERS’ COMPENSATION LAW, Copyright 2008, Matthew Bender & Company, Inc., (*Larson’s*), PART 2 “ARISING OUT OF THE EMPLOYMENT”, CHAPTER 3 *THE FIVE LINES OF INTERPRETATION OF “ARISING”*, 3.05, Positional-Risk Doctrine, where the following is written:

An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. It is even more common for the test to be approved and used in particular situations. This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by “neutral” neither personal to the claimant nor distinctly associated with the employment.

Citing *Clark*, the treatise then states in footnote 1:

Accordingly, the claimant need not show a strong causal relationship between the employment and the injury, just a “but for” relationship. Here the claimant was assaulted in the employer’s parking lot under circumstances in which it was difficult to determine if the attack was personally motivated or merely random. Since the employer could not produce evidence that the assault was purely personal, compensation was properly awarded.

Larson’s, supra.

Jones v. D.C. Office of Unified Communications, CRB No. 09-049, AHD No. PBL 08-062, DCP No. 2008-01330-846 (May 12, 2009).³

² Employer conceded at the Formal Hearing that the injury did occur in the course of Claimant’s employment. Hearing transcript at 11 and 39.

³ The positional-risk test has been applied to private sector workers’ compensation cases in *Bentt v. DOES*, 979 A.2d 1226 (D.C. 2009)

In concluding Claimant's injury did not arise out of his employment, the ALJ noted:

In *Tompkins v. WMATA*, CRB No. 15-039, AHD No. 14-372, (June 16, 2015), a bus operator, after she had checked in at Employer's facility, then drove her personal car to another location a couple of streets closer to the facility. Claimant then parked her car, which she could later use to take her break. On the way back from moving and parking her car, Claimant tripped on tree roots, injuring her right knee and shoulder. The ALJ denied the claim, finding that Claimant was on a personal errand of no benefit to Employer. On appeal to the CRB, Claimant argued three points:

1. Having a personal car parked closer to the facility, allowed a driver to eat lunch and relax within the constraints of the break.
2. Should unforeseeable circumstances arise, having a personal vehicle parked closer to Employer's facility allowed Claimant to travel with ease.
3. Having the personal vehicle parked closer to the facility allowed Claimant protection from the elements, thus enhancing personal comfort.

The CRB affirmed the ALJ's denial of the claim, holding that "Because Employer gains no benefit from Claimant eating lunch, relaxing, travelling with ease, or avoiding weather elements, we conclude the ALJ did not commit error by concluding Claimant was on a personal errand." (emphasis added) *Tompkins* at 3.

In the instant matter, I find Claimant was on a paid, unsupervised 20 minute break at the time of his accident. I further find that because Claimant had already eaten his lunch and had used the restroom prior to his exiting Union Station, he was not, as was the situation in *Bullock*, engaged in a personal comfort deviation, which had benefited both Claimant and Employer, when he reentered Union Station to get out of the cold.

Rather, I find that Claimant reentered Union Station to avoid weather elements, which was of no benefit to employer. Thus, I find that Claimant has failed to prove, by a preponderance of the evidence, that his injuries arose out and in the course of his employment. *Grayson, Tompkins, infra*.

CO at 5-6.

Claimant in argument relies upon *Bullock v. WMATA*, CRB No. 12-109, AHD No. 12-120 (October 10, 2012) (*Bullock*) for support that the ALJ erred when concluding Claimant's injury did not arise out of Claimant's employment. Employer argues *Tompkins v. WMATA, supra (Tompkins)*, *Soriano v. Renaissance Mayflower Hotel*, CRB No. 14-082, AHD No. 14-144 (October 30, 2014) (*Soriano*), *Clark v. DOES*, 743 A.2d 722 (D.C. 2000) (*Clark*) and *Grayson v. DOES*, 516 A.2d 909 (D.C. 1986)(*Grayson*) support the ALJ's conclusion. We agree with Claimant.

The factual scenarios in the cases cited by Employer above are dissimilar to the case at bar. We note *Tompkins*, *Soriano* and *Grayson* involved Claimants who drove their cars for personal reasons, one to move a car in anticipation of a future break, one to move a car closer to his place of work, and another who drove a car to pick up lunch. *Clark* involved a Claimant who was assaulted by an unknown assailant.

We agree with Claimant that *Bullock* is more similar to the facts of the case *sub judice*. In *Bullock*, the Claimant, a metro bus driver, entered a subway on her break for lunch. As the CRB noted, the ALJ in *Bullock* found:

- “During the course of a work day, bus operators are entitled to a meal break of at least twenty minutes every time they work a shift that is longer than five hours and 45 minutes. HT 41-42.”
- On October 29, 2011, Ms. Bullock was scheduled for three runs; the first bus departed at 5:37 a.m. and ran until 9:56 a.m.
- Between 9:56 a.m. and the start of her second run at 10:39 a.m., Ms. Bullock was required to travel from the end of her first run to the start of her second run.
- There are no restrooms on any Metrobuses.
- “When she ended her first tour at 10:39 a.m., Claimant was hungry and needed to use the bathroom. She entered a Subway eatery located near 14th and U Streets. Stopping at the Subway was not a violation of company policy. The Subway eatery was a place Claimant could reasonably have been expected to be during the travel time/lunch break interval abridging her assigned bus tours. In the Subway shop, Claimant used the bathroom, ordered and ate a sandwich. As she was leaving the Subway eatery Claimant slipped and fell, fracturing her ankle. She received medical treatment, and returned to work on December 27, 2011.”
- Ms. Bullock was “on the clock” at the time of her accident.
- Ms. Bullock was at the restaurant to address her personal comfort needs during her 12 hour and 37 minute tour. (Footnotes omitted.)

Bullock at 4-5.

Similarly, in the case at bar, the uncontested facts are as follows:

- Claimant received a 20 minute paid break during each shift.
- On January 27, 2015 Claimant was driving the D-8 route which stopped at Union Station.

- Claimant began his break at Union Station while waiting for his “street relief” before beginning the next assigned route, the D-6.
- Claimant used the restroom at Union Station.
- Claimant went outside to wait for his next bus, but due to cold weather, returned inside Union Station to wait.
- “Claimant had a choice of either walking around or going through Union Station to get to his next assignment.”
- Claimant sat at a chair outside Potbelly’s inside Union Station to wait for his next bus when the chair collapsed, causing his injuries.

CO at 2-3.

Based on these facts, we cannot say the ALJ’s conclusion that the Claimant’s injury did not arise out of Claimant’s employment is supported by the substantial evidence or in accordance with the law. The ALJ seems to place emphasis on *Tompkins* in affirming a denial of a claim because:

“Employer gains no benefit from Claimant eating lunch, relaxing, traveling with ease, or avoiding weather elements, we conclude the ALJ did not commit error by concluding Claimant was on a personal errand.” (Emphasis in original.)

CO at 5, quoting *Tompkins* at 3.

But as Claimant points out, the last paragraph of *Tompkins* states:

Claimant suggests that *Bullock* supports her view that her claim is compensable under the “personal comfort doctrine”. We disagree. Unlike the necessity of using a restroom, moving a car so it can be used for relaxation on break is not the type of personal comfort intended by the CRB in *Bullock*. As the ALJ found in the instant matter, Employer’s policy required that bus operators report to the garage, pre-trip her bus within 10 minutes and drive the bus out of the garage and instead of following employer’s policy, which Claimant testified she was aware of, Claimant left the Division to park her car. Claimant was not on a paid break. The ALJ concluded “At the time that the accident occurred, she was required to tend to her duties in the garage. Instead she was on a personal errand for her convenience”. This Panel finds the ALJ’s conclusion that the conditions and obligations of Claimant’s employment did not place her in the position where she was harmed and her injury arose out of a personal non-compensable risk flows rationally from her findings of fact and her analysis is in accordance with the law.

Tompkins at 5.

We agree with Claimant that his “desire to seek shelter from the freezing weather during his work shift on January 27, 2015 is a personal comfort necessity on par with seeking food or use of the

restroom, and not merely performed so that Mr. Williamson would have an easier time of 'break.'" Claimant's memorandum, unnumbered at 5. Claimant was not engaged in a personal errand but rather was at Union Station, after the end of driving the D-8 route, waiting inside for his next bus. Claimant was on a paid break inside Union Station to escape cold weather. But for the conditions and obligations of his employment, driving a bus to Union Station to wait there for the next bus, Claimant would not have been in the place where his injury occurred.

CONCLUSION AND ORDER

The July 22, 2015 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. It is VACATED and REMANDED with instructions to enter an order concluding Claimant's injury arose out of and in the course of his employment and awarding the requested claim for relief.

So ordered.