COMPENSATION REVIEW BOARD

CRB No. 12-109

NICKOLE BULLOCK,
Claimant–Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer–Petitioner.

Appeal from a Compensation Order of
The Honorable Amelia G. Govan
AHD No. 12-120, OWC No. 685451

Sarah O. Rollman, Esquire, for the Petitioner
Matthew Peffer, Esquire, for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,[1] and JEFFREY P. RUSSELL, [2] *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.[3]

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Ms. Nickole Bullock has worked as a Metrobus Operator with the Washington Metropolitan Area Transit Authority ("WMATA") for more than 4 years. On October 29, 2011, Ms. Bullock began her 12 hours and 37 minute work-tour at 5:37 a.m. When she completed her first run at 9:56 a.m., Ms. Bullock had until 10:39 a.m. to reach the starting point for her second run.

[1] Judge Leslie has been appointed by the Director of the DOES as a temporary Compensation Review Board ("CRB") member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2] Judge Russell has been appointed a temporary CRB member pursuant to the Department of Employment Services' Director's Administrative Policy Issuance No. 12-01 (June 20, 2012).

[3] Jurisdiction is conferred upon the CRB pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

There are no restrooms on Metrobuses, and there is no designated location for breaks, including meal breaks. When Ms. Bullock ended her first run, she needed to use a restroom and eat. She entered a Subway Sandwich Shop, used the restroom, and ordered and ate a sandwich. As Ms. Bullock was leaving the restaurant, Ms. Bullock fell and fractured her ankle.

WMATA did not pay Ms. Bullock any workers' compensation benefits, and the parties proceeded to a formal hearing. On June 27, 2012, an administrative law judge ("ALJ") issued a Compensation Order granting Ms. Bullock temporary total disability benefits from October 29, 2011 to December 26, 2011 plus causally related medial expenses.

On appeal, WMATA questions whether Ms. Bullock's "injury that occurred while she was on a paid break arise[s] out of and in the course of her employment."[4] Although the facts are not in dispute, WMATA disagrees with the conclusions drawn from those facts, specifically, "the conditions and obligations of [Ms. Bullock's] employment did not place her at the place where she was injured and her injury did not arise out of or in the course of employment."[5] WMATA requests the CRB reverse the Compensation Order.

On the other hand, Ms. Bullock asserts that pursuant to the positional-risk test, her injury is compensable because at the time of her accident, she was engaged in reasonable and foreseeable activity related to or incidental to her employment. She requests the CRB affirm the Compensation Order.

ANALYSIS[6]

As stated in *Jones v. D.C. Office of Unified Communications*:

> 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:

[4] Memorandum in Support of Application for Review, unnumbered p. 3.

[5] Memorandum in Support of Application for Review, unnumbered p. 5.

[6] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A), D.C. Workers' Compensation Act as amended, D.C. Code §§ 32-1501 *et seq*., (the Act). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

> 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.[7]

The ALJ applied the facts of the case to this test and determined Ms. Bullock had sustained a compensable injury, but WMATA argues that Ms. Bullock's injury cannot satisfy the positional-risk test because at the time Ms. Bullock sustained her injury, she

> was on a paid break. She was not supervised on this break and she was free to use her time as she pleased. The accident happened inside a Subway Sandwich Shop, not on WMATA property. Claimant was inside the Subway Sandwich Shop for purposes of purchasing and eating a meal. She was not on WMATA business at the time. As such, the conditions and obligations of her employment did not place her at the place where she was injured and her injury did not arise out of or in the course of employment.[8]

The ALJ addressed this argument in the Compensation Order:

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

[8] Memorandum in Support of Application for Review, unnumbered p. 5.

> The record evidence is sufficient to invoke the statutory presumption. Although Claimant was not on Employer's premises at the time of the accident, she was in transit that was necessary to meet an obligation or responsibility of her employment. Claimant's testimony regarding the reasons for her stop at the Subway shop, a situation in which she was involved solely because of her work duties, is uncontradicted. The facts, which are not in dispute, show a potential connection between Claimant's fall and a risk created by the employment which occurred within time and space boundaries created by the terms of employment, in the performance of an activity related to the employment.
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> Claimant's stop at the Subway shop was neither purely personal nor for her own convenience. It was not prohibited by any regulation or course of practice; rather, such stops were condoned by Employer and regularly taken by bus operators. Claimant's use of the Subway facility restroom and food provisions was of benefit to Employer. As such, her accident occurred well within the time and space parameters of her job duties. It was a short-lived, sanctioned deviation which was of benefit to Employer's operation of its bus routes.[9]

WMATA's view of the facts is too narrow, and the ALJ's conclusion flows rationally from a complete view of the facts of this case:

- "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."[10]

- 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.[11]

- 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.[12]

- There are no restrooms on any Metrobuses.[13]

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[9] *Bullock v. Washington Metropolitan Area Transit Authority*, AHD No. 12-120, OWC No. 685451 (June 27, 2012), pp. 4, 5.

[10] *Id*. at 2.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 3.

- "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."[14]

- Ms. Bullock was "on the clock" at the time of her accident.[15]

- Ms. Bullock was at the restaurant to address her personal comfort needs during her 12 hour and 37 minute tour.[16]

But for these conditions and responsibilities of her employment, Ms. Bullock would not have been in the place where her injury occurred.

CONCLUSION AND ORDER

The ALJ properly applied the positional-risk doctrine, and there is substantial evidence in the record to support the conclusion that Ms. Bullock's injury arose out of her employment. The Compensation Order of June 27, 2012 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

October 10, 2012
DATE

[14] *Id.*

[15] *Id.*

[16] *Id.*