

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-082

TERESITA SORIANO,  
Claimant-Respondent,

v.

RENAISSANCE MAYFLOWER HOTEL  
and MARRIOTT INTERNATIONAL  
Employer/Insurer-Petitioner.

Appeal from a May 29, 2014 Compensation Order  
by Administrative Law Judge Linda F. Jory  
AHD No. 14-144, OWC No. 705633

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 OCT 30 AM 8 52

Joel E. Ogden for Petitioner  
Roger C. Johnson for Respondent

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

JEFFREY P. RUSSELL on behalf of the Compensation Review Board:

**DECISION AND REMAND ORDER**

BACKGROUND<sup>1</sup>

Claimant/Respondent Teresita Soriano (Ms. Soriano) is the surviving dependent spouse of Benjamin Soriano (Decedent) who died from injuries sustained on June 12, 2013, when he was struck by a Dodge Caravan while attempting to walk to his car at the intersection of 17<sup>th</sup> Street, NW and DeSales Street, NW. The parties stipulate that Respondent is a dependent surviving spouse under the Act.

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<sup>1</sup> 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.

At the time of his death, decedent was employed by Employer/Petitioner Renaissance Mayflower Hotel (the Mayflower) as a general maintenance worker in the engineering department. Ms. Soriano sought death benefits under the Act, which Mayflower declined to pay. On April 14, 2014, she presented her claim for those benefits to an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES). On May 29, 2014, the ALJ issued a Compensation Order granting Ms. Soriano's claim.

In the Compensation Order, the ALJ made the following findings of fact. Although some of these facts were in dispute at the time of the formal hearing, neither party challenges them in this appeal.

Decedent was employed by Mayflower performing general maintenance duties involving electrical, plumbing and painting throughout the hotel. None of his duties required that he leave the hotel building. All tools and equipment required by Decedent to perform his job were provided by Mayflower and were kept on the hotel property. Mayflower does not provide parking for non-management employees such as the Decedent, and these employees make their own arrangements for getting to and from work at the hotel, using either public transit, private vehicles, or otherwise, and were responsible for their own parking if applicable.

Decedent's working hours were from 3:00 p.m. to 11:00 p.m. On the day of the accident, Decedent drove to work in his wife's car and parked on a public street. He clocked in at 2:55 p.m. Prior to the beginning of his shift, Decedent was approached by a co-worker who asked for change to feed the parking meter on DeSales Street where the co-worker was parked. The space was closer to the hotel than the space that Decedent had found, and he asked the co-worker if he could move into the spot when the co-worker vacated it, and the co-worker agreed.

The co-worker left the premises, fed the meter, and returned in order to clock out. After clocking out, the co-worker returned to his car to await the arrival of Decedent.

Although the Mayflower has a written policy requiring employees to clock out whenever they leave the hotel for a personal errand, Decedent did not do so when he left to move his car. The co-worker had not clocked out when he left to feed the meter, but did so after returning to the hotel before going to his car to await Decedent's arrival.

Switching parking places is a common practice among employees such as Decedent and the co-worker, as is the practice of not clocking in or out when doing so.<sup>2</sup>

At 3:12 p.m., Decedent was struck by a Dodge Caravan at the intersection of 17<sup>th</sup> and DeSales Streets, NW, while attempting to walk to his car.

Based upon these facts, all of which appear to be supported by substantial evidence and none of which are challenged by either party in this appeal, the ALJ concluded that the accident that led to Decedent's death arose out of and occurred in the course of his employment with the Mayflower.

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<sup>2</sup> The ALJ made no finding as to whether Decedent's supervisors were aware of this practice.

The Mayflower filed a timely appeal, arguing that Decedent was not in the course of his employment and that the accident did not arise out of that employment, and hence the award is not in accordance with the law.

Ms. Soriano filed a timely opposition to the appeal, arguing that the facts support a legal conclusion that Decedent's death arose out of and occurred in the course of his employment.

We reverse the decision of the ALJ and vacate the award, for the reasons set forth below.

#### ANALYSIS

The ALJ, quite properly, structured the Compensation Order by framing the question in terms of the statutory presumption of compensability. However, since none of the facts are any longer in dispute, we shall dispense with considerations relating to invoking and rebutting the presumption. On undisputed facts, the outcome is determined as a matter of law.

Citing *Lewis v. Finnegan & Henderson*, CRB (Dir. Dkt.) No. 04-50, AHD No. 04-130, OWC No. 590009 (February 16, 2005), *(Lewis)*, the ALJ applied the "quantum" approach to analyzing these facts. Application of that test was the proper approach. Quoting *Lewis*:

That approach to analysis of "arising out of and occurring in the course of employment" questions derives from *Larson's Workers' Compensation Law*, §29.01 (2000 Ed.) (*Larson's*), which includes the following:

The discussion [in the treatise] of the coverage formula, "arising out of and in the course of employment", was opened with the suggestion that, while "course" and "arising" were put under separate headings [in the treatise] for convenience, some interplay between the two factors would be observed in various categories discussed [footnote omitted]. ... [T]he two tests, in practice, have not been kept in air-tight compartments, but have to some extent merged into a single concept of work-connection. One is almost tempted to formulate a sort of quantum theory of work-connection [footnote omitted]: that a certain minimum quantum of work-connection must be shown, and if the "course" quantity is very small, but the arising quantity is large, the quantum will add up to the necessary minimum, as it will also when the arising quantity is very small but the "course" quantity is relatively large.

But if both the "course" and "arising" quantities are small, the minimum quantum will not be met.

Compensation Order, p. 6, quoting *Lewis*, p. 3.

This approach is consistent with the “positional risk” doctrine in defining and analyzing whether a claim under its workers’ compensation laws “arises out of” a claimant’s employment. *See Clark v. DOES*, 743 A.2d 722 (D.C. 2000). The positional risk doctrine is well known, and is summarized in *Larson’s*, 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.

While we detect no error in applying the “quantum” approach using a multifactorial analysis in assessing whether the decedent’s tragic accident arose out of and occurred in the course of his employment with the Mayflower, the record evidence supports but a single connection between his employment and the accident, the fact that he had clocked in at 2:55 p.m. to begin his 3:00 p.m. shift, and suffered his fatal accident some 12 minutes after that shift was to have begun.

All the other factors of record militate against a finding of an employment connection: the decedent was on an unauthorized (albeit perhaps condoned) break for which, had he followed prescribed work rules, he would not have been compensated; he was on a public street neither owned, controlled nor in any manor “favored” by the Mayflower as a place with any connection to its hotel operations; he was on his way to perform an errand of a purely personal nature which, rather than provide any benefit to the Mayflower, was in fact to some degree to the detriment of its hotel operations because the decedent was not only not performing any activity furthering the hotel’s operations, he was instead unavailable to the hotel should his services have been required while he performed this errand.

While in its most attenuated conception, it is true that “but for” the fact that the decedent was employed by the Mayflower, it is unlikely that he would have been at that particular location at that particular time. However, the risk of being struck by a third party’s vehicle on a public street has no

connection to his employment duties or any risks associated with them. His death was not brought about by any agency or force with any connection to the hotel, and was not “neutral”, but rather was personal to the decedent in that he was engaged in an errand of personal convenience, which he had not completed and which from which he was not yet returning to work, and was subject to the risks associated therewith.

The ALJ’s decision was based in part upon the suggestion that “the agency” has exhibited a trend towards “expanding” coverage under the Act to cover a wide range of places connected with access and egress to or from employee parking areas (Compensation Order, p. 7), is a misreading of what the law is.

The examples given of this trend were “injuries occurring in employer’s parking lots, in driveways leading to or from the parking lots, in garages attached to but not owned by employer, and even crossing a street leading from a garage rented by employer to be extensions of employer’s premises”.<sup>3</sup>

In each of these examples, the employer had some connection with, control over, or relationship to the parking place to which an employee was coming or going. Such is not the case here. No evidence to which we have been directed or which we have seen ourselves in the record suggests that the Mayflower had any entanglement with or interest in the commuting or parking arrangements of its employees or exercised any dominion or control over the location of the accident. In fact, the ALJ made an explicit finding that the Mayflower had no connection to this subject at all, and that finding is not challenged in this appeal.

Although a “quantum” analysis is appropriate, on this record, the determination that this accident arose out of and occurred in the course of decedent’s employment rested upon a single fact, that being that the Decedent was “on the clock” when it happened. In essence, an award for this single reason is the antithesis of a multifactorial analysis, making being on the clock (despite being in violation of rules prohibiting personal errands while on the clock and the nearly inescapable inference that he had yet to perform any work for the Mayflower in the 12 minutes between the start of his shift and being struck by the Dodge Caravan) a determinative factor which trumps all others.

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<sup>3</sup> As discussed below, two of the cases in the footnote supporting this assertion are not decisions of the Director, the CRB or the District of Columbia Court of Appeals, and have no precedential value. The other cases, *Clark, supra*, *Viera v. DOES* 721 A.2d 579 (D.C. 1998), and *Alston v. Washington Hospital Center*, Dir. Dkt. 91-64, OHA No. 91-93 (May 9, 1997) are inapposite. In *Clark*, the incident occurred in employer’s parking lot. In *Viera*, the court remanded a case to the Director to consider whether the accident fell within the “traveling employee” or “special errand” exceptions to the going-and-coming rule. It has no application here, where the Decedent was not a traveling employee and was not engaged in any errand for the benefit of the Mayflower. In *Alston*, the parent company of the employer owned a parking lot across the street from the employer’s premises. During the day the lot was a public pay-to-park lot. At night, the lot was made available to night shift workers of the employer at no charge. The Director characterized the lot as a “work related lot”, and decided that employer’s knowledge that its night shift employees used the lot, coupled with the fact that it was owned by employer’s “parent company”, and the injury occurred while crossing the street from the “work related lot” to employer’s premises immediately prior to the time the worker was to begin work brought the claim within an exception to the going and coming rule. In the case before us, there is no finding that employer knew about the practice of parking space trading, and it is clear that the parking place was not “work-related” space.

We must respectfully disagree with the ALJ where she wrote:

As addressed in the above analysis, employer's evidence that employer required that its employees clock out when performing a personal errand does not apply to the facts of the instant matter as claimant was not, in the undersigned's opinion performing a personal errand. He was merely moving his car, an event that took very little time and would have allowed him to obtain a more desirable and/or legal parking spot so he could fulfill his work duties for employer.

Compensation Order, p. 8.

We must respectfully disagree with the ALJ's opinion. He was not moving the Mayflower's car, he was moving his personal vehicle. He was not moving the vehicle to a spot more desirable for the Mayflower, he was moving the vehicle to a spot more desirable to himself. And every activity he took from the time he left home until the time he clocked in was taken "so he could fulfill his work duties", yet that would not render an injury that he might have sustained while he was driving to work or when he was originally parking his vehicle compensable.

We must also respectfully disagree with Respondent's characterization of the on-street parking elected by decedent as a "condition of employment". It is not. The Mayflower neither sought nor exercised control over how the decedent got to work, whether he chose to take public transit, or to drive and park in a garage or on the street.

And, we must respectfully point out that two cases cited by Petitioner in support of this claim, *Reynolds v. Collier, Shannon, Rill & Scott*, OHA No. 00-273, OWC No. 550551, 2001 DC Wrk. Comp. LEXIS 93 (February 27, 2001), and *McKie v. Steptoe and Johnson*, OHA No. 04-307, OWC No. 593060, 2004 DC Wrk. Comp. LEXIS 237 (October 14, 2004), are not Director's Decisions or decisions of the CRB. Rather, they are Compensation Orders of no precedential value. Beyond this, we decline to express a view as to whether they were correctly decided.

We note also that Petitioner suggests that these cases are indicative of our law having adopted the "the hazards of the street" or "the street risk rule."

To our knowledge, no precedential authority in this jurisdiction has employed either usage. However, in those jurisdictions where we have seen it employed, it is generally something along the lines of the following:

In *Hudson v. Thurston Motor Lines, Inc.*, 583 S.W.2d 597 (Tenn.1979), in considering the compensability of injuries suffered by a truck driver from an assault (unknown motive) as he was returning to his truck after purchasing his lunch, the court stated:

"In our leading assault cases, the Court appears to have focused on the motive of the assailant and disregarded any risk that may have been incidental to the employment

environment. We think the correct resolution of this case involves a consideration of the risks and dangers inherent in a truck driver's employment, rather than the objective of the assailants. No one can quarrel with the conclusion that a truck driver for a motor freight carrier is exposed to the hazards of the streets and highways to a substantially greater extent than is common to the public. That is the basis for the street-risk rule, which simply stated, is that the risks of the street are the risks of the employment, if the employment requires the employee's use of the street." 593 S.W.2d at 602.

*Special Fund of the Arizona Industrial Commission v. Catalina Trucking Co.*, 134 Ariz. 585, 589 (Ariz. Ct. App. 1982).<sup>4</sup>

Without adopting or rejecting a "street risk rule", we note that it would have no application here, where the employee's employment did not require his use of the street.

#### CONCLUSION AND ORDER

The finding that the Decedent's activities relating to moving his car from one public street parking space to another for his own convenience was not a personal errand is not supported by substantial evidence, and the conclusion that the accidental death arose out of and occurred in the course of Decedent's employment is not in accordance with the law. The decision is reversed and the award is vacated. The matter is remanded to AHD with instructions that an order denying the claim be entered at the CRB's direction.<sup>5</sup>

FOR THE COMPENSATION REVIEW BOARD:

  
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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

\_\_\_\_\_  
October 30, 2014  
DATE

<sup>4</sup> The "street risk rule", it appears to be a specialized subset of the positional risk doctrine.

<sup>5</sup> See *WMATA v. DOES*, 926 A.2d 140 (D.C. 2007).