

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-0742

JACQUELYN TOMPKINS, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*, INTERVENORS.

On Petition for Review
of a Decision and Order of the District of Columbia
Department of Employment Services, Compensation Review Board
(CRB-39-15)

(Submitted April 21, 2016

Decided May 12, 2016)

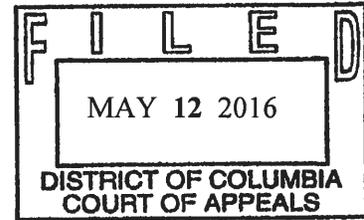
Before FISHER and BLACKBURNE-RIGSBY, *Associate Judges*, and RUIZ,
Senior Judge.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner, Jacquelyn Tompkins, appeals the June 16, 2015, order of the Compensation Review Board (CRB) affirming a Compensation Order that denied petitioner's claim for worker's compensation benefits on the basis that petitioner's injury did not "arise out of and in the course of her employment." For the reasons stated below, we affirm the decision of the CRB.

I.

Petitioner was employed by intervenor, Washington Metropolitan Area Transit Authority (WMATA), as a bus driver for seventeen years. She worked out of the Northern Division located on the corner of 14th and Buchanan Streets, Northwest, and was assigned to drive the 16th Street bus route. Her job required her to report to work at 4:30 a.m. to check-in, fill out a trip card, and receive a



manifest with her bus and schedule for the day. After receiving the manifest, bus drivers have ten minutes to “pre-trip” the bus and drive it out of the garage. To pre-trip the bus, the driver is required to start the bus, activate all the electronics — such as the flashing lights and headlights — and then walk around the bus to make sure that everything is working.

On the morning of September 15, 2011, petitioner parked her car in front of the bus garage, went inside to check-in at 4:30 a.m., filled out her trip card, and received the manifest. She then returned to her car and drove two blocks away to park her car on Buchanan Street, close to where her route ends on 16th Street, when she has a break that could last from twenty minutes to an hour. Petitioner said that she had been parking her car in this way for years. She explained that she found it necessary and convenient to go to her vehicle during breaks because sometimes, due to traffic, she would have only fifteen minutes for a break and she would not have time to return to the bus division to rest and have her meal. The car also provided convenient shelter from the weather if she had a short break waiting to relieve another bus driver on the route, rather than wait at the bus shelter as other bus drivers did. On this particular morning, on her walk back to the bus garage after parking her car, petitioner tripped on tree roots and fell causing a contusion in her right knee and right shoulder. Petitioner needed pain medication and therapy in order to recover before returning to work on November 23, 2011.

II.

On review of a decision of the CRB, “this court inquires: (1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings.” *Ferreira v. District of Columbia Dep’t of Emp’t Servs.*, 667 A.2d 310, 312 (D.C. 1995) (quoting *Cruz v. District of Columbia Dep’t of Emp’t Servs.*, 633 A.2d 66, 70 (D.C. 1993)). We will affirm the CRB’s findings of fact and conclusions of law if they are supported by “substantial evidence,” notwithstanding evidence in the record that would support different findings and conclusions. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (Citation and quotation marks omitted). We will not affirm an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Rife v. District of Columbia Police and Firefighters’ Retirement and Relief Bd.*, 940 A.2d 964, 965 (D.C. 2007).

Under the D.C. Workers Compensation Act, to be compensable, “an injury must both arise out of the employment and occur within the course of the employment.” *Grayson v. District of Columbia Dep’t of Emp’t Servs.*, 516 A.2d 909, 911 (D.C. 1986); *see* D.C. Code § 32-1501 (12). The requirement that an injury arise out of employment “refer[s] to the origin or cause of the injury.” *Kolson v. District of Columbia Dep’t of Emp’t Servs.*, 699 A.2d 357, 361 (D.C. 1997) (citation and quotation marks omitted). In determining the origin or cause of injury, the risk of such injury is analyzed in terms of the relationship between the risk and the work. Risks are categorized as: (1) risks “distinctly associated with the employment,” which are “universally compensable”; (2) risks “personal” to the employee, which are not; and (3) risks that are “neutral,” i.e., “risks having no particular employment or personal character.” *Bentt v. District of Columbia Dep’t of Emp’t Servs.*, 979 A.2d 1226, 1232 (D.C. 2009). Where a risk is “neutral,” the requirement that an injury must “arise out of the employment” can be satisfied by applying the “positional risk doctrine,” which states that “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.” *Id.* at 1232 (quoting *Clark v. District of Columbia Dep’t of Emp’t Servs.*, 743 A.2d 722, 727 (D.C. 2000) (emphasis in original)). Petitioner argued that her injury was the result of a neutral risk that satisfies the positional risk doctrine, and therefore, she should be compensated.

The Administrative Law Judge and the CRB disagreed. After recognizing that petitioner had shown a relationship between her injury and employment that raised a presumption of compensability, the ALJ found that the employer had presented sufficient specific evidence to rebut the presumption. Considering the evidence as a whole, the ALJ found that the ten-minute period allocated to pre-trip the bus was not designed as a personal break and that “it would be a violation to leave the facility in that 10 minute timeframe when [petitioner] was supposed to [be] performing the pre-trip.” Petitioner’s accident “occurred where she was not reasonably expected to be[, s]he was not reasonably fulfilling duties of her employment, nor was she doing something reasonably incidental to her employment.” Consequently, the ALJ held, because the “conditions and obligations of [petitioner’s] employment did not place her in the position where she was harmed; [petitioner’s] injury arose out of a personal, and therefore, non-compensable, risk.” In sum, the injury “did not arise out of or in the course of” her employment.” The CRB affirmed, concluding that “the ALJ did not commit error by concluding [petitioner] was on a personal errand.” Rejecting petitioner’s argument that WMATA benefited from her actions, the CRB distinguished this case from those in which employees were compensated for injuries that occurred

during a sanctioned break and in a place where the employee was reasonably expected to be. In this case, on the other hand, petitioner was not on a break, official or otherwise, when she was injured, nor was she where she was supposed to be, at the bus garage preparing her bus.

We begin our review of the CRB's order with a brief summary of relevant case law. In *Grayson*, we applied the positional risk doctrine in the case of a bus driver who was injured while pulling out of a parking spot during her scheduled lunch break. This court affirmed the agency's determination "that Grayson's injuries did not arise out of her employment" because her "lunch breaks were completely unsupervised and she was free to go anywhere or do anything she wanted during them." 516 A.2d at 912. In addition, the employer "did not require or encourage Grayson to purchase lunch elsewhere or use her car as [it] provided an eating area for its employees." *Id.*

In other cases, the CRB has determined that the positional risk doctrine does not support compensation when an employee is injured while running a personal errand, even if the injury occurs near the work place and during work hours. In *Soriano v. Renaissance Mayflower Hotel*, an employee decided to move his car to a better parking spot, a common practice among employees, and was killed while walking to his vehicle. The CRB held that the injury was not compensable. The CRB considered the fact that the employee "was on an unauthorized (albeit perhaps condoned) break, . . . he was on a public street . . . on his way to perform an errand of a purely personal nature which, rather than provide any benefit to the [employer], was in fact to some degree to [its] detriment . . . because the [employee] was . . . unavailable to the hotel should his services have been required while he performed this errand." CRB 14-082, ADH No. 14-144, 2014 WL 5847457, at *3 (Oct. 30, 2014).

Petitioner argues, relying on *Sheryl Lewis v. Finnegan & Henderson* and *Nickole Bullock v. Wash. Metro. Area Transit Auth.*, that even if she was on a personal errand, she is entitled to compensation. In *Lewis*, the claimant was employed as a legal secretary and the employer had a policy permitting "unofficial breaks for personal convenience which are not always required to be approved in advance by the supervisors and which could be taken so long as the employee's absence was within reason." *Sheryl Lewis v. Finnegan & Henderson*, 2006 WL 850906, at *3 (internal quotation marks and brackets omitted). Lewis took a short break to run an errand and on re-entering the lobby of the office building where she worked, slipped and fell onto the floor, causing her injury. The CRB granted compensation based on the fact that Lewis was on a sanctioned break and had

returned to the work site when the injury occurred. *Id.* at *3. The CRB distinguished *Lewis* from *Grayson* noting that in *Grayson*, the break was unsanctioned and unpaid and the injury took place away from the employment premises.

In *Bullock*, the CRB affirmed a compensation order for a bus driver who was injured as she was leaving a Subway Sandwich Shop where she had gone to eat and use the facilities during a break. There were no employer-provided rest or bathroom facilities available to the claimant. Applying the positional risk doctrine, the CRB found that the employee was on a sanctioned meal break at a place where she reasonably could have been expected to be and the break “was of benefit to Employer’s operation of its bus routes.” *Nickole Bullock v. Wash. Metro. Area Transit Auth.*, AHD 12-120, 2012 WL 5836885, at *2 (Oct. 10, 2012). Accordingly, the CRB affirmed the ALJ’s determination that the employee’s injury arose out of her employment.

Applying *Grayson*, *Soriano*, *Lewis*, and *Bullock*, the CRB reasoned that the positional risk doctrine does not support compensation in this case because petitioner’s injury occurred in the course of running a personal errand for her convenience and was not of benefit to the employer. In this case, the personal nature of petitioner’s decision to park on Buchanan Street is highlighted by the fact that the employer provided a parking garage, break rooms, and bathrooms for bus drivers located only two blocks from where petitioner preferred to park her car. The incident occurred during the ten-minute period after early morning check-in during which petitioner should have been inspecting her bus and preparing to leave the garage. Petitioner was not on a designated break at the time of the injury and she was unsupervised by the employer. Further, petitioner was injured while walking on a public street, not on property owned or controlled by the employer. The CRB distinguished petitioner’s case from *Lewis* and *Bullock*, in which compensation was awarded, on the basis that petitioner was not on a break expressly provided for (*Bullock*) or permitted (*Lewis*) by the employer.

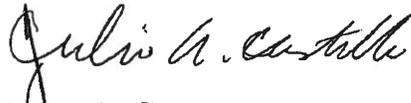
The CRB’s decision is supported by substantial evidence because here there was no WMATA policy that allowed bus drivers to use the ten-minute period intended to pre-trip their bus to move their personal vehicles. Petitioner argues, however, that this practice was known to and not forbidden by the employer. Even if that were so, the facts in this case are more akin to those in *Soriano*, in which the employee’s activity may have been condoned but not encouraged, than to those in *Lewis*, in which there was an explicit policy allowing unofficial breaks for personal use, or *Bullock*, in which the claimant was entitled to a meal break between shifts

and no facility was provided by the employer for breaks. And, unlike the compensated claimant in *Lewis*, who was injured in the building where the employer's offices were located, petitioner was injured on a public street as were the uncompensated claimants in *Grayson* and *Soriano*. In short, as the CRB noted, this is not a case where the injury would not have happened "but for the fact that the conditions and obligations of the employment placed [petitioner] in the position where [she] was injured." *Bentt*, 979 A.2d at 1232 (citation and quotation marks omitted).

The CRB's determination that petitioner's injury is not compensable because it did not "arise out of" her employment applied the positional risk principles established in *Grayson*, *Soriano*, *Lewis*, and *Bullock* and is based on substantial evidence of record.¹ Accordingly, we affirm the order of the CRB.

Affirmed.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

¹ Petitioner argues that the CRB's determination that the injury did not occur "in the course of" her employment is not supported by substantial evidence because the undisputed evidence is that she was injured after she had reported to work and had received a stamped manifest assigning her the bus she was to drive that day. The CRB, however, did not ground its determination on that basis, but reasoned that "the conditions and obligations of [petitioner's] employment did not place her in the position where she was harmed and her injury arose out of a personal non-compensable risk."

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