

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-AA-1430

SHELLY PORTEE-WHITE, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, INTERVENOR.

On Petition for Review of a Decision of the District of Columbia Department of
Employment Services Compensation Review Board
(CRB-101-14)

(Submitted January 6, 2016

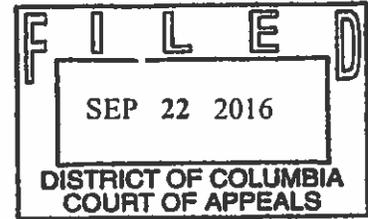
Decided September 22, 2016)

Before BECKWITH and EASTERLY, *Associate Judges*, and KING, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Shelly Portee-White seeks review of the Compensation Review Board's (CRB) decision to affirm the District of Columbia Department of Employment Services Administrative Law Judge's (ALJ) order concluding that she did not have a compensable injury and denying her worker's compensation benefits. We affirm.

The facts in this case are undisputed. Ms. Portee-White, a Washington Metropolitan Area Transit Authority (WMATA) bus driver, was scheduled to begin her shift at 6 a.m. on December 14, 2012. At approximately 5:15 a.m., she was walking from her car to catch a shuttle bus operated by WMATA for its employees. The shuttle runs from one garage, where WMATA employees are



permitted to park their private vehicles, to another garage, where WMATA houses its buses. Employees can board the shuttle at either of the garages or at various places along the route. Ms. Portee-White was planning to board at a street corner, where she had caught the shuttle previously. As she walked toward the shuttle, “she tripped in a hole” in an area on the side of the street not owned or maintained by WMATA and was injured.

The sole issue before the ALJ was whether Ms. Portee-White’s injury “ar[ose] out of and in the course of employment,” as required by the worker’s compensation statute.¹ Noting that Ms. Portee-White’s injury had occurred “on a public street on her way to work” and “not on [her] Employer’s property,” the ALJ applied the “going and coming rule,” which states that “an injury sustained while en route to or from work” is not “sustained in the course of employment.”² The ALJ noted that there are exceptions to this rule³ but concluded that none of these applied to Ms. Portee-White’s case. As Ms. Portee-White “failed to show by substantial evidence the occurrence of a work-related event,” the ALJ concluded that she had failed to establish a compensable claim.

The CRB affirmed. Reviewing the record, the CRB noted that “[i]t is undisputed that at the time of her injury, Ms. Portee-White had exited her personal vehicle and fell in the grassy area between a public sidewalk and the curb on a public street; Ms. Portee-White was not on WMATA’s property and had not boarded WMATA’s shuttle.” The CRB thus determined that “[a]t the time she fell, Ms. Portee-White was in the course of her personal commute to work.”

¹ D.C. Code § 32-1501 (12) (2012 Repl.).

² See *Kolson v. District of Columbia Dep’t of Emp’t Servs.*, 699 A.2d 357, 359 (D.C. 1997).

³ The ALJ listed a number of exceptions (e.g., “special errands for the employer, accidents in employer-provided transportation, and when an employer-mandated work vehicle is used for commuting”) but cited only one CRB decision as support for the existence of these exceptions. This case does not require us to consider the application of an exception to the going and coming rule—Ms. Portee-White has not identified an applicable exception—but we note that the law in this jurisdiction regarding these exceptions is largely unformed. The only exception this court has recognized is for “employees whose work entails travel away from the employer’s premises” as a part of their employment. *Kolson*, 699 A.2d at 360 (quoting 2 Arthur Larson, *Larson’s Worker’s Compensation* § 25.00 (1997)).

Accordingly, the CRB concluded that “as a matter of law her injuries and disability did not arise out of and in the course of her employment.”

Before this court Ms. Portee-White argues that that the CRB “erred as a matter of law when it affirmed” the ALJ determination that she had failed to establish that her injury arose out of and in the course of her employment. We review that question of law *de novo*⁴ and affirm.

“In order to receive workers’ compensation, 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 also* D.C. Code § 32-1501 (12). The object of this inquiry is to ensure that workers are compensated for injuries that are the product of “a risk involved in or incidental to the employment or . . . the conditions under which it is required to be performed.” *Wright v. District of Columbia Dep’t of Emp’t Servs.*, 924 A.2d 284, 287 (D.C. 2007). This court has held that such risks do not include the risks that attend an employee’s commute to and from work and has adopted the “going and coming” rule. *Kolson v.*, 699 A.2d at 359 (“[T]he 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.’”); *see also* 2 Lex K. Larson, *Larson’s Workers’ Compensation Law* § 13.00 (2016). The CRB’s decision to affirm the ALJ’s denial of benefits was a straightforward application of this rule to the undisputed facts.

Ms. Portee-White argues however that, instead of applying the going and coming rule, the CRB should have used this court’s “positional risk standard to evaluate whether an injury ‘arises out of’ the employment.” We disagree. As we explained in *Grayson*, this standard may be applied to circumstances when an employee was not on the employer’s premises or not engaged in work activities, so as to expand the circumstances in which an injury might be compensable. 516 A.2d at 911-912. The positional risk standard operates similarly to a “but for test”; “[a]n injury arises out of the employment if it would not have occurred *but for* the fact that conditions and obligations of the employment placed claimant in a position where he was injured.” *Id.* at 911 (quoting 1 Arthur Larson, *The Law of Workmen’s Compensation*, § 6.50 (1984)). This court has applied the positional risk standard in such a way as to create a limited exception to the going and

⁴ *See, e.g., Howard Univ. Hosp. v. District of Columbia Dep’t of Emp’t Servs.*, 960 A.2d 603, 606 (D.C. 2008).

coming rule for “traveling employees,” like long-distance bus drivers, who are injured while on assignment away from their home base. *Kolson*, 699 A.2d at 359-360 (distinguishing these employees from the “ordinary commuter”). But we have never indicated that it could more broadly displace the going and coming rule.

Even assuming that Ms. Portee-White could invoke the positional risk standard, she cannot satisfy its but for test. Instead, much like *Grayson*, where another WMATA bus driver was injured in a car accident while on her unsupervised lunch break, Ms. Portee-White’s commuting path was not the product of the conditions and obligations placed on her by her employer.⁵ Ms. Portee-White does not explain how the CRB’s decision was error in light of *Grayson*, and we conclude it was not.⁶

⁵ We explained in *Grayson*:

[Ms.] Grayson’s lunch breaks were completely unsupervised and she was free to go anywhere or do anything she wanted during them. Also, WMATA did not require or encourage [Ms.] Grayson to purchase lunch elsewhere or use her car as WMATA provided an eating area for its employees at the garage with tables, benches and vending machines. Since [Ms.] Grayson was free to do anything she wanted on her lunch break, . . . in no sense then can it be said that the conditions of claimant’s employment as a busdriver exposed her . . . to the dangers attendant the personal use of her automobile during her lunch break.

516 A.2d at 912-13.

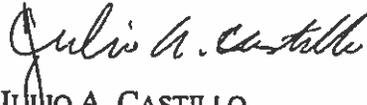
⁶ In her brief, Ms. Portee-White includes no discussion of the application of the positional risk test in *Grayson*. Instead, she relies on this court’s application of that standard in *Clark v. District of Columbia Dep’t of Emp’t Servs.*, 743 A.2d 722 (D.C. 2000). But *Clark*, which concerned injuries as the result of an assault, during the workday, in the employer’s parking lot, is factually distinguishable in a number of significant respects; perhaps most importantly, it did not involve an application of the going and coming rule.

Similarly, Ms. Portee-White’s reliance on the CRB’s decision in *Bullock v. WMATA*, AHD No. 12-120, OWC No. 685451 (Oct. 10, 2012), is misplaced. That case has no precedential authority in this court and, in any event, is distinguishable. Ms. Bullock, a WMATA employee, was injured in the midst of her shift. She was not traveling to or from work, as Ms. Portee-White was in this case, nor was she off-duty, on a defined lunch break like the petitioner in *Grayson*, 516 A.2d at 910.

For the foregoing reasons, the order of the CRB is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:



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Clerk of the Court

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