

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-039

JACQUELYN TOMPKINS,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
and AS&G CLAIMS ADMINISTRATION
Employer/Insurer-Respondent.

Appeal from a February 12, 2015 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 14-372, OWC No. 684527

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUN 16 AM 9 32

Justin M. Beall for Petitioner
Mark Dho for Respondent

Before LINDA F. JORY, MELISSA LIN JONES AND HEATHER C. LESLIE, *Administrative Appeals Judges.*

LINDA F. JORY on behalf of the Compensation Review Board:

DECISION AND ORDER

BACKGROUND

Claimant worked for Employer as a bus operator based at Employer's Northern Division located near the intersection of 14th Street, NW and Buchman Street, NW. On September 15, 2011, Claimant arrived at work prior to 4:30 a.m. in her personal vehicle and parked her vehicle along 14th Street in front of the Northern Division. After she checked in, she drove to 16th Street and Buchanan Street, NW and parked her car where she would take her break. On September 15, 2011, after Claimant parked her vehicle on 16th Street, and as she was walking on Buchanan Street, she tripped on tree roots and fell. She suffered injury to her right knee and right shoulder.

On December 18, 2014, Claimant presented her claim for benefits to an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES). On February 12, 2015, the ALJ issued a Compensation Order denying Claimant's claim.

Claimant filed a timely appeal, arguing that the ALJ erred in concluding her decision to move her vehicle was a personal errand because both Employer and Claimant benefitted from the relocation.

Employer filed a timely opposition to the appeal, arguing that the ALJ's decision is supported by substantial evidence and is in accordance with prevailing law.

ANALYSIS¹

In the Compensation Order, the ALJ made the following findings of fact.

Claimant a 53 year old woman, worked for Employer as a bus operator for 17 years. She was based at the Northern Division (hereinafter, Division), on 14th St., N.W. for 14 years. Claimant was assigned to drive the 16th St. bus route, and her job required her to report to work at 4:30 A.M. After checking in, she was required to fill out a [trip] card, a blank form where she listed her name, the date, her run number, and the division where she worked. After Claimant completed the [trip] card, she was required to give it to a clerk, who would give her a stamped manifest listing her bus schedule. Once the manifest is given to a driver, that person has 10 minutes to pre-trip her bus and drive it out of the garage.

On September 15, 2011, Claimant parked her car in front of the Division bus garage at a metered space. She went inside, filled out her [trip] card, and received her manifest. Claimant left the Division, went back to her car, drove to Buchanan St. and parked her car near 16th St. She then started walking back down the sidewalk, on Buchanan St., to the Division on 14th St.

Claimant was walking in the dark. She stepped into a grassy area and her left foot got stuck in the roots of a tree stump. She did not have time to catch or brace herself, and she fell forward on the ground. She did not have time to catch or brace herself, and she fell forward on the ground. Half of Claimant's body was on the curb and the other half was in the street, and she lay on the ground for about five minutes. A parked truck was on her left side and a parked car was on her right side. She grabbed the fog lights of the truck and pulled herself up. Claimant walked back to the Division, told her coworkers what happened, and the supervisor, Ms. Callahan, called an ambulance.

CO at 2,3.

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.

Based upon these facts, all of which are supported by substantial evidence and none of which are challenged by either party in this appeal, the ALJ concluded Claimant's accidental injury did not arise out of or in the course of her employment as the ALJ concluded Claimant was on a personal errand for her own convenience.

Claimant asserts the ALJ's holding that Claimant's actions constituted a personal errand, unrelated to employment, is not supported by substantial evidence or in accordance with the law because Claimant's motivations were not purely personal. Claimant argues that Claimant's relocation of her vehicle was not a personal errand because the relocation benefitted both Claimant and Employer.

Claimant asserts that she offered three such benefits at the formal hearing and the ALJ failed to analyze any of them, instead stating in a conclusory fashion that Claimant "was on a personal errand for her convenience." The three benefits to Employer according to Claimant are:

First, drivers are often running late due to traffic downtown, and having a personal vehicle parked on 16th Street allows a driver to eat lunch and relax under time constraints during their breaks, preserving timeliness. HT 19. Second, unforeseeable circumstances sometimes require a driver to travel across the city, and having a vehicle on 16th Street allows a driver to travel with ease. HT 20. Third, having a vehicle on 16th Street offered drivers protection from the element, enhancing personal comfort. HT 18-19. The alternatives—resting outdoors at the bus stop or walking to Employer's premises—would require exposure to the elements.

Claimant's Brief at 9.

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. We further conclude that the facts of the instant matter differ from those in *Lewis v. Finnegan and Henderson*, CRB No. 4-50, AHD No. 04-130 (Feb. 16, 2006)(*Lewis*) and agree that Claimant's actions in this matter bear little resemblance to the "personal errand" described in *Lewis*. Contrary to Claimant's assertion, *Lewis's* injury did not occur as she was leaving the premises to make a payment related to a personal matter. Unlike the instant Claimant, *Lewis* was on an unofficial but paid break and was returning from it when she fell in the lobby of her employer's office building.

We agree with Employer that the facts are similar to the CRB's recent decision, *Soriano v. Renaissance Mayflower Hotel*, CRB No. 14-082, AHD No. 14-144 (October 30, 2014)(*Soriano*). In *Soriano*, the employee arrived at work after parking on a nearby street. After punching his time card but before starting any work, he decided to move his car after learning another co-worker was parked closer to the hotel and was willing to give the spot to the employee. While walking to his car he was struck and killed by another car.

The CRB found the ALJ's determination that the Decedent's activities related to moving his car from one public street parking space to another for his own convenience was not a personal errand; and reversed the ALJ's award of benefits. The CRB explained:

We must respectfully disagree with the ALJ's opinion. He was not moving the [Employer's] car, he was moving his personal vehicle. He was not moving the vehicle to a spot more desirable for the [Employer], 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.

Soriano at 6.

In her response to Employer's Brief, Claimant asserts the facts of the instant matter differ from *Soriano*, Claimant asserts that unlike *Soriano*, her decision to relocate her vehicle along her bus route was incidental to her employment because she was relocating her vehicle along her bus route. We disagree with Claimant that relocating her vehicle along her bus route is a distinct identifiable and predictable work-related reason.

In her response brief, Claimant cites for the first time the CRB's decision in *Bullock v WMATA*, CRB No. 12-109, AHD No. 12-120, (October 10, 2012)(*Bullock*) to support her alternative argument that fulfilling personal comfort may fall within the scope of employment. Reply Brief at 4. *Bullock* was injured leaving a Subway Sandwich Shop where she had used the restroom and ate a sandwich. Utilizing the positional risk doctrine² as adopted by the DCCA in *Clark v. Jones v. D. C. DOES*, 743 A.2d 722 (D.C.2000) the CRB determined that "but for" specific conditions and responsibilities of her employment, *Bullock* would not have been in the place where her injury occurred. The specific conditions itemized by the CRB in *Bullock* were:

² The positional risk doctrine is summarized in the leading treatise on workers' compensation law at 1 LARSON'S WORKERS' COMPENSATION LAW, Copyright 2008, Matthes Bender & Company 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.

- “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.

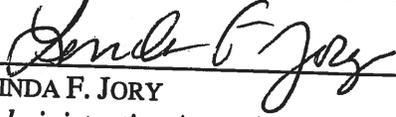
See Bullock, supra at 4, 5.

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.

CONCLUSION AND ORDER

There is substantial evidence in the record to support the conclusion that Claimant's injury did not arise out of and in the course of her employment. The Compensation Order is in accordance with the law and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY
Administrative Appeals Judge



DATE