

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-101**

**SHELLY PORTEE-WHITE,  
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY  
and SEDGWICK CMS,  
Employer/Third-Party Administrator-Respondent.**

Appeal from a July 23, 2014 Compensation Order by  
Administrative Law Judge Joan E. Knight  
AHD No. 13-221, OWC No. 699614

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 DEC 16 PM 12 53

Matthew J. Peffer for the Petitioner  
Mark H. Dho for the Respondent

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge* and MELISSA LIN JONES and  
JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

For approximately seven years, Ms. Shelly Portee-White has been employed by the Washington Metropolitan Area Transit Authority ("WMATA") as a transit bus operator. Ms. Portee-White reported to the Bladensburg bus garage by 6:00 a.m. to begin her shift. Employees arrive at the Bladensburg garage by walking, being dropped off at the gate, or riding a WMATA shuttle to a stop near the garage; the shuttle was for the exclusive use of WMATA employees.

At approximately 5:15 a.m. on December 14, 2012, Ms. Portee-White waited on V Street, N.E. with her husband. When the WMATA shuttle arrived, she exited her car and tripped in a hole near the public sidewalk.

The parties proceeded to a formal hearing for an administrative law judge (“ALJ”) to decide whether Ms. Portee-White’s December 14, 2012 accidental injury arose out of and in the course of her employment. In a Compensation Order dated July 23, 2014, the ALJ ruled that Ms. Portee-White’s accidental injuries did not arise out of her employment because

on December 14, 2012, Claimant was in the process of going to work and had not started her shift or was performing duties of her employment. The fact that Employer provided a courtesy shuttle service for its employees did not mandate that she use the shuttle to reach the bus garage. Claimant testified there were other ways to reach the Bladensburg garage stating she could have walked or been dropped off at the entrance.

The CRB has acknowledged an exception to the going and coming rule where the injury is sustained while on the employer’s premises in the course of going to or coming from work. [Footnote omitted.] The record evidence shows, when Claimant left her car to board Employer’s shuttle bus she fell in the grassy area near the curb on the public street and was not on Employer’s property. There is no evidence Claimant slipped on the steps of the shuttle or the injuries occurred while riding the employer-provided transportation, trip in Employer’s parking lot, or fall while inside the Bladensburg garage. Claimant fell on a public street on her way to work. Claimant made no showing injury occurred within the time and space limits of the employment in other words, that the public sidewalk was exclusively or principally used by employees for Employer’s convenience. Therefore none of the going and coming rule’s exceptions applies, thus the fall did not arise out of her employment.<sup>[1]</sup>

On appeal Ms. Portee-White asserts her

evidence shows that Ms. White’s injury arose out of and in the course of her employment. The injuries she sustained are a direct result from her accident on December 14, 2012 and Ms. White is entitled to the temporary total disability benefits for the periods [sic] claimed. Although the CO determined that this evidence was rebutted, under the proper legal framework, by the Employer/Insurer’s evidence, the evidence was not properly weighed. As such, the legal opinions are not supported by the substantial evidence of record and the Compensation Order be reversed [sic].<sup>[2]</sup>

Ms. Portee-White argues that she invoked the presumption of compensability and that her injuries arose out of and in the course of her employment; her arguments are detailed below. She

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<sup>1</sup> *Portee-White v. Washington Metropolitan Area Transit Authority*, AHD No. 13-221, OWC No. 699614 (July 23, 2014), p. 4.

<sup>2</sup> Memorandum of Points and Authorities in Support of Application for Review (“Memorandum”), pp. 6-7.

requests the Compensation Review Board (“CRB”) vacate the July 23, 2014 Compensation Order.

In opposition, WMATA asserts the ALJ properly applied the going and coming rule to deny Ms. Portee-White’s request for workers’ compensation benefits because while on her way to work, Ms. Portee-White fell on a grassy area near a public sidewalk after exiting her personal vehicle and that injury does not arise out of and in the course of Ms. Portee-White’s employment. WMATA requests the CRB affirm the Compensation Order.

#### ISSUES ON APPEAL

1. As a matter of law, did Ms. Portee-White invoke the presumption of compensability?
2. As a matter of law, did Ms. Portee-White’s injury arise out of and in the course of her employment?
3. Is the July 23, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

#### ANALYSIS<sup>3</sup>

To begin, Ms. Portee-White asserts she invoked the presumption of compensability that her injury arose out of and in the course of her employment. The CRB disagrees.

Pursuant to §32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability (“Presumption”). In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability. “[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act.”<sup>4</sup> In other words, the Presumption creates a causal connection between a disability and a work-related event, but before it will do so, the Presumption must be triggered by the evidence.

Ms. Portee-White argues that

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<sup>3</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand 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) of the District of Columbia Workers’ Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 (“Act”). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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).

<sup>4</sup> *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

[t]hrough the medical records and testimony, which have not been contested in this regard by the Employer, Mrs. Portee-White has demonstrated that she suffered an accidental injury to her left ankle, and right shoulder on December 14, 2012 while she was waiting for an employee-only shuttle outside of an employee-only garage. Indeed, at the formal hearing which underlies the Compensation Order, the Employee did not rebut that Mrs. Portee-White sustained an injury and is employed by WMATA. Therefore, the conclusion that Ms. Portee-White did not invoke the presumption of compensability is not in accordance with the law, and the CO must be vacated and remanded for further analysis consistent with the law.<sup>[5]</sup>

Ms. Portee-White's argument fails because she only proved one of the two required triggers. The triggers to the Presumption analysis are (1) some evidence of a disability and (2) the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability. Inasmuch as the parties do not dispute Ms. Portee-White injured herself on December 14, 2014 and was unable to work as a result of her injuries, there is no dispute regarding the first element; however, in order to invoke the Presumption, Ms. Portee-White also was required to present some evidence of a work-related event, not merely some evidence of employment by WMATA. The ALJ ruled Ms. Portee-White did not make that showing, and because the CRB affirms that ruling, there is no error in not invoking the Presumption.

The reason Ms. Portee-White did not satisfy the second trigger is because as a matter of law her injuries and disability did not arise out of and in the course of her employment. It 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. At the time she fell, Ms. Portee-White was in the course of her personal commute to work; she was going to work, and the going and coming rule bars her recovery.<sup>6</sup>

Ms. Portee-White also argues application of the positional-risk test renders her claim compensable because "[i]n evaluating whether an injury 'arises out of' employment, the District of Columbia has adopted the positional-risk standard."<sup>7</sup> Contrary to Ms. Portee-White's general statement, the District of Columbia has not adopted the positional-risk test to adjudicate all allegations of arising out of the course of employment, and in this case, the positional-risk test does not apply.

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<sup>5</sup> Memorandum at p. 8.

<sup>6</sup> See *Glasker v. Olsten Kimberly Quality Care*, Dir. Dkt. No. 98-066, H&AS No. 97-359, OWC No. 500511 (December 17, 1998) (The general rule is that injuries that occur off an employer's premises while en route to or from work do not occur in the course of employment.)

<sup>7</sup> Memorandum at p. 9. (Internal citation omitted.)

There are three basic classifications of risks:<sup>8</sup> (1) strictly personal risks which generally are not compensable, (2) employment risks which generally are compensable, and (3) neutral risks to which the positional-risk test applies.<sup>9</sup> Ms. Portee-White's risk was not neutral; it was personal, and the positional-risk test does not apply to personal risks. Ms. Portee-White describes her incident as follows:

Mrs. Portee-White's sole purpose for being at that bus stop where she was injured was to board the shuttle bus to take her to her assigned job location. Taking the shuttle bus is for work-related purposes, which still satisfies the 'in the course of employment' standard. Moreover, the shuttle bus is provided *solely* for the benefit of WMATA employees. If WMATA is providing this benefit, it must also accept any risk, such as the risk of injury to its employees, and the responsibility therefor.<sup>[10]</sup>

Ms. Portee-White's characterization of the facts is skewed. Ms. Portee-White was not at the shuttle stop nor was she injured while waiting for, boarding, or riding the shuttle. She was walking on a grassy area between a public sidewalk and a public curb. Ms. Portee-White is correct when she states "[w]hen Mrs. Portee-White slipped and fell before boarding shuttle bus, [sic] her injuries resulted in an activity where she was in transit to her employment," but it does not follow that her personal commuting activity "creates an obligation by her Employer-provided transportation [sic]."<sup>11</sup>

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<sup>8</sup> *Bentt v. DOES*, 979 A.2d 1226, 1232. (D.C. 2009) (Citation omitted.)

<sup>9</sup> "A few courts have accepted 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 or she was injured. Usually, the test is approved and used in very particular situations. The theory supports compensation, for example, in cases of roving lunatics, [footnote omitted] 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. [Footnote omitted.]" A. LARSON, 1 LARSON'S WORKERS' COMPENSATION LAW, §3.05 (2014).

<sup>10</sup> Memorandum at p. 9. (Emphasis in original.)

<sup>11</sup> *Id.* at p. 11.

CONCLUSION AND ORDER

As a matter of law, Ms. Portee-White did not invoke the presumption of compensability and her injuries do not arise out of and in the course of her employment. The July 23, 2014 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES

*Administrative Appeals Judge*

December 15, 2014

DATE