RENE N. SARAVIA, Employee,
v.
CLOUDBURST, Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1408076

Mailed Date: July 18, 2014
July 16, 2014

ORDER

This matter came before the Board on June 12, 2014. Pending is an initial Petition to Determine Compensation Due filed by Rene N. Saravia ("Claimant") on February 14, 2014. Claimant alleges that he sustained a compensable work injury on December 18, 2013, while working for Cloudburst Lawn Sprinkler Systems ("Employer"). He asserts that he was involved in a slip-and-fall accident.

On May 30, 2014, Employer filed a motion to dismiss on the basis that Claimant was not within the course and scope of employment at the time of his injury. More specifically, Employer asserts that Claimant is covered by the so-called "going and coming rule" and had not yet arrived at work as of the time of his accident on December 18, 2013.

Testimony: Sandy Perrone testified on behalf of Employer. She has been an office manager for Employer since 1999. Employer's business consists of installing underground irrigation systems. The business office has an address of 6603 Governor Printz Boulevard, but the business actually faces Sunset Drive. There is a chain-link fence across the property line. Company-owned vehicles and equipment are parked within the fence. In general, employees are

not permitted to park within the fence line.[1] Employees are told to park on the street, which is a public right-of-way, and they are instructed not to block the driveways of the residential properties on the street. Usually, employees park outside the fence on the paved shoulder of the street with their vehicles up against the fence.[2] Some employees park further down the street closer to the residential homes. In fact, they can park anywhere, just not within the fence. Some employees get to work using public transport.

Ms. Perrone stated that Employer will weed along the fence line, but the area outside the fence is maintained by DelDOT. The State plows the snow

off the street. Ms. Perrone noted that, during the winter, virtually all of Employer's employees are laid off.

Claimant testified that he began to work for Employer in April of 2013.[3] His shift began at 6:00am and he worked until the job was done that day. He drove to work in his car and usually arrived about ten to fifteen minutes ahead of his start time. Ms. Perrone had indicated to him where to park in front of Employer outside of the fence. Sometimes she would ask him to park closer to other cars. If there were no spaces available directly in front of Employer then he would look for a parking spot close to there. He has only seen the cars of other workers parked in front of the business. He has never seen other vehicles there, except maybe those of the spouses of coworkers stopping briefly to drop off workers. Sometimes those who drove Employer's trucks would park inside the fence, but he never did.

Claimant stated that, on December 18, 2013, he came to work and parked in front of Employer (in a spot just to the left of where one can see one of Employer's trucks parked on Claimant's Exhibit 2). That day he was supposed to work with Mike, and Mike's truck was

parked outside the fence. Nobody else was working that day. He was waiting in his car for Ms. Perrone to open up the door.[4] When she did, he put on his boots and, when closing the trunk of his car, he slipped and fell.

Ms. Perrone was recalled for further testimony. She clarified that there are no signs posted that the area outside the fence is for employees only. She has seen others park there. During the work week, the residents don't park there, but on the weekends cars for the residential homes will park there. She stated that she does not normally direct where employee vehicles should park, but on occasion when a large space has been left she will ask employees to move their vehicles to make more parking spaces available for others. She asks this just out of consideration for others looking for parking.

Analysis: The Workers' Compensation Act ("Act") is the exclusive remedy between employer and employee for "personal injury or death by accident *arising out of and in the course of* employment." DEL. CODE ANN. tit. 19, § 2304 (emphasis added). Thus, the employment connection focuses on two aspects: whether the injury was "in the course of employment" and whether the injury arose out of that employment ("scope"). "[Q]uestions relating to the course and scope of employment are highly factual. Necessarily, they must be resolved under a totality of the circumstances test." *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 345 (Del. 1993).

The Delaware Supreme Court has suggested that the "course and scope" analysis should start with "the terms of the employment relationship or contract" on the belief that this will "normally" resolve the issue. *Spellman v. Christiana Care Health Services,* 74 A.3d 619, 626 (Del. 2013). The initial question is "whether, under the totality of the circumstances, the

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employment contract between employer and employee contemplated that the employee's activity at the time of injury should be regarded as work-related and therefore compensable." *Spellman,* 74 A.3d at 625. If the evidence of the contractual terms resolves the issue of course and scope, then the analysis ends. If the "contract-related evidence" is insufficient to resolve the issue, then the Board should apply existing "secondary default presumptions and rules of construction that best further the statutory purpose." *Spellman,* 74 A.3d at 625.

In this case, there is no evidence of any specific written employment agreement between Employer and Claimant, nor was there any evidence submitted of written workplace rules or policies to establish whether Claimant's activity at the time of injury was contemplated by the parties as being work-related. As such, the Board must turn to a "secondary" rule.

Delaware, like most jurisdictions, follows the "going and coming" rule, which "precludes an employee from receiving workers' compensation benefits for injuries sustained while traveling to and from his or her place of employment." *Tickles v. PNC Bank,* 703 A.2d 633, 636 (Del. 1997). *See Histed,* 621 A.2d at 343; *Devine v. Advanced Power Control, Inc.,* 663 A.2d 1205, 1210 (Del. 1995). Thus, the Act provides in part that it "[s]hall not cover an employee except while the employee is engaged in, on or about the premises where the employee's services are being performed." DEL. CODE ANN. tit. 19, § 2301(15)a. The rationale for the going and coming rule is that "employees face the same hazards during daily commuting trips as does the general public. Such risks, therefore, are no different from those confronting workers on personal excursions." *Histed,* 621 A.2d at 343. *See Tickles,* 703 A.2d at 636. Because of the general principle that the Act should be construed liberally, the going and coming rule is to be interpreted narrowly and exceptions to that rule interpreted broadly "so that coverage is not denied wherever the injuries can fairly be characterized as arising out of the employment."

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Collier v. State, Del. Super., C.A. No. 93A-06-022, Del Pesco, J., 1994 WL 381000 at *2 (July 11, 1994). *See State v. Glascock,* Del. Super., C.A. No.

97A-01-001, Graves, J. (July 14, 1997). For example, the rule does not apply when the employee is engaged in a special errand, or the employer pays travel expenses, or the use of a personal vehicle is required for work, or the daily commute has special risk factors interrelated with employment. *See, generally, Histed,* 621 A.2d at 343; *Devine,* 663 A.2d at 1210-11; *Cook v. A.H. Davis & Son, Inc.,* 567 A.2d 29, 32-33 (Del. Super. 1989).

More specifically for this case, the going and coming rule does not apply if the injury actually occurs on the employer's premises. *Tickles,* 703 A.2d at 636; *Rose v. Cadillac Fairview Shopping Center Properties (Delaware), Inc.,* 668 A.2d 782, 787 (Del. Super. 1995), *aff'd sub nom. Rose v. Sears, Roebuck & Co.,* 676 A.2d 906 (Del. 1996). Stated bluntly, "injuries occurring while . . . going to and from work are compensable if they occur on the employer's premises, but are not compensable if they occur off the premises." *Quality Car Wash v. Cox,* 438 A.2d 1243, 1245 (Del. Super. 1981), *rev'd on other grounds sub nom. Cox v. Quality Car Wash,* 449 A.2d 231 (Del. 1982).

Stated like that, the rule is a clear, bright-line rule. In the current case, for example, it is undisputed that Claimant, in his trip to work, had not yet crossed the property line for Employer's place of business when he fell. As such, he was not on the actual legal premises at the time of the accident. The accident occurred "off the premises."

However, as a respected legal treatise has observed, "[i]t is a familiar problem in law, when a sharp, objective, and perhaps somewhat arbitrary line has been drawn . . .to encounter demands that the line be blurred a little to take care of the closest cases." Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law,* §13.01[2][a], at 13-6 (Desk Edition, 2014)

(hereinafter "*Larson's*"). This requires the Board to consider whether there is an applicable exception to the "premises rule." If not, it must be concluded that Claimant's accident is not compensable. Mere proximity to an employer's premises is insufficient to make the accident compensable. *See Larson's,* §13.02[2][e], at 13-29 ("If, however, none of the special circumstances . . . are present, injuries on nearby sidewalks and streets are not within the premises rule, and the mere fact of proximity, standing alone, is not sufficient to justify an exception to that rule.").

One common exception to the premises rule is that involving parking lots. The term "premises" has been interpreted to include a parking lot, *regardless of ownership of the lot,* if the employer exercises some indicia of control over the lot, such as by instructing the employees where to park,

providing security cameras to cover the parking area and providing security guards to escort employees to and from the lot. *See Rose,* 668 A.2d at 787-88. Strict legal ownership of the property is not needed, so long as the employer exercises sufficient control of the area. *See Bernadette's Hair Designers v. Incollingo,* Del. Super., C.A. No. 89A-JN-10, Babiarz, J., 1990 WL 105023 at *2 (July 16, 1990)(sufficient control when employer directed employees where to park in parking lot owned by employer's landlord); *cf. Jones v. Wendy's of Tri-State Mall,* Del. Super., C.A. No. 95A-05-003, Alford, J., 1996 WL 30239 at *2 (January 23, 1996)(holding that when parking lot surrounds employer and is used by both employees and customers, it is part of the "premises" even though owned and maintained by another).[5]

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Nevertheless, mere knowledge by the employer that employees park in a certain location does not, in itself, evidence that the employer has control of the lot. *Quality Car Wash,* 438 A.2d at 1246.[6] Thus, for example, in *Stevens v. State,* 802 A.2d 939 (Del. Super. 2002), the employee was injured in a convenience store parking lot over which the employer had no control even though she arrived there in a vanpool that brought employees to work and the van stopped at that location every day. *See Stevens,* 802 A.2d at 947-48. The employer's knowledge of this practice was not an endorsement of the risk.

As the case law cited above makes clear, for a parking area to be considered part of an employer's premises, it must be shown that the employer has "control" over the lot. If the employer owns the lot, the control is inherent. A parking lot is similarly considered part of the premises, even if not owned by the employer, provided that the employer has the owner's permission to use it. For example, in *Rose, Bernadette's Hair Designers* and *Jones,* the employer was a lessee of space in a shopping center and the parking area was provided by the landlord for the use of the tenants. As such, the parking lot is normally considered as being an extension of the employer's premises, at least as long as the employees make use of the parking lot. *See also Delhaize America, Inc. v. Barkas,* Del. Super., C.A. No. 07A-01-002, Bradley, J., 2007 WL 2429375 at *2 (August 22, 2007) (finding strip center's parking lot part of tenant-employer's premises).

In the current case, the parking area is not Employer's property. It is, in fact, the shoulder of a public roadway. There is no ownership or landlord-tenant connection between the parking area and Employer. As such, that particular type of "parking lot exception" to the

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premises rule is inapplicable to Claimant's case and his accident would still have to be deemed to have occurred "off the premises."

However, a parking area can become part of the employer's premises without any ownership or tenant connection if sufficient control is exercised over it. In *Quality Car Wash,* the employer neither owned the lot in question, nor was it owned by the employer's landlord. It was, in fact, the parking lot across the road from the employer and was connected to a long vacant supermarket. *See Quality Car Wash,* 438 A.2d at 1245. This lot was paved and was used by the employer to store an overflow of cars waiting to use the employer's car wash services. In addition, while the employer provided another unpaved lot for employee parking, it did not instruct employees to only park there and permitted employees to also park in the paved lot across the street. *See Quality Car Wash,* 438 A.2d at 1247.[7] In reversing the Superior Court, the Supreme Court found this exercise of control over the paved lot was sufficient to bring it into the scope of the employer's premises. *Cox,* 449 A.2d at 232. In other words, the employer acted as if it owned the paved lot.

It is at this point that the exception to the premises rule becomes uncomfortably vague. What is "sufficient" control to transform otherwise non-premises into premises of Employer? *Larson's* provides words of caution for those jurisdictions that depart too far from the bright-line premises rule. *See Larson's,* § 13.01[2][a] & [b], at 13-6 to 13-14. The Board agrees with the treatise's analysis of the principle behind the exceptions to the premises rule as being, at heart, a "range of risk" principle.

> The answer here suggested is this: in this instance, as in many others, the concept of "course of employment" follows

> that of "arising out of employment"; that is, the employment-connected risk is first recognized, and then a course-of-employment theory must be devised to permit compensation for that obviously occupational risk.
>
> This is exactly what has happened here. A claimant has been subjected to a particular risk because of the claimant's employment, the risk of crossing certain railway tracks near the plant entrance, for example. Since it is so obvious that a causal relation exists between the work and the hazard, the always-ill-fitting course of employment concept must be stretched at least

> far enough to prevent the injustice of denying compensation for an injury admittedly caused by the employment.
>
> We have, then, a workable explanation of the exception to the premises rule: it is not proximity, or reasonable distance, or even the identifying of surrounding areas with the premises: it is simply that, when a court has satisfied itself that there is a distinct "arising out of or causal connection between the conditions under which claimant must approach and leave the premises and the occurrence of the injury, it may hold that the course of employment extends as far as those conditions extend.

Larson's, § 13.01[5], at 13-25 to 13-26.[8]

So what "control" was exercised by Employer or what "employment-connected risk" exists in the current case? It is not disputed that the area where Claimant parked and where he fell was part of a public right-of-way. That it is a public right-of-way, rather than privately owned, does not, in itself, make a difference to the analysis. *See Larson's,* § 13.02[1], at 13-26 (stating that the public-private distinction is not relevant). However, the fact that the property in question is not owned by Employer (regardless of who does own it) does go to the analysis of the degree of control that Employer exercises over it. In terms of risk, in this case, there was no greater risk to this parking area than anywhere else in a public right-of-way. Employer did not

maintain (and had no legal authority to maintain) the stretch of road. Employer made no greater use of the shoulder area than any other member of the public. Employer parked business vehicles on Employer's own property, so Employer was not using this area for business purposes as the employer in *Quality Car Wash* did. Ms. Perrone testified that, during the weekends, the residential neighbors would use the spot for their own parking needs as well.

For all practical purposes, the "control" of the area exercised by Employer consisted only of occasionally giving employees common-sense directions on considerate parking practices.[9] Not only did this advice apply to the area directly in front of Employer's business, but to further down the street into the residential area. Employer directed employees not to block driveways in the residential area. It would, however, be too much to suggest that, by doing this, Employer had somehow converted the roadway of the

entire adjacent residential community as part of its "premises." The mere fact that Employer knew where employees would park cannot be a distinguishing factor in this case. Employer also knew that some employees arrive by public transportation, but it would be ridiculous to suggest that the entire path from the bus stop to the fence is part of Employer's "premises."

In summary, apart from mere proximity to Employer's property, there is no significant factor that would justify extending the concept of Employer's premises to cover the area of Claimant's accident. The Board finds no practical rationale for covering that particular area that would not also result in the ridiculous conclusion that Employer was also responsible for areas far away from Employer's property, such as down the street into the residential neighborhoods or

up to the bus stop. "The real reason for the premises rule is, and always has been, the impracticality of drawing another line at such a point that the administrative and judicial burden of interpreting and applying the rule would not be unmanageable." *Larson's,* § 13.01[2][b], at 13-11. As such, the Board finds that, at the time of the accident, Claimant was still in the process of traveling to his employment. He had not yet entered the premises of Employer and, as such, the "going and coming" rule precludes coverage for the accident. *See Tickles,* 703 A.2d at 636. Employer's motion to dismiss is granted.

IT IS SO ORDERED this 16th day of July, 2014.

INDUSTRIAL ACCIDENT BOARD

/s/_____
LOWELL L. GROUNDLAND

/s/_____
MARILYN J. DOTO

Mailed Date: 7-18-14

/s/_____
OWC Staff

Christopher F. Baum, Hearing Officer for the Board
Brian S. Legum, Esquire, for Claimant
Andrew M. Lukashunas, Esquire, for Employer

Notes:

[1.] Some office workers are permitted to park within the fence. The business owner parks inside the fence.

[2.] Claimant's Exhibit 2 is a photo of the property in question. The fence can clearly be seen as can some parked vehicles.

[3.] Claimant was assisted in testifying by Interpreter No. 109117 of Pacific Interpreters, a telephonic interpretation service.

[4.] Claimant clarified that, on December 18, 2013, Ms. Perrone did not direct where he should park. Although he was waiting for her to open the door, he does not think that she saw him.

[5.] The parking lot need not be contiguous to the employer's property. Indeed, by "establishing or sponsoring a parking lot not contiguous to the working premises," the employer becomes responsible for travel between the lot and the premises because "the employer has created the necessity for encountering the hazards lying between these two portions of the premises." *Larson's,* §13.01[2][b], at 13-9 (noting also that no such consideration would apply to a trip from, for example, a bus stop or parking location on a public street over which the employer has no control). *See also Larson's,* § 13.01[4][b].

[6.] Although it approved of the Superior Court's statement of the applicable legal principles, the Supreme Court reversed the Superior Court on a factual basis, finding that the employer in that case had exercised sufficient "control by use" of the parking lot by, among other things, using the lot to store or accommodate an overflow of cars waiting to use the car wash. *Cox,* 449 A.2d at 232 n*. *See also Stevens v. State,* 802 A.2d 939, 947 (Del. Super. 2002).

[7.] The employer in *Quality Car Wash* apparently had a practice of making free use of others' property. Just like it did not own the paved lot it used for business purposes, the unpaved lot it provided for employee parking was not actually owned by employer. Rather, the employer "appropriated adjacent state land" for that purpose. *See Quality Car Wash,* 438 A.2d at 1247.

[8.] Indeed, Delaware case law has, to some extent, recognized this view, noting that the "going and coming rule" should be interpreted narrowly "so that coverage is not denied wherever the injuries can fairly be characterized as arising out of the employment." *Collier v. State,* Del. Super., C.A. No. 93A-06-022, Del Pesco, J., 1994 WL 381000 at *2 (July 11, 1994).

9. It is true that Employer had some limited space on its premises where it could (in theory) have allowed employees to park. However, this area was primarily dedicated to storage of company vehicles and equipment. The Board does not believe that liability should be based on such a concept as whether an employer *should* have provided on-site parking. Such a concept gets dangerously close to imputing a degree of negligence or fault into the concept of workers' compensation liability, which is contrary to one of the core principles of the Act, which is "to eliminate questions of negligence and fault in industrial accidents." *See Hill v. Moskin Stores, Inc.,* 165 A.2d 447, 451 (Del. 1960).
