STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DORIS PHILLIPS)
)
VS.) W.C.C. No. 2017-00738
)
ENTERPRISE RENT-A-CAR
COMPANY OF RHODE ISLAND,)
LLC
)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the claim of appeal of the respondent/employer and upon consideration thereof, the employer's appeal is granted. In accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the petitioner has failed to establish by a fair preponderance of the credible evidence that the death of the employee, Joseph Phillips, on December 15, 2016, arose out of and in the course of his employment with the respondent employer.

It is, therefore, ORDERED:

1. That the petition of the surviving spouse for compensation benefits and funeral expenses is denied and dismissed.

Entered as the final decree of this Court this 27th day of April 2020

PER ORDER:

Nicholas DiFilippo, Administrator

ENTER:

Olsson, J.

Conte, J.

Fay, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DORIS PHILLIPS	)	
	)	
VS.	)	W.C.C. No. 2017-00738
	)	
ENTERPRISE RENT-A-CAR COMPANY OF RHODE ISLAND, LLC	)	
	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's claim of appeal from a decision and decree of the trial judge granting Doris Phillips' (the deceased employee's wife) petition for compensation benefits and funeral expenses. In the petition, she alleged that her husband, the employee, sustained an injury arising out of and in the course of his employment when an automobile struck and killed him while he was walking across the street from the employer's facility to a parking lot. The trial judge initially denied the petition at the pretrial conference, but after trial, granted the wife's petition and the employer filed a timely claim for trial. After a comprehensive review of the record in this matter and consideration of the arguments of both parties, we grant the employer's appeal and vacate the trial judge's decision and decree.

The parties stipulated to certain facts of the case. They agreed that the employee's average weekly wage was Two-Hundred Thirty-Three Dollars and Forty-Five Cents ($233.45), and that the employee died as a result of a motor vehicle accident that occurred on Jefferson

Boulevard. The parties stipulated that at the time of his death, the employee was married and lived with his wife, Doris Phillips.

A number of Enterprise employees testified during the trial. In addition, the report of the Warwick Police Department was admitted into evidence, as well as three (3) lease agreements for parking in three (3) parking lots, and several photographs and diagrams of the area showing the facility and parking lot in question.

Michael Pezzullo testified that he works as a "chase driver" for Enterprise Rent-A-Car Company of Rhode Island, LLC (the employer or Enterprise), located on Jefferson Boulevard in Warwick. He explained that chase drivers follow the drivers who are delivering rental cars to other Enterprise branches in order to pick them up and transport them back to the employer's facility located on Jefferson Boulevard (the facility).

Mr. Pezzullo drives his personal vehicle to work every day and parks in the lot on the opposite side of Jefferson Boulevard from the facility ("J-Lot"). Mr. Pezzullo explained that Enterprise employees cannot park their cars on the facility's property; instead, there are three (3) different parking lots where employees can park, but J-Lot is the most convenient place to park because it is the closest to the facility. Tr. 14:12-18. Mr. Pezzullo explained that when he was first hired, Fred Webber, the drivers' supervisor, "told" him to park in J-Lot, but that parking in J-Lot operated on a first come/first served basis. Tr. 11:13-17, 12:2-10, 14:19-23. He testified that Enterprise and other businesses lease parking spots in J-Lot. A lease agreement which was introduced into evidence showed there are two (2) designated areas in J-Lot where Enterprise employees can park their vehicles; one (1) area had twenty-four (24) spaces and the other area had six (6) spaces. *See* Ee's Ex. 4, License Agreement (Parking Spaces), Exhibit A attachment.

After Mr. Pezzullo parks in J-Lot each morning, he walks across Jefferson Boulevard to reach the facility. However, Mr. Pezzullo explained that the employer provides a shuttle service that transports employees to and from the parking lots. Mr. Pezzullo testified that he occasionally drove the shuttle that transported employees from the parking lots to the facility, but two (2) drivers named Jerry and Carl usually drove the shuttle. He testified that the shuttle service is always available for employees. The shuttle service usually ran in the morning from about 7:30 a.m. to 8:00 a.m., and after that, employees could call Mr. Webber if they needed a ride and he would send the shuttle to pick them up.

Mr. Pezzullo indicated that the shuttle service is not necessary in the afternoon because at the end of each day, the chase driver drops the drivers off at their personal vehicles and they can go home from there. Then, the chase driver drives the company van back to the facility to park the van and can either have another driver pick him up and drive him to his personal car or Mr. Webber could coordinate a ride for the chase driver. He stated that he had never requested a ride to his personal vehicle from anyone, but he might accept when offered one. He also explained that when arriving back to the facility there is no "consistent procedure," but if it was after hours, the drivers would be unable to clock out because the facility would be closed. Tr. 122:25, 129:21-24. According to Mr. Pezzullo, most drivers got out of the van and drove home when he dropped them off at their personal vehicles. Tr. 130:14-16.

Mr. Pezzullo testified that although there is a shuttle available to transport employees across the street, he often chooses to walk across the street instead because he arrives between 6:15 and 6:30 in the morning even though his shift starts at 8:00. He stated that walking across the street was not prohibited, and no one ever told him he had to take the shuttle to travel to and

from the parking lots. Further, he stated that Mr. Webber was aware that some employees walked across the street and would just reiterate that the shuttle was available. Tr. 17:17-21.

Mr. Pezzullo stated that he knew Joseph Phillips (the employee) as an Enterprise driver. Mr. Pezzullo testified that the employee also parked in J-Lot and usually walked across the street in the morning because he arrived early for work as well. On the morning of December 15, 2016, Mr. Pezzullo parked in J-Lot, along with the employee and a co-worker, Richard Dion. That day, Mr. Webber assigned the employee and Mr. Dion to deliver two (2) rental cars to a branch location in East Granby, Connecticut. Mr. Pezzullo was assigned as the chase driver, so he drove a company van to East Granby, Connecticut and drove the employee and Mr. Dion back to Rhode Island after they delivered the cars.

Mr. Pezzullo testified that when they returned to the facility that evening at around 7:00 p.m., the facility was closed, it was dark, and no one was around. Mr. Pezzullo drove the van into J-Lot and Mr. Dion got out, returned to his personal vehicle, and drove away. Instead of exiting the van as Mr. Dion did, the employee told Mr. Pezzullo he would remain in the company van until they parked it at the facility and then they could walk back to their cars in J-Lot together. Mr. Pezzullo told the employee that it was not necessary for him to accompany him back to the facility, but the employee insisted. Mr. Pezzullo then drove the van back over to the facility with the employee still in it. They parked and deposited the keys, a gas card, a phone, and their driver's logs[1] into the drop box. They began to walk back to their personal cars together. However, as they approached Jefferson Boulevard, Mr. Pezzullo turned right and started to walk parallel along the street to check for traffic before crossing. He looked over his

[1] The driver's log is a record of where the driver transported a rental car and his departure/arrival times. Tr. 135:5-16.

shoulder and saw that the employee had already started walking across the street and "that's when the accident happened." Tr. 16:15-19.

Kristen Piccolo, the human resource manager at Enterprise, testified that there were no written rules regarding employee parking but there was a policy that all driver employees park across the street from the facility. She testified that the shuttle service is always available to anyone who wants to use it, and the employer prefers all employees to take the shuttle to and from the lots. However, an employee may choose to walk instead of waiting for the shuttle. The employee handbook does not prohibit employees from walking across the street. She also testified that J-Lot is the most convenient place to park and that the other two (2) lots are far away. However, employees are not mandated to park in any of those lots, they are able to park anywhere they would like. Tr. 42:23-43:3. Ms. Piccolo testified that an employee has never been disciplined for parking somewhere other than one of the parking lots or for walking across Jefferson Boulevard. She explained that the chase vans are parked on-site at the facility, but the drivers may not park there; the only employees who can park at the facility work out of the building all day long such as maintenance workers, automobile technicians, vehicle acquisitions coordinators, and a few supervisors. Tr. 41:2-10.

Fred Webber testified that in December 2016 he worked as a dispatcher for the drivers at the Enterprise location on Jefferson Boulevard and his duties included supervising the drivers and discussing vehicle distribution with the area managers. Mr. Webber agreed that only a couple employees parked on-site at the facility and the drivers all parked across the street in J-Lot or elsewhere. He testified that Enterprise also leased space in an overflow lot located on Strawberry Field Road. He explained that no one was specifically assigned to park anywhere, but if all the parking spots in J-Lot were taken, employees usually parked in the Strawberry Field

Road lot. Mr. Webber testified that Enterprise did not own either parking lot; it leased both lots and at least a couple other businesses also utilized J-Lot. He pointed out on a photograph and diagram the location of the facility, J-Lot, and the spaces designated for Enterprise employees to park their vehicles. *See* Ee's Ex. 3. Mr. Webber testified that although he personally oversaw the drivers, he did not monitor who parked where and Enterprise did not mandate that the drivers had to park in J-Lot. Tr. 57:2-16. The drivers could choose to park wherever they wanted, as long as it was not at the facility. Tr. 57:20-22.

Mr. Webber explained that after parking in either of the lots, employees could wait for the shuttle, call someone for a ride, or walk across the street to get to the facility. The shuttle service begins at about 7:10 or 7:15 a.m. and the first one in, usually Jerry Halleck who parked on-site at the facility due to a back problem, would drive the shuttle. Mr. Webber testified that in the morning, the shuttle service usually stopped running at about 8:15 in the morning. After that time, employees could call the office and Mr. Webber would send the shuttle to pick them up. All the drivers had his cell phone number and the facility's phone number.

Mr. Webber explained that if drivers arrived back from a job late at night, the chase driver would bring the drivers back to their personal cars and then drive the company van to the facility. Then, one of the drivers would drive his personal vehicle across the street to the facility to pick up the chase driver and drive him to his own personal vehicle.

Mr. Webber could not recall one instance when someone needed a shuttle ride and was unable to get one. He testified that although the shuttle policy was not written or memorialized anywhere, he told drivers on their first day that the shuttle service was the transportation method for them to get back and forth across the street. Mr. Webber admitted that there were situations in which one lone driver would deliver a rental car at a different branch and then drive back

alone in a different car. In those situations, if the lone driver arrived back to the facility after hours, that driver was expected to leave the rental car he picked up at the facility and walk across the street to get back to his personal vehicle. However, that driver was also permitted to park the rental vehicle in J-Lot overnight, to avoid having to walk across Jefferson Boulevard.

Richard Dion, Robert Clarkin, and Russell Flanagan, drivers for Enterprise, all testified in this matter. They testified that they park their personal vehicles in a designated area in J-Lot, a parking lot shared with other businesses. Mr. Dion explained they were not assigned to a specific spot, just an area. Tr. 101:12-14. This lot operated on a first come/first served basis; the Enterprise drivers who arrived first could take the available spots in J-Lot. If all the available spots in J-Lot were taken, there was a lot located on Strawberry Field Road where late arrivers could park, but it was inconvenient to park there because it was so far away. In fact, Mr. Clarkin testified that he "would have parked on the street rather than park [at the Strawberry Field Road lot]. It was a long distance." Tr. 76:23-24. He explained that he has illegally parked on the street before.

Mr. Clarkin and Mr. Dion usually took the shuttle but sometimes they chose to walk rather than wait for the shuttle to come pick them up. Mr. Flanagan testified that although he always used the shuttle, he often witnessed co-workers walking across the street instead of using the shuttle but never saw anyone reprimanded for that behavior. All three (3) drivers testified that the shuttle was always available; there was never a time when it was unavailable for someone who wanted to use it.

Mr. Dion testified that there were several occasions when he arrived back to the facility after hours with Mr. Pezzullo. During those occasions, Mr. Pezzullo always dropped Mr. Dion off at his personal car in J-Lot so Mr. Dion could get in his car and leave for the day. Mr. Dion

stated that when that occurred, he frequently drove his personal car across the street, picked the chase driver up, and drove the chase driver back to the parking lot where the chase driver's car was parked before leaving for the day. Mr. Dion explained that this was a courtesy, not a requirement. Tr. 106:7-9. Mr. Clarkin testified that if he arrived back from a job after hours, he would give his paperwork to Mr. Pezzullo to deposit in the drop box. Tr. 82:10-23.

On December 15, 2016, Mr. Dion parked his personal car in J-Lot, about six (6) spots away from where the employee had parked his car for the day. He testified that he and the employee were dropping off cars in Connecticut that day. Mr. Pezzullo was the chase driver and drove Mr. Dion and the employee back to Rhode Island after they delivered the cars. On the return trip, the employee sat in the passenger seat and Mr. Dion sat in the back. When they returned to Jefferson Boulevard that evening at around 7:00 p.m., it was dark out. Mr. Pezzullo pulled into J-Lot and stopped the van directly in front of Mr. Dion's parked car. Mr. Dion said goodbye to his co-workers, exited the vehicle, and got into his personal car and left. He testified that he did not hear any conversations between the employee and Mr. Pezzullo at that point nor did he see the employee get out of the van. When asked why he did not offer Mr. Pezzullo, the chase driver, a ride back to his car that evening despite having done so on prior occasions, Mr. Dion stated that his personal vehicle, a truck, only had two seats so he would not have been able to drive both Mr. Pezzullo and the employee across the street.

The trial judge addressed two (2) issues at trial. First, the trial judge addressed whether crossing Jefferson Boulevard was a risk of employment. She concluded that it was a risk of employment because the employee had nowhere to park other than the leased lots, he was required to cross Jefferson Boulevard to reach either lot, and he was directed to park in a certain area of J-Lot. The trial judge found the facts in this matter to be directly analogous to those in

Branco v. Leviton Mfg. Co., Inc., 518 A.2d 621 (R.I. 1986). Therefore, the trial judge found that it was foreseeable to the employer that its employee drivers would be at risk of injury when crossing the street.

Second, the trial judge addressed whether the injury occurred "in the course of employment." She determined that the employee's injury occurred within the period of employment because it occurred shortly after he dropped paperwork off at the facility and while he accompanied a co-worker across the street. She also determined he was at a location where the employer reasonably could have expected him to be and was performing a duty incidental to his employment in depositing his paperwork in the drop box at the employer's facility. The trial judge granted the wife's petition and the employer promptly filed a claim of appeal.

The employer has filed five (5) reasons of appeal, the first four (4) of which we shall address as one because they present the same argument. First, the employer asserts that the trial judge failed to properly apply the factors cited in *Branco* and the corresponding case law by failing to determine that the going-and-coming rule barred recovery. Specifically, the employer contends the trial judge ignored and/or misapplied the evidence that the employer did not own or maintain the parking lot where the employee parked or control the employee's route to and from where he parked. After a thorough review of the facts of this case and the relevant case law, we agree with the employer. The circumstances of this case do not satisfy the very "narrow and particular set of facts" required to fall under the exception to the going-and-coming rule that the Rhode Island Supreme Court established in *Branco*. *Id.* at 624; *see also Rico v. All Phase Electric Supply Co.*, 675 A.2d 406, 409 (R.I. 1996). Accordingly, we must reverse the trial judge's decision and decree.

"Whether an employee's injury arises out of and in the course of employment is a mixed question of law and fact." *Branco*, 518 A.2d at 622 (citing *DeNardo v. Fairmount Foundries Cranston, Inc.*, 121 R.I. 440, 339 A.2d 1229 (1979)). Rhode Island General Laws § 28-35-28(b) provides that the findings of fact made by a trial judge shall be final unless the Appellate Division determines that they are clearly erroneous. *Diocese of Providence v. Vaz*, 679 A.2d 879, 881 (R.I. 1996). The appellate panel may conduct a *de novo* review for matters of law and "affirm, reverse, or modify the decree appealed from, and may itself take any further proceedings that are just[.]" R.I. Gen. Laws § 28-35-28(a). After a thorough review of the record, we find that the trial judge misapplied the law and accordingly, we grant the employer's appeal.

The going-and-coming rule operates to bar employee recovery "when injury occurs while the employee is traveling to or from the workplace." *Toolin v. Aquidneck Island Medical Resource*, 668 A.2d 639, 640 (R.I. 1995). However, to avoid the potential harsh results of completely barring an employee's recovery, the Court established certain exceptions to the going-and-coming rule that permit an employee to recover when they can establish a "nexus" or "causal relationship" between the injury and employment. *Branco*, 518 A.2d at 622-623. *Branco* created one such exception to the rule for situations in which an employer owns a parking lot separate from its facilities. *Id.* at 624.

In *Branco*, the employee drove his personal vehicle to work and parked his car in the employer-owned parking lot that was located across the street (Jefferson Boulevard) from the building where he worked. *Id.* at 622. Although the employer owned another parking lot for employee parking, it had specifically directed the employee to park in the lot across the street. *Id.* Thus, to reach the building where he worked, the employee was required to walk across a busy street. *Id.* One morning when the employee was walking into work, an automobile struck

him as he was crossing the public road. *Id.* In granting workers' compensation benefits, the Court extended a very specific and limited exception to the going-and-coming rule for situations in which:

> (1) the employer owns and maintains an employee parking area separate from its plant-facility grounds, (2) the employer takes affirmative action to control the route of the employee by directing the employee to park in that separate area, and (3) the employee is injured while traveling directly from the lot to the plant facility.

Id. at 624. The Court explained that "[c]learly it was foreseeable to employer that each and every one of its employees, assigned to that lot and working that shift, would be running the risk of injury on this highway at that morning hour." *Id.* at 623. Thus, crossing Jefferson Boulevard was a risk of employment. *Id.*

The case at hand fits squarely into the *Branco* analysis; both cases involved an employee being struck by an automobile while walking across Jefferson Boulevard to or from a parking lot. However, the case at hand contains at least one (1) key difference; unlike the employer in *Branco*, Enterprise did not own and maintain the parking lot. Thus, the uncontradicted evidence establishes that at a minimum, the first condition of *Branco* is not met, and the going-and-coming rule bars recovery.

The Court made the first condition of the *Branco* exception clear and simple; the employer must *own and maintain* the employee parking lot, even if it is separate from the facility's grounds. *Id.* We find this first condition to be fatal to the outcome of the present case because the employer did not exclusively own J-Lot, it merely leased spaces in the lot along with other businesses. The trial judge was of the opinion that leasing J-Lot was sufficient to satisfy the first condition of *Branco*, however, there is no case law in Rhode Island establishing that leasing equates to ownership in the Workers' Compensation system. In fact, in *Brown v. KNC*

Management Enterprises, Inc., the Appellate Division declined to adopt such a rule, stating "Rhode Island has not adopted a general rule that an employer's premises shall include a parking lot shared by multiple tenants which the tenants' employees are permitted to utilize and we decline to do so at this time." W.C.C. No. 2013-00798 at *11 (App. Div. November 25, 2019). Therefore, because Enterprise merely leased spaces in J-Lot and did not own and maintain the parking lot, the first condition set forth in *Branco* is not met.

The petitioner glosses over the first criteria of *Branco* by simply stating that leasing is the equivalent of ownership, without providing any legal authority to support the statement and then argues that the employee was doing something incidental to his employment when he was struck and suffered fatal injuries. Relying on *Barata v. Hopkins Manor*, the petitioner argues that walking across the street was incidental to the employment because Enterprise was aware that some employees walked across the street and did not expressly prohibit this practice. W.C.C. No. 2011-05196 (App. Div. March 30, 2017). We find this argument to be unpersuasive.

In *Barata,* an employee slipped on ice during her unpaid lunch break in an employer-owned parking lot adjacent to the employer's facility. Although the court did point out that the employer was aware that some employees sat in their vehicles in the parking lot during their lunch break and did not forbid that practice, the key to its holding was that the parking lot was part of the employer's premises. The court stated that "[b]ecause the parking lot is a portion of the employer's premises, it logically follows that 'compensation coverage attaches to any injury that would be compensable on the main premises.'" *Id.* (citing 2 Lex K. Larson, *Larson's Workers' Compensation Law* § 13.04[2][b] at 13-36.1 (Matthew Bender Rev. Ed)). Thus, the court found that the employee's injury resulted from a risk created by the employer because the employer was responsible for maintaining its parking lot in a safe manner. In the present matter,

although Enterprise was aware that some employees walked across the street and did not forbid that practice, the employee's injury did not occur on the employer's premises and therefore *Barata* is distinguishable.

The petitioner relies on *Ellis v. Verizon New England, Inc.* to argue that the street-peril doctrine applies to the case at hand. 63 A.3d 510 (R.I. 2013). In *Ellis*, the Court stated that "[i]n limited circumstances, our jurisprudence has recognized certain 'street perils' as actual risks of employment, permitting compensation where employees have been injured while using public roadways in connection with their employment." *Id.* at 516. The Court ultimately held that the risk of being injured in an automobile accident is among the street perils which an employee is exposed to when his or her employment requires travel on public roads stating, "that the risks of the street are the risks of the employment, if the employment requires the employee's use of the street." *Id.* (citing *Hudson v. Thurston Motor Lines, Inc.*, 583 S.W.2d 597, 602 (Tenn. 1979)). However, based upon the testimony of the co-workers, we do not find that Enterprise required the employee to walk across Jefferson Boulevard. In fact, the employee could have exited the van in J-Lot and driven away in his own personal vehicle instead of choosing to remain in the van and subsequently walk across Jefferson Boulevard. Thus, the street-peril doctrine does not apply because the course of employment did not require the employee to travel on the public road in such a manner as he did.

In its next reason of appeal, the employer asserts that the trial judge abused her discretion to question witnesses under Rhode Island Rule of Evidence 614 by eliciting testimony on issues not previously discussed by either attorney during their respective examination of the witnesses. However, because we have ruled on the merits of the decision and concluded that reversal is warranted, the court need not address this second reason of appeal.

In conclusion, for the foregoing reasons, we find that the *Branco* exception does not apply to the particular facts of this case and conclude that the going-and-coming rule precludes a recovery by the deceased employee's widow. The Court used very specific language in establishing the criteria that must be met to qualify for the exception, which we are not in the position to expand. Instead, we must look to the existing precedent and give deference to the Rhode Island Supreme Court to determine if it wishes to expand this exception further. Consequently, the employer's appeal is granted, and the decision and decree of the trial judge are reversed. A new decree shall enter containing the following findings and orders:

1. That the petitioner has failed to establish by a fair preponderance of the credible evidence that the death of the employee, Joseph Phillips, on December 15, 2016, arose out of and in the course of his employment with the respondent employer.

It is, therefore, ordered:

1. That the petition of the surviving spouse for compensation benefits and funeral expenses is denied and dismissed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a new decree, a proposed version of which is enclosed, shall be entered on **April 27, 2020.**

Conte, J. and Fay, J., concur.

ENTER:

Olsson, J.

Conte, J.

Fay, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

DORIS PHILLIPS)
)
VS.) W.C.C. No. 2017-00738
)
ENTERPRISE RENT-A-CAR
COMPANY OF RHODE ISLAND,)
LLC
)

PROPOSED FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the claim of appeal of the respondent/employer and upon consideration thereof, the employer's appeal is granted. In accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the petitioner has failed to establish by a fair preponderance of the credible evidence that the death of the employee, Joseph Phillips, on December 15, 2016, arose out of and in the course of his employment with the respondent employer.

It is, therefore, ORDERED:

1. That the petition of the surviving spouse for compensation benefits and funeral expenses is denied and dismissed.

Entered as the final decree of this Court this day of

PER ORDER:

Nicholas DiFilippo, Administrator

ENTER:

Olsson, J.

Conte, J.

Fay, J.

I hereby certify that copies of the Decision and Proposed Final Decree of the Appellate Division were mailed to Michael F. Edwards, Esq., and John M. Harnett, Esq., on April 20, 2020.