PATRICIA A. BROWN
v.
KNC MANAGEMENT ENTERPRISES, INC.
W.C.C. No. 2013-00798
Rhode Island Worker Compensation
State of Rhode Island and Providence Plantations Providence
November 25, 2019

FINAL DECREE OF THE APPELLATE DIVISION

This matter came on to be heard before the Appellate Division upon the claim of appeal of the petitioner/employee and upon consideration thereof, the employee's appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

That the findings and orders contained in a decree of this Court entered on July 15, 2014 be, arid they hereby are, affirmed.

PER ORDER:

Nicholas DiFilippo, Administrator

DECISION OF THE APPELLATE DIVISION

OLSSON, J.

This matter is before the Appellate Division on the employee's claim of appeal from a decision and decree of the trial judge denying the employee's original petition for compensation benefits. The employee alleged that she sustained work-related injuries to her neck, back, left arm, left shoulder, and left hip on January 6,2013 when she slipped and fell in a parking lot while leaving work after the end of her shift. The issue before the trial judge was whether recovery for the employee was precluded by the exclusionary going-and-coming rule, or whether the specific circumstances of this matter met one of the rule's narrow exceptions so that the employee's injury would be compensable. After a comprehensive review of the record in this matter, the respective arguments of the parties, and the pertinent statutory and case law, we deny the employee's appeal.

Patricia Brown (the employee) testified that she had been employed as a server at International House of Pancakes (IHOP/ the employer), located at Pleasant Valley Parkway, Providence, since 2009.[1] A Burger King restaurant was located to the side of the IHOP building on the same parcel of land. The employee worked the third shift twice a week, arriving to work at midnight and leaving work between 4:00 and 6:00 in the morning. On January 6, 2013, after clocking out of her shift at 5:29 a.m., she left through the front door of the IHOP restaurant and walked with a co-employee to her car in the parking lot, which was adjacent to the IHOP building. She walked the length of the building and then less than twenty (20) feet to the right before she reached the location of her vehicle. As the employee passed the front of her car, she slipped and fell on snow and ice landing on her left forearm and then her left side. Following her fall, she went back into the IHOP building to fill out an incident report. After filling out the report, she returned home to ice her left shoulder. She went to Kent Hospital later that morning and was treated for her injuries.[2]

The employee described the IHOP restaurant as having a front door, two side doors, and a back door. She testified that a couple months prior to the incident, the employees were told by management that they could only use the front door to enter and exit the building. The employee stated that IHOP employees were permitted to park anywhere in the lot which surrounded the IHOP and the Burger King as there were no designated spaces or areas specifically for employees.

Rochelle Gallagher, the night manager at IHOP, explained that the employees could exit the building by using the front door or a side door, but that the management preferred that they use the front door. The employees could not use the door on the other side of the building or the back door because they were designated as emergency

exits only and are alarmed. Ms. Gallagher testified that IHOP's employees were allowed to park anywhere in the parking lot that surrounded the IHOP building. She also stated that the parking lot is shared with the Burger King restaurant next door. It was her understanding that the parking lot was owned by a third company, Jan Co.

Greg Galino, the real estate manager at Jan Companies ("Jan Co."). testified under a subpoena issued by the employee. He explained that Jan Co. Central owned the buildings that contained both the IHOP and the Burger King restaurants. The Jan Co. Central entity also owned the entire parking lot that surrounded the restaurants. The business entity which operated the IHOP restaurant leased the building from Jan Co. Central. *See* Ee's Ex. 3. Pursuant to the terms of the lease agreement, all areas of the parcel, but for the buildings, were designated as common areas. *See* Ee's Ex. 3, Lease Agreement, Article 1, Section 1.04 at *2. Mr, Galino stated that Jan Co. Central had a contract with the Baxter Trucking Company for snow removal in the parking lot. Baxter Trucking Company would automatically remove the snow from the parking lot once the snow reached a certain amount. Jan Co. Central would pay Baxter Trucking Company directly for the snow removal and then Jan Co. Central would bill IHOP for their pro-rata share (45.2%) of the snow removal expenses as specified in the lease agreement. *See* Ee's Ex. 3, Lease Agreement, Article 2. The snow removal expenses, as well as other maintenance expenses and taxes, were charged to IHOP in addition to the annual lease amount owed to Jan Co. Central.

After reviewing the evidence, the trial judge concluded that the employee's injury was not compensable due to the going-and-coming rule which precludes recovery when an employee's injury occurs while traveling to or from the workplace. In arriving at this determination, the trial judge considered the fact that the employee had punched out after finishing her work shift, the fact that the employer did not own or maintain the parking lot, and the fact that the employer did not control the employee's route to her vehicle. He determined that the employee's claim did not meet any of the recognized exceptions to the rule that bars recovery. In making this analysis, the trial judge found the facts in this matter to be significantly different from the circumstances presented in cases where exceptions were made to the going-and-coming rule such as *Rico v. AH Phase Elec. Supply Co.,* 675 A.2d 406 (R.I. 2006) and *Branco v. Leviton Mfg. Inc.,* 518 A.2d 621 (R.1.1986). Therefore, the trial judge denied the employee's original petition and the employee promptly filed a claim of appeal.

The Appellate Division's review of the trial judge's decision is limited by Rhode Island General Laws § 28-3 5-2 8Gj), which provides that the findings of fact made by a trial judge shall be final unless the appellate panel determines that they are clearly erroneous. *Id.; see Diocese of Providence v. Vaz,* 679 A.2d 879, 881 (R.1.1996). As for matters of law, the appellate panel may conduct a de novo review and "shall 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). "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,* 121 R.I. 440, 399 A.2d 1229 (1979). After thoroughly reviewing the record with this standard as our guide, we find that the employee's appeal lacks merit and we, therefore, affirm the trial judge's decision and decree.

The employee h&s filed two (2) reasons of appeal in this matter. First, she contends that the trial judge erred in the application of existing case law to the particular facts of this petition. We find no merit in this contention as the trial judge was very thorough in his analysis of the circumstances of this case and the relevant case law.

The analysis begins with reference to the going-and-coming rule in workers' compensation which generally precludes recovery for an employee "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.1.1995). The rule also operates to bar recovery when the injury occurs "on the employer's premises prior to the commencement of or after completion of the employee's shift." *Id,* (citing *Lima* v. *William H. Haskell Manufacturing Co.,* 100 R.I. 312, 215 A.2d 229 (1965)), Because the rule acts as a complete bar to recovery, the Rhode Island Supreme Court has permitted certain exceptions to the application of the rule based on the particular circumstances of each case. To avoid application of the rule, an employee must establish that "a nexus or causal connection exists between the injury sustained and the employment." *Toolin,* 668 A.2d at 640-41 (citations omitted); *see, e.g., Rico,* 675 A.2d at 409; *Branco*, 518 A.2d at 624.

The seminal case *of Di Libero v. Middlesex Construction Co.,* established a three-prong test to determine whether the requisite nexus exists between the employee's injury and the employment. 63 R.I 509, 516, 9 A.2d 848, 851 (1939). First, the employee's injury must occur "[w]ithin the period of employment." *Id.* Second, the injury must have occurred "at a place where the employee may reasonably be." *Id.* Third, the employee must be "reasonably fulfilling the duties of the employment or doing something incidental thereto." *Id.* Generally, if these three conditions are met, the employee's injury will be deemed compensable. *Lima v. William H. Haskell Mfg. Co.*, 100 R.I. 312, 315, 215 A.2d 229, 230 (1965) (stating that "[o]nce we find that *Di Libero* standards are met, we depart from the 'going-and-coming rule' and conclude that, the injury arose out of and in the course of employment, that it was incidental to the employer-employee relationship, and that the injured worker is entitled to compensation benefits.").

In deciding whether an adequate nexus exists between the employee's injury and her employment, we must review the particular facts of this matter in accordance with the criteria set forth in *Di Libero,* We agree with the trial judge that the first two (2) criteria set by the Supreme Court have been met. The employee's injury occurred shortly after punching out and leaving the restaurant in the early morning of January 6, 2013. The Rhode Island Supreme Court has recognized that the period of employment "includes a reasonable interval before work starts and after work is completed." *Bottomley v. Kaiser Aluminum & Chem. Corp.,* 441 A.2d 553, 555 (R.I. 1982). Thus, the employee's injury is considered to have occurred within the period of her employment.

Likewise it seems clear that the employee's injury occurred at a place where the employer could reasonably expect the employee to be. The parking lot surrounded the IHOP building and was intended for use by IHOP's employees and customers. Ms. Gallagher testified that there were no designated parking spaces or a specific area of the lot for employees to park; they were permitted to park anywhere in the parking lot. It was reasonably foreseeable to the employer that its; employees would park in the parking lot surrounding the employer's business. Therefore, the first two (2) elements *of Di Libero* are satisfied.

The key to this case is the third question posed by *Di Libero:* was the employee reasonably fulfilling the duties of her employment or doing something incidental to the conditions of her employment at the time of her injury? We agree with the trial judge that this analysis begins with an examination of the opinions m Bronco, and *Rico* to determine if this matter falls within an exception to the exclusionary going-and-coming rule.

In *Branco,* the Rhode Island Supreme Court granted compensation benefits to an employee injured when walking from a parking lot owned by the employer to the place of work. The employee had been directed to park in the company-owned lot and was required to cross a busy street to enter the employer's building. In addressing the *Di Libera* criteria, the Court found that the injury occurred within the period of employment as it was ten (10) minutes before the start of the employee's shift. The employee was also in a place where the employer could reasonably expect him to be as the employer had assigned him to park in the lot directly across the

street. Finally, the Court concluded that "because the employer placed Branco in the position of having to negotiate Jefferson Boulevard each work day in order to reach his post, the risk entailed in crossing the highway must be considered a condition incident to his employment" *Bronco,* 518 A.2d at 623. Thus, the Court allowed recovery "under these narrow and particular set of facts" and created an exception to the going-and-coming rule in those particular situations when "(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." *Branco,* 518 A.2d at 624; *see also Rico,* 675 A.2d at 409.

The employee in *Rico* was injured prior to starting her work shift as she walked towards the designated employees' entrance from her car which was parked in the adjoining lot owned by the employer and in a spot to which she was directed by the employer. Although the parking lot adjoined the company's building rather than being in a separate location, the Court found these particular facts to warrant an exception to the going-and-coming rule. Those facts included that the employer owned and maintained the parking lot, that the employer controlled the employee's route by directing her to park in a specific parking space in the lot and enter the building through a specific entrance, and that the employee was injured while walking directly from her vehicle to the designated entrance. Consequently, the employee was awarded compensation benefits.

In the present matter, the trial judge correctly determined that the factors necessary to fit the established exception to the going-and-coming rule discussed in *Branco* and *Rico* are not present. IHOP did not own the situs of the employee's injury -the parking lot surrounding the building. Furthermore, although the employer paid a pro rata share for snow removal and other expenses for the common areas, including the parking lot, the employer had no authority over the maintenance of those areas. Jan Co. contracted with and paid Baxter Trucking Company directly. IHOP was not involved in the snow plowing contract and no evidence has been proffered that IHOP had any other contribution or authority regarding the maintenance of the parking lot. Therefore, the first condition of the test set forth in *Branco* is not met.

Furthermore, the facts of this case do not satisfy the second *Branco* factor which requires that the employer control the employee's route of travel by directing the employee to park m a particular place. *See Branco,* 518 A.2d at 624; *Rico,* 675 A.2d at 409. Regardless of whether the employee was required to use the front door of the restaurant or the management just preferred that the employees exit by way of the front door, it is uncontradicted that the employee was not required to park in the precise parking space where the injury occurred and there was no designated area or parking space for the employee in the parking lot. This is starkly different from *Branco* where the employee was "specifically directed to park in the lot across the street" and was injured on the walk between the parking lot and the plant on the only route available to him. *Branco,* 518 A.2d at 622. Contrarily here, unlike *Branco,* there was no specific instruction by the employer Jo the employee about where to park. Consequently, the second condition of the test for the exception articulated in *Branco* is also not met.

The facts, of this matter are similar to the circumstances in *DeSousa v. Shows Supermarket,* where we held that the employee's injury was not compensable. W.C.C. No. 1993-10759 (App. Div. 1995). In *DeSousa,* the employee, a grocery clerk, worked for the employer, Shaws Supermarket, which was located in a strip mall along with eight (8) or ten (10) other businesses. The employer did not own or exercise any control over the parking lot and did not direct the employee where to park in the lot. After completing his shift and punching out, he walked to where his car was parked in the parking lot about one hundred (100) feet from the

entrance of the store. After starting the car, he realized that one of the headlights did not turn on. He exited his car to fix this problem and slipped and fell in the lot on black ice.

The Appellate Division concluded that his injury did not arise out of or in the course of his employment and denied compensation because the employee was not required to park in the parking lot or in any particular spot in the parking lot, the lot was not owned or controlled by the employer, and the employee had punched out after his days' work was completed. The mere fact that the employee's car was parked in a lot near the place of work did not establish a nexus to his employment. The fact pattern presented in *DeSousa* is indistinguishable from the circumstances of the matter before us and dictate the same outcome.

In her second reason of appeal, the employee asserts that the trial judge erred in his determination that the parking area outside of IHOP's entrance was a common area that was not controlled, owned or maintained by the employer and cannot be considered part of the employer's "premises." The employee argues that because the employer paid a pro rata share to maintain the parking lot, it is part of the employer's premises, thereby establishing its control of the situs of the injury. To support this argument, the employee cites a Minnesota case, *Merrill v. J. C. Penney,* which she represents is the majority rule and should be controlling. *Merrill v. J. C. Penney,* 256 N.W.2d 518 (Minn. 1977). We find that the statutory underpinnings *of Merrill,* as well as the fact pattern, to be distinguishable from the present matter.

In *Merrill,* the employee worked for the employer which was located in a shopping center with surrounding parking areas. The employer leased its store and paid a pro rata share for maintenance of the parking areas. Shortly before Christmas, the owner of the shopping center sent a directive to the employer that its employees should park in an overflow lot which was distant from the store to allow customers access to more parking closer to the stores. The employer approved of the directive and posted it on the employees' bulletin board. The employee was injured in the overflow parking lot on her way into work. *Id.* at 519.

Minnesota's workers' compensation statute states that an occupational injury arises out of and in the course of the employment while the employee is "engaged in, on, or about the premises where his services require his presence as part of that service at the time of injury and during the hours of that service." Minn. St. 176.011, subd. 16. In *Merrill,* the Supreme Court of Minnesota, citing the "premises rule,"[3] held that the overflow parking lot was part of the employer's premises for purposes of satisfying the statutory requirement and therefore the employee's injury was compensable, despite the injury occurring prior to the employee's shift and in a parking lot that was not owned by the employer. *Id.* at 520-21. The focus of the decision was whether the overflow lot could be considered part of the employer's "premises" which would satisfy the statutory requirement that to be compensable, the injury must have occurred on or about the employer's premises.

Even though there are similarities between *Merrill* and the matter before us, we do not find *Merrill* to be controlling. Rhode Island does not have a statutory "premises requirement," but instead applies the nexus approach. In the absence of a similar statute, Rhode Island courts analyze whether there is a sufficient nexus between the employee's injury and the employment. *Toolin,* 668 A.2d at 640 (noting that "[b]ecause of the harshness of the [going-and-coming rule], this court has been willing to delineate exceptions to its application that depend on the particular circumstances of each case. Thus, we have held that an employee is entitled to compensation benefits if it can be demonstrated that a *nexus* or *causal connection* exists between the injury sustained and the employment[]" and not merely whether the employee was on the employer's premises at the time of the injury (emphasis added)). 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.

Not only are the underlying laws regarding a successful workers' compensation claim different in Minnesota and Rhode Island, but there are also factual differences between *Merrill* and the case at hand. In *Merrill, the* employer was in charge of enforcing the owner's directive requiring employees to park in the overflow parking lot and placed this instruction on the employees' bulletin board. The stated goal of the directive was to allow more customers access to parking closer to the stores which would obviously benefit the employer's business interests. There is no indication in the present matter that IHOP directed its employees to park in a particular area of the parking lot at issue. This fact further undermines the control the employer allegedly had over the employee at the time of the injury.

The employee also asserts that the decision in *Williams v. One Beacon Insurance,* a Kansas case, supports her proposition that the fact that an employer leases the parking lot where the injury occurred satisfies the element of employer control of the employee's activities.[4] No. 95,775, 2006 WL 2938355, at *1-4 (Kan. Ct.App. Oct. 13, 2006). In *William,* the employee fell in a parking lot while walking to her place of employment. *Id* at * 1. While compensation for this injury would generally be precluded under the going-and-coming rule, the Kansas court applied the "premises exception" to the "going and coming rule," which provides that "an accident is compensable if it occurs on the employer's premises." *Id.* at *2. The employer's premises were defined to be "a place controlled by the employer or a place where an employee may reasonably be during the time he or she is doing what a person so employed may reasonably do during or while the employment is in progress." *Id* (Internal quotation marks and citations omitted.)

The court concluded the employee's injury compensable under the "premises exception" to the going-and-coming rule due to the facts that the employer exercised control over the parking lot because it paid a pro rata share of the maintenance costs for the entire parking lot; there was a unity; of ownership of the work premises and the parking lot; the employer directed the employee to park in the specific area of the parking lot where she was injured; and the employee was obligated to enter the place of employment through a designated door. For these reasons, the court found the employee was subjected to a greater risk than the general public due to the specific designation by the employer to the employees to utilize both the parking area and the entry door. *Id* at *2-4.

The employee asserts that, as in *Williams,* IHOP's payment of a pro rata share of the snow removal fees is sufficient to find employer control over the parking lot and deem that area to be part of the employer's premises. However, two (2) significant factors of the premises exception to the going-and-coming rule present in *Williams,* are not established in the matter before the court. First, unlike *Williams,* IHOP did not direct the employee to park in a particular section of the packing lot. Second, in *Williams,* the employee was subjected to a greater risk than the public because the parking area and the entry door were limited to use by the employees. *Id.* at *3, In the present matter, the employee was subjected to the same risk as the customers of IHOP and the general public as its employees utilized the same parking lot and entry/exit door. The factual circumstances that warranted an application of the premises exception by the Kansas Court in *Williams,* are not present in the matter before the court.

The employee's assertion that an employer's act of paying a share of the maintenance of a parking lot constitutes employer control over the site of the injury and automatically allows for a recovery is unwarranted. Neither *Merrill* nor *Williams* make this blanket assertion and both cases consider a variety of other factors not present in this matter to determine if there was sufficient employer control of the site of the injury for the employee to be awarded compensation.

A review of the facts in the present matter leads us to conclude that, as in *DeSousa,* the employee's injury that occurred after her work shift while she was walking to her car in a parking lot which was merely leased by the employer who had not directed her to park in any particular area of the lot, did not arise out of and in the course of her employment. Although this court extends exceptions to the stringent going-and-coming rule, these exceptions are not warranted when (he place of injury or the employee's activity is not controlled by the employer. The mere fact that an employee was injured after leaving a work shift does not render a worker's compensation claim compensable. "[W]hile admittedly the employment is the cause of the worker's journey between home and factory, it is generally taken for granted that workers' compensation was not intended to protect against all the perils of that journey." 2 Larson, *Larson's Workers' Compensation Law,* § 13.01[1] at 13-3 (Rev. Ed.).

In conclusion, for the aforementioned reasons, we find that the going-and-coming rule precludes a recovery by the employee and conclude that the employee's injury did not arise out of and in the course of her employment. Consequently, the employee's appeal is denied and dismissed, and the decision and decree of the trial judge are affirmed. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a proposed version of which is enclosed, shall be entered on November 25, 2019.

Salem, J. and Hardman, J., concur.

Notes:

[1] The listed respondent in this matter is KNC Management Enterprises Inc., the corporation that owns the business entity at issue, IHOP. We will refer to KNC Management Enterprises. Inc. as IHOP for purposes of this decision.

[2] The medical records or her physical injuries are not in dispute in this appeal.

[3] Generally, the premises rule allows for recovery when the employee is injured on the employer's premises, even if the employee is going to or from work at the time of the injury. 2 Larson, *Larson's Workers' Compensation Law,* § 13.01[1] at 13-3(Rev. Ed.).

[4] It is imperative to note that *Williams* is a Kansas unpublished opinion; pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are "not binding precedent" and are "not favored for citation."
