IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Straub, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Port Authority of Allegheny County), Respondent	:	No. 65 C.D. 2010
	:	Submitted: April 23, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: May 27, 2010

David Straub (Claimant) seeks review of the December 13, 2009 order of the Workers' Compensation Appeal Board (Board) affirming the decision of a Workers' Compensation Judge (WCJ) denying his claim petition. Claimant presents one issue for this Court's review: whether Claimant was in the course and scope of his employment when he was injured. For reasons that follow, we affirm the Board's order.

Claimant was employed by the Port Authority of Allegheny County (Employer) as a light rail operator for approximately 19 years. On August 31, 2007, Claimant was on his way home for a scheduled lunch break when the motorcycle he was riding was hit by a car. Claimant's leg was amputated as a result of the accident. On January 15, 2008, Claimant filed a claim petition seeking total disability benefits. Employer issued a Notice of Denial indicating that Claimant did not suffer a work-

related injury. On April 30, 2009, the WCJ denied and dismissed Claimant's petition concluding that Claimant failed to meet his burden of proof that he was in the course and scope of his employment at the time of the accident. Claimant appealed to the Board, and the Board affirmed the decision and order of the WCJ. Claimant appealed to this Court.[1]

Claimant argues that the Board erred in concluding that he was not in the course and scope of his employment when he was injured on his way to a short lunch break. Specifically, Claimant contends that the WCJ's finding of fact that he was subject to recall during the lunch break, and the undisputed testimony that he intended to return, requires the opposite conclusion. We disagree.

> An injury may be sustained 'in the course of employment' under Section 301(c)(1) of the Act in two distinct situations: (1) where the employee is injured on or off the employer's premises, while actually engaged in furtherance of the employer's business or affairs; or (2) where the employee, although not actually engaged in the furtherance of the employer's business or affairs, (a) is on the premises occupied or under the control of the employer, or upon which the employer's business or affairs are being carried on, (b) is required by the nature of his employment to be present on the employer's premises, and (c) sustains injuries caused by the condition of the premises or by operation of the employer's business or affairs thereon.

U.S. Airways v. Workers' Comp. Appeal Bd. (Dixon), 764 A.2d 635, 640 (Pa. Cmwlth. 2000). "The general rule is that an employee is considered off duty while on lunch break and injuries that occur off employer's premises during the lunch break

[1] "This Court's review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence." *Bureau of Workers' Comp. v. Workers' Comp. Appeal Bd. (Consol. Freightways, Inc.)*, 876 A.2d 1069, 1071 n.1 (Pa. Cmwlth. 2005).

are not sustained within the course of employment." *Sekulski v. Workers' Comp. Appeal Bd. (Indy Assocs.)*, 828 A.2d 14, 17 n.3 (Pa. Cmwlth. 2003). Moreover,

> an 'on call', non-traveling employee such as claimant, limited to carrying a pager and remaining in the area in order to respond timely to work communications, is not considered to have sustained an injury in the course of employment unless he is actively engaged in work-related activities at the time of injury.

Id. at 19. Here, it is undisputed that Claimant was on his way to lunch at the time of his injury. It is also undisputed that he was not on the premises occupied or under the control of Employer, or upon which Employer's business or affairs were being carried on or required by the nature of his employment to be present on Employer's premises, nor were his injuries caused by the condition of the premises or by operation of Employer's business or affairs thereon. Thus, Claimant was not in the course and scope of his employment at the time of his injury.

Further, the fact that Claimant was subject to recall or intended to return does not change that conclusion. Although Claimant relies on *Keiter v. Workers' Compensation Appeal Board (Avondale Borough)*, 654 A.2d 629 (Pa. Cmwlth. 1995), for the proposition that an employee is considered to be in the scope of his employment when he is subject to recall and is injured off the premises while on a short, approved break, *Keiter* was very fact specific. The claimant in *Keiter* was on a special assignment on the night he was injured as the fire department was running a taxi service for people out on New Year's Eve. The firemen were to be available if anyone needed their services; hence, they had to keep a pager with them and remain within a six minute response area of the firehouse. The claimant in that case was literally eating on the run knowing it was quite possible he could be called at any minute to run out and pick someone up, as opposed to the circumstances here, where Claimant was going home to enjoy his lunch break. Although he brought his radio

with him and had in the past been called for extraordinary reasons, it was not the normal practice. The normal practice was to leave at the scheduled time and return when the break was over. Thus, Claimant was not acting in the furtherance of Employer's business at the time of his injury.

Claimant also argues that he is a traveling employee and since he did not abandon his employment, he should be considered in the course and scope of his employment at the time of is injury. We disagree.

> When considering whether an individual is a traveling employee, each case is determined on a case-by-case basis. This Court has explained that the determination of whether an employee is a traveling employee is based on the following factors: whether the claimant's job duties include travel, whether the claimant works on the employer's premises, or whether the claimant has no fixed place of work.

Jamison v. Workers' Comp. Appeal Bd. (Gallagher Home Health Servs.), 955 A.2d 494, 498-99 (Pa. Cmwlth. 2008) (citation omitted). Here, although Claimant's job duties required him to criss-cross Allegheny County many times a day, Employer owned all the land traveled upon. In addition, Claimant had the option of eating on Employer's premises. He chose to go home because of the close proximity between work and home. Thus, Claimant is not a traveling employee. Assuming arguendo, he was a traveling employee, Claimant clearly abandoned his employment when he left the premises to go home for lunch as he was not furthering Employer's interests when he did so. Accordingly, the Board did not err in concluding that Claimant was not in the course and scope of his employment at the time of his injury.

For all of the above reasons, the Board's order is affirmed.

JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 27th day of May, 2010, the December 13, 2009 order of the Workers' Compensation Appeal Board is affirmed.

JOHNNY J. BUTLER, Judge