IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Kruge, Petitioner	:	
	:	No. 1153 C.D. 2013
v.	:	
	:	Submitted: October 18, 2013
Workers' Compensation Appeal Board (Lehigh Valley Technologies), Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

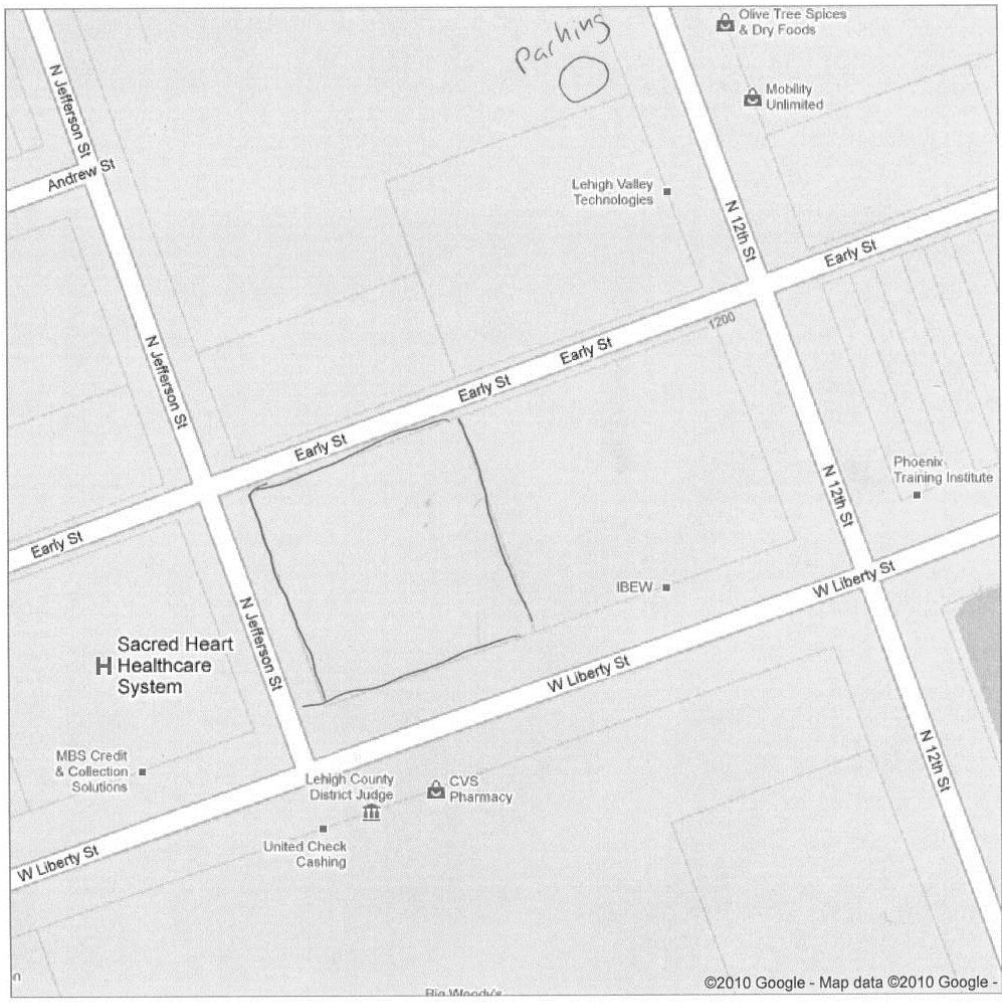
MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: January 24, 2014

James Kruge (Claimant) petitions for review of the June 10, 2013 order of the Workers' Compensation Appeal Board (Board), affirming the decision of a Workers' Compensation Judge (WCJ) denying Claimant's claim petition. We affirm.

Claimant worked for Lehigh Valley Technologies (Employer) as a maintenance man, performing building and packing machine maintenance. Employer employs approximately 30 full-time and 15 part-time employees at its manufacturing plant located at 514 North Twelfth Street, Allentown, Pennsylvania. An alley, Early Street, runs alongside Employer's plant. Employer maintains a company parking lot in front of the plant that can accommodate 15 cars. Claimant normally drove to work

and he customarily parked in a lot situated diagonally from the rear of Employer's plant on the other side of Early Street (Liberty Plaza Lot).[1] The Liberty Plaza Lot sits at the corner of North Jefferson and West Liberty Streets in Allentown. Claimant did not pay a fee to park in the lot. This lot is owned by an entity that also owns Liberty

[1] The image below is from Google Maps and was admitted as Exhibit C-7 at the WCJ's hearing. The circle identified as "parking" represents Employer's parking lot in the front of the plant. The area marked by a square represents the parking lot where Claimant parked. Liberty Plaza is identified on this map as Sacred Heart Healthcare System.



Plaza, an office building in which Employer rents space. Employer has a lease agreement for ten spots in this lot, but none of the spots are marked. Employer does not provide maintenance or upkeep for this lot. (WCJ's Findings of Fact Nos. 6, 8.)

At the entrance to Liberty Plaza Lot on North Jefferson Street is a sign which states, "Liberty Plaza Parking Only, No Trespassing, Violators Will Be Prosecuted."[2] The parking lot is surrounded by guardrails and is separated from Liberty Plaza by North Jefferson Street. On January 7, 2009, Claimant parked at the east side of the lot, approximately 60-75 feet from the door to the plant. Claimant walked from his car through a separation between two guardrails.[3] Claimant

[2] The picture below was taken near the front entrance to the Liberty Plaza Lot and was admitted as Exhibit C-6 at the WCJ's hearing. Again, the building marked with an "X" represents Employer's plant.

[3] The picture below shows the separation between the guardrails through which Claimant walked before falling and was admitted as Exhibit C-2 at the WCJ's hearing.

(Footnote continued on next page…)

proceeded onto a concrete driveway apron to cross Early Street. As Claimant was going down the concrete driveway apron, he encountered ice and his feet came out from under him.[4] Claimant required medical treatment and was taken from the scene by ambulance. Claimant did not return to work that day. Claimant thereafter received long-term disability benefits. On November 12, 2009, Claimant was laid off due to a lack of work. (WCJ's Findings of Fact Nos. 4, 6.)

(continued…)

[4] The picture below shows the separated guardrails and the concrete driveway apron of the adjoining lot where Claimant fell.

On August 5, 2010, Claimant filed a claim petition alleging that on January 7, 2009, he suffered a broken ankle as a result of his fall in the course and scope of his employment. Claimant sought ongoing total disability benefits. Employer filed an answer denying the allegations of Claimant's petition and asserting that Claimant's injury did not occur in the course of his employment. The petition was assigned to a WCJ who held multiple hearings. At Claimant's request, the matter was bifurcated and the WCJ first heard evidence relating to the course of employment issue. Claimant testified as to the facts described above relating to his fall.

Larry Dalesandro, Employer's Chief Financial Officer, testified that he has an office in Liberty Plaza, along with Employer's Chief Executive Officer, Director of Regulatory Affairs, and Director of Logistics, and that he parks in the same lot where Claimant parked. Additionally, Dalesandro indicated that twelve other companies also rent space in this building. Dalesandro stated that employees are not given instruction where to park or who is allowed to park in the ten spots leased by Employer. Dalesandro testified that, during the work day, employees from the office sometimes go to the manufacturing plant and employees from the manufacturing plant sometimes go to the office. Dalesandro stated that when he goes to the manufacturing plant, he either cuts through the parking lot or walks on North Jefferson Street and Early Street. (WCJ's Finding of Fact No. 8.)

By decision circulated March 31, 2011, the WCJ denied and dismissed Claimant's claim petition, concluding that Claimant failed to meet his burden of proving that his injury occurred on premises occupied by or under the control of Employer, or in an area that was an integral part of Employer's premises. In reaching this conclusion, the WCJ credited the testimony of both Claimant and Dalesandro. The WCJ found that Claimant was not injured on Employer's premises, he was not

injured in the parking lot where Employer leased space, nor was he injured on Early Street. (WCJ's Finding of Fact No. 10.) Rather, the WCJ found that Claimant's fall occurred after he had exited the parking lot and stepped onto a concrete apron of an adjacent lot. *Id.* The WCJ noted that the record lacked any evidence or testimony regarding the ownership and control of the lot where Claimant fell. *Id.* Additionally, the WCJ found that while Employer did not prohibit Claimant from parking in the Liberty Plaza Lot, Employer likewise did not require Claimant to park in that lot. (WCJ's Finding of Fact No. 11.) Further, the WCJ found our decision in *Waronsky v. Workers' Compensation Appeal Board (Mellon Bank)*, 958 A.2d 1118 (Pa. Cmwlth. 2008), *appeal denied*, 600 Pa. 776, 968 A.2d 1281 (2009), to be controlling. *Id.* Claimant appealed to the Board, which affirmed.

On appeal to this Court,[5] Claimant argues that the WCJ erred in concluding that his injury did not occur on Employer's premises. Claimant also argues that the WCJ erred by construing a borderline interpretation of the law in favor of Employer rather than Claimant. We disagree.

Section 301(c)(1) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §411(1), provides as follows:

> The terms 'injury' and 'personal injury,' as used in this act, shall be construed to mean an injury to an employe, regardless of his previous physical condition, except as provided under subsection (f), arising in the course of his employment and related thereto, and such disease or infection as naturally results from the injury or is aggravated, reactivated or accelerated by the injury; and wherever death is mentioned as a cause for compensation

[5] Our scope of review is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, or whether findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704.

> under this act, it shall mean only death resulting from such injury and its resultant effects, and occurring within three hundred weeks after the injury. The term 'injury arising in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment; nor shall it include injuries sustained while the employe is operating a motor vehicle provided by the employer if the employe is not otherwise in the course of employment at the time of injury; but shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include **all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment**.

(Emphasis added). Whether an employee is injured in the course of employment is a question of law to be determined on the basis of the WCJ's findings of fact. *Markle v. Workers' Compensation Appeal Board (Bucknell University)*, 785 A.2d 151, 153 (Pa. Cmwlth. 2001).

Generally, injuries that occur while commuting to or from a place of work are not considered to occur in the course of employment. *Peterson v. Workmen's Compensation Appeal Board (PRN Nursing Agency)*, 528 Pa. 279, 286, 597 A.2d 1116, 1119 (1991). However, a claimant is entitled to benefits if he is injured "on the employer's 'premises' at a reasonable time before or after the work period." *Newhouse v. Workmen's Compensation Appeal Board (Harris Cleaning*

Service, Inc.), 530 A.2d 545, 547 (Pa. Cmwlth. 1987). In this situation, the claimant must prove all of the following:

> [the employee] (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 his 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.

Workmen's Compensation Appeal Board (Slaugenhaupt) v. United States Steel Corp., 376 A.2d 271, 273 (Pa. Cmwlth. 1977).

Pennsylvania courts have held that an employer's "premises" is not necessarily limited to buildings or property controlled, occupied, or owned by the employer. *Waronsky*. Rather, the term "premises" can encompass property that "could be considered an integral part of the employer's business." *Ortt v. Workers' Compensation Appeal Board (PPL Services Corp.)*, 874 A.2d 1264, 1267 (Pa. Cmwlth. 2005). Property becomes integral to an employer's business when the employer requires employees to use that property. *Id*. at 1267-68.

In *Ortt*, the employer leased parking spaces in a commercial parking lot owned and operated by a third party and gave employees the option of renting a space at a reduced rate. The employer did not require its employees to rent a space in this lot and, in fact, owned four other lots for employee parking. The claimant chose to rent a space in this lot and sustained injuries when she slipped and fell on accumulated ice and snow in the lot after working an overtime shift. We concluded that the parking lot was not an integral part of the employer's business because: the claimant was not required to park in that particular lot, i.e., use of the lot was purely optional; the lot was owned and operated by a private company; the claimant paid for her own parking space; the lot was not used exclusively by the employer's

employees; the lot was approximately one block from the employer's place of business; and the lot was not connected to the employer's business. Thus, we held that the claimant's injury did not occur on the employer's premises.

As we observed in *Waronsky*, "the critical factor is not the employer's title to or control over the area, but rather the fact that ... [the employer] had caused the area to be used by ... employees in performance of their assigned tasks." *Waronsky*, 958 A.2d at 1125 (quoting *Epler v. North American Rockwell Corporation*, 482 Pa. 391, 399, 393 A.2d 1163, 1167 (1978)). In *Epler*, the claimant was hit by a car while crossing the street between the employer's parking lot and his workplace. The employer required its employees to park in assigned lots, and it prohibited them from parking on the street. Our Supreme Court explained that it was "sufficient [that] the employee [was] required to be in the area because of the employment," *Epler*, 482 Pa. at 399, 393 A.2d at 1167, to conclude that the lot and street were integral to the employer's business. The Court held that the claimant's injury occurred on the employer's premises.

In *Waronsky*, a claimant was hit by a car while crossing the street between the employer's office and the employer's parking garage. The employer did not require employees to park in the garage, but it did provide tax incentives for parking there. We distinguished *Epler* on the grounds that unlike in *Epler*, the employer in *Waronsky* neither issued parking directives nor exercised control over the claimant's preferred mode of transportation, and we emphasized in *Waronsky* that the claimant "was free to park her vehicle where she chose." *Waronsky*, 958 A.2d at 1125. Thus, we determined that the street between the garage and the claimant's office was not integral to the employer's business, and, relying on *Ortt*, we held that the claimant was not on the employer's premises at the time of her injury.

In this case, Claimant argues that the WCJ erred in relying on *Ortt* and *Waronsky* and that the present case is more analogous to our decisions in *ICT Group v. Workers' Compensation Appeal Board (Churchray-Woytunick)*, 995 A.2d 927 (Pa. Cmwlth. 2010), and *Thompson v. Workers' Compensation Appeal Board (Cinema Center)*, 981 A.2d 968 (Pa. Cmwlth. 2009). Claimant also argues that the WCJ erred in failing to construe a borderline interpretation of the Act in his favor. We disagree.

In *ICT Group*, the claimant worked in one of the many buildings the employer leased in an office park. The claimant parked her car in a lot situated between her workplace and another building leased by the employer. The claimant slipped and fell on ice during her lunch break while getting into her car. This Court held that the parking lot was an integral part of the employer's business because it was a reasonable means of access to the workplace. We cited the following factors as support for this holding: the claimant's fall occurred only approximately ten feet from the entrance to her workplace; the spaces in that area of the lot were reserved exclusively for the employer's use; and employees would routinely cross the parking lot to go between the employer's buildings during work hours.

The present case is easily distinguishable. The record in this case reveals that Claimant parked approximately 60 to 75 feet from the rear entrance to Employer's plant; the lot where Claimant parked was not reserved exclusively for Employer's use, but instead was used by all of the tenants in the Liberty Plaza office building; the spaces leased by Employer were not marked; Claimant did not fall in the lot where he parked, but instead fell on the concrete driveway apron of an adjoining lot after he exited the Liberty Plaza Lot; and there was no testimony that employees routinely cross the lot to travel between Employer's plant and the Liberty Plaza office building. Thus, we conclude that *ICT Group* is not controlling in the present case.

In *Thompson*, the employee worked in a movie theater located in a strip mall and parked in the mall's parking lot. The employer did not have any reserved spots in the lot, and the claimant was free to park anywhere in the lot, much like any other member of the public. The claimant fell while walking to her car after work and injured her shoulder. A WCJ granted the claimant's claim petition, but the employer did not appeal. Instead, the claimant appealed, challenging the WCJ's and the Board's denial of *quantum meriut* attorney fees for an unreasonable contest. In the context of examining the attorney fees issue, this Court addressed the claimant's argument that there could be no debate as to whether a parking lot leased by the employer was part of its "premises" such that the employer's contest was not reasonable. The employer noted that its use of the lot was not exclusive and that it had no control over where its employees parked.

After reviewing our prior decisions in *Ortt* and *Waronsky*, we stated that "the mere fact that the employer leases or even owns a parking lot or garage where the employee was injured is not dispositive of the question of whether a parking area is part of the employer's 'premises.' Such a determination requires an examination of many other facts, such as the employer's requirements on parking." *Thompson*, 981 A.2d at 974. We noted that: the employer did not own the sidewalk or the parking lot; the employer paid the landlord a fee for maintenance and the non-exclusive right to use the lot; the employer did not mandate where employees parked; and the entire lot was open for use by the public. Thus, we held that the Board did not err in concluding that the claimant's contest was reasonable because a genuinely disputed issue existed as to whether the area where the claimant fell constituted the employer's premises under the Act.

Importantly, however, we made no ruling in *Thompson* regarding the correctness of this "premises" determination, noting only that the employer did not appeal this issue. Moreover, contrary to Claimant's assertion, our decision in *Thompson* did not overrule or seriously question our prior decisions in *Ortt* and *Waronsky*.[6] Indeed, if the employer had appealed the merits, based on the facts described above, it is likely that either the Board or this Court would have reversed the WCJ's decision.

In the present case, the parking lot in which Claimant parked was not owned or maintained by Employer. Rather, in contrast to the facts of *ICT Group*, Employer only leased ten spaces in the lot, which were not marked. Significantly, Employer did not require Claimant to park in this location. In fact, Employer maintained a lot in front of the manufacturing plant in which Claimant worked, albeit with a limited number of parking spaces. Thus, as in *Ortt* and *Waronsky*, Employer leased spaces in a privately-owned lot but did not direct or otherwise require employees to park in this lot. Instead, Claimant was "free to park where [he] chose." *Waronsky*, 958 A.2d at 1125. Because use of the lot was purely optional, the lot was not integral to Employer's business. *Ortt*; *Waronsky*. Contrary to Claimant's assertion, the WCJ did not err by construing a borderline interpretation of the Act in Employer's favor. Rather, the WCJ conducted a thorough analysis of the applicable law and correctly applied this law to the facts of this case.

[6] This Court recently discussed our prior decisions in *Ortt* and *Waronsky* in determining whether a claimant who fell on a pathway while walking to a train station after work sustained injuries in the course and scope of his employment, thereby refuting any question regarding the continued viability of *Ortt* and *Waronsky*. *See Mansfield Brothers Painting & Selective Insurance Company v. Workers' Compensation Appeal Board (German)*, 72 A.3d 842 (Pa. Cmwlth. 2013).

Moreover, while Claimant emphasizes that the Liberty Plaza Lot provides a reasonable means of access to his workplace,[7] Claimant did not fall in this lot or while crossing Early Street to get to the rear door of his workplace. Instead, Claimant walked through an opening between two guardrails and slipped on ice that had accumulated on the concrete apron/driveway of an adjacent lot. Given these facts, we conclude that the WCJ properly relied on *Ortt* and *Waronsky* and that the Board did not err in affirming the WCJ's determination that Claimant's injury did not occur on Employer's premises.

PATRICIA A. McCULLOUGH, Judge

[7] Claimant relies on *Newhouse v. Workmen's Compensation Appeal Board (Harris Cleaning Service, Inc.)*, 530 A.2d 545 (Pa. Cmwlth. 1987), *appeal denied*, 517 Pa. 627, 538 A.2d 879 (1988), for support. However, *Newhouse* is distinguishable from this case. In *Newhouse*, the claimant worked as a janitor for the employer, which provided janitorial services to a research center. The research center provided the employer with office space at its facility as well as use of a parking lot adjacent to its facility. In order to reach the lot from a public roadway, one had to travel over a private access road.

After completing his shift on the evening of November 26, 1979, the claimant and another employee walked to the parking lot, where they requested a co-employee give them a ride from the lot to an exit gate from which they intended to walk to a public road and then walk to their respective homes. The claimant and the other employee sat on opposite sides of the hood of the car. When they reached the gate, it was closed and the driver had to make a right turn to follow a bend in the road. The claimant fell from the hood of the car and sustained a severe brain injury.

The claimant filed a claim petition, and a WCJ concluded that the claimant sustained an injury on the premises of the employer while in the course and scope of his employment. The Board reversed. This Court reversed and reinstated the WCJ's decision, emphasizing that the access road where the claimant fell was the only means of egress by which employees could reach a public roadway and, because the exit gate was closed, the driver was required to follow a bend in this road which caused the claimant to fall off the hood of the car.

In the present case, as noted above, Claimant was free to park where he chose, he was not required to park in the Liberty Plaza Lot, and he did not fall in that lot or even on the street between the lot and Employer's plant. Rather, he fell on the concrete driveway apron of an adjacent lot after deciding to cut through a small opening in the guardrails that surrounded and marked the lot.

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v.	:	
Workers' Compensation Appeal Board (Lehigh Valley Technologies), Respondent	:	

ORDER

AND NOW, this 24th day of January, 2014, the order of the Workers' Compensation Appeal Board, dated June 10, 2013, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge