GARY L. WALLACE
(Appellee)

v.

NEW BALANCE ATHLETICS, INC.
(Appellant)

and

THE HARTFORD
(Insurer)

Conference held: February 2, 2022
Decided: September 30, 2022

PANEL MEMBERS: Administrative Law Judges: Pelletier, Elwin and Rooks
BY: Administrative Law Judge Pelletier

[¶1] New Balance Athletics, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting Gary L. Wallace's Petition for Award of Compensation and for Payment of Medical and Related Services regarding an injury occurring November 26, 2019. New Balance contends that the ALJ erred in determining that Mr. Wallace sustained a compensable work injury when he was struck by a car while crossing a public street separating the employee parking lot from the building where he worked, and that his claim is not barred by the "going and coming rule." We disagree with New Balance's contentions and affirm the decision.

I. BACKGROUND

[¶2] The ALJ made the following Findings of Fact and Conclusions of Law. On November 26, 2019, Mr. Wallace was scheduled to begin his shift at New Balance's manufacturing plant at 6:30 a.m. Mr. Wallace customarily parked in a parking lot located directly across a public street from the plant, which was leased by New Balance, for use by its employees only. Two other New Balance parking lots are located on the same side of the street as the plant. New Balance's workers were free to park anywhere in the three lots except in certain spaces in front of the plant reserved for visitors and management. A parking sticker was necessary to park in the lot where Mr. Wallace parked. Vehicles parked there without stickers were subject to being towed.

[¶3] On the date of injury, as was his custom, Mr. Wallace arrived early and ate breakfast in his vehicle. He then walked off the parking lot to smoke a cigarette. Smoking is prohibited on New Balance premises, including the parking lots. After returning his cigarettes to his car and retrieving his earplugs, Mr. Wallace proceeded to walk across the street to the plant. At approximately 6:12 a.m., as it was beginning to get light out but before the sun rose, Mr. Wallace was struck by a moving vehicle. He was about three quarters of the way across the public street, but not in a designated crosswalk. He was immediately flown by Life Flight to a regional hospital. He had a scalp hematoma that required evacuation, and sustained injuries

to his back, neck, right shoulder, and right knee. He later underwent knee surgery and, at the time of the hearing, was in treatment for his right shoulder injury and for mental health issues, which he contends are related to the accident.

[¶4] The ALJ determined that even though the accident occurred on a public street before work hours, the injury arose out of and in the course of employment, and awarded Mr. Wallace benefits for total incapacity benefits from the date of injury and ongoing, as well as payment of medical expenses. New Balance filed a Motion for Further Findings of Fact and Conclusions of Law. The ALJ issued additional findings to correct a factual error but did not otherwise change the initial decision. This appeal followed.

II. DISCUSSION

A. The "Going and Coming" Rule and the Special Hazard Exception

[¶5] The issue in this case is whether the ALJ erred when determining that Mr. Wallace's injury is compensable under the Act. To be compensable, an injury must "aris[e] out of and in the course of employment." 39-A M.R.S.A. § 201(1). The purpose of this requirement is "to compensate employees for injuries suffered *while* and *because* they were at work." *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 366 (Me. 1982) (quoting *Bryant v. Masters Machine Co*., 444 A.2d 329, 333 (Me. 1982)). An injury arises out of and in the course of employment when there is

a sufficient connection between the injury and the employment. *Comeau*, 449 A.2d at 366-67.

[¶6] New Balance contends that Mr. Wallace's injury is barred by the "going and coming rule" because it occurred on a public street before Mr. Wallace arrived on the premises of New Balance's plant to start his shift at work. The "going and coming rule," or the "public street" rule, provides "that an accident occurring off the employer's premises while an employee is merely on his way to or from his place of business is not, *without more*, compensable." *Waycott v. Beneficial Corp*., 400 A.2d 392, 394 (Me. 1979) (holding that an injury that occurred off the employer's premises during the employee's lunch hour was not compensable (emphasis added)). The Law Court has explained the rationale for the rule as follows:

> [I]t has at various times been stated that such an injury does not "arise out of" the employment, or that it does not occur "in the course of" the employment, or both. Whether stated that in going and coming to work an employee is "exposed to the same hazards, and no more, as other members of the travelling public," or that while outside the business premises and not engaged in any work-related activity an employee is not within the spatiotemporal boundaries of employment, the rule is ultimately grounded in the notion that there is an insufficient connection with the employment context to warrant compensation for an injury occurring in such circumstances.

Id. (citations omitted). The Court's phrase "without more" means that extenuating circumstances surrounding the occurrence potentially may fit within a judicially recognized exception to the going and coming rule.[1]

[¶7] When the going and coming rule is raised, the ALJ first analyzes whether the rule applies. *See Fournier v. Aetna, Inc.*, 2006 ME 71, ¶ 14, 899 A.2d 787. If it does, the injury is not compensable. *See Waycott*, 400 A.2d at 394-95. If the rule does not apply, or if the case fits within an exception to the rule, then the ALJ proceeds to determine whether the injury arises out of or in the course of employment. *Fournier*, 2006 ME 71, ¶ 14, 899 A.2d 787.

[¶8] The ALJ determined that although this case falls within the going and coming rule, the "special hazard" exception applies; thus, Mr. Wallace's claim is not barred by the rule. New Balance contends the facts do not fit within this exception. It asserts that Mr. Wallace could have avoided crossing the street by parking in one of the lots on the same side of the street as the plant, and the only reason Mr. Wallace parked across the street was so he could smoke a cigarette before work, which was

[1] The recognized exceptions to the general rule include the "special errand" exception, *see Abshire v. City of Rockland*, 388 A.2d 512, 514-15 (Me. 1978) (applying to journeys made at the request of the employer); the "traveling employee" exception, *see Brown v. Palmer Constr. Co., Inc.*, 295 A.2d 263, 266-67 (Me. 1972) (applying when "the injury has its origin in a risk created by the necessity of sleeping and eating away from home"); the "dual purpose" exception, *Cox v. Coastal Prods. Co., Inc.*, 2001 ME 100, ¶¶ 10, 11, 774 A.2d 347 (when a trip serves both business and private purposes); and an exception for traveling to obtain medical treatment for a prior work injury, *Moreau v. Zayre Corp.*, 408 A.2d 1289, 1293 (Me. 1979).

not permitted on New Balance premises. New Balance contends that this case should be governed by *Feiereisen v. NewPage Corp.*, 2010 ME 98, 5 A.3d 669.

[¶9] In *Feiereisen*, the employee was injured in a motor vehicle accident when traveling to a mandatory mediation session related to prior work injuries. *Id.* ¶ 3. The employee had argued that his participation in the mediation was required by the Act and had a reciprocal benefit for the employer, therefore it arose out of and in the course of employment. *Id.* ¶¶ 11-12. The Law Court disagreed, determining that the employee's activity at the time of the accident fell under the going and coming rule, and did not fit within any of the recognized exceptions, stating:

> His travel to mediation was not an activity that was implied into his contract of employment and was not an action that promoted the interests of his employer. Feiereisen's injury "did not have its origin in circumstances created by the employer for the purpose of furthering [its] interests any more than if the injury had occurred on the way to or from work." *Waycott*, 400 A.2d at 395. Newpage cannot be made responsible for Feiereisen's injuries, because it could not control or affect the risk in this car accident. At the time of the accident, Newpage did not have responsibility for Feiereisen's automobile or for the behavior of the driving public.

Id. ¶ 13.

[¶10] The ALJ here relied on *Oliver v. Wyandotte Industries Corp.*, 308 A.2d 860 (1973). In *Oliver*, the claimant was injured when leaving work by the employer's private road in her own vehicle. *Id.* Her view of oncoming traffic was obscured by a tall snowbank on the employer's premises, and she had to pull her car out onto the public road to see. *Id.* at 861, 863. As she turned right into the public highway, she

was hit by an oncoming vehicle, resulting in injury. *Id.* at 861. The Commissioner denied her claim, concluding that the accident occurred when Ms. Oliver was traveling on a public road at no greater risk than the general public. *Id.*

[¶11] The Law Court vacated that decision, reasoning that even though the accident occurred on a public street,

> a dangerous condition existed on the premises maintained by her employer to provide ingress to or egress from the place of work—to wit, a blind exit from the premises into the public street—which was a hazard not common to the travelling public and which was a cause of her accident.

Id. at 863. The ALJ also cited the majority rule as set forth in Larson's treatise:

> One category in which compensation is almost always awarded is that in which the employee travels along or across a public road between two portions of the employer's premises … most courts, but by no means all, hold that an injury in a public street or other off premises place between the plant and the parking lot is in the course of employment, being on a necessary route between the two portions of the premises.

2 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 13.01 (2022).[2]

[2] Although New Balance asserts that Larson's treatise is not binding authority on the division and should not be followed in this case, we note that both the Law Court and the Appellate Division have cited the treatise when applying the going and coming rule. *See, e.g., Fournier*, 2006 ME 71, ¶ 8, 899 A.2d 787; *Santiago v. County of Penobscot*, Me. W.C.B. No. 19-21, ¶ 8 (App. Div. 2019). New Balance also contends that the exceptions to the going and coming rule were mainly articulated by the Law Court at a time when the Act provided for liberal construction in favor of the employee. *See* 39 M.R.S.A. § 92 (repealed P.L.1991, Ch. 885, § A-7 (effective Jan. 1, 1993)). Because the Act no longer contains that provision, New Balance urges us to reexamine whether the exceptions should continue to apply. The Law Court, however, has recognized the exceptions to the going and coming rule since the Act was repealed and replaced. *See Feiereisen v. NewPage Corp.*, 2020 ME 98, ¶ 8, 5 A.3d 669; *Fournier*, 2006 ME 71, ¶ 7 n.2.

[¶12] *Robert's Case* provides further support for the ALJ's decision. 124 Me. 129, 126 A. 573 (1924). In *Robert's Case,* the employer's right of way to its plant required crossing over railroad tracks. *Id.* at 130, 126 A.2d 573. The right of way was for the benefit of the employer and provided the only means of ingress and egress to its plant by "teams or automobiles." *Id*. Upon leaving work in his vehicle shortly after his shift ended, Robert was struck by a train and killed. *Id.* The Court held that the accident occurred in the course of his employment, stating:

> [T]he "course of employment" does not begin and end with the actual work he was employed to do, but covers the period between his entering the employer's premises a reasonable time before beginning his actual work and his leaving the premises after his day's work is done and during the usual lunch hour, he being in any place where he may reasonable be in connection with his duties or entering or leaving the premises by any way he may reasonably select.

Id. at 131, 126 A. 573.

[¶13] Based on these authorities, we find no error in the ALJ's determination that this case fits within an exception to the going and coming rule. Unlike *Feiereisen* and like *Oliver* and *Robert's Case,* New Balance created a hazard—by placing a designated employee parking lot across the public street from the plant. Additionally, the work shift began before sunrise at a time when the street was busy with employees arriving for work. The risks of employment thus carried over into the public way. And, as the ALJ found, the general public was not exposed to this hazard because visitor parking was specifically limited to a lot on the same side of

the street as the plant. That Mr. Wallace could have avoided the hazard by parking on the same side of the street as the plant but chose to use the lot across the street for access to a smoking area is of no consequence.

B. *Comeau* Factors

[¶14] Because the case fits within an exception to the going and coming rule, we proceed to determine whether Mr. Wallace's injury is compensable generally. *Fournier*, 2006 ME 71, ¶ 14. When the facts of a case do not "fall snugly within the arising out of and in the course of employment requirement," we "ascertain whether a sufficient work-connection exists to justify an award of compensation." *Comeau*, 449 A.2d at 366-67. This is done by considering a nonexclusive list of factors identified by the Court that bear on the question of work-connectedness. *Id*. at 367.[3]

[3] The Law Court identified the following nonexclusive list of factors to consider when determining whether an injury arises out of and in the course of employment:

> (1) Whether at the time of the injury the employee was promoting an interest of the employer, or the activity of the employee directly or indirectly benefited the employer.
> (2) Whether the activities of the employee work to the benefit or accommodate the needs of the employer.
> (3) Whether the activities were within the terms, conditions or customs of the employment, or acquiesced in or permitted by the employer.
> (4) Whether the activity of the employee serves both a business and personal purpose, or represents an insubstantial deviation from the employment.
> (5) Whether the hazard or causative condition can be viewed as employer or employee created.
> (6) Whether the actions of the employee were unreasonably reckless or created excessive risks or perils.
> (7) Whether the activities of the employee incidental to the employment were prohibited by the employer either expressly or implicitly.
> (8) Whether the injury occurred on the premises of the employer.

Comeau, 449 A.2d at 367 (citations omitted).

[¶15] The ALJ found the following factors tipped the balance in favor of compensability: Mr. Wallace's crossing the street from the parking lot to the plant to perform his work was permitted by New Balance, was in New Balance's interest, and benefitted New Balance's needs; although Mr. Wallace did not cross in the crosswalk he was not unreasonably reckless; Mr. Wallace's use of the employee parking lot across the street was expressly permitted by New Balance; and by locating an employee parking lot across the street from the workplace, New Balance created an enhanced employment risk.

[¶16] Appellate review of an administrative law judge's application of the *Comeau* test is highly deferential. *Moore v. Pratt & Whitney Aircraft,* 669 A.2d 156, 158 (Me. 1995). We have stated that the ALJ "need not reach the 'correct' conclusion, but a conclusion that is 'neither arbitrary nor without rational foundation.'" *Morse v. Laverdiere's Super Drug Store*, 645 A.2d 613, 615 (Me. 1994) (quoting *Comeau*, 449 A.2d at 368). The ALJ gave due consideration to several of the factors listed in *Comeau* and reached the conclusion that the injury arose out of and in the course of employment. We cannot say that the decision is arbitrary or lacks a rational foundation.

III. CONCLUSION

[¶17] The ALJ's determinations that (1) the circumstances of this case fall within a recognized exception to the going and coming rule, and (2) the injury arose

out of and in the course of employment, are neither arbitrary nor lack a rational foundation; and the ALJ neither misconceived nor misapplied the law. *Moore,* 669 A.2d at 158.

The entry is:

The administrative law judge's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322.

Pursuant to board Rule, ch. 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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