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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SHARP CORONADO HOSPITAL et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and LAURA BROWN, Respondents.	D042518 (WCAB No. SDO 292146)

Petition for writ of review from a decision of the Workers' Compensation Appeals Board. Decision annulled.

Sharp Coronado Hospital and its insurance carrier Travelers Property Casualty Company (together Sharp) petition for writ of review after the Workers' Compensation Appeals Board (Board) granted reconsideration and affirmed a decision of the workers' compensation judge (WCJ) in favor of the applicant, Laura Brown. The Board determined Brown sustained injuries arising out of and occurring in the course of her

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employment with Sharp when she was hit by a truck while crossing the street to her place of employment at the start of the work day. We conclude the conditions of Brown's employment did not create a "special risk" sufficient to constitute an exception to the "going and coming rule" prohibiting compensation for her injuries. Accordingly, we annul the Board's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Sharp's hospital facility is bordered by Prospect Place, Second Street and Third Street. The main entrance is on Prospect Place, a small public street that is used not as a thoroughfare, but primarily for access to the hospital. Public parking, some of which is directly in front of the hospital, is available on Prospect Place. As an accommodation to patients and their visitors, Sharp employees were discouraged from parking in the spaces directly in front of the hospital. The employees had a clear understanding of this unwritten policy, described as "informational" rather than "directive." Sharp does not provide a parking lot for its employees, but instead encourages them to park in residential areas on streets near and adjacent to the hospital.

Laura Brown was employed by Sharp as a supervisor in the cardiopulmonary department. On December 14, 2001, Brown drove to work and parked her car on Third Street. She parked there because her supervisor told her the hospital staff was encouraged to park on side streets rather than on Prospect Place. As Brown crossed Prospect Place, she was hit by a truck and injured.

Brown filed a claim for workers' compensation benefits. The WCJ issued findings and an award in Brown's favor. In its opinion, the WCJ concluded Brown's injury arose

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out of and in the course of her employment based on the applicability of the "special risk" exception to the "going and coming" rule. Sharp petitioned for reconsideration with the Board. After granting reconsideration, the Board upheld the WCJ's award by a vote of two to one.

DISCUSSION

A

In the absence of exceptional circumstances, employees are not covered by workers' compensation while "going and coming" to and from their places of employment. (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157; *General Ins. Co. v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 595, 598 (*Chairez*).) "Courts have reasoned that the employment relationship is suspended during this period and, therefore, injuries occurring when an employee is engaged in off-duty travel, off of the employer's premises, are not within the 'course of employment' for purposes of the Workers' Compensation Act." (*Parks v. Workers' Comp. Appeals Bd*. (1983) 33 Cal.3d 585, 588-589.)

The going and coming rule prohibiting compensation is subject to many judicially created exceptions. One such exception is where the employment creates a "special risk" entitling the employee to compensation for injuries sustained within the field of that risk. (*Parks v. Workers' Comp. Appeals Bd*., *supra*, 33 Cal.3d at p. 589.) The special risk exception applies where (1) "but for" the employment, the employee would not have been at the location where the injury occurred and (2) "the risk is distinctive in nature or quantitatively greater than risks common to the public." (*Chairez, supra*, 16 Cal.3d at

pp. 600-601.) The exception is recognized when the employment itself has created a special risk of injury which is not shared by the public generally. (*Id*. at p. 600.) The danger must be one to which the employee, by reason of and in connection with his or her employment, "is subjected peculiarly or to an abnormal degree." (*Freire v. Matson Navigation Co*. (1941) 19 Cal.2d 8, 12.) Where, as here, the applicability of the special risk exception to "the 'going and coming' rule turns on undisputed facts, it presents a question of law which a reviewing court may consider without deference to the Board's findings." (*State Lottery Com. v. Workers' Comp. Appeals Bd*. (1996) 50 Cal.App.4th 311, 315; *Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 351.)

B

At the time the accident occurred, Brown was on her way to work. She would not have been in that location "but for" her employment, and thus is able to meet the first requirement of the special risk exception to the going and coming rule. (*Chairez, supra*, 16 Cal.3d at pp. 600-601.) As to the second requirement, however, there are no facts to show Brown was exposed to a risk that was "distinctive in nature or quantitatively greater than risks common to the public." (*Id*. at p. 601.)

The facts here fall squarely within the holding of *Chairez*. In that case, the employer's premises had several parking spaces that were reserved for business vehicles and unavailable to employees, who customarily parked their cars around the corner on other streets. Chairez, an employee, commuted to work and parked his car in front of the business. He got out of the car and was struck by a passing motorist. (*Chairez, supra*, 16

Cal.3d at p. 598.) The court held "Chairez' death does not come within the second requirement of the special risk exception—that the risk is distinctive in nature or quantitatively greater than risks common to the public. Chairez was parked on a public street at a time and in a location where parking is available to the general public. The fact that he was struck by a passing motorist, while tragic, is a type of risk the public is subject to daily. Moreover, nothing in the facts indicates Chairez was exposed to a greater risk from passing motorists than was anyone else on [that particular street] that morning." (*Id*. at p. 601.)[1]

Similarly here, the hazard that caused Brown's injury, being struck by a passing motorist as she crossed a public street, was not a special risk of her employment. (Cf. *Freire v. Matson Navigation Co., supra*, 19 Cal.2d at p. 13 [employee injured on a bulkhead while trying to enter employer's premises was subjected to risks "peculiarly and to an abnormal degree" where hazard was directly connected with employment].) The risk to which Brown was exposed in walking across Prospect Place was neither different from nor greater than the risk faced by any other person crossing that street. Brown had parked on a public street at a time when parking was available to the general public, such

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1 The court in *Chairez* distinguished two cases that applied the special risk exception where an employee was injured while making a left turn in front of oncoming traffic from a public street onto the employer's premises. (*Greydanus v. Industrial Acc. Co.* (1965) 63 Cal.2d 490, 492-493; *Pacific Indem. Co. v. Industrial Acc. Co.* (1946) 28 Cal.2d 329, 338.) The court noted that in those cases, "the making of a left turn exposed the employee to a particular risk—one distinctive in nature—not shared by the public generally." (*Chairez, supra*, 16 Cal.3d at p. 600; see also *G.E. Engine Maintenance v. Workers' Comp. Appeals Bd.* (1998) 69 Cal.App.4th 1528, 1532 [distinguishing "left turn" cases].)

that being hit by a car is the "type of risk the public is subject to daily." (*Chairez, supra*, 16 Cal.3d at p. 601.) The necessity of being on a public street in order to get to work did not cause her a greater probability of being injured there. (See *Rivera v. Workers' Comp. Appeals Bd*. (1977) 70 Cal.App.3d 705, 708 [distinguishing cases where risk was related to and grew out of location of employer's premises and conditions over which employer exercised some control].) In this regard, Brown was exposed to a common danger in no way "peculiar[]" or "to an abnormal degree." (*Freire v. Matson Navigation Co*., *supra,* at p. 12; *G. E. Engine Maintenance v. Workers' Comp. Appeals Bd., supra,* 69 Cal.App.4th at pp. 1532-1533.)

C

Both the WCJ and the Board found Brown was placed at a greater risk of injury because Sharp prohibited her from parking in front of the hospital where she would not have to cross the street. However, the basis for this finding is inconsistent with the holding in *Chairez* where the employer made onsite parking spaces unavailable to its employees, instead requiring them to park around the corner on public streets. (*Chairez, supra*, 16 Cal.3d at p. 598.) The fact of the employer's parking policy did not change the *Chairez* court's analysis or its holding. Here too, Sharp's employees parked on nearby public streets due to restricted parking adjacent to the hospital. As in *Chairez*, Sharp did not create a special risk by failing to provide employee parking closer to its premises. Requiring that employees "regularly" park on a public street does not make the risk of

injury "quantitatively greater than risks common to the public." (*Chairez, supra*,16 Cal.3d at p. 601.)[2]

The facts here are distinguishable from those in *Parks v. Workers' Comp. Appeals Bd.*, *supra*, 33 Cal.3d 585. In that case, Parks, a teacher, left the school parking lot to drive home. She stopped her car for departing school children crossing the street between cars. While Parks was stopped, three youths opened the driver's door, wrestled her purse away from her and fled. She sought workers' compensation benefits for the disability she suffered as a result of the incident. (*Id*. at pp. 587-588.) The court held Parks was "*regularly* subjected at the end of each day's work to the risk of becoming a . . . 'sitting duck' for an assault. . . . Her risk was clearly 'quantitatively greater' than that to which passing motorists might be subjected on a sporadic or occasional basis. [Citations.] Parks' employment required her to pass through the zone of danger each day. As such, her employment created a special risk in leaving the school parking lot." (*Id*. at pp. 592-593.) Thus, the going and coming rule did not apply to preclude compensation benefits. (*Id*. at p. 593.)

Here, in contrast, there was no "zone of danger" through which Brown was required to pass on a daily basis. Sharp employees were able to park on streets adjacent to the hospital facility, allowing them access to the workplace without crossing a street.

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2 As the Board's dissenting opinion aptly points out, the special risk exception cannot be based on the mere fact Sharp employees park on nearby streets on a daily basis while patients and their visitors park there only occasionally. "Otherwise, the special risk exception from parking near a place of employment would be the rule [rather than the]

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The fact that Sharp encouraged or even required its employees to park anywhere other than directly in front of the hospital does not bring Brown's injury within the special risk exception. Further, crossing Prospect Place presented no *distinctive* risk, as that street is not a thoroughfare. Any member of the public was as likely to be struck as was any employee crossing Prospect Place. Because Brown was not subject to a risk "distinctive in nature or quantitatively greater than risks common to the public" (*Chairez, supra*, 16 Cal.3d at pp. 600-601), the special risk exception to the going and coming rule does not apply.

DISPOSITION

The decision of the Board is annulled. Costs are awarded to Petitioners.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HALLER, J.

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exception, since by the very nature of employment, the increased risk from an employee's daily use would always be greater than the risk from occasional use by the public."