

In the Matter of the Compensation of  
**THERESA A. NOBLE, Claimant**

WCB Case No. 07-02423

**ORDER ON REMAND**

Carney Buckley Hays & Marsh, Claimant Attorneys

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Reviewing Panel: Members Biehl and Langer.

This case is before us on remand from the Court of Appeals. *Legacy Health Systems v. Noble*, 232 Or App 93 (2009). The court has reversed our prior order, *Theresa A. Noble*, 60 Van Natta 880 (2008), that had affirmed an Administrative Law Judge's (ALJ's) order that set aside the self-insured employer's denial of claimant's injury claim for a right ankle condition. Although agreeing with our conclusion that claimant's injury occurred in the course of her employment, the court determined that neither the ALJ's order nor our order addressed the "arising out of" aspect of the work connection test. Consequently, the court has remanded for us to address that question.

FINDINGS OF FACT

We continue to adopt the ALJ's "Findings of Fact" with the following summary.

On February 21, 2007, claimant decided to go to her credit union during a paid break. (Tr. 5-6). It was commonplace for employees to go to the credit union during paid breaks. (Tr. 13). The route to the credit union took claimant out the front door of her workplace, across the street, and across a parking lot located on the employer's premises. (Tr. 6). The parking lot surface was slick and slightly inclined, and claimant slipped and fell as she attempted to cross it, fracturing her ankle. (Tr. 14-15).

The employer issued a denial asserting that the injury did not arise out of and in the course of employment. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant's injury arose out of and in the course of her employment. In reaching that conclusion, the ALJ particularly concluded that the "parking lot rule" exception to the "going and coming rule" applied to satisfy the "in the course of" portion of the work connection test. *See Hearthstone Manor v.*

*Stuart*, 192 Or App 153 (2004) (applying “parking lot rule”). On review, we determined that the “parking lot rule” applied because the parking lot in which claimant fell was part of the employer’s premises. *Noble*, 60 Van Natta at 881-82. Accordingly, we adopted and affirmed the ALJ’s order. *Id.* at 882.

The employer requested judicial review. The court agreed that under the “parking lot rule,” claimant’s injury occurred “in the course of” her employment. However, the court determined that neither the ALJ’s order nor our order addressed whether claimant’s injury “arose out of” her employment. Consequently, the court has remanded for reconsideration. We now proceed with our analysis.

An injury is not compensable unless it “aris[es] out of and in the course of employment.” ORS 656.005(7)(a). Thus, the temporal, spatial, circumstantial, and causal connections between an injury and employment must be sufficient to justify compensation. *Andrews v. Tektronix, Inc.*, 323 Or 154, 162 (1996); *Rogers v. SAIF*, 289 Or 633, 642 (1980). If either the “arising out of” or the “in the course of” prong is strongly satisfied, the injury may be compensable even if the other prong is only weakly satisfied, but the injury is not compensable if both prongs are only minimally satisfied. *Griffin v. SAIF*, 210 Or App 469, 476 (2006); *Getz v. Wonder Bur*, 183 Or App 494, 502 (2002). The court noted that in addition to the injury’s location on the employer’s parking lot, the circumstance of the injury occurring during a paid break, while claimant was “on the clock,” provides further support for the “in the course of” prong. *Noble*, 232 Or App at 100; *cf. Stuart*, 192 Or App at 157 (because the claimant was not “on the clock” when injured, satisfaction of the “in the course of” prong depended on application of the “parking lot rule”). Thus, the “in the course of” prong of the work connection test has been strongly satisfied.

The “arising out of” prong requires that a causal link exist between claimant’s employment and her injury. *Krushwitz v. McDonald’s Rest.*, 323 Or 520, 525-56 (1996); *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994). An injury does not automatically “arise out of” employment merely because it occurs at the workplace and during working hours; it also “must be linked to a risk connected with the nature of the work or a risk to which the work environment exposed claimant.” *Redman Indus., Inc. v. Lang*, 326 Or 32, 36 (1997); *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 601 (1997).

The risk of injury from normal ingress to or egress from the workplace, or other activities reasonably incidental to employment, is considered an employment risk, and injuries arising from such activities therefore “arise out of” employment. See *Shaun C. Martin*, 60 Van Natta 1771 (2008) (slipping on weedkiller while preparing for the beginning of the shift was an “employment” risk); *Jacob Ybanez*, 55 Van Natta 372 (2003) (tripping over the employer’s stairs while leaving the workplace was an “employment” risk). Consequently, falls caused by hazards on the employer’s premises, or under its control, are usually compensable. See *Montgomery Ward & Co. v. Malinen*, 71 Or App 457, 461 (1984) (finding compensable a fall on an ice covered public sidewalk in front of the employer’s building and parking lot, which the employer was legally required to keep clear of ice); *Jennifer Sharp*, 50 Van Natta 829, 830 (1998); *Lois F. Barton*, 48 Van Natta 1604, 1606 (1995); *Linda N. Kief*, 46 Van Natta 2290, 2292 (1994); *Ronald R. Nelson*, 46 Van Natta 1094, 1098 (1994).

Here, claimant was injured when she slipped on the slick surface of the employer’s parking lot during a paid break. (Tr. 14-15, 33). The court has affirmed our decision that the employer controlled the parking lot in which claimant was injured. *Noble*, 232 Or App at 100. Moreover, claimant’s testimony that she slipped on an icy surface while crossing the parking lot is unrebutted. Under such circumstances, the record establishes that her fall was caused by a hazard associated with the employer’s premises.

Further, claimant’s fall occurred as she left her workplace. As the employer notes, her journey had a destination outside of her workplace (*i.e.*, her credit union). Nevertheless, her route began at her desk and she was on the employer’s premises when she fell.<sup>1</sup> (Tr. 9). Thus, her fall occurred during normal egress from work. As noted above, such injuries “arise out of” employment.

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<sup>1</sup> In this respect, the present case is distinguishable from *SAIF v. Marin*, 139 Or App 518 (1996), a case cited by the employer. There, the claimant had finished working and was attempting to jump start his vehicle in the employer’s parking lot when he was injured. *Id.* at 520. The court held that the claimant’s activities were sufficiently removed from his normal egress to break the causal link between employment and his injury. *Id.* at 525.

In *Marin*, the claimant had left his workplace and was occupied with another task when he was injured. Here, by contrast, claimant was still leaving the employer’s premises when she fell. In other words, she was still in the process of her “normal egress” when she was injured.

The employer also cites *Albee v. SAIF*, 45 Or App 1027 (1980), which held that a claimant who had left work intending to put snow chains on his car and fallen in the parking lot while attempting to do so did not sustain a compensable injury. 45 Or App at 1030-31. The *Albee* court did not state whether it was addressing the “arising out of” or the “in the course of” aspects of the work-connection test.

The employer contends that this case must be distinguished from other “ingress/egress” cases because claimant’s journey was optional and because of her “unusual” route. The employer notes that employer knowledge of a claimant’s motivation and route for leaving a workplace has been considered in evaluating the “arising out of” prong. *E.g., Henderson v. S.D. Deacon Corp.*, 127 Or App 333, 339 (1994). The employer also reasons that claimant could have remained in her building and that an alternative route to the credit union, using public sidewalks, was available. (Tr. 18, 28). The employer contends that her “short cut,” for her “personal” banking business, breaks any relationship between her egress and her employment.

Yet, injuries resulting from on-premises activities to which the employer acquiesces generally satisfy the “arising out of” requirement. *See Clark v. U.S. Plywood*, 288 Or 255, 266-67 (1980) (on premises injuries sustained while engaged in personal comfort activities are compensable if the employer acquiesces to such activities); *Cheryl L. Hulse*, 60 Van Natta 2627, 2629 (2008) (injury during on-premises cigarette break compensable). Here, claimant testified that it was “quite commonplace” for employees to go to the credit union during their breaks, and that she was unaware of any policy prohibiting such activity. (Tr. 13). That testimony was not rebutted.

Further we have previously ruled that the particular route a worker uses to leave her workplace does not determine whether the worker was involved in “normal egress.” In *Laurence C Baxter*, 56 Van Natta 11 (2004), a claimant had slipped and fallen on a sidewalk that was under the employer’s control after he had finished work. The carrier argued that the injury did not occur during “normal

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However, it cited as grounds for its holding the claimant’s “personal mission” and that the claimant had “left work for the rest of the day.”

The “personal mission” question is generally relevant to the “in the course of” prong of the work connection test. *See Griffin*, 210 Or App at 478 (although the claimant’s injurious activity, performed with the employer’s acquiescence and with the employer’s equipment, but solely for the claimant’s own benefit, “arose out of” employment, it did not occur “in the course of” employment because it was a “personal mission”). Similarly, the *Albee* court’s own statement that the claimant had “left work for the rest of the day” suggests the use of the “going and coming” rule to find that the claimant’s injury had not occurred in the course of employment. Finally, the *Albee* court cited *Barker v. Wagner Mining Equip.*, 6 Or App 275 (1971), which invoked the “going and coming” rule to find that the claimant’s injury did not occur in the course of employment. Thus, the most reasonable interpretation of the *Albee* court’s opinion is that it addressed the “in the course of” prong of the work connection test. Here, because claimant has already satisfied the “in the course of” prong, *Albee* is inapposite.

egress,” because the claimant’s route was not on his usual route. 56 Van Natta at 13. Noting that employees used several routes for “normal egress,” we reasoned that the claimant’s use of one such route, rather than another, did not remove him from “normal egress” from work. *Id.* at 14.

Here, as noted, it was “quite commonplace” for employees, including claimant, to go to the credit union during their breaks. (Tr. 13). The route that she took was also the most direct route from her workplace to the credit union. (Tr. 27). Thus, we conclude that claimant’s route was part of “normal egress” from work.

As in *Baxter*, claimant here slipped and fell during her normal egress, as a result of a hazard associated with the employer’s premises. Under such circumstances, we find that her injury “arose out of” her employment and, therefore, is compensable.<sup>2</sup>

Where a claimant finally prevails after remand from the Court of Appeals, the Board shall approve or allow a reasonable attorney fee for services before every prior forum. ORS 656.388(1); *Charles R. Gode*, 56 Van Natta 1758, 1563 (2004). Consequently, we turn to a determination of a reasonable attorney fee for claimant’s counsel’s services at hearing, at the Board level in the first instance, before the court, and on remand.

Claimant’s counsel has already been granted attorney fees totaling \$4,750 for services at hearing and on board review. Those awards are undisturbed. We turn to a reasonable attorney fee award for claimant’s counsel’s services before the court and on remand.

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services before the court and on remand is \$12,120, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s counsel’s uncontested fee request), the complexity of the issue, the nature of the proceedings, the skill of the attorneys, the value of the interest involved, and the risk that counsel might go uncompensated. This award is in addition to the ALJ’s and our previous attorney fee awards.

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<sup>2</sup> In reaching this conclusion, we consider the “arising out of” prong to be strongly satisfied. In any event, considering that the “in the course of” prong was strongly satisfied, the “arising out of” prong has been sufficiently satisfied to establish the compensability of claimant’s injury.

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Finally, because we have affirmed the ALJ's compensability decision, we award reasonable expenses and costs to claimant for records, expert opinions, and witness fees. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). Consequently, in accordance with the aforementioned statute and rule, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

Accordingly, on remand, the ALJ's order dated September 5, 2008 is affirmed. In addition to our and the ALJ's previous attorney fee awards, for services before the court and on remand, claimant's counsel is awarded \$12,120, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on May 7, 2010