

In the Matter of the Compensation of
CAROLYN G. MCDERMED, Claimant

WCB Case No. 08-03945

ORDER ON REVIEW

Michael N Warshafsky, Claimant Attorneys
VavRosky MacColl PC, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Herman. Member Langer dissents.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Mundorff's order that set aside its denial of claimant's injury claim for head, right foot/ankle, and chest conditions. On review, the issue is course and scope of employment.¹ We affirm.

FINDINGS OF FACT

In April 2008, claimant worked for the employer as a police lieutenant assigned to the Office of Professional Standards. (Tr. 4). Although her duties primarily involved office work, her responsibilities included all police lieutenant and officer duties. (Tr. 5-8; Exs. 1, 3). Claimant's assignments included planning, organizing, and supervising police work, responding to major crime and accident scenes, overseeing or supervising investigations, conducting and overseeing internal affair investigations, and performing the duties of a sworn police officer. (Ex. 3; Tr. 4-6). The latter duties included responding to calls, detecting and deterring crime, directing traffic at incident scenes, and dealing with distraught victims. (Ex. 1; Tr. 6-8).

¹ The employer has requested oral argument, contending that the resolution of this case may have a significant impact on the workers' compensation system. We do not ordinarily entertain oral argument. OAR 438-011-0015(2). We may, nevertheless, allow oral argument where the case presents an issue of first impression that could have a substantial impact on the workers' compensation system. See OAR 438-011-0031(2); *Joe R. Ray*, 48 Van Natta 325, *recons*, 48 Van Natta 458 (1996); *Jeffrey B. Trevitts*, 46 Van Natta 1767 (1994). The decision to grant such a request is solely within our discretion. OAR 438-011-0031(3).

Here, the parties have adequately addressed the issues before us and we are not persuaded that oral argument would assist us in reaching our decision. Accordingly, we decline to grant the request for oral argument. See *Dale F. Cecil*, 51 Van Natta 1010 (1999); *Raymond L. Mackey*, 47 Van Natta 1 (1995).

Moreover, claimant was required to implement the employer's "neighborhood-based community policing" philosophy, and had been involved with community policing for the majority of her 17 years of work for the employer. (Tr. 8-10; Ex. 4-12, -13, -22). Community policing entailed "engaging the community in problem solving strategies to not only react to crime," but to prevent it. (Tr. 9). The employer's community policing initiative identified two core elements: "(1) establishment of relationships between police officers and the neighborhoods in which they work; and (2) sufficient patrol police officer time to engage in jointly prioritized problem-related proactive activities to improve neighborhood quality of life." (Ex. 4-22). Successful community policing, therefore, required "meeting a lot of people and being exposed to these people as a police officer and working with them." (Tr. 9). In other words, claimant was expected to interact with people on the streets to forge relationships that would enhance both public safety and neighborhood quality of life. (*Id.*; Ex. 4).

Claimant regularly worked Monday to Friday, 8:00 a.m. to 5:00 p.m. (Tr. 12, 25). As part of her workday and with her employer's consent, she routinely walked approximately one block from her office to "grab a cup of coffee." (Tr. 12-13). During that period, claimant was still on-duty and expected to carry a cell phone, respond to all calls, and return to the office if needed. (Tr. 15-19). She was also required to, and on previous occasions did, perform police duties during the one-block walk to the coffee shop. (Tr. 18). By way of example, she: (1) responded to and rendered aid for a motor vehicle accident; (2) escorted a fearful woman to an office next to the coffee shop; and (3) performed crowd control after a parked vehicle caught on fire. (Tr. 18-19, 21).

Moreover, during these walks to the coffee shop, claimant would implement the employer's community policing initiative by interacting with members in the community regarding police/community matters, including discussing current public safety and current crime trends or patterns. (Tr. 18-19). These conversations were part and parcel of claimant's community policing obligations. (*Id.*)

On April 15, 2008, while on duty and during regular working hours, claimant left her office space to get a cup of coffee, as was her routine. Tr. 10, 15). As she crossed the street, she was struck by a motor vehicle and suffered injuries to her head, face, right foot, neck, and chest. (Exs. 5 through 11, 13 through 16).

The employer denied claimant's injury claim, contending that it did not arise out of or occur in the course of employment. (Ex. 12). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the denial, finding that claimant's injury arose out of and in the course of her employment. The ALJ reasoned that claimant satisfied both the "in the course of" and "arising out of" employment prongs of the unitary work connection test in determining compensability. For the following reasons, we affirm.

For an injury to be compensable, it must "arise out of" and occur "in the course of" employment. ORS 656.005(7)(a). The "arise out of" prong of the compensability test requires that a causal link exists between the worker's injury and her employment. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 525-26 (1996); *Norpac Foods Inc. v. Gilmore*, 318 Or 363, 366 (1994). The requirement that the injury occur "in the course of" employment concerns the time, place and circumstances of the injury. *Fred Meyer Inc. v. Hayes*, 325 Or 592, 596 (1997); *Krushwitz*, 323 Or at 526.

The work connection test may be satisfied if the factors supporting one prong of the statutory test are minimal while the factors supporting the other prong are many. *Krushwitz*, 323 Or at 531, citing *Phil A. Livesley, Co. v. Russ*, 396 Or 25, 28 (1983). Both prongs, however, must be satisfied to some degree. *Hayes*, 325 Or at 596; *Krushwitz*, 323 Or at 531.

"Although the 'arising out of' and 'in the course of' prongs provide guidance, the unitary work-connection test does not supply a mechanical formula for determining whether an injury is compensable. We evaluate those factors in each case to determine whether the circumstances of a claimant's injuries are sufficiently connected to employment to be compensable."
Robinson v. Nabisco, Inc., 331 Or 178, 185 (2000).

Both prongs serve as analytical tools for determining whether, in light of the policy for which that determination is to be made, the causal connection between the injury and the employment is sufficient to warrant compensation. *Hayes*, 325 Or at 596-97; *Andrews v. Tektronix, Inc.*, 323 Or 154, 161-62 (1996).

An injury occurs “in the course of” employment if it takes place within the period of employment, at a place where a worker reasonably may be expected to be, and while the worker reasonably is fulfilling the duties of the employment or is doing something reasonably incidental to it. *Hayes*, 325 Or at 598. “Reasonably incidental to” employment includes activities that are personal in nature, so long as the conduct bears some reasonable relationship to the employment and is expressly or impliedly allowed by the employer. *Id.* at 598-99.

Here, claimant was injured while on duty and walking to get a cup of a coffee, an activity that she routinely performed with the employer’s consent. As an on-duty police officer, she was required to fulfill any and all job responsibilities while on that walk, including being a first responder to any situation. Indeed, it is undisputed that claimant had performed such vital duties in the past while on that same one-block walk to get a cup of coffee. (Tr. 18-19). Moreover, claimant was expected to perform, and had performed, essential community policing services as part of her regular walks to the coffee shop. (*Id.*) As noted above, these obligations included interacting with citizens on the street during day-to-day activities to form relationships that could improve public safety. (*See* Tr. 8-9, 18-19). Thus, although the isolated task of getting coffee may have been “personal in nature,” claimant’s actions bore “some reasonable relationship to [her] employment and [was] expressly or impliedly allowed by the employer.” *Hayes*, 325 Or at 598-99.

Accordingly, we conclude that claimant was injured “in the course of” employment. In other words, she was injured while within the period of employment, at a place where she reasonably was expected to be, and while reasonably fulfilling the duties of her employment or doing something reasonably incidental to it. *Id.* at 598. In so finding, we emphasize that, as a police officer, claimant’s job duties and responsibilities were much broader than many occupations. As detailed above, although claimant’s particular position required mostly work in an office, as opposed to patrolling the streets, her job responsibilities and duties were not limited to just work in a confined office space. (Exs. 1, 3; Tr. 5-8, 18-19). This is particularly true given the employer’s “neighborhood-based community policing strategy” initiative, which claimant was required to implement. Thus, part of claimant’s job responsibilities required community interaction on public streets while on duty. (Tr. 18-19). Moreover, her job duties did not end when she left her interior office space, but were ongoing throughout her shift, and were performed in locations remote from that interior work space.

We disagree with the dissent's conclusion that the "going and coming" rule applies and the employer's assertion that our finding regarding the "in the course of" prong amounts to a "police officer exception" to the "going and coming" rule. *See Walker v. SAIF*, 28 Or App 127 (1977) (rejecting "a so-called 'police officer exception' to the going and coming rule"). The "going and coming" rule provides that injuries sustained while going to and coming from work are generally not in the course of employment. *See Krushwitz*, 323 Or at 526 ("injuries sustained while an employee is traveling to or from work do not occur in the course of employment and, consequently, are not compensable").²

"The reason for the going and coming rule is that 'the relationship of employer and employee is ordinarily suspended from the time the employee leaves his work to go home until he resumes his work, since the employee, during the time that he is going to or coming from work, is rendering no service for the employer.'" *Id.*

Here, claimant was not injured while going to or coming from work. Rather, she was injured while on duty and still required to perform her job duties. Claimant's "work space" was not limited to the office space that she occupied for the majority of her workdays, but included numerous other areas, including the location at which she was injured. Finally, given claimant's community policing responsibilities and other police officer functions, both of which she had performed on other walks to the coffee shop, we cannot conclude that claimant "render[ed] no service for the employer" on these walks. *See id.* Accordingly, the "going and coming" rule and cases cited by the employer and the dissent are inapposite.

Contrary to the dissent's position, it is not dispositive that claimant was not performing a specific job task at the moment that she was struck by the motor vehicle. Rather, the proper inquiry is whether she was injured while within the period of employment, at a place where she reasonably was expected to be, and while reasonably fulfilling the duties of her employment or doing something reasonably incidental to it. *Hayes*, 325 Or at 598. The record establishes all three elements have been satisfied. Specifically, it is undisputed that claimant was injured during her work shift, while on a routine walk to a coffee shop (of which

² We note that in *Legacy Health Systems v. Noble*, 232 Or App 93, 99 (2009), the court observed that, for "purposes of the parking lot rule" exception to the "going and coming" rule, there was no reason to distinguish "between a worker's injury while going to or coming from work at the beginning or end of the work day, on the one hand, and an injury incurred while going to or coming from lunch, on the other."

her employer was aware and consented to), and during which she was required to fulfill her employment duties, including community policing and other police officer functions that she performed in the past and was ready to perform at the time she was injured. Under such circumstances, we are persuaded that she was injured “in the course of” employment.

We also disagree with the employer’s assertion that *Halsey Shedd RFPD v. Leopard*, 180 Or App 332 (2002) mandates a finding that claimant was not injured “in the course of” employment. In *Leopard*, the claimant, an on-call volunteer firefighter, was injured walking in his driveway (and carrying a child) on his way to church. Although the claimant was only “on-call,” the court found that there was a sufficient time, place, and circumstance connection such that the injury occurred “in the course of” employment where the claimant was walking towards a fire district vehicle and was checking a work pager when injured. *Id.* at 337-38. In doing so, the court noted that “the time, place, and circumstances also had a *significant* non-work component.” 180 Or App at 338 (emphasis added). Specifically, the “claimant was primarily engaged in the personal activity of going to church, and many of the circumstantial facts involved (*e.g.*, the decision whether and when to go to church, carrying [a] child as he did so, the composition of the driveway, etc.) were not employment related at all.” *Id.* Nevertheless, despite those *significant* non-work components, the court concluded that the claimant’s injury occurred “in the course of” employment.

Here, the “in the course of” prong is stronger than that in *Leopard*. Unlike the claimant in *Leopard*, claimant was neither on “stand-by” duty, nor “on-call.” To the contrary, she was *on duty*, and expected to handle her police duties during business hours, including the time at which she was injured. (Tr. 14-20). Moreover, she had previously performed a number of specified police duties during previous walks to the same coffee shop. (*Id.*) Thus, even though the time, place and circumstances of claimant’s injury may have had some personal component (getting a cup of coffee), they also had a significant work component (claimant was on duty, in a place where she reasonably was expected to be, available by cell phone, and expected to perform all police officer functions as she had in the past on similar walks). Under such circumstances, as in *Leopard*, we find that claimant was injured “in the course of” employment. *See Leopard*, 180 Or App at 337-38 (injury occurred “in the course of” employment even where the time, place, and circumstance connection to employment was “minimal” and had a “significant non-work component”).

We also disagree with the employer's and the dissent's assertion that *Patty Perkins*, 56 Van Natta 2173 (2004), *aff'd without opinion*, 199 Or App 417 (2005), requires a different outcome. There, in finding the claim noncompensable, we reasoned that: (1) the claimant was on a break at the time of her injury; (2) she was "coming from" work and en route to a tea house for tea and a snack; and (3) her activity of going to the tea house was not incidental to a work activity. Here, as set forth above, we have determined that: (1) claimant was not "on a break" at the time of her injury, but rather was on duty and responsible for performing all police officer functions; (2) she was not "coming from" work, but in an area (and during a time) where she had previously performed numerous work assignments; and (3) her actions bore some reasonable relationship to her employment and were expressly or impliedly allowed by the employer (*see Hayes*, 325 Or at 598-99).

In other words, we disagree with the premise of the dissent, namely that claimant was injured "away from her workplace" or that she was injured on a "coffee break." It is undisputed that claimant's "work place" was not limited to just an office space in a building; her job descriptions and duties as a police officer establish a much broader work area. (*See Exs. 1, 3; Tr. 5-8, 18-19*). Moreover, claimant was required to perform police duties while walking to the coffee shop and she was ready (and expected) to perform them at the time that she was injured. (*Tr. 18-19*).

In sum, for the foregoing reasons, we conclude that claimant was injured "in the course of" employment.

Next, we address whether claimant's injury "arose out of" employment. A worker's injury is deemed to "arise out of" employment if the risk of the injury results from the nature of the work or when it originates from some risk to which the work environment exposes the worker. *Hayes*, 325 Or at 601. In other words, an injury "arises out of" employment where there exists "a causal link between the occurrence of the injury and a risk associated with [the] employment." *Gilmore*, 318 Or at 366.

Here, we find that claimant's risk of being struck by a motor vehicle as she was crossing an intersection while on duty as a police officer resulted from the nature of her work or originated from a risk to which her work environment exposed her. *See Hayes*, 325 Or at 601. As discussed above, claimant's job duties required that she engage in community policing, which in turn required interacting with people on the streets to discuss public safety issues. (*Tr. 18-19*). It is undisputed that on previous walks to get coffee while on duty, claimant had

engaged community members in such discussions. (*Id.*) On such walks, she also had responded to a traffic accident in the same intersection where she was injured, escorted a fearful woman to an office, and managed crowd control after a parked vehicle caught fire. (Tr. 18). While on duty and walking to the coffee shop, claimant was expected and required to perform all of the aforementioned tasks, including that of community policing. Thus, there is nothing “wholly speculative” about our finding that claimant was required and ready to perform all job-related duties when she was injured. Although claimant was not performing a discrete task at the moment she was injured, it does not follow that she was not working while injured, or that her work environment, which included the street and intersection where she was injured, did not expose her to the risk of being struck by a vehicle.

We disagree with the dissent that *Leopard* supports a finding that claimant’s injury did not “arise out of” employment. In *Leopard*, the court determined that the claimant’s injury did not “arise out of” employment because the risk of injury neither “inhered in the work environment” nor was “associated with the nature of [the] claimant’s work as a volunteer firefighter.” 180 Or App at 341. Essential to that determination was the court’s finding that the injury was “an off-premises injury and that the premises involved was [the] claimant’s own driveway.” 180 Or App at 341. The court emphasized that the claimant’s injury was traceable to “slipping and falling on dirt and gravel[, but] the dirt and gravel was in [the] claimant’s own driveway. The risk thus was not one that can be said to have inhered in the work environment.” *Id.*

Here, claimant was not injured on her own premises. Rather, she was injured on a public street, an area where she performed required work duties. Thus, her injury may not fairly be characterized as an “off-premises injury” or an injury that occurred on her own premises.

Additionally, in *Leopard*, the court noted that the claimant routinely made the walk across his own driveway to go to church when not on “standby duty.” *Id.* at 339. Moreover, the claimant acknowledged that the act of reaching for his work pager “had nothing to do with his fall.” *Id.* Accordingly, the court concluded that the risk of slipping on dirt and gravel in his own driveway was not a risk “‘distinctly associated’ with being a firefighter * * * [but] a risk that existed whenever [the] claimant walked from his driveway, for whatever reason he might choose to do so.” *Id.* at 340.

The instant facts are not analogous. To begin, there is no evidence that claimant walked from her work space to the coffee shop on her days off or when not working. To the contrary, this was a walk routinely made while working and during which she performed required job duties. Moreover, performing police officer functions on public streets was a required duty of her job. Accordingly, *Leopard* does not support a finding that the injury here did not “arise out of” employment.³

Finally, we disagree with the dissent’s characterization of claimant’s walk to the coffee shop as a “personal decision to take a ‘break’ from her work activities.” As set forth above, claimant’s job duties and responsibilities involved much more than working in an enclosed office space. Specifically, it is unrebutted that claimant used her walks to the coffee shop to fulfill her community policing obligations, as well as to perform other police officer duties. (*See, e.g.*, Tr. 14-20). Thus, claimant’s decision to stop performing a particular job task in the office, while remaining on duty and responsible for performing other job duties while on her walk to the coffee shop, is not accurately characterized as taking a “break” from her work activities.

Under these circumstances, we find that the risk of injury by motor vehicle in a busy city street, which claimant was reasonably expected to cross in furtherance of her job duties, resulted from the nature of her particular employment situation and was a risk to which her work environment exposed her. Therefore, her injury “arose out of” employment. *Hayes*, 325 Or at 601-02.

In sum, we conclude that claimant has established, to some degree, each element of the work-connection test. Moreover, “the combination of those elements demonstrates that ‘the causal connection between the injury and the employment is sufficient to warrant compensation.’” *Sisco v. Quicker Recovery*, 218 Or App 376, 392 (2008) (quoting *Hayes*, 325 Or at 597). Consequently, we affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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

³ In *Leopard*, the claimant was injured while walking across dirt and gravel in his own driveway to a fire vehicle on the “same route that [the] claimant would have followed had he walked to church * * *.” 180 Or App at 339. Unlike *Leopard*, the record here does not support that claimant would have walked the path between her office space and the coffee shop in the absence of her working on the date of injury.

attorney's services on review is \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

Finally, 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. See ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated February 23, 2009 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, payable 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.

Entered at Salem, Oregon on January 25, 2010

Member Langer dissenting.

The majority concludes that claimant's injury "arose out of" and occurred "in the course of" employment. I respectfully disagree.

As set forth in the majority opinion, an injury occurs "in the course of" employment if it takes place within the period of employment, at a place where a worker reasonably may be expected to be, and while the worker reasonably is fulfilling the duties of the employment or is doing something reasonably incidental to it. *Fred Meyer Inc. v. Hayes*, 325 Or 592, 598 (1997). "Reasonably incidental to" employment includes activities that are personal in nature, so long as the conduct bears some reasonable relationship to the employment and is expressly or impliedly allowed by the employer. *Id.* at 598-99.

Although the employer may have allowed claimant to leave her office to buy coffee, the record does not establish that her coffee trip bore a "reasonable relationship to [her] employment." See *id.* Claimant conceded that there was no work purpose for the excursion; rather, she left work solely for the personal purpose of getting a cup of coffee. (Tr. 24-25, 31). She also acknowledged that

her particular work duties were performed in an office “the vast majority of the time,” and that she did not regularly leave the office “as part of her job duties.” (Tr. 21-22). Under such circumstances, I find that claimant has not established an employment relationship between her personal coffee trip and her daily work activities.

These same facts also trigger the “going and coming” rule and establish that the injury did not occur “in the course of” employment. *See Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 526 (1996) (“injuries sustained while an employee is traveling to or from work do not occur in the course of employment and, consequently, are not compensable”); *Patty Perkins*, 56 Van Natta 2173 (2004), *aff’d without opinion*, 199 Or App 417 (2005) (the claimant’s injury came within the “going and coming rule” and did not occur “in the course of” employment were the injury occurred approximately two blocks from the claimant’s work place and not within her normal “ingress” or “egress” from work, and the record did not establish that the claimant’s activity of going to get tea and a snack was incidental to “primary” work activity).⁴ Here, claimant was injured while traveling from her office to get a cup of coffee at a shop located one block from her work premises. (Tr. 24-25). The employer exercised no control over the area of injury, and claimant’s trip was undertaken only because she wanted a cup of coffee; there was no business or work-related reason for the trip. (*Id.*)

I disagree with the majority’s conclusion that claimant’s “community policing” obligations transformed this personal coffee trip into a work activity or otherwise precluded application of the “going and coming” rule. Claimant conceded that she did not make the trip to perform any “community policing” tasks or other job duties. (Tr. 24-25). That claimant may have engaged in such job tasks on *previous occasions* does not mean that she was performing any job-related

⁴ Relying on *Cheryl L. Hulse*, 60 Van Natta 2627 (2008), claimant argues that the going and coming rule does not apply here, because claimant was not on an “extended” break. In *Hulse*, we concluded that the “going and coming” rule did not apply, because the claimant never left the work premises. 60 Van Natta at 2630, n 2, 3. We did not base the applicability of the going and coming rule on the duration of the break. Accordingly, *Hulse* is inapposite. Moreover, the “going and coming” rule and its exceptions apply to injuries employees sustain while going to or coming from lunch or other breaks, whether paid or unpaid. *See Legacy Health Systems v. Noble*, 232 Or App 93 (2009) (the claimant was injured while going to the credit union on a paid break; court agreed that “going and coming” rule applied, but because the injury occurred where the employer had some control, the “parking lot” exception also applied); *JAK Pizza, Inc.-Domino’s v. Gibson*, 211 Or App 203, 206 (2007) (where the claimant chose to go across the street to buy his water at the store in order to avoid overextending his lunch break, the court noted that an unpaid break during which an employee leaves the employer’s premises is generally noncompensable under the “going and coming” rule).

duties on *this occasion*. Indeed, she acknowledged that she performed no police duties while going to get a cup of coffee on the date of injury, and that her trip was not motivated by such duties. (*Id.*; *see also* Tr. 31).

Accordingly, in my opinion, claimant was traveling from work on a personal mission when injured and, consequently, her injury did not occur “in the course of” employment. *See Krushwitz*, 323 Or at 526.

Alternatively, even if I agreed with the majority that, by virtue of claimant’s “community policing” duties, she was rendering a service to the employer at the time of injury, I disagree that such a work component was significant. Rather, claimant was engaged in the personal activity of going to get coffee and was walking across the street only as an incident to that personal activity. In other words, “but for” her decision to pursue that nonwork activity, claimant would not have had to cross the street when she did. Her activity at the time of injury, therefore, is most accurately characterized as significantly personal in nature, with an incidental connection to work. *See, e.g., Halsey Shedd RFPD v. Leopard*, 180 Or App 332, 338-39 (2002). Thus, even conceding some circumstantial connection to work, as in *Leopard*, I do not find that connection to be a strong one.

However, even if the “in the course” of prong was met to some degree, I still would not find that claimant met her burden of establishing a causal connection between the injury and work. In that regard, I disagree with the majority that the “arising out of” prong of the work-connection test was satisfied to any degree. I reason as follows.

The “arising out of” prong of the compensability test requires that a causal link exists between the worker’s injury and her employment. *Krushwitz*, 323 Or at 525-26; *Norpac Foods Inc. v. Gilmore*, 318 Or 363, 366 (1994). Such risks are categorized as employment-related, personal, or neutral. *Phil A. Livesley, Co. v. Russ*, 396 Or 25, 29-30 (1983). “Employment-related” risks are “those that are inherent to the claimant’s job and that either produce injury while the claimant is engaged in his or her usual employment or that became manifest later in the form of occupational diseases.” *SAIF v. Marin*, 139 Or App 518, 522, *rev den*, 323 Or 535 (1996). “Personal” risks have “origins of harm so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment.” 1 *Larson’s Workers’ Compensation Law* § 7.20, 3-13 (rebound ed 1997). “Neutral” risks are compensable “if the conditions of employment put claimant in a position to be injured.” *Panpat v. Owens-Brockway Glass Container, Inc.*, 334 Or 342, 349-50 (2002).

The majority finds that claimant's injury "arose out of" employment because she: (1) was required to "engage in community policing" and other police officer functions during her walks to the coffee shop; and (2) had performed such tasks on previous walks. The majority makes this finding despite its acknowledgment that claimant was not injured as a result of performing any job duties. Indeed, claimant expressly acknowledged that none of the purported "employment duties * * * put [her] in a position to get injured when [she was] hit by [the] motor vehicle." (Tr. 31). Thus, contrary to the implications of the majority, claimant's job did not mandate that she walk to the coffee shop to "engage in community policing." Rather, she walked to the coffee shop only because she "wanted a cup of coffee." (*Id.*) The anticipation that she could have been called upon to perform a job-related duty during the walk on the date of injury is wholly speculative and, consequently, irrelevant.

In analyzing the "arising out of" prong, I find *Leopard* instructive. There, the claimant was on-duty and "on call" as a firefighter and received a page on the employer-provided pager, which he was required to wear, when he slipped and fell on his driveway while walking to the fire district vehicle on his way to church. 180 Or App at 337. The claimant acknowledged that the act of reaching for his pager had nothing to do with his fall. *Id.* at 339. Moreover, the route that he took to the fire district vehicle was not distinctively different than the route he would have taken while walking to church on any other day. *Id.* The court found that the risk that the claimant's foot would slip on the dirt and gravel in his own driveway was not inherent in the nature of his work as a firefighter because it was "a risk that existed whenever [he] walked from his house across his driveway, for whatever reason he might choose to do so." *Id.* The court further found that the claimant's injury was traceable to the ordinary risk of slipping and falling on dirt and gravel in his own driveway, not inherent to his work environment. *Id.* at 340. Thus, the court concluded that the claimant's injury did not "arise out of" employment. *Id.*

Here, similar to *Leopard*, claimant's risk of injury from being struck by a motor vehicle while crossing a public street for *personal reasons* was a risk that existed whenever she crossed the street. Thus, I would conclude that claimant's risk of injury was neither an "employment-related" risk (inherent to her job as a police lieutenant while engaged in her usual employment), nor a "neutral" risk (inherent in her work environment). *Id.* at 339-40. Instead, I would find that the risk of injury (*i.e.*, claimant being struck by a motor vehicle while crossing a public street to buy coffee) was so clearly personal that it could not possibly be attributable to her employment.

In sum, I cannot conclude that claimant's injury "arose out of" employment; to the contrary, it "arose out of" claimant's personal desire to get a cup of coffee. (*See id.*) In other words, the risk of claimant being struck by the motor vehicle on that day was not a risk that resulted either from the nature of her work or a risk to which her work environment exposed her. *See Hayes*, 325 Or at 601. Rather, the risk resulted from claimant's personal decision to take a "break" from her work activities and get a cup of coffee. (*See Tr. 12*). In the absence of a "causal link between the occurrence of the injury and a risk associated with [claimant's] employment," I conclude that the injury did not arise out of employment. Therefore, even assuming the "in the course of" prong is met to some degree, claimant's injury would not be compensable. *See Krushwitz*, 323 Or at 531 (to meet the unitary work-connection test, an injury must, to some degree meet both parts); *Gilmore*, 318 Or at 366, 368.

Accordingly, for the reasons expressed herein, I conclude that the relationship between the injury and claimant's employment is insufficient to establish compensability. Because the majority concludes otherwise, I respectfully dissent.