In the Matter of the Compensation of
ELENA MENDOZA, Claimant
WCB Case No. 10-03257
ORDER ON REVIEW
Gayle A Shields, Claimant Attorneys
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) upheld the insurer's denial of claimant's injury claim for low back conditions; and (2) declined to assess penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are course and scope of employment, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant was a "team leader" for the employer, which provided cleaning services for department stores.[1] She and her fellow employees were paid bimonthly. At 3:00 p.m. on the 3rd and 23rd of each month, the employer mailed the checks from its office near Tacoma, Washington to employees in seven states, including 21 locations between Portland and Medford. (Tr. 40).

Of the Portland-area crews, six or seven of the locations routinely had one or more team leaders drive to Tacoma to pick up checks, and then take them back to Portland employees, who waited at a pre-arranged site. Additionally, the district manager would sometimes drive the checks to the Portland area for distribution to the workers. (Tr. 40, 49, 50).

Claimant preferred to receive her check in this manner because she needed the money right away, and could not wait for the mail delivery.[2] Ms. Guillen, the office manager, stated that, although she did not encourage it, if local (including Portland) employees wanted to pick up their checks, they would have to either call her or be at the Tacoma office by 3:00 p.m. Otherwise, the checks would be mailed. (Tr. 40).

On December 3, 2008, a team leader from a different store contacted claimant to inform her that he would be unable to go to Tacoma for the checks that day, and asked her to take his place. (Tr. 9). Claimant agreed to go, and traveled

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[1] A "team leader" was part of a three-person crew that was assigned to clean a particular store. (Tr. 8-9).

[2] Checks for each crew were mailed to the team leader, who would then distribute them to the individual team members.

there with another employee in that employee's truck. (Tr. 10). As they neared Tacoma, they were involved in a motor vehicle accident, in which claimant sustained injuries. (Tr. 11).

Claimant filed an injury claim for low back conditions, which the employer denied. (Ex. 15). Claimant requested a hearing.

The ALJ upheld the employer's denial, finding that claimant's injuries did not arise out of and in the course of her employment. On review, claimant argues that she has satisfied both prongs of the "work connection" analysis. She also contends that her injury is compensable under the "special errand" theory. Based on the following reasoning, we agree with the ALJ's decision.

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 Rests.*, 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.

In support of her claim, claimant cites *Carolyn G. McDermed*, 62 Van Natta 187 (2010). We find that case distinguishable.

In *McDermed*, the claimant was a police officer. As part of her workday, and with her employer's consent, she routinely walked approximately one block from her office to get a cup of coffee. During that "coffee break" period, the claimant was considered on duty, and was expected to respond to all calls and to return to the office if needed.[3] One day, while crossing the street to go to the coffee shop, the claimant was struck by a car, suffering multiple injuries.

[3] The claimant had several times performed police duties during this break period; *e.g.*, she responded to and rendered aid for a motor vehicle accident, and performed crowd control after a parked vehicle caught on fire. *McDermed*, 62 Van Natta at 188. During her walks to the coffee shop, the claimant was also able to implement the employer's "community policy" initiative, which stressed police interaction with people on the streets in order to forge a better relationship between the public and law enforcement. *Id*. at 18.

We concluded that the claimant's injuries occurred "in the course of" her employment because: (1) they occurred during her period of employment; (2) at a place where she was reasonably expected to be (her employer knew of, and consented to, her coffee break); and (3) while reasonably fulfilling the duties of her employment or something reasonably incidental to it. *Id*. at 192.

Here, unlike the claimant in *McDermed*, claimant was not "on duty" when she drove to the employer's office near Tacoma. She was at home, after her work shift had ended, when she was asked by another team leader to go pick up the checks. Thus, she was off work, not being paid, and was free to use her time as she wished.

While we acknowledge that the employer permitted team leaders to pick up the paychecks in person, the record does not establish that it was either required or encouraged. (Tr. 40). The employer received checks from its payroll processer on "check date" day, processed them, and then mailed them out that same day by 3:00 p.m. This was its normal business practice, to which an exception was made if employees, for personal reasons, did not want to wait for the mailed checks. (*Id*.)

Moreover, claimant's drive to Tacoma was not reasonably incidental to her employment. In contrast to *McDermed*, claimant's activity provided no benefit to her employer. Here, claimant's work duties involved cleaning department stores, something she could do only on the actual premises. As noted above, claimant was neither required nor "expected" to pick up paychecks as a "team leader."

Accordingly, based on the aforementioned reasoning, we are not persuaded that claimant's injury occurred in the course of her employment.[4] Thus, we affirm.

ORDER

The ALJ's order dated January 25, 2011 is affirmed.

Entered at Salem, Oregon on August 10, 2011

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[4] We need not discuss the "arising out of" prong of the work-connection test, because both prongs must be satisfied to some degree, and claimant has not proven that her injuries occurred "in the course of" her employment. *Hayes*, 325 Or at 596. Also, the record does not support claimant's contention that she was on a "special errand" for the employer. The "special errand" exception to the "going and coming" rule applies where a worker sustains an injury off the employer's premises, while the worker was proceeding to perform, or while proceeding from, the performance of a special task or mission for the employer. *See Krushwitz*, 323 Or at 527. For the reasons discussed above, we conclude that claimant was on a "personal" mission, which was neither taken at her employer's request nor for her employer's benefit.