

In the Matter of the Compensation of
MARY S. SANDBERG, Claimant

WCB Case No. 07-02441

ORDER ON REMAND

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Reviewing Panel: Members Weddell, Langer, and Herman.

This matter is before the Board on remand from the Court of Appeals. *Sandberg v. J.C. Penney Co. Inc.*, 243 Or App 342 (2011). The court has reversed our order, *Mary S. Sandberg*, 60 Van Natta 2602 (2008), which affirmed an Administrative Law Judge's (ALJ's) order upholding the self-insured employer's denial of claimant's injury claim for a right arm condition. In reaching our conclusion, we found that claimant's injury, sustained when she tripped over her dog while walking from her home to her garage to perform a work task, did not "arise out of" her employment. Reasoning that during the times that claimant worked at her home, her home was the "employer's premises," the court determined that the risk of injury resulted from her work environment. Consequently, the court reversed our decision and remanded for reconsideration of whether claimant's injury occurred in the course of her employment. Having received the parties' supplemental briefs, we proceed with our reconsideration.

FINDINGS OF FACT

We adopt the "Findings of Fact" as set forth in our initial order. We provide the following summary of claimant's employment relationship and the circumstances surrounding her injury.

Claimant worked for the employer as a custom decorator, selling window treatments, upholstery, bedding and pillows. (Tr. 7). She did not have a set work schedule, often working more than 40-hours per week. (Tr. 15, 19). She did not always work on the same days per week, and worked on weekends. (*Id.*)

Claimant worked in the employer's studio one day per week. (Tr. 8). On other days, she was usually "out on appointments" with clients. (Tr. 9). She spent the majority of her working time traveling to and from her appointments and meeting with customers in their homes to sell the decorating products. (Tr. 7-8). Also, claimant often worked at home, sometimes on the weekends, to prepare bids

and estimates and update her pricing materials. (Tr. 16, 20-21). At times, when working on bids in her home, she had to retrieve fabric collections or bid work-up books from her van and bring them into the house in order to have all the necessary information to complete a bid. (Tr. 21). The employer was aware of, or acquiesced to, claimant working at home and performing these activities. (Tr. 22, 43, 55).

The employer required claimant to have all current fabric samples that were on sale in her van when meeting with customers. (Tr. 10-11, 27). In addition, she kept hard goods for use in selling blinds and shades, pricing books, and bid work-up books in her van. (Tr. 10). When a group of fabrics went off sale, claimant was required to remove that fabric collection from the vehicle, and replace it with the new sale collection. The process of “switching-out” fabrics occurred on the weekends because sales ended on Saturdays, and claimant had to be ready with the new products in her van for appointments on Sundays or Mondays. (Tr. 16, 23).

The employer did not allow claimant to store the excess products at its studio. Claimant could store those products at home, or any other place that would keep them safe and dry. (Tr. 12, 35-36). Claimant chose to store such items at her home garage, which was separate from her house. (Tr. 12; Ex. A-1). The manner in which fabrics were changed was entirely up to claimant. (Tr. 36). The employer was aware that claimant would be “switching out” fabrics at her home. (Tr. 44).

On the day of her injury, a Sunday, claimant needed to remove “old” fabrics from her van and replace them with fabrics for a new sale that was beginning the next day, Monday. The new fabrics were stored in her garage. (Tr. 23, 41). On her way out to the garage to change the fabrics, claimant stepped down from the back door of her house onto a landing. (Tr. 24; Ex. A-3). As her foot came down, she “felt something move.” (Tr. 24). Noticing that her dog was underfoot, she shifted to her other foot, lost her balance and fell, fracturing her right wrist. (*Id.*; Ex. 3). Exiting through the back door was claimant’s usual route to reach the garage to change fabrics for her work. (Tr. 24). When injured, claimant’s only purpose for walking out the back door to the garage was to “switch-out” fabrics for her appointment the next day. (*Id.*)

The employer had no ownership interest in claimant’s home or her dog. (Tr. 35).

CONCLUSIONS OF LAW AND OPINION

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 a causal link between the worker’s injury and the employment. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997). The requirement that the injury occur “in the course of” employment concerns the time, place, and circumstances of the injury. *Id.* Both prongs of the work-connection test must be satisfied to some degree; neither is dispositive. *Id.* The work-connection test may be satisfied if the factors supporting one prong of the statutory test are weak while factors supporting the other prong are strong. *Id.* at 596-97.

As set forth above, in reversing our prior order, the court held that claimant’s injury “arose out of” employment because the risk of her injury originated from a risk to which the work environment exposed her.¹ *Sandberg*, 243 Or App at 350. The court first explained that “claimant regularly worked at her home, and she did so as a condition of her employment. During those times, her home was her ‘employer’s premises.’” *Id.* at 349-50 (citing *SAIF v. Scardi*, 218 Or App 403, 409 n 1, *rev den*, 345 Or 175 (2008) (where care provider regularly worked in client’s home, client’s home was “employer’s premises.”)). It then reasoned that her injury resulted from a risk of her work environment because she “was walking to her garage for the sole purpose of performing a work task,” and “[s]he fell while moving about an area in which she had to move about in order to perform the work task, given the conditions of her employment.” *Id.* at 350. The court explained that, although the employer may not have had control over claimant’s dog, it had control over whether claimant worked away from the studio, and “[i]f as a condition of employment, an employer exposes workers to risks outside of the employer’s control, injuries resulting from the risks can be compensable.” *Id.* at 350-51. The court reasoned:

“because employer did not provide space for claimant to perform all of her work tasks, she was required—as a condition of her employment and for the benefit of her employer—to work in her home and garage. Thus, those areas constitute claimant’s work environment when she

¹ “A worker’s injury is deemed to ‘arise out of’ employment if the risk of the injury results from the nature of his or her work or when it originates from some risk to which the work environment exposes the worker.” *Griffin v. SAIF*, 210 Or App 469, 473 (2007) (quoting *Hayes*, 325 Or at 601).

is working, and injuries suffered as a result of the risks of those environments, encountered when claimant is working, arise out of her employment. If claimant tripped over a dog and injured herself while meeting with a customer in the customer's home, her injury would arise out of her employment. The same is true here because claimant was where she was, doing what she was, because of the requirements of her employment." *Id.* at 352.

Thus, central to the court's conclusion that claimant's injury "arose out of" employment were its determinations that claimant: (1) was injured "while moving about an area in which she had to move about in order to perform the work task, given the conditions of her employment"; (2) was, at the time of injury, "where she was, doing what she was, because of the requirements of her employment"; and (3) suffered her injury as a result of a risk encountered when she was working in her "work environment," *i.e.*, her home and garage.² *Id.* at 350, 352.

Based on those determinations, we also conclude that claimant's injury occurred "in the course of" employment.³ "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.

As set forth above, the court has determined that claimant's injury "arose out of" employment, in part, on its conclusion that, based on the conditions of her employment, claimant's "work environment when she [was] working" was her "home and garage," and that she was injured "where she was, doing what she was, because of the requirements of her employment." *Sandberg*, 243 Or App at 352. Consistent with that reasoning, we also conclude that claimant was injured within

² We do not agree with the employer's argument that the court merely determined that the risk of claimant's injury was "legally capable" of arising out of her employment. The court expressly held that claimant's injury "arose out of her employment," *because* she "was walking to her garage for the sole purpose of performing a work task" and fell "while moving in an area in which she had to move about in order to perform the work task, given the conditions of her employment." *Id.* at 350.

³ Because the "arising out of" prong has been strongly satisfied, claimant needs to provide only minimal evidence that her injury occurred "in the course of" employment to meet the unitary work-connection test. *See Hayes*, 325 Or at 596; *Jacob Ybanez*, 55 Van Natta 372 (2003); *accord McTaggart v. Time Warner Cable*, 170 Or App 491, 504 (2000).

the period of her employment, at a place where she reasonably was expected to be, and while she reasonably was fulfilling the duties of the employment or doing something reasonably incidental to it. *See Hayes*, 325 Or at 598.

As discussed by the court, the record contains undisputed evidence that claimant regularly performed some work tasks, such as preparing bids and other paperwork, in her home. (Tr. 16, 20-21). Thus, as a condition of her employment, claimant's "home," including her garage, was her work environment. At the time of injury, her sole reason for going from her house to the garage was to perform the required exchange of fabrics in preparation for appointments the next day. (Tr. 23, 24). She was injured while exiting the house through her normal route of egress used when going to the garage. (Tr. 24). It was common for claimant to work irregular hours, including weekends, and the employer was aware of that practice. Under these circumstances, we conclude that claimant's injury at least minimally satisfied the "in the course of" prong of the work-connection test. While the connection may be minimal, she was injured within the period of her employment, at a place where she was reasonably expected to be, and while she was reasonably fulfilling the duties of her employment.⁴ *See Hayes*, 325 Or at 596; *see, e.g., Ybanez*, 55 Van Natta at 374.

Moreover, our determination is supported by *Halsey Shedd RFPD v. Leopard*, 180 Or App 332 (2002). 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

⁴ The employer argues that claimant was injured while "transitioning from her home life to her work life." It contends that, while claimant exited the back door of her home with the intent to traverse the intervening walkway and work in her garage, the only work purpose served by the trip was getting her from her home to the "employer's workplace." The employer notes that on the day of injury, claimant had not made any calls or prepared bids inside her home, and she was injured before she reached the "employer's workplace" (*i.e.*, the garage) to begin working. Under these circumstances, the employer concludes that the "going and coming rule" removed claimant from within the course of employment. We disagree with the employer's reasoning.

Here, claimant was not injured while going to or coming from work. As discussed above, claimant's "work premises" were not limited to the garage, but included her entire residence. The fact that claimant had not performed a specific task inside the home on the day of injury does not change the fact that when working, her *home and garage* were the "employer's premises." Thus, her "work space" was not limited to the garage, but also included the location at which she was injured. Claimant was on duty when injured and, as we have found, her injury was within the course of her employment because it was reasonably incidental to the performance of her ongoing employment duties for that day. Accordingly, the "going and coming" rule does not apply.

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 acknowledged that “the time, place, and circumstances also had a significant non-work component.” *Id.* at 338. 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 nonwork components, the court concluded that the claimant’s injury occurred “in the course of” employment.

Here, as set forth above, claimant was injured while working and because of the requirements of her employment. *Sandberg*, 243 Or App at 350, 352. Moreover, she was not simultaneously, much less “primarily engaged in [a] personal activity,” when she was injured (*see Leopard*, 180 Or App at 338); rather, she was injured while “walking to the garage for the sole purpose of performing a work task.” *See Sandberg*, 243 Or App at 350. Thus, we find the “in the course of” prong here more strongly satisfied than that in *Leopard*.

In sum, we find that claimant has established a sufficient work connection between her injury and her employment such that her injury is compensable. *See Robinson v. Nabisco, Inc.*, 331 Or 178, 185 (2000). Therefore, we reverse.

When 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(2). Because claimant has prevailed on her denied claim after remand, she is now entitled to attorney fees for her counsel’s services at hearing, at the Board level in the first instance, before the court, and on remand. ORS 656.386(1); ORS 656.382(2); ORS 656.388(1). 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 at hearing, on Board review, before the court, and on remand is \$25,000, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as demonstrated by the record, claimant’s appellate briefs on Board review, before the court, and on remand, claimant’s counsel’s attorney fee submission, and the employer’s objection), the complexity of the issues, the value of the interest involved, the nature of the proceedings, and the risk that claimant’s counsel might go uncompensated.

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; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

Accordingly, on remand, the ALJ's order dated October 29, 2007 is reversed. The self-insured employer's denial is set aside and the claim is remanded to it for processing according to law. For services at hearing, on Board review, before the court, and on remand, claimant's counsel is awarded \$25,000, 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 February 6, 2012

Member Langer dissenting.

I adhere to my concurrence in our initial order that claimant's injury did not occur in the course of her employment. *Mary S. Sandberg*, 60 Van Natta 2602, 2606 (2008) (Member Langer concurring). In response to claimant's argument on remand and the majority's opinion, I offer the following additional reasoning.

Claimant and the majority rely on *Halsey Shedd RFPD v. Leopard*, 180 Or App 332 (2002), as instructive in resolving the "course of employment" issue. In that case, a firefighter was "on duty" and responding to a pager provided by his employer when he slipped and was injured in his driveway. Relying primarily on earlier "on-call" cases, the court concluded that there was "some circumstantial connection to work--enough to characterize the injury as occurring 'in the course' of employment," although the connection was not a strong one.⁵ *Id.* at 337-338; see also *Am. Med. Response v. Gavlik*, 189 Or App 294, 300-01 (2003), *rev den*, 336 Or 376 (2004); *Allen v. SAIF*, 29 Or App 631, 634-35 (1977) (finding on-call employees within the course of their employment). The court needed not address the "going and coming" rule in any of these "on-call" cases.

⁵ The other factors supporting the "course of employment" element were: (1) the claimant was on paid duty; (2) he was walking to a fire district vehicle that his employer required him to use; (3) he had received a page on the employer-provided pager, which he was required to wear while on duty; and (4) to walk to the fire district vehicle, the claimant altered the route that he would have otherwise taken to go to church. 180 Or App at 337.

Here, claimant was not “on-call.” The employer did not require her to work during specific hours. She was not required to be available or in contact with the employer on the day of her injury. Consequently, the conditions of claimant’s employment at the time of her injury differ from the circumstances of the worker who sustains injuries while “on-call,” and neither *Leonard* nor other “on-call” cases are dispositive.

Claimant further relies on the traveling employee rule and argues that her travel from the house to the garage was a condition of her employment and, therefore, her injury is compensable even if she was not actually working when injured. I disagree. The purpose of the traveling employee rule is to provide compensation for injuries resulting from activities necessitated by and reasonably related to the employee’s travel away from the employer’s premises. *Reel v. SAIF*, 303 Or 210, 214-15 (1987); *Slaughter v. SAIF*, 60 Or App 610, 612 (1982). Here, although claimant’s work involved travel at times, she was not injured while traveling away from her work environment, be it the employer’s premises or her own residence. I would conclude that the traveling employee rule does not apply.

Claimant further relies on the court’s discussion of *Jenkins v. Tandy Corp.*, 86 Or App 133, 137, *rev den*, 304 Or 279 (1987). In *Jenkins*, because the employer required and paid for the claimant’s use of his own car at work, the claimant’s travel from the employer’s store to his car was a condition of his employment and the going and coming rule did not apply. Similarly, claimant argues for purposes of the “course of employment” prong that the going and coming rule does not apply to her injury, because her travel from the house to the garage to perform a work task was a condition of her employment.

Jenkins represents the employer-conveyance exception to the going and coming rule, which provides that when the worker is required, as part of employment, to use the worker’s own vehicle on the job, the worker is considered in the course of employment while going to and from work. The rationale for the exception is that the obligations of the job reach out beyond the employer’s premises, compel the employee to submit to hazards that otherwise the employee would have the option of avoiding, and it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer’s purposes. *Heide/Parker v. T.C.I. Inc.*, 264 Or 535, 540 (1973); *Jenkins*, 86 Or App at 137.

The employer conveyance rule has been traditionally applied to injuries associated with the use of employees’ motor vehicles required or compensated for by their employers. The court found this case similar and applied *Jenkins* in

its risk-of-employment analysis. *Sandberg*, 243 Or App at 351-52. Because the employer required claimant to furnish the work premises, claimant's home and garage "constitute claimant's work environment when she is working, and injuries suffered as a result of the risks of those environments, encountered when claimant is working, arise out of her employment." *Id.* at 352. Thus, pursuant to the court's analysis, the principles of the employer conveyance rule would apply in claimant's circumstances if she were injured when she was actually working.

Claimant, however, was not injured when she was working. She was not injured while preparing bids in her house, traveling in her van, switching the samples or performing any other work in her house or garage. Instead, her injury occurred as she was leaving her home (where she had not performed any work) to walk to her garage (where her supplies were stored) to rearrange the fabric samples in preparation for a business appointment the following day. Accordingly, I do not find *Jenkins* and other "employer controlled conveyance" cases helpful to claimant with regard to the "course of employment" element of the work-connection inquiry.

In sum, I believe the going and coming rule applies to claimant's injury claim. As discussed above, on the day of the injury, claimant did not perform any work in her house and, therefore, the house was not her work environment. At the time of her injury, she intended to switch fabric samples in her van. The place of her employment for that task was her garage and van, not her home. After leaving her home, she was on her way to the garage, but had not started working when she tripped over her dog. Although going to the garage was reasonably "incidental" to her employment, that alone does not merit a conclusion that the injury occurred in the course of her employment. Going to or coming from work *always* is incidental to one's employment.

"[T]he test of whether the going and coming rule applies is whether 'the situation * * * [is] the same as in the ordinary case of commuting from office to home' or home to office." *Runyan v. Pickard*, 86 Or App 542, 547, *rev den*, 304 Or 279 (1987) (citing *Heide/Parker*, 264 Or at 541). Here, claimant was in the same situation as an ordinary employee would be if that employee tripped over her dog on her doorsteps when embarking on her commute to her usual place of work outside of her home. Accordingly, consistent with the "going and coming" rule, I would find that any work connection concerning claimant's activities on the day in question had not begun when she tripped over her dog while walking to the garage. Consequently, her injury did not occur in the course of her employment.