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In the Matter of the Compensation of  
**ZACHARY B. SEVERSON, Claimant**  
WCB Case No. 11-04270  
ORDER ON REVIEW  
Kryger et al, Claimant Attorneys  
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Poland's order that upheld the self-insured employer's denial of claimant's nose injury claim. On review, the issue is course and scope of employment. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."<sup>1</sup> We summarize the pertinent facts.

Claimant worked in the employer's warehouse "loading up appliances and furniture into semi-trucks." (Tr. 8). At the time of his employment (the summer of 2011), his job involved significant "downtime." (Tr. 8-9, 24-25). Specifically, when all of the work had been performed on the "scheduled" trucks, claimant (and other employees) frequently remained at the worksite in the event that an unscheduled truck might provide additional work. (*Id.*) Although such unscheduled work was rare, the employer permitted employees to remain on the worksite with pay because it was difficult to retain employees otherwise. (Tr. 25).

During downtime, the employer "le[ft] it open for the guys" to determine how that downtime was filled. (Tr. 24). The break room provided a television set and an "Xbox," and watching television and playing video games was a common way to pass the downtime. (Tr. 9, 24). Employees also played board games or took naps. (Tr. 24).

Early in the summer of 2011, one of the employees asked if he could install a basketball hoop; the employer did not object. (Tr. 24). Playing basketball during downtime was "popular" with the employees and claimant played approximately three or four times during his brief period of employment. (Tr. 19, 22). Supervisors were aware of and participated in the games. (Tr. 13, 22).

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<sup>1</sup> We do not adopt: (1) the final sentence of the penultimate paragraph on page two of the Opinion and Order; or (2) the first full sentence on page three of that order.

On June 29, approximately one to two weeks after claimant started working for the employer, he participated in a “five-on-five” basketball game with other employees during some downtime. (Tr. 9, 13-15, 20-21). Approximately half of the workforce participated in the game, including “some managers.” (Tr. 13). One “manager \* \* \* pulled up her car and popped the trunk and was playing music for [the] basketball players.” (*Id.*) The employees were “on the clock” and being paid while playing in the game. (Tr. 9, 28). During the course of the game, claimant was struck in the nose, resulting in medical services and time lost from work. (Tr. 9-13; Exs. 1-8).

Claimant played in the game on June 29 because it was “fun,” “popular” with the employees, and because he was “waiting for work.” (Tr. 15, 20, 22-23). Claimant did not play in every basketball game while he worked for the employer, but did play whenever he was asked to play in a “full on five-on-five” game. (Tr. 21).

The employer denied claimant’s injury claim. Claimant requested a hearing.

#### CONCLUSIONS OF LAW AND OPINION

In upholding the employer’s denial, the ALJ found that claimant was injured while engaged in a recreational activity primarily for his personal pleasure. *See* ORS 656.005(7)(b)(B). On review, claimant contests that conclusion, arguing that although personal pleasure was *a* reason for playing, the record does not establish that it was his *primary* reason for playing. The employer responds that claimant primarily played the basketball game for personal pleasure and that the game “provided no benefit to his employer.”

Alternatively, the employer argues that claimant’s injury did not “arise out of and in the course of employment.” *See* ORS 656.005(7)(a). Claimant responds that the employer did not raise this issue at hearing, but rather limited its defense of the denial to the statutory exclusion of ORS 656.005(7)(b)(B). In the event that we address the issue, claimant contends that he has satisfied the “unitary work-connection test,” such that his injury is compensable. We affirm the ALJ’s decision, reasoning as follows.

Under ORS 656.005(7)(b)(B), a “[c]ompensable injury” does not include an “[i]njury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities primarily for the worker’s personal pleasure[.]” ORS 656.005(7)(b)(B). In *Roberts v. SAIF*, 341 Or 48 (2006), the Supreme Court explained that this statutory exclusion raises three

questions: (1) whether the worker was engaged in or performing a “recreational or social activity”; (2) whether the worker incurred the injury “while engaging in or performing, or as a result of engaging in or performing,” that activity; and (3) whether the worker engaged in or performed the activity “primarily for the worker’s personal pleasure.” If the answer to all those questions is “yes,” then the worker cannot recover. *Id.* at 52.

Here, there is no dispute concerning the first two prongs of the *Roberts* test: namely, claimant was injured while engaged in (or as result of) a recreational activity (playing basketball). Thus, the parties direct their respective arguments to the third prong: whether claimant engaged in or performed the activity of playing basketball primarily for his personal pleasure.

Because ORS 656.005(7)(b)(B) is an affirmative defense, the employer bears the burden of establishing that claimant played in the basketball game on June 29 primarily for his personal pleasure. *See Washington Group Int’l v. Barela*, 218 Or App 541 (2008); *Donnakay Smith*, 60 Van Natta 2955, 2957 (2008). In *Roberts*, the court explained that a worker may engage in a recreational or social activity for reasons other than personal pleasure, and that our task is to determine whether the worker’s personal pleasure was the principal or fundamental reason for engaging in the activity. In doing so, *Roberts* instructed that we

“should determine both the degree to which a recreational or social activity serves the employer’s work-related interests and the degree to which the worker engaged in the activity for the worker’s personal pleasure. Only if the worker’s personal pleasure was the fundamental or principal reason, in relation to work-related reasons, for engaging in the activity will the resulting injury be noncompensable.” *Roberts*, 341 Or at 56.

Here, there is evidence, as claimant acknowledges, that his personal pleasure was *a* reason for engaging in the activity of playing basketball. Specifically, claimant testified that he liked basketball and that he played the game on the date of injury because it was “fun.” Moreover, claimant’s election to play basketball on the date of injury over other options (*i.e.*, watching television, playing video games, napping, or “floating around) also indicated that personal pleasure motivated his decision to play basketball on that date.

The employer must prove, however, that personal pleasure was the *primary* or fundamental reason why claimant played basketball on the date of injury. *Roberts*, 341 Or at 56. Here, claimant testified that the “main” reason that he played the game on the date of injury because he was “waiting for work” (Tr. 15, 22-23). There is no other testimonial evidence concerning claimant’s reason for playing basketball on the date of injury. The ALJ did not make any credibility determination (either demeanor-based or otherwise) concerning claimant’s testimony. Looking at the record as a whole, we find claimant’s testimony concerning why he primarily played basketball on the date of injury to be credible. *See Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987) (when a potential credibility issue concerns the substance of a witness’s testimony, we are equally qualified to make our own determination of credibility).

Moreover, the record establishes that claimant’s basketball activity significantly served the employer’s work-related interests. Specifically, the employer’s facility manager acknowledged that they paid employees to remain on the worksite during downtime as “a motivation thing” to help in employee retention. (Tr. 25). The employer also provided recreational supplies (television set and an “Xbox”) and voiced no objection to the employees playing basketball, including on the day of injury. (Tr. 9, 24).<sup>2</sup> Under such circumstances, the employer has not satisfied its statutory burden of proving that claimant’s basketball activity was *primarily* for his personal pleasure. *See Roberts*, 341 Or at 56 (the Board should determine the degree to which a recreational or social activity serves the employer’s work-related interests). Accordingly, we find that the employer has not established that claimant’s injury is excluded from compensability under ORS 656.005(7)(b)(B).

Generally, if the employer contended that, although not excluded under ORS 656.005(7)(b)(B), an injury did not arise out of and in the course of employment, we would next address that issue. *See Smith*, 60 Van Natta at 2960. Here, however, claimant contends that this issue was not raised and preserved by the employer, and that the employer first presented that issue on Board review. We need not resolve claimant’s procedural challenge because, even if we considered the employer’s contention, we find the claim compensable. We reason as follows.

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<sup>2</sup> The supervisors participated in the basketball game that caused claimant’s injury, and, on the day of injury, a supervisor provided encouragement to those participating in the basketball game by playing music. (Tr. 13, 22).

A “compensable injury” is an accidental injury\* \* \* arising out of and in the course of employment.” ORS 656.005(7)(a). In determining whether an injury occurs “in the course of” employment, we look at the time, place, and circumstances of the injury. *Robinson v. Nabisco, Inc.*, 331 Or 178, 186 (2000). The “arising out of” prong refers to the causal link—the causal nexus—between the injury and the employment. *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-526 (1996). 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.” *Fred Meyer, Inc. v. Hayes*, 325 Or. 592, 601 (1997). Both prongs of the “unitary work-connection test” must be met to some degree. *See Krushwitz*, 323 Or at 531. The test may be satisfied, even if the factors supporting one prong are weak, if those supporting the other are strong. *Redman Industries, Inc. v. Lang*, 326 Or 32, 35 (1997).

With that framework in mind, we turn to the facts of this dispute. “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. Activities that are personal in nature are “reasonably incidental” to employment “as 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 the clock” and being paid during a routine period of downtime. The injury took place on the employer’s premises during a basketball game that was sanctioned by the employer and involved the participation (and support) of supervisory personnel. Permitting employees to participate in recreational activities during downtime was an incentive provided by the employer to promote employee retention.

Under these circumstances, we find that claimant was injured “within the period of employment, at a place where [he] reasonably [was] expected to be, and while [he] reasonably [was] fulfilling the duties of the employment or [was] doing something reasonably incidental to it.” *Hayes*, 325 Or at 598. Consequently, the time, place, and circumstances of the injury support compensability.

We next determine whether the 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.” *Norpac Foods Inc. v. Gilmore*, 318 Or 363, 366 (1994).

Here, we find that the risk of claimant’s injury “originate[d] from [a] risk to which the work environment expose[d] [him].” *See Hayes*, 325 Or at 601. Specifically, claimant’s work environment consisted of extensive paid downtime, during which the employer facilitated the participation in various recreational activities, including playing basketball. The record establishes that, during claimant’s employment tenure, playing basketball during downtime was “very popular,” and involved the participation of employees and managers. The record further establishes that permitting recreational activities constituted an important part of the work environment created by the employer to attract and retain workers. Thus, claimant’s risk of being injured playing a game of employer-sanctioned basketball while waiting for additional work and being paid originated from a risk to which his work environment exposed him. Consequently, his injury “arose out of” employment.

In sum, based on the aforementioned reasoning, we are persuaded that claimant’s injury is compensable. Consequently, we reverse the ALJ’s order and set aside the employer’s denial.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(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 and on review is \$15,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant’s appellate briefs, and his counsel’s uncontested attorney fee request), the complexity of the issue, the value of the interest involved, and the risk that counsel may 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).

ORDER

The ALJ's order dated December 16, 2011 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$15,500, 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.

Entered at Salem, Oregon on August 3, 2012