

In the Matter of the Compensation of
ROBERT M. COLEMAN, JR., Claimant

WCB Case No. 12-05678

ORDER ON REVIEW

Dolan Griggs LLP, Claimant Attorneys
James B Northrop, SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that upheld the SAIF Corporation's denial of his injury claim. On review, the issue is course and scope of employment.

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

Claimant worked for the employer as a correctional officer. (Tr. 23). His job duties included escorting inmates to and from the hospital and staying with them at the hospital. (Tr. 4-5, 20). On October 12, 2012, claimant was scheduled to work from 9:30 P.M. to 5:30 A.M. The employer called claimant at home about 5:00 P.M. and directed him to report for hospital watch at a local hospital. (Tr. 5-6). Claimant could have driven to the correctional facility, picked up an employer-owned vehicle and then driven to the hospital. (Tr. 24). Instead, he drove directly from his home to the hospital in his personal vehicle. He parked in the hospital parking lot. At about 9:10 P.M., he got out of his car, tried to run to the building and slipped and fell on wet ground/leaves. (Tr. 5-7, 9).

Claimant filed an injury claim. SAIF denied the claim, asserting that the injury did not arise out of and in the course of employment. Claimant requested a hearing.

In upholding SAIF's denial, the ALJ determined that the circumstances of claimant's injury fell within the "going and coming" rule and that the so-called "special errand" exception to that rule did not apply. On review, claimant contends that his injury occurred "in the course of" and "arose out of" his employment. In addition, claimant asserts that the ALJ erred in applying the "going and coming" rule and that, even assuming it does apply, several well-recognized exceptions compel a finding that the claim is compensable. We disagree, and reason as follows.

For an injury to be compensable, it must “arise out of” and occur “in the course of” employment. ORS 656.005(7)(a). The “arising out of” prong requires a causal link between the worker’s injury and his 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. An injury must satisfy both requirements to some degree; neither is dispositive. *Id.*

We turn first to the requirement that the injury occur “in the course of” employment. Injuries sustained while the employee is going to or coming from the place of employment generally do not occur “in the course of” employment. *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 526 (1996). The rationale for the “going and coming” rule is that the employment relationship is ordinarily suspended from the time the employee leaves his work to go home until he resumes his work, since, during the time that he is going to or coming from work, he is not rendering any service for the employer. *Id.*

Claimant contends that he was “in the course of employment” when he was injured. He cites *Tri-Met, Inc. v. Lamb*, 193 Or App 564 (2004), and *Michael D. Razavi*, 65 Van Natta 506 (2013) in support of his contention. However, in *Lamb*, the claimant had not ended her work for the employer when she was injured. 193 Or App at 570. And, in *Razavi*, claimant was injured in the middle of the workday. 65 Van Natta at 508. Here, claimant had not yet started work for the day when he was injured. The injury occurred while he was going to work.

Claimant contends that the “going and coming” rule does not apply because he was subject to the employer’s direction and control when he was injured. He argues that he was not going to his “regular place of work.” Yet, claimant testified that he spent eight out of the ten days before the injury on hospital watch. (Tr. 4). And, he estimated that he went to the hospital directly from home 30 to 40 percent of the time over the course of a year. (Tr. 5).

Consequently, claimant’s job involved routine assignments to local hospitals. Therefore, he was traveling to a regular place of work, thus triggering the application of the “going and coming” rule. “Generally, injuries sustained by employees when going to and coming from their regular places of work are not compensable.” *Jenkins v. Tandy Corp.*, 86 Or App 133, 137, *rev den*, 304 Or 279 (1987).

Claimant also contends that the rule does not apply because he was rendering a service to his employer. He argues that, when he drove directly from home to the hospital, he saved the employer overtime pay that would have accrued

had he driven to the correctional facility to pick up an employer-owned vehicle before driving to the hospital. Yet, the employer's assistant superintendent of security testified that overtime pay was an anticipated cost of operating the prison and was included in the budget. (Tr. 30). We conclude that any service claimant provided by driving his personal car directly to the hospital was insufficient to reinstate the employment relationship that had been suspended when he left work to go home at the end of his prior shift.

Claimant also contends that he was "on duty" or otherwise subject to his employer's "direction and control" when he was injured. We acknowledge that the employer called claimant to direct him to report to the hospital and that he called his employer to report that he had arrived at the hospital. (Tr. 6). The employer's assistant superintendent of security described claimant as a diligent and responsible employee, who was "proactive" in determining his post assignment for the day. (Tr. 25). Yet, claimant's shift did not start until 9:30 P.M. (Tr. 6, 25). He was not paid for his time before the shift started. (Tr. 21, 24).

Thus, the nature of claimant's job involved varying assignments that required communication between claimant and his employer before the start of his shift. That communication did make him subject to the employer's "direction and control" at the time of injury. The employer did not direct claimant to drive his personal vehicle from home to the hospital, did not direct the route he took or where he parked.

Based on the aforementioned reasoning, we conclude that claimant was subject to the "going and coming" rule at the time of the injury. His injury is not compensable unless one of the exceptions to that rule applies.

Claimant contends that the "employer's conveyance" exception and the "special errand" exception apply to his claim. Exceptions to the "going and coming" rule, however, are narrowly applied. *Krushwitz*, 323 Or at 529.

The "employer conveyance" exception provides that, "[w]hen the journey to or from work is made in the employer's conveyance, the journey is in the course of employment, the reason being that the risks of the employment continue throughout the journey." Arthur Larson, 1 *Workers' Compensation Law* §15.00, 15-1 (2007). Professor Larson explained that the employer's act of supplying travel compensation or a vehicle "is evidence of the status of the journey as part of compensated employment." Larson, 1 *Workers' Compensation Law* §15.01[1] at 15-2. The exception does not require that the employer own or drive the vehicle.

In Oregon, most “employer conveyance” cases have involved instances where the employer required the claimant to use his or her personal car for work. The focus of the inquiry is whether the employer was directing where the vehicle should go, or requiring the use of the vehicle. *See William A. Hedger*, 58 Van Natta 1330, 1331 *recons* 58 Van Natta 2382 (2006) (and cases cited therein).¹

Here, the employer did not require claimant to bring his car to work. (Tr. 24). The employer did not pay him for the time he spent driving to and from work. (Tr. 21, 24, 26). And, the record does not establish that claimant received mileage or expense reimbursement.

We acknowledge claimant’s testimony that he used his personal car to avoid incurring overtime expense. (Tr. 35). We also acknowledge the employer’s assistant superintendent’s testimony that overtime pay was an anticipated cost of operating the prison and was included in the budget. (Tr. 30). Nevertheless, we are not persuaded that the employer implicitly or explicitly required claimant, as part of his job, to bring his own car to work. Claimant could have driven to the prison and taken an employer-owned car to the hospital. (Tr. 24-25). Although that alternative could result in overtime, the prison budget anticipated that operational expense. (Tr. 29-30). *Cf. Liberty Northwest Ins. Corp. v. Over*, 107 Or App 30 (1991) (where the claimant carried work tools and equipment in his vehicle, was required to travel between job sites during the day and the employer did not provide transportation, but paid mileage for travel, between job sites, an injury during the morning commute to an off-premises job site was compensable). We conclude that the “employer conveyance” exception to the “going and coming” rule does not apply here.

The “special errand” exception applies when an employee sustains an injury while off the employer’s premises, but while he or she is proceeding to perform, or proceeding from performing, a special task or mission. *Krushwitz*, 323 at 527. The exception is limited to “when *either* the employee was acting in furtherance of the employer’s business at the time of the injury *or* the employer had a right to control the employee’s travel in some respect.” *Id.* at 528 (emphasis in original).

¹ Claimant’s relies on our decision in *Juan A. Renteria*, 60 Van Natta 866 (2008). Yet, in *Renteria*, the claimant was injured after he exited a vehicle owned and used by the employer to transport employees to a work site. Here, claimant was injured after he exited his personal vehicle, rather than a vehicle owned and used by his employer to transport employees. Furthermore, as discussed below, the employer did not require claimant to use his car to work.

Here, claimant was injured while he was going to work. He was not acting in furtherance of the employer's business any more than any other employee driving to work. In addition, we are not persuaded that the employer controlled any aspect of claimant's travel at the time he was injured. Although the nature of claimant's job on hospital watch required the employer to communicate with him about where to report for work, the employer did not direct claimant's route or tell him where to park. Moreover, he was regularly assigned to "hospital watch" at various local hospitals. Therefore, there was nothing special or out of the ordinary about this assignment. Under such circumstances, we conclude that claimant does not come within the "special errand" exception. *See Mona E. Hardman*, 60 Van Natta 3147 (2008) (where the claimant, a substitute teacher, was injured en-route to an assignment, the "special errand" exception did not apply because the nature of claimant's position often involved "last minute" assignments); *cf. Ryan Gibson*, 60 Van Natta 6 (2005) (where the claimant's supervisor directed him to return to work before the end of his break, directed him to take his break at a specific location and the route to take, the "special errand" exception applied when he was injured while returning to work).

Finally, claimant relies on the "traveling employee" rule. We do not agree that claimant was a "traveling employee." We reason as follows.

When an employee is required to travel as a condition of employment, injuries resulting from activities necessitated by the travel can be compensable, even if the employee is not performing a work task at the time of injury. Yet, injuries sustained while driving to and from work normally are not covered, even though it is the work that subjects the worker to the hazard. *State Acc. Ins. Fund v. Reel*, 303 Or 210, 216 (1987). Therefore, in applying the "traveling employee" rule, we must be mindful of the two-prong unitary inquiry: to be compensable, an injury must arise out of and occur in the course of employment. The two prongs of that compensability test are parts of a unitary work connection inquiry that asks whether the relationship between the injury and the employment has a sufficient nexus so that the injury should be deemed compensable. *Hayes*, 325 Or at 596, *Earl R. Holt*, 60 Van Natta 860, 862 (2008).

Here, at the time of his injury, claimant was coming to work. Although part of his job as a hospital escort involved travel for his employer, that did not make his commute to "hospital watch" work related "travel." He was not compensated for the time or expense of his commute. As such, he was not a "traveling employee." *See Kevin G. Robare*, 47 Van Natta 318 (1995) (the claimant, who traveled daily to different construction sites for the employer,

was not a “traveling employee.” His work activities did not involve traveling for the employer and he was not compensated for his travel time); *cf. Elva McBride*, 46 Van Natta 282 (1994) (the claimant qualified as a “traveling employee” where she was dispatched by telephone call to her home every morning to various work sites. She used her own car for work-related travel and received car and mileage allowances in addition to wages).

We conclude that the “going and coming” rule applies without exception. Accordingly, claimant’s injury did not occur “in the course of” employment.

We next address whether claimant’s injury “arose out of” his employment. This prong of the unitary tests addresses whether a causal connection exists between claimant’s injury and a risk connected with his employment. *Krushwitz*, 323 Or at 525-26. “[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.*, 325 Or at 601.

In this context, risks are generally categorized as employment-related risks, which are compensable, personal risks, which are not compensable, or neutral risks, which may or may not be compensable, depending on the situation. *Phil A. Livesley Co. v. Russ*, 246 Or 25, 29-30 (1983). Neutral risks, which have no particular employment or personal character, are compensable only if employment conditions put the worker in a position to be injured by the neutral risk. *Id.* at 30. Thus, the “arising out of” prong is not satisfied unless the cause of claimant’s injury was either “a risk connected with the nature of the work” (*i.e.*, an employment-related risk) or “a risk to which the employment environment exposed claimant.” *Legacy Health Systems v. Noble*, 250 Or App 596, 603 (2012) (citing *Redman Indus., Inc. v. Lang*, 326 Or 32, 36 (1997)); *see also Hayes*, 325 Or 601.

Here, claimant had not begun working when he was injured. The risk of injury from slipping on wet ground/leaves while running from the parking lot to the building entrance, in the rain, was not a risk connected with the nature of his work as a correctional officer. Therefore, the injury is compensable only if it resulted from a “risk to which the work environment exposed claimant.” *Hayes*, 325 Or at 601. There must be some causal connection between the injury and claimant’s work to establish a work-related risk. *See Kuana L. Blackmon*, 64 Van Natta 2336 (2012) (where the claimant twisted her foot and fell while exiting a public bus in front of the employer’s driveway, her claim did not “arise out of” her work in customer service). We find the record insufficient to establish that

claimant's work environment exposed him to a risk of injury in the manner that occurred.² Accordingly, we conclude that claimant's injury did not "arise out of" his employment.

In sum, we are not persuaded that claimant's injury "arose out of" and "in the course of" his employment. Accordingly, his claim is not compensable. Thus, we affirm.

ORDER

The ALJ's order dated March 7, 2013 is affirmed.

Entered at Salem, Oregon on September 9, 2013

² Claimant did not argue that the "parking lot" exception to the "going and coming" rule applies in this case. In any event, the employer did not own or control the property where claimant slipped and fell. *See Maria L. Duran-Angel*, 63 Van Natta 2580 (2011) (injury did not occur "in the course of" employment where the claimant slipped and fell in the parking lot of the building to which she was going to begin her work activities as a cleaning person).