

In the Matter of the Compensation of
RACHEL A. ROMERO, Claimant
WCB Case No. 13-02697
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

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

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

In 2009, claimant was diagnosed with a mild myopathy of unclear etiology. (Ex. 8). Claimant treated with various providers at Oregon Health & Science University's (OHSU) neurology clinic and with her primary care physician, Dr. Smucker.

Claimant developed progressive muscle ache and weakness, making it difficult for her to climb stairs. (Ex. 18). She fell in November 2011. (Exs. 27, 28). She fell again in March 2012, fracturing her right shoulder. (Ex. 29). By November 2012, she was having difficulty getting in and out of a car and putting on her pants. (*Id.*) She described having to consciously lift her leg up while walking. (*Id.*) In March 2013, she developed blurry vision and fatigue after she began taking Prednisone for her condition. (Ex. 30).

On March 20, 2013, claimant was coming to work when she fell on the sidewalk outside the entrance to the employer's facility. (Tr. 9, 11; Ex. 32). About an hour later, she called the neurology clinic to discuss her concern that the Prednisone was making her "very shaky" and causing her to fall. (Tr. 27; Exs. 31, 51-1). She told Dr. Marburger, a neurologist, that she had difficulty lifting her leg/foot while walking and had stumbled and fallen. (Exs. 31, 51-1).

Reasoning that claimant's lower extremity weakness put her at risk for falls, Drs. Marburger and Lou, treating neurologists, concluded that it was highly probable that the March 2013 fall was due to claimant's myopathy. (Exs. 31, 50, 51-1). Dr. Marburger explained that, "[a]ccording to [claimant], she basically stumbled over her own foot and fell." (Ex. 51-1).

Dr. Satayaprasert, another treating neurologist, confirmed weakness in claimant's extremities. Consequently, Dr. Satayaprasert suggested that claimant would benefit from a cane or a walker because of her frequent falls. (Ex. 42-3).

Dr. Smucker evaluated claimant a week after the falling incident. (Ex. 34). Claimant told him that she tripped, but Dr. Smucker did not know why she tripped. (Ex. 52-1). Considering that claimant had fallen "a number of times" and remained a "fall risk," Dr. Smucker could not rule out the possibility that claimant tripped and fell on March 20, 2013 because of her myopathy. (Ex. 52-1).

Claimant provided the employer a written report of the injury. When asked to describe how the accident occurred, she responded that the reason was not apparent or unknown. (Exs. 36-1, 37). When asked how such an injury could be avoided, she wrote "possible fill rubber breaks in sidewalk?" (Ex. 36-1). Yet, she explained that "was the only thing that I could think on my very own as to why I may have stumbled, but I couldn't say that was the reason. It was possible, question mark; don't know." (Tr. 32).

For a few days after the fall, claimant did not know why she had fallen. (Tr. 11). Later, after she "stubbed" her toe again in the same area, she came to believe that on March 20, 2013, she had stubbed her toe on "unevenness or the grooves is where my shoe might have, and I fell face-forward." (Tr. 11-12). Yet, she also "remember[ed] a few days later realizing that my foot had stubbed, but how or on what, I don't know what." (Tr. 33).

A March 27, 2013 left shoulder x-ray was interpreted as showing a fracture of claimant's left humerus. (Ex. 32). Dr. Schweigert, an orthopedist, treated the fracture. (Ex. 40). Acknowledging claimant's myopathy and previous falls, Dr. Schweigert concluded that claimant's 2013 fall was due to both personal and employment risks. (Ex. 53). Based on information that there were "small gaps between the concrete slabs that were filled in with a rubber like substance" and "slight height differences between the concrete slabs" where claimant fell, Dr. Schweigert believed that claimant "tripped on one or around one of these areas, which caused her to fall." (Ex. 53-2). He opined that claimant's myopathic leg weakness and the uneven surface where she fell both contributed to the fall. (*Id.*)

The employer denied that claimant's injury arose out of and in the course of her employment. (Ex. 46). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Without making an express demeanor-based credibility finding, the ALJ was not persuaded that claimant fell because she tripped on unevenness or irregularity in the sidewalk. Concluding that it was just as likely that claimant's preexisting myopathy was the sole cause of the fall, the ALJ upheld the employer's denial.

On review, claimant contends that her claim is compensable under the "mixed risk" doctrine. Based on the following reasoning, we disagree.

Claimant must establish that her injury arose out of and in the course of employment. ORS 656.005(7)(a); ORS 656.266(1). Whether an injury arises out of and in the course of employment concerns two prongs of a unitary "work-connection" inquiry that asks whether the relationship between the injury and employment has sufficient nexus such that the injury should be compensable. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997). Both prongs must be satisfied to some degree. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 531 (1996).

Whether the injury occurred "in the course of" employment depends on the time, place, and circumstances under which the accident took place. *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994). Whether the injury "arose out of" employment depends on the causal relationship between the injury and the employment. *Id.* A worker cannot prove the compensability of his claim merely by establishing that an injury occurred at work; *i.e.*, in the "course of employment." *Redman Indus., Inc. v. Lang*, 326 Or 32, 35 (1997). Instead, the claimant must also "show a causal link between the occurrence of the injury and a risk connected with his or her employment." *Gilmore*, 318 Or at 368-69.

Risks causing injury to a claimant fall into three categories: (1) risks distinctly associated with employment; (2) risks personal to the claimant; and (3) neutral risks having no particular employment or personal character. *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983).

Because it is dispositive, we first address the "arising out of" element of the work-connection test. Specifically, the question is whether an employment risk contributed to claimant's injury such that the "mixed risk" doctrine applies to allow compensability.

Where both personal and employment factors are found to contribute to an injury, we have applied the "mixed risk" doctrine. Under the "mixed risk" doctrine, if the employment risk was a contributing factor, the concurrent

contribution from a personal risk will not defeat compensability. *See Theresa A. Graham*, 63 Van Natta 740, 744, *recons*, 63 Van Natta 970 (2011) (where the claimant's syncopal episode was the result of both idiopathic anemia and workplace induced hyperthermia, the injury arose out of employment under the "mixed risk" doctrine).

The "mixed risk" doctrine does not apply where the sole cause of the fall or workplace event is a personal risk. *Pamela M. Hamilton*, 63 Van Natta 736, 737 (2011), *aff'd*, 256 Or App 256 (2013) (the "mixed risk" doctrine did not apply where the cause of a workplace fall was a syncopal episode and it was undisputed that the fall was caused by solely personal reasons).

After reviewing the record and considering the parties' arguments, we are persuaded that claimant's March 2013 fall was caused by solely personal factors. We do not find that unevenness or irregularity in the sidewalk contributed to the cause of her fall. Accordingly, the "mixed risk" doctrine does not apply. We reason as follows.

Claimant relies on her own testimony and on Dr. Schweigert's opinion to establish that an employment risk contributed to her injury. As described above, claimant's testimony as to why she "stubbed" her foot/toe is not clear. For a few days, she did not know why she had fallen. (Tr. 11-12). Even after she stubbed her toe in the same area a few days later, she described her belief that she stubbed her "toe somewhere on that sidewalk on the unevenness or the grooves" as "where my shoe *might* have [been]." (Tr. 11-12). Thus, claimant's testimony does not persuasively establish that she tripped on unevenness or irregularity in the sidewalk.

Moreover, if claimant believed that she tripped and fell due to unevenness or irregularity in the sidewalk, she did not share that belief with her employer or her medical providers. One hour after the fall, she told Dr. Marburger that she stumbled due to her myopathy. (Exs. 31, 51-1). One week after the fall, she told the employer that she did not know why she fell. (Exs. 36-1, 37). The first and only mention that she tripped on unevenness in the sidewalk was in August 2013, five months after the accident, when Dr. Schweigert described his "understanding" that claimant tripped on or around an area of unevenness or irregularity in the sidewalk. (Ex. 53-2). Dr. Schweigert did not identify the source of that information, which was not otherwise documented. (Exs. 40, 44, 47, 49, 53).

Finally, the medical record is replete with assessments that claimant's myopathy put her at risk for falls. For example, Dr. Satayaprasert anticipated that claimant would benefit from a cane or walker because of frequent falls. (Ex. 42-3). Explaining that myopathy causes muscular weakness, Dr. Lou opined that claimant has weakness in her lower extremities, putting her at risk for falls. (Ex. 50). Reporting that claimant has fallen "a number of times," Dr. Smucker opined that she "remains a fall risk." (Ex. 52-1).

Consequently, we are not persuaded that claimant fell because she tripped on unevenness or irregularity in the sidewalk. *See Catherine A. Sheldon*, 66 Van Natta 275, 277-78 (2014) (where the claimant tripped and fell as a result of her foot "catching" for an unknown reason, the injury did not arise out of employment where it was equally possible that idiopathic factors caused the fall as it was due to work-related risks); *cf. Janet G. Cavalliere*, 66 Van Natta 228, 232-33 (2014) (where the claimant fell as a result of her employer required skid-resistant shoe "gripping" the floor as she walked, the injury arose out of employment even assuming idiopathic factors partially contributed to the fall). Instead, the preponderance of the record supports a conclusion that claimant's myopathy caused her difficulty lifting her foot and was the sole cause of her tripping and falling.¹

In reaching this conclusion, we do not agree with claimant's assertion that walking is an employment risk that contributed to her injury. She relies on *William H. Schaefer*, 59 Van Natta 3029 (2007). In that case, we found that a truck driver's right knee injury, which occurred when his knee locked while he was returning to the cab of his truck after completing a safety inspection, "arose out of" employment. We disagreed with the carrier's argument that the claimant did not establish a causal connection to work other than the fact that the step occurred at work. We had previously found that a delivery truck driver's knee injury, while walking on level ground to deliver a package, "arose out of" employment because his employment put him in a position to be injured. *Frederick A. Labasan*, 58 Van Natta 2621 (2006), *aff'd without opinion*, 216 Or App 192 (2007). In both cases, walking put the claimants at risk of injury.

¹ While the medical opinions are probative evidence of whether there is a causative medical link between the mechanism of injury and the injury sustained, they are not necessarily determinative of a question of fact; *e.g.*, whether claimant tripped because she had difficulty lifting her foot up or because the sidewalk was uneven. The ultimate resolution of that fact rests with us. *Cavalliere*, 66 Van Natta at 235 n 3.

In this case, it was not walking, but claimant's myopathy that put her at risk of injury. Her myopathy made it difficult for her to lift her leg/foot while walking, creating the risk that she would stub her toe/foot, trip, and fall.² See *Sharron L. Birrer*, 57 Van Natta 535, 538 n 6 (2005) (finding that eating at work did not cause the claimant's anaphylactic injuries; instead the injuries were caused by her allergic reaction to the specific substances ingested; *e.g.*, as compared to choking).

Under these circumstances, we conclude that there is an insufficient nexus between claimant's fall and her work. Thus, even if the "in the course of" prong of the unitary test was satisfied, the record does not establish that claimant's injury "arose out of" her employment. Accordingly, her claim is not compensable. Therefore, we affirm.

ORDER

The ALJ's order dated November 13, 2013 is affirmed.

Entered at Salem, Oregon on April 4, 2014

² In *Cavalliere*, 66 Van Natta at 234, we concluded that the claimant's fall "arose out of" employment because her employer-required skid-resistant shoe "gripped" the floor and caused her to fall. In doing so, we stated that the claimant's injury would be compensable, even assuming idiopathic factors (shuffling gait, history of stumbling and falling) partially contributed to her fall, under the "mixed risk" doctrine. We reiterated that the "mixed risk" doctrine applies when a fall is due to both personal and employment reasons. Here, in contrast, for the reasons expressed above, the record does not persuasively support a conclusion that an "employment risk" contributed to claimant's fall. Therefore, the "mixed risk" analysis does not apply.