
In the Matter of the Compensation of
CHRIS MASSARI, Claimant
WCB Case No. 15-00155
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Weddell, Curey, and Somers. Member Curey dissents.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Smitke's order that set aside its denial of claimant's injury claim for a right leg condition. On review, the issue is course and scope of employment.

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

Claimant is a doctor who primarily works at a hospital, which is not his employer, and at his home office. (Tr. 6-7, 9). He is paid on a salary basis, rather than an hourly basis. (Tr. 7). He is not required to be at the hospital during his entire regular shift, but is "on the beeper" during that time. (Tr. 8). Consequently, he must be available to answer questions by phone from nurses, family members, or the Emergency Room, and must be able to return to the hospital within 15 minutes if necessary. (Tr. 8-10).

Claimant's day shift begins at 7:00 a.m. and continues until 5:00 p.m. (Tr. 7). When he is assigned the day shift, he is "on the beeper" and responsible to answer any questions when the shift begins at 7:00 a.m., but he usually begins his "rounds" any time between 7:00 a.m. and 8:00 a.m., depending on "what's going on that morning." (Tr. 7-8). He is not "on call" outside of his regular shift hours, but often works beyond the end of his regular shift to finish his work. (*Id.*) His employer provides him with a pager and partially reimburses him for his cell phone, which he also uses for work. (Tr. 14-15). He drives his own car to and from work, and is not reimbursed for that expense. (Tr. 11).

On the date of injury, claimant's shift began, and his pager went on, at 7:00 a.m. (Tr. 10). He was at his home at the beginning of his shift and began driving to the hospital at approximately 7:15 a.m. (*Id.*) He bought a coffee on the way, and arrived in the hospital's parking lot at approximately 7:30 a.m. (*Id.*) He slipped and fell in the icy parking lot while walking from his car to the hospital, injuring his right leg. (Tr. 11). Asserting that the injury did not arise out of or occur in the course of employment, SAIF denied claimant's injury claim. Claimant requested a hearing.

The ALJ reasoned that claimant's injury occurred "in the course of" employment because it occurred during his shift, while he was subject to his employer's control and traveling between one work location (his home) and another (the hospital). Further, reasoning that claimant's injury "arose out of" employment because it resulted from a risk to which his employment exposed him, the ALJ set aside the denial.

On review, SAIF does not dispute that claimant's injury "arose out of" employment, but contends that claimant's injury did not occur "in the course of employment" under the "going and coming" rule. As explained below, we disagree with SAIF's contention.

A compensable injury must "aris[e] out of and in the course of employment." ORS 656.005(7)(a). Whether an injury "arises out of" employment depends on the causal link between the worker's injury and employment. *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994). Whether the injury arises "in the course of employment" depends on whether the time, place, and circumstances of the injury justify connecting the injury to the employment. *Id.* 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." *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 598 (1997). The two requirements are prongs of a single "work-connection" inquiry, which must both be satisfied to some degree; neither is dispositive. *Id.* at 596. Nevertheless, a sufficient work connection may exist if the factors supporting one prong are weak, if those supporting the other are strong. *Redman Indus., Inc. v. Lang*, 326 Or 32, 35 (1997).

Under the "going and coming" rule, injuries sustained while an employee is traveling to or from work generally do not occur "in the course of employment" and, consequently, are not compensable. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 526 (1996). The reason for this 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 the employee, during the time that he is going to or coming from work, is rendering no service for the employer." *Heide/Parker v. T.C.I. Inc.*, 264 Or 535, 540 (1973) (internal quotation marks omitted).

However, the "going and coming" rule is not implicated when the employee is outside the regular workplace while "'on duty' or otherwise subject to the employer's direction or control." *Enterprise Rent-A-Car Co. v. Frazer*, 252 Or

App 726 (2012); *see also U.S. Bank v. Pohrman*, 272 Or App 31, 44 (2015) (“the going and coming rule generally does not apply when the worker, although not engaging in his or her appointed work activity at a specific moment in time, still remains in the course of employment and, therefore, has not left work”); *City of Eugene v. McDermed*, 250 Or App 572 (2012) (“going and coming” rule was inapposite when a police officer who “was still on duty and was obligated to perform” police functions left the office to get a cup of coffee). As explained below, we conclude that the “going and coming” rule does not apply in the present circumstances.

Although claimant was injured traveling to his workplace, his injury occurred during his scheduled shift, rather than before his shift began. He was, at that time, “on duty” and, as such, subject to the employer’s direction and control. Although his duties did not require him to be at the hospital at the beginning of his shift, he was available to answer questions by phone or to be at the hospital within 15 minutes if needed.

SAIF notes that an injury is not compensable merely because it occurs when a worker is “on call.” *See Walker v. SAIF*, 28 Or App 127, 130 (1977) (declining to find that “on call” injuries necessarily occur “in the course of employment”). Here, however, claimant was on a regular scheduled shift, rather than simply “on call,” when he was injured. He was not at his home or in another area that was unrelated to his employment, but was walking to enter his assigned workplace. Such facts establish the necessary “time, place, and circumstances connection to employment.”

Additionally, in prior cases in which the “going and coming” rule has excluded injuries from the course of employment because they were incurred during a commute to work, the rule has generally been applied to injuries suffered before the claimants’ period of employment, when they were not paid for their time or available to render service to their employers. *E.g.*, *Alltucker v. City of Salem*, 164 Or App 643 (1999); *Robert M. Coleman, Jr.*, 65 Van Natta 1748 (2013); *Mitchell D. Clem*, 54 Van Natta 93 (2002); *Kevin G. Robare*, 47 Van Natta 318 (1995).

Whether an injury occurs “on-the-clock,” during paid time, is not determinative. For example, the “going and coming” rule has been applied during paid breaks. *E.g.*, *Frazer*, 252 Or App at 726; *Legacy Health Sys. v. Noble*, 232 Or App 93 (2009). Nevertheless, claimants’ “off-the-clock” status has frequently been noted as a factor indicating that the employment relationship has been

suspended such that the “going and coming” rule should be applied. *E.g.*, *Hearthstone Manor v. Stuart*, 192 Or App 153, 157 (2004); *Coleman*, 65 Van Natta at 1750; *see also Noble*, 232 Or App at 99-100 (the fact that the injury occurred during a paid break made the work connection stronger than the one in *Stuart*).

Here, the employment relationship was not akin to a paid break, in which a worker is generally free from the duties of employment. Although claimant was not performing specific services to the employer at the time of the injury, he was “on duty” and immediately available as his employment might require.

SAIF cites *Claudia M. Tacy*, 57 Van Natta 668 (2005), in which we applied the “going and coming” rule to an injury that was sustained before work, despite the claimant’s contention that her duties started at her home. The claimant, an “on call” driver, who was paid either an hourly rate for driving a medical van or a flat rate for driving an ambulance, was called at her home and assigned to drive an ambulance. She walked out of her house, slipped, fell, and was injured.

We noted that, notwithstanding conflicting testimony regarding whether the claimant’s hourly pay for driving a *medical van* would have started when she received an assignment, the claimant would have been paid a flat fee for her *ambulance* driving duties on the day of the injury. 57 Van Natta at 670. We further reasoned that the claimant, who was injured before she had left her home premises, was not performing any of her work duties when she was injured. *Id.* Distinguishing *American Medical Response v. Gavlik*, 189 Or App 294 (2003), *rev den*, 336 Or 376 (2004), involving an “on call” worker whose injury was compensable, we concluded that the injury did not occur “in the course of” the claimant’s employment. *Id.* at 670. We also concluded that the “arising out of” prong of the work connection test was not satisfied because the claimant’s injury resulted from the risk that she would slip on her driveway, a risk that was not inherent to her work environment, because it existed whenever she left her house, and was in her control rather than her employer’s. *Id.* at 671.

Tacy is of little precedential value. *Tacy*’s analysis of the “arising out of” prong rested on the rationale that the risks of the claimant’s home environment were necessarily not risks of her work environment. In *Mary S. Sandberg*, 60 Van Natta 2602 (2008), *rev’d*, *Sandberg v. JC Penney Co.*, 243 Or App 342 (2011), we likewise reasoned that the risk of an injury that arose from a claimant’s home environment was not a risk inherent to her work environment, although she was walking to perform work-related tasks when she was injured. 60 Van Natta at

2605. On appeal, the court explained that where a worker was required to work in her home and garage, those areas were her “work environment” when she was working, and an injury resulting from risks of those environments, encountered when she was working, “ar[ose] out of her employment.” 243 Or App at 352. Thus, the *Tacy* rationale regarding the “arising out of” requirement is incompatible with subsequent case law.

As noted above, the “arising out of” employment and “in the course of employment” prongs concern separate inquiries, and in this case it is the “in the course of employment” prong that is disputed. Nevertheless, in *Tacy*, the location of the injury, a key component of the “in the course of employment” inquiry, was determinative to the outcome of the case. See *Legacy Health Sys. v. Noble*, 250 Or App 596, 601 (2012) (as a practical matter, some overlap between the facts and circumstances pertaining to the two prongs may be unavoidable). Considering our emphasis on that factor in our overall analysis, and because the strength of the factors supporting one prong of the unitary “work-connection” test may compensate for the weakness of the factors supporting the other, we cannot conclude that we would employ the same analysis regarding the “in the course of employment” prong if the facts of *Tacy* were presented to us today.

The present case is also factually distinguishable from *Tacy*. The claimant in *Tacy* was not injured during a regular scheduled shift, was paid a flat fee for performing a specific task, and had performed no work duties related to that task. Here, by contrast, claimant was paid a salary for a shift that covered a specific period of time. He was not required to be in the hospital during that entire time, but was “on the beeper” and available as needed.

In contrast to *Tacy*, and to cases applying the “going and coming” rule to paid breaks and commutes to work, this case involves a claimant who was injured during a regular period of employment, at a place where he reasonably would be expected to be at that time, and doing something reasonably incidental to the fulfillment of his duties. Such circumstances establish that claimant was “on duty” and “subject to the employer’s direction and control,” and his employment was not “suspended,” when he was injured.

Therefore, we conclude that claimant’s injury occurred “in the course of,” as well as arose “out of,” his employment. Accordingly, we affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$3,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

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 SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 4, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, payable by SAIF. 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 SAIF.

Entered at Salem, Oregon on December 8, 2015

Member Curey dissenting.

The majority declines to apply the "going and coming" rule. As explained below, I conclude that the "going and coming" rule applies and, therefore, that claimant's injury did not occur "in the course of employment."

Claimant is a physician who is employed by Bend Memorial Clinic, but practices at St. Charles Hospital. (Tr. 6-7). He testified that he was "on the beeper" as of 7:00 a.m., when his shift began, but he did not begin his morning commute to work until 7:15 a.m. (Tr. 10). He slipped and fell in the hospital's parking lot at the end of his commute to work. (Tr. 11). There is no evidence that claimant received any work-related calls or performed any other work-related tasks before his injury.

A compensable injury must "aris[e] out of and in the course of employment." ORS 656.005(7)(a). Whether an injury "arises out of" employment depends on the causal relationship between employment and the injury; whether

the injury occurs “in the course of” employment depends on the time, place, and circumstances of the injury. *Norpac Foods v. Gilmore*, 318 Or 363, 366 (1994). Under the “going and coming” rule, injuries sustained while an employee is traveling to or from work generally do not occur “in the course of employment” and, consequently, are not compensable.¹ *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 526 (1996). The reason for this 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 the employee, during the time that he is going to or coming from work, is rendering no service for the employer.” *Heide/Parker v. T.C.I. Inc.*, 264 Or 535, 540 (1973) (internal quotation marks omitted).

The “going and coming” rule has consistently been applied to injuries sustained during commutes to work. *E.g.*, *Alltucker v. City of Salem*, 164 Or App 643 (1999); *Robert M. Coleman, Jr.*, 65 Van Natta 1748 (2013); *Claudia M. Tacy*, 57 Van Natta 668 (2005); *Mitchell D. Clem*, 54 Van Natta 93 (2002); *Kevin G. Robare*, 47 Van Natta 318 (1995). The Oregon Supreme Court takes a traditionally narrow approach to applying exceptions to the going and coming rule. *Krushwitz*, 323 Or at 529. The facts of this case lead me to conclude that claimant’s injury occurred during his commute to work.

As the majority notes, the aforementioned cases differ from the present case because the claimants in those cases had not yet begun their shifts and were not “on-the-clock.”² The majority reasons that the “going and coming” rule does not apply in this case because claimant’s commute-related injury occurred *after* the

¹ There is no contention that the employer, which was not the hospital, exercised control over the hospital’s parking lot such that the “parking lot” exception to the “going and coming” rule would apply. *See Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 367 (1994) (where an employer exercises control of the location of an injury, the “parking lot” exception to “going and coming” rule brings the injury within the “course of employment”).

Additionally, because claimant was injured during his commute, not during work-related travel, the “traveling employee” rule does not apply. *See SAIF v. Scardi*, 218 Or App 403, 409 (2008) (when an employee’s work requires travel away from an employer’s premises, the employee becomes a traveling employee and is continuously acting in the course of employment unless the employee has engaged in a distinct departure on a personal errand).

² In *Tacy*, the claimant contended that her paid duties began at her home, before her commute, when she received a call assigning her work for the day. However, observing that the claimant would have been paid a lump sum for her days’ work, and not an hourly wage for the time that she was injured, we concluded that she was not injured “in the course of employment” because she was not performing any work-related tasks when she was injured. 57 Van Natta at 670.

beginning of his scheduled shift at 7:00 a.m., after he was placed “on the beeper” and after he became available to perform his duties if required. I disagree with the majority’s reasoning because I do not find that claimant’s “availability” for work after going “on-the-clock,” without more, is dispositive.

The facts of this case are unique and cannot be compared squarely with any of the previously cited authorities. However, as in *Tacy*, claimant was “on salary,” and was not performing any work-related tasks when he was injured in the hospital parking lot.

Whether an injury occurs when a claimant is “on-the-clock” may, in some cases, be relevant to determine whether the injury occurs “in the course of employment,” but the inquiry does not end there. The application of the “going and coming” rule to “on-the-clock” injuries has been addressed primarily in the context of injuries suffered during paid breaks.

In *Enterprise Rent-A-Car Co. v. Frazer*, 252 Or App 726 (2012), for example, the claimant had taken a paid break outside her workplace and was walking back to her work when she fell and was injured. The court explained that the “going and coming rule” applies “not only to injuries that occur before the workday begins and after it ends, but also when a claimant is injured while leaving the workplace for lunch or returning from a lunch break,” and “also applies when a claimant is injured while on a shorter break--even a paid break--away from work.” 252 Or App at 731. The court explained, however, that the “going and coming” rule does not apply if the employee was “‘on duty’ or otherwise subject to the employer’s direction or control.” *Id.* Reasoning that the claimant “was away from her workplace on a regular break and she was not ‘on duty’ or otherwise subject to [the] employer’s direction or control,” the court concluded that the “going and coming” rule applied. *Id.* at 736.

While claimant here argues he was “on-the-clock” and “on duty” because he was “on the beeper,” he was not subject to the employer’s control until he started work at the hospital. The facts of this case are more akin to “unpaid break” injury cases.

Similarly, in *Legacy Health Sys. v. Noble*, 232 Or App 93 (2009), the claimant had left her workplace during a paid break to perform a personal errand when she fell on an employer-controlled parking lot. The court stated that the claimant’s “on-the-clock” status indicated a stronger work connection, relative to a case involving an injury suffered during an unpaid break. 232 Or App at 100.

Nevertheless, the court concluded that the “going and coming” rule, as well as the “parking lot” exception, applied. *Id.*; see also *Frazer*, 252 Or App at 733. Here, the claimant’s “on-the-clock” status may, like *Noble*, indicate a stronger work connection, but the fact remains that claimant was not engaged in any work-related function at the time of the injury.

Frazer and *Noble* differ from the present case because the claimants in those cases were taking breaks during their shifts, after they had worked for a period and then left their workplaces. While claimant asserts that he had already started work because he was “on the beeper,” I find that the circumstances of this case, where claimant had not begun any actual work or even arrived at his workplace at the time of injury, even more clearly fit the core rationale for applying of the “going and coming” rule, which is that the employment relationship is “suspended from the time the employee leaves his work to go home until he resumes his work.” See *Heide/Parker*, 264 Or at 540. Considering these principles, I conclude that claimant’s “on-the-clock” status does not militate against application of the “going and coming” rule.

The majority reasons that claimant was “on duty” or otherwise “subject to the employer’s direction and control” because, in addition to being “on-the-clock,” claimant was “available” to answer questions by phone or be summoned to the hospital within 15 minutes. In *Eugene v. McDermed*, 250 Or App 572 (2012), the court declined to apply the “going and coming” rule where a police officer was injured while walking from her office to get a cup of coffee during her shift. The court noted that the claimant was required to act in her official capacity as a police officer during such walks, and had done so on several occasions. 250 Or App at 574. Based on her continuing obligations to act in her official capacity while on the street, as well as the fact that she remained subject to the employer’s continuing direction by way of her work cell phone, the court concluded that the claimant was “on duty.” *Id.* at 582. Accordingly, the court found the “going and coming” rule inapposite. *Id.*

I find the present case, however, distinguishable from *McDermed*. In *McDermed*, the claimant had begun work and was under a continuous obligation to act in her official capacity, regardless of her location. Here, by contrast, the record does not indicate that claimant had begun any work-related tasks on the day of injury or that he had any ongoing duties or continuous obligations that he might be expected to perform during his commute.

While claimant was “on the beeper” at 7:00 am, there is no indication that during his commutes to and from the hospital that he was under a “continuous obligation” to work in his capacity as a physician. Further, there is no evidence that the claimant was under the employer’s direction and control in general while on his commutes to and from work. When scheduled to work, he was not required to be at the hospital during his entire shift, and had the flexibility to arrive after he was “on the beeper,” “depending on if you have morning meetings or, you know, what’s going on that morning.” (Tr. 8). He could also “go home or go get a bite to eat or relax outside if the weather permits it” and “there are many situations depending on which shift where you don’t necessarily physically have to be in the hospital.” (*Id.*) Added to these facts is that claimant was a salaried employee. To interpret this case as suggested by the majority would mean that this claimant could go anywhere throughout the day, while on his beeper, and if injured in the local coffee house parking lot, the injury would be compensable. I simply do not agree.

Claimant asserts that his freedom to act outside of his role as an employee was limited primarily by the requirement that he be available to answer questions or be at the hospital within 15 minutes. (Tr. 8-10). I do not consider this fact alone to satisfy claimant’s burden of proving that he was in the course of his employment at the time of his injury, which occurred after he drove to the hospital, in a parking lot neither owned nor controlled by claimant’s employer, and even before he entered his work place. I find claimant’s availability argument more akin to the “on call” worker cases.

In the context of “on call” workers, case law has established that a worker’s mere *availability* at the time of injury does not bring the injury within “the course of employment” unless other facts also support a “time, place, and circumstances connection to employment.” *See Halsey Shedd RFPD v. Leopard*, 180 Or App 332, 337 (2002) (injury sustained at home while the claimant was paid to be “on duty” over the weekend and was walking to a work truck and checking a work pager was “in the course of employment”); *Walker v. SAIF*, 28 Or App 127, 130 (1977) (declining to find that “on call” injuries necessarily occur “in the course of employment”). Here, the only other “time, place, and circumstances” connection between the injury and employment was that claimant was injured commuting to work while “on-the-clock” or “on the beeper.”

As discussed above, the fact that claimant was going to work while “on-the-clock” supports application of the “going and coming” rule. In the absence of an additional “time, place, and circumstances” connection between claimant’s injury

and his employment, such as a call to duty or the beginning of work-related tasks, his “availability” for work does not establish that he was “on duty” or otherwise “subject to the employer’s direction or control.”

Therefore, I would apply the “going and coming” rule to find that claimant’s injury did not occur “in the course of employment.” Accordingly, I respectfully dissent.