In the Matter of the Compensation of
LAINA HAEFER, Claimant
WCB Case No. 14-00256
ORDER ON REVIEW
Jon C Correll, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's injury claim for a left ankle condition. 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.

Claimant worked for the employer as a senior escrow officer. Her normal work hours were from 8:00 a.m. to 5:00 p.m., Monday through Friday. (Tr. 5). However, because her work level varied depending on deadlines, claimant would occasionally work extra hours during the week or on weekends. (*Id.*) She received either overtime or comp time for this extra work. (Tr. 6).

The employer allowed workers to take a "floating" holiday between Thanksgiving and New Year's Day. Claimant originally planned to take December 23, 2013 off, but work was too busy. (Tr. 7). On that day, she worked on a complicated, time-consuming file that had many errors. (Tr. 8). At the end of the day, she left notes with the file regarding how the matter should be finished the next day, which was her day off. (*Id.*) She left the file on top of her desk. (*Id.*)

On December 24, 2013, her scheduled day off, claimant decided to go into the office for a short period to make sure that the file had been completed correctly and answer any questions that may have arisen. (Tr. 9). In addition, she planned to go into the office that day because she wanted to drop off some personal gifts, plus a gift that was part of a "Secret Santa" gift exchange. (Tr. 10). The employer acquiesced in, but did not require participation in, the "Secret Santa" gift exchange. (Tr. 11, 12, 20, 24, 29). Several coworkers agreed that the "Secret Santa" program was good for morale. (Tr. 26, 31).

Claimant arrived at the employer's office building around 1:00 p.m. Her office was located on the second floor of the building. She went to her desk and checked to see if the file had been taken care of, and determined that it was fine. (Tr. 9). She then delivered a couple of personal gifts on the second floor.[1] (Tr. 10). Claimant's supervisor, Ms. Schombachler, noticed claimant's presence on the second floor that day, but did not see whether or not claimant checked on the file. (Tr. 15, 17, 18).

Claimant then started down a set of stairs to deliver her "Secret Santa" gift. (Tr. 10). On the way down the stairs, she saw a coworker and said, "Hi." As she did so, she missed a step and fell, twisting her left ankle and injuring her left leg. (*Id.*) When she sought medical treatment, it was determined that she had fractured her right proximal fibula. (Exs. 1, 4).

The title manager, Mr. Watterson, was present downstairs and heard claimant fall and saw the end of the fall. (Tr. 23). Claimant mentioned to him that she had been coming down the stairs to deliver a present to another coworker. (Tr. 24).

CONCLUSIONS OF LAW AND OPINION

In setting aside SAIF's denial of claimant's injury claim, the ALJ determined that the claim was not statutorily excluded under ORS 656.005(7)(b)(B), which addresses injuries incurred while engaging in recreational or social activities primarily for the worker's personal pleasure. Further, the ALJ held that the injury arose out of and in the course of claimant's employment.

On review, SAIF argues that claimant was injured while engaging in a social/recreational activity primarily for her personal pleasure, and that her injury did not arise out of or in the course of employment. For the following reasons, we find that claimant has established legal causation.

We first address the "social/recreational" defense under ORS 656.005(7)(b)(B). As the ALJ indicated, this affirmative defense was not specifically raised by either party at hearing. Under such circumstances, we decline to address it on review. *See Oregonians For Sound Economic Policy, Inc. v. SAIF*, 218 Or App 31 (2008) (affirmative defense must be pleaded and

[1] Due to the upcoming holiday, the office was deserted, so claimant put these gifts on the recipients' desks. (Tr. 9-10).

proved, and can be waived if not timely raised); *Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing); *Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing). Moreover, SAIF's denial was also a standard "arising out of/in the course of" denial. (Ex. 9). Such a denial does not encompass the "social/recreational" defense of ORS 656.005(7)(b)(B).

As explained in *Liberty Northwest Ins. Corp. v. Nichols*, 186 Or App 664, 667 (2003), the compensability of a claimant's injury depends on the outcome of a two-step analysis under ORS 656.005(7)(a) and (b)(B). Subsection (7)(a), which provides that a "'compensable injury' is an accidental injury * * * arising out of and in the course of employment * * *," provides the primary definition of compensability. Subsection (7)(b)(B), however, states grounds for exclusion that are additional to those that are inherent in the primary definition found in subsection (7)(a), including "[i]njury incurred while engaging in or performing * * * any recreational or social activities primarily for the worker's personal pleasure[.]" *Andrews v. Tektronix, Inc.*, 323 Or 154, 160-61 n 1 (1996) (emphasis in original). Thus, ORS 656.005(7)(b)(B) involves a different standard and necessitates the development of different facts and evidence than does a standard "course and scope" analysis. Accordingly, we decline to address the "social/recreation" defense issue. *See Cynthia A. Watson*, 48 Van Natta 609 (1996) (where the employer used a "course and scope" defense at hearing, its argument on review for the first time that the claim was not compensable under ORS 656.005(7)(b)(B) was not timely raised).

We turn to whether claimant's injury arose out of and in the course of employment. Whether an injury "aris[es] out of" and occurs "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 a sufficient nexus such that the injury should be compensable. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997). The requirement that an injury "arise out of" employment depends on the causal link between the injury and the employment. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 525-26 (1996). The requirement that an injury occur "in the course of" employment depends on "the time, place, and circumstances" of the injury. *Robinson v. Nabisco, Inc.*, 331 Or 178, 186 (2000). Both requirements must be satisfied to some degree, although "the work-connection test may be satisfied if the factors supporting one prong are minimal while the factors supporting the other prong are many." *Krushwitz*, 323 Or at 531.

We first address the "in the course of" prong. SAIF contends that claimant's injury did not occur in the course of her employment because she was on a day off and did not do any actual work while at the employer's premises, and her only purpose for being in the office that day was to deliver gifts (a personal matter). For the following reasons, we disagree.

Claimant was authorized to come into work on "off days" without prior approval, and it was not unusual for her to do so. Her injury also occurred on the employer's premises, in a place she would reasonably be expected (on the stairs between office levels). In terms of the circumstances of the injury, claimant was on the employer's premises to check on a file, and to deliver packages, including one for the "Secret Santa" exchange. We do not find it determinative that once claimant checked on the file, no action was needed. In other words, her purpose for being in the office included checking on the file, which was part of her regular employment duties. Thus, her injury occurred while she was doing something reasonably incidental to her employment, which was acquiesced in by the employer. *See Hayes*, 325 Or at 598. Accordingly, we conclude that claimant's injury occurred in the course of her employment.

We also conclude that claimant's 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 his or her work or when it originates from some risk to which the work environment exposes the worker. *Id.* at 601. In this context, risks are generally categorized as employment-related risks, which are compensable; personal risks, which are noncompensable; or neutral risks, which may or may not be compensable, depending on the situation. *Legacy Health Systems v. Noble*, 250 Or App 596, 602 (2012).

As discussed above, claimant's action of going to the employer's premises on an "off-day" and engaging in the "Secret Santa" gift exchange were actions contemplated and acquiesced in by the employer. Although she had finished checking the file when her injury occurred, we do not find that the act of walking down the stairs to deliver the "Secret Santa" gift, which was permitted by the employer, represented a departure from, or somehow severed, the employment relationship. Consequently, we conclude that the conditions of claimant's employment put her in a position to be injured as she walked down the employer's stairs.[2] *See Hayes*, 325 Or at 601-02 (the fact that the claimant was injured after

[2] Moreover, the stairway where clamant was injured was a normal part of her work environment.

finishing her work shift and engaging in a personal errand for about 20 minutes did not negate a finding that her injury arose out of a risk to which her employment exposed her).

Accordingly, for the foregoing reasons, we find a sufficient work connection between claimant's injury and her employment.[3] *Id.* at 596. Consequently, 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 issues, 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 November 20, 2014 is affirmed. For services on review, claimant 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 June 11, 2015

[3] We disagree with SAIF's assertion that *Panpat v. Owens-Brockway Glass Container*, 334 Or 342 (2002), and *Royanne Messer*, 57 Van Natta 271 (2005), are instructive. Those cases are factually distinguishable because, as opposed to this case, *Panpat* involved an injury caused by a personal risk, and *Messer* dealt with the "social/recreational" defense.