
In the Matter of the Compensation of
JOSE VARGAS, Claimant
WCB Case No. 15-01388
ORDER ON REVIEW
Welch Bruun & Green, Claimant Attorneys
Law Offices Of Kathryn R Morton, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Naugle's order that upheld the insurer's denial of claimant's 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" and provide the following summary and supplementation.

Claimant, a farm worker, began working for the employer, a farm labor contractor, on August 27, 2014. (Exs. 1-2, 5). Thereafter, claimant was assigned to work at various local vineyards. (Ex. 6). Usually, he worked at one site for an entire day, but sometimes he worked at two different sites. (*Id.*) The employer did not provide transportation, reimburse travel expenses, or pay for travel time.¹ (Ex. 1-2; Tr. 22, 23, 25).

Claimant, who did not drive, relied on his supervisors and coworkers for transportation. (Tr. 17, 18). Before work, claimant and his coworkers would meet at the home of Mr. Ortiz-Ornelas, claimant's uncle/supervisor. (Tr. 13, 31). From there, claimant and his coworkers would drive to the assigned fields. (*Id.*)

On October 9, 2014, Mr. Ortiz-Ornelas assigned claimant to work at the "Prive" site the following day. (Tr. 31). On the morning of October 10, 2014, Mr. Ortiz-Ornelas learned that the starting time at the "Prive" site had been delayed. (*Id.*) When claimant arrived at his uncle's/supervisor's home to get a ride to work, Mr. Ortiz-Ornelas offered claimant and his coworkers work at the

¹ Claimant signed an hourly wage agreement with the employer, which provided that he was responsible for his transportation. (Ex. 1-2).

“Stoller” site (which was “in a harvest” and “shorthanded a couple people”) until work at the “Prive” site was scheduled to start. (Tr. 31, 32). Mr. Ortiz-Ornelas explained that this allowed all three people going to the “Prive” site to “stay together.” (*Id.*) Claimant and his coworkers accepted the offer. (*Id.*)

Claimant got a ride to the “Stoller” site, where he worked until the “Prive” site called, asking about the whereabouts of the crew. (Tr. 13-14). Then, claimant’s supervisor told him (and two other workers), “you guys need to go to the Prive Vineyard and landscape for the boss.” (Tr. 14).

Claimant testified that he thought he would be “fired” if he rejected an assignment or failed to appear for an assignment due to lack of transportation. (Tr. 15). The employer’s representative testified that an employee could reject an assignment, or fail to appear for an assignment due to lack of transportation, without “negative repercussions.” (Tr. 22, 25). However, the representative also testified that it was “extremely difficult” to find a substitute when an employee failed to appear for an assignment. (Tr. 26).

Claimant got a ride from the “Stoller” site to the “Prive” site in a coworker’s pickup truck. (Tr. 9-10). He was injured when he was ejected from the back of the pickup truck en route to the “Prive” site. (Ex. 2-2; Tr. 10).

Subsequently, the insurer denied claimant’s injury claim, asserting that his injuries were not related to his work activity. (Ex. 4). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

In upholding the insurer’s denial, the ALJ concluded that claimant was not in “the course of” employment when the accident occurred. In doing so, the ALJ determined that claimant was not a “traveling employee.” *See Kevin G. Robare*, 47 Van Natta 318 (1995). The ALJ also determined that no other exceptions to the “going and coming” rule applied.

On review, claimant contends that his injuries arose out of and in the course of employment. The insurer responds that the injury is not compensable under the “going and coming” rule. For the following reasons, we conclude that claimant’s injuries arose out of and in the course of employment.

For an injury to be compensable, it must “arise out of” and “in the course of” employment. ORS 665.005(7)(a). The “arising out of” prong requires a causal link between the worker’s injury and the 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. *Id.* Both prongs of the work-connection test must be satisfied to some degree; neither is dispositive. *Id.*

The general rule is that injuries sustained while a worker is traveling to or from work do not occur “in the course of” employment. *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 526 (1996). Injuries suffered when a worker is traveling to or from work generally are noncompensable because, during that time, the worker is rendering no service for the employer. *Id.* at 526-27.

However, a “special errand” exception applies when “either the employee was acting in furtherance of the employer’s business at the time of the injury or the employer had the right to control the employee’s travel in some respect.” *Krushwitz*, 323 Or at 528 (emphasis in original); *JAK Pizza, Inc.-Domino’s v. Gibson*, 211 Or App 203, 207 (2007).

Here, while the employer may not have had the right to control claimant’s travel en route to the “Prive” work site, we conclude that the travel was in furtherance of the employer’s business. Although claimant and two coworkers were assigned to work at the “Prive” site, they accepted the employer’s offer to work at the “Stoller” site first, which needed help with the harvest. Later, when the “Prive” site called to inquire about the workers’ whereabouts, claimant and his coworkers were told, “* * * you guys need to go to the Prive Vineyard and landscape for the boss,” and [they] said okay.” (Tr. 14). Based on claimant’s testimony, we conclude that the employer directed claimant and his coworkers to travel from the “Stoller” site to the “Prive” site. As such, claimant’s injuries occurred while he was acting in furtherance of the employer’s business by traveling from the “Stoller” site to the “Prive” site.

Under these particular circumstances, we conclude that the “special errand” exception to the “going and coming” rule applies. See *Ryan K. Gibson*, 60 Van Natta 6 (2008) (where the claimant was struck by an automobile returning to work from a break after the employer told him to take his break across the street so that he would be available, the claimant was acting in further of the employer’s business by taking the break across the street and the “special errand” exception to the “going and coming” rule applied); *Bethany Davidson*, 52 Van Natta 1351,

1352-1353 (2000) (where the claimant was injured in a motor vehicle accident returning to work from home after the employer told her to change clothes due to a “dress code” violation, the claimant was acting in furtherance of the employer’s business by returning home to change clothes and the “special errand” exception to the “going and coming” rule applied). Therefore, claimant was “in the course of” employment at the time of his injury.²

We next address whether claimant’s injury “arose out of” his 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.” *Hayes*, 325 Or at 601. Risks are categorized as employment-related risks, which are compensable, personal risks, which are not compensable, or neutral risks, which have no particular employment or personal character, and may or may not be compensable depending on whether employment conditions put the worker in a position to be injured by the neutral risk. *Phil A. Livesley Co. v. Russ*, 246 Or 25, 29-30 (1983).

Here, as noted above, claimant was injured when he was ejected from a coworker’s pickup truck while traveling between assignments at the employer’s behest. Under these circumstances, we conclude that claimant’s injury resulted from a risk to which he was exposed by his work environment.

Accordingly, we conclude that claimant’s injury “arose out of” and “in the course of” his employment. Consequently, we reverse.

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 \$14,000, payable by the insurer. 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 submission), 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 insurer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina*

² For the reasons expressed in the ALJ’s order, we conclude that claimant was not a “traveling employee.”

Schmidt, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering the award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated December 18, 2015 is reversed. The insurer's denial is set aside and the claim is remanded to it for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$14,000, to be paid by the insurer. 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 insurer.

Entered at Salem, Oregon on June 2, 2016

Member Curey dissenting.

The majority concludes that claimant's injury arose out of and in the course of his employment. Because I disagree with that conclusion, I respectfully dissent.

For an injury to be compensable, it must "arise out of" and "in the course of" employment. ORS 656.005(7)(a). The "arise out of" prong requires a causal link between the worker's injury and his employment. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 296 (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.*

Turning 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 because, during the time that he is going to or coming from work, he is not rendering any service to the employer. *Id.*

Claimant contends that the rule does not apply because he was traveling between two work site assignments in the middle of the workday. Yet, claimant's employment agreement expressly provided that his work activities did not involve

traveling for the employer.³ Further, he was not compensated for the time or expense of the commute. His commute to the first job site was clearly not work-related “travel,” nor was his commute to the second site, to which he would have traveled directly had he not accepted the employer’s offer to earn additional hours and pay. His acceptance of the “first job site” offer delayed his originally scheduled commute, but it did not change his commute to work-related travel.

The majority applies the “special errand” exception. The “special errand” exception applies when an employee sustains an injury while he or she is proceeding to perform, or proceeding from performing, a special task or mission. *Krushwitz*, 323 Or 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 the right to control the employee’s travel in some respect.” *Id.* at 528 (emphasis in original).

Here, claimant was injured while he was going to work at the second job site. In doing so, he was not acting in furtherance of the employer’s business any more than any other employee driving to work. Although the start time at the “Prive” site had been delayed and claimant was riding with a coworker who apparently wanted to take advantage of the extra work offered at the “Stoller” site, he was free to accept or reject either assignment without “negative repercussions.” (Tr. 22, 34). Claimant chose to work at the “Stoller” site instead of going directly to the “Prive” site. There is no evidence that there was anything special or out of the ordinary about these assignments.

In addition, I am not persuaded that the employer controlled any aspect of claimant’s travel at the time he was injured. Under these circumstances, I would conclude that claimant does not come within the “special errand” exception. Neither claimant nor the employer had any expectation that claimant’s travel/commute was a work-related activity. Therefore, claimant’s injury did not occur in the time, place, and circumstances of employment. Accordingly, I would conclude that the “going and coming” rule applies without exception and that claimant’s injury did not occur “in the course of” employment.

I would also conclude that claimant’s injury did not “arise out of” his employment. A worker’s injury “arises out of” employment if the risk of the injury results from the nature of his or her work or when it originates from some

³ I agree with the majority’s conclusion that claimant was not a “traveling employee.”

risk to which the work environment exposes the worker. *Hayes*, 325 Or at 601. Risks are categorized as employment-related risks, which are compensable, personal risks, which are not compensable, or neutral risks, which have no particular employment or personal character, and may or may not be compensable depending on whether employment conditions put the worker in a position to be injured by the neutral risk. *Phil A. Livesley Co. v. Russ*, 246 Or 25, 29-30 (1983).

Here, claimant was injured when he was ejected from the back of a coworker's pickup truck while driving to a work site. His employment agreement expressly provided that he was responsible for his transportation. Under these circumstances, I do not regard claimant's injury (while being transported in a coworker's truck on his personal time and without reimbursement from his employer) to be a risk connected with the nature of his work as a farmworker or a risk to which the work environment exposed him. Accordingly, I conclude that claimant's injury did not "arise out of" his employment. Therefore, I respectfully dissent.