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In the Matter of the Compensation of  
**ANGELINA COX, Claimant**  
WCB Case No. 15-01088  
ORDER ON REVIEW  
Hollander & Lebenbaum et al, Claimant Attorneys  
Wallace Klor & Mann PC, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Jacobson's order that set aside its denial of claimant's injury claim. On review, the issue is course and scope of employment.

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

At the time of injury, claimant worked for the employer in its leased office space on the fifth floor of a shared office building. (Tr. 5). Employees were required, and encouraged, to take two paid 15-minute breaks during the workday, and could go wherever they wanted on a break. (Tr. 7, 17, 21). Claimant regularly used her break time to take a walk, and the walk provided personal pleasure. (Tr. 17). The employer was aware that claimant often went for walks on her break. (Tr. 7, 17, 21).

On February 2, 2015, at approximately 10:45 a.m., claimant took one of her paid 15-minute breaks. She left her work station and went for a walk around the outside of the office building. (Tr. 6). Upon returning from her break, claimant approached the northeast entrance into the building. (Tr. 7, 37). Before reaching the entrance doors, she slipped in water and fell. (Tr. 7, 10). She returned to her work area, and reported the injury to her supervisor. (Tr. 13).

The northeast entrance was commonly used by the employer's employees, employees of other employers in the building, and general members of the public. (Tr. 8, 22). The employer did not own, control or maintain the east entrance to the building. (Tr. 22, 23, 28, 29). According to the lease, maintenance and repair of the common areas, such as the entrance where claimant fell, were the responsibility of the landlord. (Tr. 28, 32; Ex. 1A). The employer is required to pay a pro rata share of "operating expenses," which includes repairs and maintenance to common areas. (Tr. 36; Ex. 1A). If something on the employer's premises (defined as the fifth floor offices), or within the building, was in need of repair, the employer had a procedure to report the issue to property management. (Tr. 14, 23, 24, 29, 36).

The employer denied claimant's injury claim, asserting that she was not in the course and scope of employment at the time of her injury. (Ex. 6). Claimant requested a hearing.

The ALJ set aside the denial, finding that claimant's injury arose out of and in the course of her employment based on application of the "personal comfort" doctrine. *See U.S. Bank v. Pohrman*, 272 Or App 31, *rev den*, 358 Or 70 (2015).

On review, the employer contends that claimant's injury is excluded from compensability under the "going and coming" rule. It argues that this case is similar to *Enter. Rent-A-Car Co. v. Frazer*, 252 Or App 726 (2012), *rev den*, 353 Or 428 (2013) (*Frazer I*). For the following reasons, we disagree.

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 begin by addressing the "in the course of" prong of the "work connection" test. 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. *Hayes*, 325 Or at 598. It is in this context that we consider the applicability of the "going and coming" rule and the "personal comfort" doctrine. *Pohrman*, 272 Or App at 43; *see Laura Brown*, 68 Van Natta 774 (May 24, 2016).

The "going and coming" rule provides generally that injuries sustained while an employee is travelling to or from work do not occur in the course of employment. *Krushwitz*, 323 Or at 526. The reasoning behind the "going and coming" rule is "that the relationship of employer and employee 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.” *Id.* The “going and coming” rule applies to injuries occurring both before and after the workday, in addition to injuries occurring while the employee is going to or coming from a break. *Frazer I*, 252 Or App at 730-31; see *Frazer v. Enter. Rent-A-Car Co.*, 278 Or App 409, 412 (2016) (*Frazer II*).

“But the going and coming rule is not implicated at all—that is, the rule is never triggered—when a worker has not left work.” *Pohrman*, 272 Or App at 44. Thus, 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. Sometimes that occurs because the worker is “still ‘on duty’ and otherwise subject to the employer’s direction or control.” *Id.* (citing *Frazer I*, 252 Or App at 731). The “personal comfort” doctrine may apply in that situation, depending on the “nature of the activity” in which the worker is involved. *Id.*

Under the “personal comfort” doctrine, “an employee remains in the course and scope of employment if he or she engages in an activity that is not his or her appointed work task, but which is a ‘personal comfort’ activity that bears a sufficient connection to his or her employment.” *Id.* In *Pohrman*, the court explained that seven factors have been used to make that determination, with a general focus on whether the activity was contemplated, directed by, or acquiesced in by the employer, where the activity occurred, and whether the employer benefited from the activity. *Id.* at 44-45; see *Jordan v. Western Electric*, 1 Or App 441, 443 (1970).<sup>1</sup>

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<sup>1</sup> The seven *Jordan* factors are:

“(a) Whether the activity was for the benefit of the employer \* \* \*;

“(b) Whether the activity was contemplated by the employer and employee either at the time of hiring or later \* \* \*;

“(c) Whether the activity was an ordinary risk of, and incidental to, the employment \* \* \*;

“(d) Whether the employee was paid for the activity \* \* \*;

“(e) Whether the activity was on the employer’s premises \* \* \*;

“(f) Whether the activity was directed by or acquiesced in by the employer \* \* \*;

“(g) Whether the employee was on a personal mission of his own[.]”

*Jordan*, 1 Or App at 443-44 (internal citations omitted).

“Personal comfort” activities that are merely incidental to employment involve “engaging in activity with a ‘limited objective’ of achieving ‘personal comfort’—such as restroom breaks, getting something to drink, or other ‘typical kind of coffee break activity’ which is ‘contemplated by an employer’ and, therefore, do not ‘remove[] [the employee] from the employment situation.’” *Id.* at 45; *Halfman v. SAIF*, 49 Or App 23, 29-30 (1980); *see also Clark v. U.S. Plywood*, 288 Or 255, 260-61 (1980) (“personal comfort” doctrine applies in situations in which the claimant sustains injuries while engaged “in other incidental activities not directly involved with the performance of the appointed task, such as preparing for work, going to or from the area of work, eating, rest periods, going to the bathroom, or getting fresh air or a drink of water”). The court has also focused on whether the activity was “expressly or impliedly authorized” by the employer. *Clark*, 288 Or at 264.

As instructed in *Pohrman*, we must first inquire into the nature of claimant’s activity when she was injured to determine whether it bears a sufficient connection to the employment so that she cannot be considered to have left the course of employment, making the “personal comfort” doctrine applicable and the “going and coming” rule inapplicable. After making that inquiry, if we determine that claimant has not engaged in a personal comfort activity, but rather was injured while on a personal mission, or if we determine that the personal comfort activity did not bear a sufficient connection to the employment, then we may consider whether the “going and coming” rule, or any of the exceptions to that rule, would properly apply.<sup>2</sup> *Id.* at 47; *see Brown*, 68 Van Natta at 774.

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As the *Pohrman* court explained, in the wake of the adoption of the unitary work-connection test, courts can still consider the seven *Jordan* factors to determine compensability. 272 Or App at 45 n 8; *see Rogers v. SAIF*, 289 Or 633, 643 (1980) (“Existing law regarding proximity, causation, risk, economic benefit, and all other concepts which are useful in determining work relationship remain applicable.”); *First Interstate Bank v. Clark*, 133 Or App 712, 717 (1995) (explaining that, although the seven factors derived from *Jordan* were no longer the independent and dispositive test of work-connection, “depending on the circumstances, some or all of those factors will remain helpful inquiries” under the unitary work-connection test); *Wallace v. Green Thumb, Inc.*, 61 Or App 695, 698-700, *aff’d*, 296 Or 79 (1983) (noting that the court’s adoption of the “unitary work connection approach” was not a rejection of “the specialized concepts that have been developed to analyze the relationship between the injury and the employment, e.g., personal comfort, special errand and lunch hour cases”).

<sup>2</sup> In *Pohrman*, the court specifically clarified that the personal comfort doctrine is *not* an exception to the “going and coming” rule. *Id.* at 42; *see Frazer II*, 278 Or App at 415 n 4 (citing *Pohrman*).

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Under the circumstances of this case, we find the “personal comfort” doctrine applicable. We reason as follows.

Claimant was injured while entering the lobby of the office building where her employer’s offices were located, after returning from her regular paid 15-minute break. Employees were required, and encouraged, to take two paid 15-minute breaks during the workday. (Tr. 7, 17, 21). Claimant regularly used her break time to take a walk. (Tr. 17). The employer did not direct claimant to take a walk on her required break time, but was aware that she often went for walks on her break. (Tr. 7, 17, 21). Therefore, claimant was injured during her regular work hours, while on a paid break that was contemplated by both the employer and claimant, and such breaks and walking activity were acquiesced in by the employer.

Although claimant derived personal pleasure from such walks, she was not on a personal mission when injured. Rather, she was engaging in a 15-minute break, during her work hours, that was a “typical kind of coffee break activity that is contemplated by an employer[.]” *See Mellis v. McEwen, Hanna, Gisvold, Rankin & Van Koten*, 74 Or App 571, 575, rev den, 300 Or 249 (1985) (citing *Halfman*, 49 Or App at 29); *see also Clark*, 288 Or at 260-61.

Under such circumstances, we conclude that claimant’s activity at the time of injury was not a departure from the employment relationship, even though it did not occur on the employer’s premises, because she was engaged in an activity incidental to her employment and had not “left work.” *See id.* at 574-75; *see also Halfman*, 49 Or App at 30; *Brown*, 68 Van Natta at 774 (the claimant had not “left work” and remained in the course of employment under the “personal comfort” doctrine when injured during her lunch break while participating in an employer-sponsored walking program).

As explained in *Pohrman*, a finding that the “personal comfort” doctrine applies under these circumstances is not inconsistent with *Frazer*, “because a proper application of the course and scope inquiry requires an antecedent consideration of the personal comfort doctrine.” 272 Or App at 47. Rather, an inquiry into the nature of claimant’s activity when injured reveals that it bore a sufficient connection to her employment so that she cannot be considered to have left the course and scope of employment, making the “personal comfort” doctrine applicable and the “going and coming” rule inapplicable. *Id.* *Frazer*, in contrast, was based not on an application of the “personal comfort” doctrine, but rather on an analysis of the “going and coming” rule. 252 Or App at 736.

Given these circumstances, we conclude that claimant had not “left work” when her injury occurred because she was engaged in a personal comfort activity of the type that meant that she still was acting in the course of her employment when she was injured. Moreover, her fall occurred during work hours as she was entering the building for the purpose of returning to the workplace after a mandatory paid break, and the employer acquiesced in such breaks and walking activity. Therefore, we also conclude that claimant’s injury arose out of a risk to which her employment exposed her. Because both prongs of the compensability test have been satisfied, we conclude that the relationship between claimant’s injury and her employment is sufficient and that her injury is compensable.<sup>3</sup> 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 \$4,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief and her counsel’s uncontested fee 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 employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

### ORDER

The ALJ’s order dated July 6, 2015 is affirmed. For services on review, claimant’s counsel is awarded an assessed attorney fee of \$4,000, payable by the employer. 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 employer.

Entered at Salem, Oregon on May 25, 2016

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<sup>3</sup> Our decision should not be interpreted as a determination that every injury occurring during a paid break is *per se* compensable. Rather, the compensability determination is made by evaluating all of the factors in a particular case that are pertinent to the question of work-connectedness, and weighing those factors in light of the policy underlying the Workers’ Compensation Act. *See Andrews v. Tektronix, Inc.*, 323 Or 154 (1996).