

In the Matter of the Compensation of
MARY S. SANDBERG, Claimant

WCB Case No. 07-02441

ORDER ON REVIEW

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Reviewing Panel: Members Weddell, Langer, and Herman. Member Langer concurs; Member Weddell dissents.

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

FINDINGS OF FACT

On the date of injury, claimant worked as a custom decorator, selling window treatments, upholstery, bedding and pillows. (Tr. 7). Different fabric collections would alternate being on sale, with a collection sale typically ending on a Saturday and a new fabric collection sale beginning on a Sunday. (Tr. 22).

The employer has a studio where claimant (and other custom decorators) worked one day per week. (Tr. 8). On other days, she was "out on appointments" with clients, or working from home. (Tr. 9, 20). She spent the majority of her working time traveling to and from her appointments and meeting with customers in their homes to sell the decorating products. (Tr. 7-8).

Because she needed to have samples to show potential customers, she kept all of the current fabric samples, books and pricing guides in her van. (Tr. 9-10). She was required to have all current fabrics on hand and had previously been reprimanded for not having all of the current sale samples in her van when meeting with customers. (Tr. 10-11). In short, she was required to have an "office * * * in [her] car." (Tr. 10).

Because she could not safely store all of the items in the vehicle at one time, she stored the excess items in her home garage. (Tr. 11-12). She was not allowed to store these excess products at the studio and was instructed by the employer to store the products at home, or any other place that kept the products safe and dry. (Tr. 12, 35-36). Thus, she used her home garage to store samples that would, from time to time, need to be changed out with other samples and materials that were kept in her van.

On the Saturday before the date of injury, a sale collection had ended, with a new collection beginning the next day. (Tr. 22-23). Because of the fabric sale change, claimant needed to remove the “old” fabrics from her van and replace them with fabrics for the new sale that were being stored in her garage. (Tr. 23). Claimant walked out her back door toward the garage to change the fabrics. (Tr. 24). When her foot came down, she “felt something move.” (*Id.*) Noticing that her dog was underfoot, she shifted to her other foot, lost her balance and fell. (*Id.*) As a result of the fall, claimant sustained a right distal radius fracture. (Ex. 3).

The employer denied claimant’s injury claim, asserting that her injury did not arise out of or in the course of her employment. (Ex. 15-1). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the denial, finding that claimant’s injury did not arise out of and in the course of her employment. In particular, the ALJ concluded that the injury did not “arise out of” her employment, “because claimant did not prove that the risks that caused her injury * * * were risks associated with her position as a custom decorator or were inherent in the nature of the work * * *.”¹

On review, claimant contends that she was a “traveling employee” who was injured while engaged in an activity reasonably related to her status as a traveling employee. Moreover, claimant asserts that, contrary to the ALJ’s determination, her injury “arose out of” her employment. We disagree with claimant’s contentions, reasoning as follows.

For an injury to be compensable, it must “arise out of” and occur “in the course of” employment. ORS 656.005(7)(a). The “arise out of” prong of the compensability test 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.*

¹ The ALJ found that claimant had “minimally established” that her injury occurred “in the course of” her employment. The ALJ also determined that claimant was not a “traveling employee.”

We agree with the ALJ's conclusion that claimant's injury is not compensable because it did not "arise out of" her 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." *Griffin v. SAIF*, 210 Or App 469, 473 (2007) (quoting *Hayes*, 325 Or at 601). In assessing whether the risk originated with the work environment, we look to the nature of the risk that caused the injury. In this context, risks are generally categorized as employment-related, personal, or neutral. *Phil A. Livesley Co. v. Russ*, 296 Or 25, 29-30 (1983); *Juan A. Renteria*, 60 Van Natta 866, 872 (2008). "Employment-related" risks are universally compensable; "personal" risks are universally noncompensable; and "neutral" risks (*i.e.*, risks having no particular employment or personal character) may or may not be compensable, depending on the situation. *Panpat v. Owens-Brockway Glass Container, Inc.*, 334 Or 342, 349-50 (2002); *Renteria*, 60 Van Natta at 872. We have defined "personal" risks as having "origins of harm so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." *Brenda K. Davis*, 60 Van Natta 1345, 1347 (2008) (quoting 1 Larson's Workers' Compensation Law § 7.20, 3-13 (rebound ed 1997)).

Here, we find that the risk of injury, claimant tripping over her own dog while stepping out of her home, was so clearly personal that it could not possibly be attributable to her employment. Claimant was not exposed to this risk by virtue of her employment, but encountered this same risk any time that she stepped outside the door of her home. *See Halsey Shedd RFPD v. Leopard*, 180 Or App 332, 339 (2002) (injury did not "arise out of" employment where the risk of injury for the claimant slipping on dirt and gravel in his own driveway was "a risk that existed whenever claimant walked from his house across his driveway, for whatever reason he might choose to do so"). Accordingly, we conclude that claimant's injury did not "arise out of" her employment.

Our conclusion here is supported by the court's decision in *Leopard*. There, the claimant was injured while "on stand-by duty as a volunteer firefighter." *Id.* at 334. The claimant fell in his driveway while walking toward an employer-owned vehicle that he was going to drive to church. The court reasoned that there was insufficient evidence that the injury "arose out of" employment. The court explained that the dirt and gravel were in the claimant's own driveway, and that the risk "arose in claimant's home environment [that] was in claimant's control, not that of his employer." *Id.* at 340. Accordingly, the court concluded that the risk of falling in the driveway "was not one that can be said to have inhaled in the work environment." *Id.* at 341.

Likewise, here, claimant tripped over her own dog while stepping out of her house. As with the risk in *Leopard*, the risk here arose from claimant's home environment, which was outside of the employer's control. Moreover, the risk existed whenever claimant stepped outside of her house for whatever reason she chose to do so. Accordingly, "the connection between that risk and claimant's work activities is coincidental, not causal." *Id.* at 339.

We also do not agree that claimant may accurately be described as a "traveling employee." "When travel is part of employment, 'the risk of injury during activities necessitated by travel remains an incident to the employment even though the employee may not actually be working at the time of injury.'" *Sosnoski v. SAIF*, 184 Or App 88, 93 (2002). "A traveling employee is continuously within the course and scope of employment *while traveling*, except when the person has 'engaged in a distinct departure on a personal errand.'" *Id.* (emphasis added). Here, claimant was injured while at home, a location where she routinely worked. Thus, it cannot be fairly said that claimant was injured while "traveling" away from the employer's premises. *See SAIF v. Scardi*, 218 Or App 403, 409 (2008) (an employee is a traveling employee where the work entails travel away from an employer's premises). Rather, she was injured in her home, which also functioned at times as her work premises.

In any event, even were we to consider claimant a "traveling employee," her injury must nevertheless "arise out of" her employment. "[I]n the case of a traveling employee, an injury arises out of employment if the risk of the injury results from the nature of the travel or originates from some other risk to which the travel exposes the worker." *Scardi*, 218 Or App at 408. As explained above, the risk of claimant tripping over her own dog was personal to claimant; it did not inhere in the nature of traveling away from her work premises, nor did the travel itself expose the worker to that risk. Rather, that risk existed whenever claimant was in her home.

In sum, we conclude that claimant's injury did not "arise out of" her employment. Accordingly, we need not address whether her injury occurred "in the course of" her employment. *See Hayes*, 325 Or 592 at 596 (1997) (for an injury to be compensable, both prongs of the work-connection test must be satisfied to some degree).

ORDER

The ALJ's order dated October 29, 2007 is affirmed.

Entered at Salem, Oregon on October 8, 2008

Member Langer concurring.

The dissent asserts that claimant's entire home, the garage and the pathway leading to it, represent "work premises" and, therefore, her injury arising out of a risk situated on these premises should be compensable. The fact that an injury occurs on work premises is relevant primarily in determining whether an injury occurred in the course of employment. However, not every injury occurring at or near "traditional" employment premises is compensable. *See, e.g., Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994) (injuries sustained while an employee is going to and coming from the employee's regular place of employment generally are not considered to have occurred in the course of employment); *Cope v. West American Ins. Co.*, 309 Or 232, 240 (1990) ("When an employee is injured on a public sidewalk over which the employer has no control, and on which there are no employer-created hazards, the connection between the injury and the employment is insufficient to make the injury compensable.").

The work task that claimant was to perform involved changing fabric samples stored in her garage. She had not begun working when she tripped over her dog and fell. These circumstances resemble cases involving the "going and coming" rule. Under that rule, an injury sustained while a worker is going to or coming from work is not considered to have occurred in the course of employment and, therefore, is not compensable. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 526 (1996). Similarly, here, claimant was "going to" work when she was injured. Moreover, as discussed in the lead opinion, her injury arose out of a personal risk. Therefore, her injury did not arise out of and in the course of her employment.

Member Weddell dissenting.

The majority affirms that portion of the ALJ's order that found that claimant's injury did not arise out of her employment. Because I would find that claimant's injury arose out of employment (and occurred in the course of employment), I dissent.

By narrowing the scope of its inquiry to simply the categorization of the risk of claimant's injury, the majority fails to properly apply the unitary work-connection test. As the Supreme Court explained,

“[a]lthough the ‘arising out of’ and ‘in the course of’ prongs provide guidance, the unitary work-connection test does not supply a mechanical formula for determining whether an injury is compensable. We evaluate those factors in each case to determine whether the circumstances of a claimant’s injuries are sufficiently connected to employment to be compensable.”
Robinson v. Nabisco, Inc., 331 Or 178, 185 (2000).

In other words, the “ultimate test is * * * [whether] the temporal, spatial, circumstantial, and causal connections between the claimant’s injury and employment [are] sufficient to justify compensation, when sufficiency is evaluated in the light of the Act’s policy of providing financial protection to workers who are injured in the course of employment, regardless of fault[.]” *Andrews v. Tektronix, Inc.*, 323 Or 154, 162 (1996).

The majority’s approach here does not adhere to these principles and directives of the court. Rather, the majority hones in exclusively on the object that caused claimant to lose her balance. As explained below, this single factor “risk analysis test” is inconsistent with the directives of the court, which require us to look to the totality of the circumstances surrounding the injury. *See Norpac Foods v. Gilmore*, 318 Or 363, 369 (1994) (the Board must consider “all the circumstances” to determine whether a sufficient work-connection existed to justify compensability); *Karson Gard*, 58 Van Natta 1121, (2006) (rather than focus on any one factor, the unitary work-connection analysis requires consideration of “the totality of the circumstances”).

Although the majority does not address whether claimant’s injury occurred “in the course of” her employment, there can be little doubt that this prong of the unitary work-connection test is satisfied.

“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. * * * By ‘reasonably incidental to’ employment, we include activities that are personal in nature * * * as long as the conduct bears some reasonable relationship to the employment and is expressly or impliedly allowed by the employer.” *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 598-99 (1997).

Here, claimant was injured while walking to the garage to change fabric samples. There is no dispute that she was required to change these fabric samples whenever a sale change took place. Moreover, it is also undisputed that she (and other home decorators) worked irregular hours, including the weekends. Claimant also was required to work frequently from her home. (Tr. 20-21). Although claimant had not actually begun replacing the fabrics when she sustained her injury, she was walking to the garage to perform that task. Thus, at the time of injury, she was in a place where she reasonably was expected to be while beginning the process of changing fabric samples as required by her job. Under these circumstances, I would find that claimant was injured “within the period of employment, at a place where [she] reasonably may be expected to be, and while [she] reasonably [was] fulfilling the duties of the employment or [was] doing something reasonably incidental to it.” *Hayes*, 325 Or at 598-99.

I disagree with the concurrence’s assertion that claimant was not injured “in the course of” her employment because she had not yet begun working at the time of her fall. By beginning her walk to the garage, where her husband was awaiting to assist her, claimant had begun the process of exchanging the fabric samples. Claimant unequivocally stated that her sole reason for going into the garage was to perform the required sample change. (Tr. 24). Because claimant routinely worked from both her home and its attendant garage (and needed to walk between the two to exchange the fabrics), walking from one area of her work environment to another was a work task in furtherance of her job duties. (*See* Tr. 20-22). In any event, her actions at the time of injury were certainly “reasonably incidental” to performing her required tasks. *See Hayes*, 325 Or at 598-99. Accordingly, I would find that she was injured “in the course of” her employment.

I next address whether claimant’s injury “arose out of” her 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.” *Griffin v. SAIF*, 210 Or App 469, 473 (2007) (quoting *Hayes*, 325 Or at 601). Here, because claimant did not work from a single worksite, her work environment necessarily included the various locations where she worked, including her home and garage.

The majority erroneously concludes that *Halsey Shedd RFPD v. Leopard*, 180 Or App 332 (2002), controls this claim. Essential to the *Leopard* court’s finding that the injury did not arise out of employment was the determination that “the injury was not a work-premises injury * * *.” *Id.* at 340. The instant matter is distinguishable in this key respect: because claimant regularly and routinely

worked out of her home and was doing so at the time of her fall, she was “on work premises” at the time of her injury. Thus, unlike *Leopard*, this was a work-premises injury. The majority’s opinion ignores this critical fact.

As explained by Professor Larson, risks associated with a home work environment are risks of employment. In other words, “once it is established that the home premises are also the work premises, as was amply done [here], it follows that the hazards of home premises encountered in connection with the performance of the work are also hazards of employment.” 1 *Larson’s Workers’ Compensation Law*, § 16.10[4].

The majority does not acknowledge the unique nature of claimant’s employment; specifically, that she did not (and was not permitted to) work out of a traditional single-site workplace. Such an omission does not recognize that

“[t]hese problems arise with regularity within the ordinary workers’ compensation system context outside the home. That the employee is a telecommuter or other home-based worker should not, in and of itself, make any difference. Was the risk of injury a risk of *this* employment? So long as the employment subjects the employee to the actual risk of injury, the argument follows that the injury should be compensable.” *Id.* (emphasis in original).

Here, claimant’s work environment (customers’ homes, the employer’s studio, her van, her home, her garage and the pathway between the two), exposed her to numerous and diverse risks, including stumbling over a variety of objects in performing her tasks. She was required to routinely walk to her garage to retrieve and relocate fabric samples, thereby subjecting her to risks of tripping and falling in performing those duties. The majority’s approach treats claimant differently because she was required to work out of her home. In other words, had claimant tripped over an everyday work object in traditional workspace, there would be no question that the risk of tripping over such an object would be an employment-related risk. There is no rational basis not to apply this same principle to a home work environment. Accordingly, I would find that her injury, which was sustained as a result of her work-premises fall, is compensable.

Claudia M. Tacy, 57 Van Natta 668 (2005), cited by the employer, is also distinguishable. There, the claimant tripped on the front steps of her house on her way to picking up a patient to be transported by ambulance. We found that the

claimant's injury did not "arise out of" her employment because the risk of falling in her driveway "was not one inherent in [her] work environment." *Id.* at 671. In doing so, however, we rejected the claimant's assertion "that her house was * * * a 'home' office." *Id.* at 669 n 1. That factor alone distinguishes *Tacy* from the instant matter. Here, the risk of claimant tripping over a hazard in her own home was within the employer's control by virtue of the employer authorizing and requiring claimant to work at a location other than the studio.

I also disagree with the majority's conclusion that the risk of claimant tripping over her own dog at her own house was a distinctly "personal" risk and therefore necessarily not compensable. This argument misses the mark on two key points.

First, as explained above, because claimant's home premises were also her work premises, those attendant hazards were hazards of employment so long as they were encountered in connection with the performance of her work. At the time of injury, claimant was walking to the garage to change fabric samples on the date of a sale change. She was not walking to the garage for personal reasons, but specifically in furtherance of her job duties. Accordingly, the risks attendant to that environment were not "personal" risks, but risks associated with the workplace.

In concluding otherwise, the majority does not explain precisely why the risk of tripping over an object in the workplace constitutes a "personal" risk. The implications of the majority's conclusion is that the ownership of the hazard is somehow determinative. This, however, is clearly erroneous. For example, an employee tripping over her own purse or bag in an office would not render an injury sustained from such a fall noncompensable.

Second, the majority's approach makes the characterization of the risk determinative. This is legal error. The courts have emphasized that the Board must look at the totality of the circumstances, rather than just a risk analysis, in determining the compensability of a claim. Accordingly, the court has cautioned against

"overemphasiz[ing] the importance of the risk analysis. While it is true that past decisions of [the courts] have included such a risk analysis, that analysis is not dispositive. *See, e.g., Phil A. Livesley Co. v. Russ*, 296 Or 25, 31 (1983) ('while risk and causation are important

factors in a work-connection analysis, they are but two of many factors, and even when risk and causation are weak, compensation is not automatically foreclosed'). Rather, it is the totality of the circumstances surrounding the injury that determines compensability." *SAIF v. Fortson*, 155 Or App 586, 591-92 (1998).

Here, by resting its decision solely on the basis of a risk analysis, the majority has not sufficiently considered the court's admonition that a risk analysis is but one of many factors to be considered, and is not dispositive. In doing so, the majority has taken an approach that has been expressly rejected by the courts.

As the *Fortson* court explained, we are required to look to the "totality of the circumstances" in assessing whether there is a sufficient work connection to the injury. *See also Norpac Foods*, 318 Or at 369 (we must consider all of the circumstances relevant to the work-connection analysis); *Gard*, 58 Van Natta at 1125 (same). Here, the "totality of the circumstances" is as follows: claimant only worked one day per week at the employer's studio. At all other times, she was required to work in customers' houses or from her own home. She also routinely worked on weekends. The employer required her to keep extra fabric samples in a location remote from the studio and was aware that she kept those samples in her garage. A new sale had begun on the date of injury, requiring claimant to replace the "old" fabrics in her van with the "new" fabrics from her garage. At the time of injury, claimant was walking to the garage to exchange those fabrics in preparation for an appointment the following day. She then tripped over an object that, although personal to her, was part of the workplace environment. All of these pertinent circumstances establish a sufficient causal connection between claimant's employment and her injury.

In sum, I disagree with the majority's decision, which applies an overly narrow analysis that is inconsistent with the unitary work-connection test as explained by the courts. Properly applying that test, I would conclude that claimant has established to some degree each element of the work-connection test and that the combination of these elements sufficiently establishes a "causal connection between the injury and the employment" warranting compensation. *Hayes*, 325 Or at 597. Because the majority concludes otherwise, I respectfully dissent.