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In the Matter of the Compensation of  
**KEVINIA L FRAZER, Claimant**  
WCB Case No. 09-02947  
ORDER ON REVIEW  
Malagon Moore & Jensen, Claimant Attorneys  
Travis L Terrall, Defense Attorneys

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

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Mundorff's order that: (1) set aside its denial of claimant's right knee and ankle injury claim; and (2) awarded a \$6,000 assessed attorney fee. On review, the issues are course and scope of employment and attorney fees. We affirm.

#### FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary.

On March 24, 2009, claimant injured her right knee and ankle when she fell after snagging her shoe in the parking lot surface outside her workplace. Claimant was on a paid break and returning to her workplace after visiting with coworkers near a "break shelter" when she fell.<sup>1</sup>

The employer denied claimant's claim, asserting that the injury did not occur in the "course and scope" of her employment. Claimant requested a hearing.

#### CONCLUSIONS OF LAW AND OPINION

The ALJ found that the injury occurred during claimant's scheduled work hours, while she was on a paid break, in a place where she was reasonably expected to be, and on her route of normal ingress returning to her workplace. Further reasoning that claimant's injury was precipitated by walking along the "employer's path" through the parking lot, the ALJ also found that the injury arose out of claimant's employment. Consequently, the ALJ set aside the employer's denial.

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<sup>1</sup> The shelter was located approximately 100 feet from the entrance to claimant's workplace.

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 that a causal link exist between the worker’s injury and her employment. *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996); *Norpac Foods Inc. v. Gilmore*, 318 Or 363, 366 (1994). The requirement that the injury occur “in the course of” employment concerns the time, place and circumstances of the injury. *Fred Meyer Inc. v. Hayes*, 325 Or 592, 596 (1997); *Krushwitz*, 323 Or at 526.

Both prongs of the unitary “work connection” test must be satisfied to some degree. *Hayes*, 325 Or at 596; *Krushwitz*, 323 Or at 531. We evaluate the relevant 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).

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. Ordinarily, 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. *Id.* at 597; *Krushwitz*, 323 Or at 526; *Norpac*, 318 Or at 366.

We recognize that for purposes of the “going and coming” rule, we do not distinguish an employee going to or coming from work at the beginning or end of the workday from an employee going to or coming from work at the beginning or end of a break, whether paid or unpaid. *See Hearthstone Manor v. Stuart*, 192 Or App 153, 158 (2004); *Legacy Health Systems v. Noble*, 232 Or App 93 (2009).<sup>2</sup>

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<sup>2</sup> In both *Stuart* and *Noble*, the claimants’ injuries were found compensable after application of the “going and coming” rule and the “parking lot” exception. Here, although we also find this claimant’s injury compensable, we do not reach such a conclusion under the “parking lot” exception to the “going and coming” rule because we consider *Stuart* and *Noble* distinguishable. In *Noble*, the claimant left her work location and crossed the street to go to her credit union. Although she was on a paid break when injured, the “going and coming” rule and attendant “parking lot” exception applied because she was “coming from” work. In *Stuart*, the claimant was injured while returning to the building in which she worked from an unpaid lunch break in the employer’s cafeteria. The “going and coming” rule and attendant “parking lot” exception applied because the claimant was “going to” work. Here, in contrast, claimant neither planned to leave, nor left, her immediate work location, but rather remained in close proximity (*i.e.*, approximately 100 feet) to her work area during her paid break. Therefore, even though

However, in *Jill K. Thornton*, 56 Van Natta 3781 (2004), we found the “going and coming” rule inapplicable where the claimant was only taking a brief break (and was not “off the clock”), in close proximity to her working area when injured. *Id.* at 3782. Rather, we reasoned that the activity in *Thornton* was more analogous to cases where a worker is injured during a “personal comfort” activity. *Id.* at 3783. Thus, the import of *Thornton* is that the “going and coming” rule does not apply where a claimant is only on a brief departure from work activities near the workplace and, therefore, not truly “going to” or “coming from” work. See *Cheryl L. Hulse*, 60 Van Natta 2627, 2629 (2008).

We find the instant matter analogous to *Thornton*. Here, as in *Thornton*, claimant’s injury occurred when she was on a brief paid break, during her regular work hours, and in close proximity to her employer’s premises. Because claimant was only on a brief departure from work activities near the workplace, she was not truly “going to” work when she fell en route to the employer’s entrance. Under these circumstances, we are not persuaded that the “going and coming rule” applies.<sup>3</sup> See 56 Van Natta at 3783; see also *Hulse*, 60 Van Natta at 2629 (where the claimant was injured while descending the exterior stairs of her workplace while on a paid break, the “going and coming” rule was found inapplicable because the claimant had no intention of leaving the work premises and was thus not actually “coming from” work when injured).

We now address whether claimant has satisfied the “in the course of” prong to some degree. Claimant’s injury occurred during her regular working hours, while she was returning from her paid break, in a place she was reasonably expected to be. The break was 10 or 15 minutes long. (Tr. 22). The employer required workers to leave their work areas on breaks. Although they were not required to leave the employer’s building, the employer allowed workers to do so, and it acquiesced to the employees’ use of the break shelter, which was located

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claimant was on a break, as in *Noble* and *Stuart*, this case differs because claimant was not “going to” or “coming from” work as contemplated by those cases. Consequently, we disagree with the dissent’s analysis that the “going and coming” rule/“parking lot” exception as referenced in *Noble* must be applied.

<sup>3</sup> The “parking lot” exception is only relevant if the “going and coming” rule applies. See *Hayes*, 325 Or at 598 n 10 (the “parking lot” exception to the “going and coming rule” recognizes that a parking lot over which an employer exercises control is a part of the worker’s employment environment). Because the “going and coming” rule does not apply, we need not address the employer’s arguments that it did not exercise “control” of the area where the injury occurred under the “parking lot” exception to the “going and coming” rule. See, e.g., *Hulse*, 60 Van Natta at 2630 n 3; *Thornton*, 56 Van Natta at 3783-3784 (not addressing whether the employer exercised control over the premises of injury where the “going and coming” rule did not apply).

about 100 feet from the entrance to the workplace. The employer was also aware that workers on breaks crossed the parking lot using the same route as claimant did when going to and from the break shelter.

Before the injury, claimant had been conversing with coworkers near the break shelter, where she typically “took her breaks.” (Tr. 4, 6). She and her coworkers were “venting about some of the calls,” which she explained was typical behavior. (Tr. 20, 24). According to claimant, “We usually spend our breaks kind of, you know, getting out everything about our phone calls (laugh), because between breaks, honestly, your head is just filling up.”<sup>4</sup> (Tr. 23).

Near the end of her break, claimant fell as she was returning to work via the normal path taken by workers returning from the break shelter. (Tr. 10). At that time, claimant was looking through the window of the building to try and see a clock, when her shoe caught in a break in the pavement and she fell.<sup>5</sup> (Tr. 4, 10, 19).

Based on this evidence, we find that claimant’s injury occurred within the period of employment (a paid break, during regular work hours), at a place where she reasonably was expected to be (returning from the break shelter, the use of which the employer had acquiesced to, via the normal route), and while she was doing something reasonably incidental to employment (on a paid break and checking the clock to make sure she was on time). Under these circumstances, we find that the “in the course of” prong of the unitary work connection test is satisfied.

Next, we address whether 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 the work or when it originates from some risk to which the work environment exposes the worker. *Hayes*, 325 Or at 601. Thus, an injury “arises out of” employment where there exists “a causal link between the occurrence of the injury and a risk associated with [the] employment.” *Gilmore*,

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<sup>4</sup> The fact that Mr. Adams, the employer’s Human Resource Associate, and Ms. Sobomehin, the employer’s Human Resources Manager, testified that employees were not encouraged to vent on breaks does not affect our reasoning. (Tr. 35-36, 45).

<sup>5</sup> Mr. Adams testified that claimant told him that she had gotten coffee from Dutch Bothers, about a block away, before she fell. (Tr. 26, 28-29, 32, 34). Claimant, however, testified that the coffee she was carrying was old and cold, from earlier that morning. (Tr. 21-22). The discrepancy between these statements does not affect our reasoning.

318 Or at 366. In this context, risks are generally categorized as employment-related, personal, or neutral, *i.e.*, neither employment related nor personal. *Sharron L. Birrer*, 57 Van Natta 535, 537 (2005).

Here, we find, and the parties do not dispute, that claimant's injury resulted from a "neutral risk." For an injury resulting from a "neutral risk" to be compensable, claimant's work conditions must have placed her in a position to be injured. *Stuart*, 192 Or App at 159; *Birrer*, 57 Van Natta at 539. For the following reasons, we find that they did.

The record establishes that the employer required workers to take breaks away from their work areas and it did not limit where workers might go on breaks. In addition, the employer acquiesced to employees' use of the shelter on their breaks and was aware of the normal egress/ingress route taken by employees when going to and from the building to the shelter. At the time of her injury, claimant was returning to work via that normal route, approaching the only entrance to her work place, when she fell while trying to check the time. It is reasonable to assume that claimant was required by her employment duties to return to her workplace before the end of the break. Thus, claimant's fall occurred as she was returning to her employment duties from a short paid break at the break shelter (as contemplated by the employer), along the normal ingress toward the only entrance to the employer's premises.

Under these circumstances, we conclude that the conditions of claimant's employment put her in a position to be injured in the manner that occurred, and that there was no break in that causal connection at the time of injury. *See Hayes*, 325 Or at 601-02; *Hulse*, 60 Van Natta at 2629 (injury during a brief break from work arose out of the claimant's employment, where the injury occurred during the kind of break activity contemplated by the employer); *Thornton*, 56 Van Natta at 3783 (injury during a brief break from work arose out of the claimant's employment, where the claimant was required by her employment duties to return to her workplace from a location that was the normal ingress/egress to her workplace; further, the break activity was the type contemplated by the employer and the claimant did not depart from the employment relationship when she went outdoors to escape the effect of paint fumes).<sup>6</sup> Thus, the "arising out of" prong of the work connection test has also been satisfied to some extent.

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<sup>6</sup> *Cf. Patty Perkins*, 56 Van Natta 2173 (2004), *aff'd without opinion*, 199 Or App 417 (2005) (employment did not expose the claimant to the risk of falling on a sidewalk several blocks away from the workplace, where her job did not require her to be).

The employer argues that claimant's "parking lot" injury did not arise out of her employment, because the injury did not occur in an area that was owned or maintained by the employer, or over which it exercised control. In support of this argument, the employer cites *Montgomery Ward v. Cutter*, 64 Or App 759 (1983). In *Cutter*, the court stated, "[i]f the injury occurs in a parking lot or other off-premises area over which the employer exercises no control, it is generally not compensable." *Id.* at 762.

However, since *Cutter*, the court has explained that, under the "arising out of" standard, we should not focus on individual factors, like control, but rather on "the totality of the events that gave rise to [the] claimant's injury." *Torkko v. SAIF*, 147 Or App 678, 682 (1997); *SAIF v. Marin*, 139 Or App 518, 522, *rev den*, 323 Or 535 (1996). Thus, the proper focus is on whether claimant's injury (which was caused when her shoe caught in a break in the parking lot where a post had been removed) is causally connected with her employment. As discussed above, we conclude that it was.

In sum, we find that claimant has established, to some degree, each element of the work-connection test. *Hayes*, 325 Or at 596 (both prongs of the statutory "work connection" test must be satisfied to some degree); *Krushwitz*, 323 Or at 531. Moreover, "the combination of those elements demonstrates that 'the causal connection between the injury and the employment is sufficient to warrant compensation.'" *Sisco v. Quicker Recovery*, 218 Or App 376, 392 (2008) (quoting *Hayes*, 325 Or at 597). Consequently, we affirm.<sup>7</sup>

Claimant's attorney is entitled to an assessed fee for services on review concerning the "course and scope" issue. 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 regarding the "course and scope" issue is \$3,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and claimant's counsel's uncontested request), the complexity of the issue, and the value of the interest involved.

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<sup>7</sup> We adopt the ALJ's reasoning and conclusions regarding the attorney fee award for services at hearing.

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 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 September 16, 2009 is affirmed. For services on review, claimant's counsel is awarded a \$3,500 attorney fee, to be paid 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, payable by the employer.

Entered at Salem, Oregon on August 13, 2010

Member Langer dissenting.

The majority concludes that the going and coming rule does not apply to determine compensability of claimant's injury. I respectfully disagree.

As set forth in the majority opinion, 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).

Generally, 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 is not compensable. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 526 (1996). The purpose of this "going and coming" rule is that the relationship between the employer and its employees is ordinarily suspended, because employees, during the time that they are going to or coming from work, are rendering no service for the employer. *Id.* at 526-27. A number of exceptions to the general rule exist, however, that justify treating employees as if they continued in the course of employment at the time of an injury that occurred while going to or coming from work.

One of the exceptions to the “going and coming” rule is the “parking lot” exception. *Compton v. SAIF*, 195 Or App 329, 332, *rev den*, 337 Or 669 (2004). “The parking lot exception applies to any area over which an employer exercises some control.” *Id.*; *see also Cope v. West American Ins. Co.*, 309 Or 232, 239 (1990) (“When an employee traveling to or from work sustains an injury on or near the employer’s premises, there is a ‘sufficient work relationship’ between the injury and the employment only if the employer exercises some ‘control’ over the place where the injury is sustained.”).

The court has explained that there is “no reason to distinguish, for purposes of the parking lot rule” between a worker’s injury while going to or coming from work at the beginning or end of the work day and an injury incurred while going to or coming from a break (whether paid or unpaid). *Legacy Health Systems v. Noble*, 232 Or App 93, 99 (2009). Here, because the record establishes that claimant left the employer’s premises and was *returning to work* at the end of a paid break when she was injured, the “going and coming” rule applies and the claim is not compensable unless the employer controlled the parking lot where the injury occurred. *See id.* at 100 (“in the course of” established under the “parking lot” exception where the claimant was injured while going to a credit union on a paid break and the injury occurred where the employer had some control); *Hearthstone Manor v. Stuart*, 192 Or App 153, 158 (2004) (injury sustained on a sidewalk connecting two of the employer’s buildings when claimant was returning from lunch fell within the “parking lot rule” and occurred in the course of employment); *see also JAK Pizza, Inc.-Domino’s v. Gibson*, 211 Or App 203 (2007) (applying the going and coming rule and its exceptions to an unpaid lunch break injury).<sup>8</sup>

The majority relies on *Cheryl L. Hulse*, 60 Van Natta 2627 (2008), and *Jill K. Thornton*, 56 Van Natta 3781 (2004). However, I interpret the Court of Appeals’ *Noble* opinion as holding that the “going and coming” rule applies anytime an employee departs from their workplace during a break (whether paid or unpaid). Accordingly, I consider those cases as having been effectively overruled.

Moreover, those cases are factually distinguishable. In *Hulse*, the claimant was injured when she fell descending the exterior stairs of her workplace (a county courthouse) while on a paid break, which she intended to spend smoking at least 10 feet away from the building, as directed by her employer. We concluded that

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<sup>8</sup> Here, the parties litigated the compensability issue under the going and coming rule and parking lot exception. They did not raise any issues under ORS 656.005(7)(b)(B).

the “going and coming” rule did not apply, because the claimant’s brief break in another area of the insured’s premises did not amount to her “coming from” work. Moreover, the county was responsible for maintenance of the area on which the claimant was injured. Thus, relying on *Thornton*, we found the claim compensable. 60 Van Natta at 2629-30.

In *Thornton*, the claimant was bothered by paint fumes in the building where she worked and left for a breath of fresh air. She remained outside for five to ten minutes in close proximity to her work area, on the margin of a parking lot, and was injured returning from her break when she tripped on curbing along the sidewalk where she had been standing. 56 Van Natta at 3781-82.

Here, claimant was injured when she was returning from a shelter located about 100 feet away from her workplace. The employer leased several parking places in the parking lot, but claimant did not sustain her injury there. Instead, she fell because of a crack in the pavement in the area right outside of the shelter. Accordingly, unlike in *Thornton* and *Hulse*, claimant was not injured in “close proximity” of her workplace; nor did her working conditions require her to use the shelter.

In my view, this case is controlled by *Noble*, 232 Or App at 99-100 (the “going and coming” rule applied to the claimant’s injury sustained during a break on a personal errand); *Gibson*, 211 Or App at 206-207 (the “going and coming” rule applied where the claimant left the employer’s premises during his break and ran across the street to purchase a drink); *Stuart*, 192 Or App at 157 (the “going and coming” rule applied to an injury sustained on a sidewalk connecting two of the employer’s buildings when the claimant was returning from lunch); *Naomi R. Pierce*, 60 Van Natta 2420 (2008) (the “going and coming” rule applied to the claimant’s injury she sustained while going to purchase lunch during her break); and *Patty Perkins*, 56 Van Natta 2173 (2004) (the “going and coming” rule applied to the claimant’s injury she sustained on a public sidewalk while she was going to a nearby restaurant during her break).

Here, the record does not establish that the employer owned, leased, or otherwise controlled or maintained the area of the parking lot where claimant was injured. There is no evidence that any control the employer may have had over the leased parking spaces extended beyond the boundaries of that specific area. Under these circumstances, the “parking lot” exception to the “going and coming” rule

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does not apply and the injury did not occur in the course of claimant's employment. Consequently, I would not find the claim compensable. *Hayes*, 325 Or at 596 (for an injury to be compensable, both prongs of the unitary "work-connection" test must be satisfied to some degree).<sup>9</sup>

Accordingly, for the reasons expressed herein, I conclude that the relationship between the injury and claimant's employment is insufficient to establish compensability. Because the majority concludes otherwise, I respectfully dissent.

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<sup>9</sup> In addition, because the record does not establish that the employer had any control over the defect in the pavement over which claimant fell, claimant's injury did not arise out of her employment.