

In the Matter of the Compensation of  
**ASHLEY N. SCHUTZ, Claimant**

WCB Case No. 10-01509

ORDER ON REVIEW

Brian R Whitehead, Claimant Attorneys  
David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that upheld the SAIF Corporation's denial of her injury claim resulting from a motor vehicle accident (MVA). On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

Claimant began working for the insured, a construction company, on a permanent basis as an office manager on December 1, 2008.<sup>1</sup> (Tr. 92).<sup>2</sup> As an office manager, she reported to multiple project managers, although she primarily reported to the son of the company's owner. (Tr. 19, 93-94, 104, II: 48; Exs. 2, 23-9). Her work shift typically ended at 5 p.m. (Ex. 23-7).

At approximately 4:30 p.m. on December 12, 2008, the owner's son invited claimant to a restaurant, along with other employees. (Tr. 104; Ex. 23-7). She accepted the invitation and, shortly thereafter, left the insured's premises and drove to a nearby restaurant. She had previously been invited by the owner's son on multiple occasions to events and activities outside of work hours, but had refused those invitations because she felt "really uncomfortable going out drinking with [her] boss." (Tr. 94; *see also* Tr. 46-49, 95-96; Exs. 2-8, 3, 23-3, -6). She accepted the invitation on this occasion, however, because she wanted to be a "team player" and felt that she needed "to go out at least once" and "get along with her boss"; she also believed that accepting the invitation was important to advancing in the company. (Tr. 94, 109-10, II: 51, 53-54; Ex. 23-3). Moreover, because this

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<sup>1</sup> Claimant worked at the insured for a couple of months as a temporary agency employee before being hired on a permanent basis as of December 1, 2008.

<sup>2</sup> Transcript pages refer to the first volume of transcripts, unless otherwise indicated.

particular invitation involved only coworkers, whereas other invitations involved the owner's son's friends, it seemed to claimant that this outing was "the most professional thing, the closest to work of the other things that [the owner's son] had invited [her] to." (Tr. II: 51).

Claimant, the owner's son, and two other employees arrived at the restaurant at approximately 5 p.m. (Tr. 59, 60, 63, 68, 77, 97, II: 7-8). One of the other two employees left after drinking one 24-ounce beer, while the other consumed two or three such drinks. (Tr. 60, 64, 78, II: 8, 15, 49-50). Claimant and the owner's son remained at the restaurant and continued drinking; by the time that the two left the restaurant (between 8 and 9 p.m.), they had each consumed four or more 24-ounce beers. (Tr. 29-30, II: 10-11; Exs. 18-13, 26-2, 30-3, -4). The owner's son paid for claimant's drinks. He also sent a text message at 9:18 p.m. to claimant and one of the other employees that read: "Let me know if you two make it home okay." (Ex. 7; Tr. 25-26).

Shortly after 9 p.m., claimant called a friend and indicated that she was headed home. (Ex. 18-20). She got into her car and proceeded to drive the wrong direction on a freeway and, after driving approximately .88 miles at 55-65 mph, struck another vehicle in an "off-set, head-on collision." (Ex. 18-3, -14). Claimant sustained multiple serious injuries. Her blood alcohol level was recorded at .24 percent when admitted to the hospital. (Ex. 16-3).

SAIF denied claimant's injury claim. (Ex. 24).<sup>3</sup> Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ upheld SAIF's denial, finding that claimant's injury did not arise out of and occur in the course of her employment. On review, claimant contends that her appearance at the "after-work party" was in the course and scope of her employment, as was her subsequent trip home.

SAIF requests that we affirm the ALJ's determination. Alternatively, SAIF asserts several affirmative defenses, which it raised at hearing, that it contends also warrant upholding its denial.<sup>4</sup>

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<sup>3</sup> Claimant submitted a long-term disability form to the employer on or about February 3, 2009 and an "801" form on December 9, 2009. (Tr. II: 57-58; Exs. 20A, 21).

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We agree with SAIF that claimant's injury did not occur "in the course of" or "arise out of" employment.<sup>5</sup> We reason 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.*

We begin by addressing whether the injury occurred "in the course" of employment.

"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." *Id.* at 598-99.

Claimant's injury occurred off the insured's premises, approximately five hours after she had completed her work duties and left her work premises, and while driving her vehicle, presumably home, in an intoxicated state. Under such circumstances, we do not conclude that she was injured "within the period of employment, at a place where [she] reasonably may be expected to be, [or] while [she] reasonably [was] fulfilling the duties of" her employment as an office manager or "doing something reasonably incidental to" that employment. *See id.*

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<sup>4</sup> Specifically, SAIF argues that: (1) claimant's claim was not timely filed (*see* ORS 656.265); (2) claimant was injured as a result of a recreational or social activity primarily engaged in for her personal pleasure (*see* ORS 656.005(7)(b)(B)); and (3) the major contributing cause of claimant's injury was her consumption of alcoholic beverages, and that its insured did not permit, encourage, or have actual knowledge of such consumption (*see* ORS 656.005(7)(b)(C)).

<sup>5</sup> Therefore, we do not address SAIF's alternative affirmative defenses or adopt that portion of the ALJ's order concerning the statutory exclusion under ORS 656.005(7)(b)(B).

Claimant contends that, because she went to the restaurant to “get along with her boss” and/or improve her chances of advancing in the company, she was “in the course of” employment at the time that she was injured on the way home from the restaurant.<sup>6</sup> Claimant acknowledges that, under the “going and coming” rule, injuries sustained while traveling to or from work generally do not occur in the course of employment and, consequently, are not compensable. *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 526 (1996). Therefore, even if we agreed with claimant’s “in the course of” theory as to her time spent at the restaurant, which we do not, she would need to satisfy some exception to the “going and coming” rule. On that point, claimant argues that either the “special errand” or “greater hazard” exception applies. We disagree.

To begin, exceptions to the “going and coming” rule are narrowly applied. *Id.* at 529. The “special errand” exception applies when an employee sustains an injury while off the employer’s premises, but while he or she was proceeding to perform, or while proceeding from the performance of, a special task or mission. *Id.* at 527. Moreover, the exception is limited to “when either the employee was acting in the furtherance of the employer’s business at the time of the injury or the employer had a right to control the employee’s travel in some respect.” *Id.* at 528.

Applying those principles in *Heide/Parker v. T.C.I. Inc.*, 264 Or 535, 545-46 (1973), the court found that the “special errand” exception did not apply where the claimant was killed in an MVA while traveling home from her place of employment. In *Heide/Parker*, the claimant stopped at a bar with a customer before leaving for home and was carrying some work-related items in her vehicle at the time of the accident. 264 Or at 538. In declining to apply the “special errand” exception, the court stated:

“[W]e cannot see how it can be said that [the employee] was in the furtherance of her employer’s business after she left the bar and started for her home in Salem. Her employer had no right to dictate the manner of travel, the route to be taken, her speed, or that she use her car to drive home as compared to other modes of travel.” *Id.* at 545-46.

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<sup>6</sup> Claimant’s argument presumes that she remained “in the course of” employment for the entire four-hour period of drinking at the restaurant. As set forth in more detail below, we do not agree with that presumption. In any event, even if we agreed with claimant on that point, she acknowledges that she was not injured at the restaurant, but on the way home from the restaurant. Therefore, to be compensable, we would have to conclude that she was “in the course of” employment on the drive home.

Likewise, here, the record does not establish that claimant “was acting in the furtherance of the [insured’s] business at the time of injury” or that the insured “had a right to control [her] travel in some respect.” See *Krushwitz*, 323 Or at 528. As in *Heide/Parker*, the record does not support the proposition that the insured could “dictate the manner of travel, the route to be taken, [claimant’s] speed, or that she use her car to drive home as compared to other modes of travel.” See 264 Or at 538. Moreover, the record does not establish that the insured could dictate that claimant drive her vehicle home in an intoxicated state. Consequently, we find that the “special errand” exception does not apply.

The “greater hazard” exception applies if “the employee’s employment requires the employee to use an entrance or exit to or from \* \* \* work [that] exposes the employee to hazards in a greater degree than the common public.” *Krushwitz*, 323 Or at 529 (original brackets removed). The exception is only applied in the “limited circumstances” where a worker “is injured while traveling upon the only means of ingress to or egress from the employer’s premises and some ‘greater hazard’ existed upon that route.” *Id.* (emphasis in original).

In *Krushwitz*, the court refused to apply the exception where the purported “greater hazard” was that the claimant “was tired after working two shifts and attending school within the same 24-hour period.” *Id.* The court reasoned that the claimant did not show that the MVA occurred “upon a route that was the sole means of ingress to or egress from [the] restaurant,” and that “no specific hazard existed at a particular off-premises point, such as heavy, dangerous traffic or a railroad crossing.” *Id.*

As applied to the instant matter, the evidence does not establish that claimant was injured on “a route that was the sole means of ingress to or egress from” the restaurant.<sup>7</sup> See *id.* Rather, claimant was injured at a location over a mile from the restaurant and after proceeding the wrong way onto a freeway. Moreover, the record does not establish that claimant was injured as a result of a “specific hazard” at a “particular off-premises point,” but rather as a result of her own self-created hazard of driving intoxicated in the wrong direction toward oncoming freeway traffic. Therefore, the “special hazard” exception does not apply.<sup>8</sup>

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<sup>7</sup> Again, this presumes that the employer’s premises extended to the restaurant for the duration of the evening, a presumption with which we do not agree.

<sup>8</sup> We also decline claimant’s request to create some new exception to the “going and coming” rule that would bring her injury within the course of employment.

Because claimant's injury did not occur "in the course of" employment, her claim is not compensable. *See id.* at 530-32. Although that is sufficient to end our inquiry, we also find that claimant's injury 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.

Here, we find that the risk of injury resulted from an MVA that occurred while driving home approximately four hours after she finished her work shift. That MVA did not result "from the nature of \* \* \* her work" as an office manager or "originate[] from some risk to which the work environment expose[d] her." *See Griffin*, 210 Or App at 473. Regardless of the reason(s) that claimant went to the restaurant with her boss and coworkers after work, she was not exposed to the risk of the MVA, which occurred some four hours later and while driving home, by virtue of her employment. Rather, that risk arose out of factors unrelated to her work as an office manager.<sup>9</sup> Therefore, we find that claimant has not established that her injury "arose out of" employment.

Finally, we reject claimant's request that we find her injury claim compensable as a "consequential condition." *See* ORS 656.005(7)(a)(A). A consequential condition is "a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn results in back strain." *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1996); *see also William T. Pepperling*, 61 Van Natta 186, 187, *recons*, 61 Van Natta 770 (2009), *aff'd*, 237 Or App 79 (2010).

Claimant contends that by viewing her MVA injuries as a "consequential condition," we can "avoid[] any analysis of 'course and scope' questions or exceptions to the coming and going rule." The very nature of a compensable

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<sup>9</sup> We reject claimant's contention that her MVA was caused by "work-related intoxication." The record does not support a finding that claimant's intoxication was related to work. Specifically, the evidence does not establish that claimant was pressured or encouraged to consume alcoholic beverages at the restaurant, much less in the quantity that she did. The evidence also does not support any employer direction or encouragement that she drive home afterward. At most, the record supports that claimant felt "obligated" to engage in at least one after-work outing with her boss and coworkers. It does not follow that claimant's consumption of alcohol, her drive home afterward, or the MVA on that drive home were "work-related."

injury, however, is that it *must* occur in the “course and scope” of employment. *See* ORS 656.005(7)(a). Thus, we may not “avoid” conducting a “course and scope” analysis of claimant’s claimed injury. Likewise, as set forth above, the “going and coming” rule derives from the requirement that compensable injuries must occur “in the course of” employment, and therefore is not a doctrine that we may elect to avoid.

Moreover, a “consequential condition” demands, as a prerequisite, an initial injury that occurred in the course and scope of employment. In other words, a “consequential condition” does not bypass a “course and scope” analysis, but rather describes “a separate condition that *arises from* the compensable injury.” *Crompton*, 150 Or App at 536 (emphasis added). Thus, an injury occurring in the “course and scope” of employment is fundamental to any “consequential condition.”

As we understand claimant’s “consequential condition” theory, she contends that she suffered a “compensable injury” by becoming intoxicated at the restaurant, and that her MVA-related injuries were “consequential conditions” to that purported initial “injury” of intoxication. Claimant, however, has not established even the initial prerequisite of a “consequential condition,” *i.e.*, that she sustained a “compensable injury.” *See* ORS 656.005(7)(a) (defining “compensable injury” as “an accidental injury \* \* \* arising out of and in the course of employment requiring medical services or resulting in disability or death \* \* \* if it is established by medical evidence supported by objective findings”).

Specifically, she has not established that her intoxication at the restaurant (separate and apart from the subsequent MVA) “require[ed] medical services or result[ed] in disability or death.” *See id.* She also did not establish that her intoxication “arose out of” and “in the course of” employment. To the contrary, the evidence supports that claimant’s intoxication occurred at a time and place where she was not reasonably expected to be as an office manager, and that she was not reasonably fulfilling her office manager duties or doing something reasonably incidental to that employment when she became intoxicated. *See Hayes*, 325 Or at 598-99. Likewise, any risk of excessive alcohol consumption was not proven to be a risk that resulted from the nature of her work as an office manager or from some risk to which her work environment exposed her. *See Griffin*, 210 Or App at 473. Therefore, we do not find that claimant’s intoxication at the restaurant qualifies as a “compensable injury.” Consequently, it is not necessary to determine whether her subsequent MVA injuries arose from that intoxication in a manner consistent with being a “consequential condition.”

In sum, for the foregoing reasons, we find that claimant's claimed injuries did not "arise out of" or occur "in the course of" employment. Therefore, we affirm.

ORDER

The ALJ's order dated November 12, 2010 is affirmed.

Entered at Salem, Oregon on June 2, 2011