
In the Matter of the Compensation of
DIANE POHRMAN, Claimant
WCB Case No. 11-01308
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Dougherty's order that upheld the self-insured employer's denial of claimant's injury claim for head, neck, and upper extremity conditions. On review, the issue is course and scope of employment.¹ We reverse.

FINDINGS OF FACT

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

In February 2011, claimant worked as a customer service assistant in the employer's wealth management department. She assisted two banking "officers" with their clients' business. (Tr. 30, 36; Ex. 16-2). These officers were not supervisors. (Tr. 36).

Claimant's office was located on the sixth floor of the "Tower" building. (Tr. 31; Ex. 16-2). When arriving at work, claimant would enter the "Tower" building from the sixth-street entrance, and walk northeast through the lobby to the elevators, which she would take up to her sixth floor office. (Tr. 31-32).

The "Tower" building shares a lobby with the "Plaza" building. (Tr. 26). The employer also has an office in the "Plaza" building, but it is a different division from the one for which claimant works. (Tr. 17-18; Ex. 16-2, -3).

¹ Claimant argues that the ALJ should have considered testimony that she offered after resting her case in chief. (See Tr. 59-60). We review the ALJ's evidentiary ruling for abuse of discretion. *SAIF v. Kurcin*, 344 Or 399 (2002). Here, even if we considered the proposed testimony, it would not affect the outcome of this case. Therefore, we need not decide whether the ALJ abused her discretion. See, e.g., *Joyce A. Dietrich*, 63 Van Natta 2507, 2509 (2011).

Pursuant to its lease, the employer has a nonexclusive right to use the lobby of the “Tower” building, and no portion of the “rental area” of the lobby shall be used or occupied for “retail financial services purposes” by anyone other than the employer. (Ex. A-17). The employer maintains and operates an ATM machine in the lobby area. (Tr. 38). Under the lease, the employer’s rental payment includes a *pro rata* share of “operating costs,” which are expenses paid by the landlord for maintaining, operating and repairing the building (including the cost of supplies, janitorial and cleaning services). (Ex. A-18, -19; *see also* Ex B). The lease also provides the employer with a “self-help” provision, giving it the right to set-off an amount of its rental payment in the event the landlord fails to perform its maintenance obligations (including all common areas of the building) following notice by the employer. (Exs. A-27, B). Finally, under the lease, the employer waives all claims against the landlord for “any injury to any person, loss of life or any loss of or damage to any property caused by or resulting from any negligence or willful act or negligent failure to act by [employer] or any * * * employee, * * * in or about the Development.”² (Ex. A-31).

Claimant was not an “exempt” employee and was paid hourly. (Tr. 33; Ex. 16-2). She would take two 15-minute breaks, one in the morning and one in the afternoon, and an hour lunch break.³ The 15-minute breaks were paid and “mandatory”; she was “encouraged” to take her breaks. (Tr. 33-34, 56). Her supervisor would often remind her to take her breaks. (Tr. 34, 57). She would coordinate her break times with two other assistants so one of them was always present in the office. (Tr. 34). Claimant usually took her breaks last, since she was the latest to arrive to work. (*Id.*)

There were no restrictions on where claimant could go or what she could do during her breaks. (Tr. 34, 57). There was a break room on the sixth floor, down the hall from claimant’s desk, which provided coffee, tea, creamer, and hot water. (Tr. 34-35). More than 80 percent of the time, claimant would take her breaks downstairs in the lobby, which housed several businesses, including a coffee shop, several restaurants, and a gym. (Tr. 37-39; Ex. 16-4). Claimant believed that the employer “had reason to know” that she and other employees went downstairs to the lobby for their breaks. (Tr. 56).

² The “development” includes the “Tower” Building, the “Plaza” Building, and an adjoining garage, collectively. (Ex. A-15).

³ Claimant usually described her mandatory breaks as being 15 minutes long. She also indicated that they could be “Fifteen to 20 minutes, just general.” (Tr. 33).

Claimant's supervisors periodically gave employees gift cards for the lobby coffee shop as gifts, as a "thank you," or on special days. (Tr. 16, 35). Claimant generally took her break at the lobby coffee shop two to three times a week. She estimated that the other assistants in her department took their breaks at the coffee shop at about the same frequency. (*Id.*)

About once a week, during her break, claimant would have coffee in the lobby with her friend, Mr. Grant, who worked as a manager for the employer in its "Plaza" building division. (Tr. 12, 18; Ex. 16-3). There was no work connection between claimant and Mr. Grant, or in them having coffee together. (Tr. 48). Both Mr. Grant and claimant, who were personal friends, described their coffee meetings as "social in nature," with no work-related purpose. (Tr. 13, 18, 21, 22, 48, 50, 51; Ex. 16-3). Mr. Grant stated that "getting coffee with [claimant]" was something that he did "primarily for personal pleasure." (Tr. 22). Claimant also stated that having coffee with Mr. Grant was something she did "primarily for [her] own personal pleasure." (Tr. 50). Mr. Grant's position at the employer's in no way influenced claimant's choice to have coffee with him at any given time. (Tr. 48-49).

On February 24, 2011, claimant took her morning break at 10:00 a.m., as instructed by her supervisor. (Ex. 16-3). Before leaving her desk, she communicated with Mr. Grant via an inter-office "same time message" that it was time to meet for coffee. (Tr. 38). As claimant was walking out of the office, one of the officers, who was returning from a break, gave her a free gift card that she had gotten from the coffee shop. Claimant accepted the card with the intention of using it that day. (Tr. 36; Ex. 16-3). She then took the elevator to the lobby where she met Mr. Grant (who had come from the "Plaza" building elevators) and began crossing the lobby toward the coffee shop. (Tr. 40; Ex. 16-3). Their intention was to get coffee and then sit in the lobby and "chat." (Tr. 37; Ex. 16-3). However, about half way across the lobby, as claimant and Mr. Grant were walking and talking, claimant slipped on water and fell, hitting her backside and head. (Tr. 14, 19, 40; Ex. 16-4).

Neither claimant nor Mr. Grant remember what they were talking about when she fell. (Tr. 19; Ex. 16-4). Mr. Grant stated that he did not intend to conduct any work-related business with claimant on the day she fell. (Tr. 22).

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 claimant's injury occurred while she was engaged in a social activity performed primarily for her personal pleasure and, therefore, it was not a compensable injury under ORS 656.005(7)(b)(B). Alternatively, even if not otherwise excluded, the ALJ found that claimant's injury did not arise out of and in the course of her employment. Consequently, the ALJ upheld the employer's denial.

On review, claimant argues that her activity when injured was not the type of social or recreational activity contemplated by the exclusionary statute, nor was it performed primarily for her personal pleasure, because the break itself was part of her regular work day. Turning to compensability, claimant contends that her injury arose out of and in the course of employment because she was injured while on an employer-mandated paid break in a place where the employer reasonably expected her to be.

For the following reasons, we conclude that claimant's injury is compensable.

We first address whether the injury is excluded from coverage under ORS 656.005(7)(b)(B) before determining whether it "arose out of" and occurred "in the course of" claimant's employment. *Liberty Northwest Ins. Corp. v. Nichols*, 186 Or App 664, 667 (2003). That statute provides an exclusion for an "[i]njury incurred while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities primarily for the worker's personal pleasure[.]" ORS 656.005(7)(b)(B).

In *Roberts v. SAIF*, 341 Or 48 (2006), the Supreme Court explained that this statutory exclusion raises three questions. The first is whether the worker was engaged in or performing a "recreational or social activity." The second is whether the worker incurred the injury "while engaging in or performing, or as a result of engaging in or performing," that activity. The final question is whether the worker engaged in or performed the activity "primarily for the worker's personal pleasure." If the answer to all those questions is "yes," then the worker cannot recover. *Id.* at 52.

Because ORS 656.005(7)(b)(B) is an affirmative defense, the employer bears the burden of establishing that claimant's activity at the time of her injury was a recreational or social activity engaged in or performed primarily for her personal pleasure. See *Washington Group Int'l v. Barela*, 218 Or App 541 (2008); *Donnakay Smith*, 60 Van Natta 2955, 2957 (2008).

We first address whether claimant was engaged in or performing a “recreational or social activity.” Based on our review of the record, we find that claimant was not engaged in the type of “social” activity contemplated by the statute when injured.

The Court of Appeals has adopted the dictionary definition of “social” for purposes of the exclusionary statute. Thus, “social,” in this context, means “marked by or passed in pleasant companionship with one’s friends or associates * * * taken, enjoyed, or engaged in with friends or for the sake of companionship.” *Nichols*, 186 Or App at 668 (quoting Webster’s Third New Int’l Dictionary 2161 (unabridged ed 1993)); *see also Barela*, 218 Or App at 546.

In *Legacy Health Systems v. Noble*, 232 Or App 93 (2009), the claimant was injured while walking to a credit union to deposit a personal check during a paid break from work. The employer conceded that the claimant was not engaged in a “social” activity, and the court agreed, noting that she was “walking alone, from a workstation, to her credit union.” *Id.* at 98. It noted, however, that walking “can, in some circumstances, be social (a group hike), * * *.” (*Id.*) Regarding whether the activity was “recreational,” the court explained that the claimant’s walking activity did not fit the established definition of that term, nor was it the kind of activity that it had previously recognized as “recreational.” It reasoned:

“[The] [c]laimant was walking to the bank, while on the clock; by no stretch of the imagination can we conclude that she was refreshing her strength and spirits after toil or engaged in play, diversion, or entertainment. [*Roberts*, 196 Or App] at 418. Nor does walking to the bank to deposit a check bear any kind of relationship to soaking in a hot tub, picnicking, or engaging in a game or sport. It is true that walking can, in some circumstances, be * * * refreshing to the spirit after toil (a stroll along the river after work on a warm spring day), or a sport (a 10-kilometer walk race). The ALJ, however, found that, when [the] claimant walked toward the credit union in this case, she was not engaged in refreshment of strength and spirit after toil, or in diversion or play. The board agreed. Substantial evidence supports that finding.” *Id.* at 98-99.

Finally, the court noted that, under the three-part analysis mandated by *Roberts*, “the abstract nature of the activity presents a question (social or recreational?) that is distinct from the actor’s state of mind while acting (primarily for the claimant’s personal pleasure?).” *Id.* at 99 n 1.

Here, claimant testified that her meetings with Mr. Grant for coffee during her breaks were “social in nature.” Nevertheless, we conclude that her activity of walking with a friend to get coffee during a paid, mandatory break is not the kind of “social” activity contemplated by the statute. Because the employer required two 15-minute breaks every day, these short mandatory breaks were a part of claimant’s regular work day. The employer acquiesced to the employees going to the lobby for coffee during their breaks. Claimant estimated that she had coffee in the lobby during her breaks 80 percent of the time, and that she would meet Mr. Grant for coffee about once a week. Moreover, on the day of injury, the employer had told claimant to take her break after coworkers returned from their breaks, which she did. (Ex. 16-3). In addition, on her way out, she received a free gift card for the coffee shop from one of the officers, which she intended to use that day.

Under these circumstances, we find that claimant’s activity at the time of her injury (walking with a friend to get coffee during a paid, mandatory break) was a regular incident of her employment, and was not the type of “social” activity that the legislature intended to exclude from a compensable injury. *See Roberts v. SAIF*, 196 Or App 414, 417 (2004), *aff’d*, 341 Or 48 (2006) (“The question of the compensability of an injury sustained during a recreational or social activity has typically arisen in the context of cases involving off-the-job group recreational or social activities such as picnics, office parties, or organized or spontaneous sports or games. *See, e.g., Colvin v. Industrial Indemnity*, [83 Or App 73] (1986) (law firm picnic); *Rose v. Argonaut Ins. Co.*, [77 Or App 167] (1985) (softball game); *Richmond v. SAIF*, [58 Or App 354, *rev den*, 293 Or 634] (1982) (benefit basketball game).”).

Alternatively, even if claimant was injured during a “social” activity as contemplated under the statute, we would still find the statutory exclusion inapplicable because we are not persuaded that the activity was performed “primarily” for personal pleasure. We reason as follows.

In *Roberts*, the court explained that a worker may engage in a recreational or social activity for reasons other than personal pleasure, and that our task is to determine whether the worker’s personal pleasure was the principal or fundamental

reason for engaging in the activity. We must consider whether claimant was engaged in the activity primarily for personal pleasure or for work-related reasons. 341 Or at 53. In *Nichols*, the court explained that “the ‘activity’ the statute refers to is not the particular action that causes the injury * * *, but the activity within which that action occurs (working or not working).” 186 Or App at 670 n 4. The court explained that the proper focus of the exclusionary statute is not whether the activity at the time of the injury was pleasurable, but whether it was incidental to the employment. *Id.* at 670-71.

Here, claimant was injured while on a paid, mandatory break, in a place that the employer reasonably expected her to be. She was required to take two 15-minute breaks every day, as a part of her regular work schedule. On the day of injury, the employer had told claimant to take her break after her coworkers returned from their breaks, which she did. (Ex. 16-3). On her way out, she received a free gift card from one of the officers, which she intended to use that day. Moreover, the employer acquiesced to employees going to the lobby for coffee during their breaks. Claimant estimated that she had coffee in the lobby during her breaks 80 percent of the time. Thus, at the time of injury, she was on an employer-mandated paid rest break, going to an area where she and other employees were accustomed to going, at a place where the employer reasonably expected her to be, and using a gift card furnished by a superior for whom she performed services.

We acknowledge that claimant agreed that having coffee with Mr. Grant during her breaks was something she did “primarily” for her own “personal pleasure.” (Tr. 50). However, although claimant may have derived pleasure from her interaction with Mr. Grant, that did not represent the totality of the “activity” within which she was injured. Most importantly, claimant was on a paid, mandatory break, taken at her employer’s direction, when injured. Under these circumstances, any personal pleasure she derived from being with Mr. Grant was merely incidental to the primarily work-related nature of the activity. *See Nichols*, 186 Or App at 669 (the claimant was primarily engaged in work activities at the time of his tooth injury, and the pleasurable activity of eating candy was merely incidental to work); *Kaiel v. NCE Cultural Homestay Inst.*, 129 Or App 471, 478, *rev den*, 320 Or 453 (1994) (“The fact that a worker derives pleasure from a work activity does not necessarily mean that the worker engages in the activity primarily for personal pleasure. It would be absurd to make the compensability of an injury turn on whether a worker has fun doing his or her job.”); *Kaleiokalani Barela*, 60 Van Natta 3177 (2008) (on remand) (where the claimant had lunch on the employer’s premises because of the distance to outside

eating choices, his participation in a group lunch in one of the employer's lunchrooms was not an activity primarily for personal pleasure and, as such, his injury while incidentally "jostling" a candy machine was not excluded from compensation).

Accordingly, because we have determined that claimant's "activity" at the time of injury was not "social/recreational," and, alternatively, that it was not performed "primarily for personal pleasure," we conclude that the employer has not carried its burden of proving that claimant's injury is excluded from compensability under ORS 656.005(7)(b)(B). See *Matthew E. Barrall*, 63 Van Natta 2218, 221 (2011) (because ORS 656.005(7)(b)(B) is an affirmative defense, the carrier bears the burden of establishing that the claimant's activity at the time of injury was a recreational or social activity performed primarily for personal pleasure). Having so determined, we next address compensability.

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. 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 work 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.

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 Noble*, 232 Or App at 99-100 (citing *Hearthstone Manor v. Stuart*, 192 Or App 153, 158 (2004)).

However, in *Kevinia L. Frazer*, 62 Van Natta 2079, 2081-82 (2010), and *Jill K. Thornton*, 56 Van Natta 3781, 3782 (2004), we found the “going and coming” rule inapplicable where the claimants were only taking brief breaks and they were “on the clock”, in close proximity to their working areas when injured. Rather, we reasoned that the activities in *Frazer* and *Thornton* were more analogous to cases where a worker is injured during a “personal comfort” activity. (*Id.*) Thus, the import of *Frazer* and *Thornton* is that the “going and coming” rule does not apply where a claimant is only on a brief departure for personal comfort 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).

Here, as in *Frazer* and *Thornton*, claimant’s injury occurred when she was on a brief paid break, during her regular work hours, and in close proximity to her work area – *i.e.*, in the common lobby area of the same office building. The employer required claimant to take two such breaks every work day and, on the day of injury, had specifically told claimant not to take her mandatory break until after her coworkers returned. Claimant had no intention of leaving the building during her break, nor did she. Her only purpose for going to the lobby of the building was to get coffee at the place where she and other coworkers regularly visited. At the time of her injury, she was crossing the lobby via her normal egress/ingress route.⁴ Under these circumstances, like the activity in *Thornton*, claimant’s brief departure from employment to get coffee in the common lobby of her office building did not amount to her “coming from” work, and did not remove her from the course of her employment.⁵ *See Frazer*, 62 Van Natta at 2081; *Hulse*, 60 Van Natta at 2629; *Thornton*, 56 Van Natta at 3783.

⁴ *See Laurence C. Baxter*, 56 Van Natta 11, 13 (2004) (the particular route a worker uses to leave his or her workplace does not determine whether the worker was involved in “normal egress”; the claimant’s use of one route, rather than another, did not remove him from “normal egress” from work).

⁵ Because the “going and coming” rule does not apply, we need not address whether the employer exercised “control” of the area where the injury occurred. *See Hulse*, 60 Van Natta at 2630 n 3 (not addressing whether the employer exercised control over the premises of injury where the “going and coming” rule did not apply); *Thornton*, 56 Van Natta at 3783 (same).

In addition, the employer was aware that employees regularly visited the lobby coffee shop during their breaks. In fact, the employer frequently distributed gift cards for the coffee shop as gifts, or to say “thank you” to employees. On the day of injury, one of the officers claimant supported gave her a “free coffee” card from the coffee shop, which she intended to use that day. Also, as noted, the employer required workers to take breaks as a part of their regular work day and did not limit where workers might go on breaks. Regular coffee breaks during regular working hours were taken by employees at places of their choice, off or on the employer’s premises, with the knowledge and consent of the employer. Under these circumstances, we conclude that the employer acquiesced in claimant’s “break activity.”

Therefore, because claimant’s coffee break was the kind contemplated by the employer (*i.e.*, her coffee break for personal comfort during her regular work hours was consented to by the employer as an incident of her employment), and claimant did not otherwise depart from the employment relationship when she went to the lobby of the building to get coffee, the injury also “arose out of” employment. *See Mellis v. McEwen, Hanna, Grisvold*, 74 Or App 571, *rev den*, 300 Or 249 (1985) (because the claimant’s coffee break activity, in a common cafeteria located in the same office building as her employer’s office, was contemplated by the employer and acquiesced in by the employer, it was not a departure from the employment relationship);⁶ *Hulse*, 60 Van Natta at 2629; *Thornton*, 56 Van Natta at 3783.

Accordingly, for the foregoing reasons, we find a sufficient work connection between claimant’s injury and her employment. *See Hayes*, 325 Or at 596. 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 \$9,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant’s appellate briefs, and her counsel’s uncontested attorney fee submission), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

⁶ Although the seven-part *Mellis* test is not mechanically applied, the holding of *Mellis* (that an injury during a coffee break outside the employer’s premises but within the same building was compensable) has not been overruled.

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

ORDER

The ALJ's order dated July 8, 2011 is reversed. The employer'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 \$9,000, 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, to be paid by the employer.

Entered at Salem, Oregon on April 23, 2012

Member Langer, dissenting.

The majority reverses the ALJ's order that upheld the employer's denial of claimant's claim for an injury that occurred when she was meeting a friend for coffee during a prearranged visit while on a break from work. The majority reasons that the injury is not excluded from among compensable injuries under ORS 656.005(7)(b)(B). The majority further finds that the injury arose out of and in the course of claimant's employment. I disagree, reasoning as follows.⁷

During a paid break from work, claimant slipped in a lobby of the building where she worked, fell and sustained injuries. She had met her friend, Mr. Grant, and the two were going for coffee. She testified: "I'm walking and we're chatting and the next thing I know, I'm * * * down." (Tr. 40). Mr. Grant believed that claimant slipped "on something on the floor," probably water brought into the lobby from the outside on a cold and rainy day. (Tr. 19). Claimant and Mr. Grant both agreed that there was no work connection between them, and no work-related purpose for their coffee breaks together, including on the day of injury. (Tr. 48, 51). Claimant testified that going for coffee with Mr. Grant was "social in nature" and it was something she did "primarily for personal pleasure." (Tr. 50-51). Mr. Grant's testimony corroborates that of claimant. (Tr. 18, 21).

⁷ I agree with the majority's resolution of the evidentiary issue. *See* n 1, *supra*.

As the majority states, ORS 656.005(7)(b)(B) raises three questions. *Roberts v. SAIF*, 341 Or 48, 52 (2006). First, we must determine whether claimant was engaged in or performing a “recreational” or “social” activity when injured. (*Id.*)

“Social” means “marked by or passed in pleasant companionship with one’s friends or associates,” while “recreation” means “refreshment of the strength and spirits after toil.” *Washington Group Int’l v. Barela*, 218 Or App 541, 546 (2008); *Liberty Northwest Ins. v. Nichols*, 186 Or App 664, 668 (2003) (utilizing dictionary definitions in deciding whether the claimant’s activity was “recreational” or “social”). Walking may be recreational depending on the circumstances. *Legacy Health Systems v. Noble*, 232 Or App 93, 98 (2009).⁸

The “abstract nature” of claimant’s walk to the coffee shop and chat with a friend, *see Nichols*, 186 Or App n 1 at 100, satisfies the definition of “social,” because it was marked by or passed in pleasant companionship of her personal friend. Moreover, the activity likely qualifies as “recreational,” because claimant was in the process of refreshing herself after hours of work.

The second part of the *Roberts* test concerns whether the worker incurred the injury while engaging in or as a result of engaging in a recreational or social activity. Here, claimant apparently slipped while walking and chatting with her friend. That activity caused her injury or was, at least, temporarily connected to the injury. Thus, claimant was injured “while engaging in” that activity. 341 Or at 52 (the statute requires a temporal, not causal, connection between the injury and activity).

The third question under *Roberts* is whether the worker engaged in the activity “primarily for the worker’s personal pleasure.” In this regard, the majority finds determinative that claimant was injured on her regular, paid break, had received a coffee gift card from her superior, and was injured in an area where the employer reasonably expected her to be. In my opinion, the majority does not focus its inquiry properly. Instead, the “primarily for the worker’s personal pleasure” question concerns the actor’s state of mind while acting. *Noble*, 232 Or App 93, 100 n 1.

⁸ In *Noble*, the claimant was injured while walking alone from a workstation to her credit union to deposit a personal check. The court concluded that she was not engaged in a “social” activity; furthermore, although walking may be recreational, depending on the circumstances, the claimant’s walk to the credit union was not a recreational activity, because the claimant was not refreshing her strength and spirits after toil or engaged in play, diversion or entertainment.

According to the majority, the fact that claimant was injured while taking a “paid, mandatory break,” somehow trumps the fact that she was socially interacting with a friend. I respectfully disagree. The “taking of a paid break” provides a temporal, spatial and circumstantial setting for an injury that, unlike in a general “course of employment” analysis under ORS 656.005(7)(a), does not conclusively determine the outcome of an analysis under ORS 656.005(7)(b)(B). *See, e.g., Roberts*, 341 Or at 56-57 (an injury arising out of the claimant’s motorcycle ride in the work place, during regular hours and with the employer’s consent occurred during a recreational activity primarily for personal pleasure); *Pamela S. Langley*, 60 Van Natta 1098 (2009) (an injury occurring at work, during a break, found not compensable because it occurred during a recreational activity primarily for the worker’s personal pleasure); *Norma J. Wallace*, 50 Van Natta 1172 (1998) (the claimant’s injury, which occurred at work, on a paid break, and while she was using the treadmill on the employer’s premises, found not compensable because it occurred during a recreational activity primarily for personal pleasure).

Moreover, as demonstrated in *Noble*, because claimant was not working at the time of her injury, we must focus more narrowly on what she did during her break rather than simply on the fact that she was taking a scheduled break from work. 232 Or App at 98 (analyzing whether the claimant’s walking to a credit union to deposit a personal check during her paid break was a recreational or social activity).

In addition, the cases on which the majority relies are readily distinguishable. In *Nichols*, the claimant injured his tooth while working and eating candy for a snack. The court concluded that the social and recreational activity exclusion did not apply, because the claimant was not traveling to or from work, on a break, or at lunch, and even presuming that he derived pleasure from the snack, that pleasure was merely incidental to his primary activity, which was working. 186 Or App at 668, 670.

In *Kaiel v. NCE Cultural Homestay Inst.*, 129 Or App 471, *rev den*, 320 Or 453 (1994), the claimant, whose job was to supervise students during a trip to an amusement park, suffered an injury while riding a bumper car. Because the primary activity during which the claimant was injured was supervising the students, the court concluded that the injury was not excluded under ORS 656.005(7)(b)(B). The fact that the claimant had “fun” on the ride was not dispositive, as the proper inquiry concerned the primary purpose of her activity, which was (as in *Nichols*) working. *Id.* at 477-78.

Here, in contrast, although claimant was on a paid break mandated by the employer and at a place to which the employer acquiesced, her injury occurred while she was *not* working. She was free to spend her break anywhere she wanted, including the break room down the hall from her work station or at nearby shops. When she incurred the injury, she was in pleasant companionship with Mr. Grant, chatting and walking to a coffee shop to refresh her strength and spirits after several hours of work. The coffee meeting was entirely social in nature, with no work-related purpose. (Tr. 18, 21, 50-51). Claimant testified that meeting Mr. Grant for coffee was something she did primarily for her own personal pleasure. (Tr. 50). It is also undisputed that claimant prearranged to meet with Mr. Grant on her paid break. Thus, her primary activity during her break was personal, while the relationship to her employment was incidental.

Moreover, there is no evidence suggesting that, in her state of mind, claimant engaged in the activity during which she was injured for a purpose other than her personal pleasure. The fact that she intended to use the gift card she had received from her superior does not transform her social meeting into a primarily work-related activity. *See, e.g., Wallace*, 50 Van Natta at 1172 (although the employer supplied a treadmill on its premises, the claimant's injury incurred while she was using it found not compensable under ORS 656.005(7)(b)(B)). In any event, claimant had made up her mind to spend her break in the coffee shop with Mr. Grant before she received the gift card (Tr. 36; Ex. 16-3) and, therefore, the gift card is largely irrelevant to the resolution of the third *Roberts* question.

In summary, the evidence establishes that claimant was engaged in a social or recreational activity with no work-related purpose *and* she engaged in that activity primarily for her personal pleasure. Thus, the employer has carried its burden of proof under the exclusionary statute and the claim cannot be compensable.

Because the majority reaches the opposite conclusion, I respectfully dissent.