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In the Matter of the Compensation of  
**WALTER S. WIESE, Claimant**  
WCB Case No. 11-01651  
ORDER ON REVIEW  
Black Chapman et al, Claimant Attorneys  
MacColl Busch Sato PC, Defense Attorneys

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

Claimant requests review of that portion of Administrative Law Judge (ALJ) Smith's order that upheld the insurer's denial of his injury claim for bilateral shoulder, neck, and upper back conditions. In its respondent's brief, the insurer challenges that portion of the ALJ's order that determined that claimant was a subject worker. On review, the issues are subjectivity and course and scope of employment. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Subjectivity

The ALJ found that claimant was a subject worker under ORS 656.128(2), reasoning that he did not have to prove that he received remuneration as a chiropractor while under the insurer's coverage. The ALJ also found that claimant was injured while moving out of the facility in which he had intended to do business and, therefore, if his injury was related to employment, it was the employment of "Lighthouse Chiropractic."

In its respondent's brief, the insurer argues that claimant was not a subject worker when he was injured.<sup>1</sup> The insurer acknowledges that claimant elected coverage and was no longer excluded from coverage as a sole proprietor.

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<sup>1</sup> Claimant contends that the insurer waived its right to raise the issue of subjectivity because it did not cross-request review of the ALJ's order. However, by virtue of our *de novo* review, we have authority to consider matters decided by the ALJ that are raised by the parties' briefs in the absence of a formal cross-request for review. *Destael v. Nicolai Co.*, 80 Or App 596 (1986) (even if a party fails to cross appeal, all issues in the case are subject to the Board's *de novo* review); *Marty M. Miley*, 56 Van Natta 1932 (2004).

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However, the insurer contends that, under ORS 656.128(2), claimant must still satisfy other statutory requirements to be a subject worker. The insurer argues that claimant was not a subject worker because he was not receiving remuneration at the time of the injury.

Claimant responds that, because he applied to the insurer to become entitled as a subject worker to compensation and his application was accepted, he was a “subject worker” at the time of the injury. We agree with claimant’s position.

ORS 656.128 provides, in part:

“(1) Any person who is a sole proprietor, or a member, including a member who is a manager, of a limited liability company, or a member of a partnership, or an independent contractor pursuant to ORS 670.600, may make written application to an insurer to become entitled as a subject worker to compensation benefits. Thereupon, the insurer may accept such application and fix a classification and an assumed monthly wage at which such person shall be carried on the payroll as a worker for purposes of computations under this chapter.

“(2) When the application is accepted, such person thereupon is subject to the provisions and entitled to the benefits of this chapter. The person shall promptly notify the insurer whenever the status of the person as an employer of subject workers changes. Any subject worker employed by such a person after the effective date of the election of the person shall, upon being employed, be considered covered automatically by the same workers’ compensation insurance policy that covers such person.”

Under ORS 656.027(7), “sole proprietors” are “nonsubject workers” unless they meet certain qualifications.<sup>2</sup> However, ORS 656.128(1) allows a

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<sup>2</sup> ORS 656.027 provides, in part:

“All workers are subject to this chapter except those nonsubject workers described in the following subsections:

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sole proprietor to make a written application to an insurer to become entitled as a subject worker to compensation benefits.

Here, claimant applied to the insurer to “become entitled as a subject worker to compensation benefits[,]” pursuant to ORS 656.128(1). The insurer issued a policy to “[claimant] dba Lighthouse Chiropractic,” effective July 27, 2010 to July 27, 2011. (Ex. Ca-6, -7). The “insured” was listed as “an individual.” (Ex. Ca-7). The policy included an endorsement for “sole proprietors, partners, officers and others,” which explained that “an election was made by or on behalf of each person described in the Schedule to be subject to the workers compensation law of the state named in the Schedule.” (Ex. Ca-10, -17). Claimant, as a sole proprietor, was the only person listed in the “Schedule.”

Thus, by the policy terms, effective July 27, 2010 to July 27, 2011, claimant had elected to be subject to the workers’ compensation law. Moreover, pursuant to ORS 656.128, claimant had applied and been accepted “to become entitled as a subject worker to compensation benefits.” ORS 656.128(1). Because the application was accepted, claimant was “subject to the provisions and entitled to the benefits of [ORS Chapter 656].” ORS 656.128(2).

Under such circumstances, the insurer accepted claimant as a “subject worker” under ORS 656.128. As such, he was a “subject worker” at the time of his injury. Therefore, we affirm the ALJ’s “subjectivity” determination.

### Course and Scope

The ALJ determined that moving the heavy exam table was arguably a risk to which the Lighthouse Chiropractic business exposed claimant and found no evidence that he was moving the table for purely personal reasons. Nevertheless, the ALJ concluded that there was no “employment” for an injury to arise out of because claimant never opened that business, had no patients, and did not receive any chiropractic-related income during the policy period.

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“(7) Sole proprietors, except those described in paragraph (b) of this subsection. When labor or services are performed under contract, the sole proprietor must qualify as an independent contractor.

“(b) Sole proprietors actively licensed under ORS 671.525 or 701.021. When labor or services are performed under contract for remuneration, notwithstanding ORS 656.005 (30), the sole proprietor must qualify as an independent contractor. Any sole proprietor licensed under ORS 671.525 or 701.021 and involved in activities subject thereto is conclusively presumed to be an independent contractor.”

The ALJ also concluded that claimant's injury did not occur "in the course of" his employment. Although acknowledging that claimant was at a place where he was reasonably expected to be at the time of the injury, the ALJ found that moving the exam table was not within the scope of his duties as a chiropractor because he was not engaged in practicing his "healing art" at the time of injury. The ALJ reasoned that moving the exam table was not an ordinary risk of his employment as a chiropractic physician, nor was it incidental to his employment.

On review, claimant argues that the ALJ interpreted his work too narrowly and did not consider the entire scope of his activities as a sole proprietor chiropractor running his own business. He contends that moving the adjustment table bore a sufficient relationship to his employment as a sole proprietor chiropractor to be compensable and that, in any event, his activity at the time of the injury was at least sufficiently incidental to his employment to be compensable. Based on the following reasoning, we agree.

For an injury to be compensable, it must "arise out of" and "in the course of" employment. ORS 656.005(7)(a). The "arising out of" prong 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.*

A worker's injury is deemed to "arise out of" employment "if the risk of 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." *Id.* at 601. In this context, risks are generally categorized as employment-related risks, which are compensable, personal risks, which are noncompensable, or neutral risks, which may or may not be compensable, depending on the situation. *Phil A. Livesley Co. v. Russ*, 246 Or 25, 29-30 (1983). The "arising out of" prong is satisfied only if the claimant's injury is the product of either (1) "a risk connected with the nature of the work" or (2) "a risk to which the work environment exposed claimant." *Legacy Health Systems v. Noble*, 250 Or App 596, 603 (2012) (citing *Redman Indus., Inc. v. Lang*, 326 Or 32, 36 (1997)).

Here, we begin by identifying the nature of claimant's work. He is a chiropractic physician who was setting up a business under the name of Lighthouse Chiropractic in the Curves facility run by Ms. Mochau. As a sole proprietor, his business did not simply involve performing chiropractic treatment. Instead, the

record establishes that to set up his new practice, claimant obtained a business license and moved equipment and furniture to the Curves facility, including the adjustment table. (Exs. C, 5A-7, 12A-1; Tr. 6-7). He also arranged for new carpeting and other improvements in the room he was using at the Curves facility and obtained a sign to advertise his business. (Exs. A-1, 12A; Tr. 7). The city inspected claimant's new location before allowing a business permit. (Exs. 12A-3, 17-2). Because he hoped to re-establish a practice with his former patients, the new location was in the same general area. (Tr. 19). Claimant was in the process of establishing the practice. (Exs. 5A-2, -6, -7, 12A; Tr. 21-22). In setting up the new practice, he explained that "I had to do everything." (Ex. 5A-15). He planned to see patients as soon as he found a place to live. (Ex. 19-1).

Claimant's injury occurred when he moved a heavy chiropractic adjustment table out of the Curves facility. (Exs. A-2, 5A-2, -13, 12A-2, 17-2; Tr. 18-19, 21). He moved the table by himself. (Exs. 5A-2, 12A-2). He explained that Ms. Mochau had to close the Curves business and he had to get his equipment and furniture out of the Curves facility because it was going to be locked up and there was a concern that his items could be kept for Ms. Mochau's "back rent." (Exs. 5A-11, -13, -14, 17-2; Tr. 19, 23). Claimant explained: "I did not get hurt at home, I did not get hurt at some sport or fun place[;] it was lifting my office table, which I do not use for anything other th[a]n for WORK." (Ex. 19-2).

We conclude that the "arising out of" prong is satisfied because claimant's injury resulted from a risk connected with the nature of his work as a sole proprietor of a chiropractic business. Claimant's work as a sole proprietor chiropractor did not simply include chiropractic treatment. Rather, his business responsibilities included arranging for an office site, moving equipment in and out of the site, and obtaining a business license.

We turn to the "in the course of" employment prong, which concerns the time, place, and circumstances of the injury. 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 is reasonably fulfilling the duties of the employment or is doing something reasonably incidental to it." *Hayes*, 325 Or at 598.

Here, claimant's injury occurred at the Curves facility where he set up his chiropractic business. He was injured while moving a heavy adjustment table out of the facility. The injury occurred at a time in which Ms. Mochau allowed claimant to get his equipment and furniture out of the Curves facility. (Ex. 17-2).

Under these circumstances, we find that claimant's injury occurred "in the course of" his employment because it took place within the period of his employment as a sole proprietor of a chiropractic business, at a place where he was reasonably expected to be, and while he was reasonably fulfilling the duties of his employment. *See Hayes*, 325 Or at 598. Claimant did not cease being the sole proprietor of a chiropractic business simply because he had to leave the Curves facility. He was hoping to set up a practice in Eagle Point after the Curves facility closed. (Ex. 5A-22). Consequently, we find that the time, place, and circumstances of the injury also support compensability. *See Bidyut K. Bhattacharyya*, 61 Van Natta 1028, 1030 (2009), *aff'd without opinion*, 236 Or App 665 (2010) (the claimant's injury bore a reasonable relationship to his employment because he was on the employer's premises, when he was expected to be there, while removing plaques he had been given for his work with the employer, in preparation for his upcoming termination).

In sum, based on the aforementioned reasoning, we are persuaded that claimant's injury is compensable. Consequently, we reverse the "course and scope" portion of the ALJ's order.<sup>3</sup>

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 \$14,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, and his counsel's uncontested attorney fee submission), the complexity of the issues, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the insurer. *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).

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<sup>3</sup> At hearing, the insurer did not dispute that claimant's injury event occurred. (Tr. 2). On review, the insurer does not challenge the ALJ's finding that claimant presented the necessary corroboration under ORS 656.128(3). Furthermore, the insurer does not raise an issue regarding medical causation. In any event, we find that the evidence is sufficient to establish medical causation. (Exs. 15, 16).

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ORDER

The ALJ's order dated April 5, 2012 is reversed. The insurer's denial is set aside and the claim is remanded to the insurer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$14,000, to be paid by the insurer. 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 insurer.

Entered at Salem, Oregon on December 20, 2012

Member Lowell dissenting.

Although I agree with the majority's reasoning that claimant was a "subject worker" under ORS 656.128, I do not agree that the claim is compensable. I dissent for the following reasons.

For an injury to be compensable, it must "arise out of" and "in the course of" employment. ORS 656.005(7)(a). The "arising out of" prong 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.*

Here, neither prong is satisfied. The ALJ correctly determined that there was no "employment" for an injury to arise out of because claimant never opened the "Lighthouse Chiropractic" business, had no patients, and did not receive any chiropractic-related income during the policy period.

Claimant planned to see patients at the Curves facility (*i.e.*, "Lighthouse Chiropractic") as soon as he found a place to live. (Ex. 19-1). Because of delays in finding a place to live, by the time claimant was settled, Ms. Mochau had to close the Curves business because of her financial issues. (Exs. 17, 19; Tr. 23). Claimant did not treat any paying patients at the Curves facility or earn any income at that location. (Exs. 12A-2, 19-2; Tr. 18-19). Claimant did not earn any wages in 2011 and the last time he worked was in May 2010. (Exs. 5A-7, -8, 20).

Thus, claimant's business as "Lighthouse Chiropractic" never actually opened and he never had a paying customer. His injury occurred in February 2011, when he moved his equipment out of the Curves location, apparently into storage. (Exs. 5, 5A-3; Tr. 19). The record does not establish that claimant was moving his equipment into a new business location. Moreover, his injury did not occur while he was "closing" his business because the business never actually opened.

On this record, claimant cannot sustain his burden of proving that his injury occurred "in the course of" his employment. See *Matthew E. Deroest*, 64 Van Natta 1432 (2012) (time of the claimant's injury did not suggest an employment relationship because he was not "on duty" when he was injured and he was not performing services, or taking other actions, related to his position as an after-school program instructor); *Ken Griffin*, 57 Van Natta 1365 (2005), *aff'd*, *Griffin v. SAIF*, 210 Or App 469, 478 (2007) (injury did not occur in the course of employment where the injury-producing activity was not performed for the employer's benefit, was performed on a day off, was not an activity for which the claimant was paid, and was an activity as to which he was on a personal mission).

Furthermore, claimant has not established that his injury "arose out of" employment. The "arising out of" prong is not satisfied unless the cause of claimant's injury was either "a risk connected with the nature of the work" (*i.e.*, an employment-related risk) or "a risk to which the work environment exposed claimant." *Legacy Health Systems v. Noble*, 250 Or App 596, 603 (2012) (citing *Redman Indus., Inc. v. Lang*, 326 Or 32, 36 (1997)); see also *Hayes*, 325 Or at 601. Here, because there was no employment as "Lighthouse Chiropractic," there were no "employment-related risks" and claimant did not have a "work environment" that exposed him to any risks.

In summary, because claimant's "Lighthouse Chiropractic" business never opened and he never had a paying customer, his injury did not "arise out of" and "in the course of" employment. Claimant's injury claim should not be compensable. Because the majority concludes otherwise, I respectfully dissent.