

In the Matter of the Compensation of
ALICIA G. TONO, Claimant

WCB Case No. 12-00495

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
James B Northrop, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that upheld the SAIF Corporation's denial of her injury claim for multiple conditions. On review, the issue is course and scope of employment. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as modified and supplemented herein.

Claimant is a home care worker (HCW) employed through a program administered in part by the State of Oregon Department of Human Services (DHS). (Ex. A; Tr. 16-17). She is employed by a client, *i.e.*, a person receiving home care services, although her paycheck "is processed and mailed by the State of Oregon." (Ex. A-5; *see also* Tr. 30-32).

Under this arrangement, a DHS Case Manager generates a "Service Plan" and a "Task List" based on an individual assessment of a particular client/employer. (Tr. 17; Ex. A-6). The "Service Plan" and "Task List" set forth the number of eligible home care service hours for a client/employer, as well as tasks for which the HCW will be paid. (Tr. 17-20, 30-32; Ex. A-6). Certain services are specifically "unauthorized," including: home repair; yard work; caring for the employer's children or grandchildren; services that benefit the entire household; and purchasing alcohol or illegal drugs for the employer. (Ex. A-6; *see also* Ex. 1-3).

After undergoing required training, the HCW's name is placed on a "Registry and Referral System * * * to be found by client/employers looking for a provider" (*i.e.*, HCW). (Ex. A-7). The client/employer is responsible for hiring any HCW of its choosing, and the client/employer directs the HCW in carrying out work tasks; the client/employer also has the right to fire the HCW. (Tr. 23, 30-32); *see also* ORS 410.608(1), (2).

Consistent with the aforementioned system, claimant was registered through DHS as an HCW and was contacted and hired by a client/employer to provide 96 hours of home care services per month, beginning around October 2011. (Exs. 1, 1C; Tr. 6-9). The DHS “Task List” for the client/employer included assisting the client/employer with “moving around outside,” “[p]lacing food/utensils within reach,” [b]reakfast [p]reparation,” and “get[ting] in/out of a vehicle.” (Ex. 1).

On November 2011, claimant performed some initial morning duties for the client/employer. Because the client/employer did not want to have breakfast at home, she asked claimant to take her out for breakfast. (Tr. 9-10). Claimant complied with this request, and in the process of driving the client/employer to breakfast, was involved in a motor vehicle accident (MVA), resulting in injuries requiring medical treatment. (Tr. 10-13; Ex. 3).

Claimant filed an injury claim, which SAIF denied, asserting that the “injury did not arise out or occur within the course of [her] employment.” (Ex. 10). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld SAIF’s denial, reasoning that the injury-causing activity was not provided for in the aforementioned “Task List” generated by DHS. On review, claimant contends the circumstances of her injury satisfy both prongs of the unitary work connection test and that her injury, therefore, arose out of and in the course of employment. Specifically, claimant asserts that she was injured while (and as a result of) her employer’s directive to drive the employer to breakfast as part of claimant’s work duties. For the following reasons, we agree with claimant.

Before discussing the principles of the unitary “work-connection” test (*see Sandberg v. JC Penney Co. Inc.*, 243 Or App 342, 345 (2011)), we analyze another applicable statute, ORS 656.039(5), which provides:

“(a) The Home Care Commission created by ORS 410.602 shall elect coverage on behalf of clients of the Department of Human Services or the Oregon Health Authority who employ home care workers to make home care workers subject workers if the home care worker is funded by the state on behalf of the client.

“(b) As used in this subsection, ‘home care worker’ has the meaning given that term in ORS 410.600.”

The Home Care Commission (HCC) “is an ‘independent public commission’ that ensures high quality, comprehensive home care services for the elderly and people with disabilities who receive personal care services in their homes by HCWs. *See Serv. Employees Int’l Union Local 503, v. State, Dept. of Admin. Services*, 202 Or App 469, 471 (2005); *see also* Or. Const., Art. XV, § 11. Although HCWs are hired directly by their clients, they are paid with public funds by DHS or other agencies administering home care programs. HCWs are not to be considered employees of the state “for any purposes.” ORS 410.612(2); *SEIU Local 503*, 202 Or App at 472-73. However, for collective bargaining purposes, the HCC is considered to be a public employer and the employer of record for HCWs. Or Const., Art. XV, § 11(3)(f); ORS 410.612(1); *SEIU Local 503*, 202 Or App at 473.

Despite the aforementioned measures, HCWs were deemed, until 2007, to be non-subject “domestic servants,” within the meaning of ORS 656.027(1). In 2007, however, the legislature adopted ORS 656.039(5) to require the HCC to “elect coverage on behalf of clients of [DHS] * * * who employ home care workers to make home care workers subject workers if the home care worker is funded by the state on behalf of the client.” ORS 656.039(5)(a); *see also* Or Laws 2007, c 835, § 1, eff. Jan. 1, 2008. Although the HCC is an HCW’s “employer of record” for purposes of collective bargaining (ORS 410.612(1)) and DHS processes pay for HCWs, HCWs are directly employed by clients and HCWs “may not be considered *for any purposes* to be an employee of the State of Oregon, an area agency or other public agency. ORS 410.612(2); *accord SEIU Local 503*, 202 Or App at 473; *see also* ORS 410.608.

The legislative history regarding ORS 656.039(5) shows that HCWs funded by the state on behalf of client/employers are subject workers under workers’ compensation law. *See, e.g.*, Tape Recording, House Business and Labor Committee, HB 3362, April 11, 2007, Tape 66, Side A, Tape 65, Side B; Tape Recording, Senate Commerce Committee, May 30, 2007, Tape 73, Side B. The history further confirms that the clients of HCWs would be the “employers” for workers’ compensation purposes, and that DHS would function as a “fiscal agent” that paid the HCWs. *See, e.g.*, Tape Recording, House Business and Labor Committee, HB 3362, April 11, 2007, Tape 66, Side A, Tape 65, Side B.

Thus, the text of ORS 656.039(5), and its legislative history, confirm that DHS clients (those receiving home care services) “employ” HCWs, although the HCC elects coverage on behalf of those clients for the HCWs and DHS pays the HCWs. *See State v. Gaines*, 346 Or 160, 166, 171-73, (2009) (in interpreting statutes, the intentions of the legislature are ascertained by examining the text of the statute in its context, along with any relevant legislative history, and, if necessary, relevant canons of statutory construction). The evidence submitted in this case also confirms that claimant’s “client” was her “employer.” (Ex. A-5; *see also* Tr. 6-10, 23, 30-32).¹ With that determination in mind, we turn to whether claimant was injured within the course and scope of her employment.

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.*

“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. Here, claimant was injured within her scheduled period of employment and while she was driving the employer to breakfast, as directed by the employer. Therefore, we find that she was injured “in the course of” her employment.

We next turn to 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 his or her work or when it originates from some risk to which the work environment exposes the worker.” *Id.* at 601; *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996); *Norpac Foods Inc. v. Gilmore*, 318 Or 363, 366 (1994). “That assessment, in turn, implicates categorization of the risk,” specifically:

“Risks distinctly associated with the employment are universally compensable; risks personal to the claimant are universally noncompensable; and neutral risks are

¹ Indeed, in its brief on review, SAIF refers to the client as the “client/employer.”

compensable if the conditions of employment put claimant in a position to be injured.” *Legacy Health Sys. v. Noble*, 250 Or App 596, 602 (2012) (“*Noble II*”) (quoting *Panpat v. Owens–Brockway Glass Container*, 334 Or 342, 349–50 (2002)).

Here, on the date of injury, the employer specifically requested that claimant drive her to eat breakfast. Claimant complied with the employer’s request and was injured while carrying out that assignment. We find that claimant’s activity of driving the employer (at the employer’s request) to breakfast was a risk “distinctly associated with [her] employment” as an HCW with that employer. As such, the injury “arose out of” employment.

Although SAIF does not dispute that the client/employer requested that claimant drive the employer to breakfast as part of her morning work assignment, it nevertheless contends that the injury was outside the course and scope of claimant’s employment because the DHS “Task List” did not include that specific work activity. (*See Ex. 1*). We disagree with that contention.

The record establishes that the DHS “Task List” informed claimant what services she would be paid to perform. (*See Ex. A-6*). Even if we agreed with SAIF that the injury-producing activity was not authorized by the DHS Task List, such a conclusion would mean that claimant might not be paid for the time spent performing that activity.² Whether or not claimant was ultimately paid for driving the employer to breakfast on the date of injury (which is unclear on this record), however, is not dispositive as to whether her injury is compensable. *SAIF v. Scardi*, 218 Or App 403, 410, *rev den*, 345 Or 175 (2008) (injury of the claimant, an HCW, found compensable, even though the claimant was not paid for the time during which she was injured).

Moreover, SAIF does not contend that DHS was claimant’s employer, and any such contention would, in any event, be foreclosed by statute. *See ORS 410.612(2)* (“Notwithstanding subsection (1) of this section, home care workers may not be considered *for any purposes* to be an employee of the State of Oregon, an area agency or other public agency”) (emphasis added); *SEIU Local 503*, 202

² A DHS employee testified that its training protocol included telling HCWs that tasks performed beyond the “Task List” would be performed “as a volunteer position.” (Tr. 27).

Or App at 472-73 (same).³ Thus, even assuming that claimant's injury-producing activity (driving the client/employer to breakfast) fell outside the scope of DHS's "Task List" for pay purposes, claimant was nevertheless directed on the date of injury by her client/employer to perform that task. Consequently, the absence of that activity as being authorized by DHS's "Task List" does not mean that claimant was acting outside the course and scope of employment when she was injured.⁴

Finally, we distinguish *Francis Toth*, 62 Van Natta 1027 (2010), in which we concluded that an injury sustained by the claimant, an HCW, was not compensable. In *Toth*, the claimant was injured while riding his bicycle home after delivering meals and bottled water to the client/employer, who had been hospitalized. In finding the claim not compensable, we relied on the following facts: (1) the claimant's duties were suspended and he had no work-related reason to be bicycling from the hospital; (2) the claimant's duties expressly excluded providing services to his client while his client was hospitalized; and (3) the claimant would have delivered meals and bottled water to his client (who was also his brother) regardless of whether he was employed to do so.

None of those factual findings are present here. Moreover, in *Toth*, the client/employer did not expressly direct the claimant to deliver meals and bottled water to the hospital. In contrast, here, the client/employer requested that claimant engage in the precise task that resulted in her injury. Consequently, we distinguish *Toth*.

³ In any event, even if DHS was *an employer* of claimant, such a determination would not foreclose a conclusion that the client was *also an employer*. See *Liberty Northwest Ins. Co. v. McDonald*, 187 Or App 40, 44 (2003) (an employee may have two employers for the purposes of workers' compensation).

⁴ As mentioned above, certain services not at issue here are specifically listed by DHS as "unauthorized." (Ex. A-6; see also Ex. 1-3). We express no opinion on the compensability of injuries sustained by HCWs while performing such "unauthorized" services. See *Andrews v. Tektronix, Inc.*, 323 Or 154, 166 (1996) (an employee's violation of an employment rule does not render his or her claim *per se* noncompensable; rather, the question of compensability is decided in the first instance, by determining whether a claimant was engaged in an activity that was within the boundaries of his or her ultimate work, a determination made by "evaluating all the factors that are pertinent to the question of work-connectedness, and weighing those factors in the light of the policy underlying the Workers' Compensation Act"); see also *Sisco v. Quicker Recovery*, 218 Or App 376, 384 (2008) (violation of an employer rule relating to the *method* of accomplishing the ultimate work" is not outside the course of employment). We note, however, that driving the client/employer to breakfast was not identified as an "unauthorized" service. Moreover, the work task was done at the client/employer's express request within the period of employment and while claimant was fulfilling her duties of employment, and the risk of being injured while performing those duties originated from a risk to which her work environment exposed her.

In sum, for the foregoing reasons, we conclude that claimant has established to some degree each element of the work-connection test and that the combination of these elements sufficiently establishes a “causal connection between the injury and the employment” warranting compensation. *Hayes*, 325 Or at 597. Therefore, 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 \$8,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant’s appellate briefs), the complexity of the issue, 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 SAIF. *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 May 7, 2012 is reversed. SAIF’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 \$8,000, to be paid by SAIF. 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 SAIF.

Entered at Salem, Oregon on December 18, 2012