
In the Matter of the Compensation of
KATHERINE MANDES, Claimant
WCB Case No. 13-04012
ORDER ON REVIEW
Shelley K Edling, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: *En Banc*. Members Johnson, Weddell, Lanning, Curey, and Somers. Chair Somers specially concurs. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that upheld the self-insured employer's denial of her injury claim for multiple conditions. In its respondent's brief, the employer contests that portion of the ALJ's order that determined that claimant's injury claim was not excluded under ORS 656.005(7)(b)(B). On review, the issue is course and scope of employment. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

During a paid break, claimant left the building where she worked and walked around the block with two coworkers, Canham and Hartley. After walking around the block, claimant walked toward her building. In an area adjacent to a parking lot, she tripped and fell on an uneven part of the sidewalk which was raised on the downhill side, sustaining multiple injuries. The employer denied the claim, prompting claimant to request a hearing.

At the hearing, there was no testimony indicating that the employer had any right of control or duty to maintain the area where claimant fell. The ALJ reasoned that, although claimant's injury was not excluded from compensability under ORS 656.005(7)(b)(B) (which addresses injuries occurring while engaging in recreational or social activities primarily for the worker's personal pleasure), it did not occur in the course of employment. Specifically, the ALJ determined that the "going and coming" rule applied, and that, because there was no evidence that the employer controlled the area where claimant was injured, the "parking lot" exception to the rule did not operate to make the injury compensable. Accordingly, the ALJ upheld the denial.

On review, claimant contends that her injury is compensable under the “personal comfort” doctrine, which provides that certain activities by employees are expected and necessary and that the conduct of those activities is not a departure from the employment relationship. The employer responds that claimant’s injury is excluded from compensability as resulting from a social or recreational activity she was engaged in primarily for her own personal pleasure, as well as by the “going and coming” rule. As explained below, we find that claimant’s injury did not arise out of and in the course of employment.¹

Whether an injury “aris[es] out of” and occurs “in the course of” employment concerns two prongs of a unitary “work-connection” inquiry that asks whether the relationship between the injury and employment has a sufficient nexus such that the injury should be compensable. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997). The requirement that an injury arise “out of” employment depends on the causal link between the injury and the employment. *Krushwitz v. McDonald’s Restaurants*, 323 Or 520, 525-26 (1996). The requirement that an injury occur “in the course of” employment depends on “the time, place, and circumstances” of the injury. *Robinson v. Nabisco, Inc.*, 331 Or 178, 186 (2000).

Both requirements must be satisfied to some degree, although “the work-connection test may be satisfied if the factors supporting one prong are minimal while the factors supporting the other prong are many.” *Krushwitz*, 323 Or at 531. The Supreme Court has reiterated the following statement, from *Allen v. State Acc. Ins. Fund*, 29 Or App 631, 633-34 (1977), on several occasions:

“The statutory phrase ‘arising out of and in the course of employment’ must be applied in each case so as to best effectuate the socio-economic purpose of the Workers’ Compensation Act: the financial protection of the worker and his/her family from poverty due to injury incurred in production, regardless of fault, as an inherent cost of the product to the consumer. 1 *Larson, Workmen’s Compensation Law* § 2.20. Various concepts have arisen from attempts to rationalize that purpose, *e.g.*, the going and coming rule, special errands, lunch hour cases, dual

¹ Members Curey and Lanning are inclined to find that this claim is excluded from compensability under ORS 656.005(7)(b)(B). However, they do not find it necessary to resolve that question because, even if the claim was not statutorily excluded, they are not persuaded that claimant’s injury arose out of and in the course of employment.

purpose trips, impedimenta of employment, horseplay, etc. Each is helpful for conceptualization and indexing, but there is no formula for decision. *Etchison v. SAIF*, 8 Or App 395, 398 (1972). Rather, in each case, every pertinent factor must be considered as part of the whole. It is the purpose of the Act which gives weight to particular facts and direction to the analysis of whether an injury arises out of and in the course of employment.” *Robinson*, 331 Or at 185-86; *Hayes*, 325 Or at 597 n 9; *Rogers v. SAIF*, 289 Or 633, 643 (1980).

Bearing these principles in mind, we examine recognized rules and exceptions to aid in our evaluation of this case. Under the “going and coming” rule, an injury generally does not occur “in the course of” employment if it is sustained while the employee is traveling to or from work. *Krushwitz*, 232 Or at 526; *Philpott v. State Indus. Acc. Comm’n*, 234 Or 37, 40 (1963); *Hopkins v. State Indus. Acc. Comm’n*, 160 Or 95, 110 (1938). In applying the “going and coming” rule, the *Hopkins* court explained that if an injury occurs while the employee is traveling to or from work, “That alone [is] not deemed a sufficient causal connection; something more [is] demanded.” 160 Or at 110. Such an injury is not compensable unless the case falls within an exception to the rule. *Id.*; *Enterprise Rent-A-Car Co. of Oregon v. Frazer*, 252 Or App 726, 736 (2012), *rev den*, 353 Or 428 (2013).

We recently addressed the “going and coming” rule on remand from the Court of Appeals in *Enterprise Rent-A-Car Co. of Oregon v. Frazer*, 252 Or App 726 (2012).² *Kevinia L. Frazer*, 66 Van Natta 761 (2014). In that case, we held that the claimant’s injury, which occurred when she fell while returning to her employer’s office from a “smoking hut” in the parking lot of the “strip mall” where her employer was a tenant, did not occur in the course of her employment because her employer did not have the right to exercise control over the parking lot or the area where she had fallen.

² The *Frazer* court observed that injuries sustained while an employee is traveling to or from work do not occur in the course of employment and, consequently, are not compensable unless an exception to the “going and coming” rule applies. Noting that the claimant was injured when she was away from her workplace on a regular break and that she was not “on duty” or otherwise subject to the employer’s direction or control, the *Frazer* court determined that the “going and coming” rule applied. According to the *Frazer* court, the claimant’s injury did not occur in the course of her employment unless the circumstances under which she was injured fell within some exception to the rule. The court then remanded to us for a determination of whether the claimant’s injury fell within the “parking lot” exception. *Id.* at 737.

Citing *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994), we stated that injuries sustained while an employee is going to or coming from the place of employment generally do not occur “in the course of” employment. However, we noted that, under the “parking lot” exception to the “going and coming” rule, when an employee traveling to or from work sustains an injury “on or near” the employer’s premises, the “in the course of employment” portion of the work-connection test may be satisfied if the employer exercises some “control” over the place where the injury is sustained. We further observed that “control” may arise from the employer’s property rights to the area, as a result of an increased employer-created hazard, from the employer’s obligation to maintain the area where the injury occurred, or the employer’s obligation to pay for maintenance (together with the right to require maintenance).

Turning to the case at hand, we find *Frazer* instructive. We found that the claimant in *Frazer* was injured in an area of the parking lot that was open to the public, rather than the fenced area where her employer’s leased parking spaces were located. We further determined that the employer was not obligated, and had no right, to direct how the area where the claimant was injured was maintained, handled, used, or operated.

Under such circumstances, we concluded in *Frazer* that the employer did not have sufficient control over the area where the claimant was injured. Consequently, we held that the “parking lot” exception to the “going and coming” rule did not apply.

Here, similar to the circumstances in *Frazer*, claimant was returning to work from a break when she fell and was injured. Pursuant to the court’s holding and our analysis on remand in *Frazer*, we conclude that the “going and coming” rule controls and requires a finding that claimant’s injury did not arise out of and in the course of employment, unless an exception to the rule applies. We agree with the ALJ’s reasoning that the “parking lot” exception does not apply because the record does not establish that the employer controlled the area in which claimant was injured.

Claimant asserts, and the dissent finds, however, that the “personal comfort” doctrine supports a finding that her injury arose out of and in the course of employment. We disagree.

First, the controlling case precedent does not expressly recognize the “personal comfort” doctrine as an exception to the “going and coming” rule. Moreover, the Board cases cited by claimant in support of her argument that her

claim is compensable under the “personal comfort” doctrine are not controlling. *Diane Pohrman*, 64 Van Natta 752 (2012); *Jill K. Thornton*, 56 Van Natta 3781, 3782 (2004).

In *Pohrman*, we held that an injury suffered by the claimant while walking to a coffee shop in the lobby of her office building was compensable. We reasoned that the 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. 64 Van Natta at 760.

In *Thornton*, we found the “going and coming” rule inapplicable where the claimant was only taking a brief break and was “on the clock,” in close proximity to her work area when injured. Rather, we reasoned that the activities in *Thornton* were more analogous to cases where a worker is injured during a “personal comfort” activity. 56 Van Natta at 3782.

Thus, the import of *Thornton*, *Pohrman* and our original decision in *Frazer*, was that the “going and coming” rule does not apply where a claimant is only on a brief departure from work for personal comfort activity near the workplace and, therefore, not truly “going to” or “coming from” work. *See also Cheryl L. Hulse*, 60 Van Natta 2627, 2629 (2008).

However, as we noted in *Christyne Belden*, 65 Van Natta 737, 740 n 6 (2013), *Pohrman*, which has been appealed to the Court of Appeals, was based in part on our initial decision in *Kevinia Frazer*, 62 Van Natta 2079 (2010), which the court has subsequently reversed because the claimant’s brief departure from work on a paid break in close proximity to her workplace fell under the “going and coming” rule. In light of the court’s *Frazer* decision, we conclude that the rationale expressed in *Pohrman* and *Thornton* is of questionable precedential value.³

We further disagree with claimant and the dissent that the Court of Appeals has implicitly recognized the “personal comfort” doctrine as an exception to the “going and coming” rule. The dissent cites *Mellis v. McEwen, Hanna, Gisvold*, 74 Or App 571, *rev den*, 300 Or 249 (1985); *Halfman v. State Acc. Ins. Fund*, 49 Or App 23 (1980); and *Jordan v. Western Elec. Co.*, 1 Or App 441 (1970).

³ Claimant also asserts that the “facts and circumstances” of the claim satisfy the arising out of and in the course of employment test. She cites evidence that the employer encouraged and was benefitted by her walking during her break periods and even provided equipment (pedometers) for that purpose. Nevertheless, pursuant to the *Frazer* court’s opinion, the “going and coming” rule applies to the facts of this claim. That doctrine requires a finding of noncompensability unless an exception to that rule applies. For the reasons previously mentioned, no such exception applies.

First, as we noted on remand in *Frazier*, the controlling precedent does not recognize the “personal comfort” doctrine as an exception to the “going and coming” rule. Moreover, the statutory foundation for the *Jordan* rationale is no longer present. We reason as follows.

In *Jordan*, the court held that the claimant’s injury that occurred off the employer’s premises during a paid coffee break arose out of and in the course of employment. In doing so, the *Jordan* court cited a California decision that noted the personal comfort doctrine, but also noted the established principle of liberal construction in favor of the employee. Further, the *Jordan* court cited *Livingston v. State Ind. Acc. Comm.*, 200 Or 468, 472-73 (1954), a case in which the claimant’s decedent spouse was killed while en route to his job site. 1 Or App at 447. The *Livingston* court emphasized that the injury occurred during paid time, and held that compensation must be awarded, saying:

“This court has uniformly held that the provisions of the Workmen’s Compensation Law should be interpreted liberally in favor of the workman, and particularly should this be so when we are confronted with a ‘borderline case’. In the interests of justice, and to carry out the humane purposes of the Compensation Law, all reasonable doubts should be resolved in favor of the workman.” 200 Or at 472.

Thus, a prominent factor in the *Jordan* court’s decision was liberal construction of workers’ compensation law in favor of the worker such that all reasonable doubt should be resolved in favor of the worker. Yet, such liberal construction is no longer the guiding principle in Oregon. After the *Jordan* decision, the legislature enacted ORS 656.012(3), which states that the provisions of Chapter 656 “shall be interpreted in an impartial and balanced manner.”

Accordingly, an integral underpinning of the *Jordan* decision no longer applies. Apart from this, the *Jordan* court never expressly ruled that the personal comfort doctrine was an exception to the “going and coming” rule. In fact, the *Jordan* decision does not analyze the injury claim under the “going and coming” rule. Rather, the *Jordan* court ultimately resolved the disputed issue by applying the seven general factors that would be subsequently applied in *Halfman* and *Mellis*. 1 Or App at 447-8.

In *Halfman*, the claimant left the premises of his employment to find a restroom and get something to drink because the employer lacked such facilities. As he was doing so, he was injured crossing a busy street. The court found that the injury was compensable after applying the seven factor test enunciated in *Jordan*. 49 Or App at 30. Although the employer argued that the claimant's injury was not compensable under the "going and coming" rule, the court did not mention that rule in its analysis, much less determine that the personal comfort doctrine was an exception to it.

The most reasonable interpretation of *Halfman* is that it rejected the employer's contention that the "going and coming" rule applied and decided the case by balancing the seven general factors mentioned in *Jordan*, while acknowledging that so-called "personal comfort" activities may be compensable. Such reasoning is significantly different from holding that the "going and coming" rule would have barred the claim, but for application of an exception to the rule. Such a ruling is not present in *Halfman*.

Moreover, the *Halfman* court relied on the previous *Jordan* decision. Yet, as earlier noted, a significant underpinning of that decision was eliminated under ORS 656.012(2), which provides that the statutes are to be applied in an impartial and balanced manner. In short, the case law foundation of *Halfman* is of questionable precedential value, even if its holding was interpreted to concern an exception to the going and coming rule.⁴

In *Mellis*, the claimant was injured during a paid break as she arose from her chair after eating in a cafeteria that was located in the same building as, but on a different floor than her employer. The claimant had eaten lunch at her desk but, although the employer's premises included a break area, she decided instead to go to the cafeteria during her break to clear her mind before beginning a long series of calculations.

⁴ The dissent interprets *Halfman* as holding that the "going and coming" rule applies, but that the personal comfort doctrine provided an exception to that rule. Yet, such reasoning cannot be found in *Halfman*. Moreover, the decisions on which the dissent relies (which applied the "seven factors" in resolving "course and scope" questions) are of limited value in such cases. See *First Interstate Bank v. Clark*, 133 Or App 712, 717 (1995) (*Mellis* test is inconsistent with the framework in *Norpac Foods, Inc. v. Gilmore*, 318 Or 363 (1994), because it does not necessarily allow a meaningful consideration of each of the two elements of the inquiry; nevertheless, depending on the circumstances, some or all of those factors will remain helpful inquiries under the *Norpac Foods* two-prong analysis).

The *Mellis* court noted that *Jordan* and *Halfman* had held that injuries that had occurred off premises during coffee breaks were work related. 74 Or App at 574. The court then applied the seven *Jordan* factors and concluded that the claimant's activity was a "typical kind of coffee break activity that is contemplated by an employer," was acquiesced in by the employer, and was not a departure from the employment relationship. Accordingly, the court found the claimant's injury work-related.

Like *Halfman*, *Mellis* addressed the ultimate inquiry of "whether the relationship between the injury and the employment is sufficient that the injury should be compensable," instead of addressing the effect of the "going and coming" rule on the "course of employment" requirement. *Id.* at 573 (citing *Rogers*). Moreover, *Mellis* itself did not identify the "personal comfort" doctrine as the basis for its holding that a "typical kind of coffee break activity that is contemplated by an employer" was compensable. Although the dissent interprets *Mellis* as most consistent with the application of the "personal comfort" doctrine as an exception to the "going and coming" rule, neither the doctrine nor the rule is mentioned in the court's decision.

In sum, having reviewed the decisions on which claimant and the dissent rely, we cannot agree that the personal comfort doctrine provides an exception to the "going and coming" rule.⁵ Further, because we agree with the ALJ's conclusion that the "going and coming" rule applies, and further because the record does not establish the requisite employer control of the area in which claimant was injured, the "parking lot" exception to the "going and coming" rule does not operate to make this claim compensable.⁶ Therefore, in the absence of an exception to that rule, we conclude that claimant's injury did not occur in the course of her employment.

⁵ In *Clark v. U.S. Plywood*, 288 Or 255 (1980), the Supreme Court explained that when an injury occurs on the employer's premises while the employee is engaged in activities for her or his own personal comfort, it occurs within the course and scope of employment if the conduct was expressly or impliedly allowed by the employer. Other court cases have also limited the personal comfort doctrine to on-premises activity, which is not the situation in this claim. See *Wallace v. Green Thumb, Inc.*, 296 Or 79 (1983) (an injury sustained on the employer's premises during personal comfort activities by a resident employee continuously on call was compensable); *Leo Polehn Orchards v. Hernandez*, 122 Or App 241 (1993) (the "bunkhouse rule" represents an incremental extension of the line of cases involving "personal comfort" activities that occur on the employer's premises).

⁶ Claimant argues that, to the extent that the "going and coming" rule applies, it should not preclude a compensable claim because she was injured on a sidewalk that provided access to the building in which she worked. However, the fact remains that this record does not establish that the employer had the right to control the area in which claimant was injured. Under these circumstances, claimant's injury did not occur in the course of employment.

We further find that claimant's injury did not arise out of her employment. To meet the "arising out of" employment prong, there must be "some causal link" between the injury and the employment. *Krushwitz*, 323 Or at 525-26. "[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." *Hayes*, 325 Or at 601.

Here, we are unable to conclude that claimant's injury was the result of a risk to which the work environment exposed her. None of the witnesses testified that the employer had any right of control to, or duty to maintain, the area in which claimant fell. Although there is evidence that the employer encouraged employees to walk during their breaks, we are unable to find any work-related risk that contributed to claimant's injury. Under such circumstances, we find that claimant's injury did not arise out of her employment.

In summary, claimant's injury did not arise out and in the course of employment. Accordingly, we affirm.

ORDER

The ALJ's order dated December 6, 2013 is affirmed.

Entered at Salem, Oregon on January 7, 2015

Member Somers specially concurring.

I agree with Member Weddell's reasoning and conclusion that claimant was engaged in "personal comfort" activity when she was injured. Because I further agree with Member Weddell's reasoning and conclusion that this doctrine provides an exception to the "going and coming" rule, I share her opinion that the claimed injury occurred during the course of employment. However, I concur with the majority's ultimate conclusion that claimant's injury is not compensable because it did not arise out of her employment. Consequently, I offer this special concurring opinion.

Member Weddell dissenting.

The majority concludes that claimant's injury did not arise out of and in the course of employment. Because I disagree with the majority's reasoning and conclusions, I respectfully dissent.

The compensability of claimant's injury is contested under both ORS 656.005(7)(a), which requires that a "compensable injury" be an accidental injury "arising out of and in the course of employment," and ORS 656.005(7)(b)(B), which excludes from compensability any injury "incurred while engaging in or performing, or as a result of engaging in or performing, any recreational or social activities primarily for the worker's personal pleasure." If the injury is excluded by ORS 656.005(7)(b)(B), it is *per se* noncompensable; if the exclusion does not apply, the injury must still "aris[e] out of and in the course of employment." *Liberty Northwest Ins. Corp. v. Nichols*, 186 Or App 664, 667 (2003).

Recreational/Social Activity Exclusion

The ORS 656.005(7)(b)(B) exclusion raises three questions: (1) whether the worker engaged in or performed a "recreational or social activity"; (2) whether the worker incurred the injury "while engaging in or performing, or as a result of engaging in or performing," that activity; and (3) whether the worker engaged in or performed the activity "primarily for the worker's personal pleasure." *Roberts v. SAIF*, 341 Or 48, 52 (2006). If the answer to all those questions is "yes," then the worker cannot recover. *Id.*

Because the exclusion is an affirmative defense, the employer bears the burden of establishing each element. *Donnakay Smith*, 60 Van Natta 2955, 2957 (2008). I examine the facts of this case to determine whether the record supports the "recreational or social activity" exclusion.

Claimant left her workplace to walk with two coworkers during a paid break. (Tr. 5). Their route followed a sidewalk around the city block where the employer was located. (Tr. 24). After completing the route once, claimant followed a sidewalk adjacent to a parking lot to return to work while her coworkers continued to circle the block a second time. (Tr. 13, 17). She fell on that sidewalk as she was returning to work. (Tr. 10).

Claimant testified that her job is sedentary and she walked on her breaks "[b]ecause it's good for me, because it makes me brighter and more able to think, get my blood moving, and because it's encouraged by my employer," and that the walks make her a better worker. (Tr. 6, 44). She testified that she did not walk

on her breaks for personal pleasure or enjoyment, and did not often go on similar walks outside of work. (Tr. 10, 15-16). She did not know whether she would have participated in a walking program if she had not been encouraged to do so by the employer. (Tr. 15)

Claimant testified that the employer was aware that she walked on her breaks and had never prohibited the practice, although she did not specifically “check out” with the employer when she left for the walks. (Tr. 6). She also testified that the employer encouraged walking on breaks. (*Id.*) Two or three years earlier, the employer had given her, and other employees, pedometers and encouraged them to walk on breaks. (*Id.*) More recently, the employer had shown them a video about the benefits of exercise, primarily walking, given them pedometers, and encouraged them to walk. (Tr. 8). Both of the pedometers she received displayed the employer’s name. (Tr. 7-8). She believed that the health benefits of exercise were of benefit to the employer in the form of lower insurance costs, a healthier workforce, and less use of sick time. (Tr. 9-10).

Ms. Hartley, a coworker who walked with claimant on July 23, 2013, testified that she walked with Ms. Canham “pretty religiously” and that claimant would join them “occasionally.” (Ex. 26). She explained that she walked to “get [her] daily exercise in,” and that she and Ms. Canham were “good about encouraging each other to go” because “it’s fun to have a partner to go with.” (Tr. 26). She was at the meeting where employees were shown the video about the benefits of exercise, but did not interpret the employer to have encouraged employees to exercise during their breaks or during their workdays. (Tr. 27).

Ms. Godoy, claimant’s supervisor, testified that the employer encouraged physical activity as a way to maintain a healthy workforce, but did not specifically encourage employees to walk on their breaks. (Tr. 37). She was aware that employees walked during their lunch breaks, although she was not aware that employees walked during their briefer paid breaks. (Tr. 38). The employer never prohibited its employees from their walks. (*Id.*)

The ALJ found that the demeanor of the witnesses indicated no reason to doubt their credibility. Although there was disagreement among the witnesses regarding the nature of the employer’s encouragement of its employees to exercise, the ALJ found credible claimant’s testimony that she believed that the employer had encouraged her to walk during breaks. I find no persuasive reason not to defer to the ALJ’s demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991); *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *Humphrey v. SAIF*, 58 Or App 360, 363 (1982).

Claimant's testimony indicates that she walked for her health and to be mentally and physically refreshed for further work, as she believed that her employer encouraged her to. Although Ms. Hartley indicated that she and Ms. Canham enjoyed the social aspect of walking together, claimant testified that she did not consider the walks "personal pleasure or enjoyment." (Tr. 15). Based on claimant's credible testimony, I conclude that even if her break-time walk had a "recreational" or "social" aspect,⁷ she did not walk primarily for her personal pleasure.

The employer cites *Norma J. Wallace*, 50 Van Natta 1172 (1998), *Juan M. Zurita*, 46 Van Natta 993 (1994), and *Michael W. Hardenbrook*, 44 Van Natta 529 (1992), in which we found injuries excluded by ORS 656.005(7)(b)(B). In those cases, we found the claimants' recreational or social activities to be undertaken primarily for their personal pleasure. *Wallace*, 50 Van Natta at 1173; *Zurita*, 46 Van Natta at 993; *Hardenbrook*, 44 Van Natta at 531. Here, by contrast, claimant's personal pleasure was not the primary reason for her breaktime walk. Accordingly, claimant's injury is not excluded by ORS 656.005(7)(b)(B). See *Zachery B. Severson*, 64 Van Natta 1525, corrected, 64 Van Natta 1533 (2012) (the third prong of the *Roberts* test requires personal pleasure to be the *primary* reason for the social or recreational activity).

"Course and Scope"

I turn to the requirement that a compensable injury "arise out of and in the course of" employment. ORS 656.005(7)(a).

To begin, I address claimant's contention that the "going and coming" rule is inapplicable because the "personal comfort" doctrine applies. In past cases, we have considered the "personal comfort" nature of a departure from a workplace in determining whether to apply the "going and coming" rule, rather than in determining whether it is an exception to the rule. *E.g.*, *Kevinia L. Frazer*, 62 Van Natta 2079, 2081 (2010), *rev'd*, 252 Or App 726 (2012); *Cheryl L. Hulse*, 60 Van Natta 2627, 2629 (2008); *Jill K. Thornton*, 56 Van Natta 3781, 3782 (2004).

⁷ "Recreation" is "the act of recreating or state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY * * * a means of getting diversion or entertainment[.]" *Legacy Health System v. Noble*, 232 Or App 93, 98 (2009) (quoting *Webster's Third New Int'l Dictionary* 1899 (unabridged ed 1993)). "Social" 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." *Liberty Northwest Ins. Corp. v. Nichols*, 186 Or App 664, 668 (2003) (quoting *Webster's* at 2161).

On appeal in *Frazer*, however, the court explained that if an exception to the “going and coming” rule applies to an injury sustained while the employee is traveling to or from work, such that the injury occurs within the course of employment, it is correct to say that both the “going and coming” rule and an exception apply, rather than that the “going and coming” rule does not apply. 252 Or App at 733-34. The *Frazer* court concluded that the “going and coming” rule applied because the claimant was away from her workplace on a regular break and was not “on duty” or otherwise subject to the employer’s direction or control, regardless of whether an exception to the rule also applied. *Id.* at 736. Thus, the *Frazer* court essentially described a two step “going and coming” analysis: the first step is to determine whether the “going and coming” rule applies, and the second step is to determine whether an exception to the “going and coming” rule also applies.

I apply *Frazer*’s framework to this case. First, I agree with the ALJ’s conclusion that the “going and coming” rule applies because claimant had left her workplace to walk during her break and was returning to work when she was injured. Therefore, I turn to the question of whether an exception to the rule also applies.

In *Kowcun v. Bybee*, 182 Or 271 (1947), the court held that an injury sustained in an employer’s parking lot while the employee was traveling from work after the end of her shift was compensable. The court explained:

“We do not believe that the whistle which calls the men to work in the morning and later signals the end of the day’s labors always determines whether an injury which befell a workman arose ‘out of and in the course of his employment.’ Likewise, we do not believe that the Workmen’s Compensation Law selects the threshold of the factory as the dividing line which decides whether or not an injury happened ‘out of and in the course of’ an employment. In construing the phrase ‘out of and in the course of his employment,’ the courts consider the nature, conditions, obligations and incidents of the employment.” *Id.* at 279.

In addition to injuries sustained while proceeding to or from work on an employer’s premises, exceptions to the “going and coming” rule have been recognized for: injuries sustained off the employer’s premises, but while in

close proximity thereto and while using a customary means of ingress or egress; off-premises injuries sustained while proceeding to perform, or proceeding from the performance of, a special task or mission; and injuries sustained while being transported to or from the place of employment pursuant to contractual obligation. *Philpott*, 234 Or at 41; see also *Krushwitz v. McDonald's Restaurants of Oregon, Inc.*, 323 Or 520 (1996) (“greater hazard” exception applies when an employee is injured traveling on the only means of ingress to or egress from the employer’s premises, which exposes the employee to a greater hazard than the common public); *Legacy Health Sys. v. Noble*, 232 Or App 93 (2009) (*Noble I*) (applying “parking lot” rule as an exception to the “going and coming” rule); *Dehiya v. Spencer*, 221 Or App 539 (2008) (“employer conveyance” rule applies both when the employer provides compensation for travel and when the employer provides the vehicle); *J A K Pizza, Inc.-Domino’s v. Gibson*, 211 Or App 203 (2007) (discussing “special errand” exception).

Other exceptions to the “going and coming” rule have been recognized for injuries sustained by workers who are required to drive their own cars to work to use during the work day for the employer’s benefit (e.g., *Jenkins v. Tandy Corp.*, 86 Or App 133, *rev den*, 304 Or 279 (1987)), injuries sustained when a trip to or from work has a “dual purpose” that includes a business-related purpose (e.g., *Marshall v. Cosgrave, Kester, Crowe, Gidley and Lagesen*, 112 Or App 384 (1992)), and for injuries sustained by a “travelling employee” exposed to additional hazards as a result of employment-required travel (e.g., *Gwin v. Liberty Northwest Ins. Corp.*, 105 Or App 171 (1991)). Thus, exceptions to the “going and coming” rule relate to the location of the injury, the reason for which the claimant was going to or coming from work, the method by which the claimant was going to or coming from work, or a combination of those factors.

To date, controlling court precedent has not explicitly recognized the “personal comfort” doctrine as an exception to the “going and coming” rule. *Kevina L. Frazer*, 66 Van Natta 761, 763 n 4 (2014).⁸ Here, because the “going and coming” rule applies, and claimant contends that her injury is compensable

⁸ Noting that, on review, we had not considered whether the “parking lot” exception to the “going and coming” rule applied, the *Frazer* court remanded the case to us. On remand, considering circumstances similar to those presented here, we concluded that the “parking lot” exception did not apply. *Kevina L. Frazer*, 66 Van Natta 761, 766 (2014). Neither the *Frazer* court’s opinion nor our opinion on remand addressed whether the “personal comfort” doctrine may operate as an exception to the “going and coming” rule.

under the “personal comfort” doctrine, I address whether the “personal comfort” doctrine is an exception to the “going and coming” rule, and, if so, whether claimant was engaged in personal comfort activity when she was injured. I answer both questions in the affirmative.

As discussed below, court precedent has found injuries sustained while going to or coming from work compensable when the claimants were engaged in activities for their personal comfort. These cases did not explicitly follow *Frazer*’s two step inquiry by recognizing the applicability of the “going and coming” rule and then finding that the “personal comfort” doctrine was as an exception to the rule. Nevertheless, because they found injuries sustained during “personal comfort” activities compensable despite the fact that they were sustained while going to or coming from work, they implicitly applied the “personal comfort” doctrine as an exception to the “going and coming” rule.

The “personal comfort” doctrine was first adopted in Oregon in *Jordan v. Western Elec. Co.*, 1 Or App 441 (1970). There, the claimant was on a paid break when, at his supervisor’s suggestion, he accompanied his supervisor and most of the other employees to a restaurant and, when returning, slipped on a curb and was injured. Break facilities were available on the premises, but most of the employees customarily went to the restaurant.

The court noted the general rule that “injuries sustained by employees when going to or from their place of employment are not deemed to arise out of and in the course of their employment.” *Id.* at 443. However, it was persuaded by the “personal comfort” doctrine’s principle that “the course of employment is not considered broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee. On the other hand, acts which are found to be departures effecting a temporary abandonment of employment are not protected.” *Id.* at 446. It also enumerated seven factors that had been useful in determining whether an injury arose out of and in the course of employment: (a) whether the activity was for the benefit of the employer; (b) whether the activity was contemplated by the employer and the employee either at the time of hiring or later; (c) whether the activity was an ordinary risk of, and incidental to, the employment; (d) whether the employee was paid for the activity; (e) whether the activity was on the employer’s

premises; (f) whether the activity was directed by or acquiesced in by the employer; and (g) whether the employee was on a personal mission of his or her own.⁹ *Id.* at 443-44.

Applying those principles, the court reasoned that the claimant's activity was for the benefit of the employer as well as himself, was contemplated by the employer and the claimant under the contract of employment, was acquiesced in by the employer, involved an element of employer control because the supervisor accompanied the employees, and the claimant was paid for the time involved and was not on a personal mission. The court concluded that such factors outweighed the off-premises location of the injury, the presence of canteen facilities on the premises, and the fact that the claimant was not performing a regular function of his job. *Id.* at 447-48. Accordingly, the court held that the claimant's injury arose out of and in the course of employment.

Although the court did not expressly identify the "personal comfort" doctrine as an exception to the "going and coming" rule, it acknowledged that the claimant's injury would ordinarily be outside of the course of employment under the "going and coming" rule. Nevertheless, it explained that the course of employment is not considered broken by "personal comfort" activity in some circumstances and enumerated factors that were relevant to that determination. Evaluating the claimant's "personal comfort" activity in light of those factors, it concluded that the course of employment was not broken despite the fact that the injury occurred off premises as the claimant was returning to work.

Thus, described in the terms of the *Frazer* court's two step analysis, the *Jordan* court found that the "going and coming" rule applied, and that an exception to the "going and coming" rule also applied. Further, it identified the "personal comfort" doctrine as a significant consideration, albeit not the only one, in reaching that conclusion. Accordingly, I conclude that *Jordan* applied the "personal comfort" doctrine as an exception to the "going and coming" rule, although it did not do so in express terms.

I also conclude that the "personal comfort" doctrine has been effectively applied as an exception to the "going and coming" rule in *Halfman v. State Acc. Ins. Fund*, 49 Or App 23 (1980), and *Mellis v. McEwen, Hanna, Givold*, 74 Or App 571, *rev den*, 300 Or 249 (1985).

⁹ Mechanical application of these factors has been rejected, but consideration of these factors remains helpful in determining whether an injury arose "out of and in the course of employment." *First Interstate Bank of Oregon v. Clark*, 133 Or App 712, 717 (1995).

In *Halfman*, the claimant left the premises of his employment to find a restroom and get something to drink, because the employer lacked such facilities, and was injured crossing a busy street. The employer argued that the injury was not compensable under the “going and coming” rule. 49 Or App at 26.

Citing *Jordan*, among other cases,¹⁰ the court noted, “Injuries incurred in certain ‘personal comfort’ activities incidental to employment have been held to be compensable.” *Id.* at 27. The court explained, “The basis of the personal comfort doctrine is that certain activities are expected and necessary and the conduct of those activities is not a departure from the employment relationship.” *Id.* at 29. The court then applied the seven factors enumerated in *Jordan*.

The *Halfman* court reasoned that although the claimant was on a personal mission “in a sense,” his objective was limited to the “typical kind of coffee break activity that is contemplated by an employer,” rather than the kind of personal mission that has “nothing to do with his employment.”¹¹ *Id.* Additionally, the court noted that the claimant’s activity benefited the employer, was contemplated by the employer and employee, was incidental to employment because there were no such facilities on the premises, occurred during a paid break, and was acquiesced in by the employer. *Id.* at 28-30. Under such circumstances, the court held that the injury was compensable despite the fact that the employee was “coming from” work during a break. *Id.* at 30.

The *Halfman* court acknowledged the “going and coming” rule and cited the “personal comfort” doctrine as the reason for finding the claimant’s injury compensable. Thus, cast in terms of *Frazer*’s two step analysis, *Halfman* effectively applied the “personal comfort” doctrine as an exception to the “going and coming” rule.

¹⁰ The court also cited *Clark v. U.S. Plywood*, 288 Or 255 (1980), which held that when an injury occurs *on* the employer’s premises while the employee is engaged in activities for her or his own personal comfort, it occurs within the course and scope of employment if the conduct was expressly or impliedly allowed by the employer. *Id.* at 266. *Clark* did not address the standard for *off* premises personal comfort activities, as this case involves.

¹¹ The *Halfman* court contrasted the claimant’s “typical kind of coffee break activity” with the “personal mission” involved in *Allen v. SAIF*, 29 Or App 631 (1977). In *Allen*, the worker had driven to his bank to conduct personal business during his lunch break and was killed while returning to work. The *Allen* court had distinguished *Jordan* because the claimant’s travel to defer a loan payment, instead of taking rest and nourishment, during his lunch break did not further the employer’s interest in having a refreshed employee. *Id.* at 635.

In *Mellis*, the claimant was injured during a paid break as she arose from her chair after eating in a cafeteria that was located in the same building as, but on a different floor from, her employer. The claimant had eaten lunch at her desk but, although the employer's premises included a break area, she decided to go to the cafeteria during her break to clear her mind before beginning a long series of calculations.

The court noted that *Jordan* and *Halfman* had held that injuries that had occurred off premises during coffee breaks were work related. 74 Or App at 574. The court then applied the seven *Jordan* factors and concluded that the claimant's activity was a "typical kind of coffee break activity that is contemplated by an employer," was acquiesced in by the employer, and was not a departure from the employment relationship. Accordingly, the court found the claimant's injury work-related.

Like *Halfman*, *Mellis* addressed the ultimate inquiry of "whether the relationship between the injury and the employment is sufficient that the injury should be compensable," instead of discretely addressing the effect of the "going and coming" rule on the "course of employment" requirement. *Id.* at 573 (citing *Rogers*). Nevertheless, *Mellis* applied *Jordan* and *Halfman* to find an off-premises "coffee break" injury, incurred while the claimant was "going to" work, compensable. Although *Mellis* itself did not identify the "personal comfort" doctrine as the basis for its holding that a "typical kind of coffee break activity that is contemplated by an employer" was compensable, it relied on *Jordan* and *Halfman*, which, as discussed above, based their holdings on the "personal comfort" doctrine. I interpret *Mellis* as consistent with the application of the "personal comfort" doctrine as an exception to the "going and coming" rule.

In sum, *Jordan*, *Halfman*, and *Mellis* found injuries compensable despite the fact that they occurred when the claimants were going to or coming from their places of employment. They did so because the claimants' travels to or from work were for personal comfort activities that were reasonably incidental to employment and advanced the employers' interests in having the labor of refreshed employees. Although they did not explicitly find that the injuries would not have been compensable under the "going and coming" rule but for the "personal comfort" doctrine exception, that is the implication of their holdings.

Accordingly, I turn to the facts of this case to determine whether the "personal comfort" doctrine applies. When taking a routine paid break from her sedentary job, claimant walked on a route that was near the employer's premises to "get [her] blood moving" and be "brighter and more able to think," as well as

to promote her own health. Doing so benefited the employer because it made her a better worker. She believed that her employer had encouraged such walks. Further, even if the employer never specifically encouraged her to walk during her breaks, it encouraged its employees to exercise for a healthier workforce and never discouraged them from walking outside during their breaks. These circumstances indicate that claimant was injured “going to” work because of a personal comfort activity incidental to employment, which aided her in the efficient performance of her job, rather than a temporary abandonment of employment. *See Jordan*, 1 Or App at 446.

Accordingly, I would apply the “personal comfort” doctrine as an exception to the “going and coming” rule in this case. Therefore, I would conclude that claimant’s injury occurred “in the course of” employment.

Finally, I address the requirement that the injury “aris[e] out of” employment. This requirement addresses the causal link between the occurrence of the injury and a risk associated with claimant’s employment. *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 368-69 (1994). All risks causing injury will fall into three categories: (1) risks “distinctly associated with the employment,” which are universally compensable; (2) risks “personal to the claimant,” which are universally noncompensable; and (3) “neutral” risks, which are compensable if employment conditions put the claimant in a position to be injured. *Panpat v. Owens-Brockway Glass Container, Inc.*, 334 Or 342, 349-50 (2002). Thus, claimant’s injury “ar[ose] out of” employment only if the risk of the injury resulted from the nature of her work or was a risk to which the work environment exposed her. *Redman Industries, Inc. v. Lang*, 326 Or 32, 36 (1997).

As discussed above, claimant’s job was sedentary, and she walked during the workday to be mentally and physically refreshed for further work. Additionally, she believed that her employer encouraged her to walk during breaks to improve her health, in addition to her work performance, because of the benefits that healthy workers provided to the employer. Such circumstances support the conclusion that claimant’s break-time walks were an employment-related risk.

Further, I conclude that even if the risk that claimant would fall when returning from her break-time walk was not a risk distinctly associated with employment, it was at least a neutral risk to which her employment conditions exposed her. Although I am mindful that prior cases do not impose methodological straightjackets, precedents regarding ingress and egress provide useful guidance. *Legacy Health Systems v. Noble*, 250 Or App 596, 602 (2012) (*Noble II*).

Generally, because injuries occurring during ingress and egress occur while a worker is going to or coming from work, their compensability depends on whether they occur “in the course of” employment under an exception to the “going and coming” rule. Thus, such cases typically involve some employer control over the place of the injury (*i.e.*, the “parking lot” exception) or a greater hazard than faced by the general public (*i.e.*, the “greater hazard” exception). I acknowledge that neither factor is present here. Nevertheless, after considering *SAIF v. Marin*, 139 Or App 518 (1996), *Hearthstone Manor v. Stuart*, 192 Or App 153 (2004), and *Noble II*, I conclude that claimant’s injury occurred during normal ingress/egress, and that claimant’s employment exposed her to the risk of falling during such activity. Of these three cases, only *Stuart* found that the claimant’s injury arose out of employment. I find *Stuart* most applicable but, because its reasoning relied heavily on *Marin*, I discuss *Stuart* last.

In *Marin*, the claimant had finished his shift and walked to his car in an employer-controlled parking lot, when he found his car battery dead. He waited approximately a half an hour for other workers to finish their shifts, so that he could ask for a jump start. A supervisor agreed to give him a jump start, and the supervisor’s wife attempted to move the supervisor’s car closer to the claimant’s car. The supervisor’s car struck a flower box, which struck the claimant, causing his injury.

Characterizing the risk of being injured by a flower box as a “neutral” one, the *Marin* court explained that the injury would be compensable only if employment conditions caused him to be in a position to be injured by the flower box. 139 Or App at 524-25. The court reasoned that although the claimant was injured by a flower box on the employer’s premises, the risk of the injury (being struck by the flower box) existed only when an outside force (the supervisor’s car) struck the flower box, an event that had no connection to the claimant’s employment. *Id.* at 522. Additionally, the court explained that the employer’s control of the instrumentality of the injury, the flower box, was not determinative. *Id.* Instead, the causal relationship between the claimant’s injury and the totality of events that gave rise to the claimant’s injury should be considered. *Id.*

The court acknowledged that because an employee who drives to work generally must walk to and from the parking lot while entering and leaving work, “in a general sense, walking through the parking lot to his car on the way home after work could be viewed as a condition of claimant’s employment.” *Id.* at 525. Nevertheless, the claimant’s injury “was not precipitated simply by his walking through the parking lot on the way to his car after work.” *Id.* Rather, the claimant

was put in a position to be injured by the flower box by his efforts to jump start his car and the circumstances that followed. *Id.* Those activities “were sufficiently removed from his normal ingress and egress to and from work as to break the causal connection between his normal conditions of employment and his injury.” *Id.*

Thus, the *Marin* court recognized that normal employment exposes workers to the risks of ingress and egress to and from work. In *Marin*, the injury did not “arise out of” employment because the risk of injury was “sufficiently removed” from “normal ingress and egress to and from work as to break the causal connection” with employment. In reaching that conclusion, the *Marin* court considered the nature of the claimant’s “normal egress” (*i.e.*, walking to a car) and the totality of events diverging from such “normal egress,” from claimant waiting for help in jump starting his car to the other car striking the flower box.

Here, by contrast, claimant was walking directly to her workplace from her break-time walk, during working hours, for the purpose of returning to work, when she fell. The location of her fall was the sidewalk that was the most direct pedestrian route from the perimeter of the block to her workplace, and which bordered a parking lot that adjoined her workplace. (Tr. 10; Ex. B). Such circumstances do not suggest that her injury was “sufficiently removed” from normal ingress and egress to work to break the causal connection between normal employment conditions and the injury. Rather, they establish that claimant was engaged in normal ingress to work, and that the risk of her fall was, therefore, one to which her employment conditions exposed her.

In *Noble II*, the claimant was going to perform a purely personal errand at her nearby credit union when she was injured. She had left the building in which she worked, crossed a public street, walked a block, crossed another public street, and walked through a parking lot that was owned and controlled by the employer (but which she and other employees who worked at her workplace did not use), where she slipped and fell. The *Noble II* court reasoned that the claimant’s work environment did not expose her to the risk of her injury because the location of the injury had no “environmental nexus” to her work.¹² 250 Or App at 603.

¹² Addressing the question of whether the injury “result[ed] from a risk connected with a nature of the work,” which would be *per se* compensable, the *Noble II* court also reasoned that the claimant’s work activities were confined to the hospital and bore no connection to the risk of suffering an injury while walking across a slippery parking lot to deposit a personal check. 250 Or App at 603. Such facts are distinguishable from the present case, where claimant walked during her break because it improved her work performance and she believed her employer encouraged her to.

Here, the facts noted above (that the sidewalk on which claimant fell was the most direct pedestrian path from the perimeter of the block to her workplace and bordered a parking lot adjacent to her workplace) establish a close “environmental nexus” between the location of claimant’s injury and her work. Such circumstances distinguish *Noble II*, and establish that claimant was involved in normal ingress to work when she was injured.

In *Stuart*, the claimant was injured returning from her lunch break when she walked into a concrete ashtray on an employer-controlled walkway. *Stuart* discussed and distinguished *Marin*. The *Stuart* court distinguished the flower box in *Marin* from the ashtray that “was an object that claimant would predictably encounter from returning to work from the employer-controlled cafeteria, on an employer-controlled path.” 192 Or App at 159. However, the *Stuart* court also noted *Marin*’s reasoning that the totality of events giving rise to the injury should be considered and that the employer’s control over the instrumentality of the injury was not determinative. *Id.*

The *Stuart* court noted that in *Marin*, the claimant had been injured by a neutral risk to which employment had not exposed him because the events intervening between the end of his shift and his injury “were sufficiently removed from his normal ingress and egress to and from work as to break the causal connection between his normal conditions of employment and his injury.” *Stuart*, 192 Or App at 160 (quoting *Marin*). Distinguishing such circumstances, the *Stuart* court explained:

“In the present case, we agree * * * that claimant’s injury was precipitated by walking along employer’s path on her way back to work after lunch and that in doing so she was engaged in ‘normal ingress’ to work. Thus, as distinct from *Marin*, in the present case, nothing broke the causal connection between claimant’s conditions of employment and her injury.” *Id.*

Although the employer in *Stuart* controlled the location of the injury, such control was not a determinative factor. Instead, it was among the totality of circumstances that the *Stuart* court considered in determining whether the causal connection between the claimant’s employment conditions and her injury had been broken, as in *Marin*. The *Stuart* court concluded that the injury arose out of employment because the claimant was engaged in “normal ingress” to work at the time.

Such circumstances are similar to those present in this case, where claimant's injury was precipitated by walking on the normal path on her way back to work after her break. Although the employer did not control the sidewalk on which claimant fell, she was engaged in "normal ingress" to work when she was injured. Under such circumstances, I would find that her risk of injury was one to which her employment conditions exposed her.

Accordingly, I would conclude that claimant's injury arose out of, as well as in the course of, her employment. Consequently, it is compensable. Because the majority reaches the opposite conclusion, I respectfully dissent.