

In the Matter of the Compensation of
JUSTEN A. SWAGER, Claimant
WCB Case No. 13-04386
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that upheld the SAIF Corporation's denial of claimant's injury claim for conditions arising out of a motor vehicle accident (MVA). On review, the issue is course and scope of employment. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

In 2013, claimant worked for the employer as a ranch hand. His job required regular travel to various fields where the employer had work or owned property. He was responsible for harvesting hay on the employer's fields, and on Jeanne's, Al's, and Cabral's fields, which were located at least several miles from the employer's fields. (Tr. I: 106-07, 113). To accomplish these tasks, the employer furnished a company pickup truck and paid for the fuel. (Tr. I: 110). The employer permitted claimant to use the company vehicle to travel to and from his home to work, and to and from the store to purchase work-related items (on the employer's account). Claimant was required to ask permission from the employer to use the company vehicle for personal errands. (Tr. I: 117; Tr. II: 33).

When claimant began working for the employer in 2013, the employer informed him that he was not permitted to consume any alcohol on the job and that he would be terminated if he did so. (Tr. I: 124, 160; Tr. II: 29, 31).

On July 26, 2013, claimant was working for the employer in one of the above mentioned fields. (Tr. II: 50, 53). He has no memory of his whereabouts or actions during that day. (Tr. I: 23). Around 7:00 p.m., claimant drove the company truck to a neighboring farm (Blankenship's) to help with the operation of a new baler. (Tr. I: 174). Claimant did so as a personal favor for a friend. (Tr. I: 206). The record does not indicate that claimant sought the employer's permission to use the truck in this manner. The Blankenship farm had no connection to claimant's employer or employment. (Tr. II: 75).

Claimant stayed at the Blankenship farm for about two hours. Blankenship offered claimant a beer and claimant drank it. (Tr. I: 176). Subsequently, claimant left in the employer's truck. At approximately, 9:30 p.m., as he was driving toward home (claimant lived in a trailer on the employer's property), portions of tire tread detached from both rear tires. (Ex. 36). Claimant lost control of the truck, which rolled over. He was thrown from the truck and sustained serious injuries. A blood draw, taken shortly after midnight, showed his blood alcohol content at .22 percent. (Ex. 11-1).

On August 21, 2013, SAIF denied the claim, asserting that claimant's injuries did not arise out of or occur within the course of his employment. (Ex. 47). Claimant requested a hearing.

In February 2014, Dr. Burton, a medical toxicologist, performed a file review at SAIF's request. (Ex. 57). Dr. Burton opined that claimant's alcohol intoxication was the major cause of his loss of control of the vehicle. (Ex. 57-3).

In June 2014, Mr. Myers, a professional engineer, performed an accident reconstruction analysis at claimant's request. Mr. Myers opined that the tire failure probably caused loss of directional control and the subsequent rollover of the vehicle. (Ex. 59).

At the hearing, Dr. Burton estimated that claimant's blood alcohol content at the time of the accident was approximately .27 percent, more than three times the legal limit of .08 percent. (Tr. II: 89, 91, 92). He testified that given claimant's high level of intoxication and the sudden and unexpected nature of the tread separation, claimant would have had difficulty recognizing the tire-separation and would have had a delayed, inappropriate, and uncoordinated response to the event. (Tr. II: 88, 100, 101).

CONCLUSIONS OF LAW AND OPINION

In upholding SAIF's denial, the ALJ reasoned that claimant's injuries did not arise out of and within the course of his employment. Specifically, the ALJ determined that claimant was a traveling employee who was injured while engaged in a distinct departure on a personal errand.

On review, claimant contends that his injury arose out of and in the course of employment under the “traveling employee” doctrine. For the following reasons, we conclude that claimant’s injury did not occur in the course of his employment.¹

For an injury to be compensable, it must “[a]rise out of and in the course of employment.” ORS 656.005(7)(a). We use a unitary work connection test in which the “arising out of” and “in the course of” elements are both part of a single inquiry, which is whether the relationship between the injury and the work is sufficient to make the injury compensable. *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994). Each element of the inquiry tests the connection in a different manner; the “in the course of” element concerns the time, place, and circumstances of the injury, while the “arising out of” element concerns the causal connection between the injury and employment. *Id.* Both prongs of the work-connection test must be satisfied to some degree; neither is dispositive. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997).

We first address the requirement that an injury occur “in the course of” employment, which in this case is dispositive. When an employee’s work entails travel, the employee becomes a traveling employee, even if the travel is local and of limited duration. *See Savin Corp. v. McBride*, 134 Or App 321 (1995) (traveling employee’s work entailed driving to customers’ premises and returning home each evening; injury sustained while running a banking errand on the way home was compensable); *PP & L v. Jacobson*, 121 Or App 260, *rev den*, 317 Or 583 (1993) (traveling employee rule is not limited to employees who travel overnight).

A traveling employee is considered to be continuously acting in the course of employment unless the employee has engaged in a distinct departure on a personal errand. *SAIF v. Scardi*, 218 Or App 403, 408 (2008); *Sosnoski v. SAIF*, 184 Or App 88, 93, *rev den*, 335 Or 114 (2002); *Savin Corp. v. McBride*, 134 Or App 321, 324 (1995). Moreover, a traveling employee need not be actually working when injured for the injury to be compensable. *See Sosnoski*, 184 Or App at 93-95; *see also Jacobson*, 121 Or App at 263 (when travel is part of employment, the risk of injury during activities necessitated by travel remains an incident to the employment even though the employee may not actually be working at the time of the injury).

¹ Given our reasoning below, we need not address SAIF’s “intoxication” defense under ORS 656.005(7)(b)(C).

We begin with the threshold question of whether claimant was a “traveling employee” at the time he was injured. *See Proctor v. SAIF*, 123 Or App 326, 330 (1993). As noted above, claimant’s job as a ranch hand required regular travel off of the employer’s premises to other fields, some of which were located as least several miles from the employer’s fields. The employer provided a company vehicle for claimant to use in traveling between fields, and paid for the fuel. Under such circumstances, we find that claimant was a “traveling employee.”

Next, we examine whether claimant was engaged in a distinct departure on a personal errand and thus not acting in the course of his employment when he was injured. An activity is a distinct departure on a personal errand if it is not reasonably related to an employee’s travel status. *Scardi*, 218 Or App at 411 (the relevant inquiry regarding distinct departures is whether the injury-causing activity is reasonably related to--not whether it is mandated by--the claimant’s employment). If the activity is one that an employer might reasonably approve of or contemplate that a traveling employee will engage in, and the activity is not inconsistent with the travel’s purpose or the employer’s directives, it is not a distinct departure. *Sosnoski*, 184 Or App at 94-95. For the following reasons, we conclude that claimant was injured during a “distinct departure.”

Before the accident, claimant was working for the employer in one of the usual fields. However, he subsequently drove the employer’s truck to Blankenship’s farm to help with the baler as a personal favor for a friend. The Blankenship farm had no connection to claimant’s employer or employment. Claimant consumed a beer while at Blankenship’s, and stayed there for about two hours.

There is no indication that claimant was authorized to help at the Blankenship farm as a condition of his employment (particularly for a two-hour period). Nor is there evidence that claimant sought permission from the employer to use its truck to travel to and from Blankenship’s farm. Moreover, he was expressly prohibited from consuming alcohol while working. Therefore, his consumption of alcohol at Blankenship’s farm (a location where he had no permission to be) supports an inference that he was no longer performing his work activities once he arrived at the farm.

Under these circumstances, we conclude that claimant had ended his work day when he went to the Blankenship farm and was no longer performing activities that were reasonably related to his travel status once he arrived there. Therefore, claimant’s traveling employee status had ended when he went to the Blankenship

farm, and he was thereafter engaged in a distinct departure on a personal errand. Thus, at the time of the accident (while returning home from his personal errand several hours after his work day ended), claimant was not acting within the course of his employment. *See Darlynda J. McClain*, 48 Van Natta 542 (1996) (the claimant's injury in an automobile accident when traveling from her home to an awards banquet that the employer did not require her to attend did not occur within her work status as a traveling employee); *Abderrahim Najjar*, 53 Van Natta 1544 (2001) (the claimant's injury incurred while chasing a shoplifting suspect did not occur in the course of employment where he was not working at the time and had been drinking alcohol in the employer's parking lot, and was doing something that was not a part of his job (chasing a suspected shoplifter off the premises against the employer's express written policy)). Accordingly, we affirm.

ORDER

The ALJ's order dated September 15, 2014 is affirmed.

Entered at Salem, Oregon on July 14, 2015