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In the Matter of the Compensation of  
**LAURA BROWN, Claimant**  
WCB Case No. 14-04948  
ORDER ON REVIEW  
Randy M Elmer, Claimant Attorneys  
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Lanning, Johnson, and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that upheld the insurer's denial of claimant's injury claim for a left knee condition. On review, the issue is course and scope of employment. We reverse.

FINDINGS OF FACT

Claimant began working for the employer in July 2013 as a customer service representative. (Tr. 7). Her job, which she described as "sedentary," involved answering phones and helping customers with extended protection plans or warranties. (Tr. 7-8, 33). She worked Monday through Friday, with two paid 15-minute breaks and an unpaid one-hour lunch break each day (from 12:00 p.m. to 1:00 p.m.). (Tr. 8-9, 10). The employer's business is located in a mall, where it leases office space. (Tr. 11-12, 41; Ex. 4).

The employer initiated a walking/exercise program for its employees in September 2014. (Tr. 52). The walking program was not required, but was encouraged by the employer. (Tr. 36, 37, 58-59). Employees were told that they could walk on their breaks, during lunch, or before/after work, but not during work. (Tr. 20, 21). Employees participated on teams, and tracked miles either via pedometer/step counter or by using specific employer-designated routes and a punch card. (Tr. 35-36, 52-53). Once a punch card was full, it was entered into a drawing for individual prizes. (Tr. 10, 54). To receive card "punches," the employee had to use one of two possible routes mapped out by the employer. (Tr. 10, 38-39, 53). One route was 1/8 mile per lap and was inside the building. An employee received one punch per card for walking that route. (Tr. 52, 56). The other route was an outdoor lap of 1/4 mile and was around the outside of the building. That route received two punches. (*Id.*)<sup>1</sup> Individual miles walked (as indicated via pedometer or punch card) were counted together for team mileage.

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<sup>1</sup> The employer determined and measured both the inside and outside routes. (Tr. 56).

(Tr. 20, 56). At the end of the program, there would be an employer-provided lunch for the team that logged the most miles. (Tr. 55, 56). Claimant described the program as follows:

“It was a program the company was doing for—to better our health, kind of like a heart program, those type of things, \* \* \* we had two choices; we could walk inside or we could walk outside, and they had specific routes that you take. Then there was little cards that you would be given, and if you walked, I believe it was, two rounds inside you got one punch, if you walked outside it was one, or vice-versa. And once you filled that card, it went into a big jar, and then there was team incentives. If your team got more that specific time, you got a certain prize. And then as a whole site, there was a big board that marked—I don’t remember specifically the locations, but say if we went from here to Portland, once we reached Portland by the number of miles we got per stamp, we got a special treat. And then the overall goal was there was memberships to gyms, there was other different prizes for the individual who was drawn for that.”  
(Tr. 10; *see also* Tr. 20).

Claimant participated as part of a team in the employer’s walking program. Before the program started, she “constantly” went for walks during her lunch breaks, and enjoys walking. (Tr. 33). She liked to walk during lunch to relieve stress and for exercise. (Tr. 38). However, she did not like walking the outdoor route designated as part of the employer’s walking program due to congestion, shoppers, carts, and vehicles. Rather, she preferred to walk in a less congested, more peaceful area. (Tr. 33, 38). Claimant chose the employer’s outdoor route for her walk because she liked “going out and getting a little fresh air,” and there was less of a chance of disturbing coworkers than on the indoor route. Also, by using the outdoor route, she could earn double the punches in about the same amount of time. (Tr. 35).

According to claimant, her “team supervisor” encouraged her to walk to earn more points for the team, and participation in the program was “strongly recommended.” (Tr. 36, 37; *see* Tr. 59). In claimant’s view, there was a competitive aspect and they were “encouraged to be team players \* \* \* Like for in this case, it was something that reflected upon the whole site; that’s why we had

the map to go to other cities.” (Tr. 37). Claimant believed the “general mood around [the] program” was “morale-boosting or trying to encourage people to be healthy.” (*Id.*) The employer representative agreed with claimant’s counsel that the program “created morale.” (Tr. 57).

On the day she was injured, claimant decided to walk on the designated outdoor lap during her unpaid lunch break to earn more “punches” for the program. (Tr. 20). The route took her behind the building where delivery trucks entered and exited. (Tr. 21; Ex. A). After moving closer to the building to avoid truck traffic, claimant stepped into a depressed area on the pavement, and felt knee pain when her leg twisted. (Tr. 9, 21, 23).

The lease between the landlord and the employer defined the “Property” as being composed of the “Premises,” the “Limited Common Areas,” and the “General Common Areas.” (Ex. 4-2, -3, -31). The General Common Areas referred to those portions of the Property that were not the Premises and were not the Limited Common Area. (Ex. 4-31). According to the employer’s facility manager, claimant’s injury was sustained in a “General Common Area.” (Tr. 42, 49; *see* Ex. 4-32). The employer did not have responsibility to maintain/repave that area. (Tr. 43, 48; *see* Ex. 4-13).

On September 24, 2014, the insurer denied claimant’s knee injury claim, asserting that she was not in the course and scope of employment at the time of her injury. Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the denial, finding that claimant’s injury did not arise out of and in the course of her employment.<sup>2</sup> The ALJ did not address the insurer’s “social/recreational” defense under ORS 656.005(7)(b)(B).

On review, claimant contends that her injury is compensable under the “personal comfort” doctrine and “the analytical template as enunciated” in *U.S. Bank v. Pohrman*, 272 Or App 31, *rev den*, 358 Or 70 (2015) (which issued after the ALJ’s order). The insurer responds that claimant’s injury is excluded from coverage under ORS 656.005(7)(b)(B), and the “going and coming” rule. For the following reasons, we conclude that claimant’s injury is compensable.

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<sup>2</sup> Based on demeanor, the ALJ found all witnesses credible. We find no persuasive reasons 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).

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

In *Roberts v. SAIF*, 341 Or 48 (2006), the Supreme Court explained that this statutory exclusion raises three questions: (1) whether the worker was engaged in or performing 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.” If the answer to all those questions is “yes,” then the worker cannot recover. *Id.* at 52.

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

The parties do not dispute that claimant was engaged in a recreational activity or that she was injured while engaging in that activity. Thus, this case turns on the issue of whether claimant was engaged in that activity primarily for her personal pleasure. Based on this record, we do not find the “primarily for personal pleasure” element satisfied. We reason as follows.

In the context of ORS 656.005(7)(b)(B), “primarily” means “first of all : fundamentally, principally.” *Roberts*, 341 Or at 53. “[A] worker may engage in a recreational or social activity for reasons other than personal pleasure,” and our task “is to determine whether the worker’s personal pleasure was the principal or fundamental reason for engaging in the activity.” *Id.* That requires us to determine “whether there was any work-related reason for the activity.” *Barela*, 218 Or App at 546. That is, we must determine “both the degree to which a recreational or social activity serves the employer’s work-related interests and the degree to which the worker engaged in the activity for the worker’s personal pleasure. Only if the worker’s personal pleasure was the fundamental or principal reason, in relation to work-related reasons, for engaging in the activity will the resulting injury be noncompensable.” *Roberts*, 341 Or at 56. “[T]he ‘activity’ [that ORS 656.005(7)(b)(B)] refers to is not the particular action that causes

the injury [], but the activity within which that action occurs (working or not working).” *Pohrman*, 272 Or App at 37; *Nichols*, 186 Or App at 670 n 4. In that vein, recreational activities that occur “on the job” are not “always incidental to the primary activity of working.” *Pohrman*, 272 Or App at 38. Thus, the proper focus is not on the fact that the recreational/social activity is pleasurable but on the fact that the activity is work related; *i.e.*, the injury is compensable if it occurred during a recreational/social activity that is *incidental* to an employment activity. *Id.*

Here, the evidence does not support a conclusion that claimant was walking during her lunch break *primarily* for her personal pleasure. At the time of her injury, claimant was participating in the employer’s walking program, and was walking on a route specifically designated by the employer for that program. (Tr. 20, 52, 56). Although she enjoyed walking and had walked during her lunch hour on her own in the past, she was walking on that particular day to earn more points/mileage as a participant in the employer’s walking program. (Tr. 20, 33, 35, 38). Claimant’s “team supervisor” had encouraged her to walk to earn more miles for the team, and participation in the program was “strongly recommended.” (Tr. 36, 37).

Thus, despite her personal reasons for the activity, the record establishes that claimant was injured while participating in the employer’s walking program because it was encouraged by the employer. This close work nexus leads us to conclude that the requirements for exclusion under ORS 656.005(7)(b)(B) have not been satisfied. Rather, we conclude that the personal nature of claimant’s walking was incidental or secondary to the work-related reason for the activity. In other words, a preponderance of the evidence does not establish that claimant’s personal pleasure derived from walking (*e.g.*, fresh air, exercise, stress relief) was the fundamental or principal reason, in relation to work-related reasons (employer’s walking program, team encouragement),<sup>3</sup> for engaging in the activity. *See Roberts*, 341 Or at 56. Accordingly, on this record, the insurer has not established that claimant was injured while engaged in a recreational activity primarily for her personal pleasure.

We next address whether claimant’s injury arose out of and within the course of employment. 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

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<sup>3</sup> As a corollary matter, given the sedentary nature of claimant’s job, the employer also benefited from having a refreshed employee, which strengthens the work-related connection for claimant’s walk.

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.

We begin with an analysis of the “in the course of” prong of the “work connection” test. 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. It is in this context that we consider the applicability of the “going and coming” rule and the “personal comfort” doctrine. *Pohrman*, 272 Or App at 43.

The “going and coming” rule provides generally that injuries sustained while an employee is travelling to or from work do not occur in the course of employment. *Krushwitz*, 323 Or at 526. The reasoning behind the “going and coming” rule is “that the relationship of employer and employee is ordinarily suspended from the time the employee leaves his work to go home until he resumes his work, since the employee, during the time that he is going to or coming from work, is rendering no service for the employer.” *Id.* The “going and coming” rule applies to injuries occurring both before and after the workday, as well as to those occurring while the employee is going to or coming from a break. *Enter. Rent-A-Car Co. v. Frazer*, 252 Or App 726, 730-31 (2012), *rev den*, 353 Or 428 (2013) (*Frazer I*); *see Frazer v. Enter. Rent-A-Car Co.*, 278 Or App 409, 412 (2016) (*Frazer II*).

“But the going and coming rule is not implicated at all—that is, the rule is never triggered—when a worker has not left work.” *Pohrman*, 272 Or App at 44. Thus, the “going and coming” rule generally does not apply when the worker, although not engaging in his or her appointed work activity at a specific moment, still remains in the course of employment and, therefore, has not left work. Sometimes that occurs because the worker is “still ‘on duty’ and otherwise subject to the employer’s direction or control.” *Id.* (citing *Frazer I*, 252 Or App at 731). The “personal comfort” doctrine may apply in that situation, depending on the “nature of the activity” in which the worker is involved. *Id.*

Under the “personal comfort” doctrine, “an employee remains in the course and scope of employment if he or she engages in an activity that is not his or her appointed work task, but which is a ‘personal comfort’ activity that bears a sufficient connection to his or her employment.” *Id.* In *Pohrman*, the court explained that seven factors have been used to make that determination, with a general focus on whether the activity was contemplated, directed by, or acquiesced in by the employer, where the activity occurred, and whether the employer benefited from the activity. *Id.* at 44-45; *see Jordan v. Western Electric*, 1 Or App 441, 443 (1970).<sup>4</sup>

“Personal comfort” activities that are merely incidental to employment involve “engaging in activity with a ‘limited objective’ of achieving ‘personal comfort’—such as restroom breaks, getting something to drink, or other ‘typical kind of coffee break activity’ which is ‘contemplated by an employer’ and, therefore, do not ‘remove[] [the employee] from the employment situation.’” *Id.* at 45; *Halfman v. SAIF*, 49 Or App 23, 29-30 (1980); *see also Clark v. U.S. Plywood*, 288 Or 255, 260-61 (1980) (noting that the “personal comfort” doctrine applies in

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<sup>4</sup> The seven *Jordan* factors are:

“(a) Whether the activity was for the benefit of the employer \* \* \*;

“(b) Whether the activity was contemplated by the employer and 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 \* \* \*;

“(g) Whether the employee was on a personal mission of his own[.]”

*Jordan*, 1 Or App at 443-44 (internal citations omitted).

As the *Pohrman* court explained, in the wake of the adoption of the unitary work-connection test, courts can still consider the seven *Jordan* factors to determine compensability. 272 Or App at 45 n 8; *see Rogers v. SAIF*, 289 Or 633, 643 (1980) (“Existing law regarding proximity, causation, risk, economic benefit, and all other concepts which are useful in determining work relationship remain applicable.”); *First Interstate Bank v. Clark*, 133 Or App 712, 717 (1995) (explaining that, although the seven factors derived from *Jordan* were no longer the independent and dispositive test of work-connection, “depending on the circumstances, some or all of those factors will remain helpful inquiries” under the unitary work-connection test); *Wallace v. Green Thumb, Inc.*, 61 Or App 695, 698-700, *aff’d*, 296 Or 79 (1983) (noting that the court’s adoption of the “unitary work connection approach” was not a rejection of “the specialized concepts that have been developed to analyze the relationship between the injury and the employment, e.g., personal comfort, special errand and lunch hour cases”).

situations in which the claimant sustains injuries while engaged “in other incidental activities not directly involved with the performance of the appointed task, such as preparing for work, going to or from the area of work, eating, rest periods, going to the bathroom, or getting fresh air or a drink of water”). The court has also focused on whether the activity was “expressly or impliedly authorized” by the employer. *Clark*, 288 Or at 264.

As instructed in *Pohrman*, we must first inquire into the nature of claimant’s activity when injured to determine whether it bears a sufficient connection to the employment so that she cannot be considered to have left the course of employment, making the “personal comfort” doctrine applicable and the “going and coming” rule inapplicable. After making that inquiry, if we determine that claimant has not engaged in a personal comfort activity, but rather was injured while on a personal mission, or determine that the personal comfort activity did not bear a sufficient connection to the employment, then we may consider whether the “going and coming” rule, or any of the exceptions to that rule, would properly apply.<sup>5</sup> *Id.* at 47.

Under the circumstances of this case, we find the “personal comfort” doctrine applicable. We reason as follows.

When on her routine (unpaid) lunch hour, claimant walked on a route designated by the employer for participation in the employer-sponsored walking program, with the objective to receive more punches for personal and team mileage counts. She also liked to walk for stress relief and exercise, and had walked during her lunch time “constantly” in the past. (Tr. 33, 38). The record also supports a conclusion that employee participation in the walking program benefited the employer by increasing morale. (Tr. 37, 57). There was also a benefit to the employer in having refreshed employees. *Cf. Allen v. SAIF*, 29 Or App 631 (1977) (where the claimant “traveled \* \* \* to defer a loan payment instead of taking rest and nourishment at noon,” the court concluded the situation was “not analogous to the coffee break situation in [*Jordan*]” and that the claimant’s lunch hour was not in furtherance of the employer’s “interest in having a refreshed employe[e] \* \* \*”). Also, the employer contemplated and acquiesced in its employees’ participation in the walking program, and claimant’s un rebutted testimony supports the proposition that she was encouraged by her “team supervisor” to walk in order to earn more points/mileage for the team. (Tr. 36, 52).

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<sup>5</sup> In *Pohrman*, the court specifically clarified that the “personal comfort” doctrine is *not* an exception to the “going and coming” rule. *Id.* at 42; *see Frazer II*, 278 Or App at 415 n 4 (citing *Pohrman*).

Given these circumstances, we conclude that the consideration of the factors identified in *Jordan* preponderate in favor of a finding that claimant was still acting in the course of her employment when she was injured. Claimant's walking activity was for the benefit of the employer as well as herself, was contemplated by the employer and claimant, was acquiesced in by the employer, involved an element of employer control because the route was designated as part of the employer's walking program, and claimant was not on a personal mission. *See Jordan*, 1 Or App at 447-48. Thus, claimant had not "left work" when her injury occurred, but was engaged in an activity incidental to her employment (walking on the employer's designated "walking program" route to earn individual/team mileage points). Therefore, we conclude that claimant was injured within the course of her employment under the "personal comfort" doctrine.

Moreover, the outdoor walking route chosen by the employer put claimant in a more congested, less-maintained area, and created the risk of her having to avoid traffic and stepping into a depressed area of pavement when walking as part of the employer's walking program. Thus, we conclude that claimant's injury arose out of a risk to which her employment exposed her. Because both prongs of the compensability test have been established, we conclude that the relationship between claimant's injury and her employment is sufficient and that her injury is compensable.<sup>6</sup> Accordingly, we reverse.

Because claimant has prevailed over the insurer's denial, her counsel 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 \$10,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellant's brief), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

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<sup>6</sup> Our decision should not be interpreted as a determination that every injury occurring during a lunch break or employer-sponsored walking program is *per se* compensable. Rather, for the reasons expressed above, we conclude that the particular circumstances of this case (employer-sponsored walking program, employer control/risk due to use of a designated walking route, encouraged participation, employer acquiescence, contemplated by both parties) weigh in favor of a finding that claimant's injury arose out of and in the course of her employment.

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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, if prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated May 29, 2015 is reversed. The insurer's denial is set aside and the claim is remanded to the insurer for processing in accordance with the law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$10,500, 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 May 24, 2016