

In the Matter of the Compensation of
DONNA L. COMBS, Claimant

WCB Case No. 17-01196

ORDER ON REVIEW

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Reviewing Panel: Members Curey and Ousey.

The self-insured employer requests review of Administrative Law Judge (ALJ) Jacobson's order that set aside its denial of claimant's injury claim. On review, the issue is course and scope of employment.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant worked as a patient access representative for a hospital. (Tr. 6). She had two paid 15-minute breaks and one paid 30-minute break per shift. (Tr. 7). She frequently used her 15-minute breaks to smoke. (*Id.*) Two of claimant's supervisors and the department manager knew that claimant smoked on her breaks. (*Id.*)

The employer has a strict "tobacco free" policy, and smoking is prohibited on the hospital's campus. (Ex. 3). Accordingly, to smoke on her breaks, claimant had to exit the building where she worked and walk one block to a street outside the campus (Kerby Avenue). (Tr. 8).

On December 15, 2016, on her 15-minute break, claimant exited her building and attempted to walk to Kerby Avenue. (Tr. 8-11). However, the sidewalks on the hospital campus were icy, and before reaching her destination, she decided to turn around and return to her desk. (Tr. 11). While walking back, she slipped on the campus sidewalk directly across the street from the building where she worked. (*Id.*) She fell, hitting her left shoulder and hip. (*Id.*)

On February 17, 2017, the employer denied claimant's injury claim, asserting that the injury did not arise out of, or occur within the course of, her employment.

The ALJ set aside the denial, concluding that the injury occurred in the course of claimant's employment as it occurred during a "personal comfort" activity and that the injury arose out of her employment.

On review, the employer contends that claimant was not injured in the course of her employment because the injury did not occur while she was engaged in a “personal comfort” activity. The employer further asserts that her injury did not arise out of her employment.¹ Based on the following reasoning, we disagree with the employer’s contentions.

Claimant must establish that her injury “arose out of” and occurred “in the course of” her employment.² ORS 656.005(7)(a); ORS 656.266(1). Whether an injury “arises 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 the 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). A sufficient work connection may exist where the factors supporting one prong are weak, if those supporting the other are strong. *Redman Indus., Inc. v. Lang*, 326 Or 32, 35 (1997). Nevertheless, both requirements must be satisfied to some degree; neither is dispositive. *Krushwitz*, 323 Or at 531.

We begin by addressing 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. *U.S. Bank v. Pohrman*, 272 Or App 31, 43, *rev den*, 358 Or 70 (2015); *Angelina Cox*, 68 Van Natta 792 (2016); *Laura Brown*, 68 Van Natta 774 (2016).

¹ The employer also contends that the “going and coming” rule applies without exception. However, we need not address that argument because we conclude that claimant was engaged in a “personal comfort” activity when she was injured.

² Before considering whether a claimant’s injury occurred “in the course of” and “arose out of” employment, we generally consider whether an activity is excluded from coverage under ORS 656.005(7)(b)(B), because the claimant was injured while engaged in or performing, or as a result of engaging in or performing, a recreational or social activity primarily for his/her personal pleasure. See *Liberty Northwest Ins. Corp., v. Nichols*, 186 Or App 664, 667 (2003). However, the employer does not contend that the ORS 656.005(7)(b)(B) exclusion applies to these circumstances. Accordingly, we do not address the issue.

The “going and coming” rule provides generally that injuries sustained while an employee is traveling to or from work do not occur in the course of employment. *Krushwitz*, 323 Or at 526. The “going and coming” rule applies to injuries occurring both before and after the workday, and also to injuries occurring while the employee is going to or coming from a lunch break or “while on a shorter break—even a paid break—away from work.” *Frazer v. Enter. Rent-A-Car Co.*, 278 Or App 409, 412 (2016).

In *Pohrman*, the court explained that 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 in time, still remains in the course of employment and, therefore, has not left work.” 272 Or App at 44. This sometimes occurs because the worker is “still ‘on duty’ and otherwise subject to the employer’s direction or control.” *Id.*; *Frazer*, 278 Or App at 412. The “personal comfort” doctrine may apply in that situation, depending on the nature of the activity in which the worker is involved. *Pohrman*, 272 Or App at 44.

Under the “personal comfort” doctrine, “an employee remains in the course * * * 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.*; see *Lori C. Watt*, 70 Van Natta 755 (2018) (concluding that the “in the course of” prong was satisfied because claimant was injured while engaged in a personal comfort activity). 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);³ see also *Mellis v. McEwen, Hanna, Gisvold*, 74 Or App 571, 573-74, *rev den*, 300 Or 249 (1985).

³ 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 * * *;

“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.’” *Pohrman*, 272 Or App 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) (“personal comfort” doctrine applies in 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 Supreme Court has also focused on whether the activity was “expressly or impliedly authorized” by the employer. *Clark*, 288 Or at 266 (compensability of on-premises injuries sustained while engaged in activities for the personal comfort of the employee can best be determined by a test that asks: Was the conduct expressly or impliedly allowed by the employer?).

As instructed in *Pohrman*, we must first inquire into the nature of claimant’s activity when she was 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 if we 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. *Pohrman*, 272 Or App at 47; *see Brown*, 68 Van Natta at 774.

Here, claimant was injured while walking across the employer’s campus, during regular work hours, while still on a paid 15-minute break. Claimant’s un rebutted testimony establishes that two of her supervisors and the department manager knew that she smoked on her 15-minute breaks. (Tr. 7). Moreover,

“(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); *see also Mellis v. McEwen, Hanna, Gisvold*, 74 Or App 571, 573-74, *rev den*, 300 Or 249 (1985).

although the employer prohibited smoking on its campus, it did not preclude employees from smoking off campus during their paid breaks. (Ex. 3). In fact, claimant’s un rebutted testimony establishes that several employees regularly walked to Kerby Avenue to smoke on their breaks. (Tr. 15).

Under such circumstances, we conclude that claimant was not on a personal mission when injured. Rather, she was on a paid 15-minute break, during her work hours, while walking on the employer’s campus and engaging in a “typical kind of coffee break activity” that was contemplated by her employer. *See Pohrman*, 272 Or App at 45; *Watt*, 70 Van Natta at 755 (“personal comfort” doctrine applied where the claimant was injured during her regular work hours, while on a paid break, and her walking activity was acquiesced in by the employer); *Cox*, 68 Van Natta at 796 (the claimant had not “left work” and remained in the course of employment under the “personal comfort” doctrine when injured during her regular work hours when entering the office building after taking a walk on her paid break, and such breaks and walking activity were acquiesced in by the employer).

Thus, we conclude that claimant was injured in the course of her employment under the “personal comfort” doctrine. Therefore, her injury was not subject to the “going and coming” rule (or any of its exceptions).⁴ *See Pohrman*, 272 Or App at 47; *see also Mandes v. Liberty Mut. Holdings-Liberty Mut. Ins.*, 289 Or App 268 (2017).

We turn to the “arising out of” component. For the following reasons, we conclude that the injury arose out of claimant’s employment.

A worker’s injury is deemed to “arise out of” employment “if the risk of injury results from the nature of his or her work or when it originates from some risk to which the work environment exposes the worker.” *Hayes*, 325 Or at 601. In this context, risks are generally categorized as employment-related risks, which are compensable, personal risks, which are noncompensable, or neutral risks, which may or may not be compensable, depending on the situation. *Phil A. Livesley Co. v. Russ*, 246 Or 25, 29-30 (1983). Neutral risks, which have no particular employment or personal character, are compensable only if employment conditions put the

⁴ In *Frazer*, a case involving similar facts, the court affirmed our conclusion that the claimant’s injury did not occur “in the course of” her employment. 278 Or App at 416. However, in reaching that conclusion, we considered only whether the claimant’s injury occurred “in the course of” her employment under the “parking lot” exception to the “going and coming” rule. *Id.* at 415-16. In doing so, we reasoned that the question of whether the claimant’s injury occurred in the course of her employment under the “personal comfort” doctrine was not properly before us. *Id.* Here, in contrast to *Frazer*, this “personal comfort” doctrine question has been properly posed.

worker in a position to be injured by the neutral risk. *Id.* at 30. Thus, the “arising out of” prong is not satisfied unless the cause of claimant’s injury was either “a risk connected with the nature of the work” (*i.e.*, an employment-related risk) or “a risk to which the work environment exposed claimant.” *Legacy Health Sys. v. Noble*, 250 Or App 596, 603 (2012) (citing *Lang*, 326 Or at 36); *see also Hayes*, 325 Or at 601.

Here, the record does not establish that the risk of slipping and falling on an icy sidewalk was a risk connected with the nature of claimant’s work as a patient access representative. Therefore, the injury is compensable only if it resulted from a “risk to which the work environment exposed claimant.” *Hayes*, 325 Or at 601. Based on the following reasoning, we find that claimant’s work environment exposed her to such a risk.

Claimant’s injury occurred during work hours, while she was returning to her work station from a paid 15-minute break. She was injured when she slipped on the sidewalk on the employer’s campus, directly across the street from the building where she worked. Because the employer prohibited smoking on its premises, claimant was precluded from engaging in such activity during her paid break on the hospital’s campus. Instead, if she wished to smoke during her break, it was necessary for her to exit the building where she worked and walk one block to reach a street off of the campus. She and other hospital employees regularly smoked in that area, and that activity was contemplated by the employer. *See Henderson v. S.D. Deacon Corp.*, 127 Or App 333, 338-39 (1994) (injury arose out of employment when the claimant was injured stepping out of an elevator during her lunch break when she was required to take an hour lunch break, was encouraged to leave the employer’s premises during that break, and the employer knew she used the elevator to enter and exit her office building); *Cheryl L. Hulse*, 60 Van Natta 2627, 2630-31 (2008) (injury arose out of employment when the claimant was injured while stepping outside to smoke (as contemplated by the employer) when she was not permitted to smoke in her office building and she was injured in the normal ingress/egress from the area where she and her coworkers regularly smoked).

Under such circumstances, we conclude that claimant’s work environment exposed her to the risk of injury while walking on the employer’s campus during her paid break.⁵ *See Lang*, 326 Or at 35; *Courtney K. Leach*, 69 Van Natta 439,

⁵ The employer focuses on claimant’s smoking as the activity she was engaged in when she sustained her injury. Yet, as explained above, claimant’s injury occurred when she slipped on the sidewalk while walking on her employer’s campus during her 15-minute paid break.

441 (2017) (a sufficient work connection may exist where the factors supporting one prong are weak, if those supporting the other are strong). Accordingly, we conclude that claimant's injury arose out of her employment.

In reaching this conclusion, we distinguish *Noble*. There, the claimant, a hospital employee, was injured while walking from the hospital to her credit union on a paid 15-minute break. *Id.* at 597. Specifically, she was injured while walking across an employer-owned parking lot associated with a facility, separate from the hospital. 250 Or App at 598. In concluding that the risk of slipping in the parking lot of the separate facility was not a risk to which the claimant's employment exposed her, the court reasoned that the area where she slipped had no connection to her employment with the hospital (*i.e.*, she did not work in the separate facility or park in its parking lot). *Id.* at 603-04. Additionally, the court reasoned that the employer did not control the claimant's break time activities or direct her to walk across the parking lot. *Id.*

Here, by contrast, claimant was not injured in the parking lot of a separate facility to which she had no connection. Rather, she was injured while walking on her employer's campus, directly across the street from the building where she worked. Moreover, to comply with the employer's tobacco-free campus policy, claimant was required to leave the building where she worked and walk one block to the off-campus street where she and other employees regularly smoked. Thus, unlike the employer in *Noble*, the employer here exercised some control over claimant's break time activity.

In sum, based on the aforementioned reasoning, we conclude that claimant's injury occurred "in the course of" and "arose out of" her employment. Consequently, we affirm.

Claimant's counsel is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$6,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and her counsel's fee submission),⁶ the complexity of

⁶ We are obligated to award a reasonable attorney fee, irrespective of a specific objection to a claimant's counsel's attorney fee request. See *Dennis E. Reynolds*, 69 Van Natta 1456, 1461 n 7 (2017); *Terilynn McNeil-Dane*, 67 Van Natta 246 (2015); *Daniel M. McCartney*, 56 Van Natta 460 (2004).

the issue, the value of the interest involved, the skill of claimant's attorney, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

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 employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated October 20, 2017 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$6,000, payable by the employer. 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 employer.

Entered at Salem, Oregon on February 19, 2019