IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Katherine Mandes, Claimant.

Katherine MANDES,
Petitioner,

v.

LIBERTY MUTUAL HOLDINGS-
LIBERTY MUTUAL INSURANCE,
Respondent.

Workers' Compensation Board
1304012; A158741

Argued and submitted October 25, 2016.

Julene M. Quinn argued the cause and filed the briefs for petitioner.

Chad Kosieracki argued the cause for respondent. On the brief were Steven T. Maher and Maher & Tolleson, LLC.

Before DeVore, Presiding Judge, and Garrett, Judge, and Powers, Judge.*

POWERS, J.

Reversed and remanded.

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* Powers, J., *vice* Duncan, J. pro tempore.

POWERS, J.

Claimant seeks judicial review of an order of the Workers' Compensation Board holding that injuries she sustained during a paid break are not compensable. We review the board's order for substantial evidence and errors of law. ORS 183.482(8)(a), (c). Because we conclude that the board applied an incorrect legal analysis in deciding that the claim is not compensable, we reverse the board's order and remand for reconsideration.

The facts relevant to our review are largely undisputed. Claimant, who works for employer Liberty Mutual as a nurse case manager, used her paid 15-minute break to take a walk around the building with coworkers. As she returned to the building, she tripped and fell on an uneven sidewalk adjacent to employer's parking lot, sustaining multiple injuries.

Employer denied claimant's claim for workers' compensation benefits, and the board ultimately upheld the denial, reasoning that claimant's injuries did not occur in the course and scope of her employment. Citing this court's opinion in *Enterprise Rent-A-Car Co. of Oregon v. Frazer*, 252 Or App 726, 730-31, 289 P3d 277 (2012), *rev den*, 353 Or 428 (2013), the board reasoned that, because claimant was returning to work at the time of her injury but was not on employer's premises or on premises within employer's control, the "going and coming" rule applied. 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 and are not compensable. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 526, 919 P2d 465 (1996). There are exceptions to the going and coming rule, including an exception for injuries that occur in an employer-controlled parking lot. *See Frazer v. Enterprise Rent-A-Car Co. of Oregon*, 278 Or App 409, 416, 374 P3d 1003 (2016) (discussing parking lot exception). In applying the going and coming rule here, the board concluded that the "parking lot" exception did not apply, because employer did not have control of the premises where claimant fell. Therefore, the board concluded, claimant's injury did not occur in the course of her employment.

Claimant had argued to the board that her injuries arose out of and in the course and scope of her work under the "personal comfort" doctrine. Two dissenting board members agreed. Under the personal comfort doctrine, a worker remains in the course and scope of employment during personal comfort activities that are sanctioned by the employer and are incidental to, but not directly involved in, the performance of the appointed task. *U.S. Bank v. Pohrman*, 272 Or App 31, 44-48, 354 P3d 722, *rev den*, 358 Or 70 (2015) (discussing doctrine).

Off-premises activities that have been found to be within the course and scope of employment under the personal comfort doctrine have included coffee, lunch, or restroom breaks. *See Mellis v. McEwen, Hanna, Gisvold*, 74 Or App 571, 703 P2d 255, *rev den*, 300 Or 249 (1985) (tripping on a leg of a chair while on a 15-minute lunch break); *Halfman v. SAIF*, 49 Or App 23, 29-30, 618 P2d 1294 (1980) (crossing a street on a break to buy a drink); *Jordan v. Western Electric*, 1 Or App 441, 446-47, 463 P2d 598 (1970) (slipping on curb while returning from 15-minute coffee break); *see also Clark v. U. S. Plywood*, 288 Or 255, 266, 605 P2d 265 (1980) ("[T]he compensability of on-premises injuries sustained while engaged in activities for the personal comfort of the employee can best be determined by a test which asks: Was the conduct expressly or impliedly allowed by the employer?"); Lex K. Larson, *Larson's Workers' Compensation* § 21.01 to 21.08 (Matthew Bender rev ed 1998) (collecting cases on "personal comfort doctrine").

Such personal comfort activities, if allowed or acquiesced in by the employer, are deemed to have a sufficient connection to the employment because they are "'helpful to the employer in that they aid in efficient performance by the employee.'" *Jordan*, 1 Or App at 446 (quoting with approval the California Supreme Court's opinion in *State Comp. Insurance Fund v. Workmen's Comp. App. Bd.(Cardoza)*, 67 Cal 2d 925, 928, 434 P2d 619 (1967) (injuries sustained while swimming in a canal to cool off during a coffee break held compensable)). In *Jordan*, we set out seven factors to be considered in determining whether a worker remains within the course and scope of employment at the time of the injury while engaged in a personal comfort activity. 1 Or App at

443-44. In *Pohrman*, 272 Or App at 46-48, we recently reiterated our adherence to that formula and to *Jordan*.

The board did not have the benefit of our en banc opinion in *Pohrman* when it rejected claimant's contention that her injury occurred during the course and scope of her employment because she was engaged in a personal comfort activity.[1] Citing our opinion in *Frazer*, which involved similar facts but was not analyzed under the personal comfort doctrine, the board instead resolved the case against claimant under the going and coming rule, without first addressing claimant's contention that her claim was within the course and scope of employment under the personal comfort doctrine. As we held in *Pohrman*, because the personal comfort doctrine is a part of the "course and scope inquiry," it necessarily precedes any discussion of the going and coming rule, which applies when the worker has left the course and scope of employment. 272 Or App at 47. If, after evaluating claimant's contention under the personal comfort doctrine, the board determines that claimant was not engaged in a personal comfort activity, but rather was injured while on a personal mission, or if the board determines that the personal comfort activity did not bear a sufficient relationship to the employment, then the board may reconsider whether the going and coming rule applies. *Id.* (describing analysis). We therefore reverse and remand the board's order for reconsideration in light of *Pohrman*.

Reversed and remanded.

[1] Because our discussion in *Jordan* had included recognition of the then widely accepted rule that the Workers' Compensation Law "should be interpreted liberally in favor of" the worker, 1 Or App at 447, the board reasoned that *Jordan* may have been undermined by the legislature's adoption in 1995 of an amendment to ORS 656.012(3) stating that workers' compensation statutes are to be interpreted "in an impartial and balanced manner." The board therefore expressed doubt about the continued precedential value of *Jordan* and the continued viability of the personal comfort doctrine. That doubt should be dispelled by our opinion in *Pohrman*.