

**FILED: September 17, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Alicia G. Tono, Claimant.

SAIF CORPORATION and HCW CLIENTS,  
Petitioners,

v.

ALICIA G. TONO,  
Respondent.

Workers' Compensation Board  
1200495

A153393

Argued and submitted on July 02, 2014.

David L. Runner argued the cause and filed the briefs for petitioners.

Spencer D. Kelly argued the cause for respondent. With him on the briefs was Welch, Bruun & Green.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Lagesen, Judge.

LAGESEN, J.

Affirmed.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent

- No costs allowed.  
 Costs allowed, payable by Petitioners.  
 Costs allowed, to abide the outcome on remand, payable by
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1 LAGESEN, J.

2 The question in this case is whether ORS 656.039(5) limits the workers'  
3 compensation coverage available to a home care worker funded by the state on behalf of  
4 the client to only those injuries suffered by the worker while performing state-funded  
5 activities--as distinguished from those activities not funded by the state--for the client.  
6 We conclude that it does not.

7 I. BACKGROUND

8 This case arises on SAIF Corporation's (SAIF's) petition for judicial review  
9 of an order of the Workers' Compensation Board (board). The pertinent facts are not  
10 disputed.<sup>1</sup> Claimant is a home care worker within the meaning of ORS 410.600.<sup>2</sup> At the

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<sup>1</sup> The parties do not challenge the board's factual findings. We therefore take the facts from the board's order, supplementing with consistent facts from the record as necessary. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995).

<sup>2</sup> ORS 410.600(8) provides that a "Home care worker" is

"(a) A person:

"(A) Who is hired directly by an elderly person or a person with a physical disability or by a parent or guardian of an elderly person or a person with a physical disability;

"(B) Who receives moneys from the Department of Human Services for the purpose of providing care to the elderly person or the person with a physical disability;

"(C) Whose compensation is funded in whole or in part by the department, an area agency or other public agency; and

"(D) Who provides either hourly or live-in home care services; or

1 time of her injury, she was employed by her client/employer through a program  
2 administered, in part, by the State of Oregon Department of Human Services (DHS). As  
3 part of that program, a DHS Case Manager generated a "Service Plan" for claimant's  
4 client/employer and an associated "Task List" for claimant. The "Service Plan" and  
5 "Task List" set forth the number of home care service hours for which claimant's home  
6 care client/employer was eligible under the program and identified the tasks for which the  
7 claimant would be compensated. Claimant's Task List for her client/employer provided,  
8 among other things, that she was to assist the client with "moving around outside,"  
9 "[p]lacing food/utensils within reach," "[b]reakfast [p]reparation," and "get[ting] in/out of  
10 a vehicle." The Task List did not specifically authorize claimant to transport the  
11 client/employer or to conduct any services for the client/employer away from the  
12 client/employer's home. Under the DHS program, claimant's client/employer was her  
13 employer, and was responsible for hiring claimant, directing claimant's work, and,  
14 ultimately, firing claimant. However, claimant was paid through DHS for providing the  
15 services on the Task List.

16           One morning, after claimant had performed some services on the Task List,  
17 the client/employer requested that claimant take her out for breakfast because the  
18 client/employer did not want to have breakfast at home. Claimant complied with the  
19 request and, while driving her client/employer to get breakfast, was involved in a motor  
20 vehicle accident. Claimant sustained injuries requiring medical treatment.

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"(b) A personal support worker."



1 workers' compensation coverage for an injury incurred in an employer-directed activity  
2 that was not funded by the state. We review the board's order to determine whether it  
3 reflects an erroneous interpretation of ORS 656.039(5) and, if so, whether the correct  
4 interpretation of the statute requires the board to take a particular action. ORS  
5 183.482(8)(a).

### 6 III. ANALYSIS

7 On review, SAIF does not contest that claimant was injured while  
8 performing a service directed by her employer or that, under ordinary circumstances,  
9 claimant's injury would be deemed to have arisen out of, and occurred in the course of,  
10 claimant's employment, in light of the fact that the employer directed that claimant  
11 conduct the activity in which she was injured. Instead, SAIF argues that, in concluding  
12 that claimant was entitled to workers' compensation coverage for her injury, the board  
13 erroneously interpreted ORS 656.039(5).<sup>3</sup> SAIF contends that, in the case of home care  
14 workers, ORS 656.039(5) supplants the ordinary framework for determining whether an

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<sup>3</sup> SAIF also argues that administrative rules limit workers' compensation coverage for home care workers to activities funded by the state. However, the administrative rules cited by SAIF--OAR 411-030-0050(3)(c) (Dec 14, 2012) and OAR 411-030-0040(3)(a) (Dec 14, 2012)--do not discuss the scope of workers' compensation coverage available to home care workers and, thus, are not probative of whether workers' compensation coverage for home care workers is restricted to state-funded activities. Moreover, a different administrative rule indicates that the Collective Bargaining Agreement between home care workers and the Home Care Commission may set forth the parameters for workers' compensation for home care workers. *See* OAR 411-031-0040(12) ("Workers' compensation and health insurance are available to eligible homecare workers as described in the Collective Bargaining Agreement."); *see also* Or Const Art XV, § 11(3)(f); ORS 410.612; ORS 410.614 (all providing for collective bargaining for home care workers).

1 employee's injury arises out of, and occurs in the course of, employment and is therefore  
2 compensable. SAIF further asserts that ORS 656.039(5) limits workers' compensation  
3 coverage for home care workers to injuries sustained while performing activities funded  
4 by the state, that is, activities on the Task List. Accordingly, in SAIF's view, the board  
5 erred by setting aside the denial, because ORS 656.039(5) establishes as a matter of law  
6 that claimant's injury--which did not occur during a Task List activity--is not one for  
7 which workers' compensation coverage is available.

8           We reject SAIF's interpretation of ORS 656.039(5). The text and the  
9 context of that statute demonstrate that it does not impose the limitation on workers'  
10 compensation coverage for home care workers that SAIF claims it does.

11           ORS 656.039(5) provides:

12           "(a) The Home Care Commission created by ORS 410.602 shall  
13 elect coverage on behalf of clients of the Department of Human Services or  
14 the Oregon Health Authority who employ home care workers to make  
15 home care workers subject workers if the home care worker is funded by  
16 the state on behalf of the client.

17           "(b) As used in this subsection, 'home care worker' has the meaning  
18 given that term in ORS 410.600."

19           Nothing in the plain terms of that provision imposes any limitation on the  
20 scope of workers' compensation coverage available to state-funded home care workers.<sup>4</sup>

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<sup>4</sup> We note that, in 2014, the legislature amended ORS 656.039 to make privately paid home care workers, as well as state-funded home care workers, eligible for workers' compensation coverage upon election by the Home Care Commission. Or Laws 2014, ch 116, § 12. As amended, that statute provides, in pertinent part, that "[t]he Home Care Commission created by ORS 410.602 shall elect coverage on behalf of persons who employ home care workers to make home care workers subject workers." ORS 656.039(5)(a). The amendments took effect on April 1, 2014, and become operative on

1 In particular, the provision does not state that coverage is limited to injuries incurred by  
2 home care workers during state-funded *activities*. Instead, the statute simply makes clear,  
3 particularly when read in conjunction with the definition of "home care worker" in ORS  
4 410.600(8), that home care workers who receive state funding are subject workers for  
5 purposes of the Workers' Compensation Law. To read ORS 656.039(5) to say that  
6 workers' compensation coverage for home care workers applies only to state-funded  
7 *activities* would require us to insert terms into the statute that the legislature did not  
8 include. ORS 174.010 bars us from rewriting the statute in that manner. ORS 174.010  
9 (in construing a statute, courts shall "not insert what has been omitted").

10           The context of ORS 656.039(5) also counters SAIF's interpretation of it.  
11 As SAIF points out in its brief, other provisions of the Workers' Compensation Law--  
12 specifically, ORS 656.031 (governing municipal volunteers),<sup>5</sup> ORS 656.033 (governing

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July 1, 2015, but do not bear on our analysis.

<sup>5</sup> ORS 656.031(4) provides, in pertinent part, that municipal volunteers are entitled to workers' compensation benefits

"if injured as provided in ORS 656.202 while performing any duties arising out of and in the course of their employment as volunteer personnel, *if the duties being performed are among those:*

(a) *Described on the application of the county, city or municipality;*  
*and*

(b) *Required of similar full-time paid employees."*

(Emphases added.)

1 worker experience trainees),<sup>6</sup> and ORS 656.041 (governing city and county inmate  
2 workers)<sup>7</sup>--all provide for workers' compensation coverage for certain unique categories  
3 of workers, but all also explicitly limit coverage to specified activities by those workers.  
4 If the legislature had intended to limit workers' compensation coverage for home care  
5 workers to particular activities, it would have said so expressly, as it did in ORS 656.031,  
6 ORS 656.033, and ORS 656.041, by stating that home care workers were entitled to  
7 workers' compensation benefits "provided the injury occurred while the home care  
8 worker was performing a state-funded duty," or some similar wording. The legislature's  
9 omission of that type of express limitation in ORS 656.039(5) indicates that it did not  
10 intend to impose one on workers' compensation coverage for home care workers.

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<sup>6</sup> ORS 656.033(4) provides, in pertinent part, that work experience trainees are entitled to workers' compensation benefits

"if injured as provided in ORS 656.156 and 656.202 while performing any duties arising out of and in the course of their participation in the work experience program or school directed professional education project, *provided the duties being performed are among those:*

*(a) Described on the application of the school district; and*

*(b) Required of similar full-time paid employees."*

(Emphases added.)

<sup>7</sup> ORS 656.041(4) provides, in pertinent part, that certain city and county inmate workers are entitled to workers' compensation benefits "if injured as provided in ORS 656.202 while performing any duties arising out of and in the course of their participation in the authorized employment, *provided the duties being performed are among those described on the application of the city or county.*" (Emphasis added.)

1           In the light of that text and context,<sup>8</sup> we conclude that ORS 656.039(5) does  
2 not limit workers' compensation coverage for home care workers to state-funded  
3 activities only and that the board's order therefore does not represent an erroneous  
4 interpretation of that statutory provision. In reaching that conclusion, we emphasize the  
5 narrowness of our holding. It is possible that there is some other limitation on the scope  
6 of workers' compensation coverage for home care workers, but SAIF has not identified  
7 one. For that reason, we express no opinion on whether other limitations restrict workers'  
8 compensation coverage for home care workers to state-funded activities and hold only  
9 that ORS 656.039(5) does not impose that limitation.

10           Affirmed.

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<sup>8</sup> We have reviewed the legislative history of ORS 656.039(5), but did not find it probative of the question in this case.