

FILED: June 27, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Theresa A. Noble, Claimant.

LEGACY HEALTH SYSTEMS,
Petitioner,

v.

THERESA A. NOBLE,
Respondent.

Workers' Compensation Board
0702423

A145784

Argued and submitted on May 18, 2011.

Jerald P. Keene argued the cause and filed the briefs for petitioner.

James O. Marsh argued the cause for respondent. With him on the brief was Carney, Buckley, Hays & Marsh.

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

HASELTON, C. J.

Reversed.

1 HASELTON, C. J.

2 Employer seeks review of a Workers' Compensation Board (board) order
3 awarding compensation for an injury that claimant suffered when, during a paid break,
4 she slipped and fell in an employer-owned parking lot while walking from her workplace
5 to a credit union to deposit a personal check. This case is before us for the second time.
6 In [*Legacy Health Systems v. Noble*](#), 232 Or App 93, 100, 221 P3d 180 (2009) (*Noble I*),
7 we held that the injury occurred "in the course of" claimant's employment; however, we
8 reversed and remanded for the board to determine whether the injury "arose out of"
9 claimant's employment. ORS 656.005(7)(a).¹ On remand, the board concluded that
10 claimant's injury did arise out of her employment and, thus, that claimant's injury was
11 compensable. We conclude, on review, that claimant's injury did not arise out of her
12 employment because neither claimant's work nor her work environment exposed her to
13 the risk of the injury that she suffered.² Accordingly, we reverse.

14 The material facts are undisputed. Claimant was a patient-care coordinator,
15 who "managed the desk and the day-to-day operations in the short-stay unit" at
16 employer's Legacy Good Samaritan Medical Center in northwest Portland. On the
17 morning of February 21, 2007, claimant decided to walk from the hospital to her nearby

¹ ORS 656.005(7)(a) provides, in part, "A 'compensable injury' is an accidental injury * * * arising out of and in the course of employment requiring medical services or resulting in disability or death[.]"

² Because the relevant facts are undisputed, we review for errors of law. ORS 656.298(7); ORS 183.482; *Sandberg v. JC Penney Co. Inc.*, 243 Or App 342, 347, 260 P3d 495 (2011).

1 credit union to deposit a personal check during a paid 15-minute break. Claimant's
2 purpose was purely personal--she was not going to the credit union for any work-related
3 purpose.

4 To that end, claimant, while on her paid break from work, left her desk and
5 walked out the front door of the hospital on NW 22nd Avenue near NW Marshall Street.
6 She then crossed NW 22nd Avenue and continued past the intersection with NW
7 Northrup Street and then, as the most direct route to the credit union (which was located
8 on NW Overton Street), started to cut across a parking lot. That parking lot was owned
9 and controlled by employer and associated with employer's Green Gable House, a
10 facility, separate from the hospital, that serves families of cancer clinic patients.
11 Claimant did not work in the Green Gable House; nor did she park her car in that parking
12 lot. As claimant crossed the parking lot, she slipped on a slick surface, fell, and fractured
13 her ankle.

14 The board, in its original order, which was the object of review in *Noble I*,
15 determined that claimant's injuries were compensable. In doing so, the board applied the
16 "parking lot" rule and determined, *inter alia*, that "there is sufficient evidence that
17 claimant was injured on the employer's premises." *Noble I*, 232 Or App at 96 (internal
18 quotation marks omitted). On judicial review in *Noble I*, we sustained the board's
19 determination that, because claimant had been injured in a parking lot over which
20 employer had control, the circumstances fell within the "parking lot" exception to the
21 general principle that injuries sustained while going to or coming from the place of

1 employment are not compensable--and that, in turn, established that claimant's injuries
2 had occurred "in the course of employment." *Id.* at 100. However, that alone was legally
3 insufficient to establish compensability under the unitary work-connection test, which (as
4 amplified below) requires a claimant to prove not only that the injury occurred in the
5 course of employment, but also that the injury arose out of the claimant's employment.
6 *Id.* Because we agreed with the employer that the board (and the administrative law
7 judge) had failed to address the conjunctive "arising out of" inquiry, we reversed and
8 remanded for it to do so. *Id.*

9 On remand, the board reiterated its determination of compensability,
10 determining that claimant's injury had arisen out of her work. The gravamen of the
11 board's reasoning in that regard was (1) claimant's "fall was caused by a hazard" (slippery
12 conditions) "associated with the employer's premises" (the parking lot); (2) because
13 claimant's "route" to the credit union "began at her desk" and she took "the most direct
14 route from her workplace to the credit union," her fall "occurred during normal egress
15 from work"; and (3) employer "had acquiesced" in claimant's activity during her personal
16 break.

17 Employer again seeks judicial review, challenging the board's "arising out
18 of" determination as being erroneous as a matter of law. While deconstructing and
19 disputing the correctness of specific aspects of the board's analysis--*e.g.*, "normal egress"
20 and "acquiescence"--the overarching theme of employer's challenge is as follows:

21 "Not every risk encountered while in the course of employment is an
22 'employment risk.' Under the specific circumstances of this case, claimant's

1 injury resulted from a risk originated by her pursuit of a personal errand
2 while in the course of her employment. The fact that it occurred on a
3 parking lot controlled by the employer in connection with a different
4 workplace was merely coincidental. *Because it resulted from a 'personal*
5 *risk' (or at most a 'neutral risk') to which her employment did not expose*
6 *her, claimant's injury did not 'arise out of employment' as required to*
7 *qualify for worker's compensation benefits."*

8 (Citations omitted; emphasis added.)

9 Claimant remonstrates that consideration of the personal, nonwork-related
10 nature of her errand is subsumed within the "in the course of" inquiry and has been
11 concluded by the board's original determination in that regard and by that aspect of *Noble*
12 *I* that sustained that determination. Beyond that--and beyond reiterating facets of the
13 board's reasoning--claimant emphasizes that compensability can be based on only a slight
14 showing as to "arising out of" if (as claimant urges is true here) the "in the course of"
15 component is very strong.

16 We agree with employer that the uncontroverted circumstances of
17 claimant's injury are legally insufficient to support a determination of compensability
18 under the unitary work-connection test. We so conclude because, as we will try to
19 explain, the application of that test, in its sometimes arcane particulars, cannot, and must
20 not, be divorced from its overarching purpose--and, indeed, the overarching purpose of
21 the workers' compensation statutes. By way of foreshadowing our essential reasoning, to
22 which we will return, we posit the following hypothetical, a variant of which we posed
23 during the oral argument in this case:

24 "A," an employee of a business owned by an employer in one part of
25 a city, has a one-hour lunch break, during which A is not subject to

1 employer's direction and control, and is free to do anything she chooses.
2 One day, A decides to deliver her rent check, during her lunch break, to her
3 property manager who, coincidentally, works at another of the employer's
4 establishments on the other side of the city. A (who, of course, intends to
5 return to work after her break) drives across the city, on public streets, and
6 parks in the parking lot of the employer's establishment where the property
7 manager works. As A walks from her car to the front door, she slips on ice
8 and is injured.

9 Is A's injury compensable in workers' compensation as connected to her
10 work? What meaningful purpose, relating to the fundamental purposes of the workers'
11 compensation statutes, would be served by such a result--as opposed to
12 consigning/permitting A to pursue an action and remedy in tort? Our hypothetical is,
13 ultimately, materially indistinguishable from this case.

14 We turn to the applicable legal principles. A claimant bears the burden of
15 establishing the compensability of his or her injury--and, specifically, the requisite
16 connection between the injury and his or her employment. *Phil A. Livesley Co. v. Russ*,
17 296 Or 25, 29, 672 P2d 337 (1983). "A 'compensable injury' is an accidental injury * * *
18 arising out of *and* in the course of employment." ORS 656.005(7)(a) (emphasis added).
19 That is, both conjunctive statutory elements must be met. In determining whether an
20 injury occurs "in the course of" employment, we look at the time, place, and
21 circumstances of the injury. [*Robinson v. Nabisco, Inc.*](#), 331 Or 178, 186, 11 P3d 1286
22 (2000). The "arising out of" prong refers to the causal link--the causal nexus--between
23 the injury and the employment. *Krushwitz v. McDonald's Restaurants*, 323 Or 520, 525-
24 26, 919 P2d 465 (1996). "[A] worker's injury is deemed to 'arise out of' employment if
25 the risk of the injury results from the nature of his or her work or when it originates from

1 some risk to which the work environment exposes the worker." *Fred Meyer, Inc. v.*
2 *Hayes*, 325 Or 592, 601, 943 P2d 197 (1997). As noted, both prongs of the "unitary
3 work-connection test" must be met to some degree. *Krushwitz*, 323 Or at 531.
4 Nevertheless, the test may be satisfied, even if the factors supporting one prong are weak,
5 if those supporting the other are strong. *Redman Industries, Inc. v. Lang*, 326 Or 32, 35,
6 943 P2d 208 (1997).

7 The Supreme Court has "repeatedly cautioned that the reading of other
8 decisions is normally of little assistance when this issue is presented and that each case
9 must be decided on its own particular facts." *Wallace v. Green Thumb, Inc.*, 296 Or 79,
10 81, 672 P2d 344 (1983) (internal quotation marks omitted). That is so because, as a
11 practical matter, some overlap between the facts and circumstances pertaining to the two
12 prongs may be unavoidable and because the ultimate determination is functional,
13 predicated on practical reference to the purpose of the workers' compensation statutes.
14 Thus, our decisions--and, for the most part, decisions of our Supreme Court--addressing
15 compensability may provide useful points of departure and guidance, but they do not
16 impose methodological straightjackets. *See Robinson*, 331 Or at 185 ("[T]he unitary
17 work-connection test does not supply a mechanical formula for determining whether an
18 injury is compensable."). Rather, as we explained 35 years ago in *Allen v. SAIF*, 29 Or
19 App 631, 633-34, 564 P2d 1086 (1977):

20 "The statutory phrase 'arising out of and in the course of
21 employment' must be applied in each case so as to best effectuate the socio-
22 economic purpose of the Workers' Compensation Act: the financial
23 protection of the worker and his/her family from poverty due to injury
24 incurred in production, regardless of fault, as an inherent cost of the product

1 to the consumer. 1 Larson, Workmen's Compensation Law § 2.20. Various
2 concepts have arisen from attempts to rationalize that purpose, e.g., the
3 going and coming rule, special errands, lunch hour cases, dual purpose
4 trips, impedimenta of employment, horseplay, etc. Each is helpful for
5 conceptualization and indexing, but there is no formula for decision.
6 Rather, in each case, every pertinent factor must be considered as a part of
7 the whole. It is the basic purpose of the Act which gives weight to
8 particular facts and direction to the analysis of whether an injury arises out
9 of and in the course of employment."

10 (Citation omitted); *see also Robinson*, 331 Or at 185-86 (quoting the above-quoted
11 language with approval); *Hayes*, 325 Or at 597 n 9 (same); *Rogers v. SAIF*, 289 Or 633,
12 642-43, 616 P2d 485 (1980) (same).

13 Consistently with those functional premises, the determination of whether a
14 claimant's injury arose out of his or her employment depends on an assessment of the
15 nature of the claimant's work and work environment in conjunction with the risk of harm
16 that resulted in the injury. As we explained in *Sandberg v. JC Penney Co. Inc.*, 243 Or
17 App 342, 347, 260 P3d 495 (2011), "our focus is on whether claimant established a
18 causal connection between her injury and her employment, that is, *whether claimant's*
19 *injury resulted from a risk connected to either the nature of her work or her work*
20 *environment.*" (Emphasis added.) That assessment, in turn, implicates categorization of
21 the risk and, specifically, the classic, albeit stilted, tripartite taxonomy:

22 "Risks distinctly associated with the employment are universally
23 compensable; risks personal to the claimant are universally
24 noncompensable; and neutral risks are compensable if the conditions of
25 employment put claimant in a position to be injured."

26 [*Panpat v. Owens-Brockway Glass Container*](#), 334 Or 342, 349-50, 49 P3d 773 (2002)

27 (internal quotation marks omitted).

1 The parties have vigorously disputed the proper categorization of the risk--
2 *viz.*, the slippery conditions in the Green Gable House parking lot that was under
3 employer's control--that caused claimant's injury. Claimant especially invokes *Hayes* in
4 contending that the injury-producing risk was distinctly associated with her employment,
5 while employer contends that various "personal errand"-related decisions³ afford superior
6 guidance on the correct understanding of the operative causal risk.

7 Even as we are mindful of *Wallace's* admonition against case-matching, we
8 begin by "clearing the decks" of *Hayes*. In *Hayes*, the Supreme Court concluded that the
9 claimant's injury originated from an employment-related risk. There, the claimant, a
10 retail department manager, was attacked and stabbed by a stranger as she was returning to
11 her car in the employer's store parking lot at the end of her shift. 325 Or at 595. The
12 employer had directed her to park on the poorly lit perimeter of the parking lot. *Id.* In
13 concluding that the injuries arose out of the claimant's employment, the court emphasized
14 that "her employer required her to park at the fringes of the parking lot in an area that was
15 not well lit" and that those factors "made claimant vulnerable to an attack and created the
16 risk that such an attack would occur." *Id.* at 601-02 (internal quotation marks omitted).
17 Here, of course, there is absolutely no evidence that employer directed claimant to do
18 anything during her paid break, much less required her to follow a specific route, across

³ See, e.g., *Allbee v. SAIF*, 45 Or App 1027, 1030, 609 P2d 920 (1980) (the claimant's injuries were not compensable because he was "on a personal mission" to attach snow chains to his car in an icy parking lot); see also [J A K Pizza, Inc. - Domino's v. Gibson](#), 211 Or App 203, 154 P3d 159 (2007) (examining the distinction between a compensable "special errand" and noncompensable personal errand).

1 the employer-owned parking lot, to the credit union. *Hayes* is patently distinguishable.

2 We return to and reiterate the dispositive principle: The "arising out of"
3 prong is satisfied only if the claimant's injury is the product of either (1) "a risk connected
4 with the nature of the work" or (2) "a risk to which the work environment exposed
5 claimant." *Redman Industries, Inc.*, 326 Or at 36; *see also Sandberg*, 243 Or App at 348
6 ("[T]o arise out of employment, an injury must result from a risk connected with the
7 nature of the work or a risk connected with the work environment.").

8 The circumstances here did not meet either of those alternative
9 formulations. Nothing in the "*nature* of [claimant's] work" as a patient-care coordinator,
10 whose work activities were confined to the hospital, bore any causal connection to
11 suffering an ankle injury while walking across a slippery parking lot to deposit a personal
12 check.

13 Nor did claimant's "work environment" expose claimant to a risk of the
14 injury that she suffered. To be sure, employer did own and control the premises, the
15 parking lot where claimant was injured. But that alone is insufficient because the Green
16 Gable House parking lot had no (for lack of a better term) "environmental" nexus to
17 claimant's work. *See Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 369, 867 P2d 1373
18 (1994) ("[T]he mere fact that an injury occurs in a parking lot that is owned and
19 maintained by an employer when an employee is going to and coming from the
20 employee's regular place of employment does not, in and of itself, establish
21 compensability. Claimant's injury must also 'arise out of' the employment, *i.e.*, some

1 causal connection must be demonstrated."). Claimant did not use that lot to park her own
2 car there--and there is no suggestion in the record that that lot was used by hospital
3 personnel. Thus--as in our "foreshadowing" hypothetical--claimant's employment was
4 causally immaterial to the injury that she suffered. The board, accordingly, erred in
5 concluding that claimant's injury arose out of her employment.

6 Reversed.