BEFORE THE WORKERS' COMPENSATION BOARD

OF THE STATE OF OREGON

HEARINGS DIVISION

In the Matter of the Compensation	)	WCB No. 17-01196
	)	Claim No. 710-226856
of	)	D/Injury 01/03/2017
	)	
Allison Cameron,	)	
	)	**OPINION AND ORDER**
	)	
Claimant.	)	

Pursuant to notice, a hearing was held March 20, 2018 in Portland, Oregon, before Administrative Law Judge Bin Chen. Claimant was present and represented by attorney Ned Arenberg. The employer, Princeton-Plainsboro Teaching Hospital (PPTH), and its insurer, Mandatory Insurance Company, were represented by attorney Kelsey Fleharty. Exhibits 1-5 were admitted into evidence at hearing. The record closed at the time of hearing on March 20, 2018.

ISSUES

Claimant contests a July 1, 2017 denial issued by the employer denying an injury occurring on January 3, 2017, on the basis that the injury did not arise out of or in the course of employment. At hearing, the employer raised two affirmative defenses: (1) claimant did not provide timely notice of the claim under ORS 656.265 and (2) the injury is excluded from compensability pursuant to ORS 656.005(7)(b)(B) (i.e., "social or recreational activities" exclusion). Claimant requests an assessed attorney fee and reasonable costs pursuant to ORS 656.386, should she prevail. Claimant also requests penalties and attorney fees for unreasonable claim denial.

FINDINGS OF FACT

Claimant works for the employer as a surgical tech. Her job duties require her to prepare instruments for surgery, assist surgeons during surgical procedures, and clean and sanitize surgical instruments. Her direct supervisor is Gregory House, M.D., but claimant also works with other surgeons.

Claimant is a long-time smoker, and believes smoking helps her relieve workplace stress. She normally uses her 15-minute breaks to smoke a cigarette. The hospital has a strict tobacco-free policy, and there is no smoking permitted on the premises. Thus, claimant would usually cross Congress Street to smoke near an off-

campus lodging facility. The lodging facility is leased by the oncology department of the hospital to provide short-term lodging for families of cancer patients undergoing treatment at the hospital. The employer is aware some of its employees utilize this area for smoking while on their breaks.

On January 3, 2017, the sidewalk and road conditions were icy due to inclement weather. Claimant arrived 20 minutes late for her scheduled shift. She took her first 15-minute paid break around 10:30 a.m. after finishing a particularly tough surgery. She walked to the parking lot of the oncology lodging facility. As she was pulling out a cigarette, she slipped on ice and fell, injuring her right knee. After the fall a hospital security guard came to claimant's aid. On her way back to the surgery center, claimant ran into trauma surgeon James Wilson, M.D. She told Dr. Wilson about the fall. Dr. Wilson offered claimant ibuprofen.

Claimant first sought treatment for her right knee on May 1, 2017 with Dr. Dreifus, after her symptoms worsened over time. On the same day, the medical provider's office submitted a Form 827 (signed by both claimant and Dr. Dreifus) to the employer. Claimant checked the box "First report of injury or disease."

On July 1, 2017, the employer issued a denial of the injury occurring on January 3, 2017, asserting that the injury did not arise out of or in the course and scope of claimant's employment. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Affirmative Defenses:

I will first address the two affirmative defenses raised by the employer. Because these are affirmative defenses, the employer has the burden of persuasion on these issues.

The employer's first affirmative defense is that claimant did not satisfy the 90-day notice requirement for making a timely claim. A claimant is required to give the employer notice of an accident resulting in an injury within 90 days after the work accident. ORS 656.265(1). A claim is generally barred unless notice is given within 90 days. ORS 656.265(1), (4). However, a claim is not barred by ORS 656.265(4) if notice is given within one year and the employer had knowledge of the injury within 90 days of the accident. ORS 656.265(4)(a); *see also Keller v. SAIF*, 175 Or App 78, 82, *rev den*, 333 Or 260 (2002) (knowledge of the injury or death must be acquired within the initial 90-day notice period). The knowledge of a person with supervisory authority over an injured worker may be imputed to the employer. *Safeway Stores, Inc. v. Angus*, 200 Or App 94, 98 (2005).

Here, I find claimant provided timely notice of the injury to Dr. Wilson on the date of injury. Dr. Wilson testified at hearing and verified claimant's account that

claimant reported an injury to him on January 3, 2017. While Dr. Wilson did not supervise claimant on the date of injury, he testified that he often worked with claimant on the surgical floor. He could write her up for policy violations and recommend HR involvement. Thus, Dr. Wilson had sufficient supervisory authority over the claimant, and his knowledge of the January 3, 2017 injury is constructively imputed to the employer. I conclude the employer had timely notice.

The employer's second affirmative defense pertains to the application of the "social or recreational activities" exclusion under ORS 656.005(7)(b)(B). ORS 656.005(7)(b)(B) raises three questions: (1) whether the worker was engaging 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." *Summer Cook,* 69 Van Natta 1227, 1229 (2017). If the answer to all those questions is "yes," then the worker cannot recover benefits. *Id.* Here, it is undisputed that claimant was not injured while engaging in or performing a recreational activity (even if one assumes smoking is the type of recreational activity contemplated by the statute). Nor did her injury occur as a result of smoking. Therefore, the second element of the affirmative defense is not met.

Based on the foregoing, the employer has not satisfied its burden of proving the two affirmative defenses.

<u>Course and Scope:</u>

I now turn to whether claimant's January 3, 2017 injury otherwise occurred within the course and scope of her 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 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.

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." *U.S. Bank v. Pohrman*, 272 Or App 31, *rev den*,

358 Or 70 (2015). 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). Of these factors, the Board has primarily focused on whether the relevant personal comfort activity is contemplated by both the employer and claimant, and whether such activity was acquiesced in by the employer. *See Angelina Cox,* 68 Van Natta 792, 796 (2016).

Here, I find the "personal comfort" doctrine inapplicable because the employer took multiple steps to deter its employees from smoking (i.e., the relevant personal comfort activity at issue). The employer expressly prohibits all employees from using tobacco or smoke products on its premises, thereby making it difficult for employees to smoke during breaks. There is a financial incentive for employees to stop using tobacco products. Claimant testified that she could save considerable money in health insurance premiums if she ceased using tobacco products. She testified she had access to a no-cost tobacco cessation program offered by the employer. The employer's policy clearly sets out to discourage its employees from smoking.

Claimant nevertheless remonstrates that the employer acquiesced in claimant's smoking break off campus because the employer had knowledge of its employees smoking near the off-campus lodging facility and did nothing to prohibit it. However, claimant testified that the employer had no control over what she did during her breaks. Moreover, ORS 659A.315 specifically prohibits an employer from requiring, as a condition of employment, that any employee or prospective employee refrain from using lawful tobacco products during nonworking hours, except when the restriction relates to a bona fide occupational requirement. If I adopt the claimant's argument, the employer will in essence be left with a "Sophie's Choice"—the employer can commit unlawful employment discrimination by forbidding smoking during breaks and potentially avoid workers' compensation liability, or the employer can comply with the requirements of the anti-discrimination statute but risk having its "silence" construed as an acquiescence to a "personal comfort" activity (thereby incurring workers' compensation liability). Such an expansive view of the "personal comfort" doctrine would be highly inequitable to the employer and can potentially result in an absurd outcome in a number of scenarios. I find the employer did not direct or acquiesce in claimant's smoking break off campus. While the employer arguably benefited from the effect of stress-relief from claimant's smoking break, claimant testified that she could have relieved work-related stress by relaxing in the staff lounge but chose to smoke instead on her own volition. I find claimant was on a personal mission of her own at the time of her injury, and she was not engaged in an activity necessary and incidental to her employment. For these reasons, I decline to apply the "personal comfort" doctrine.

I next address whether claimant's injury is excluded from the course of employment by the "going and coming" rule. I find that it is not because the "parking lot" exception to the "going and coming rule" applies to the instant case.

Generally, injuries sustained while the employee is going to or coming from the place of employment do not occur "in the course of employment." *Norpac Foods, Inc. v. Gilmore*, 318 Or 363, 366 (1994). This is generally referred to as the "going and coming" rule. The "parking lot" exception to the "going and coming" rule applies when an employee traveling to or from work sustains an injury "on or near" the employer's premises, and the employer exercises some "control" over the place where the injury is sustained. *Id.* at 367; *Beverly M. Helmken*, 55 Van Natta 3174, 3175 (2003), *aff'd without opinion*, 196 Or App 787 (2004). Case law is now well-settled that the employer's obligation to pay for maintenance, together with the right to require maintenance, has also been found to be sufficient "control" under the "parking lot" exception. *See Montgomery Ward v. Cutter*, 64 Or App 759 (1983).

Here, the commercial lease agreement in the record clearly shows the employer is obligated to pay a surcharge for maintenance costs, and the employer has a right to require maintenance under Sections 2 and 3 of the agreement. Therefore, I conclude the lease agreement confers the employer sufficient control over the parking lot where claimant fell. Under the circumstances, the "parking lot" exception to the "going and coming" rule applies and the injury occurred in the course of claimant's employment.

This is not the end of the unitary work-connection test, however. The "arising out of" prong is satisfied only if the claimant's injury is the product of either (1) "a risk connected with the nature of the work" or (2) "a risk to which the work environment exposed claimant." *Redman Industries, Inc.* v. *Lang*, 326 Or 32, 36 (1997); *see also Sandberg v. JC Penney Co. Inc.*, 243 Or App 342, 348 (2011) ("[T]o arise out of employment, an injury must result from a risk connected with the nature of the work or a risk connected with the work environment.").

The circumstances here do not meet either of those alternative formulations. Nothing in the "nature of [claimant's] work" as a surgical tech, whose work activities were confined to the hospital, bore any causal connection to suffering a right knee injury while walking in an off-campus parking lot to smoke. Nor did claimant's "work environment" expose claimant to a risk of the injury that she suffered. Claimant did not use that lot to park her own car there—to the contrary, the record suggests the lot was utilized only by families of cancer patients undergoing treatment at the hospital. I find claimant's employment was casually immaterial to the injury that she suffered. Under such circumstances, I find that claimant's injury did not arise out of her employment. The employer's July 1, 2017 denial must be affirmed.

CONCLUSIONS OF LAW AND OPINION

IT IS HEREBY ORDERED that the July 1, 2017 denial is affirmed. All other relief is denied.

Entered at Portland, Oregon, on May 2, 2018.