Traveling or not, the Oregon Board deems gym time personal, not work-related in *Summer Cook*

By Trisha D. Hole ■ August 22, 2017

A recent Board case, *In Re Summer Cook*, 69 Van Natta 1227 (2017), may serve to narrow the broad coverage of injuries typically deemed compensable under the traveling employee doctrine.

The facts of the case are simple: Claimant, a flight attendant, sustained an injury to her right lower extremity while participating in an exercise class at her own gym the morning after spending the night in her own home while on layover. Although the employer offered claimant a hotel room to stay in during the layover, claimant opted to stay at home instead. The employer denied the claim, asserting that claimant's injury at her personal gym did not arise out of and within the course of her employment. Claimant appealed the denial.

Following a hearing, the ALJ issued an Opinion and Order setting aside the employer's denial. First, the ALJ rejected the employer's affirmative defense, raised pursuant to ORS 656.005(7)(b)(B), and determined that claimant's participation in the exercise class did not constitute a recreational activity sufficient to invoke the statutory exception to compensability. The ALJ determined that the "activity" claimant was involved in was "work" particularly given the fact that she was prohibited from using alcohol for ten hours before each flight and because she received a $1.85 hourly per diem stipend while on layover (for meals). The ALJ further determined that claimant was properly classified as a traveling employee at the time of injury, and had not engaged in a "distinct departure on a personal errand" at the time of injury. As a result, the ALJ decided that claimant's injury arose out of and in the course of employment. The employer filed a request for Board review.

On August 9, 2017, the Board issued its Order on Review, reversing the ALJ's decision and affirming the employer's denial. The Board concluded that claimant's injury did fall within the statutory exception outlined in ORS 656.005(7)(b)(B) regardless of whether or not claimant was a traveling employee. In fact, the Board specifically stated that the social/recreational statutory exclusion applies to traveling employees, and was created in response to a 1986 case where a traveling salesman got drunk and died while in his hotel's hot tub.

The Board narrows the broad coverage of injuries typically deemed compensable under the traveling employee doctrine

Under the facts of *Summer Cook*, the Board determined claimant was

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Gym time personal, not work-related in *Summer Cook* (continued)

injured while engaging in a recreational activity (working out at the gym) primarily for her personal pleasure (despite an incidental benefit to the employer—a healthier employee). The Board found particularly persuasive claimant's testimony that working out was a "daily activity of life" and the fact that she admitted she would have worked out regardless of whether she was on layover. Because the Board found claimant's injury was excluded from compensability under ORS 656.005(7)(b)(B), it did not decide whether claimant's injury arose out of and in the course of her employment.

It is too early to tell with any certainty how this decision will impact the analysis of injuries under ORS 656.005(7)(b)(B) and the traveling employee doctrine. However, it does appear to be a positive step in the right direction as the case upholds the fundamental requirement that there must be a sufficient work connection between a worker's employment and the claimed injury.

If you have any questions or concerns regarding this decision, please contact one of the Oregon practice attorneys at Reinisch Wilson Weier. ■

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[1] ORS 656.005(7)(b)(B) excludes from compensability injuries which occur "while engaging in or performing, or as the result of engaging in or performing, any recreational or social activities primarily for the worker's personal pleasure."

[2] A traveling employee ceases to be in the course and scope of employment when "engaged in a distinct departure on a personal errand." *Slaughter v. SAIF*, 60 Or App 610, 615 (1982)(*citing Simons v. SWF Plywood Co.,* 26 Or App 137, 143 (1976).

[3] *Beneficiaries of McBroom v. Chamber of Commerce*, 77 Or App 700, rev den, 301 Or App 240 (1986).