She tripped over what at home?! And it was **compensable**?!

By Trisha Hole ■ April 14, 2020

As mentioned in our most recent blog, "How to address Washington claims from telecommuters," in light of the rise of telecommuting employees due to the COVID-19 pandemic, employers and claims adjusters need to be aware of the potential for increased claims involving injuries sustained away from the employer's typical "premises."

In Oregon, a compensable injury must "arise out of" and occur "in the course of" employment.[1] An injury "arises out of employment" if the risk of injury results from the nature of the work or the work environment.[2] An injury occurs "in the course of employment" if "the time, place and circumstances of the injury justify connecting the injury to the employment."[3] Both prongs of this work connection test must be met to some degree (although one can be stronger than the other).[4]

There are very few Oregon workers' compensation cases addressing injuries sustained by telecommuting workers. The seminal case addressing the remote worker injured at home remains *Sandberg v. JC Penney Co. Inc.*[5] In that case, claimant, a custom decorator who sold various home furnishings including window treatments, bedding and upholstery, worked one day a week at her employer's studio. She spent the other workdays either traveling to various appointments with customers or working out of her own home.

Since her employer required her to have all of the current fabric samples on hand when speaking with customers, claimant kept samples of the fabrics, books and pricing guides in her van.[6] Claimant stored the excess fabrics in her garage,[7] which she would occasionally swap out with the items in her van. The Saturday before the injury, a sale collection had ended so claimant needed to swap out the "old" sale fabrics in her van for the new ones stored in her garage. On the date of injury, claimant walked out the back door of her house towards the garage to complete the swap and "felt something move" under her foot. Realizing it was her dog,[8] claimant shifted her weight, lost her balance and fell. As a result, she sustained a right distal radius fracture.

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The employer denied the claim, asserting that claimant's injury (tripping over her dog at home) did not arise out of and in the course of her employment. After a hearing, the ALJ issued an Opinion and Order affirming the employer's denial. The ALJ determined that although claimant's injury occurred while

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Oregon Telecommuting workers' compensation claims (continued)

she was in the course of employment, her injury did not arise out of her employment. On appeal, the Board majority agreed that claimant's injury did not arise out of her employment as a custom decorator.[9] The Board concluded that the risk of claimant tripping over her own dog, a risk arising in claimant's home environment and outside the employer's control, was "so clearly personal that it could not possibly be attributable to her employment."[10] Since the Board concluded claimant's injury did not arise out of her employment, it did not address whether claimant was in the course of her employment when injured.

On appeal, the Oregon Court of Appeals reversed and remanded the Board's decision.[11] Focusing only on the two components of the "arise out of" inquiry, the court looked first to see whether the risk of injury was a risk connected with the nature of her work as a custom decorator. Not surprisingly, the court concluded that the risk of claimant tripping over her own dog at home did not arise out of her work as a decorator but was "a risk that existed whenever claimant walked around her property."[12] However, the court then analyzed whether the risk of tripping over her own dog at home was a risk associated with claimant's work environment. The court reasoned that because claimant regularly worked at her home as a condition of her employment, her home was, during those times, her "employer's premises."[13] Moreover, because claimant was walking to her garage for the sole purpose of completing a work task (switching out fabrics) and she fell while moving about in an area she needed to be in to perform that task, the court concluded her injury resulted from a risk of her work environment.[14]

In response to the Board's concern that the employer had no control over claimant's home or dog, the court disagreed and stated "although the employer may not have had control over claimant's dog, it had control over whether claimant worked away from the studio."[15] Since the employer did not provide claimant with the space to perform all of her work tasks, she needed to use her home and garage as a condition of her employment.[16] The court explained that if claimant had tripped over a customer's dog while at an appointment at the customer's home, the injury would arise out of her employment, and thus, the same is true for an injury sustained in her own home.[17] The court concluded its opinion with the following admonition:

> "If an employer, for its own advantage, demands that a worker furnish the work premises, the risks of those premises encountered in connection with the performance of work are risks of the work environment, even if they are outside of the employer's control, and injuries resulting from

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those risks arise out of the employment."[18]

The court then remanded the matter to the Board for a determination as to whether claimant's injury occurred "in the course of" her employment. As expected, the Board concluded that claimant's injury satisfied this prong of the work connection test as well.[19]

As can be seen, an injury sustained at home that appears at first glance to have nothing to do with work can in fact turn into a compensable claim. At this point, it is difficult to predict whether the substantial rise of remote workers in Oregon will result in increased claims for injuries (or even an occupational disease depending on the duration of remote work) sustained at home. If you find yourself having to process such a claim, please be sure to keep in mind the fundamental requirement that a sufficient work connection exists between the worker's injury and his or her employment. As always, should you have any questions or concerns regarding this complex area of the law, please do not hesitate to contact one of the Oregon practice attorneys at Reinisch Wilson Weier PC. ■

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[1] ORS 656.005(7)(a); *Fred Meyer, Inc. v. Hayes*, 325 Or 592 (1997); *Krushwitz v. McDonald's Restaurants*, 323 Or 520 (1996).

[2] Hayes, 325 Or at 601.

[3] *Robinson v. Nabisco*, 331 Or 178, 186 (2000); See also *Hayes*, 325 Or at 598 (injury occurs in the course of employment if "it takes place within the period of employment, at a place where a worker reasonably may be expected to be, and while the worker is reasonably fulfilling the duties of employment or is doing something reasonably incidental to it.").

[4] Hayes, 325 Or at 596; Krushwitz, 323 Or at 531.

[5] 243 Or App 342 (2011).

[6] For curious SNL fans, claimant did not keep this van down by the river, but in her driveway.

[7] Her employer did not allow her to store the excess products at the studio, and instructed claimant to keep them somewhere safe and dry.

[8] Although the breed of dog was never identified, this author is convinced it was a pug.

[9] *Mary S. Sandberg*, 60 Van Natta 2602 (2008).

[10] *Id.* at 2604-2605. In reaching this determination, the Board relied on its interpretation of *Halsey Shedd RFPD v. Leopard*, 180 Or App 332, 339 (2002) (injury did not 'arise out of' employment where claimant slipped and fell on dirt and gravel on his own driveway while "on call" and walking to his work truck to go to church). The Court of Appeals distinguished the facts of *Halsey Shedd RFPD* in the *Sandberg* decision, but the court's analysis is not discussed in detail here given space constraints.

[11] *Sandberg*, 243 Or App at 352.

[12] *Id.* at 349.

[13] *Id.* at 349-350.

[14] *Id.* at 350.

[15] *Id.*

[16] *Id.* at 352.

[17] *Id.*

[18] *Id.*

[19] *Mary S. Sandberg*, 64 Van Natta 238 (2012).

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