

In the Compensation of
Gloria Toussaint, Claimant
Contested Case No: 05-175H
PROPOSED & FINAL ORDER

April 14, 2006

GLORIA TOUSSAINT, Petitioner
OREGON OPERATORS SELF-INSURERS FUND, Respondent
Before Darren L. Otto, Administrative Law Judge, Workers' Compensation Board

A hearing was convened and concluded in the above entitled matter on March 21, 2006 in Portland, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was present and was represented by her attorney Ernest M. Jenks. The employer, Don and Lori Armstrong, and their processing agent, Pinnacle Risk Management Services, were represented by their attorney Daniel J. Sato. Exhibits 1 through 16 and 9A were received into evidence.

ISSUES

Claimant challenges a November 18, 2005 Administrative Order which found the employer not liable for her replacement eyeglasses. The issues are whether OAR 436-010-0230 is valid and, if so, whether claimant's glasses were in use at the time of injury.

FACTS

On May 23, 2005, [claimant] entered a walk-in freezer and slipped on ice and fell. She sustained a compensable back and left knee injury. On June 24, 2005, Oregon Operators accepted the claim as disabling lumbar strain and left knee contusion, and on that same day enrolled [claimant] in Providence, the managed care organization (MCO).

[Claimant] wears prescription eyeglasses. When she fell at work, her glasses were in her back pocket and were broken. [Claimant] requested that Pinnacle Risk Management Services (Pinnacle), [the employer's] processing agent, replace the broken glasses.

When approval was not forthcoming, [claimant] requested Administrative Review.

Upon MRU inquiry, Pinnacle, through its attorney, responded that because [claimant's] glasses were in her pocket at the time of injury replacement glasses are not reimbursable.

On September 30, 2005, [claimant] responded that she wears her prescription glasses most of the time while at work. Her work activities require that from time

to time she has to go into a walk-in freezer. When she enters the freezer she takes her glasses off, as they fog up and she is unable to see.

(Ex. 10-1).

On November 18, 2005, the MRU concluded that the employer was not liable for claimant's replacement eyeglasses. Claimant appealed that decision and the matter was referred to the Workers' Compensation Board for a hearing (Ex.10 & 12).

CONCLUSIONS OF LAW AND OPINIONS

At hearing, no meaningful discussion was held between the parties regarding the standard of review of the Administrative Law Judge. Exhibits were received and claimant's testimony was taken. Those actions were appropriate under a *de novo* review standard but may not be for a more restricted standard of review.

OAR 436-001-0225, promulgated by the Workers' Compensation Division, prescribes the standard of review governing an ALJ's review on appeal of an MRU order in a proceeding under ORS 656.245:

- (1) Except for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction *de novo*, unless otherwise provided by statute or administrative rule.
- (2) In medical service and medical treatment disputes under ORS 656.245 *** the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

Under "substantial evidence" review, the reviewing tribunal "look[s] at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence." Armstrong v. Asten-Hill Co., 90 Or App 200, 206 (1988). Thus, "substantial evidence" review "is not what has been referred to as the 'any evidence' rule *** but it is also not *de novo* review." *Id.* (citation omitted); *see also United Sates Bakery v. Shaw*, 199 Or App 286, 288-89 (2005). Under a substantial evidence review, the administrative law judge may not supplement the evidentiary record developed by the MRU. Kraft v. Department of Consumer and Business Services, ____ Or App ____ (April 5, 2006).

Since this proceeding involves a medical service dispute under ORS 656.245, the standard of review is substantial evidence and the evidentiary record developed by the MRU may not be altered or supplemented. Consequently, claimant's testimony is stricken from the record. The exhibits, on the other hand, were all part of the MRU record and will not be disturbed. *See* Ex. 11.

Claimant contends that OAR 436-010-0230(12), which requires a prosthetic appliance to

be “in use” when damaged in an industrial accident to be compensable, is inconsistent with ORS 656.005(7)(a), requiring only that an injury “arise out of and in the course of employment,” and the employer should be ordered to pay for replacement eyeglasses. Alternatively, claimant contends that her glasses were in use at the time of injury. The employer asserts that the administrative rule is clear and, since claimant’s glasses were not in use when she fell, it is not liable for replacement eyeglasses.

ORS 656.005(7)(a) provides that a “‘compensable injury’ is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death ***.” Replacement or repair of damaged prosthetic appliances, including eyeglasses, constitutes medical services under the statute. Robert B. Kappa, 50 Van Natta 797, 798 (1998). The Board has also held that a compensable injury can be established by damage to the prosthetic device, regardless of whether the claimant sustains an accompanying physical injury. *Id.*

OAR 436-010-0230(12) provides that “[t]he cost of repair or replacement of prosthetic appliances damaged when in use at the time of and in the course of a compensable injury, is a compensable medical expense, including when the worker received no physical injury.”

In Martin J. McKeown, 42 Van Natta 1053, 1054 (1990), claimant wore glasses to read most of the day, but they fell out of his pocket and broke when he bent over to pick up a case file. Relying on a prior version of OAR 436-010-0230(12), the Board concluded that claimant’s eyeglasses were not “in use” and the damage to them was not compensable. *Id.*

As far as I can tell, the Board has not addressed whether the “in use” language contained in OAR 436-010-0230(12) is inconsistent with the statutory “course and scope” requirements of ORS 656.005(7)(a). In Robert B. Kappa, 50 Van Natta at 798, the Board stated, “It may be that the requirement that eye glasses be “in use” is consistent with the statutory definition which necessitates that an injury ‘arise out of and in the course of employment.’ However, we need not decide that issue in this case ***.”

To “use” is “[t]o put into action or service: avail oneself of.” Webster’s Ninth New Collegiate Dictionary, page 1299 (1988). “USE implies availing oneself of something as a means or instrument to an end.” *Id.* Since claimant’s eyeglasses were not performing their function and were not in service at the time of injury, the MRU correctly determined that claimant’s eyeglasses were not “in use” when they were damaged in the fall at work. Therefore, the validity of OAR 436-010-0230(12) with regard to ORS 656.005(7)(a) must be addressed.

The term “arising out of and in the course of employment” in ORS 656.005(7)(a) is an inexact term, *i.e.*, the legislature has expressed its meaning completely, but that meaning remains to be spelled out in the agency’s rule or order. An inexact term gives the agency interpretative but not legislative responsibility. England v. Thunderbird, 315 Or 633, 638 (1993) *citing* Springfield Education Assn. v. School Dist., 290 Or at 233 (so holding for terms “employment relations” and “conditions of employment”). With respect to an inexact term, the court reviews the validity of the rule for consistency with the relevant provisions of the workers’ compensation statutes. Carroll v. Boise Cascade Corp., 138 Or App 610, 614 (1996). In other words, it must

determine whether the agency “erroneously interpreted a provision of law.” England v. Thunderbird, 315 Or at 638. The same standard of review applies to the Board and its Hearings Division. See OAR 436-001-0225(2). If ORS 656.005(7)(a) is inconsistent with the provisions of OAR 436-010-0230(12), the statute is controlling. Nada Lovre, 56 Van Natta 598, 602 (2004); Julio C. Garcia-Caro, 50 Van Natta 160 (1998); Lee R. Jones, 46 Van Natta 2179 (1994)(in the event that there is a conflict between the administrative rule and the statute, it is the statute rather than the rule which controls).

An injury arises out of and in the course of employment where there exists "a causal link between the occurrence of the injury and a risk associated with [the] employment." Norpac Foods Inc. v. Gilmore, 318 Or 363, 366 (1994). If there is no causal connection between the claimant's injury and his or her work activities other than the fact the injury occurred at work, the injury is not compensable. Johnson v. Beaver Coaches, Inc., 147 Or App at 235. However, where the claimant's injury results from either an employment-related risk or a neutral risk that the employment put the claimant in a position to be injured, the injury is compensable under ORS 656.005(7)(a). See, e.g., Henderson v. S.D. Deacon Corp., 127 Or App 333 (1994) (worker's injury when she stepped out of an elevator while attempting to leave the building for a lunch break was in the course and scope of employment); Pamela M. Ahlstrom, 48 Van Natta 1665 (1996) (the claimant's knee injury, which occurred as she bent over to pick up merchandise off the floor, was within the course and scope of employment). Moreover, where a specific work activity is part of a claimant's job, the risk of injury from that activity is a risk of that job. Folkenberg v. SAIF, 69 Or App 159, 165 (1984); Helen L. Good, 49 Van Natta 1295, 1296 (1997).

Claimant slipped on some ice in the cooler at work and fell, injuring her low back and left knee and breaking her glasses. The employer appropriately accepted claimant's physical injuries because they clearly arose out of and in the course of her employment. A work-created hazard caused the injuries to claimant while she performed her work activities. Claimant did not receive replacement eyeglasses because OAR 436-010-0230(12) provides that a damaged prosthetic appliance must be “in use at the time of and in the course of a compensable injury.” The term “in use” is more restrictive and inconsistent with the statutory definition of a compensable injury under ORS 656.005(7)(a) because it renders otherwise compensable damage to a prosthetic appliance not compensable. Therefore, I find the rule invalid and apply the broader terms of the statute. The MRU's conclusion that the employer was not liable for claimant's replacement eyeglasses is reversed.

Claimant is entitled to an attorney fee pursuant to ORS 656.385(1) for prevailing in a medical service dispute. Her request for \$3500.00, however, is denied because ORS 65.385(1) also provides, “An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances.” Although claimant's attorney conducted four hours of legal research, the facts were not in dispute, the testimony was limited (and now stricken), and there were only 17 exhibits. Extraordinary circumstances have not been shown and the fee will therefore not exceed the statutory limit.

ORDER

IT IS HEREBY ORDERED that the November 18, 2005 Administrative Order, Case No. MMS 05-895, is reversed. The claim for claimant's replacement eyeglasses is remanded to Don & Lori Armstrong and Pinnacle Risk Management Services for acceptance and processing.

IT IS FURTHER ORDERED that Don & Lori Armstrong and Pinnacle Risk Management Services are assessed a reasonable attorney fee pursuant to ORS 656.385 in the amount of \$2000 (two thousand dollars) to be paid directly to claimant's attorney.