

In the Matter of the Compensation of
BROOKE A. WOODARD, Claimant

WCB Case No. 15-04848

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Sedgwick Claims Management, as the statutory assigned claims agent under ORS 656.054(1), requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) found that claimant was a subject worker; and (2) set aside its denial of claimant's injury claim for a left ankle condition. On review, the issues are subjectivity and course and scope of employment.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant was hired as a receptionist for a medical marijuana dispensary that was scheduled to open on April 20, 2015. (Ex. 2-3, -4). She understood that she would earn minimum wage for her work. (Tr. 33). The manager of the dispensary, Mr. Stamps, told her to be at work on April 17 and 18, 2015, for training. (Tr. 17). Claimant arrived on April 17, 2015, and was given a work schedule that listed her name. (Ex. 13). On April 18, 2015, she arrived at work and attended a business plan orientation meeting. (Ex. 7). After the meeting, Mr. Stamps invited all the employees into the back area of the dispensary, where he and one of the business owners prepared joints and "dabs" for the employees to smoke. (Tr. 8). Claimant joined the other employees in smoking those substances. (*Id.*)

When they finished smoking, the employees resumed preparing for the dispensary's opening. (Tr. 9). Claimant was asked by several coworkers to assist them in buying office supplies. (*Id.*) On the way to the store, claimant suffered a panic attack as a result of her marijuana intoxication. (Ex. 7-3, -7). Her coworkers returned her to the parking lot of the dispensary, and claimant exited the car. (Tr. 10, 11). Feeling unsafe, claimant ran/somersaulted across the parking lot to a retaining wall topped by a chain-link fence. (Tr. 11). She climbed the fence and dropped about 15 feet to the ground below, fracturing her left ankle. (*Id.*)

Claimant filed an injury claim for her fractured ankle. Sedgwick denied the claim, asserting that her injury was not caused by her "work exposure." (Ex. 6-1). Claimant requested a hearing.

The ALJ concluded that: (1) claimant was a subject worker; (2) her injury did not result from engaging in a recreational or social activity primarily for her personal pleasure (ORS 656.005(7)(b)(B)); and (3) her injury arose out of and occurred in the course of her employment.

On review, Sedgwick argues that: (1) based on *DePew v. SAIF*, 74 Or App 557 (1985), claimant was not a subject worker because the dispensary was operating as an illegal enterprise at the time of the injury; (2) claimant was not a subject worker because she did not receive remuneration from the dispensary; and (3) the injury is excluded from coverage under ORS 656.005(7)(b)(B) because claimant was injured as a result of engaging in or performing a recreational or social activity primarily for her personal pleasure. For the following reasons, we disagree with Sedgwick's contentions.

ORS 656.027 provides that all workers are subject to the Workers' Compensation Act unless they fall within certain enumerated exceptions. In *DePew*, the court held that employees of an illegal gambling operation were not subject workers under ORS 656.027. In so doing, the court reasoned that "the statutory language and the public policy implicit in the Workers' Compensation Act prohibit an award of compensation for injuries suffered by a worker employed under a contract to engage in criminal activities." 74 Or App at 560.

Sedgwick argues that the medical marijuana dispensary became an illegal enterprise when its employees engaged in the illegal activity of smoking marijuana. It therefore contends, based on the *DePew* rationale, that claimant is not a subject worker. Based on the following reasoning, we conclude that *DePew* is distinguishable.

Critical to the court's reasoning in *DePew* was the fact that, because the gambling enterprise was itself illegal, its employees were contracted specifically to engage in illegal activities. By contrast, claimant in this case was not hired to engage in illegal activities. Rather, she was hired as a receptionist for a legal enterprise, *i.e.*, a licensed medical marijuana dispensary. We decline to extend the *DePew* rationale to a legal business enterprise merely because its employees have engaged in an illegal activity on the premises.¹ Accordingly, we conclude that claimant is a subject worker under ORS 656.027.

¹ Possession and purchase of limited amounts of marijuana for recreational use by persons over 21 years of age was not lawful until June 30, 2015. ORS 475B.260; HB 3400 (2015). Because claimant's injury occurred on April 18, 2015, and she was under 21 years old at that time (Ex. 3-3), her use and possession of marijuana on the day of her injury was unlawful.

Sedgwick further argues that claimant was not a subject worker under ORS 656.005(3) because she did not receive remuneration for her work. ORS 656.005(30) defines a subject worker, in relevant part, as any person “who engages to furnish services for remuneration.” Under that statute, the claimant has the burden of proving the existence of a “contract for hire” that serves as an agreement between the claimant and the employer that the employer will provide remuneration for the claimant’s services. *Dep’t of Consumer and Bus. Servs. v. Clements*, 240 Van Natta 226, 232 (2010); *Cozmin I. Gadalean*, 68 Van Natta 336, 339-41 (2016). A “contract for hire” may be an implied-in-fact contract, based on the parties’ course of conduct. *Ashely A. Rehfeld*, 63 Van Natta 2515, 2517 (2011).

Here, although claimant was not paid for her work at the dispensary, we find that “a contract for hire” existed. Claimant was hired by the dispensary and understood that she would be paid minimum wage for her work. She was told to attend training on August 17 and 18, 2015, and was asked to assist in preparing for the dispensary’s opening. Further, she was listed on the employer’s work schedule. Under such circumstances, we conclude that claimant was engaged in providing services for remuneration, and thus, was a subject worker under ORS 656.005(30). See *Rehfeld*, 63 Van Natta at 1218-19 (the claimant was a subject employee where the employer assigned the claimant a work space and equipment and directed her work activities and the claimant expected to be paid for completed sales work).

We next turn to whether claimant’s injury is excluded from coverage under ORS 656.005(7)(b)(B). That statute provides an exclusion for an “injury incurred while engaging in or performing, or as a result of engaging in or performing, any recreational or social activities primarily for the worker’s personal pleasure.” ORS 656.005(7)(b)(B). The activity to which the statute refers is not the actual injurious action, but rather “the activity within which that action occurs.” *Liberty Northwest Ins. Corp. v. Nichols*, 186 Or App 664, 670 n 4 (2003); *Harry Cruz*, 66 Van Natta 2064 (2014).

In *Roberts v. SAIF*, 341 Or 48, 52 (2006), the Supreme Court explained that this statutory exclusion raises three questions: (1) whether the worker was engaged in or performing a “recreational or social activity”; (2) whether the worker incurred the injury “while engaged 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.” If the answer to all those questions is “yes,” the worker cannot recover. *Id.*

Here, the parties agree that the “activity” at issue is claimant’s consumption of marijuana at the dispensary preceding her injury. They also agree that when consuming the marijuana, claimant was engaged in a recreational or social activity and that she was injured as a result of engaging in that activity. Thus, this case turns on whether claimant was engaged in that activity primarily for her personal pleasure.

Sedgwick contends that because claimant testified that she participated in the smoking activity for her personal pleasure and that she was not compelled to participate in smoking marijuana at work on the day of the injury, she engaged in smoking marijuana primarily for personal pleasure. (Tr. 17). Based on the following reasoning, we disagree with Sedgwick’s contention.

We acknowledge claimant’s testimony that she found smoking marijuana pleasurable, did not feel “put off” by smoking marijuana with her manager and coworkers, and did not feel forced to participate in the activity. (Tr. 17). However, the proper focus of ORS 656.005(7)(b)(B) is not whether the activity was pleasurable or coerced, but whether it was incidental to employment. *Nichols*, 186 Or App at 670-71.

Here, claimant’s uncontroverted testimony established that the dispensary’s owner and manager invited and encouraged the staff to participate in smoking marijuana and that they provided the marijuana that was consumed. (Tr. 8, 34). Both the dispensary’s manager and owner were present while the smoking activity occurred and all but one of the employees participated in the activity. (Tr. 8, 33-34; Ex 3-14). Further, claimant’s testimony established that she was expected to stay at work after the smoking activity had ended to continue assisting with preparation for the dispensary’s opening. (Ex. 3-15).

Under such circumstances, we conclude that the record does not establish that claimant’s personal pleasure was the fundamental reason for engaging in the smoking activity. See *U.S. Bank v. Pohrman*, 272 Or App 31, 37-38 (2015) (determining that the claimant who had injured herself while walking to a coffee shop on a 15-minute break taken at the employer’s direction had not engaged in a social or recreational activity primarily for her personal pleasure); *Laura Brown*, 68 Van Natta 774, 778 (2016) (concluding that the claimant who had injured herself participating in a break time walking program arranged and encouraged by the employer had not engaged in a social or recreational activity primarily for her personal pleasure due to the close nexus between the walking activity and the claimant’s work). Therefore, the exclusion for injuries incurred while engaging in or performing recreational or social activities primarily for the worker’s personal pleasure under ORS 656.005(7)(b)(B) is not applicable.

In summary, we conclude that claimant is a subject worker and that her injury was not the result of a social or recreational activity engaged in primarily for personal pleasure under ORS 656.005(7)(b)(B). Finally, for the reasons expressed in the ALJ's order, we agree with the ALJ's conclusion that claimant's injury arose out of and occurred in the course of her employment.² We therefore affirm.

Claimant's counsel is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$6,000, payable by Sedgwick, on behalf of the noncomplying employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and her counsel's uncontested submission), the complexity of the issues, the value of the interest involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by Sedgwick, on behalf of the noncomplying employer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated June 7, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$6,000, payable by Sedgwick, on behalf of the noncomplying employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of the left ankle condition, to be paid by Sedgwick, on behalf of the noncomplying employer.

Entered at Salem, Oregon on February 8, 2017

² Alternatively, we find that claimant engaged in the smoking activity "in the course" of her employment under the personal comfort doctrine. See *Pohrman*, 272 Or App at 47 ("[A] proper application of the course and scope inquiry requires an antecedent consideration of the personal comfort doctrine."). That activity occurred on the employer's premises, was contemplated and acquiesced in by the employer, and claimant was not on a personal mission. See *id.* at 44-45. Under these circumstances, we find that the activity was sufficiently connected to claimant's employment, such that she had not left the course of her employment when injured.