DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANNIE HERRERA, individually and on behalf of all statutory beneficiaries of Decedent, Herman Herrera,	1 CA-CV 12-0104
	DEPARTMENT D
Plaintiff/Appellant,	**MEMORANDUM DECISION** (Not for publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
KENT COURTNEY, EMT and JANE DOE COURTNEY, husband and wife; PEABODY WESTERN COAL COMPANY, a Delaware corporation; PEABODY ENERGY CORPORATION, a Delaware corporation,	
Defendants/Appellees.	

Appeal from the Superior Court in Navajo County

Cause No. S0900CV201000396

The Honorable Ralph E. Hatch, Judge

REVERSED AND REMANDED

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And

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K E S S L E R, Judge

¶1 Plaintiff/Appellant Annie Herrera, individually and on behalf of all statutory beneficiaries of Herman Herrera, appeals the superior court's judgment dismissing her complaint against Defendants/Appellees Peabody Western Coal Company, Peabody Energy Corporation (collectively "Peabody"), and Kent Courtney for lack of subject matter jurisdiction. The issue is whether our workers' compensation law bars a civil action against an employer based on allegedly negligent medical treatment at a company-run clinic: (1) for a condition unrelated to work; (2) when the clinic and services were available on the same terms and conditions to non-employees; and (3) when the employee went to the clinic because it was the only clinic available for treatment. We conclude the injury did not arise out of or occur in the course of employment. Accordingly, we reverse the dismissal of the complaint.

FACTUAL AND PROCEDURAL HISTORY

¶2 Peabody Western operates the Kayenta Mine, a coal mine located on the Navajo and Hopi Reservations about thirty miles southwest of Kayenta. Peabody Western offers a free medical clinic, staffed by a paramedic, at the mine complex. The clinic is not usually staffed after business hours, but when the clinic is closed, employees and others may obtain medical assistance by contacting the on-duty paramedic at the clinic crew quarters. Although the clinic was established to provide first aid and emergency services for Peabody Western employees, the clinic also serves non-employees who live in the area. At oral argument in this Court, Peabody and Courtney also conceded that any member of the public who sought emergency treatment at the clinic or crew quarters after hours would be treated on the same terms as a Peabody Western employee. It was undisputed that the clinic is the only medical clinic within nineteen miles for treating emergencies.

¶3 Peabody Western employed Herman at the Kayenta Mine. Herman and his wife, Annie, lived on the Navajo Reservation within the area leased to the mine.

¶4 Herman worked the day shift on July 24, 2008, and clocked out at 4:23 p.m. That evening after dinner, he began feeling ill and went to the Peabody Western medical clinic. Courtney, an emergency medical technician, was on call that

night for after-hours care. He examined Herman at the crew quarters and administered aspirin. Later that night, Herman collapsed at his home. Family summoned Courtney, who responded to the home and attempted to stabilize Herman, then transported him to meet an ambulance from Kayenta so he could be taken to a hospital. Herman later died from a heart attack.

¶5 Annie filed this action for wrongful death, alleging Courtney negligently treated Herman. Peabody Western and Courtney moved to dismiss, arguing the superior court lacked subject matter jurisdiction because Arizona's Workers' Compensation Act, Arizona Revised Statutes ("A.R.S.") sections 23-901 through 23-1091 (1995 & Supp. 2012)[1] ("the Act"), provided Annie's exclusive remedy. The court granted Annie's request for additional time, pursuant to Arizona Rule of Civil Procedure 56(f), to conduct discovery regarding whether workers' compensation coverage applied to Herman's injury. Thereafter, the parties submitted additional evidence regarding the jurisdictional issue.

¶6 Annie argued Herman's injury did not arise out of or in the course of his employment pursuant to A.R.S. § 23-1021(A) (1995) and thus was not compensable under the workers' compensation scheme. She also urged the court to apply the dual

[1] We cite to the current version of the applicable statute when no revisions material to this decision have since occurred.

capacity doctrine, which allows an employee who is otherwise subject to the exclusive remedy of workers' compensation to sue in tort when he is injured while in a relationship with the employer that is the same as any other member of the public. The court granted the motion to dismiss, finding it lacked subject matter jurisdiction because Annie's exclusive remedy was workers' compensation.[2] Annie timely appealed.

¶7 We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶8 Annie argues the superior court erred as a matter of law by ruling that her claims are barred by the exclusivity provision of Arizona's Workers' Compensation Act. Annie, as the plaintiff, had the burden to demonstrate the existence of jurisdiction. *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991). "Where jurisdictional fact issues are not intertwined with fact issues raised by a plaintiff's claim on the merits, the resolution of those jurisdictional fact issues is for the trial court." *Id.* In resolving such issues the court may consider affidavits, depositions, and exhibits

[2] Peabody Energy also moved to dismiss for lack of personal jurisdiction. The court did not rule on the motion, but dismissed Annie's entire complaint on the grounds that it lacked subject matter jurisdiction over all claims. Peabody Energy does not argue on appeal that the court lacked personal jurisdiction over it. Accordingly, we do not address that issue.

without converting a motion to dismiss to one for summary judgment. *Id.* We view the record in the light most favorable to sustaining the superior court's ruling and will infer any necessary findings reasonably supported by the evidence, but review the court's ultimate legal conclusion de novo. *Id.*

¶9 Arizona's Workers' Compensation Act grants the Industrial Commission of Arizona exclusive jurisdiction over claims for injuries arising out of and sustained in the course of employment. *Rios v. Indus. Comm'n*, 120 Ariz. 374, 376, 586 P.2d 219, 221 (App. 1978); *see also* A.R.S. § 23-1021(A).[3] The Act thus bars employees to whom it affords coverage from suing their employer or co-employees for accidents arising out of and in the course of their employment. A.R.S. § 23-1022(A) (1995) ("The right to recover compensation pursuant to this chapter for injuries sustained by an employee . . . is the exclusive remedy against the employer or any co-employee acting in the scope of

[3] Section 23-1021(A) provides:

> Every employee coming within the provisions of this chapter who is injured, and the dependents of every such employee who is killed by accident *arising out of and in the course of his employment*, wherever the injury occurred, unless the injury was purposely self-inflicted, shall be entitled to receive and shall be paid such compensation for loss sustained on account of the injury or death, such medical, nurse and hospital services and medicines, and such amount of funeral expenses in event of death, as are provided by this chapter.

(Emphasis added.)

his employment . . . .").[4] Annie argues that because Herman's injury did not arise out of or during the course of his employment, the Act does not constitute her exclusive remedy against Peabody Western or Courtney.

¶10 For an injury to "arise out of" employment, the cause producing the injury must flow or originate from a source within the employment; *i.e.*, the source of the injury "must have its situs in some risk" incidental to the employment duties so that we can say there is some causal relation between the employment and the injury. *Royall v. Indus. Comm'n*, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970) (citation omitted).[5] In contrast, the inquiry regarding whether an injury was sustained "in the course of" the employment focuses on the time, place, and circumstances under which it occurred. *Id.* Thus, an injury occurs in the

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[4] The exclusivity of the workers' compensation remedy does not apply to an action for medical malpractice against any employee of a hospital maintained by the employer pursuant to A.R.S. § 23-1070 (Supp. 2012), which allows an employer to provide medical, surgical, or hospital care directly to its employees in lieu of paying premiums for such benefits. *See* A.R.S. § 23-1022(C). There is no evidence that Peabody Western's medical clinic was established or maintained under that statute. *See Diaz v. Magma Copper Co.*, 190 Ariz. 544, 553, 950 P.2d 1165, 1174 (App. 1997) (holding as a matter of law that mining company's dispensary, which provided only "limited basic first aid services" was not a hospital as contemplated by A.R.S. § 23-1070).

[5] Although under A.R.S. § 23-1043.01(A) (1995), a heart attack normally is not a work-related injury, Annie's claim is not based on Herman's heart attack but on Courtney's allegedly negligent treatment of Herman.

course of employment if the employee is injured when he or she was doing what the employee "may reasonably do within a time during which [the employee] is employed and at a place where [the employee] may reasonably be during that time." *Id.* (citation omitted). The "arising out of" and "in the course of" tests are not independent, but are both parts of a single test of work connection known as the "quantum theory" of work connection. *Noble v. Indus. Comm'n*, 188 Ariz. 48, 50, 52-53, 932 P.2d 804, 806, 808-09 (App. 1996) (citing 1A Arthur Larson, *The Law of Workmen's Compensation* § 29.10, at 5-478 (1996) ("Larson"), and *Arizona Workers' Compensation Handbook* § 3.2.1, at 3-10 (Ray Jay Davis et al. eds., 1992)). Ultimately, "[w]hether an activity is related to the claimant's employment . . . will depend upon the totality of the circumstances." *Finnegan v. Indus. Comm'n*, 157 Ariz. 108, 110, 755 P.2d 413, 415 (1988).

1. The injury did not arise out of Herman's employment.

¶11 We agree with Annie that Herman's risk of negligence by Courtney did not arise out of his employment because there was no causal connection between Herman's employment by Peabody Western and Courtney's allegedly negligent medical treatment. The Massachusetts Court of Appeals' decision in *Case of Hicks*, 820 N.E.2d 826 (Mass. App. Ct. 2005), is especially helpful to our analysis. There, a health care technician for a hospital

obtained a flu shot in the lobby of the hospital on her lunch hour. *Hicks*, 820 N.E.2d at 828. The hospital was offering such shots free of charge to employees and the general public. *Id.* She later had an adverse reaction to the shot and ultimately became blind from the reaction. *Id.* at 828-29. The employee filed a workers' compensation claim and the hospital conceded that the injury occurred in the course of her employment, but argued that it did not arise out of her employment. *Id.* at 833. The court of appeals disagreed, holding that the injury arose out of her employment because the activity, receipt of the flu shot, was not a purely personal activity, but an incident of employment. *Id.* at 835. The court reasoned that her getting the shot on the hospital premises was consistent with her status as a health care worker providing direct patient care. *Id.* In addition, the court noted the shot plainly furthered the employer's business interests and was thus beyond an element of mutual benefit such as improved employee relations. *Id.* In so holding, the court distinguished a line of cases denying compensation when the health care that was provided was given to non-health care providers. *Id.* at 834.

¶12 Here, Herman's medical care at the clinic was identical to the care which the clinic would have provided to any member of the public who showed up for care. The incident leading up to the treatment was not related to Herman's

employment and providing the service was not related to his duties at the mine.

¶13 The decision in *Royall*, 106 Ariz. 346, 476 P.2d 156, is distinguishable. In *Royall*, our supreme court stated that "arising out of" refers to the cause or origin of the injury, and that test is met when the cause producing the injury flows from a source within the employment, *i.e.*, "the source of the injury is distinctly associated with the employment." 106 Ariz. at 350, 476 P.2d at 160. However, in *Royall*, the claimant was an employee on a paid lunch break in the company cafeteria when she tripped over another employee. *Id.* at 348, 476 P.2d at 158. Our supreme court held that her injury arose out of her employment because "the source of injury was sufficiently associated with the employment as to constitute a risk to which claimant was subjected in the course of her employment, and to which she would not have been subjected had she not been so employed." *Id.* at 351, 476 P.2d at 161. Here, Herman was not on duty or even on a break from work, paid or unpaid, and simply went to the clinic for treatment as any member of the public could because it was the only facility reasonably available.

2. The injury did not occur in the course of Herman's employment.

¶14 We also agree with Annie that Herman's injury did not occur in the course of Herman's employment. "An employee acts

within the scope of employment if the activity is of the kind the employee is employed to perform, occurs substantially within the authorized time and space limit, and is actuated at least in part by a purpose to serve the master." *Smithey v. Hansberger*, 189 Ariz. 103, 106, 938 P.2d 498, 501 (App. 1996) (citation and internal punctuation omitted); *see also Pottinger v. Indus. Comm'n*, 22 Ariz. App. 389, 390, 527 P.2d 1232, 1233 (1974). "An injury or accident occurs in the course of his employment if the employee is injured while he is doing what a [person] so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time. The words 'in the course of' refer[] to the time, place, and circumstances under which it occurred." *Royall*, 106 Ariz. at 349, 476 P.2d at 159 (citation and internal quotation marks omitted). "The 'ultimate test' is whether 'the totality of the circumstances establishes sufficient indicia of employment connection.'" *Noble*, 188 Ariz. at 51, 932 P.2d at 807 (citation omitted).

¶15 Under the test articulated in *Smithey* and *Royall*, Herman was not acting "in the course of" his employment when he sought medical treatment from Courtney. Seeking medical assistance is not a task he was "employed to perform," *Smithey*, 189 Ariz. at 106, 938 P.2d at 501 (citation omitted), and because Herman had clocked out of work hours before he fell ill,

the alleged negligence did not occur "within a time during which he [was] employed," *Royall*, 106 Ariz. at 349, 476 P.2d at 159 (citation omitted). Nor was his request for medical treatment "actuated at least in part by a purpose to serve the master." *Smithey*, 189 Ariz. at 106, 938 P.2d at 501 (citation omitted).

¶16 Arizona cases holding that injuries have occurred "in the course of" employment are based on circumstances not present here. The claimant in *Royall* was on a paid lunch break in the company's cafeteria when she tripped over another employee. 106 Ariz. at 348, 476 P.2d at 158. Examining the time, place, and circumstances of the incident, the court held it arose in the course of the claimant's employment because she was on a paid thirty-minute lunch break, was injured on the employer's premises, and there was no other place for her to go to have lunch off the premises. *Id.* at 351, 476 P.2d at 161. By contrast, the injury here either occurred on the company premises or at Herman's home, Herman had left his employment for the day and came back to the clinic for treatment for a non-employment related condition.[6]

[6] Nor do we think that *Delgado v. Industrial Commission*, 183 Ariz. 129, 901 P.2d 1159 (App. 1994), supports the superior court's decision. In *Delgado*, the employee was injured at work when he tried to use the employer's air pump to inflate a tire on his truck. 183 Ariz. at 130, 901 P.2d at 1160. The tire exploded and the carrier denied the claim. *Id.* The court concluded that the claimant was acting within the course of his employment because the injury occurred when using the employer's

¶17 We also do not find *Noble* helpful. In *Noble*, the employee was injured by falling cartons when he was using a break room after his shift ended and he had clocked out. 188 Ariz. at 50, 932 P.2d at 806. We held the injury was compensable under the workers' compensation laws despite a weak showing that it arose out of the course of employment. *Id.* at 52-53, 932 P.2d at 808-09. In deciding that the injury arose in the course of employment, we cited a leading commentator's analysis that injuries before or after work were compensable if the injury occurred coming to or going from work, during an interval while waiting to begin work or right after work, or during regular unpaid rest periods and unpaid lunch hours on the premises. *Id.* at 51, 932 P.2d at 807 (quoting Larson at § 21.60(a)-(c)). The underlying concept supporting compensability was that the time of the injury was contiguous to the working hour. *Id.* Herman's injury does not fit into any of those exceptions.

¶18 The facts in *Finnegan*, 157 Ariz. 108, 755 P.2d 413, are also distinguishable. In *Finnegan*, a garage employee was deemed injured in the course of his employment even though the injury occurred while he was off-duty. 157 Ariz. at 111, 755

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equipment, on the employer's premises, while the employee was on duty, and that any deviation from his duties was insubstantial. *Id.* at 132-33, 901 P.2d at 162-63. In contrast here, Herman was not on duty when the alleged misdiagnosis occurred.

P.2d at 416. Even though the employee was utilizing his employer's premises and equipment to help a co-worker repair his personal vehicle, the permission to use the facilities was a fringe benefit, and thus, employment-related. *Id*. This was consistent with the point made in Larson and cited with approval in *Noble*, *see supra* ¶ 17, that an injury to an employee on the company premises during a break or contiguous with work would be in the course of the claimant's employment. Here, however, the injury occurred only after Herman left work and returned home and either when he went to the clinic for treatment or when Courtney came to his house. Moreover, Herman went to the clinic not because it was a fringe benefit but because it was the only service available to assist him. Thus, the reasoning in *Finnegan* does not apply here.

¶19 Peabody's and Courtney's reliance on S*mithey*, 189 Ariz. 103, 938 P.2d 498, is misplaced. In *Smithey*, we focused on the co-employee defendant's conduct to see it if fell within the scope of his duties so we could determine if the bar of A.R.S. § 23-1022(A) applied. 189 Ariz. at 106-07, 938 P.2d at 501-02. We held that where the co-employee met all the requisites of working in the course of his employment for respondeat superior purposes (driving employees to and from work in a company van), workers' compensation applied when an employee-passenger was injured in an accident leaving from work.

Id. at 107, 938 P.2d at 502. It was undisputed that an exception to the going and coming rule applied because the injured employee was being driven from work in a company van by a fellow employee subject to the control of and at the request of the employer. *Id.* at 107-08, 938 P.2d at 502-03. The holding in *Smithey* would have been different if the co-employee had been working within the scope of his employment, lost control of his van and happened to hit another employee who was not at work or going to or coming from work but was just in the wrong place at the wrong time. Here we must determine whether Herman suffered an injury on the job, meaning whether it arose in the course of *his* employment. Herman was not acting in the course of his employment—he had left work and gone home and then went to the clinic because it was the only available service. *See Levin v. Twin Tanners*, 60 N.E.2d 6, 9 (Mass. 1945) ("The defendant finally contends that it is not liable because the plaintiff and the defendant's truck driver were fellow servants. But the fellow servant rule applies only where the servant was injured 'while acting within the scope of his employment or in connection therewith' and 'does not extend to public ways necessarily used by the servant as an approach.'" (citations omitted)).

¶20 Although no Arizona court has addressed whether workers' compensation applies to an injury sustained in an

after-hours company clinic, we find the test developed by New York helpful. As most recently stated, New York applies a three-part test for determining whether workers' compensation statutes preclude a private cause of action. *Hollingshed v. Levine*, 763 N.Y.S.2d 595, 596 (N.Y. App. Div. 2003). Under that test, the court will look to whether: (1) the medical treatment was offered and paid for by the employer; (2) the medical treatment was not available to the general public; and (3) the injured employee obtained the treatment not as a member of the public but only as a consequence of his employment. *Id.*

¶21 In *Ruiz v. Chase Manhattan Bank*, 607 N.Y.S.2d 207, 208 (N.Y. App. Div. 1993), the court held that the workers' compensation law did not bar a tort action by a bank employee against a bank-owned pharmacy after it negligently filled a prescription to treat the employee's non-work-related injury. The court reasoned that because the pharmaceutical services were provided both to bank employees and about 2500 non-employees working in the building, the risk of injury did not arise out of and in the course of the plaintiff's employment so there was no causal nexus between the injury and employment. *Ruiz*, 607 N.Y.S.2d at 208. The court distinguished earlier cases holding the bar applied because the healthcare provider could see private paying patients at the location while treatment of the

employee was for free or those cases involved services exclusively available to employees. *Id.*

¶22 In contrast, *Feliciano-Delgado v. The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc.*, 722 N.Y.S.2d 498, 499 (N.Y. App. Div. 2001), addressed a claim brought by an employee of a health center operated for restaurant and hotel union members. The employee, who was entitled to free health care at the center, alleged he was injured by negligent treatment he received at the health center. *Feliciano-Delgado*, 722 N.Y.S.2d at 499. The court held the claimant was barred from bringing a tort action against the center because the center was not open to the general public and the services were paid for by her employer as an employee benefit. *Id.* at 502. In that event, the provision of such services to her was a consequence of her employment. *Id.* at 501-02.

¶23 This case is more like *Ruiz* than *Feliciano-Delgado* because the Peabody Western clinic was open to members of the public on the same terms as it was open to Herman. Moreover, Herman went to the clinic not because he was an employee, but because it was the only medical care available. Applying the New York three-part test to the facts here, Herman's use of the company clinic did not occur in the course of employment. The clinic was open to both employees and non-employees, including

third-parties with no relationship to the company. Anyone who presented for treatment at the clinic would be seen without any distinction based on their employment status at the mine. Herman sought treatment from the clinic because it was the only facility within a reasonable distance at which he might get care for his symptoms. Particularly under the circumstances here, when the symptoms for which he sought treatment occurred hours after he left work, Herman sought treatment not as a consequence of his employment, *but rather just like any member of the public*.

¶24 We also find support for our conclusion in *Stables v. General Motors Corporation*, 24 N.W.2d 524 (Mich. 1946). In *Stables*, the employee injured herself at home in applying acid to a wart. 24 N.W.2d at 524. After she returned to work and during the working day, she voluntarily went to the company first aid station for treatment. *Id.* She had a reaction to the treatment and filed for workers' compensation benefits. *Id.* at 524-25. The Michigan Supreme Court held that the claim was not compensable because the original injury had occurred at home and had nothing to do with her employment, treatment was a gratuitous service extended to employees for any injury or disease even if unrelated to employment, and she was not obligated to go to the clinic for the service. *Id.* at 525. As the court succinctly put it, the "accident did not happen out of

or in the course of the employment except to the extent that during working hours plaintiff was excused to avail herself of the gratuitous medical aid . . . ." *Id.* Herman's case is even stronger to find the injury did not occur in the course of employment because unlike the claimant in *Stables*, he did not go to the company clinic during his working hours.

¶25 Our conclusion in this case does not mean that any employee who sustains an injury at or after visiting a company-owned clinic is not covered by workers' compensation. We are only dealing with an injury to an off-duty employee seeking treatment for a condition unrelated to his employment at an employer's clinic that is open to the public and is the only available facility for medical emergencies. In the particular circumstances present here, we conclude workers' compensation does not apply because Herman's injury was not sustained in the course of his employment.[7]

CONCLUSION

¶26 For the foregoing reasons, we reverse the superior court's dismissal of the complaint for lack of subject matter

[7] Because we reverse and remand for further proceedings, we need not address the issue of dual capacity.

jurisdiction and remand to the superior court for further proceedings consistent with this decision.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
ANDREW W. GOULD, Acting Presiding Judge

/s/
DIANE M. JOHNSEN, Judge