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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DONNA JONES, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

MOHAVE MARKET PLACE, *Respondent Employer,*

LIBERTY MUTUAL INS. CO., *Respondent Carrier.*

No. 1 CA-IC 16-0001
FILED 1-24-2017

Special Action - Industrial Commission

ICA Claim No. 20142-340291
Carrier Claim No. 5420600
Deborah A. Nye, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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By Chris Gulinson
Counsel for Petitioner Employee

Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent

Lundmark, Barberich, LaMont & Slavin, P.C., Phoenix
By Lisa M. LaMont, Danielle Vukonich
Counsel for Respondents Employer and Carrier

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Donn Kessler joined.

H O W E, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (“ICA”) award and decision upon review for a non-compensable claim. The petitioner, Donna Jones, presents one issue on appeal: whether Mohave Market Place’s placement of dumpsters on its property created an actual or increased risk of its employees being struck by cars. Because the evidence and law reasonably support the findings and conclusion of the administrative law judge (“ALJ”), we affirm the award.

FACTS AND PROCEDURAL HISTORY

¶2 Jones worked as a cashier at Mohave. One July night, while at work, Jones was hit by a car while taking trash to the dumpster behind the market. Jones filed a workers’ compensation claim, which was denied, and she timely requested an ICA hearing. The ALJ held two hearings for testimony from Jones, Mohave’s co-owner and three current or former employees, and the Mohave County Sheriff’s Office detective who investigated the incident.

¶3 Access to Mohave’s premises was from streets bordering the market on the south and west sides, with the market’s front entrance on the southwest corner of the main building. The market’s rear exit was on the east side of the building, and the garbage dumpsters were located in the northeast corner of the property. Although cars could go around the market, Mohave’s co-owner testified that the area by the dumpsters was gravel and not typically used.

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¶4 Just before 9 pm on the night of the incident, Jones, without work-related purpose or permission, opened Mohave’s safe and removed at least \$200, which she placed in her pocket. She then left the building through the rear exit and walked to the dumpsters. As she returned to the building, a slow-moving car hit her and knocked her to the ground. Jones was then repeatedly run over. She stated that after being run over the first time she was able to see the car reverse before it backed up over her. She was then able to see the headlights of the car before it ran her over for a third time and exited the property.

¶5 Jones testified that the area where she was hit was well-lit and that the driver had to have seen her. Mohave’s surveillance cameras did not show the “specific location where the applicant was struck and run over,” but it captured the car’s movements, including a U-turn. Jones’s description of the incident was consistent with the video except that she did not describe the U-turn. Jones testified that around the time of the incident, she was involved with illegal drugs such as methamphetamine, and blood work at the hospital on the night of the incident confirmed the presence of methamphetamine. She also stated that sometime after she was run over, the \$200 that she took from Mohave’s safe disappeared from her pocket, and she did not know what happened to it.

¶6 With regard to the car involved in the incident, Jones denied knowing who hit her, seeing the driver, or recognizing the car. At her deposition, Jones testified that when she went outside with the trash, the car was near the diesel pumps on the east side of the market. One of Jones’s co-workers testified that when he saw the surveillance video, he recalled having seen Jones talking to a man in a similar car in Mohave’s parking lot about a month before the incident. Another co-worker told the police that when she found Jones after the incident, the car was still in the parking lot and the window was being rolled up.

¶7 The detective testified that the sheriff’s office treated this incident as an aggravated assault and that he believed the driver was someone Jones had upset. The detective also testified that the fact the driver ran Jones over three times suggested that the driver’s conduct was intentional. Additionally, the detective stated that Jones did not seem forthcoming and thought that Jones had more information about the incident than she provided.

¶8 Following the evidentiary hearings and after reviewing post-hearing memoranda, which the ALJ adopted and incorporated into the award, the ALJ entered an award for a non-compensable claim. Jones

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requested administrative review, but the ALJ summarily affirmed the award. Jones timely appealed.

DISCUSSION

¶9 Jones argues that the ALJ erred by finding that an actual or increased risk did not exist. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but we review legal conclusions de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270 ¶ 14, 63 P.3d 298, 301 (App. 2003). To establish a compensable claim, Jones had the burden of proving that she had sustained an injury by accident arising out of and in the course of her employment. See A.R.S. § 23-1021. "Arising out of" refers to the origin or cause of the injury, while "in the course of" refers to the time, place, and circumstances of the injury in relation to the employment. *Keovorabouth v. Indus. Comm'n*, 222 Ariz. 378, 381 ¶ 8, 214 P.3d 1019, 1022 (App. 2009).

¶10 In this case, the parties agreed Jones was injured within the time, place, and circumstances of her employment. The only remaining question at the time of the hearings was whether Jones's injury arose out of her employment. Jones contends that her injury arose out of her employment because the configuration of Mohave's premises caused an actual or increased risk of a car hitting her.

¶11 To "arise out of the employment," the injury must result from some risk of the employment or be incidental to the discharge of the duties thereof. *Lane v. Indus. Comm'n*, 218 Ariz. 44, 47 ¶ 10, 178 P.3d 516, 519 (App. 2008). The nature of the risk has been categorized based on the work contribution involved as: (1) those peculiar to the employment; (2) those to which the employment causes an *increased exposure to risk*; (3) those that are *actual risks of the employment*; or (4) those that would not occur "but for the fact the employment placed the employee in a position where he or she was injured." *Id.* at 48 ¶ 11, 178 P.3d at 520 (emphasis added). In addition to evaluating the nature of the risk, it also is necessary to consider whether the origin of the risk is: (1) distinctly work related; (2) wholly personal; (3) mixed, i.e., partially work related and partially personal; or (4) neutral. *Id.* at ¶ 12, 178 P.3d at 520. An injury is unlikely to "arise out of the employment" when the origin of the risk is wholly personal. See *Royall v. Indus. Comm'n*, 106 Ariz. 346, 350, 476 P.2d 156, 160 (1970).

¶12 On review, Mohave asserts that Jones's injury did not arise out of her employment because the motivating cause for the assault was purely personal. Assault-related injuries are only compensable when the

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altercation arises out of a work-related dispute. *See, e.g., Colvert v. Indus. Comm'n*, 21 Ariz. App. 409, 410–11, 520 P.2d 322, 323–24 (1974). This is true regardless of who was the aggressor, because workers' compensation is a no-fault system. *Id.* at 411, 520 P.2d at 324.

¶13 The ALJ is the sole judge of witness credibility. *Henderson-Jones v. Indus. Comm'n*, 233 Ariz. 188, 191 ¶ 9, 310 P.3d 976, 979 (App. 2013). The ALJ resolves all conflicts in the evidence and draws all warranted inferences. *Id.* On appeal, this Court will not disturb an ALJ's conclusions regarding conflicting evidence unless they are wholly unreasonable. *Id.* at 191–92 ¶ 9, 310 P.3d at 979–80.

¶14 The ALJ heard testimony that the area where the accident occurred was well-lit and not often driven on. Although Jones stated that she did not know the driver of the car, her co-worker testified that he had seen Jones talking to a man in a similar car before. Further, the detective testified that the driver's conduct seemed intentional and that Jones was not completely forthcoming about what occurred. Based on all of this evidence, the ALJ concluded that Jones was not a credible witness. The ALJ held:

[T]he salient fact that the driver ran over applicant three times after having made a U-turn near her suggests to the undersigned that this was an intentional assault. Considering all the credible evidence I do not find the risk in this case to be neutral, nor do I find that the applicant's employment or her duties increased the risk of her assault. Instead, I find it reasonable to infer by a preponderance of the credible evidence that this assault was intentionally directed against applicant's person, that it was not a random accident, and that the motivations for it arose more likely than not from circumstances having to do with her personal and private activities.

Accordingly, because the evidence presented at the hearings is sufficient to support the ALJ's determination that the injury was wholly personal to Jones, the ALJ did not err by entering an award for a non-compensable claim.

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CONCLUSION

¶15 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA