IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

AUCTION EMPIRE, L.L.C., *Petitioner Employer*,

STANDARD FIRE INSURANCE CO./TRAVELERS INSURANCE,
Petitioner Carrier,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent*,

PAUL S. WELCH, JR., *Respondent Employee*.

No. 1 CA-IC 13-0017
FILED 11-26-2013

Special Action - Industrial Commission
ICA Claim No. 20121-160337
Carrier Claim No. 127CBEPE2166N
J. Matthew Powell, Administrative Law Judge

AFFIRMED

COUNSEL

Lester & Norton, P.C., Phoenix
By Steven C. Lester

Counsel for Petitioners Employer & Carrier

The Industrial Commission, Phoenix
By Andrew F. Wade, Chief Counsel

Counsel for Respondent

J. Wayne Turley, P.C., Phoenix
By J. Wayne Turley

Counsel for Respondent Employee

MEMORANDUM DECISION

Presiding Judge Winthrop delivered the decision of the Court, in which Judge Downie and Judge Thompson joined.

W I N T H R O P, Presiding Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review finding that the respondent employee ("Claimant") sustained a compensable industrial injury when he was struck by a car while trying to aid a stranded motorist. Four interrelated issues are presented on appeal which may be summarized as whether the administrative law judge ("ALJ") legally erred by finding that Claimant's injury arose out of and in the course of his employment. Because we find no legal error, we affirm.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2013),[1] 23-951(A), and Arizona Rule of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

---

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

PROCEDURAL AND FACTUAL HISTORY

¶3 The petitioner employer, Auction Empire, LLC ("Auction Empire"), hired Claimant on April 5, 2012, to be a sidewalk sign holder and to help set up for and clean up after auctions. When Claimant arrived for work that morning, he was given a six-foot sign and the location of the street corner where he would stand. He was instructed to speak to anyone who inquired about the auctions and to sound upbeat. Claimant walked to his assigned location, four blocks from Auction Empire at the southwest corner of University Drive and North Country Club Drive.

¶4 While standing on the street corner, Claimant observed a car stalled in the middle of the intersection. He testified that he was concerned that the car or its driver would get hit.[2] Because he believed the situation to be dangerous, he decided to help the driver move the vehicle out of the road. While the traffic light was red, Claimant proceeded into the intersection to help the stalled driver and was struck from behind by a car.

¶5 The Mesa Police Traffic Accident Report indicated that the car's driver was charged with running a red light and striking a pedestrian. The impact threw Claimant into the air, and he landed in the intersection on his head, sustaining serious injuries. Claimant testified that the next thing he remembered was waking up in the hospital. At the time of the hearing, he was still receiving medical care and was living in a group rehabilitation home.

¶6 Claimant filed a workers' compensation claim, which was denied for benefits. He timely requested a hearing, and one ICA hearing was held for testimony from the claimant and an Auction Empire representative. Auction Empire's member/manager, Dean A. Young, testified that Auction Empire held one auction for one day each month. One or two days before each auction, the company hired two to three sign holders to help promote the auction. Mr. Young stated that two sign holders were placed at major intersections near the Auction Empire, and one stood directly in front of the business.

¶7 Mr. Young testified that for liability reasons, Auction Empire specifically chose locations for its sign holders that would not require them to cross any major streets. He stated that he usually spoke to the

---

[2] The driver had gotten out of the vehicle and was looking around.

sign holders before they went to their assigned locations to give them safety instructions. He did not have an opportunity to speak to Claimant before he went to his assigned location because Claimant arrived for work late.

¶8 Following the hearing, the ALJ entered an award for a compensable claim. The ALJ found that Claimant was in the course of his employment and the accident arose out of his employment when he attempted to assist the stranded motorist and was injured. The ALJ also found that Claimant's conduct "was natural and probable" in relation to the situation he confronted and that his conduct "was reasonable under the circumstances." Auction Empire requested administrative review, but the ALJ summarily affirmed the award. Auction Empire then brought this petition for special action review.

DISCUSSION

¶9 For an injury to be compensable, it must "aris[e] out of and [be] in the course of employment." A.R.S. § 23-1021(A). "Arising out of" is defined as the origin or cause of the injury. *Royall v. Indus. Comm'n*, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970). "In the course of" pertains to the time, place, and circumstances of the accident in relation to the employment. *Id.*

¶10 In order 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. *Royall*, 106 Ariz. at 349, 476 P.2d at 159. The nature of these risks is categorized both by work contribution and origin. *See* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* ("*Larson's*"), §§ 3.02-.05, at 3-4 to -9, 4.01-.04, at 4-2 to -4 (2013).

¶11 The nature of the work contribution, ranging from strongest to weakest, may be *peculiar* (exposure to risk only at work), *increased* (greater quantity of exposure to risk at work), *actual* (exposure at work but not greater than when not working), and *positional* (random exposure to risk connected to work only by time and place). *Nowlin v. Indus. Comm'n*, 167 Ariz. 291, 293, 806 P.2d 880, 882 (App. 1990). The origin of the risk can be distinctly work related (e.g., machinery malfunctioning or dynamite exploding), wholly personal (e.g., a heart attack entirely attributable to a preexisting heart condition or a death from natural causes), mixed (i.e., partially work related and partially personal), or neutral (e.g., being hit by a stray bullet or struck by lightning). *See Royall*, 106 Ariz. at 350, 476 P.2d at 160.

¶12 Here, the parties agree that the resolution of the compensability issue is controlled by this court's interpretation of *Food Products Corporation v. Industrial Commission*, 129 Ariz. 208, 630 P.2d 31 (App. 1981). In *Food Products*, the claimant was a delivery truck driver. On the way to his first delivery of the day, he observed a woman struggling to push her stalled vehicle out of "the fast lane of the six-lane thoroughfare" to the curb. *Id.* at 208, 630 P.2d at 32. Because "visibility was limited in the dawn light, and rush hour traffic was forthcoming," the claimant believed that the woman and the child in the car were in danger. *Id*. For that reason, he parked his truck and helped her push the car out of the road to prevent her or anyone else from having an accident. While assisting the woman push the car out of the road, he was struck by a truck and sustained serious injuries.

¶13 On appeal, we affirmed the ALJ's award for a compensable claim. With regard to the "arising out of" element, we recognized that the claimant's employment as a deliveryman caused him to come into contact with the situation of the stalled vehicle, a positional risk.[3] *Food Products*, 129 Ariz. at 211, 630 P.2d at 34. With regard to the origin of the risk, we found that the source of the injury was not related to a risk personal to the employee nor distinctly associated with the employment, so in other words, it was a neutral risk. *Id.* at 210, 630 P.2d at 33. Discussing the "in the course of" element we held:

> [T]he accident clearly occurred during the time of the employee's regular work schedule, and in a place where he could reasonably have been expected to be for his delivery route. However, the circumstance of the accident was only incidentally related to the performance of the employee's duties. It was essentially a humanitarian response by the employee to a situation which the employee perceived as an emergency faced by a fellow motorist.

Id. at 209, 630 P.2d at 32. We concluded that the employee "reasonably believed that an emergency existed," and under the circumstances, it was "natural and probable that the employee would stop and attempt to move the stranger's vehicle to safety." *Id.* at 211, 630 P.2d at 34. Further, we affirmed the ALJ's finding that the claimant's conduct was "reasonable

---

[3] *See also Larson's* § 28.02[3], at 28-12 to -17 (rescue of a complete stranger as a positional risk).

under the circumstances . . . [d]espite the lack of express or implied permission from the employer" to engage in this activity. *Id.*

¶14 Here, the ALJ made factual findings that analogized this case to the facts in *Food Products*. We defer to the ALJ's factual findings when, as here, they are supported by the record. *Young*, 204 Ariz. at 270, ¶ 14, 63 P.3d at 301. The ALJ stated that, as in *Food Products*, it was "natural and probable" that Claimant would "stop and attempt to move the stranger's vehicle to safety." The ALJ also found that "the conduct of [Claimant] was reasonable under the circumstances," even without express or implied consent from his employer.

¶15 Auction Empire argues, as it did before the ALJ, that this case is factually distinguishable from *Food Products* because (1) no "true emergency" existed and (2) Claimant did not act in a "reasonable" manner. As noted above, however, the ALJ made contrary factual findings that are supported by the record and undermine both arguments. Furthermore, regarding the necessity of a "true emergency," the *Food Products* court's description was that "the employee reasonably believed that an emergency existed, which prompted his action." *Food Products*, 129 Ariz. at 211, 630 P.2d at 34 (relying on *D'Angeli's Case*, 369 Mass. 812, 343 N.E.2d 368 (1976)); *see also O'Leary v. Brown-Pacific Maxon, Inc.*, 340 U.S. 504 (1951) (not necessary that rescue recipient have been in actual danger for a compensable claim, only that the conditions of employment create the "zone of special danger" out of which the injury arose). We find no legally significant distinction between the "emergency" perceived in *Food Products* and Claimant's perception of an emergency in this case. Because the ALJ's findings of fact are supported by the record, we affirm.

¶16 Auction Empire also argues that the positional risk doctrine alone does not render it liable for the claimant's injuries. We agree. We disagree, however, with Auction Empire's characterization of the origin of the risk as personal. We note that the "arising out of" and "in the course of" tests are not independent, but are both parts of a single test known as the "quantum theory of work connection." *See Noble v. Indus. Comm'n,* 188 Ariz. 48, 52-53, 932 P.2d 804, 808-09 (App. 1996) (citations omitted). For that reason, all portions of the test are considered together when evaluating liability for injuries. Here, like in *Food Products*, Claimant's accident occurred during his regular work hours and in a place where he could reasonably have been expected to be: holding Auction Empire's promotional sign. With regard to the nature and origin of the risk, i.e. the work contribution, Claimant's employment as a sign holder placed him at a time and place where he could come into contact with a stalled vehicle.

Being struck by a vehicle running a red light while performing a humanitarian act is neither work related, nor wholly personal, so the origin of the risk is neutral. For these reasons, we agree with the ALJ that the facts here are analogous to the facts in *Food Products*, and we affirm the ALJ's award of a compensable claim.