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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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AUSTIN PECK, *Petitioner,*

*v.*

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

CITY OF GOODYEAR, *Respondent Employer,*

COPPERPOINT AMERICAN INSURANCE COMPANY, *Respondent  
Carrier.*

No. 1 CA-IC 17-0038  
FILED 6-19-2018

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Special Action - Industrial Commission  
ICA Claim No. 20153-630272  
Carrier Claim No. 15A01254  
The Honorable Rachel C. Morgan, Administrative Law Judge

**AFFIRMED**

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COUNSEL

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By Jason M. Porter  
*Counsel for Respondent ICA*

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Toby Zimbalist, Attorney at Law, Phoenix  
By Toby Zimbalist  
*Counsel for Amicus Curiae Professional Firefighters of Arizona*

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**MEMORANDUM DECISION**

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Kenton D. Jones joined.

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**M O R S E**, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") decision denying petitioner employee Austin Peck's claim for workers' compensation benefits.<sup>1</sup> For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Peck worked for the City of Goodyear ("Goodyear") as a firefighter emergency medical technician beginning in April 2008, and was promoted to engineer in November 2015.<sup>2</sup> On or about October 30, 2015, Peck was diagnosed with sinonasal undifferentiated carcinoma ("SNUC") involving the nasal cavity.

¶3 Peck stopped going on firefighting calls in November 2015 and subsequently applied for workers' compensation benefits on December 22, 2015. On February 22, 2016, Copperpoint American Insurance Company denied Peck's claim for benefits.

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<sup>1</sup> We have reviewed, considered, and appreciate the amicus brief filed in this case. "However, in accordance with our practice, we base our opinion solely on legal issues advanced by the parties themselves." *Ruiz v. Hull*, 191 Ariz. 441, 446, ¶ 15 (1998).

<sup>2</sup> Peck also worked as a seasonal wildland firefighter during two seasons before his employment by Goodyear.

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¶4 Peck timely requested an ICA hearing. The administrative law judge ("ALJ") heard medical testimony from Drs. Grover and Salganick. The doctors testified about Peck's possible occupational exposure to carcinogens generally and opined about whether SNUC is classified as an adenocarcinoma, an enumerated cancer pursuant to Arizona Revised Statutes ("A.R.S.") section 23-901.01(B).

¶5 On April 13, 2017, the ALJ decided that Peck's claim was noncompensable and ordered that Peck's claim for benefits be denied. On May 31, 2017, the ICA affirmed the noncompensable claim decision and award.

¶6 Peck timely requested special action relief.

¶7 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

## DISCUSSION

### I. STANDARD OF REVIEW

¶8 "On review of an Industrial Commission award, we must view the evidence in the light most favorable to sustaining the Industrial Commission's findings and award." *Roberts v. Indus. Comm'n*, 162 Ariz. 108, 110 (1989). Although "[w]e liberally construe Arizona's Workers' Compensation Act [] to effect its purpose of having industry bear its share of the burden of human injury as a cost of doing business," this "is not synonymous with a generous interpretation and we are constrained by the plain language of the Act." *Hahn v. Indus. Comm'n*, 227 Ariz. 72, 74, ¶ 7 (App. 2000) (internal quotation marks omitted). We deferentially review the ALJ's factual findings but review de novo the ALJ's legal conclusions. *Gamez v. Indus. Comm'n*, 213 Ariz. 314, 315, ¶ 9 (App. 2006). "We will not set aside an award unless it cannot be supported by any reasonable theory of the evidence." *Id.*

### II. THE CLAIM WAS PROPERLY DENIED

#### A. Occupational Disease

¶9 The Arizona Workers' Compensation Act (the "Act") provides that an employee who sustains an injury by accident arising out of and in the course of employment shall be entitled to compensation for the loss sustained. A.R.S. § 23-1021.

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¶10 The compensability of an employee's claim based upon conditions resulting from an occupational disease is governed by A.R.S. § 23-901.01.<sup>3</sup> *Phx. Pest Control v. Indus. Comm'n*, 134 Ariz. 215, 219 (App. 1982); see A.R.S. § 23-901(13)(c) ("An occupational disease that is due to causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and not the ordinary diseases to which the general public is exposed, and subject to § 23-901.01 . . .").

¶11 Pursuant to A.R.S. § 23-901.01(A), an occupational disease shall be deemed to arise out of the employment if six requirements all exist: (1) the occupational disease is directly caused by the conditions under which the work is performed; (2) the disease can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) the disease can be fairly traced to the employment as the proximate cause; (4) the disease does not come from a hazard to which an employee would have been equally exposed outside of the employment; (5) the disease is incidental to the character of the business and not independent of the relation of employer and employee; and (6) the disease appears to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence, although it need not have been foreseen or expected. See *Phx. Pest Control*, 134 Ariz. at 219 (noting that the six statutory causation requirements are applicable to all claims based upon conditions resulting from an occupational disease).

¶12 Peck argues that the evidence within the record established, by a preponderance of the evidence, that he was undeniably exposed to carcinogens on the job generally and, therefore, the ALJ's decision is unfounded.

¶13 While sympathetic to Peck's case, our standard of review compels that we affirm the noncompensable claim decision and award. See *New Sun Bus. Park, LLC v. Yuma Cty.*, 221 Ariz. 43, 47, ¶ 16 (App. 2009) ("[W]e are not at liberty to rewrite the statute under the guise of judicial interpretation." (internal quotation marks omitted)). The applicable law is not in dispute: To establish that his claim was compensable, Peck was

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<sup>3</sup> A.R.S. §§ 23-901 and 23-901.01 were amended and clarified in 2017; however, we look to the statutes as written in 2015 in this case because statutes in effect on the date of injury govern a claimant's substantive rights. See, e.g., *Alvarado v. Indus. Comm'n*, 148 Ariz. 561, 563 (1986); *Howard P. Foley Co. v. Indus. Comm'n*, 151 Ariz. 522, 523 (App. 1986).

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required to establish, by a preponderance of the evidence, all material elements of the claim, including causation and the necessary connection to his employment. *T.W.M. Custom Framing v. Indus. Comm'n*, 198 Ariz. 41, 45-46, ¶ 12 (App. 2000). Where the cause of an alleged occupational disease is not readily apparent, the medical evidence must establish a causal relationship. See *Reynolds Metals Co. v. Indus. Comm'n*, 119 Ariz. 566, 569 (App. 1978); see also *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, 343, ¶ 9 (App. 2012) (noting that causation must be proven to a reasonable degree of medical probability).

¶14 Based upon our review of the record, we find that the ALJ properly applied these legal standards and that sufficient evidence in the record supported the ALJ's conclusion that Peck's cancer was not causally connected to his employment. "Among the special provisions of section 23-901.01 that are applicable to occupational diseases is the requirement that the employment increase the risk that results in the disease." *McCreary v. Indus. Comm'n*, 172 Ariz. 137, 141 (App. 1992). "Occupational diseases, as the very name implies, are produced by the particular substances or conditions inherent in the environment of the employment." *Phx. Pest Control*, 134 Ariz. at 220. Although causal connection was disputed below, "we must view the evidence in the light most favorable to sustaining" that decision. *Roberts*, 162 Ariz. at 110.

¶15 At the hearing, no one disputed that Peck was diagnosed with SNUC; however, the medical testimony and opinions diverged about the causal relationship between Peck's occupation as a firefighter and his cancer. The medical testimony and opinions could not establish any etiology of the rare sinonasal cancer or relate any particular risk or causal exposure occasioned by Peck's work, in contrast to that of the general public. See *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506 (1987) ("Reasonable assurances are met if medical probabilities of industrial contribution exist. These probabilities are met for purposes of the act if the possibility can be defined as more than insubstantial or slight." (internal quotation marks omitted)).

¶16 On review below, the ALJ considered the record "in its entirety" and determined that Peck's claim was noncompensable because "to accept applicant's claim as an industrial responsibility would reduce industrial insurance to a general health and accident insurance, which it is not."

¶17 The evidence before the ALJ included Peck's testimony and the medical testimony and opinions of Drs. Grover and Salganick, upon

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which Peck largely bases his arguments, and the written medical opinion of Dr. Robert Brown.

¶18 Dr. Ryan Grover, a radiation oncologist who had treated Peck's cancer, testified in support of Peck's claim. Grover stated that the focus of his practice includes head and neck cancer and opined that Peck's cancer was more likely than not related to his occupation as a firefighter. Grover noted that Peck responded to "many fires including car and home fires where petroleum, plastics, and other combustible materials are involved."

¶19 In support of his opinion, Grover considered Peck's medical records and social and occupational history, and Peck's testimony that his social history had no bearing on his SNUC diagnosis.

¶20 Grover testified that he reviewed "the two largest studies I could find on the matter" and opined that the two studies "show that the risks of head and neck cancers in firefighters is [] measurably increased relative to the back spine population or control groups."

¶21 Grover acknowledged that he was unfamiliar with the International Agency for Research on Cancer ("IARC") monographs specifically, but stated that he was generally aware of chemicals that can cause cancer in humans and other carcinogens. However, Grover could not relate any particular exposure to Peck's development of SNUC and was unable to testify specifically about any certain etiology of SNUC.

¶22 Rather, Grover testified of his limited understanding of SNUC, stating that statistically, incidents of the cancer were said to occur at a rate of ".02 per 100,000" and "because of the rarity of it there has been controversy about the etiology . . . mak[ing] proof very, very difficult to establish." Grover stated in sum that "there is not a lot of good information available, you know, but extrapolating from the Daniels and ICARE study it is reasonable to conclude that [Peck's cancer is] related - his cancer is related to - or is likely related to his occupation."

¶23 Although Grover was unable to testify about any of Peck's actual occupational exposure bearing on the matter, Grover opined that *if* Peck had any established occupational exposure to soot, wood dust, and smoke for example, and had no such non-occupational exposure, "it would follow that, that would increase the risk of his cancer being related with dust exposure which was occupational." When asked on direct whether Peck was exposed to soot, to a reasonable degree of medical probability, Grover opined that "I certainly think it's possible [Peck] was exposed to

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soot, but I can't speak for the actual exposure." Such medical testimony is merely equivocal and insufficient to support an award of compensation. *See Hackworth*, 229 Ariz. at 343, ¶ 10 ("Medical testimony is equivocal when it is subject to more than one interpretation or when the expert avoids committing to a particular opinion.").

¶24 The ALJ also heard testimony by Dr. Jason Salganick, board certified in medical oncology, who similarly stated that SNUC is an extremely rare subset of sinonasal cancer. Salganick testified of his disagreement with Grover's opinion that Peck's condition was causally-related to firefighting.

¶25 Salganick stated that no scientific evidence established the etiology of SNUC or related SNUC (or an increased risk of SNUC) to occupational firefighting. Moreover, Salganick testified that because "little is known even about [SNUC's] causes," no "specific carcinogen, much less those among a potential risk of carcinogens thought to be related to fire," were known to cause SNUC, "[s]o any conclusion connecting firefighting or the . . . combustion products of firefighting with this tumor is simply impossible."

¶26 Salganick explained that "there simply is not enough known about this tumor type." In his practice, Salganick had seen only two patients diagnosed with SNUC and neither were firefighters. Salganick was "aware of papers that have supposed some relationship with fires [and the etiology of SNUC] but nothing that's really definitive."

¶27 Salganick based his medical testimony and opinion in part on his own independent medical examination ("IME") of Peck, which he performed with Dr. Daniel Brooks, board certified in medical toxicology, and afterwards co-authored an independent medical evaluation report.

¶28 Salganick also considered medical and scientific literature and reviewed Peck's medical and employment records, including those from Peck's physician who performed the diagnosis-related surgery and the Goodyear fire department call list to which Peck responded between 2008 and 2015.

¶29 Salganick and Brooks noted within their IME report that although Peck was probably "exposed to various products of combustion including formaldehyde, [] this exposure cannot be definitely established nor quantitated"; "[i]n other words, formaldehyde is a common component of indoor air pollution, and humans are exposed to it in many indoor and residential settings."

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¶30 Further, Salganick testified about the IARC monographs related to occupational firefighting and cancer. Salganick explained that "the evidence was quite weak" but "there is a possible but not a probable association between firefighting and cancer" generally.

¶31 In response to Grover's testimony, Salganick stated that "[t]here was insufficient evidence in the literature to associate [SNUC] with firefighting or the toxins, the products of firefighting." Salganick opined that Grover reached his opinion "more by gut than by science" and noted that Grover was unfamiliar with the IARC monographs. Moreover, Salganick stated that the IARC monograph related to firefighting showed only a possible relationship to all cancers generally and emphasized that the IARC monographs relating to wood dust, wood smoke, and soot in particular were irrelevant to firefighting and SNUC. Further, Salganick testified that "SNUC is not mentioned whatsoever" and "[t]he category of which SNUC is a subset, that would be nasal pharyngeal cancer . . . is not mentioned specifically but ENT or neck cancers are mentioned as a group . . . and . . . there was no convincing association between neck cancer and firefighting."

¶32 On this record, we cannot say that the ALJ erred in finding that the medical evidence did not establish to a reasonable degree of medical probability that Peck's work had contributed to his cancer. Instead, substantial evidence showed that a causal relationship between Peck's cancer and his work could not be established. Grover's speculative opinion that the cancer was "likely related to his occupation" does not create a conflict in the evidence sufficient to find that the ALJ's decision was devoid of evidentiary support. *See Hackworth*, 229 Ariz. at 343, ¶ 10. Similarly, the Grover and Salganick equivocal testimony that Peck was likely occupationally exposed to various known carcinogens fails to bring Peck's claim within the Act's compensable coverage. *See Dunlap v. Indus. Comm'n*, 90 Ariz. 3, 6 (1961) ("[T]he Act does not contemplate a general health and accident fund; hence, there must be a causal connection between the employment and the injury.").

¶33 Having "[c]onsider[ed] the evidence in its entirety," the ALJ properly resolved the conflicts in the medical evidence "by accepting the opinions of Dr. Salganick as being more probably well-founded and correct." *See Gamez*, 213 Ariz. at 316, ¶ 15 ("It is the ALJ's responsibility to resolve conflicts in the medical evidence, and we will not disturb that resolution unless it is wholly unreasonable." (internal quotation marks omitted)).



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¶34 Based upon this record, the ALJ reasonably concluded that Peck was not injured by the result of an occupational disease and we will not substitute our view of the evidence for that of the ALJ. *See Glodo v. Indus. Comm'n*, 191 Ariz. 259, 262 (App. 1997) ("The ALJ is the sole judge of witness credibility . . . and on review, this Court will not substitute its judgment for that of the ALJ.").

**B. Presumed Occupational Disease**

¶35 In pertinent part, A.R.S. § 23-901.01(B) (2015), provides that if a firefighter was exposed to a "known carcinogen" that is "reasonably related" to his cancer, then any "brain, bladder, rectal or colon cancer, lymphoma, leukemia or aden carcinoma [sic<sup>4</sup>] or mesothelioma of the respiratory tract . . . is presumed to be an occupational disease . . . and is deemed to arise out of employment."

¶36 As with the ALJ's finding regarding causation, we must defer to the ALJ's determination regarding Peck's cancer. The ALJ considered conflicting medical evidence about whether SNUC is classified as an adenocarcinoma, an enumerated cancer eligible to qualify for the occupational disease presumption.

¶37 Peck presented the written medical opinion of Dr. Robert Brown, professor and chair in pathology and laboratory medicine. Brown noted that "firefighters ha[ve] an elevated odds ratio of head and neck cancer" and because SNUC "is a head and neck cancer and is thought to arise from the Schneiderian epithelium," Peck's cancer would "represent a dedifferentiated form of adenocarcinoma" because "[h]istologically, Schneiderian epithelium is comprised of ciliated columnar/cuboidal cells, interspersed goblet cells and non-ciliated columnar cells, whose neoplastic counterparts are adenocarcinoma."

¶38 By contrast, Salganick stated that the attempt to classify SNUC as an adenocarcinoma was not consistent with his review of published medical literature. Salganick testified of his disagreement with Brown's opinion linking SNUC to an additive carcinoma:

The name of the entity is sinonasal undifferentiated [and] that means that it's undifferentiated. It means that we don't know

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<sup>4</sup> The parties acknowledge that "aden carcinoma" in the 2015 statute means "adenocarcinoma." The legislature amended the statute in 2017 to correct this error. A.R.S. § 23-901.01(B) (Supp. 2017).

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where it came from. So studies that have tried to look at differentiating or at least trying to figure out, well, [] if it was undifferentiated maybe it started off as a differentiated tumor, meaning it was once a claim or perhaps it was once an adeno and then dedifferentiated, became undifferentiated, that's an evolution, meaning there were some traits that one can find. So there were studies that were – are being done on a genetic level to try to find out what the – what this tumor was before it became undifferentiated. When I see the research, I couldn't find any definitive pathway that had been established. Again and again experts have said this is a tumor that simply cannot be classified.

¶39 Regarding Brown's medical opinion, as purportedly supported by a study of occupational head and neck cancer, Salganick stated the study upon which Brown relied "specifically did not analyze nasopharyngeal cancer" nor address SNUC specifically.

¶40 Salganick pointed to the World Health Organization definition and classification of SNUC "as a highly aggressive and clinicopathologically distinctive carcinoma of uncertain histogenesis that typically presents with locally extensive disease." He explained that "uncertain histogenesis" meant "that the origin or the cell line that generates this tumor is unknown." Within the IME report, Salganick and Brooks noted their inability to "definitely determine that the claimant was exposed to a known carcinogen, as identified by IARC, during his employment as a firefighter."

¶41 Because the ALJ could reasonably resolve the conflicts in the medical evidence by accepting Salganick's medical opinion that SNUC is not classified as an adenocarcinoma, over that of Brown's, we will not disturb that resolution. *See Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557 (App. 1979) (noting that it is the ALJ's "obligation to resolve conflicting medical evidence, and his resolution will not be disturbed unless it is wholly unreasonable"). Accordingly, we affirm ALJ's decision that the statutory presumption did not apply.

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**CONCLUSION**

¶42 For the foregoing reasons, we affirm the decision denying Peck's claim for benefits.



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