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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CITY OF PHOENIX*, **, *Petitioner Employer*

CITY OF PHOENIX*, **, *Petitioner Carrier*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent*

DEREK E. HENDERSON, *Respondent Employee.*

No. 1 CA-IC 18-0079
FILED 10-31-2019

Special Action - Industrial Commission

ICA Claim No. 20170-460124*
20173-050400**
Carrier Claim No. F187372*
6433040**

C. Andrew Campbell, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

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MEMORANDUM DECISION

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

M O R S E, Judge:

¶1 Petitioner City of Phoenix ("City") appeals from an award in favor of Respondent Employee Derek E. Henderson, a detective for the City of Phoenix Police Department, finding that a compensable injury arose from events in which Detective Henderson became the first responder for his unconscious mother, whom he was unable to resuscitate.¹ Because we find the Administrative Law Judge ("ALJ") failed to properly analyze the competing risks that led to the injury, and because we therefore conclude the injury was not connected to the employment, we set aside the award.

FACTS AND PROCEDURAL BACKGROUND

¶2 Detective Henderson served the Phoenix Police Department as a patrol officer for ten years before he became a detective assigned to property crimes. One of the primary duties of patrol officers is to respond to "check-welfare" calls. During his time as a patrol officer, Detective Henderson was the first responder to many emergency scenes where people were seriously injured, including one in which he performed CPR on a person until medical personnel arrived, thereby saving the person's life.

¹ Although two claims were consolidated below for agency adjudication, the parties agree that only the claim arising from date of injury September 28, 2016, designated as ICA Claim No. 20170-460124 and identifying the events of that specific day as the cause of injury, is at issue in this appeal.

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¶3 In 2005, Detective Henderson became a detective in the Investigative Division. His primary duty in that position was to perform follow-up investigations of property crimes. His primary duties did not include acting as a first responder for check-welfare calls, but department policy allowed him to do so if he was available and in the vicinity.

¶4 On the morning of September 28, 2016, Detective Henderson was working at his desk when he received a phone call from his sister. She informed him that a caregiver who was scheduled to be at their mother's home was standing outside the house but had been unable to contact their mother to open the door. Detective Henderson decided to check on his mother because his office was only a mile away from her house. Detective Henderson got in his assigned police vehicle and left the police station. As he was on his way to his mother's house, a check-welfare call for his mother's address was broadcast over the radio. Detective Henderson responded to the dispatcher that he was already on his way. When he arrived, he let himself in with a key and found his mother unconscious and unresponsive. He called for dispatch to send paramedics and performed CPR on his mother until they arrived and took over. Patrol officers, sent by dispatch, also arrived. His mother did not regain consciousness and was pronounced dead shortly thereafter.

¶5 Within the next few months, Detective Henderson began having trouble at work and was eventually diagnosed with PTSD and placed on administrative leave. He filed a worker's compensation claim, claiming his mental injury was caused by his failed attempt to resuscitate his mother. The City, which is self-insured, denied the claim as not compensable.² Detective Henderson requested a hearing.

¶6 At the hearing, the ALJ heard from several police department witnesses. The lieutenant who oversaw the property crimes unit testified that property crimes detectives are not expected to respond to check-welfare calls but are not prohibited from doing so if they are in the field nearby and are available. He testified that property crimes detectives are not supposed to leave their posts or use city vehicles for routine personal matters but that the Phoenix Police Department is "not going to fault"

² As noted, Detective Henderson also filed another claim, arguing that his mental injury was caused by his experiences during his years as a first-responder patrol officer. The City denied that claim too. Detective Henderson requested hearings for both denials, and the cases were consolidated. As part of the consolidated award, the ALJ found the claim based on the years as a patrol officer to be non-compensable.

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Detective Henderson for leaving his desk and using a police vehicle in this particular situation. An assistant chief testified that even though Detective Henderson responded to the call, protocols dictated that the dispatcher assign a patrol officer to the scene as well.

¶7 Additionally, Detective Henderson testified that the cause of his mental health issues was the event with his mother on September 28, 2016. He called Joyce Vesper, Ph.D., to testify on his behalf. She is a licensed psychologist who has been treating Detective Henderson since June 2017. She testified that the event with his mother is a substantial contributing cause of Detective Henderson's mental injury.

¶8 The ALJ accepted Dr. Vesper's opinion that Detective Henderson has a mental injury substantially caused by the event with his mother. He also found that Detective Henderson was "performing a police function" when he answered the check-welfare call to his mother's house and that, therefore, Detective Henderson was in the course of his employment as he tried to resuscitate his mother. The ALJ also concluded, without any specific analysis, that the mental injury Detective Henderson suffered "[arose] out of his employment" with the City. Finally, the ALJ determined that the stress of the incident was unusual, unexpected, or extraordinary as required by Arizona statute. Thus, the ALJ found Detective Henderson's mental injury to be compensable. Upon administrative review, the award was affirmed.

¶9 The City challenges the award. We have jurisdiction under A.R.S. §§ 12-120.21(A)(2) and 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶10 In reviewing awards issued by the ICA, "[w]e defer to the ALJ's factual findings unless no reasonable evidence supports them and view the evidence in the light most favorable to upholding the award." *Danial v. Indus. Comm'n*, 246 Ariz. 81, 83, ¶ 11 (App. 2019). We review issues of law, such as whether an injury arose out of employment, *de novo*. *Ibarra v. Indus. Comm'n*, 245 Ariz. 171, 174, ¶ 12 (App. 2018).

¶11 When interpreting the Worker's Compensation Act ("Act"), we must keep in mind its purpose, which is "to spread the risk of injury inherent in a job" over all employers. *Whittington v. Indus. Comm'n*, 105 Ariz. 567, 569 (1970). Because it is remedial, we are called upon to give the Act a liberal construction to achieve its purpose. *Special Fund Div. v. Indus. Comm'n*, 191 Ariz. 149, 152, ¶ 9 (1998). However,

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[a] liberal construction is not synonymous with a generous interpretation. To interpret liberally envisions an approach with an open and broad mind not circumscribed by strictures or predilection, whereas a generous interpretation suggests free-handedness-largess. It is not in the power of this court to "give" but it definitely is its duty to interpret the law to insure that what the law gives is not withheld.

Nicholson v. Indus. Comm'n, 76 Ariz. 105, 109 (1953). Thus, we will not construe the Act to cover injuries unless those injuries meet every statutory requirement.

A. Compensability Standard

¶12 An injury is compensable under the Act if it occurs "by accident arising out of and in the course of . . . employment." A.R.S. § 23-1021. An accident includes "any unexpected, injury-causing event" connected to employment. *Dugan v. Am. Express Travel Related Servs. Co.*, 185 Ariz. 93, 99 (App. 1995). In general, the "course of employment" element pertains to the time, place, and circumstances of the injury, while the "arising out of" element pertains to the cause of the injury relevant to the employment. *Royall v. Indus. Comm'n*, 106 Ariz. 346, 349 (1970). These three elements – "by accident," "arising out of," and "in the course of" – must be independently established, but the "arising out of" and "in the course of" elements should be considered together to determine whether there is "the necessary degree or quantum of 'work-connection.'" *Id.* at 349-50. Because we find it dispositive in this case, we focus on the "arising out of" requirement and view the "in the course of" requirement only as it relates to a requisite "work connection."

B. Did the Injury Arise Out of the Employment?

¶13 The evidence supports the ALJ's conclusion that Detective Henderson was injured by accident and was performing a police duty when he attempted to resuscitate his mother. Responding to check-welfare calls was not a primary duty of Detective Henderson as a property crimes detective, but he was not prohibited from doing so. When he was already en route to his mother's house and aware there might be a problem, he voluntarily chose to respond to the call from dispatch and elected to continue to his mother's home. After he accepted the call, he was acting in the course of his employment.

¶14 As noted, however, the finding that the injury occurred in the course of employment, standing alone, is insufficient for compensability.

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See id. at 349 ("There is no 'rule of thumb' that an injury is compensable merely because it was incurred during working hours."). The ALJ should have proceeded to analyze the risks involved to determine whether Detective Henderson's injury arose out of his employment. *See Nowlin v. Indus. Comm'n*, 167 Ariz. 291, 293 (App. 1990) (to determine whether an injury arose out of employment, the court "must analyze the risks associated with compensable injuries"). The ALJ's conclusory statement that "the injury arose out of [Detective Henderson's] employment" is not supported by an identification of the risks involved or an analysis of how those risks connected the injury to the employment.

¶15 Categories of risks associated with employment include (1) employment risks—those distinctly associated with the employment; (2) personal risks—those personal to the worker; and (3) mixed risks consisting of a combination of personal and work risks. *Id.* at 294.³ Risks arising solely from employment are clearly compensable under the Act. On the other hand, personal risks, *i.e.*, those arising solely from personal circumstances, are not covered. *See id.* at 294 ("No one seriously argues that industry should be responsible for the enemy who kills for no reason other than one personal to the worker."); *see also Sacks v. Indus. Comm'n*, 13 Ariz. App. 83, 84 (1970) (finding no "causal connection between the injury and the employment" where a worker suffered a herniated disc when rising from a toilet on work premises). Mixed risk cases, where personal and employment risks combine, require analysis of the work connection by considering the risks in relation to the "course of employment" element to determine if there is a "quantum of work connection." *Royall*, 106 Ariz. at 350. In these cases, our courts have used either an increased-risk test, *Sacks*, 13 Ariz. App. at 84, or an actual-risk test, *Nowlin*, 167 Ariz. at 295-96. If both the "arising" and the "course" elements are weakly or minimally connected to the employment, the injury is not compensable. *Nowlin*, 167 Ariz. at 295 (citing *Sacks*, 13 Ariz. App. at 84).

³ The Arizona Supreme Court has recognized a fourth category: "neutral" risks, those that are "neither distinctly personal to claimant nor associated with the employment," such as an unexplained fall. *Circle K Store No. 1131 v. Indus. Comm'n*, 165 Ariz. 91, 96 (1990). The Court adopted the positional-risk test in that case, applying a but-for standard: whether the injury would not have occurred but for the employment. *Id.* A neutral risk is not before us here, so we do not apply the positional-risk test.

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¶16 In this case, we conclude that the risk was primarily personal. The cause of the injury identified by the ALJ was the stress of Detective Henderson's unsuccessful attempt to resuscitate his mother.⁴ That he answered the call from dispatch and was "on the clock" when he arrived at the house contributed little to this stress because he was going to check on his mother's well-being regardless of whether he accepted the check-welfare call. The employment did not much contribute to this stress; it was incidental to it. And the risk of injury here was not simply that CPR would be unsuccessful; that is not an uncommon event for a first responder. Instead, what caused the injury here is that Detective Henderson was unable to successfully resuscitate his mother, a deeply personal risk. Thus, Detective Henderson's employment did not increase the risk of the mental injury that occurred, nor was the injury an actual risk of the employment.

¶17 On this set of facts, both the causal connection and the "course of" connection, if any, to the employment are weak. And when both factors are simultaneously weak a court may find that the necessary degree or quantum of work connection is not present to justify an award. *Nowlin*, 167 Ariz. at 295. Therefore, we find that the injury is not compensable.

CONCLUSION

¶18 We hold that the injury in this case is not compensable because it did not arise out of Detective Henderson's employment. We therefore set aside the award.



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

⁴ At oral argument, Respondent's counsel conceded that the victim being Detective Henderson's mother was a compelling factor in the injury that occurred, precluding the need for further fact-finding on this element.