DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALPHA SECURITY LLC, Petitioner Employer, SCF ARIZONA, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, KAMAL IBRAHIM, Respondent Employee.	)	1 CA-IC 08-0066 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20073-520185

Carrier Claim No. 0745101

Administrative Law Judge Paula R. Eaton

AWARD AFFIRMED

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G E M M I L L, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a compensable claim. The petitioner employer, Alpha Security LLC ("Alpha"), and the petitioner carrier, SCF Arizona ("SCF"), argue that the administrative law judge ("ALJ") made unsupported findings and erroneously applied the unexplained injury presumption to find the respondent employee's ("claimant's") injury to be compensable. Because we find sufficient evidence in the record to support the ALJ's ultimate finding of a work connection and no error of law, 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) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. On appeal, this court defers to the ALJ's reasonably supported factual findings, but independently reviews whether a claimant's injury arose out of and in the course of his employment, a question of law. *See, e.g., Finnegan v. Indus. Comm'n,* 157 Ariz. 108, 109, 755 P.2d 413, 414 (1988).

PROCEDURAL AND FACTUAL HISTORY

¶3 On September 29, 2007, the claimant was injured while employed as a security guard for Alpha. He sustained head injuries and filed a workers' compensation claim. SCF denied the claim for benefits, and the claimant timely requested a hearing. A hearing was held on two separate days and documentary evidence was filed.

¶4 The claimant came to the United States from Sudan in 2004 and primarily speaks Arabic. He testified that he began working at Alpha in 2006. At the time of his injury, the claimant had been assigned to a construction site at Weber and Scottsdale Road in Tempe for six months. He worked either a 5 p.m. to 5 a.m. or 6 p.m. to 6 a.m. shift, five days per week. The claimant testified that he was aware of the risks associated with working at night, but he never had had any difficulties prior to September 29, 2007.

¶5 The claimant described the job site as a fenced area with one gate for ingress and egress. He stated that the gate had a lock, but it had been broken for a week before this incident. The claimant's duties included walking the job site once each hour and using a "Deggy"[1] to record his presence at various locations within the site. After completing his hourly rounds, the claimant would return to his personal vehicle to complete a security guard log. The claimant stated that he spent the remainder of his time sitting

[1] We understand a Deggy to be an electronic tool a security guard uses to touch various electronic checkpoints installed throughout the job site. When the guard touches a checkpoint, the Deggy records the time and date.

in his personal vehicle, which was parked inside the fence between two construction trailers facing the gate.

¶6 On September 28, 2007, the claimant arrived for work at 6 p.m. At 1 a.m. on September 29, 2007, the claimant's supervisor visited his job site and signed off on his security guard log. The claimant testified that after his supervisor left, he made his rounds and remembers walking back towards his vehicle to write his report. The claimant has no additional recollection until he woke up in the hospital.

¶7 Dennis Marian, the claimant's field supervisor, testified that he roamed throughout the night making random checks at Alpha's job sites. He visited the claimant's job site on September 29, 2007, and signed his security guard log at 1 a.m. He testified that, at that time, nothing appeared to be out of the ordinary. Mr. Marian testified that he had known the claimant through Alpha for one year before this incident, and the claimant had always been a responsible and credible employee.

¶8 Herman DeLuna, Alpha's operations supervisor, testified that he hired the claimant to be a security guard. He assigned the claimant to work at a Trammell Crow job site in Tempe, where he had worked for six months prior to his injury. Mr. DeLuna testified that Alpha's security guards wear a white uniform shirt with "security" across the front and "badges" on the sleeves. He stated that Trammell Crow installed and monitored the Deggy system. The

claimant's last recorded Deggy checkpoint was at 2:49 a.m. on September 29, 2007. Additionally, Mr. DeLuna agreed that unarmed security guards working alone in the middle of the night are subject to an increased risk of injury.

¶9 Robert Anselmo, a City of Glendale police officer, testified that he investigated an incident involving the claimant on September 29, 2007, and authored a report. Officer Anselmo stated that he responded to a check welfare call at 3:32 a.m., and he found a black male lying on the northeast corner of 44th Avenue and Ocotillo in Glendale. The officer stated that there was a large pool of blood on the sidewalk, and he found a flashlight and a broken wristwatch. Officer Anselmo stated that it appeared that the victim had been assaulted and robbed. The victim's pants pockets were pulled inside out, and he did not have a wallet or any other personal items. The officer also noted that the victim had a large contusion on the back of his head, a cut behind his ear, and a bloody nose. He requested an ambulance to transport the claimant to the hospital.

¶10 Officer Anselmo could not recall what the victim was wearing, but he stated that if the victim had been wearing an Alpha Security uniform, he would have noted that in his report and contacted the company. The officer also stated that this incident occurred in a high crime neighborhood.

¶11 The claimant's hospital records were placed in evidence.

The admission records reflect that the applicant arrived at the hospital wearing pants, two socks, and two shoes, with no other belongings. He was combative and had to be restrained and sedated before he could be treated. Examination revealed that he had been struck in the back of the head, resulting in a scalp laceration and hematoma. Diagnostic testing also revealed a C4-5 disc herniation and a left medial orbital blowout fracture. A urine toxicology screen was performed and was reported as negative. He was released from the hospital on October 3, 2007.

¶12 At 7 a.m. on September 29, 2007, the claimant's vehicle was found at 43rd Avenue and Maryland in Glendale by the Glendale Police Department. The vehicle's doors were open, the keys were in the ignition, the engine was running, and the claimant's cell phone was lying in the front seat.[2] The Glendale Police Department notified the claimant's family, and the family filed a missing person report. The Tempe Police Department investigated the Trammell Crow job site but found no evidence of any foul play.

¶13 A friend of the claimant's family, Melanie Kovarik, testified that she helped the family look for the claimant for two days after the Glendale Police found his car, before they located him in the hospital. She had known the claimant and his family for two years before the injury. She stated that the claimant was a devout Muslim who did not drink or use drugs. She described him as

[2] The Glendale Police Department did not complete a separate report regarding the claimant's vehicle.

honest, kind, and peaceable, and she was not aware of him having any enemies in the community.

¶14 At the conclusion of the hearings, the ALJ allowed the parties to file simultaneous post-hearing memoranda. She then entered an award for a compensable claim. She specifically found the claimant credible and resolved all conflicts in the evidence in his favor.[3] She further explained:

> 14. Based upon the applicant's testimony, I find that the applicant is unable to recall the circumstances of his accident due to his injury. The next issue to be addressed is whether the injury 'occurred during the time and space limitations' of his employment. *Hypl, supra*. It is undisputed that the assault of the applicant occurred during the time at which he was supposed to be performing his job duties. The issue then, is whether the applicant's presence, 20 miles from where he was supposed to be working, makes his claim non-compensable.
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> 15. The lack of direct evidence requires that inferences be made from the evidence that does exist. The fact that the applicant was found a distance from the jobsite does not, in and of itself, make this claim non-compensable. *State Compensation Fund v. Delgadillo*, 14 Ariz. App. 242, 482 P.2d 491 (App. 1971). This is a close case and the evidence available can be interpreted in more than one fashion. I find that, based upon the available evidence, that the applicant did not

[3] The ALJ is the sole judge of witness credibility. *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984) It is his job to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n.* 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968).

> leave the job site voluntarily and that, therefore, his assault occurred in the time and space of his employment. I based this finding upon the fact that the applicant had never voluntarily left the job site, upon the fact that the applicant was at the jobsite at 2:49 and was found assaulted at 3:32, upon the fact that the applicant's work shirt and all of his identification were stolen, upon the fact that the applicant was found at a location where he knew no one, upon the fact that the applicant was found at a location that was not on a direct route to his residence, upon the fact that he was not known to use drugs or alcohol or be involved in any activity that would have taken him into this high crime area, upon the fact that the applicant's memory ends while he was still performing his employment, and upon Mr. Marian's testimony that he found the applicant to be a responsible and credible employee.

Alpha and SCF timely requested administrative review, and the ALJ summarily affirmed her award. Alpha and SCF next brought this appeal.

III. DISCUSSION

¶15 The statutory elements of compensability are an injury by accident arising out of and in the course of employment. *See* A.R.S. § 23-1021(A). "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. *See, e.g., Peter Kiewit Sons' Co. v. Indus. Comm'n*, 88 Ariz. 164, 168, 354 P.2d 28, 30 (1960); *Scheller v. Indus. Comm'n*, 134 Ariz. 418, 420, 656 P.2d 1279, 1281 (App. 1982). It is the

claimant's burden to prove all elements of a compensable claim. *E.g., Toto v. Indus. Comm'n*, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985).

¶16 In this case, the ALJ relied on the unexplained injury presumption to find the claimant's injuries compensable. This presumption was first applied by Arizona courts to injury cases in *Hypl v. Indus. Comm'n*, 210 Ariz. 381, 111 P.3d 423 (App. 2005). The court held that

> a presumption similar to the unexplained death presumption should apply to an injury to a living worker who, due to the injury, is unable to testify about how the injury happened. Thus, an injured worker who proves by a preponderance of the evidence that he or she is unable to remember or to communicate the circumstances and cause of an injury due to the injury and who proves by a preponderance of the evidence that the injury occurred during the time and space limitations of the employment is presumed to have been injured while doing the employer's work, i.e., in the course of the employment, and the injury is presumed to have arisen from the employment in the absence of evidence that the worker was not within the course of the employment or that the injury did not arise from the employment.

210 Ariz. at 387, ¶ 20, 111 P.3d at 429.

¶17 Alpha and SCF argue that the ALJ erroneously applied the unexplained injury presumption, because the claimant did not establish that the injury took place within the time and space limitations of his employment. They assert that it was necessary for the claimant to affirmatively produce evidence that the assault

began at the Trammell Crow job site in order to satisfy the space requirement and for the presumption to attach. Because the Tempe Police investigated the job site and found no evidence of foul play, they argue that the unexplained injury presumption does not apply. The claimant responds that it was not necessary for the injury to take place on the job site in order to satisfy the space requirement. *See State Comp. Fund v. Delgadillo*, 14 Ariz. App. 242, 243, 482 P.2d 491, 492 (1971).

¶18 We recognize that case outcomes become less certain when there is room for doubt as to whether the injury arose within the time and space limitations of the employment. *See* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 7.04 [2][c], at 7-37 to -38 (2008) (*"Larson"*). In addition, as with other presumptions, the unexplained injury presumption only applies in the absence of contrary evidence. *See, e.g., Martin v. Indus. Comm'n*, 75 Ariz. 403, 411, 257 P.2d 596, 601 (1953) (deceased route salesman with a history of domestic quarrels sometimes slept in his truck at his employer's warehouse; when found asphyxiated in his truck with motor running claim noncompensable because his history permitted inference that presence at warehouse was for personal, not occupational, reasons); *Helton v. Indus. Comm'n*, 85 Ariz. 276, 279, 336 P.2d 852, 853 (1959) (decedent killed while driving his employer's truck twenty miles from his Phoenix home at a time when he was working at a job site 110 miles from Phoenix; noncompensable

because coemployee testified that shortly before leaving job site decedent stated he felt like going home).

¶19 Against this background, it is necessary to examine the evidence in this case in order to determine whether there is an inference as to a personal or work-related reason for the claimant being found injured in Glendale, twenty miles from the Tempe job site. In considering the evidence, we must consider that the ALJ expressly found the claimant credible and resolved all evidentiary conflicts in his favor.

¶20 On the date of injury, the claimant was physically seen by his supervisor at the Tempe job site at 1 a.m. At 2:49 a.m., the claimant was electronically recorded at the job site. The claimant's memory of events ends shortly thereafter as he was walking to his vehicle. Forty minutes later, the claimant was found lying on a sidewalk in Glendale bleeding, twenty miles away. He had been badly beaten, and his security uniform shirt and all of his identification were missing. Several hours later, the claimant's vehicle was discovered with its motor running, lights on, and doors open within blocks of where he had been found. The claimant's family filed a missing person report, and they eventually located him in a hospital two days later.

¶21 Documentary and testamentary evidence establish that the claimant is Muslim and does not smoke, drink or use drugs. A toxicology screen at the hospital was negative. The claimant was

described as peaceable, with no known enemies. His supervisor described him as a credible and reliable employee. The claimant himself testified that he would not leave the job site unless he had permission to do so.

¶22 We recognize that the unexplained injury presumption is intended to satisfy the arising out of employment test in situations such as this, i.e., when an assault occurs for which no explanation appears and nothing connects it either with the victim privately nor with a specific employment origin. But in this case, there is also other evidence to assist in satisfying the arising out of test. There was evidence that working as an unarmed security guard at night involves an inherent risk. Professors Larson have recognized and discussed this risk.

> Since every jurisdiction now accepts, at the minimum, the principle that a harm is compensable if its risk is increased by the employment, the clearest ground of compensability in the assault category is a showing that the probability of assault was augmented either because of the particular character of claimant's job or because of the special liability to assault associated with the environment in which he or she must work.
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> Among the particular jobs that have, for self-evident reasons, been held to subject an employee to a special risk of assault are those jobs that have to do with keeping the peace or guarding property, such as those of police officers, deputy sheriffs, marshals, and prison guards, and, to the extent that they have as one of their duties the protection of the premises . . . private security guards, ...
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> Similarly, although the nature of the

> particular job may not entail aggravated risk of assault, the time or place of the employment may be such as to increase that risk. This has been held to be a ground for an assault award . . . when the employee was required to work at night.

Larson, *supra*, § 8.01[1][a], [b] at 8-3 to -5 (footnotes omitted) (emphasis added).

¶23 Arizona has adopted the increased risk doctrine. *See Nowlin v. Indus. Comm'n*, 167 Ariz. 291, 294, 806 P.2d 880, 883 (App. 1990). *See also Sacks v. Indus. Comm'n*, 13 Ariz. App. 83, 474 P.2d 442 (1970). This court has acknowledged the increased risk of assault due to the nature of employment for police officers. In *Lane v. Indus. Comm'n*, 218 Ariz. 44, 178 P.3d 516 (App. 2008), an off-duty police officer received a gun shot wound while trying to protect a friend. In discussing the arising out of test, the court held that the officer had an increased risk of injury arising out of his employment, because even though he was off-duty, the code of conduct for his employment required him to act in an official capacity if he observed an incident requiring police action. *Id*. at 48, ¶ 14, 178 P.3d at 520. Similarly, this court found an increased risk of injury to an employee who was required to work at night, in *S.E. Rycoff and Co. v. Indus. Comm'n*, 172 Ariz. 22, 833 P.2d 39 (App. 1992). In *Rycoff*, the injured employee worked the night shift in a grocery warehouse in a "run-down" part of town. *Id*. at 23-24, 833 P.2d at 40-41. He was

injured while trying to stop the theft of his vehicle from the warehouse parking lot. *Id*. at 24, 833 P.2d at 41.

¶24 This court also has recognized that 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." *See Noble v. Indus. Comm'n*, 188 Ariz. 48, 50, 932 P.2d 804, 806 (App. 1996) (citing *Larson*, *supra* § 29.10, at 5-478[4]); *Arizona Workers' Compensation Handbook* § 3.2.1, at 3-10 (Ray J. Davis, et al. eds., 1992 and Supp. 2007). For that reason, deficiencies in the strength of one part of the test can be made up for by the strength of the other part. *Id*.

¶25 The unexplained injury presumption softens both the arising out of and in the course of tests. *Hypl*, 210 Ariz. at 386, ¶ 13, 111 P.3d at 428. The increased risk doctrine helps to satisfy the arising out of employment test. *Larson, supra,* ¶ 8.01 [a], [b], at 8-3 to -5. In light of the quantum theory of work connection, we consider all portions of the test together as a single test of work connection. *See Noble,* 188 Ariz. at 52-53, 932 P.2d at 808-09. When the evidence is viewed in its entirety, we believe there is sufficient work connection to support the ALJ's finding of compensability.

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[4] The current treatise citation is: 2 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 29.00, at 29-1 (Supp. 2008).

CONCLUSION

¶26 We have considered Alpha and SCF's arguments and whether the available evidence is insufficient to support an award of compensability absent pure speculation. As the ALJ acknowledges, this is a close case. Ultimately, we find the inferences drawn by the ALJ to be reasonable, sufficient evidence in the record to support the ALJ's ultimate finding of a work connection, and no error of law. We therefore affirm the ALJ's award and decision upon review.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/_____
JON W. THOMPSON, Judge

___/s/_____
PATRICK IRVINE, Judge