DIVISION ONE
FILED: 09/22/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MERRY M. SHAYDAK, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, TURQUOISE VALLEY GOLF & RV PARK, Respondent Employer, SCF ARIZONA, Respondent Carrier.	No. 1 CA-IC 11-0002 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20100-770363

Carrier Claim No. 1002475

Administrative Law Judge Gary M. Israel

AWARD AFFIRMED

Taylor & Associates, P.L.L.C. Phoenix
By Roger A. Schwartz
Attorneys for Petitioner Employee

The Industrial Commission of Arizona Phoenix
By Andrew Wade, Chief Counsel
Attorney for Respondent

State Compensation Fund of Arizona Phoenix
By James B. Stabler, Chief Counsel
Jean Kamm Gage
Attorneys for Respondents Employer and Carrier

D O W N I E, Judge

¶1 Merry M. Shaydak appeals the denial of her worker's compensation claim. Because we agree with the Industrial Commission ("Commission") that Shaydak failed to prove that her injuries occurred in the course of employment, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2010, Shaydak brought two dogs to work, believing they would be warmer in her car that snowy day than at home. Shaydak left the dogs in her car, which she parked in the employee parking lot, intending to check on them during her waitressing shift. The shift supervisor allowed Shaydak to check on the dogs in the morning and again about 1:30 p.m. During the afternoon check, Shaydak decided to jump a five-foot chain link fence that surrounded the employee parking lot to save the time it would take to walk to an opening for foot traffic. Shaydak "landed wrong" and "snapped [her] knee in half." She drove back to the restaurant. Shaydak was upset, and a co-worker suggested she take the dogs home and return to

finish her shift. About 20 minutes later, Shaydak called the restaurant, saying she was not returning because she was going to the hospital. Medical testing revealed injuries to her right knee that required surgery.

¶3 Shaydak filed a worker's compensation claim that was denied for benefits; she timely requested review. After a hearing and post-hearing briefing, an Administrative Law Judge ("ALJ") denied Shaydak's claim, concluding she failed to prove that her injuries arose out of and in the course of employment. *See Goodyear Aircraft Corp., Ariz. Div. v. Gilbert*, 65 Ariz. 379, 382-83, 181 P.2d 624, 626 (1947) ("Both the elements 'arising out of' and 'in the course of employment' must coexist at one and the same time in order that an award be sustained."). The ALJ's determination was affirmed upon review.

¶4 Shaydak timely filed a special action petition with this Court. We have jurisdiction pursuant to Arizona Revised Statues ("A.R.S.") sections 12-120.21(A)(2) and 23-951.

DISCUSSION

¶5 Shaydak contends the denial of her claim was contrary to law because: (1) checking on the dogs was a personal comfort activity approved by her supervisor, and (2) her actions in jumping over the fence did not violate any law or company policy.

¶6 We consider the facts in the light most favorable to sustaining the Commission's award. *Anton v. Indus. Comm'n*, 141 Ariz. 566, 569, 688 P.2d 192, 195 (App. 1984). We defer to an ALJ's reasonably supported factual findings, but independently determine whether those facts support the legal conclusion reached. *Bergmann Precision, Inc. v. Indus. Comm'n*, 199 Ariz. 164, 166, ¶ 9, 15 P.3d 276, 278 (App. 2000). We will affirm if there is substantial evidence to support the decision. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 216, 439 P.2d 485, 488 (1968).

I. Personal Comfort Activity

¶7 "[A]n accident 'arises out of' employment if its origin or cause is work-related; it occurs 'in the course of employment' if the time, place, and circumstances of injury are employment related." *Bergmann,* 199 Ariz. at 166, ¶ 9, 15 P.3d at 278. The personal comfort doctrine provides that employees remain in the course of employment during the work day while "engag[ing] in reasonable acts" that minister to their personal comfort, such as a break to rest, eat, make a telephone call, or use the bathroom. *Nicholson v. Indus. Comm'n*, 76 Ariz. 105, 109-10, 259 P.2d 547, 550 (1953); *see also Sacks v. Indus. Comm'n*, 13 Ariz. App. 83, 84, 474 P.2d 442, 443 (1970). But, an employee "can act so unreasonably" that the employee's actions create a "wholly personal risk," and any injuries that result are not compensable. *Bergmann*, 199 Ariz. at 167-68, ¶ 18, 15

P.3d at 279-80. "To constitute a deviation [from the course of employment], the activity must be so remote from customary or reasonable practice that . . . [it] cannot be said to be [an] incident [] of the employment." *Id.* at 168, ¶ 19, 15 P.3d at 280 (alteration in original) (internal quotation marks omitted); *see also Pottinger v. Indus. Comm'n*, 22 Ariz. App. 389, 393, 527 P.2d 1232, 1236 (1974) ("[I]t is readily apparent that . . . an accident arising out of personal comfort and convenience must still evolve from a risk peculiar to or increased by the employment.").

¶8 In post-hearing memoranda, both parties agreed the pertinent question was whether the injurious act occurred in the course of Shaydak's employment. Even assuming *arguendo* that checking on the dogs was a personal comfort activity, the evidence supports the ALJ's conclusion that jumping the fence was sufficiently unreasonable to remove Shaydak's actions from the course of employment.

¶9 Shaydak testified it took about ten minutes to get to her car in the employee lot and that jumping the fence would cut the time in half. She further testified she had never before jumped the fence, and nothing prevented her from accessing the lot in her usual manner -- except that she "needed to get back" to work. The record and testimony of other witnesses, however, contradicted Shaydak's version of the day's events. The record

demonstrates that two employees were available to cover Shaydak's two tables -- the only customers in the restaurant that afternoon. Three witnesses testified it took only a couple of minutes to walk from the restaurant to the employee parking lot using the foot-traffic entrance. The ALJ specifically found Shaydak's testimony less credible than that of the other witnesses.

¶10 Shaydak's situation is analogous to that presented in *Rodriguez v. Indus. Comm'n*, where this Court affirmed the denial of compensation for injuries incurred when an employee returned to his work station via a "dark, incomplete new construction area" instead of using the employer's well-lit, safe walkway. 20 Ariz. App. 148, 149, 510 P.2d 1053, 1054 (1973). We explained that injuries could be compensable if they were a "rational consequence of, or . . . had . . . origin in, a risk inherent in, or connected with or reasonably incident to, the employment." *Id.* at 150, 510 P.2d at 1055 (citation omitted) (internal quotation marks omitted). But injuries resulting from "acts for [the employee's] own purposes or benefits, other than acts necessary for [the employee's] personal comfort and convenience while at work" were not compensable. *Id.* at 150-51, 510 P.2d at 1055-56; *see also Goodyear*, 65 Ariz. at 383, 181 P.2d at 626 ("[T]he act being performed by the Workman at the time of his injury must be part of the duty he was employed to

perform or must be reasonably incidental thereto.") (citation omitted) (internal quotation marks omitted).

¶11 Applying those principles here, compensation was appropriately denied. Shaydak's decision to jump the fence was not a "rational consequence of, or . . . a risk inherent in, or connected with or reasonably incident to" her employment. *Rodriguez*, 20 Ariz. App. at 150, 510 P.2d at 1055. Shaydak admitted bringing the dogs to work to protect them from inclement weather. Although she testified she felt a need to hurry back to work, she also admitted it was a "very slow" day in the restaurant, and her customers were adequately covered by other employees. Even if Shaydak *did* need to hurry back, jumping the fence would not have saved significant time because it took only a couple of minutes to walk from the restaurant to the parking lot gate. To the extent conflicting testimony was presented about the length of time required to walk from the restaurant to the employee parking lot, "[t]he administrative law judge is the sole judge of witness credibility." *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). On this record, the evidence and the law support the determination that Shaydak's injury did not occur in the course of employment.

II. Violation of Law or Policy

¶12 Shaydak next contends her injury should be compensable because she did not violate any law or company policy by jumping the fence. Although she discusses cases wherein employees were injured as a result of violations of law and policy, Shaydak does not explain how the holdings in those cases are relevant here. Additionally, the ALJ did not rely on this reasoning in denying benefits. We therefore decline to further address this issue.

CONCLUSION

¶13 For the foregoing reasons, we affirm the Commission's denial of benefits.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PETER B. SWANN, Judge

/s/
DONN KESSLER, Judge