IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

STURGEON ELECTRIC COMPANY, INC.,
Petitioner Employer,

ZURICH AMERICAN INSURANCE COMPANY,
Petitioner Insurer,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

COLBY V. HALE,
Respondent Employee.

No. 2 CA-IC 2014-0016
Filed March 2, 2015

Special Action – Industrial Commission
ICA Claim No. 20131060013
Insurer No. 2080287646
Thomas A. Ireson, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
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By J. Patrick Butler
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MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

V Á S Q U E Z, Judge:

¶1 In this statutory special action, Sturgeon Electric Company, Inc. and Zurich American Insurance Company challenge the award of the administrative law judge (ALJ) finding Colby Hale sustained a compensable injury. Sturgeon and Zurich argue the ALJ erred by concluding that Hale's injury arose out of and in the course of employment. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts, which are largely undisputed, in the light most favorable to upholding the ALJ's award. *See Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2, 275 P.3d 638, 640 (App. 2012). Sturgeon is a member of the National Electrical Contractors Association (NECA) and the local NECA chapter, Southwestern Line Constructors (SWLC). The NECA entered into a collective bargaining agreement with the International Brotherhood of

Electrical Workers (IBEW). Pursuant to that agreement, Sturgeon, as a member of the NECA and SWLC, also participates in the Southwestern Line Constructors Joint Apprenticeship and Training Program. The purpose of the program is to develop trained journeymen linemen. It is funded by the contractors, including Sturgeon, which pay one percent of their gross payroll into the program.

¶3 The program consists of "seven steps of apprenticeship," requiring classroom and field training, as well as 7,000 hours of on-the-job training. The classroom and field training is held the first Saturday of each month, while the on-the-job training is completed by the contractors. When a contractor needs an apprentice, it contacts the program, which in turn refers an apprentice to the contractor. The apprentice becomes an employee of the contractor and is paid for his work. Apprentices may be reassigned to other contractors if they need different training to advance in the seven steps of the program.

¶4 In October 2012, Hale joined the local IBEW chapter, Union 769, and enrolled in the apprenticeship program. That same day, he was referred to Sturgeon for employment. After being interviewed and completing an employee orientation, Hale started working for Sturgeon four days after joining the union.

¶5 In April 2013, Hale was injured during a Saturday training when he was atop a utility pole disconnecting a cable and the pole collapsed. The following month, Hale filed a claim against Sturgeon for workers' compensation benefits. Zurich, Sturgeon's insurer, denied the claim, and Hale filed a request for a hearing. After a two-day hearing, the ALJ issued its findings of fact and conclusions of law, determining Hale had sustained a compensable injury and awarding benefits. Sturgeon and Zurich filed a request for review, and the ALJ affirmed the prior decision. This petition for special action followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Actions.

Discussion

¶6 Sturgeon and Zurich maintain the ALJ erred by concluding Hale had sustained a compensable injury. They assert that Hale's injury neither arose out of nor occurred within the course of employment because he was participating in a Saturday training as part of the apprenticeship program at the time. "We deferentially review the ALJ's factual findings . . . ." *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004). However, we review de novo the ALJ's legal conclusions, including "whether a claimant's injury arose out of and in the course of his employment." *PF Chang's v. Indus. Comm'n*, 216 Ariz. 344, ¶ 13, 166 P.3d 135, 138 (App. 2007).

¶7 To be compensable under the workers' compensation act, an injury must both "aris[e] out of" and be sustained "in the course of" employment. A.R.S. § 23-1021. "'Arising out of' refers to the origin or cause of the injury; 'in the course of' refers to the time, place, and circumstances of the accident in relation to the employment." *S.E. Rykoff & Co. v. Indus. Comm'n*, 172 Ariz. 22, 24, 833 P.2d 39, 41 (App. 1992). The claimant bears the burden of establishing both elements. *Hypl v. Indus. Comm'n*, 210 Ariz. 381, ¶ 6, 111 P.3d 423, 426 (App. 2005). Although the "elements must be independently satisfied, they are also interrelated and must be considered as a whole in order to determine 'whether the necessary degree or quantum of work-connection is established to bring the claimant under the coverage of the [a]ct.'" *Nowlin v. Indus. Comm'n*, 167 Ariz. 291, 293, 806 P.2d 880, 882 (App. 1990), *quoting Royall v. Indus. Comm'n*, 106 Ariz. 346, 350, 476 P.2d 156, 160 (1970). The analysis required by § 23-1021 is a fact-intensive inquiry. *Jones v. Indus. Comm'n*, 81 Ariz. 352, 356, 306 P.2d 277, 279 (1957).

Arising Out of Employment

¶8 The "arising out of" element is met when the claimant shows a causal connection between the employment and the injury. *Murphy v. Indus. Comm'n*, 160 Ariz. 482, 485, 774 P.2d 221, 224 (1989). We thus consider whether the injuries had their "origin in a risk connected with the employment and [were] a consequence of that risk." *S.E. Rykoff*, 172 Ariz. at 24, 833 P.2d at 41. In doing so, we

examine what type of risk is at issue. Our decisions have set forth four categories of risk justifying compensation:

> [T]hose particular to the employment (peculiar risk); those to which the employment causes an increased exposure even if not particular to the employment (increased risk); those that are actual risks of the employment (actual risk); and those that would not occur "but for the fact the employment placed the employee in a position where he or she was injured[]" (positional risk).

Lane v. Indus. Comm'n, 218 Ariz. 44, ¶ 11, 178 P.3d 516, 520 (App. 2008), *quoting Nowlin*, 167 Ariz. at 293, 806 P.2d at 882. We also assess the origin of the risk, which may be distinctly work related, wholly personal, mixed, or neutral.[1] *S.E. Rykoff*, 172 Ariz. at 25, 833 P.2d at 42.

¶9 Hale was injured while atop a utility pole disconnecting a cable. As he did so, the pole collapsed and he fell to the ground. Pole climbing was part of Hale's job with Sturgeon. In describing the nature of the work, the union's website warns that "linemen must be physically capable of climbing up and down metal towers, wood poles and other structures" and that "[m]uch of the work is at heights ranging from 40 to several hundred feet off the ground." The website also lists "falling" as a "[p]rimary hazard[]" of the job. Thus, the ALJ properly concluded that falling from the pole as it collapsed was a risk connected with Hale's employment and that

[1]The parties do not expressly identify the type or origin of the risk involved in this case. Accordingly, although we have considered these factors, we do not label the risk here because the parties have not done so. *See* Ariz. R. Civ. App. P. 13(a)(7) (appellant's brief must contain argument); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (issue waived for insufficient argument).

Hale's injury was a consequence of that risk. *See S.E. Rykoff*, 172 Ariz. at 24, 833 P.2d at 41.

¶10 Sturgeon and Zurich, however, argue that "Hale was not injured while performing services for Sturgeon." They suggest that his "personal" decision to participate in the apprenticeship program was "the cause of his injury." But, for the many reasons discussed below, *see Nowlin*, 167 Ariz. at 293, 806 P.2d at 882 (two § 23-1021 elements considered as whole), Hale's participation in the apprenticeship program and his employment with Sturgeon were inextricably connected. Of particular import, the apprenticeship program referred Hale to Sturgeon for employment, and, if he quit the program or failed to attend, Hale would lose his job with Sturgeon.

¶11 As did the ALJ, we find *Delbridge v. Salt River Project Agricultural Improvement & Power District*, 182 Ariz. 46, 893 P.2d 46 (App. 1994), instructive. Delbridge worked for the Salt River Project Agricultural Improvement and Power District (SRP) as a pre-apprentice lineman. *Delbridge*, 182 Ariz. at 48, 893 P.2d at 48. As a condition of his employment, he had to complete two sixteen-week training classes. *Id.* SRP contracted with a community college to offer the classes and also provided its training center as the location and one of its employees as the instructor. *Id.* at 48-49, 893 P.2d at 48-49. Delbridge was injured while completing a free pole climb during one of those classes. *Id.* at 49, 893 P.2d at 49. He refused workers' compensation benefits and instead filed a lawsuit against SRP for negligence. *Id.* The trial court granted SRP's motion for summary judgment, finding that, because Delbridge's injuries arose out of and in the course of employment, the court lacked subject matter jurisdiction over his civil tort action. *Id.*

¶12 On appeal, we affirmed the judgment in favor of SRP, explaining that workers' compensation was Delbridge's "sole and exclusive remedy." *Id.* at 52, 893 P.2d at 52. In discussing how Delbridge's injuries arose out of his employment with SRP, we pointed out that his "job as a pre-apprentice lineman required him to climb utility poles, and the risk of falling from a pole, whether or not he was using safety equipment, was a risk connected with his

employment." *Id.* at 51, 893 P.2d at 51. And, we further noted, "an occasional free climb could be a normal job activity." *Id.*

¶13 "[N]o hard and fast rule can be laid down that governs all situations" under § 23-1021 because "each case must be determined upon its own peculiar facts." *Jones*, 81 Ariz. at 356, 306 P.2d at 279. Still, this case is similar in all material respects to *Delbridge*. And, like in *Delbridge*, there was a causal connection between Hale's employment and injury, satisfying the "arising out of" element. *See Murphy*, 160 Ariz. at 485, 774 P.2d at 224.

In the Course of Employment

¶14 In determining whether an injury occurred "in the course of" employment, we consider several factors:

> Did the activity inure to the substantial benefit of the employer? Was the activity engaged in with the permission or at the direction of the employer? Did the employer knowingly furnish the instrumentalities by which the activity was to be carried out? Could the employee reasonably expect compensation or reimbursement for the activity engaged in? . . . [W]as the activity primarily for the personal enjoyment of the employee?

Truck Ins. Exch. v. Indus. Comm'n, 22 Ariz. App. 158, 160, 524 P.2d 1331, 1333 (1974) (internal citations omitted). In short, "'[t]here must be at least some action on the part of the employer to connect the [activity] to employment, some sponsorship, some approval, some employer action must be present.'" *Johnson Stewart Mining Co. v. Indus. Comm'n*, 133 Ariz. 424, 428, 652 P.2d 163, 167 (App. 1982), *quoting Tally v. J.J. Newberry Co.,* 291 N.Y.S.2d 950, 952 (App. Div. 1968). If the factors reveal "sufficient indicia of employment-related activity," then we generally will conclude the injury occurred within the course of employment. *Truck Ins. Exch.*, 22 Ariz. App. at 160, 524 P.2d at 1333.

¶15 For example, in *Delbridge*, after weighing all of the factors, we concluded that Delbridge had been acting in the course of employment when he was injured. 182 Ariz. at 52, 893 P.2d at 52. In particular, we noted that SRP obtained a substantial benefit—in the form of "well-trained linemen"—from its employees completing the class. *Id.* at 51-52, 893 P.2d at 51-52. We further observed that "Delbridge enrolled in and attended the class at SRP's direction and as a condition of his job," that SRP provided climbing equipment and use of its pole yard for the class, that SRP reimbursed its employees for their tuition costs, and that Delbridge had not suggested the class was primarily for his personal enjoyment. *Id.* at 52, 893 P.2d at 52. Again, we find this case comparable to *Delbridge*.

¶16 First, Hale's participation in the apprenticeship program, and more specifically the Saturday trainings, was a substantial benefit to Sturgeon. Sturgeon's own district manager testified that the purpose of the apprenticeship program is "to train apprentices to become qualified journeymen linemen," which benefits not only "the journeymen themselves" but "the employers such as Sturgeon . . . as well." Hale's supervisor at Sturgeon echoed that opinion, confirming that he saw "a direct benefit to Sturgeon [from] the training [Hale] was receiving." He explained, "There's a lot they go through [in] class in order to better themselves for on the job." And, Hale provided numerous examples of lessons he had learned during the Saturday trainings that he was later able to apply at work for Sturgeon.

¶17 Sturgeon and Zurich nevertheless assert that "Hale's particular training did not inure a substantial benefit to Sturgeon because Hale would not be staying to work for Sturgeon" and "could have been reassigned . . . at any time to another contractor." But how long Hale worked for Sturgeon is not the test by which we determine whether Sturgeon benefitted from Hale's participation in the program. *See Truck Ins. Exch.*, 22 Ariz. App. at 160, 524 P.2d at 1333. Moreover, the business manager for the union testified that it was "very common" for apprentices to work for one contractor for a "lengthy amount of time." And, Hale worked continuously and exclusively for Sturgeon from October 2012 when he joined the

union until his injury in April 2013, giving Sturgeon the benefit of his training during that entire time.

¶18 Second, Hale's participation in the apprenticeship program was a condition of his employment with Sturgeon. Hale's supervisor testified that the apprenticeship program was "required of any apprentice working for Sturgeon." He also said he "[a]bsolutely" had encouraged Hale to attend the Saturday trainings "[b]ecause if he d[id] not attend a class he [would] no longer [be] allowed to work for the company." Sturgeon and Zurich argue that "Sturgeon's 'encouragement' . . . to attend the monthly training sessions[] is . . . insufficient to bring this injury within the course of employment." But the record shows Sturgeon's connection with the apprenticeship program was such that it provided more than mere "encouragement."

¶19 Through the collective bargaining agreement, Sturgeon agreed to participate in and fund the apprenticeship program. Sturgeon assisted in the program administration by providing on-the-job training to its apprentices and by providing an employee to sit on both the committee and subcommittee that oversee the program. Hale's supervisor also testified that each apprentice tracks his work hours and that, at the end of each month, a supervisor verifies the hours are correct and evaluates the apprentice's progress. The apprentice then turns in the paperwork at the monthly Saturday training. If an apprentice is having issues at work with a particular skill, the field instructors help the apprentice master that skill. Sturgeon was thus heavily involved in the administration and operation of the apprenticeship program.

¶20 Third, Sturgeon gave Hale permission to use the safety equipment it had provided to him for use during work at the Saturday trainings. That equipment included a vest, a hard hat, gloves, safety glasses, and protection for his ears. Additionally, Sturgeon pays one percent of its gross payroll into the apprenticeship program, some of which is used to purchase supplies for the trainings.

¶21 Fourth, Hale was not compensated by Sturgeon for the time he spent participating in the Saturday trainings, nor was he

reimbursed the cost for his books and supplies. He was, however, eligible for pay raises from Sturgeon based on his progress in the seven steps of the apprenticeship program. And, during his employment with Sturgeon, Hale received one raise for completion of the first 1,000-hour requirement.

¶22 Fifth, there is no evidence indicating that Hale participated in the apprenticeship program for his own personal enjoyment. Hale seemingly admitted at the hearing that he participated in the apprenticeship program at least in part for his own career advancement. But as he explains on appeal:

> Hale was not at a weekend self-help, self-improvement seminar to learn general skills or how to be a happier person. He was at a training program for linemen, which provided instruction on tasks directly related to his lineman work, funded in part by his employer, administered in part by his employer, encouraged to attend by his employer and directly benefitting his employer.

¶23 In sum, there was sufficient evidence to support the ALJ's award. Hale was injured during a "job-related training class required by [Sturgeon] but conducted outside of working hours." *Delbridge*, 182 Ariz. at 48, 893 P.2d at 48; *see also Johnson Stewart Mining*, 133 Ariz. at 427-28, 652 P.2d at 166-67 (employer asked employees to attend educational seminar after working hours; employees entitled to workers' compensation benefits for injuries sustained in coming home from seminar). Based on Sturgeon's multiple, substantial connections with the apprenticeship program, *see Johnson Stewart Mining*, 133 Ariz. at 428, 652 P.2d at 167, we find "sufficient indicia of employment-related activity," *Truck Ins. Exch.*, 22 Ariz. App. at 160, 524 P.2d at 1333. As the trier of fact, the ALJ has the duty to weigh and resolve any conflicts in the evidence. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). Although we review the evidence, we will not reweigh it. *Id*.

Conclusion

¶24 Hale's injury both arose out of and occurred in the course of his employment with Sturgeon. [2] *See* § 23-1021. Accordingly, we cannot say the ALJ erred in determining Hale had sustained a compensable injury. *See PF Chang's*, 216 Ariz. 344, ¶ 13, 166 P.3d at 138.

¶25 The public policies underlying the workers' compensation act further support our conclusion. The purpose of the act is "to dispense, so far as possible, with litigation between employer and employee and to place upon industry the burden of compensation for injuries caused by the employment." *Pressley v. Indus. Comm'n*, 73 Ariz. 22, 28, 236 P.2d 1011, 1015 (1951); *see also* Ariz. Const. art. XVIII, § 8. Thus, "[w]e construe the workers' compensation law liberally so as to effectuate its remedial purpose." *Young v. Indus. Comm'n*, 204 Ariz. 267, ¶ 14, 63 P.3d 298, 301 (App. 2003); *see also Carbajal v. Indus. Comm'n*, 223 Ariz. 1, ¶ 10, 219 P.3d 211, 213 (2009) ("When construing workers' compensation statutes, we favor interpretations that make the claimant whole."). Providing Hale with coverage under the circumstances comports with these principles.

Disposition

¶26 For the foregoing reasons, we affirm the ALJ's award. Hale requests his attorney fees on appeal pursuant to A.R.S. § 12-349 and Rule 25, Ariz. R. Civ. App. P. The record does not show that Sturgeon and Zurich brought this appeal in bad faith or for purposes of delay; therefore, we deny his request under § 12-349. And, in our discretion, because of the fact-intensive inquiry involved in this

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[2]Zurich and Sturgeon point to several out-of-state cases that they assert support their position. *See, e.g.*, *Jecker v. Plumbers' Local 107*, 2 S.W.3d 107, 110 (Ky. Ct. App. 1999). However, those cases are not binding on this court, nor are they persuasive in light of the fact-specific inquiry under § 23-1021 and *Delbridge*. *See Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, ¶ 40, 47 P.3d 1119, 1129 (App. 2002) (jurisprudence of other jurisdictions not binding in Arizona).

appeal, we decline to grant Hale his attorney fees pursuant to Rule 25. *See Villa De Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, ¶ 26, 253 P.3d 288, 296 (App. 2011). However, as the prevailing party, Hale is entitled to his costs, contingent upon his compliance with Rule 21, Ariz. R. Civ. App. P.