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IS IT COMPENSABLE? A REVIEW OF THE EVER EXPANDING BOUNDARIES OF WORKERS' COMPENSATION COVERAGE

by

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I. GUIDING PRINCIPLES

A. Constitutional and Statutory Authorities

1. The Arizona Constitution directs the Legislature to enact workers' compensation laws providing compensation for personal injuries and death "from any accident arising out of and in the course of . . . employment," when the accident is "caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees to exercise due care." Ariz. Const. art. XVIII, section 8.

2. "Every employee . . . who is injured, and the dependents of every such employee who is killed by accident arising out of and in the course of his employment . . . shall be entitled to receive and shall be paid . . . compensation for loss sustained on account of the injury or death . . .." A.R.S. §23-10.21(A).

B. Case Authorities

1. Workers' compensation is a no-fault system. Benefits are provided without regard to the fault of either the employee or the employer. *See eg. Burnett v. Industrial Comm'n.* 158 Ariz. 548, 764 P.2d 33 (App. 1983).

2. The employer takes the employee as he or she is "with whatever peculiar vulnerability to an injury that the employee may have." *Murphy v. Industrial Comm'n.*, 160 Ariz. 482 at 486, 774 P.2d 221 at 225. Ordinarily, an accident need merely be "a" cause rather than "the" or the "substantial" cause of injury.

3. The workers' compensation laws are remedial in nature and must be liberally construed in favored of the injured worker. *Ocean Acc. & Guarantee Corp. v. Industrial Comm'n.*, 132 Ariz. 265, 257 P.2d 641 (1927); *Nicholson v. Industrial Comm'n.*, 76 Ariz. 105, 259 P.2d 547 (1953).

4. "It is a familiar sight in compensation law to observe a doctrine getting started in the form of an apparently exceptional concession in an unusual or limited class of cases, only to be followed by the necessity of extending the supposedly exceptional rule to more and more comparable cases, until ultimately the exception has become the rule." 2 Arthur Larson & Lex K. Larson, Larson's Law of Workers' Compensation (2009) §25.05 [3].

II. INJURY BY ACCIDENT

A. What is an Injury?

1. An anatomic or organic change is not required. A symptomatic aggravation of a pre-existing condition is enough to constitute a new injury, as long as the aggravation necessitates medical care. *Industrial Ind. Co. v. Industrial Comm'n.*, 152 Ariz. 195, 731 P.2d 90 (App. 1986).

2. Injuries that occur gradually are covered. *Mandex, Inc. v. Industrial Comm'n.*, 151 Ariz. 567, 729 P.2d 921 (App. 1986); *Employers Mut. Liab. Ins. Co.*, 24 Ariz. Appeals 427, 539 P.2d 541 (1975) (coverage provided for a shoulder injury that developed over a period of three and a half years).

B. What is an Accident?

1. An injury is "accidental" if either the cause or the result is unexpected. *Paulley v. Industrial Comm'n.*, 91 Ariz. 266, 371 P.2d 888 (1962). This means that routine exertion that causes an injury can be regarded as accidental. The risk need not be greater than the risk associated with daily living. *Cf. Pierce v. Phelps Dodge Corp.*, 42 Ariz. 436, 26 P.2d 1017 (1933) (death benefits denied because the employee was performing the usual and ordinary tasks of his occupation at the time his death).

2. An intentional act that causes a foreseeable or expected result cannot qualify as an accident for compensation purposes. *Glodo v. Industrial Comm'n.*, 191 Ariz. 259, 955 P.2d 15 (App. 1997).

3. Injuries and deaths are rebuttably presumed not to have been purposely self inflicted. *See Mandex, Inc., supra; Rural Metro Corp. v. Industrial Comm'n.*, 197 Ariz. 133, 3P.3rd 1053 (App. 1999).

III. COURSE OF EMPLOYMENT

A. The Going-and-Coming Rule

1. General rule: a trip to and from work is not within the course of employment. *Butler v. Industrial Comm'n.*, 50 Ariz. 516, 73 P.2d 703 (1937).

2. The rule is riddled with exceptions. *See eg. Pauley v. Industrial Comm'n.*, 109 Ariz. 298, 508 P.2d 1160 (1973) (premises rule); *Knoop v. Industrial Comm'n.*, 121 Ariz. 293, 589 P.2d 1325 (App. 1978) (travel between two portions of employer's premises); *Cavness v. Industrial Comm'n.*, 74 Ariz. 27, 243 P.2d 459 (1952) (special errand); *Serrano v. Industrial Comm'n.*, 75 Ariz. 326, 256 P.2d 709 (1953) (payment for travel time); *Brooks v. Industrial Comm'n.*, 136 Ariz. 146, 664 P.2d 690 (App. 1983) (vehicle under employee's own control). *See also* A.R.S. §23-1021.01 (providing exception for police officers and firefighters).

B. Personal Activities

1. Personal comfort. Employees remain within the course of employment while engaging in personal comfort activities such as eating, making phone calls during lunch breaks, or using the bathroom. *See Nicholson v. Industrial Comm'n.*, 76 Ariz. 105, 259 P.2d 547 (1953); *Royall v. Industrial Comm'n.*, 106 Ariz. 346, 476 P.2d 156 (1970); *Downs v. Industrial Comm'n.*, 113 Ariz. 90, 546 P.2d 826 (1976). But the employment must have increased the risk of injury in some way when an accident occurs during a personal comfort activity and as a result of an employee's own personal health condition. *See Sachs v. Industrial Comm'n.*, 13 Ariz. Appeals 83, 474 P.2d 442 (1970).

2. Traveling employees. Absent unreasonable behavior, an employee is afforded 24-hour coverage during work-related travel. *Bergman Precision, Inc. v. Industrial Comm'n.*, 199 Ariz. 164, 15 P.2d 776 (App. 2000).

3. Recreational and social activities. Participation in a company picnic, office party, or sports team is within the course of employment when (a) the employer sponsored the activity to a substantial degree, and (b) the employer benefitted beyond the intangible of enhanced employee morale. *See Stephenson v. Industrial Comm'n.*, 23 Ariz. App. 424, 533 P.2d 1161 (1975) (game of catch over the lunch hour). *Cf. Atkison v. Industrial Comm'n.*, 26 Ariz. App. 6, 545 P.2d 968 (1976) (coverage denied for the dependents of an employee who drowned while tubing during an office picnic at which attendance was voluntary); *Finnegan v. Industrial Comm'n.*, 157 Ariz. 108, 755 P.2d 413 (1988) (holding that enhanced employee morale, in and of itself, may be sufficient).

C. Improper Activity

1. Horseplay. Whether horseplay is a deviation from the course of employment depends on (a) the extent and the seriousness of the deviation, (b) the completeness of the deviation (i.e., whether it is co-mingled with the performance of regular work), (c) the extent to which the practice of horseplay has become an accepted part of the employment, and (d) the extent to which the nature of the employment may be expected to include some horseplay. *Jaimes v. Industrial Comm'n.*, 163 Ariz. 307, 787 P.2d 1103 (App. 1990).

2. Intoxication. Impairment by drugs or alcohol does not bar recovery unless the employee is no longer able to "follow" his employment and thus abandons it. *See Grammatico v. Industrial Comm'n.*, 211 Ariz. 67, 117 P.3d 786 (2005) (declaring unconstitutional Arizona's drug and alcohol statute); *Embree v. Industrial Comm'n.*, 21 Ariz. App. 411, 520 P.2d 324 (1974) (truck driver who drank six to eight beers before going to work remained within the course of employment for injuries he sustained when he fell while preparing his truck for hauling ore).

3. Work-rule violations. Arizona follows the familiar "means-ends" misconduct rule. A violation of a rule relating to the manner in which an employee is to perform his work is no bar to coverage, but an employee loses coverage if the rule violated pertains to the "scope, ambit or sphere of work which the employee is authorized to do." *See eg. Goodyear Aircraft Corp. v. Industrial Comm'n.*, 62 Ariz. 398, 158 P.2d 511 (1945) (coverage denied to an employee injured while fabricating a souvenir from a machine gun shell in violation of work rules); *Schroeder v. Industrial Comm'n.*, 132 Ariz. 455, 646 P.2d 886 (App. 1982) (benefits awarded to an employee injured while riding double on a forklift); *City Prod. Corp. v. Industrial Comm'n.*, 23 Ariz. App. 362, 533 P.2d 573 (1975) (benefits awarded to an employee injured while climbing onto a moving conveyer belt).

4. Assaults. As long as the dispute concerns the employment, coverage is available to an employee injured in an assault even though he may have instigated it. *See Colvert v. Industrial Comm'n.*, 21 Ariz. Appeals 409, 520 P.2d 322 (1974). Assaults arising from mere "friction and strain" are likewise covered. *P.F. Chang's v. Industrial Comm'n.*, 216 Ariz. 344, 166 P.3d 135 (App. 2007). *Cf. Estate of Simms v. Industrial Comm'n.*, 138 Ariz. 112, 673 P.2d 310 (App. 1983).

IV. ARISING OUT OF

A. Risk Analysis

1. Personal risks. "Risks with wholly personal origins never arise out of the employment." Tom Gordon, "Arising out of," Arizona Workers' Compensation Handbook, section 3.2.1, pp. 3-7 (1992).

2. Actual risks. An accident that occurs during the actual work performance is covered even though the activity may have been routine and even though the employee's personal health may have contributed to the injury. *See eg. Nowlin v. Industrial Comm'n.*, 167 Ariz. 291, 806 P.2d 880 (App. 1991) (back strain from sitting down in chair); *Samaritan Health Serv. v. Industrial Comm'n.*, 170 Ariz. 287, 823 P.2d 1295 (App. 1991) (pre-existing knee injury aggravated while employee was merely reaching down for a file on the floor); *Lou Grubb Cheverolet v. Industrial Comm'n.*, 171 Ariz. 183, 829 P.2d 1229 (App. 1992) (secretary strained neck while merely turning head). "Many routine activities such as walking, bending, or sitting involve a slight but actual risk of injury even if a worker's personal condition contributes nothing to the risk. . . . [T]he risk of injury from work-related activity need not be greater than the risk of injury associated with daily living." Gordon, *id.* at pp. 3-6, 3-8. *See also Farish v. Industrial Comm'n.*, 167 Ariz. 288, 806 P.2d 877 (App. 1990) (actual risk of injury while walking).

3. Positional risks. When the risk of injury is neither work related nor personal, but the workplace is where the employee is injured, the injury or death presumptively arises from the employment. *See eg. Circle K Store No. 1131 v. Industrial Comm'n.*, 165 Ariz. 91, 796 P.2d 893 (1990); *Hypl v. Industrial Comm'n.*, 210 Ariz. 381, 111 P.3d 423 (App.2005). *Cf. Netherton v. Lightning Delivery Co. v. Industrial Comm'n.*, 32 Ariz. 350, 258 P.2d 306 (1927) (benefits denied for employee killed by lightning).

B. Problematic Cases

1. Unexplained deaths and falls. Deaths and falls that are unexplained are rebuttably presumed to arise out the employment, if the death or fall occurred in the course of employment. *See Circle K, Supra; Konichek v. Industrial Comm'n.*, 167 Ariz. 296, 806 P.2d 885 (App. 1990) (death benefits awarded for employee even though his fatal cardiac disrhythmia could not attributed to any work-related exposure).

2. Idiopathic falls. A personal health condition that produces an injury is never compensable, unless the workplace increased the risk of injury. *See Valerio v. Industrial Comm'n.*, 85 Ariz. 189, 334 P.2d 768 (1959); *PMC Powdered Metals Corp. v. Industrial Comm'n.*, 15 Ariz. App. 460, 489 P.2d 718 (1971).

V. SPECIAL STATUTORY AREAS

A. Occupational Diseases

1. Coverage is extended to diseases "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." A.R.S. §23-901(13)(c).

2. Injury-by-accident analysis applies when an illness is not peculiar or particular to the employment. *See eg. Lorentzen v. Industrial Comm'n.*, 164 Ariz. 67, 790 P.2d 765 (App. 1990); *McCreary v. Industrial Comm'n.*, 172 Ariz. 137, 835 P.2d 469 (App. 1992).

B. Heart or Perivascular Injuries

1. "A heart-related or perivascular injury, illness or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some injury, stress or exertion related to the employment was a substantial contributing cause of the heart-related or perivascular injury, illness or death." A.R.S. §23-1043.01(A).

2. "Substantial contributing cause" refers to activity or exertion that is greater than "insubstantial" or "slight" *Skyview Cooling Co. v. Industrial Comm'n.*, 142 Ariz. 554, 691 P.2d 320 (App. 1984).

C. Mental Injuries

1. "A mental injury, illness or condition shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition." A.R.S. §23-1043.01(B).

2. For mental injuries, "substantial contributing cause" has the same definition used for heart and perivascular injuries. *TWM Custom Framing v. State Compensation Fund*, 198 Ariz. 41, 456 P.2d 745 (App. 2000).

3. Stress that is inherent in the nature of the employee's work is generally not enough to qualify as unusual, extraordinary, or unexpected. *See eg. Sloss v. Industrial Comm'n.*, 121 Ariz. 10, 588 P.2d 303 (1978); *LaPare v. Industrial Comm'n.*, 154 Ariz. 318, 742 P.2d 819 (App. 1987); *Ziv v. Industrial Comm'n.*, 160 Ariz. 330, 773 P.2d S228 (App. 1989).