

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

M. J. HILL, a single woman, *Plaintiff/Appellant*,

v.

JAMES P. BOWMAN and PAMELA L. BOWMAN, husband and wife,
Defendants/Appellees.

No. 1 CA-CV 14-0535
FILED 12-8-2015

Appeal from the Superior Court in Maricopa County
No. CV2013-009024
The Honorable Colleen L. French, Judge Pro Tempore

AFFIRMED

COUNSEL

Cynthia D. Starkey, PLLC, Phoenix
By Cynthia D. Starkey
Counsel for Plaintiff/Appellant

Jones, Skelton & Hochuli, PLC, Phoenix
By Mark D. Zukowski, Lori L. Voepel
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which
Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

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T H U M M A, Judge:

¶1 M.J. Hill appeals the superior court’s judgment dismissing her complaint against James and Pamela Bowman for lack of subject matter jurisdiction. Because Hill has shown no error, the dismissal is affirmed.

FACTS AND PROCEDURAL BACKGROUND

¶2 Hill was employed by Above and Beyond Delivery, Inc. (A&B), a delivery logistics company owned by James Bowman. Hill’s job was to manage and expand A&B’s business from existing and new clients. While in Hawaii to inspect a related company, Hill and Bowman participated in a golf tournament sponsored by A&B client Foodland. During the tournament, Hill was injured when she was thrown from a golf cart driven by Bowman.

¶3 Hill filed this negligence action against the Bowmans. The Bowmans moved to dismiss, arguing the superior court lacked subject matter jurisdiction because Arizona’s Workers’ Compensation Act (Act), Arizona Revised Statutes (A.R.S.) sections 23-901 through -1104 (2015)¹ provided Hill’s exclusive remedy. Hill argued her injury did not arise in the course and scope of her employment pursuant to A.R.S. § 23-1021(A) (2012), meaning her injuries were not compensable under the Act and that the superior court was not divested of subject matter jurisdiction over her negligence claim. She also urged the court to deny the motion because A&B had not incurred workers’ compensation liability for her injury. Both parties submitted evidence regarding the jurisdictional issue.

¶4 The court granted the motion, finding it lacked subject matter jurisdiction because the facts presented “clearly establish that [Hill] was acting within the scope of her employment when she was injured,” meaning her exclusive remedy was under the Act. This court has jurisdiction over Hill’s timely appeal pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶5 The parties dispute the applicable standard of review. Hill contends the superior court’s decision is subject to de novo review with no deference afforded, while the Bowmans maintain this court should defer to the superior court’s discretion. As plaintiff, Hill had the burden to show the court had subject matter jurisdiction over her claim. *See Swichtenberg v.*

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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Brimer, 171 Ariz. 77, 82 (App. 1991). “Where jurisdictional fact issues are not intertwined with fact issues raised by a plaintiff’s claim on the merits, the resolution of those jurisdictional fact issues is for the trial court.” *Id.* In resolving such issues, the court may consider affidavits, depositions and exhibits without converting a motion to dismiss into a motion for summary judgment. *Id.* This appeal concerns the correctness of the superior court’s determination that Hill’s injury was covered by the Act, meaning the Act was her exclusive remedy, a mixed question of fact and law. See *Mitchell v. Gamble*, 207 Ariz. 364, 367 ¶ 5 (App. 2004). Accordingly, this court views the record in the light most favorable to sustaining the ruling but reviews the legal conclusion de novo. *Brimer*, 171 Ariz. at 82; *Mitchell*, 207 Ariz. at 367-68 ¶7.

I. Hill’s Injury Was Covered By The Act.

¶6 The Act grants the Industrial Commission of Arizona (ICA) exclusive jurisdiction, and therefore bars employees to whom it affords coverage from suing their employer or co-employees, over claims for injuries “arising out of and in the course of” employment. A.R.S. § 23-1021(A) (2012); A.R.S. § 23-1022(A) (“The right to recover compensation pursuant to this chapter for injuries sustained by an employee . . . is the exclusive remedy against the employer or any co-employee acting in the scope of his employment.”).

The expressions “arising out of” and “in the course of” the employment are not synonymous; but the words “arising out of” are construed to refer to the origin or cause of the injury, and the words “in the course of” to refer to the time, place, and circumstances under which it occurred. An injury which occurs in the course of the employment will ordinarily, but not necessarily, arise out of it, while an injury arising out of an employment almost necessarily occurs in the course of it.

Peter Kiewit Sons’ Co. v. Industrial Commission, 88 Ariz. 164, 168 (1960) (citation omitted); *accord Truck Ins. Exch. v. Indus. Comm’n*, 22 Ariz. App. 158, 160 (1974). Whether an injury is covered by the Act depends on the totality of the circumstances. *Finnegan v. Indus. Comm’n*, 157 Ariz. 108, 110 (1988).

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¶7 Hill argues her injury did not occur during the course of her employment and the Act therefore does not constitute her exclusive remedy. Whether an activity arises during the course of employment, even though it is not normally associated with that employment, requires consideration of five factors:

(1) “Did the activity inure to the substantial benefit of the employer?”

(2) “Was the activity engaged in with the permission or at the direction of the employer?”

(3) “Did the employer knowingly furnish the instrumentalities by which the activity was to be carried out?”

(4) “Could the employee reasonably expect compensation or reimbursement for the activity engaged in?”

(5) “Was the activity primarily for the personal enjoyment of the employee?”

Truck Ins. Exch., 22 Ariz. App. at 160 (citations omitted).

¶8 Hill contends these factors do not support the court’s decision because there is no evidence that A&B received a substantial benefit from her attendance at the golf tournament and, “at best,” there was only a remote and hypothetical benefit to A&B’s good will. However, the evidence established that Hill’s employment responsibilities included business development. A&B facilitated Hill attending the golf tournament for the purpose of obtaining additional business for A&B. A&B paid Hill’s \$7,500 entry fee and other expenses for the golf tournament held in Hawaii. A&B did not require Hill to use any paid leave time for the tournament because it anticipated attendance might expand its business relationship with Foodland (even though, in fact, Foodland’s contacts ultimately did not attend the event). This evidence establishes that Hill attended in order to further A&B’s business interests and, thus, supports a finding that the injury occurred during the course of her employment. *See Truck Ins. Exch.*, 22 Ariz. App. at 160.

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¶9 Hill also argues the court erred in concluding her injury arose in the course of her employment because she averred that she did not believe her job required her to attend the event. Hill's perception that the golf tournament was voluntary does not alter the analysis. Contrary to Hill's argument, Arizona law does not require that an activity be performed as a condition of employment in order to qualify as employment-related activity and be within the course of employment. *See Truck Ins. Exch.*, 22 Ariz. App. at 160 (noting, when automobile dealership permitted and facilitated employee's participation in weekend drag races, employee was acting within course and scope of employment).

¶10 Hill cites *Atkison v. Industrial Commission*, 26 Ariz. App. 6, (1976), for the proposition that employer sponsorship of a social activity does not make that activity work-related. *Atkison* upheld the ICA's decision that a factory employee who drowned while at a company-sponsored picnic held on a non-work day did not arise out of and in the course of employment. 26 Ariz. App. at 9. The employee's widow argued that, although the picnic was unrelated to the employee's job, the injury arose out of his employment because his employer required his attendance. *Id.* at 7. The court noted disputed evidence on the issue and deferred to the administrative decision. *Id.* at 9. Given that deference properly given to an administrative decision based on a different factual record, *Atkison* does not stand for the proposition that an employee's perception regarding whether attendance at a social activity is mandatory is dispositive of the "in the course and scope" analysis.

¶11 Hill also relies on *Vest v. Phoenix Motor Company*, 50 Ariz. 137 (1937). *Vest* held that there was reasonable evidence to sustain the ICA's decision that a car salesman who died while in a demonstration vehicle, on a drunken joy ride with a passerby on the way to a dance, was not in the course of his employment despite his widow's argument that he had called to advise her that he was attempting to sell the car to the passerby. *Id.* at 139-40. In doing so, *Vest* found

it unnecessary for us to discuss and analyze this evidence at length. We certainly cannot say that it points so unerringly to a conclusion that [the] deceased was at the time in the due course of his employment that we must hold, as a matter of law, it was insufficient to justify the finding of the [ICA].

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Id. at 140. As with *Atkison*, because the facts and procedural posture are vastly different, *Vest* similarly does not compel reversal of the superior court's ruling in this case.

¶12 At oral argument on appeal, Hill argued that the superior court did not address the "arising out of" requirement. It is true that, in concluding the record clearly established that Hill "was acting within the scope of her employment when she was injured," the minute entry could have been more precise in stating that Hill's injuries were "arising out of and in the course of" her employment. A.R.S. § 23-1021(A) (2012). That said, the court necessarily came to that conclusion by stating Hill's "only avenue of relief was to pursue worker's compensation benefits" and granting the motion to dismiss. Moreover, on this record, Hill has not shown that the court erred in finding Hill's injuries arose out of her employment. See *Royall v. Industrial Comm'n*, 106 Ariz. 346, 349-51 (1970); *Peter Kiewit*, 88 Ariz. at 168; *PF Chang's v. Industrial Comm'n*, 216 Ariz. 344, 348-49 ¶¶ 14-16 (App. 2008) (listing categories; citing authority).

¶13 Hill also has not shown that factual disputes precluded the court's ruling as a matter of law and that an evidentiary hearing was required. Hill's declaration did not contradict the substance of Bowman's affidavit or establish a material dispute of fact. For example, Hill did not dispute Bowman's avowals that: (1) she and Bowman anticipated that Foodland employees would be at the tournament and attended it to foster a better relationship with Foodland; (2) part of her job was to obtain additional business for A&B; and (3) participation in the tournament was part of her efforts to develop and expand A&B's client base. Although Hill's declaration set forth her beliefs that her attendance at the tournament was not required and A&B paid for the trip for tax purposes, those issues are not dispositive. See *Truck Ins. Exch.*, 22 Ariz. App. at 160. Moreover, Hill did not request an evidentiary hearing. Although she sought additional time to depose Bowman to "explore some of the issues in his affidavit," she made no proffer about what that deposition would reveal. See *Ringling Bros. & Barnum & Bailey Combined Shows, Inc. v. Superior Court*, 140 Ariz. 38, 42 (App. 1983) (rejecting argument that decision on a jurisdictional issue should await further hearing when plaintiff failed to request hearing and submitted evidence in briefing motion). Accordingly, Hill has not shown the superior court erred by not holding an evidentiary hearing. *Moulton v. Napolitano*, 205 Ariz. 506, 510-11 ¶ 8 (App. 2003).

II. Equitable Principles Do Not Require Reversal.

¶14 Hill argues the superior court erred in finding it lacked subject matter over her negligence claim because she is unable to recover workers' compensation benefits. Arizona law requires an injured worker to apply for workers' compensation benefits within one year after the date of injury. A.R.S. § 23-1061(A). Citing informal correspondence from A&B's workers' compensation insurance carrier, Hill insists her claim was timely and was denied and asserts it is now too late for her to apply for benefits. However, there is no evidence Hill filed a timely claim for compensation with the ICA. *See* A.R.S. § 23-1061(A) (requiring such a claim to be made within one year after injury occurs). Moreover, the only evidence regarding Hill's communications with the insurance carrier indicates they occurred more than one year after Hill's injury *and* after she filed this negligence case.

¶15 Hill also argues it is inequitable to allow the Bowmans to avoid liability for her negligence claim on the theory that workers' compensation is her exclusive remedy when she has not received workers' compensation benefits. She relies on language from *Inmon v. Crane Rental Services, Inc.*, 205 Ariz. 130 (App. 2003), *disapproved on other grounds by Tarron v. Bowen Machine and Fabricating, Inc.*, 225 Ariz. 147 (2010), indicating, in the lent employee context, that Arizona courts would not interpret the Act to grant immunity from suit without a corresponding obligation upon the immunized party. As discussed, however, workers' compensation offered the exclusive remedy for Hill's injury; the fact that she did not timely avail herself of that remedy does not require a finding of subject matter jurisdiction for her to pursue an otherwise unavailable negligence claim against the Bowmans.

¶16 Hill's reliance on *Inmon* is misplaced factually. That case addressed whether an injured employees' common law tort claims against a third-party were barred by workers' compensation under a theory that the third party was a co-employee under the "lent employee" doctrine. *Inmon*, 205 Ariz. at 133 ¶¶ 7-8. This court held that the third party was not a co-employee under the Act because the "lent employee" doctrine only provides workers' compensation coverage for the lent employee from the special employer and did not apply to a claim by an employee against a third-party tortfeasor. *Id.* at 133 ¶ 8. Thus, *Inmon* is factually distinct from this case, which involves no third party but only Hill's claim against her co-employee.

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¶17 Hill has not shown the superior court erred in finding it lacked subject matter jurisdiction because she did not timely submit a workers' compensation claim.

CONCLUSION

¶18 The superior court's order dismissing Hill's claim for lack of subject matter jurisdiction is affirmed.



Ruth A. Willingham · Clerk of the Court
FILED : ama