



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**GRAMMATICO V. INDUSTRIAL COMMISSION
NO. CV-04-0197-PR**

PARTIES AND COUNSEL:

Petitioners: AROK, Inc., and State Compensation Fund, represented by James B. Stabler

Respondent: David C. Grammatico, represented by Joel F. Friedman, of Jerome, Gibson, Stewart, Friedman, Stevenson & Engle

FACTS:

David Grammatico worked as foreman of a crew installing sheet metal trim. He performed his work on 42-inch drywall stilts. On the day of the accident, after working several hours on the stilts, Grammatico fell while walking through a cluttered area of the job site, breaking his wrist and knee. Grammatico admitted having smoked marijuana and inhaled three to four lines of methamphetamine on the previous Saturday, and having also inhaled three to four lines of methamphetamine on Sunday, the day before the accident. A urine sample he provided tested positive, showing high levels of methamphetamine and marijuana and methamphetamine metabolites.

Grammatico's employer, AROK, and its workers' compensation carrier, the State Compensation Fund, denied his claim for workers' compensation benefits and a hearing was held before the Industrial Commission. AROK presented evidence that it maintains a drug-testing policy and has certification of its policy on file with the Industrial Commission, thereby triggering the applicability of A.R.S. § 23-1021(D). This statute provides that if an employer implements a drug-free workplace policy, a worker who suffers a workplace injury and subsequently tests positive for alcohol impairment or illegal drug use is not eligible for workers' compensation benefits. The statute sets forth certain exceptions, including situations in which the employee's use of alcohol or unlawful substance "was not a contributing cause" of the employee's injury.

The administrative law judge found the claim in this case noncompensable because Grammatico failed to prove that his use of unlawful controlled substances "was not a contributing cause" of his injuries. Grammatico sought review in the court of appeals, asserting that A.R.S. § 23-1021(D) violates Art. 18, § 8 of the Arizona Constitution by depriving workers of compensatory benefits for injuries "caused in whole, or in part, or . . . contributed to" by necessary employment risks and dangers.

In a divided opinion (Judges Timmer and Garbarino concurring, Judge Barker dissenting), the court of appeals set aside the administrative law judge's award. The majority began its analysis by quoting Art. 18, § 8 of the constitution, which requires enactment of a law to compensate workers

injured in the course of employment if the injury “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” (Emphasis added.)

The majority explained that to receive benefits, a worker must prove both legal and medical causation. “Legal causation” requires a showing that the accident arose out of and in the course of employment. “Medical causation” is established by showing that the industrial accident caused the injury. Art. 18, § 8 delineates the scope of legal causation by providing that a compensable injury “is caused in whole, or in part, or is contributed to” by a necessary risk of employment. The majority concluded § 23-1021(D) restricts legal causation by denying compensation for injuries unless the worker demonstrates that a necessary risk of employment *wholly* caused the industrial accident. If alcohol or drug use contributed to the accident, § 23-1021(D) denies compensation even if a necessary risk of employment partially caused or contributed to the accident. Applying that standard in this case, Grammatico could establish legal causation only if he proved that his drug use did *not* contribute to his fall from the stilts, even if the necessary risk of working on stilts partially caused or contributed to his fall. Because § 23-1021(D) abrogates claims for injuries partially caused or contributed to by necessary risks of employment, it impermissibly conflicts with Art. 18, § 8 of the constitution.

The majority conceded that drug and alcohol use have no place in the working world and should not be encouraged or rewarded, but it could not ignore the constitutional requirement that benefits must be paid if a necessary risk of employment partially caused or contributed to an industrial accident, without consideration of any fault; however, because § 23-1021(D) can be applied to deny benefits without violating Art. 18, § 8, if necessary employment risks did not wholly or partially cause or contribute to an industrial accident, the majority held the statutory provision is not unconstitutional on its face, but only as applied to the facts of this case.

The dissent focused on the phrase “necessary risk” of employment in the constitutional provision, concluding that while the act of being on stilts was a “necessary risk” of Grammatico’s employment, being on stilts *while under the influence of illegal drugs* was not a “necessary risk.” The legislature could justifiably require consideration of the entirety of the risk when the necessary element of the risk cannot be factually separated from the unnecessary element of the risk. This is particularly true when, as in this case, the worker’s voluntary and intentional acts result in the unnecessary element of the risk. There is no constitutional problem in concluding that no part of being on stilts while under the influence of illegal drugs was a “necessary risk” of employment. In light of statistics that drug users are more than three times as likely as non-drug users to have on-the-job accidents, it is reasonable to conclude that such conduct is a “self-inflicted” injury just waiting to happen.

The dissent concluded that the concept of fault cannot cast so broad a net that it overwhelms the other terms of the constitutional mandate. The legislature can constitutionally and reasonably construe the term “necessary risk” as not including conduct affected by the use of illegal drugs, especially in light of the worker’s ability to show that his use of any unlawful substance was not a contributing cause of his injury.

ISSUE:

Whether A.R.S. § 23-1021(D), as applied to the facts of this case, violates Article 18, Section 8 of the Arizona Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Ariz. Const., Art. 18, § 8. Workmen's compensation law

The Legislature shall enact a Workmen's Compensation Law . . . by which compensation shall be required to be paid to any such workman, in case of his injury . . . if in the course of such employment personal injury . . . 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

Ariz. Rev. Stat. § 23-1021. Right of employee to compensation; definitions

A. Every employee coming within the provisions of this chapter 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, wherever the injury occurred, unless the injury was purposely self-inflicted, shall be entitled to receive and shall be paid such compensation for loss sustained on account of the injury or death, such medical, nurse and hospital services and medicines, and such amount of funeral expenses in the event of death, as are provided by this chapter.

* * *

C. An employee's injury 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 if the impairment of the employee is due to the employee's use of alcohol or the unlawful use of any controlled substance proscribed by title 13, chapter 34 and is a substantial contributing cause of the employee's personal injury or death. This subsection does not apply if the employer had actual knowledge of and permitted, or condoned, the employee's use of alcohol or the unlawful use of the controlled substance proscribed by title 13, chapter 34.

D. Notwithstanding subsection C of this section, if the employer has established a policy of drug testing or alcohol impairment testing in accordance with chapter 2, article 14 of this title, is maintaining that policy on an ongoing manner and, before the date of the employee's injury, the employer files the written certification with the industrial commission as required by subsection F of this section, an employee's injury 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, if the employee of such an employer fails to pass, refuses to cooperate with or refuses to take a drug test for the unlawful use of any controlled substance proscribed by title 13, chapter 34 or fails to pass, refuses to cooperate with or refuses to take an alcohol impairment test that is administered by or at the request of the employer not more than twenty-four hours after the employer receives actual notice of the injury, unless the employee proves any of the following:

1. The employee's use of alcohol or the employee's use of any unlawful substance proscribed by title 13, chapter 34 was not a contributing cause of the employee's injury or death.

* * *

H. For the purposes of this section:

* * *

2. "Substantial contributing cause" means anything more than a slight contributing cause.

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