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8 SUPREME COURT OF ARIZONA

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10	BENCHMARK INSURANCE c/o )	Arizona Supreme Court No.
	BENCHMARK ADMINISTRATORS, )	CV-23-0211-PR
11		
12	Petitioner Insurance Carrier, )	
	vs. )	Arizona Court of Appeals No.
13		1 CA - I C: 22-0046
14	SUPERSTITION FIRE & MEDICAL, )	
15	Petitioner Employer, )	Industrial Commission of Arizona
		ICA Claim No. 20210280125
16	INDUSTRIAL COMMISSION OF )	
	ARIZONA, )	
17		
18	Respondent, )	RESPONDENT EMPLOYEE'S
		RESPONSE TO
19	ROBERT VANDEKROL, )	PETITION FOR REVIEW
20	Respondent Employee, )	
21		

22           This matter arises out of a claim by Robert Vande Krol for the consequences  
23 of his exposures to carcinogenic materials as a firefighter.  
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1 **ISSUE PRESENTED FOR REVIEW**

2 Benchmark petitioned for review of the Court of Appeals Opinion filed July  
3 11, 2023, ("Opinion") which set aside the Decision Upon Hearing and Findings and  
4 Award for Non-Compensable Claim of the Administrative Law Judge ("Decision").  
5 They identify the issue presented for review by this Court as whether the “2021  
6 statute” can be used in Vande Krol’s case.  
7

8 The Petitioners here allege the Opinion erroneously breaks from well-  
9 established appellate authority. Additionally, they submit for review whether the it  
10 is reasonably supported by the record on appeal.  
11

12 **FACTS AND PROCEDURAL HISTORY**

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14  
15 This matter arises out of a claim by Robert Vande Krol for the consequences  
16 of his exposure to carcinogenic material as a firefighter. Respondent hereby  
17 incorporates and refers this Court to his Opening Brief, pages 1-8, and 12-23, for  
18 the Statement of the Case and Facts, so as not to be repetitive at length. Respondent  
19 does not agree with the characterization of some “facts” as alleged by Petitioner.  
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1           **REASONS PETITION FOR REVIEW SHOULD NOT BE GRANTED:**

2           I.   THE COURT OF APPEALS CORRECTLY ANALYZED THAT  
3           THE “2021 STATUTE” CAN BE APPLIED HERE

4           A. THE PLAIN TEXT OF THE “2021 STATUTE” ALLOWS  
5           IT TO BE APPLIED HERE

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7           The Court of Appeals addresses this interpretation in ¶ 22-28. Importantly,  
8 the Court noted “[t]he legislature can (and should) include provisions in statutes  
9 defining their application. *See* A.R.S. §1-244.” Opinion, ¶ 25. The Court further  
10 noted that when the legislature has not done so, there are other methods of  
11 evaluating the legislature’s intent. “Under the plain text of the 2021 statute, it  
12 should apply to the firefighter’s claim and be used to determine whether he is  
13 entitled to benefits – after all, he is under 65 and has been separated from  
14 employment for less than 15 years. *See* A.R.S. §23-901.09(C)(2).” Opinion, ¶ 26.  
15  
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17           B. THE WAY IT IS APPLIED BY THE COURT OF  
18           APPEALS, THE “2021 STATUTE” IS NOT BEING  
19           APPLIED RETROACTIVELY, BUT APPLIED TO  
20           PENDING CASES, AS ALLOWED

21           The Court of Appeals addresses this interpretation in the Opinion, ¶ 29-32.  
22 The Court noted this is a situation where new rules should have been applied to a  
23 pending action. Opinion, ¶ 30 (citing *State Comp. Fund of Ariz. v. Fink*, 224 Ariz.  
24 611, 613 (App. 2010)). Furthermore, rights and remedies created solely by a  
25

1 modified statute disappear with the modified statute unless there is a final  
2 judgement. Opinion, ¶ 30 (citing *In re Dos Cabezas Power Dist.*, 17 Ariz. App.  
3 414, 420 (1972)). Also, in ¶ 32 the Court stated: “Simply put, applying the 2021  
4 statute to a later hearing ‘is not a retroactive application.’ *Id.*; see also *Landgraf*,  
5 511 U.S. at 273 (‘[I]n many situations, a court should ‘apply the law in effect at the  
6 time it renders its decision,’ even though that law was enacted after the events that  
7 gave rise to the suit.’ (citation omitted)).”  
8  
9

10  
11 C. IT IS PROCEDURAL, NOT SUBSTANTIVE, AND THUS  
12 CAN BE APPLIED RETROACTIVELY

13 The Court of Appeals further sets out reasons why the “2021 statute” is  
14 procedural and should be applied in the Opinion ¶ 33-42. Therein the Court  
15 discussed whether the changes are procedural in nature and whether it impacts  
16 established substantive rights. For the many reasons set forth in this portion of the  
17 Opinion, and in Petitioner’s Reply Brief, pages 17-22, Vande Krol submits that the  
18 changes affect the procedure in application of the law, not substantive rights, and  
19 not substantive vested rights. See Opinion, ¶ 40-41.  
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1 D. IT IS NOT MANIFESTLY UNJUST TO APPLY THE  
2 “2021 STATUTE” RETROACTIVELY

3  
4 Alternatively, if this Court finds that Benchmark and the City of Superstition  
5 have a vested right, that is not the end of the necessary analysis.

6 The Supreme Court provided a very reflective and in-depth analysis of these  
7 issues in *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 717 P.2d 434 (1986).  
8 The case arose from the change in the enacted statute with respect to comparative  
9 negligence and contributory negligence defenses in Arizona. Respondent submits  
10 that significant portions of the Court’s analyses apply here.  
11

12 “Any inquiry into the effect of a statute on antecedent events must have as its  
13 touchstone a consideration of A.R.S. § 1-244.” *Hall v. A.N.R. Freight System, Inc.*,  
14 149 Ariz. 130, 138-39, 717 P.2d 434, 442-43 (1986) (citing *Bouldin v. Turek*, 125  
15 Ariz. at 77, 78, 607 P.2d 954, 955). Arizona courts have fashioned an exception to  
16 this rule, by which a statute is not considered retroactive if it is merely procedural  
17 and does not affect an earlier established substantive right. *Hall*, 149 Ariz. at 139,  
18 717 P.2d at 443 (1986) (citing, see also *Allen v. Fisher*, 118 Ariz. 95, 96, 574 P.2d  
19 1314, 1315 (App.1978)).  
20  
21

22 The Court also stated in *Hall*:

23  
24 In *Allen v. Fisher*, 118 Ariz. 95, 574 P.2d 1314 (App.1978), the Court  
25 of Appeals stated that ‘it is generally agreed that a substantive law  
creates, defines and regulates rights while a procedural one prescribes

1 the method of enforcing such rights or obtaining redress.’ *Id.* at 96, 574  
2 P.2d at 1315. A rule affecting the measure of damages is substantive.  
3 *Hall*, 149 Ariz. at 138, 717 P.2d at 442 (citing *Bouldin v. Turek*, 125  
4 Ariz. at 78, 607 P.2d at 955).

5 Continuing, the *Hall* Court stated:

6 ‘Substantive’ is merely a label we apply to certain legal rights. The  
7 conclusion that a particular legal right is substantive, in contrast to  
8 procedural, does not mean that it can never be modified or abolished by  
9 the legislature. ‘The rule is that any right conferred by statute may be  
10 taken away by statute before it has become vested.’  
11 *Hall*, 149 Ariz. at 138, 717 P.2d at 442 (citing *In re Dos Cabezas Power*  
12 *District*, 17 Ariz. App. 414, 418, 498 P.2d 488, 492 (1972)).

13 Additionally, they stated:

14 When the defendant asserts that substantive legal rights cannot be  
15 retroactively impaired, he **cannot mean that substantive rights may**  
16 **never be altered**. Such a contention would sweep far too broadly, since  
17 substantive rights, whether statutory or common law, may be abrogated  
18 before vesting. *In re Dos Cabezas Power District, supra*. If the rule were  
19 otherwise, our continually changing landscape of ideas and laws would  
20 instead resemble a petrified forest populated by the outmoded concepts  
21 of the past.

22 *Hall*, 149 Ariz. at 139, 717 P.2d at 443 (emphasis added).

23 To further evaluate these issues of retroactive application, the Court in *Hall* stated:

24 The critical inquiry in retroactivity analysis is not whether a statute  
25 affects a substantive right but whether a statute affects a vested right.  
Thus the implicit meaning of the statement ‘substantive rights may not  
be retroactively impaired’ is ‘substantive rights may not be impaired  
once vested.’

*Hall*, 149 Ariz. at 139-40, 717 P.2d at 443-44.

1 The distinction between substantive and vested rights, while implied by  
2 the decisions of this Court and the Court of Appeals, has rarely, if ever,  
3 been explicitly delineated. Even those cases which have employed  
4 vested rights terminology usually fail to consider what constitutes a  
5 vested right and when it accrues. See, e.g., *Wilco Aviation v. Garfield*,  
6 123 Ariz. 360, 362, 599 P.2d 813, 815 (1979) ('statutory changes in  
7 procedures or remedies may be applied to proceedings already pending  
8 except when the statute effects or impairs vested rights'), *State v.*  
9 *Sanchez*, 119 Ariz. 64, 66, 579 P.2d 568, 570 (1978) ('a statute can not  
10 [sic] be applied retroactively to impair a vested right.')  
11 *Hall*, 149 Ariz. at 140, 717 P.2d at 444.

12  
13 Ultimately, the *Hall* Court holds:

14 We believe that a right vests only when it is actually assertable as a  
15 legal cause of action or defense or is so substantially relied upon that  
16 retroactive divestiture would be **manifestly unjust**.

17 ...

18 When a lawsuit is commenced the defendant gains 'an immediate fixed  
19 right' to assert any substantive defense, which may not thereafter be  
20 prejudiced by the state.

21 *Hall*, 149 Ariz. at 140, 717 P.2d at 444 (emphasis added) (citing, See  
22 *In re Dos Cabezas Power District*, 17 Ariz. App. at 418, 498 P.2d at  
23 492).

24 In part then, the issues to be considered here are whether application of the current  
25 statute is "manifestly unjust" to the interest of Benchmark or Superstition.

26 We now need to determine what the true value of their vested right or interest  
27 means. In *Red Rover*, the Supreme Court held that equity is to be considered in  
28 industrial injury cases: "We hold, therefore, that the [Industrial] commission in  
29 making an award necessarily has the right to consider and make the proper

1 application of the rules of equity...” *Red Rover Copper Co. v. Industrial Comm’n*,  
2 58 Ariz. 203, 208, 118 P.2d 1102, 1107 (1941).

3  
4 There are a plethora of insurance laws, rules, and regulations. Specifically,  
5 this includes laws related to assessing payment of benefits for injured workers.  
6 Petitioners in this case clearly believe retroactivity will impact their obligation to  
7 pay benefits to Vande Krol, when their insurance premium determinations were  
8 evaluated using statutes which existed in 2017. These premium assessments would  
9 have been aligned with their projected costs based upon the 2017 statute. However,  
10 certainly there should have been an appropriate premium assessment based upon  
11 potential cancer cases which would accrue, considering the increasing number of  
12 firefighters who were facing the diagnosis of cancer as an occupational injury.  
13  
14

15 The question arises, whether the reliance upon retroactive application of the  
16 current statute will be “manifestly unjust.”

17  
18 In 2021, when A.R.S. §23-901.09 was passed, the Legislature also passed  
19 A.R.S. §23-1701 *et seq.* Contained in this legislation, themed “firefighter cancer  
20 reimbursement for municipal payors,” are provisions which allow insurance carriers  
21 to make claims with the Industrial Commission of Arizona for payments made  
22 pursuant to A.R.S. §23-901.09(A), as defined in the current cancer statutes. The  
23 requirements in A.R.S. §23-1701 *et seq.* are satisfied in the instant case.  
24  
25

1           Additionally, A.R.S. §20-359 allows for deviation from other worker  
2 compensation premium rates for coverage of firefighters and fire investigators to  
3 address the anticipated increase in losses and expenses for claims that are  
4 compensable pursuant to A.R.S. §23-901.09.

6           The reimbursement statute, A.R.S. §23-1701, allows Benchmark and  
7 Superstition to make a claim for payment of Vande Krol’s cancer claim.

8           It would be manifestly unjust for them to deny the payment of this claim  
9 when they can seek reimbursement from the Industrial Commission of Arizona  
10 under the statutory construction. Vande Krol’s claim should be found compensable.  
11 Thus, the Decision and Decision Upon Review must be set aside.  
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16                   **IF THIS COURT ACCEPTS REVIEW, RESPONDENT**  
17                   **SUBMITS ADDITIONAL ISSUES MUST BE ADDRESSED:**

18                   **THE COURT OF APPEALS FOUND NO NEED TO ADDRESS**  
19                   **WHETHER THE ALJ CORRECTLY INTERPRETED THE**  
20                   **“2017 STATUTE”**

1 **CONCLUSION**

2 Vande Krol submits the Opinion of the Court of Appeals is fully supported  
3 by the law, and proper analysis and interpretation of the law and facts. Vande Krol  
4 requests the Supreme Court deny review.  
5

6 In the alternative, Vande Krol requests the Supreme Court find that the  
7 Administrative Law Judge’s Decision must still be set aside pursuant to Vande  
8 Krol’s Opening Brief regarding the “2017 statute.”  
9

10 DATED September 13, 2023.

11  
12 TAYLOR & ASSOCIATES P.L.L.C.

13  
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