SUMMARY
August 3, 2023

2023COA73

No. 22CA1745, *King Soopers v ICAO* — — Labor and Industry — Workers' Compensation — Coverage and Liability — Conditions of Recovery — Unexplained Injury

In this workers' compensation action, a division of the court of appeals addresses the following question: Does an employee meet the burden of proof to obtain compensation for an on-the-job injury when the facts of record show that the cause of the injury is unknown, but not due to a preexisting condition or other personal risk?

Since *City of Brighton v. Rodriguez*, 2014 CO 7, was decided in 2014, it appears that no published case has addressed this specific question, and the decisions of the ICAO addressing the question have yielded varying results. The division answers the above question "yes" and affirms the Panel's order.

COLORADO COURT OF APPEALS **2023COA73**

Court of Appeals No. 22CA1745
Industrial Claim Appeals Office of the State of Colorado
WC No. 5-181-279

King Soopers Inc.,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Michael Waters,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE RICHMAN*
Pawar and Schock, JJ., concur

Announced August 3, 2023

Law Office of Stephen J. Picardi, P.C., Stephen J. Picardi, Parker, Colorado, for Petitioner

No appearance for the Industrial Claim Appeals Office

Burg Simpson Eldredge Hersh & Jardine, P.C., D. Dean Batchleder, Stephan J. Marsh, for Respondent Michael Waters

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 In this workers' compensation action, we address the following question: Does an employee meet the burden of proof to obtain compensation for an on-the-job injury when the facts of record show that the cause of the injury is unknown, but not due to a preexisting condition or other personal risk?

¶ 2 Employer, King Soopers, seeks review of a final order of the Industrial Claim Appeals Office (Panel) upholding the determination of the administrative law judge (ALJ) that claimant, Michael Waters, sustained a compensable right knee injury. We answer the above question "yes" and affirm the Panel's order.

I. Background

¶ 3 On August 8, 2021, Waters, while performing his job duties as an assistant manager for King Soopers, was walking in the back area of the store carrying cardboard to a cardboard baler. While walking, Waters felt a "pop" in his right knee and fell to the ground. A security camera's video recording of the incident shows that after Waters took several steps, his right leg appeared to flex laterally, and he grasped his right knee and fell. The area where Waters was working was dry, unobstructed, and free of debris. Prior to that

date, Waters had no injuries, symptoms, or treatments involving his right knee.

¶ 4 Waters saw Dr. Lori Long Miller the next day, using crutches and reporting that he was unable to bear weight on his right leg. Dr. Miller noted swelling, tenderness, limited range of motion, and crepitus[1] on palpatation. She ordered magnetic resonance imaging (MRI), which revealed an acute medial meniscal tear, as well as a possible posterior cruciate ligament sprain or reactive edema, moderate joint effusion, and tricompartmental osteoarthritis. Following the injury, Waters was able to work light duty for approximately four weeks. When his condition did not improve, Waters underwent arthroscopic partial medial meniscectomy surgery on September 17, 2021. After recovery and physical therapy, Waters was cleared to resume work activities without restriction, and he returned to work on November 20, 2021.

¶ 5 King Soopers and its insurer filed a notice of contest, and Waters responded with an application for hearing. In January

[1] "Crepitus" is defined as "a grating or crackling sound or sensation." Webster's Third New International Dictionary 534 (2002).

2022, King Soopers requested that Waters undergo an independent medical examination (IME) by a physiatrist, Dr. Lawrence Lesnak. Dr. Lesnak viewed the video of the incident and examined Waters. In his IME report, Dr. Lesnak concluded there was no industrial causation of the injury.

¶ 6 Waters testified at an evidentiary hearing before an ALJ on February 16, 2022. Dr. Lesnak did not testify, but the ALJ admitted his IME report. The ALJ noted that King Soopers had scheduled Dr. Lesnak's deposition for early March, and agreed to keep the record open and subsequently admit the deposition as evidence in lieu of testimony. The only issue at the hearing was compensability, with the parties stipulating to the amount of benefits if the injury was deemed compensable.

¶ 7 Waters testified that his job was very physical and involved moving displays and stocking shelves. On the date of the injury, he had been at work for about six hours and was moving pallets of material from one point to another in the store. He testified that the pallets weighed several hundred pounds, and he had difficulty moving one of the pallets. He broke down a display, put the cardboard on a pallet, and took the pallet to the back room. When

he was walking with the cardboard to the cardboard baler, his knee popped, and he fell. He also testified that he had never had any issues, injuries, or treatments involving his right knee, and that up to that day, it had felt fine.

¶ 8 On cross-examination, Waters testified that he did not recall any twisting of the knee before it popped, and that he did not step on anything. When asked if he had "abruptly turned or anything like that," he responded, "I do that all day, but I don't remember." He stated the cardboard was pretty thick, but he did not know how much it weighed. At the conclusion of the hearing, the ALJ asked the parties to submit written position papers and left the hearing open for the admission of Dr. Lesnak's deposition.

¶ 9 In the deposition, Dr. Lesnak testified that, after reviewing the video and the MRI and examining Waters, he concluded that degenerative changes caused the knee injury. Specifically, Dr. Lesnak opined that "any meniscus tear was present prior" to the incident at work, and that during the incident, "a flap of the meniscus got caught between the femur and tibia when his knee flexed." Dr. Lesnak also stated that degeneration caused the pop, and that carrying the cardboard did not contribute to the injury.

¶ 10 During the deposition, Dr. Lesnak was asked if he agreed that there was no indication that Waters was having any knee issues leading up to his injury. Dr. Lesnak responded,

> Well, I'm not sure what to say about that. I look at his gait and I see how he has a very exaggerated kind of bowlegged gait with his right knee, which clearly indicates chronic pathology involving the right knee. I mean, it is just not in alignment and not walking correctly. He did not seem to have any type of gait antalgia, meaning obvious signs of pain, when he was walking. But his gait was not normal.

¶ 11 The ALJ, after receiving the deposition and position papers, and reviewing all the testimony and evidence, determined that the knee injury was compensable. The ALJ specifically found that Dr. Lesnak's deposition testimony contradicted his IME report.

¶ 12 The ALJ also found the following:

> Moreover, the video evidence of the Claimant's injury shows no more than three visible steps, and only one step in which the Claimant's gait could reasonably be seen. The ALJ finds Dr. Lesnak's opinion that the Claimant's right leg gait "clearly indicates chronic pathology involving the right knee" to lack credibility, given that the video demonstrates only one step in which Claimant's right knee appeared to bow outward. The ALJ finds Dr. Lesnak's opinion that Claimant's MRI and gait were indicative of a pre-existing meniscal tear, flap

> or extrusion that caught in his knee joint to be speculative and unpersuasive.

¶ 13 The ALJ determined that Waters was engaging in an employment function — carrying cardboard to a baler while walking in the employer's store — when the injury occurred. The ALJ then applied the "but for" test in *City of Brighton v. Rodriguez*, 2014 CO 7, and concluded that but for his employment, Waters would not have been walking when and where he was walking when the injury occurred. The ALJ concluded that Waters established by a preponderance of the evidence that he sustained a compensable injury to his right knee on August 8, 2021.

¶ 14 King Soopers appealed the ALJ's determination to the Panel. The Panel affirmed the ALJ's decision because substantial evidence in the record supported it. King Soopers appealed.

II. Analysis

¶ 15 At the outset, we note that King Soopers made a somewhat different argument to the Panel than it does on appeal to this court. In the appeal to the Panel, King Soopers primarily asserted that the "but for" test in *City of Brighton* required Waters to establish that the injury would have occurred to "any person" who happened to be

in his position at the time and place in question. The Panel considered, but rejected, that interpretation of *City of Brighton*.

¶ 16 In this appeal, King Soopers argues that the ALJ erred by finding that Waters sustained a compensable injury when the ALJ specifically found that the cause of the injury was "unexplained" and that this case illustrates an "unexplained injury" rather than an "unexplained fall." The Panel also addressed this argument in its decision: "According to [King Soopers], the case at bar illustrates an unexplained injury as opposed to an unexplained fall." Although at oral argument counsel for King Soopers stated that it was no longer relying on the "any person" test, we address and reject both arguments, as both were the bases for the Panel's decision.

A. Standard of Review

¶ 17 The Workers' Compensation Act (the Act) expressly limits this court's review of a Panel's decision as follows:

> Upon hearing the action, the court of appeals may affirm or set aside such order, but only upon the following grounds: That the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not

> supported by applicable law. If the findings of fact entered by the director or administrative law judge are supported by substantial evidence, they shall not be altered by the court of appeals.

§ 8-43-308, C.R.S. 2022.

¶ 18 The determination of whether an employee's injuries arose out of employment is a question of fact for resolution by the ALJ. *See City of Brighton*, ¶ 11. This court reviews an administrative agency's conclusions of law de novo. *Id.*

B. Law Governing Compensability

¶ 19 Recovery under the Act requires a finding that the injury occurred while the claimant was "performing service arising out of and in the course of the employee's employment," § 8-41-301(1)(b), C.R.S. 2022, and that "the injury . . . is proximately caused by an injury . . . arising out of and in the course of the employee's employment," § 8-41-301(1)(c).

¶ 20 The phrases "arising out of" and "in the course of the employee's employment" are not synonymous, and a claimant must meet both requirements. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Course of employment refers to the time, place, and circumstances under which a work-related injury occurs. *Id.* Thus,

an injury occurs in the course of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *Id.* The parties here do not dispute that Waters was performing a service in the course of his employment.

¶ 21 An injury arises out of employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Id.* Importantly, "[t]he determination of whether an employee's injuries arose out of employment is a question of fact for resolution by the ALJ." *City of Brighton*, ¶ 11.

¶ 22 In *City of Brighton*, an employee paused at the top of a flight of concrete stairs to greet two coworkers standing toward the bottom of the stairs. *Id.* at ¶ 4. She began to walk down the stairs, which were dry and unobstructed. All of a sudden, she tumbled forward, hit her head, lost consciousness, and did not remember precisely how she fell — she did not know whether she tripped, slipped, lost her balance, or something else entirely. *Id.* Her employer denied compensation and argued that her fall was caused by a pre-existing condition of brain aneurysms. *Id.* at ¶ 6.

¶ 23 The Colorado Supreme Court disagreed with the employer and ruled for the employee. In doing so, the court noted that its analysis conflicted with a line of unpublished court of appeals cases that had barred recovery if the cause of a claimant's injury, often a fall, was "unexplained." *Id.* at ¶ 35 n.9. The court stated as follows:

> All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) *employment risks*, which are directly tied to the work itself; (2) *personal risks*, which are inherently personal or private to the employee him- or herself; and (3) *neutral risks*, which are neither employment related nor personal.

Id. at ¶ 19 (citing 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §§ 4.01-.03, at 4-1 to -3 (2013) (hereinafter *2013 Larson*)); *see also* 1 Arthur Larson et al., *Larson's Workers' Compensation Law* (2023) (hereinafter *2023 Larson*).

¶ 24 The court concluded that an unexplained fall "necessarily" constitutes a neutral risk. *Id.* at ¶ 36. The court then held that an employee meets the burden to prove that the injury "arose out of" employment when the employee proves that the injury (1) had its "origin in" his or her work-related functions and is "sufficiently

related to" those functions so as to be considered part of employment; and (2) arose from a neutral risk, whether that neutral risk is an unexplained fall down an employer's staircase or "an arrow out of nowhere." *Id.* at ¶ 29 (citing *2013 Larson* § 7.04[1][b], at 7-28).

¶ 25 The court also stated,

> Importantly, however, injuries stemming from neutral risks, whether such risks be an employer's dry and unobstructed stairs or stray bullets, "arise out of" employment because they would not have occurred *but for* employment. That is, the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of injury.

Id. at ¶ 25.

C. Application of Law to this Case

¶ 26 In this case, the ALJ carefully analyzed Waters's injury under the principles of *City of Brighton*. First, the ALJ ruled out the injury being from the "employment risk" category because neither the physical condition of the area where Waters was injured nor the specific activity of walking while carrying cardboard caused his injury. The ALJ relied on Waters's testimony and found that he did

not slip, twist, or otherwise have an explanation for the injury. Second, the ALJ ruled out the injury being from the "personal risk" category, as he found that there was no credible evidence that the meniscal tear was pre-existing or that any pre-existing condition contributed to or caused the injury. Therefore, the ALJ found that the injury fell within the "neutral risk" category of injury.

¶ 27 As the Panel noted, King Soopers did not challenge the ALJ's conclusion that the injury was not in the "employment risk" category or the "personal risk" category. Instead, King Soopers initially contended that the ALJ incorrectly applied the *City of Brighton* test. Specifically, King Soopers argued that under that test, an employee who suffers an unexplained fall must prove that "any person" who was in the same position would have been injured. Like the Panel, however, we reject this argument. This argument appears to stem from dictum in the *Horodyskyj* case, and the failure to carefully differentiate between the term "the employee" and "any person."

¶ 28 In *City of Brighton*, the Colorado Supreme Court approved the "but for" test, also known as the "positional risk" test, as articulated in *Larson*:

> An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed *claimant* in the position where he was injured. . . . This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed *the employee* in the particular place at the particular time when he or she was injured by some neutral force . . . .

1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 3.05, at 3-5 to -6 (2000) (emphasis added), *quoted in Horodyskyj*, 32 P.3d at 477.

¶ 29 The Colorado Supreme Court directly quoted some of this language in *City of Brighton*, ¶ 26. But then, the court also included this language from the *Horodyskyj* case:

> [A]n injury is compensable under the Act as long as it is triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to *any person* who happened to be in the position of the injured employee at the time and place in question.

City of Brighton, ¶ 25 (emphasis added) (quoting *Horodyskyj*, 32 P.3d at 477).

¶ 30 Importantly, the *Horodyskyj* case is not an unexplained fall case. In the *Horodyskyj* case, the employee was harassed by a coworker at the worksite during regular business hours. 32 P.3d at 473. The court concluded that the harassment was personal and not attributable to neutral forces (i.e., it would not have happened to any employee), and compensation was denied. *Id.* at 478. The Colorado Supreme Court interpreted the term "neutral forces" in an assault case as different than the term in an unexplained fall case. As *Larson* explains,

> In the analysis of the three categories of risk, it was shown that a particular source of injury may be classified as "neutral" for either of two reasons: The nature of the risk may be known, but may be associated neither with the employment nor the employee personally; or the nature of the *cause of harm* may be simply unknown.

2023 Larson § 7.04(1)(a) (emphasis added).

¶ 31 In the *Horodyskyj* case, the nature of the risk was known, but it was not neutral because the court determined it was personal. In *City of Brighton*, the nature of the cause of harm was simply unknown (i.e., the reason for the fall was unknown). Similarly, in Waters's case, the ALJ determined that the nature of the cause of

harm to Waters was simply unknown (i.e., the reason for the knee pop, and subsequent fall, was unknown).

¶ 32 Therefore, we conclude that Waters was not obligated to meet the "any person" component of an assault case like *Horodyskyj*. As the Panel noted in affirming the ALJ, "looking at such a circumstance logically, if any worker would have been so injured in that time and place while engaging in the same activity, then this would exhibit not a 'neutral risk' but a risk in the situs of the employment, i.e. — an 'employment risk,' and would likewise be compensable."

¶ 33 After careful review of the record and arguments on appeal, we conclude that the ALJ correctly applied the "but for," or positional risk, test under *City of Brighton*.[2]

¶ 34 On appeal to this court, King Soopers attempts to distinguish this case as an "unexplained injury" case as opposed to an "unexplained fall" case. King Soopers observes that, while the ALJ

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[2] Since *City of Brighton* was decided in 2014, it appears that no published case has addressed the question we identified at the outset of this opinion. The decisions of the ICAO have yielded varying results. *See* Margaret Keck, *Three Years After* City of Brighton*: Its Effect on the Compensability of Workers' Compensation Claims*, 46 Colo. Law. 47 (May 2017).

eliminated two possible causes of the injury (employment conditions or a pre-existing personal condition), the ALJ made no findings as to what did cause the injury. In its notice of appeal, King Soopers states, "as a matter of law, an unexplained injury *never* can be compensable, as the injured worker has the burden of proving the injury was caused by work." But we perceive this as essentially the same argument that the Colorado Supreme Court rejected in *City of Brighton*, ¶ 35 n.9 ("We note that this analysis conflicts with the following unpublished court of appeals' decisions, which held that unexplained falls were noncompensable injuries . . . ."). We are bound to follow Colorado Supreme Court precedent. *See In re Estate of Ramstetter*, 2016 COA 81, ¶ 40.

¶ 35 Although the *City of Brighton* case used the phrase "unexplained fall," and here King Soopers argues the record shows an "unexplained injury," we do not consider the semantic difference to be material to the outcome in this case. We find guidance in the language of the Act.

¶ 36 The statute, as it currently reads, states that "the injury" must be proximately caused by "an injury." § 8-41-301(1)(c). We note that in the previous versions, the statute stated that the "injury"

must be proximately caused by "accident." Ch. 210, sec. 15, 1919 Colo. Sess. Laws 705 ("Where the injury or death is proximately caused by accident arising out of . . . employment . . . ."). The current definitions of the terms "injury" and "accident" are as follows: An "injury" includes disability "resulting from accident." § 8-40-201(2), C.R.S. 2022. An "accident" is "an unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; or the effect of an unknown cause or, the cause, being known, an unprecedented consequence of it." § 8-40-201(1).

¶ 37 The definition of an accident is similar to *Larson*'s explanation of a neutral risk: the nature of the risk may be known but may be associated neither with the employment nor the employee personally; or the nature of the *cause of harm* may be simply unknown. *See 2023 Larson* § 7.04(1)(a). As noted above, in this case, the ALJ determined that the injury to Waters was unexplained, and thus fell into the "neutral risk" category of injury under *City of Brighton*. And, in *City of Brighton*, the Colorado Supreme Court held that an employee meets the burden to prove that the injury "arose out of" employment when the employee

proves that the injury originated in work-related functions and "arose from a neutral risk," not due to a pre-existing condition or other personal risk. *City of Brighton*, ¶ 29 (citing *2013 Larson* § 7.04[1][b], at 7-28).

¶ 38 The "originated in work-related functions" component was deemed to be met in *City of Brighton* because "the employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of injury." *Id.* at ¶ 25. The ALJ found the same to be true in Waters's situation.

¶ 39 King Soopers also relies on *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968), to support its argument that this injury is not compensable. However, the court in *City of Brighton* clarified that "our statement in *Finn* that an employee must show a 'direct causal relationship between his employment and his injury' applies only to cases involving idiopathic[3] — and thus not

[3] In footnote 2 to *City of Brighton* the court explained that it was using the term idiopathic to mean injuries that have arisen from a personal risk, and therefore are not compensable.

unexplained — falls." *City of Brighton*, ¶ 35 (quoting *Finn*, 165 Colo. at 109, 437 P.2d at 544).

¶ 40 The ALJ in this case determined that Waters's injury was not due to a pre-existing condition (and therefore not idiopathic), specifically rejecting Dr. Lesnak's testimony. And on appeal, King Soopers does not challenge the finding that Waters's injury did not fall into the category of personal risks.

¶ 41 The ALJ and the Panel properly applied *City of Brighton*'s holding: In an unexplained-fall case, there is no way in which an award can be justified as a matter of causation theory except by recognition that this but-for reasoning satisfies the "arising" requirement. *See id.* at ¶ 19; *2023 Larson* § 7.04(1)(a). The court determined that "demanding more precision about the exact mechanism of a fall is inconsistent with the spirit of a statute that is designed to compensate workers for workplace accidents regardless of fault." *City of Brighton*, ¶ 30.

¶ 42 We conclude that the ALJ and the Panel did not err in the application of *City of Brighton* to this particular case, regardless of whether this case is described as one involving an unexplained fall or an unexplained injury. In both instances, requiring more

precision from the employee, when an ALJ has specifically found that the cause of the harm was not pre-existing and truly unexplained, is inconsistent with the spirit of the Act.

III. Disposition

¶ 43 For all the foregoing reasons, the Panel's order is affirmed.

JUDGE PAWAR and JUDGE SCHOCK concur.