SUMMARY
May 2, 2024

2024COA47

No. 23CA1295, Life Care Centers v. ICAO — Workers' Compensation — Conditions of Recovery — Occupational Disease — COVID-19

A division of the court of appeals concludes, as a matter of first impression, that COVID-19 can be an occupational disease under the Workers' Compensation Act of Colorado.

COLORADO COURT OF APPEALS **2024COA47**

Court of Appeals No. 23CA1295
Industrial Claim Appeals Office of the State of Colorado
WC Nos. 5-140-113 & 5-205-197

Life Care Centers of America, d/b/a University Park Care Center, and Old Republic Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Vincent Gaines, (Deceased), by appointed representative and surviving spouse, Sheila Jackson,

Respondents.

ORDER AFFIRMED

Division VII
Opinion by JUDGE TOW
Lipinsky and Grove, JJ., concur

Announced May 2, 2024

Treece Alfrey Musat P.C., James B. Fairbanks, Chayla A. Witherspoon, Denver, Colorado, for Petitioners

Philip J. Weiser, Attorney General, Tanya M. Santillan, Assistant Attorney General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Franklin D. Azar & Associates, P.C, Robert W. Turner, Aurora, Colorado, for Respondent Sheila Jackson

¶ 1 Life Care Centers of America (Life Care) and its insurer, Old Republic Insurance Company, (collectively petitioners) seek review of the final order issued by the Industrial Claim Appeals Office (the Panel) awarding workers' compensation benefits to Vincent Gaines and his surviving spouse, Sheila Jackson, after Gaines died from COVID-19 while employed at a skilled nursing facility that Life Care operates. This appeal requires us to consider, as a matter of first impression, whether COVID-19 can be an occupational disease under the Workers' Compensation Act of Colorado (the Act). We conclude that, under the circumstances of this case, COVID-19 met the statutory definition of an "occupational disease" set forth in section 8-40-201(14), C.R.S. 2023. We therefore affirm.

I. Background

¶ 2 Life Care operates a long-term skilled nursing facility known as University Park Care Center (the facility). Gaines worked for Life Care for over twenty years as a floor technician and a member of the housekeeping department. His duties included cleaning and maintaining the main areas of the facility, such as the dining room, hallways, common areas, and lobby. He also collected and disposed of the facility's trash.

¶ 3 On May 2, 2020, the Colorado National Guard tested all facility residents and staff members for COVID-19. Gaines tested negative on that date. The first positive test of a resident was returned on May 24, 2020. Gaines became sick with COVID-19 on or about May 26, 2020, and the facility declared a COVID-19 outbreak three days later. By the end of the outbreak on July 29, 2020, thirty-five cases were reported among residents, with eight resident deaths. Among the staff, there were thirteen known COVID-19 cases and nine probable cases. Gaines was the third staff member at the facility to test positive for COVID-19.

¶ 4 After contracting COVID-19, Gaines's health deteriorated rapidly. On June 2, 2020, he was hospitalized with a diagnosis of acute respiratory failure with hypoxia due to pneumonia. Gaines was treated in the hospital's intensive care unit, but his condition worsened and he died a month later.

¶ 5 On June 8, 2020, Jackson, on Gaines's behalf, filed a workers' compensation claim based on his exposure to and contraction of COVID-19 at the facility. The petitioners filed a notice of contest on July 7, 2020. Jackson, through counsel, filed for death benefits and applied for a hearing before an administrative law judge (ALJ).

¶ 6 At the hearing, the ALJ took testimony from Jackson and two Life Care employees, Destiny Maes and Michelle Nevarrez. Dr. Marcus Oginsky testified as an expert for Jackson. The ALJ also admitted depositions taken from Life Care's Human Resources Director, Michael Dunphy, and its Executive Director, Roberto Newman.[1] At the conclusion of the hearing, the ALJ held the record open to allow counsel to file post-hearing position statements in lieu of closing arguments.

¶ 7 The ALJ subsequently issued findings of fact and conclusions of law, concluding that Gaines had suffered a compensable occupational disease causally related to his employment. The ALJ found it was more probable than not that Gaines's COVID-19 infection was related to his presence in Life Care's facility to discharge his work duties. The ALJ was persuaded that his infection followed as a natural incident of his work in the facility

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[1] At oral argument, counsel for the petitioners appeared to disagree that Dunphy's and Newman's testimony was part of the evidentiary record. But in a pre-hearing order, the ALJ accepted the parties' agreement to conduct evidentiary depositions of both individuals. Thus, the ALJ properly considered the testimony from these depositions. *See* § 8-43-210, C.R.S. 2023 ("Depositions may be substituted for testimony upon good cause shown.").

and, as a result of the exposure occasioned by the nature of his employment, Gaines fell ill and died. Thus, his employment exposure was the proximate cause of his illness and death.

¶ 8 The ALJ further determined that the medical benefits provided to Gaines were reasonable and necessary and that his need for care was related to the infection. The petitioners were ordered to pay temporary total disability benefits from June 2, 2020, through June 30, 2020, and to pay death benefits to Jackson.

¶ 9 The petitioners appealed to the Panel, asserting that the ALJ's order was not supported by substantial evidence and failed to resolve material conflicts in the record. The petitioners also argued that the ALJ erred as a matter of law with respect to the occupational disease standard. In its briefing to the Panel, the petitioners also contended that the ALJ's order violated the policy underlying the statute pertaining to occupational diseases.

¶ 10 The Panel rejected the petitioners' arguments and affirmed the ALJ's order, holding as follows:

> The record supports that at the time of [Gaines's] exposure, the working conditions included a high prevalence of COVID-19 positive-testing residents in addition to residents who had been unknowingly exposed

> to the virus but had not yet exhibited symptoms of illness or a positive test. No evidence was provided that [Gaines] did not personally interact with other residents that had not yet been quarantined but would later test positive for COVID-19. The record well documents that these individuals could have been contagious without exhibiting signs or symptoms of the virus. In fact, very many of these residents later tested positive for COVID-19.

¶ 11 Further, the Panel noted the following:

> We must recognize that the advent of the COVID-19 virus, worldwide, stressed the social fabric. Despite shut-downs, self-isolation, face masking, social distancing, and strict compliance with CDC protocols, tens of millions caught the disease and millions died in the United States. The novel virus raises a unique consideration under Colorado workers' compensation law. Because of the nature of a virus, it cannot be proven beyond a reasonable doubt precisely where or from whom an individual had the exposure that transmitted the disease. Like the ALJ, we believe a reasoned statistical analysis can determine where the site of exposure was most probable. The ALJ concluded that it was more probable than not that the exposure site was within the facility. In our view, the ALJ used the appropriate burden of proof.

¶ 12 The Panel concluded that, under its standard of review, it had no basis to disturb the ALJ's order.

II. Analysis

A. Standard of Review

¶ 13 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. 2023.

¶ 14 Substantial evidence is that quantum of probative evidence that a rational fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, evidence that is probative, credible, and competent, such that it warrants a reasonable belief in the existence of a particular fact without regard to contradictory

testimony or inference, is considered substantial evidence. *City of Loveland Police Dep't v. Indus. Claim Appeals Off.*, 141 P.3d 943, 950 (Colo. App. 2006).

¶ 15 We defer to the ALJ's credibility determinations and resolution of conflicts in the evidence, including the medical evidence. *See City of Littleton v. Indus. Claim Appeals Off.*, 2016 CO 25, ¶ 51. Causation is generally a question of fact for the ALJ. *Id.* Under the Act, an ALJ must determine if a claim is established by a preponderance of the evidence. § 8-43-201(1), C.R.S. 2023. A "preponderance of the evidence" is that which leads the trier of fact, after considering all the evidence, to find that the existence of a contested fact is more probable than its nonexistence. *Town of Castle Rock v. Indus. Claim Appeals Off.*, 2013 COA 109, ¶ 21, *aff'd*, 2016 CO 26.

B. Law Governing Compensability

¶ 16 Under the Act, an employee is entitled to compensation if "the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted." § 8-41-301(1)(c), C.R.S. 2023. An occupational disease means a disease that

(1) results directly from the employment or conditions under which the work was performed; (2) can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment; (3) can be fairly traced to the employment as a proximate cause; and (4) does not come from a hazard to which the worker would have been equally exposed outside of the employment. *See* § 8-40-201(14). Once an employee establishes the first three elements, the fourth element becomes an affirmative defense; thus, the employer and insurer, not the employee, must prove nonemployment causation. *See Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992) ("[B]ecause the equal exposure provision provides an exception to the general rule of compensability, the rule relating to statutory exceptions would require [the employer] to produce evidence establishing its applicability.").

C. Discussion

1. Proceedings Below

¶ 17 Maes became Life Care's infection prevention nurse at the facility in October 2020. In that position, she took custody of a chart that listed every person in the facility who had tested positive

for COVID-19 before she arrived at the facility. She testified that during the COVID-19 outbreak, Life Care followed stringent guidelines, including setting up an isolation room (known as the red unit) and requiring personal protective gear. She acknowledged that, despite these protocols, residents and staff continued to develop COVID-19 infections.

¶ 18 At the hearing, the ALJ asked Maes about Life Care's "First Report of Injury" form, completed on June 24, 2020, which reported that Gaines "may have been exposed to COVID-19 while moving COVID-19 positive residents to isolation rooms." Maes asserted that the information was incorrect. She testified that Gaines did not move COVID-19 positive residents to the red unit.

¶ 19 Although the form was not signed, it indicated that the "HR Director" had completed it.

¶ 20 During his deposition, Newman testified that a former Human Resources Director named Valorie had completed the First Report of Injury form. He further testified that Nevarrez would have informed Valorie that Gaines may have been exposed to COVID-19. When asked who had moved people to quarantine at the time, Newman said, "[I]t could have been nursing, it could have been

housekeeping, or it could have been maintenance potentially." Newman said that Gaines may have moved patients on a voluntary basis. Newman asserted that he was a "finance guy" rather than a nursing employee. But Newman also testified that he had been Gaines's supervisor, as a Director of Environmental Services, for several years before becoming Executive Director.

¶ 21 At the time of the outbreak, Nevarrez was the facility's Director of Environmental Services and was Gaines's immediate supervisor. Nevarrez oversaw the laundry and housekeeping staffs and the floor technicians. She testified that, during the outbreak, she took the responsibility to move infected residents to the red unit. Like Maes, she testified that Gaines was not tasked with moving COVID-19 residents to the red unit. She admitted, however, that after taking patients to the red unit, she went back to her regular duties, which included contact with Gaines. She testified that during the relevant time period, she wore personal protective equipment (PPE) and did not test positive for COVID-19. She admitted that housekeepers would clean resident rooms, and that housekeepers and floor technicians could interact in the break room. She also testified

that, while Gaines was responsible for collecting trash from outside the red unit, he would have worn full PPE while doing so.

¶ 22 Jackson, who was trained as a nurse, testified that she worked from home during the relevant time period. She shared a home with Gaines, his half-brother Roger, and her son Carter. Carter and Roger worked for Life Care in the facility's kitchen. Jackson testified that they took stringent precautions at home to avoid infection, including wiping down groceries, not going out except for work, and changing clothes immediately upon returning from work. Before Gaines got sick, nobody in the household exhibited any signs of COVID-19. According to Jackson, Gaines told her that he felt uncomfortable at work during the COVID-19 outbreak because, at times, he moved residents to the isolation unit, and he either did not understand how to wear the PPE or wore it incorrectly.

¶ 23 Under cross-examination, Jackson admitted she had been sick during the relevant time period, but with gastrointestinal issues related to gastritis and a hernia. She had no respiratory problems or coughing at the time.

¶ 24 Dr. Oginsky is board certified in internal medicine and health care quality management. There was no objection to his testifying as an expert in those fields. At the time he testified, Dr. Oginsky had received training in the analysis of probability and statistics regarding the transmission of diseases, had treated over 1,000 COVID-19 patients, had developed COVID-19 protocols for his hospital, and had developed similar protocols for his own company, which the Centers for Disease Control and Prevention and the Morbidity and Mortality Weekly Report had published.

¶ 25 Dr. Oginsky noted in his expert report and in his testimony the unique characteristics of the COVID-19 virus. He testified that the virus is spread by inhaling aerosolized virus particles that are buoyant in the air and can travel directly into a person's airways and lungs. Dr. Oginsky opined that one must analyze the "attack rate" of the virus in an individual's different environments to assess where it is medically probable that an individual became infected with the virus. Dr. Oginsky also said that it is not appropriate to apply a system of direct transmission in analyzing how an individual became infected with COVID-19. Dr. Oginsky determined that no available evidence suggested that Gaines was

exposed to COVID-19 in his home. After reviewing the data available on community spread for the applicable time period, and considering the presence of the virus in the facility, Dr. Oginsky opined that the facility was the highest medically probable environment in which Gaines could have contracted COVID-19. Dr. Oginsky's opinion was unrebutted.

¶ 26 He concluded that

> Mr. Gaines had no known exposures in the household, no household contacts with COVID-19. So, I excluded that as a potential source of contagion. Based on the fact that the community exposure rates were very low in Pueblo County at the time, it is highly unlikely that he encountered a stranger in the general community that would have been the transmission source of COVID-19, and at the same time his workplace had a clearly documented [outbreak] of contagious COVID-19 at that moment in time. So I concluded that his workplace was the most probable source of his illness.

¶ 27 Likewise, Dr. Oginsky testified that, regardless of the efficacy and appropriateness of controls, COVID-19 spread to staff members at the facility. He testified that "there is documented spread. There was presence in 30% of the residents, and there was presence in

twelve or fifteen staff members. So there was person-to-person transmission within that workplace environment."

2. Issues on Appeal

¶ 28 On appeal, the petitioners raise two issues:

(1) whether the Panel correctly interpreted and applied the standards applicable to the law and statutes regarding occupational diseases; and

(2) whether the Panel's final order violates the underlying policies associated with and giving rise to the requirements set forth for occupational diseases.

¶ 29 In response, Jackson[2] observes that the petitioners' arguments do not mirror the issues presented but instead are a factual attack on the ALJ's determination because the petitioners continue to argue that the ALJ's findings are not based on substantial evidence. Jackson also contends that the petitioners did not preserve the second issue, which focuses on the policy implications of the ALJ's order. In its appellate brief, the Panel agrees with Jackson that the

[2] Jackson is both Gaines's surviving spouse and his appointed representative. Thus, when referring to the arguments on Gaines's and her behalf, we will refer to Jackson.

petitioners' policy argument was not preserved for appeal and contends that, even if it was preserved for appeal, the petitioners' argument is unpersuasive because the Act expressly allows coverage for diseases or infections, such as COVID-19, so long as certain requirements are met.

¶ 30 We interpret the petitioners' first argument as a contention that the Panel's determination that Gaines was entitled to benefits is not supported by applicable law. *See* § 8-43-308 (we may set aside an order if the award of benefits is not supported by applicable law). Additionally, when the petitioners appealed to the Panel, one of their listed issues was "that the ALJ erred as a matter of law with respect to the occupational disease standard." As discussed below, however, we conclude that we need not address the petitioners' second argument, whether or not it was raised below, to resolve this case.

a. The ALJ's Order Is Supported by Substantial Evidence

¶ 31 As they did before the Panel, the petitioners persist in their argument that, because Gaines did not go into resident rooms or transport infected residents, the ALJ erred by determining that it was probable Gaines came into some sort of contact with an

infected resident or coworker. In their briefing and at oral argument, the petitioners contended that Dr. Oginsky had erroneously relied on information indicating that Gaines had transported patients. In that regard, Dr. Oginsky testified at the hearing as follows:

> Q (by the petitioners' counsel): [I]n your report you mention some direct contact with someone. I'm on page three of your report, Dr. Oginsky.
>
> A (by Dr. Oginsky): Yes. I was told that he was asked at one point to participate in moving patients to the COVID isolation unit.
>
> Q: Okay. And who told you that?
>
> A: That was related in an interrogatory, I believe.

¶ 32 But the ALJ concluded that, regardless of whether Gaines went into resident rooms or transported infected residents, the expert testimony showed that it was still more probable than not that Gaines became infected at work. The ALJ specifically determined that

> [t]he testimony of Ms. Nevarrez that Mr. Gaines did not have any contact with known COVID-19 positive persons provides [the petitioners] with no safe harbor to escape liability given the fact that contagious persons may be asymptomatic for up to twenty-four hours

> before the onset of symptoms, which simply means that contagious individuals are often not recognized before they infect someone else.

¶ 33 The ALJ ultimately credited Dr. Oginsky's testimony comparing the likelihood that Gaines contracted COVID-19 at work as opposed to at home or in the community. While Dr. Oginsky noted that a high probability of infection could occur in a home environment, in this particular case there was no credible evidence that anyone in Gaines's home had COVID-19. Consequently, Dr. Oginsky concluded that the home was not the source of Gaines's exposure to the disease. As to the community at large, Dr. Oginsky further determined that the prevalence of COVID-19 in the Pueblo area at the time suggested that the chance of Gaines having encountered a contagious stranger was "only 0.3%," and that the chances that such an encounter would involve a long enough exposure to transmit the virus was an "extremely low probability event."

¶ 34 In Dr. Oginsky's report, he noted that "observational studies have demonstrated a higher risk of infection for workers in a health care environment." Indeed, the State and Pueblo County public health authorities registered a COVID-19 outbreak at Life Care's

facility on May 29, 2020. Dr. Oginsky also said in his report that the outbreak reporting date of May 29, 2020, did not imply that this was the start of the illness in that environment; instead, "this is the date when it was clear that the disease was present, and authorities were made aware of cases." Dr. Oginsky concluded that, at the time the outbreak at the facility was declared, there were two COVID-19 cases that could be connected to the same physical location, and Gaines's acute illness, hospitalization, and respiratory failure were consistent with an exposure around May 20, 2020, or after.

¶ 35 Further, there was no credible evidence Gaines contracted the infection anywhere else. While the petitioners suggest that Jackson may have been sick with COVID-19 in the weeks before Gaines contracted the illness, there is no evidence in the record showing that Jackson's illness was COVID-19. To the contrary, Nevarrez testified that Gaines had been concerned about Jackson because Jackson was ill, but that Gaines did not know what her illness was. Nevarrez also testified that Gaines told her Jackson did not want to go the hospital to get tested because, at that early time in the pandemic, she was afraid she might be more likely to get COVID-19

there than anywhere else. The petitioners use this testimony to allege that Jackson actually had COVID-19 but refused to get tested. But the record does not support this inference. And, as noted, the petitioners needed to show the existence of a "non-industrial hazard" to which Gaines "had been equally exposed" to be relieved of responsibility. *Cowin*, 860 P.2d at 537.

¶ 36 The ALJ is the sole finder of fact, and the sole determiner of the credibility of witnesses. *City of Littleton*, ¶ 52. The weight and sufficiency of the evidence and the probative effect of evidence are matters solely within the ALJ's province. *Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002). We conclude that the ALJ did not err by crediting the testimony and other evidence before him to determine that Gaines most probably contracted COVID-19 at the facility. The ALJ found Dr. Oginsky's testimony credible, and the petitioners did not rebut it. We note that, even if the petitioners do not agree with Dr. Oginsky, it was the ALJ's prerogative to make credibility determinations and to determine the weight to be given to the testimony, and we will not disturb those determinations on review.

¶ 37 After thoroughly reviewing the entire record, we conclude that substantial evidence supports the ALJ's findings. Therefore, we will not set aside the Panel's determination that the ALJ's findings were supported by substantial evidence.

b. The Award of Benefits Is Supported by Applicable Law

¶ 38 Occupational diseases were historically identified and governed by the Colorado Occupational Disease Disability Act (CODDA). *City of Littleton*, ¶ 30 (citing Ch. 163, sec. 9, 1945 Colo. Sess. Laws 432, 434). In 1975, the legislature repealed CODDA and incorporated several of its provisions into the Act, including the definition of "occupational disease" now codified at section 8-40-201(14). *City of Littleton*, ¶ 31. As discussed previously, that section provides that for a condition to be considered an occupational disease, there must be a showing that the disease

(1) resulted directly from the employment or conditions under which the work was performed;

(2) followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment;

(3) is fairly traced to the employment as a proximate cause; and

(4) did not come from a hazard to which the worker would have been equally exposed outside the employment.

See § 8-40-201(14).

¶ 39 A claimant must establish a reasonable causal connection but is not required to prove causation with mathematical certainty or beyond a reasonable doubt; rather, it is sufficient that the claimant present facts and circumstances indicating a reasonable probability that his disease was proximately caused by the conditions of his employment. *See Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *see also City of Littleton*, ¶ 32 (noting that the proof of causation is the showing of the job relatedness of an occupational disease). The petitioners posit that, when a disease is viral, a finding of causation demands more stringent proof, as a claimant must show that his or her exposure to the virus at the workplace was the proximate cause of his or her infection. But in this case, as discussed above, Gaines met that threshold. As a division of this court noted in *Rockwell*,

> [A]lthough the claimant in a workers' compensation case has the initial burden of proving his entitlement to benefits, once the claimant has presented evidence sufficient to establish a prima facie case, the burden of

> going forward shifts to the employer and its insurer to rebut the claimant's evidence or to establish that the claim lacks merit.

802 P.2d at 1184.

¶ 40 The petitioners rely on *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993), to support their argument that the legislature intended to limit the scope of occupational diseases to those that result from working conditions that are "characteristic of the vocation." *Id.* at 823. But the ALJ's finding is consistent with *Anderson*. In *Anderson*, the claimant was a carpenter and former smoker who suffered from a hereditary condition that caused progressive emphysema. *Id.* at 820. As a carpenter, he was exposed to airborne particles (sawdust) that aggravated his disease. *Id.* The Colorado Supreme Court determined that his disease was compensable because he showed that he was "exposed by his . . . employment to the risk causing the disease *in a measurably greater degree and in a substantially different manner* than are persons in employment generally." *Id.* at 824 (emphasis added) (citation omitted).

¶ 41 Thus, under *Anderson*, Gaines had to show that his employment exposed him to the risk of contracting COVID-19 to a

measurably greater degree and in a substantially different manner than persons in employment generally. The ALJ determined that Gaines made this showing via unrebutted expert testimony that, around the time he contracted COVID-19, 30% of the facility's residents, along with a substantial number of employees, had contracted the virus, compared to 0.3% of the community as a whole. While the petitioners argue that Dr. Oginsky mistakenly failed to consider household exposure, that is not an attack on whether the award of benefits was in error as a matter of law.[3] Rather, as noted previously, that argument goes to whether substantial evidence supports the ALJ's causation finding. And we have already held that it does.

¶ 42 We cannot say that the Panel erroneously applied the relevant statutory framework or case law. The Panel affirmed the ALJ's detailed and reasoned analysis, and we will not disturb it on review.

[3] The petitioners' argument is wrong in any event. Dr. Oginsky did consider household exposure and concluded there had been none.

c. The Petitioners' Policy Argument Simply Recasts Their Sufficiency Challenge

¶ 43 The Panel noted that the petitioners "did not previously raise the issue of public policy considerations as a defense in the claim." The Panel also concluded that the petitioners' policy argument should be characterized as an "as applied" constitutional challenge and declined to address it.

¶ 44 Regardless of whether the Panel correctly characterized the argument as a constitutional challenge, we discern no basis for reversal. It appears that the petitioners contend that the final order converts the Act into a "general health insurance act." Although couched as a policy argument, the petitioners merely reiterate their position that "the rigorous requirements are not satisfied by [the Panel's final order]." The petitioners further contend that "[i]t is tragic that Mr. Gaines acquired COVID-19, but it was not established that [they] should be liable for his benefits." This, again, is simply a repackaging of their attack on the sufficiency of the evidence, which we have rejected.

¶ 45 Ultimately, we agree with Jackson that, because Gaines's exposure to COVID-19 was shown to have arisen out of his

employment based on substantial evidence presented to the ALJ and upheld by the Panel, his award of benefits should not be reversed on appeal "based upon some ill-defined policy considerations" presented by the petitioners.

¶ 46 As a final note, the petitioners argue, without any explanation, that the medical benefits awarded were not reasonable and necessary because the medical record billings are "simply bills" and "there is no medical justification to support the finding that such bills completely and entirely flowed from the COVID-19 treatment." This argument was not raised before the Panel, and we thus will not consider it. *See Apache Corp. v. Indus. Comm'n*, 717 P.2d 1000, 1003 (Colo. App. 1986).

III. Disposition

¶ 47 The Panel's order is affirmed.

JUDGE LIPINSKY and JUDGE GROVE concur.