**IN THE SUPREME COURT**
**STATE OF ARIZONA**

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| JANE SHERRING,<br>Petitioner,<br><br>v.<br><br>THE INDUSTRIAL COMMISSION OF ARIZONA,<br><br>Respondent,<br><br>CITY OF TUCSON,<br><br>Respondent Employer/Carrier. | 2 CA-IC 2017-0011<br><br>ICA Claim No.:<br>20170-470053<br><br>Carrier Claim No.:<br>0773-WC-17-0000369 |

# PETITION FOR REVIEW


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## JURISDICTION

Jane Sherring, pursuant to Rule 23 Arizona Rules of Civil Appellate Procedure, hereby petitions this Court to review the August 9, 2018 Court of Appeal's opinion affirming the August 22, 2017 Decision Upon Hearing And Findings And Award for Non-Compensable Claim and the October 25, 2017 Decision Upon Review Affirming Decision Upon Hearing And Findings And Award for Non-Compensable Claim issued by the Industrial Commission of Arizona.

## ABBREVIATIONS AND TERMS USED

References to record on appeal will be styled "[ROA ALJ Hrg TR at ep page:line-line]" or "[ROA ALJ Hrg TR at ep page:line to ep page:line]." Citations to other parts of the record will be styled "[ROA ALJ Hrg ep __]." Citations to the Court of Appeals Opinion will be styled "[COA at ¶].

## STATEMENT OF FACTS

¶ 1 Jane Sherring applied for a job in parking enforcement with the City of Tucson in late 2016. [ROA ALJ Hrg TR at ep 47:10-19; ep 55:4-6]

¶ 2 Shortly thereafter, Sherring was notified that she was accepted for the job contingent on passing "all paperwork, background information,

reference checks, reemployment testing and approval from the Equal Opportunity Programs Division and Human Resources." This included a driving record check, and also a physical. She had passed the background and driving checks and all of the other "paper" requirements and the only remaining contingency was her passing the physical. [ROA ALJ Hrg TR at ep 48:12 – 49:5; ep 60:2-22]

¶ 3 After filling out the paperwork for the City on January 13, 2017, Sherring attended the required physical. During the course of the fifty-pound lift test, Sherring injured her left knee. [ROA ALJ Hrg TR at ep 50:21 – 52:12]

¶ 4 The "certification" that Sherring passed the physical was completed on a "Pre-Employment Services" form bearing the City of Tucson's Human Resources logo and indicates, through checked boxes in Section 2, that Human Resources was requesting the pre-employment physical include a "basic physical" and a "50 lb. lift test." This form was signed by Dr. Richard Secklinger at US HealthWorks and indicates that Sherring was "Medically able to perform the essential functions of the position offered." [ROA ALJ Hrg at ep 160]

¶ 5 While the parties agree that the City had not completed its processing of the "onboarding paperwork", as Petitioner's Statement of Facts shows, Sherring completed all of her required paperwork [Opening Brief, SOF ¶¶17-21, at ep 8-9]. Additionally, the City sent an email to Sherring on January 19, 2017 confirming that she had completed all of the pre-employment and background testing stating: "Congratulations! You have successfully completed all of the pre-employment and background testing necessary for the Parking Services Agent position with the City of Tucson. Please contact me at … to discuss a start date." [ROA ALJ Hrg at ep 178]

¶ 6 Sherring sought medical treatment for her left knee on February 3, 2017 and never physically worked for the City. She never received a paycheck. [ROA ALJ Hrg TR at ep 55:7 – 56:1; ep 65-67; ep 63:14-24]

¶ 7 The administrative law judge found Sherring's claim non-compensable. [ROA ALJ Hrg at ep 93, ¶6]; [ROA ALJ Hrg at ep 9-10]

## COURT OF APPEAL'S DECISION

(A copy of the August 9, 2018 Court of Appeal's opinion is filed herewith.)

Petitioner raised two issues before the Court of Appeals. First, whether Sherring had a completed a contingency offer of employment with the City at the time of her injury (or when that injury manifested itself) thus making her a City employee and entitled to workers' compensation benefits. Second, if she was not an employee at the time of her injury, then public policy and the interpretation of workers' compensation law favoring injured workers compels coverage for an injury that occurs in a pre-hearing physical.

The Court of Appeals ruled that Sherring was injured prior to the formation of an employment contract with the City and that Arizona's workers' compensation statutes preclude awarding workers' compensation benefits for a worker injured during a pre-employment physical because that worker is not an employee.

As part of her argument that she was an employee of the City and entitled to workers' compensation benefits, Sherring also argued that her injury did not manifest itself and her right to file a claim did not accrue until after she was an employee. This argument was not addressed by the Court of Appeals.

## REASONS TO GRANT PETITION FOR REVIEW

The facts of this case are essentially undisputed and are detailed in the Statement of Facts. In short, Ms. Sherring applied for a job in parking enforcement with the City of Tucson. The City made a contingent offer of employment that Sherring accepted. The City's offer was contingent on Ms. Sherring completing the necessary paperwork, passing a background check, and passing a required physical. Sherring completed the necessary paperwork, passed the background check, and passed the physical. During the physical, however, Sherring injured her left knee in a lifting test, though she would not discover this fact until seeing a doctor a short time later, well after completing the City's physical examination.

**Public Policy**

As set forth above, Petitioner presented two issues to the Court of Appeals, and the issue of whether a potential employee who is required to attend a pre-employment physical arranged by and for the benefit of the employer is entitled to workers' compensation coverage is an issue of first impression in Arizona. Given that the vast majority of people in Arizona are workers and pre-employment physicals are not uncommon, this is an important issue to workers, business, and insurers alike, and has statewide importance in clarifying workers' compensation benefits. Further, the Court

of Appeals issued an opinion decision, thus setting precedence to the state on an issue not yet addressed by this Court.

While Arizona has never addressed this question, the issue of whether a person injured in a pre-employment physical has been addressed in at least three other states, California, Nebraska, and Kentucky. The California Supreme Court held that these injuries are industrially related and provided coverage in *Laeng v. Workmen's Comp. Appeals Bd.,* 494 P.2d 1 (1972), and the Supreme Courts of Nebraska and Kentucky finding against coverage in *Gebhard v. Dixie Carbonic*, 261 Neb. 715, 625 N.W.2d 207 (2001) and *Rahla v. Medical Ctr. at Bowling Green*, 483 S.W. 3d 360 (Ky. 2016) respectively.

Petitioner urged the courts below to find she was entitled to workers' compensation benefits based on Arizona's public policy favoring workers when interpreting Arizona's workers' compensation statutes, relying on the rationale in *Laeng*, supra. The Court of Appeals, however, rejected Petitioner's arguments and denied coverage, relying on *Gebhard*, supra.

The Court of Appeals determined that workers' compensation coverage was not appropriate in Arizona because Arizona, like Nebraska,

provides workers' compensation coverage only for employees, noting the similarity of Arizona's and Nebraska's definition of an employee. [COA at ¶14] This analysis, however, simply ignores the fact that Arizona's definition of an employee is also nearly identical to California's definition of an employee.[1]

Arizona's definition of an employee is found in *A.R.S. § 23-901(6)(b)*: "Every person in the service of any employer subject to this chapter, including aliens and minors legally or illegally permitted to work for hire…" According to *Laeng*, California's definition is, "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written…" *Laeng,* id. at 4. Finally, Nebraska defines an employee as "Every person in the service of an employer who is engaged in any trade, occupation, business, or profession … under any contract of hire, expressed or implied, oral or written, including aliens and also including minors…" *Gebhard*, id. at N.W. 2d. at

[1] The Court of Appeals distinguished California's definition because it "carried a presumption of employee status for any person who rendered service to another" [COA at ¶14]. But that presumption is not part of California's definition of an employee and that separate section of the Labor Code played no role in the *Laeng* decision.

210-11. Thus, in California, Nebraska, and Arizona, an employee is a person who provides a service to an employer.

In *Laeng*, id., California's Supreme Court held that a job applicant injured during a pre-employment agility test was an employee for workers' compensation purposes despite the fact that the applicant was not officially hired at the time of his injury. In so holding, the court acknowledged that a person who may not be an "employee" under contract law may still be an "employee" for purposes of workers' compensation. "Given these broad statutory contours, we believe that an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contract or common law conceptions of employment but must be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." *Laeng*, id. at 5-6 (citations omitted.)

The *Laeng* decision rests upon the fact that the Laeng was performing a "service" for the employer by undergoing a pre-employment physical. While the examination in *Laeng* was an agility test to determine if Laeng had the relevant skills to perform the job, the lifting test that Sherring undertook was also to see if she had the relevant ability to perform the City's job. As set forth in the statement of facts, the City dictated where the

physical was to take place and what requirement the physical would consist. The physical was solely for the City's benefit, and it cannot be denied that Sherring was in the "service" of the City when she underwent the exam.

The critical criteria in determining when a service is performed for the employer is when the risk of injury is inherent in the work, meaning that the worker is exposed to the risk of injury by the services rendered by the worker to the employer. While the *Laeng* court recognized the difference between being injured while performing work services as opposed to a pre-employment physical (or agility test), both sets of cases are a benefit to the employer. In pre-employment testing, the test is done to ensure a worker is qualified in some way for the job and test is chosen by the employer. Further, the employer establishes and retains control over the manner of testing. Was the City's required physical a benefit to the City and performed to ensure Sherring was qualified for the job? While the Court of Appeals opined that it was not, the facts say otherwise.

The Court of Appeal's opinion states that the physical exam that Sherring had to pass did not "'occur[ ] in the service of the employer' to the same extent as the *Laeng* agility test." [COA at ¶ 15.] It is difficult to understand, however, how requiring a worker to pass a lifting test differs

from requiring a worker to pass an agility test. Simply stated, a lifting test is not part of a routine physical examination, and the City's requirement that Petitioner pass a lifting test of fifty pounds aptly demonstrates that her ability to do so was necessary for her to perform the job for the City, most likely to demonstrate her ability to place "boots" on vehicles as part of the City's parking enforcement. Indeed, the certification, which is a City form, provided to the City by the doctor's office states that Sherring was "Medically able to perform the essential functions of the position offered." [SOF ¶ 5] Given this language, there cannot be any doubt that the physical "occurred in the service of the employer," thus bringing Sherring within the purview of Arizona's statute, *A.R.S. § 23-901)6)(b)*.

The Court of Appeals also stated that, "Our statute [A.R.S. § 23-901(6)(a)] and the principle that public policy is determined by the legislature, not the courts, compel the same result here [as *Gebhard*]." (Citation omitted.) [COA at ¶14] But there is not any disagreement over Arizona's public policy for workers' compensation claims and this case allows this Court the opportunity to interpret our statute in light of our stated public policy.

This Court has repeatedly stated that, "The Workmen's Compensation Act is remedial, and its terms should be liberally construed in order to effectively carry out the purpose for which it was intended, that being to place the burden of injury and death from industrial causes upon industry." *Dunlap v. Industrial Commission*, 90 Ariz. 3, 363 P.2d 600 (1961). Indeed, this public policy is cited frequently and also by the courts of appeals: "We liberally construe [the] Act to effect its purpose of having industry bear its share of the burden of human injury as a cost of doing business." *Landon v. Industrial Commission of* Arizona, 240 Ariz. 21, 375 P.3d 86, ¶12 (App. 2016) (Citations omitted.) Where there is doubt in the construction of the workers' compensation statutes, courts should construe the Act in a way that best effect its purpose of compensating the injured employee for his loss of earning power. *English v. Industrial Commission,* 73 Ariz. 86, 237 P.2d 815 (1951). Public policy favors interpreting workers' compensation statutes in favor of compensability and liberally in a manner that favors workers and shifts the injury costs associated with industry to industry. The opinion by the Court of Appeals does not further Arizona's stated policies. Indeed, by rejecting workers' compensation coverage for pre-employment injuries, it has shifted the cost of those injuries to the workers and away from industry.

This same reasoning shows why such coverage cannot be grounded on the assumption that a person injured in a pre-employment physical must be an employee first as the Court of Appeals held: "Moreover, from a public policy perspective, it would be incongruous to allow workers' compensation for pre-employment exam injuries that are not so severe as to prevent the applicant from passing but to disallow compensation for injuries that result in a failing score." [COA at ¶ 13] As a general statement, Petitioner agrees with this, but if Arizona's policy is to expand coverage to workers, then denying benefits to some because not all will be covered does not further that policy; coverage for some is better than coverage for none.

Furthermore, while Petitioner argues that she was an employee at the time of the injury, being an employee should not be a predicate to coverage given Arizona's public policy, and a blanket rule that workers are employees while attending pre-employment physicals for workers' compensation purposes eliminates the "minor injuries are covered but severe injuries are not" incongruity the Court of Appeals noted. She is urging that this Court grant review and find that, as a matter of public policy, injuries that occur during a pre-employment physical be eligible for workers' compensation because when those physicals, as here, are required

by employers as a condition of employment and when employers determine what requirements the employee must pass, such as an agility test or a lifting test. The employers create the risk of injury to the worker and employer's should therefore be responsible for injuries that occur as a result of that risk.

**Contract**

Petitioner continues to assert that the contract issue was wrongly decided. The determination of whether she was an employee at the time of her injury is based on which event took place first – the injury or the completion of the final contingency forming an employment contract between Sherring and the City. Sherring asserts, as she did below, that those events occurred simultaneously, that she injured her knee as she passed her physical and therefore she was an employee at the time she was injured. Given that there is not a factual dispute over when and how Sherring sustained her knee injury, this is a legal issue for an appellate court to consider.

This Court has on several occasions clarified Arizona law on when a potential employee becomes an employee, including three of the four cases the parties relied on in arguing this issue. Those cases, *City Products Corp. v. Industrial Commission,* 19 Ariz. App. 286, 506 P.2d 1071 (1973), *Knack*

*v. Industrial Commission,* 108 Ariz. 545, 503 P.2d 373 (1972), *Pauley v. Industrial Commission,* 109 Ariz. 298, 508 P.2d 1160 (1973), and *Ryan v. Industrial Commission*, 127 Ariz. 607, 623 P.2d 37 (1981) do not, however, lead to a clear resolution of the contract issue presented in this case. The evidence shows that the lifting test was the last part of Sherring's physical and that she both passed the lifting test and injured herself in the process. Petitioner urges the Court to grant review to clarify that under these facts, she was an employee.

Even if the Court finds that the injury occurred first, which is implicit in the Court of Appeal's opinion, the evidence showed that Sherring did not realize that she had sustained an injury until weeks after the physical. Thus, her right to pursue her claim did not accrue until well after the physical examination and after the employment contract had been formed. Again, this should have made her eligible for benefits.

Under these circumstances and under the cases cited above, Sherring urges this Court to revisit the question of when a potential employee forms a contract of employment and becomes an employee for purposes of workers' compensation benefits.

## CONCLUSION

It is not only appropriate that this Court hear cases of first impression in Arizona, it is desirable that its justices do so, especially when a Court of Appeals issues its decision as an opinion, as it did here. While the issue of whether a worker injured during a pre-employment is covered by workers' compensation benefits has not come before our appellate courts before now does not mean that such injuries have not occurred or that this is not an important issue. Given the vast number of workers in Arizona, it is an issue that will arise again, and this issue is therefore of statewide importance.

Further, given the important and undeniable policy of interpreting the Workers' Compensation Act liberally in favor of workers and of shifting the burden of injured workers on industry, this Court should accept review to once again affirm that risks associated with employment must be borne by industry. Society requires workers and workers must know that the statutes enacted to protect them from risks associated with employment will indeed protect them from those risks.

For the reasons set forth above, Jane Sherring respectfully requests this Court to grant her Petition for Review.

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RESPECTFULLY SUBMITTED, this 5th day of September, 2018.

DIX & FORMAN, P.C.

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<u>CERTIFICATE OF COMPLIANCE</u>

1. This Certificate of Compliance concerns:

_____ A brief, and is submitted under Rule 14(a)(5)

_____ An accelerated brief, and is submitted under Rule 29(a)

_____ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

_X___ A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

_____ An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the brief/motion for reconsideration/petition or cross petition for review to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3384 words.

3. The document to which this Certificate is attached __X__ does not, or ____ does exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

By: __/s/ Robert J. Forman__
Attorney for Petitioner

## CERTIFICATE OF SERVICE

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