CONCLUSION

In these consolidated appeals, we conclude that the Strodes' motions for rehearing before the full TERC were timely filed by facsimile on March 28, 2011, thus tolling the time for filing petitions for review with the Court of Appeals until the TERC ruled on the motions, which ruling occurred on March 30. The Strodes timely filed their petitions for judicial review with the Court of Appeals on May 2, and the Court of Appeals erred when it dismissed these appeals for lack of jurisdiction as untimely filed. The TERC erred when it determined that the motions for rehearing were filed out of time, and instead of denying the motions as untimely, the TERC should have considered the motions for rehearing on their merits. On further review, we reverse the Court of Appeals' dismissal of these appeals and remand these appeals to the Court of Appeals with directions to reverse the TERC's denial of the motions for rehearing as untimely and to remand the causes to the TERC with directions to the TERC to consider the merits of the motions for rehearing.

REVERSED AND REMANDED WITH DIRECTIONS.

CHRISTY SPITZ, AS SURVIVING SPOUSE OF ROGER MCCANNON AND AS NEXT FRIEND OF DANIELLE E. SPITZ-MCCANNON, APPELLANT, V. T.O. HAAS TIRE CO., AND ITS INSURER, CINCINNATI CASUALTY CO., APPELLEES.

815 N.W.2d 524

Filed May 4, 2012. No. S-11-620.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
2. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
3. **Marriage: Proof.** In Nebraska, a couple cannot create a common-law marriage by agreement or cohabitation and reputation.

Appeal from the Workers' Compensation Court. Affirmed.

William J. Erickson and Lori A. Zeilinger for appellant.

John W. Iliff, of Gross & Welch, P.C., L.L.O., for appellees.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

SUMMARY

We are asked to decide whether, under Colorado law, the appellant, Christy Spitz, was the common-law wife of Roger McCannon. McCannon died in an accident while working for the appellee T.O. Haas Tire Company (T.O. Haas). Spitz sought workers' compensation death benefits. The trial judge applied Colorado law and found that Spitz was not McCannon's common-law spouse. The review panel affirmed. Finding no error of fact or law, we also affirm.

BACKGROUND

The parties stipulated that on July 15, 2006, McCannon died in an accident arising out of and in the course of his employment with T.O. Haas. On July 28, Spitz sent a demand letter to T.O. Haas' insurer for indemnity payments to herself and Danielle E. Spitz-McCannon (Danielle). Danielle is the daughter of Spitz and McCannon. T.O. Haas' insurer made indemnity payments to Danielle.

In November 2006, the county court for Perkins County entered an order of intestacy, determining that McCannon's heirs were Danielle and "Christy Spitz(surviving spouse)." The assets of McCannon's estate included only the $40,000 in proceeds from his life insurance policy, which was payable to his estate, and his vehicle, which was worth $5,000. The inventory did not list any joint property.

EVIDENCE OF SPITZ' RELATIONSHIP WITH MCCANNON

McCannon moved into Spitz' home in 1990 or 1991 while they were attending a junior college in Colorado. Spitz stated that because they had each been through a bad divorce, they did not feel that "it was relevant to have a piece of paper saying

that [they] were married." After her divorce, Spitz began using her maiden name. Neither Spitz nor McCannon ever used the other's surname.

Danielle was born in 1991. Spitz also had two older daughters. In 1993, Spitz and McCannon lived apart for 7 to 8 months. Spitz also stated that they were separated for a period in the last half of 1996. But an affidavit in the record suggests that she meant that they were separated in the last half of 1995. In 1998, McCannon gave Spitz a ring; the court found that this was a wedding ring. In 1999, they moved to Nebraska.

Spitz and McCannon never used the same name in any contracts or other writings. Spitz filed her income tax returns as the head of a household, and from 1995 to 2005, Spitz listed McCannon as a dependent on her returns. She and McCannon never filed a joint return. An accountant testified that persons claiming "head of household" status must maintain their home for a dependent child for more than half the year and that they then receive a more favorable tax treatment than persons claiming a single status. But he said that a person cannot claim "head of household" status if the person's spouse was a member of his or her household for the last 6 months of the year.

Spitz also represented that she was a single person on deeds of trust in Nebraska. She said that McCannon had bad credit and that a real estate agent had advised them not to include McCannon's name. Spitz and McCannon never jointly purchased real estate. They both owned vehicles while living in Colorado that they separately titled in their own names.

Spitz never talked to McCannon about providing any type of health insurance or life insurance benefits for her, nor did they discuss how she would manage financially after his death. Neither Spitz nor McCannon had wills. Spitz believed that she was validly married in Colorado. She said that she did not hold herself out as married after they moved to Nebraska because she thought Nebraska did not recognize common-law marriages.

One of Spitz' older daughters testified that she lived with Spitz and McCannon from the time she was 11 (in 1990) until she was 15. She believed that Spitz and McCannon were

common-law spouses because they had lived together for more than 6 months. She stated that they acted like a married couple and that her children had called McCannon "grandfather." But she could not recall that Spitz or McCannon ever addressed themselves as husband and wife.

Danielle testified that Spitz and McCannon appeared to love each other, acted together in rearing her, and regularly attended school functions together. But she stated that she had no information that would lead her to believe that Spitz and McCannon were "in fact" married. A friend who had known Spitz and McCannon from 1991 to 1999 also testified that they acted like a married couple and made decisions together, including parenting decisions and where to live.

Trial Judge's Order

The trial judge ruled that Danielle was entitled to benefits and assessed attorney fees and a penalty for late payments made to Danielle. But the judge dismissed Spitz' claim that she was McCannon's surviving spouse. He concluded that he was not bound by the county court's intestacy order finding that Spitz was McCannon's surviving spouse. He found that Spitz failed to meet her burden to prove that the marriage existed by "'clear, consistent, and convincing'" evidence. Citing a Colorado case, *People v. Lucero*,[1] the judge stated that under Colorado law, this phrase means that "it is [Spitz'] burden to present more than vague claims unsupported by competent evidence." The judge stated that living together and acting like a married couple around friends was not enough and cited objective facts showing that Spitz and McCannon had held themselves out as single persons, not married persons.

Review Panel's Order

The review panel concluded that the trial judge had correctly interpreted Colorado case law regarding Spitz' burden of proof. It rejected Spitz' argument that Colorado law requires a trial court to follow a burden-shifting scheme. It concluded that "[e]ven if a shift in the burden of proof existed, the trier of fact

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[1] *People v. Lucero*, 747 P.2d 660 (Colo. 1987).

obviously credited, in large measure, the evidence generated by the defendants."

ASSIGNMENTS OF ERROR

Spitz assigns that the trial judge erred in (1) finding that she was not McCannon's surviving spouse, (2) requiring her to prove the alleged marriage by clear and convincing evidence, (3) finding that she had failed to present a prima facie claim of marriage, (4) failing to find that a presumption or inference of a valid marriage existed, and (5) failing to rule that T.O. Haas had the burden to disprove the existence of a marriage.

STANDARD OF REVIEW

[1,2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.[2] We independently review questions of law decided by a lower court.[3]

ANALYSIS

[3] In Nebraska, a couple cannot create a common-law marriage by agreement or cohabitation and reputation.[4] So to claim workers' compensation benefits as a surviving spouse in Nebraska, Spitz must show that she and McCannon had a valid common-law marriage under Colorado law before 1999, when they moved to Nebraska.[5]

We sum up Spitz' assignments of error as follows: The trial judge and review panel incorrectly interpreted and applied Colorado law to these facts. She argues that the trial judge misinterpreted the Colorado Supreme Court's 1987 decision in *Lucero*[6] as requiring the proponent of a common-law marriage

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[2] See *Lovelace v. City of Lincoln, ante* p. 12, 809 N.W.2d 505 (2012).

[3] See *id.*

[4] See, Neb. Rev. Stat. § 42-104 (Reissue 2008); *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984).

[5] See, Neb. Rev. Stat. § 42-117 (Reissue 2008); *Randall, supra* note 4.

[6] *Lucero, supra* note 1.

to establish the marital relationship by clear and convincing evidence. In addition, she argues that under Colorado law, a presumption exists in favor of a finding of marriage. We disagree with both contentions.

Lucero was a criminal case in which the defendant objected to testimony from his alleged common-law wife under the state's marital testimonial privilege. The trial court found that no marriage existed and admitted her testimony. The putative wife testified that she had lived with the defendant for 5 years and that they had a child together. She also testified that (1) she considered herself married to the defendant, (2) the defendant agreed that they were married, and (3) she and the defendant had held themselves out to friends as being married. The Colorado Court of Appeals reversed, finding that the court should not have admitted the testimony. Based on the putative wife's testimony, the court found the existence of a common-law marriage as a matter of law.

The Colorado Supreme Court reversed that conclusion. It remanded for the trial court to provide further findings and explanation under the standards that it set forth in the opinion:

> In the present case, the trial court was offered evidence that, if believed, would have established the existence of a common law marriage. . . . We disagree with the court of appeals that the evidence established a common law marriage as a matter of law. A determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the trial court's discretion. . . . However, in ruling that no such marriage existed, the trial court gave no indication of its reasoning, and it did not make any finding that the testimony of [the putative wife] was lacking in credibility. Since it is not clear by what criteria the trial court evaluated the existence of the common law marriage, we now return this case . . . for further findings in light of the standards we have clarified today.[7]

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[7] *Id.* at 665.

The court explained that "[a] common law marriage is established by mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship."[8] The court further stated that although some of its cases could be read otherwise,

> we have almost uniformly required that such consent or agreement be manifested by conduct that gives evidence of the mutual understanding of the parties. . . . We affirm today that such conduct in a form of mutual public acknowledgment of the marital relationship is not only important evidence of the existence of mutual agreement but is essential to the establishment of a common law marriage.[9]

The court provided the following examples of the type of evidence that could establish a mutual understanding of the parties that they had a marital relationship:

> The two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife. Specific behavior that may be considered includes maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the parties; and the filing of joint tax returns. . . . However, there is no single form that such evidence must take. Rather, *any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife* will provide the requisite proof from which the existence of their mutual understanding can be inferred.[10]

In addition, the Colorado Supreme Court specifically rejected a presumption in favor of a common-law marriage:

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[8] *Id.* at 663.

[9] *Id.* at 663-64.

[10] *Id.* at 665 (emphasis supplied).

> The cases in this jurisdiction have used language suggesting that an agreement "may be proven by, and *presumed* from, evidence of cohabitation as husband and wife, and general repute," . . . interchangeably with language stating that "mutual consent may be *inferred* from cohabitation and repute" . . . . In applying these standards to particular facts, we have generally not treated evidence of cohabitation and repute as creating a presumption of a common law marriage. . . . Instead, sufficient evidence of cohabitation and reputation may give rise to a permissible inference of common law marriage.[11]

Spitz acknowledges this last statement from *Lucero*, but she nonetheless relies on cases preceding *Lucero* or cases from states other than Colorado to argue that a presumption applies or that upon a prima facie showing of marriage, the burden of proof shifts to the opponent.

This argument is without merit. The *Lucero* court intended to resolve any inconsistencies in its earlier cases. So we decline to consider any contrary decision preceding *Lucero* as authority for a presumption of a common-law marriage. In addition, the court clarified that a trial court is free to reject a claimant's testimony as not credible even if it is uncontested. So a presumption of a common-law marriage does not exist under Colorado law.

Similarly, we reject Spitz' argument that the trial judge improperly enhanced her burden of proof. In a footnote, the *Lucero* court stated that it did not intend its "'clear, consistent and convincing'" standard of proof "to establish a higher burden of proof for those attempting to prove a common law marriage, but instead merely stresses that the parties must present more than vague claims unsupported by competent evidence."[12] The trial judge specifically cited this language. We read the order as discussing the type of evidence that the claimant must present, rather than the claimant's burden of proof. Having eliminated these preliminary issues, we turn to Spitz' claim that

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[11] *Id.* at 664 n.5 (emphasis in original).

[12] *Id.* at 664 n.6.

the court erred in finding the evidence insufficient to show the parties' intent.

The evidence established that Spitz and McCannon cohabitated for many years before his death. So Spitz' appeal is really about whether the other evidence showed their intent to have a marital relationship. It is true that Spitz and McCannon had a committed relationship and made decisions together for Danielle. Affidavits and testimony showed that at least some of their family members and friends believed that they had a common-law marriage under Colorado law because they had lived together for an extended period. But one of Spitz' older daughters could not recall that Spitz or McCannon had ever addressed themselves as husband and wife. And no one, including Danielle, testified or stated in an affidavit that Spitz or McCannon had ever said that they were married.

The trial judge correctly determined that evidence showing that a friend or family member had assumed that Spitz and McCannon had a common-law marriage or believed that they behaved like a married couple was insufficient to create a common-law marriage under *Lucero*. The *Lucero* court was concerned with evidence that manifests the parties' *intent* to have a marital relationship. If their intent could be shown by other persons' assumptions based solely on their cohabitation or committed relationship, then a court could find that a cohabitating couple was legally married even if the couple did not intend to create a marital relationship. Similarly, evidence that McCannon gave Spitz a wedding ring in 1998 cannot alone show he intended to create a marriage. This evidence could equally show that Spitz and McCannon were devoted to each other but did not want the complications or obligations of a marital relationship.

In contrast, the trial court found that the following facts showed Spitz and McCannon did not intend to create a marital relationship:

- Spitz never held herself out to be Christy "McCannon."
- In 2006, McCannon represented that he was single on his W-4 form and his life insurance forms with his employer.
- Spitz and McCannon never filed joint tax returns.
- The parties titled their vehicles in their individual names.

- Spitz presented no documents that showed she and McCannon had signed them as husband and wife.
- In July 2003, Spitz and McCannon filed a "Subordinate Deed of Trust," in which they represented that they were single persons.
- In October 2003, Spitz executed a "Deed of Reconveyance" as a single person.
- From 2003 to 2005, Spitz represented in deed documents that she was single, and the documents described the property as Spitz' sole property.
- Spitz' tax returns for 1995 through 2005 show that she did not represent herself as married: "In fact, by stating she was the head of the household, the filing of [Spitz'] tax returns actually shows that [she] held herself out to be unmarried."
- McCannon's obituary identified Spitz as a "longtime companion."

We conclude that the court was not clearly wrong in finding that the vast majority of objective evidence showed that Spitz and McCannon did not intend to create a common-law marriage and did not conduct their affairs as though a common-law marriage existed. Under Colorado law, we review the trial judge's conclusion for abuse of discretion. We find none here.

AFFIRMED.

WRIGHT, J., not participating.