

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/11/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALTECH SERVICES*,) No. 1 CA-IC 11-0071
)
Petitioner Employer,) DEPARTMENT E
)
) **MEMORANDUM DECISION**
LIBERTY MUTUAL FIRE INSURANCE)
COMPANY*,) (Not for Publication -
) Rule 28, Arizona Rules
Petitioner Carrier,) of Civil Appellate
v.) Procedure)
)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
TIMOTHY BUTLER,)
)
Respondent Employee,)
)
STATE OF ARIZONA DEPARTMENT OF)
ADMINISTRATION**,)
)
Respondent Employer,)
)
STATE OF ARIZONA, DOA RISK)
MANAGEMENT**,)
)
Respondent Carrier.)
)

Special Action - Industrial Commission

ICA Claim Nos. 20071-700489** and 20100-950018*

Carrier Claim Nos. WC19778541* and WC200702502**

Administrative Law Judge Karen Gianas

AWARD AFFIRMED

Cross & Lieberman, P.A. By Lawrence H. Lieberman Attorneys for Petitioners Employer and Carrier	Phoenix
Andrew Wade, Chief Counsel The Industrial Commission of Arizona Attorney for Respondent	Phoenix
Snow & Carpio, PLC By Chad T. Snow and	Phoenix
Toby Zimbalist, Esq. Attorneys for Respondent Employee	Phoenix
Thomas Horne, Attorney General By Charles W. Ferris, Jr., Assistant Attorney General Attorneys for Respondent Employer and Carrier	Phoenix

T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review for a compensable low back injury (2010) and denying reopening of a prior claim (2007). Several issues are presented on appeal:

- (1) whether the administrative law judge's (ALJ's) award is legally sufficient for this court's review;
- (2) whether the ALJ erroneously interpreted Terry E. McLean, M.D.'s testimony when she found that it supported compensability; and
- (3) whether Dr. McLean's testimony is equivocal such that it cannot support the award.

Because we find the award legally sufficient for our review and that Dr. McLean's testimony supports compensability, we affirm the award.¹

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) (2003), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

PROCEDURAL AND FACTUAL HISTORY

¶3 On March 26, 2010, the petitioner employer, Altech Services, Inc. (Altech) employed the respondent employee (claimant) as a light rail safety inspector. The claimant testified that he was injured when he stepped down onto a gravel embankment from a train that he had inspected. He stated that

¹ After filing an answering brief in this appeal, but prior to oral argument, the state respondents filed a notice of intent to file a motion to dismiss the state respondents from this appeal. Subsequently, the state respondents requested us to treat that notice as their motion to dismiss. Because we affirm the award, the request to dismiss the state respondents is moot and we deny the motion to dismiss.

he felt both a crunch in his knee and sharp pain behind the knee and down the back of his leg. The claimant also experienced a "burning" sensation in the back of his knee and/or buttock.

¶4 The claimant filed a workers' compensation claim, which was accepted for benefits, and he began receiving conservative treatment for his left knee injury. Subsequently, he also sought treatment for his low back. The petitioner carrier, Liberty Mutual Fire Insurance Company (Liberty Mutual), refused to authorize that treatment and issued a notice of claim status limiting its liability to the claimant's left knee.

¶5 The claimant filed a request for a hearing pursuant to A.R.S. § 23-1061(J) (2008), asserting he was entitled to treatment for his back.² He also petitioned to reopen his 2007 back injury claim. The petition was denied for benefits, and the claimant requested a hearing and consolidation with the compensability hearing.

¶6 The ALJ heard testimony over three occasions from the claimant, Dr. McLean, and Dennis G. Crandall, M.D. The ALJ entered an award finding the claimant's low back complaints compensable under the 2010 injury claim and denying reopening of the 2007 claim. Altech and Liberty Mutual timely requested

² A.R.S. § 23-1061(J) provides that a claimant may request an investigation by the ICA into the payment of benefits that the claimant believes that he is owed but has not been paid.

administrative review, but the ALJ affirmed her award. She explicitly adopted the responses to the request for review filed with the Industrial Commission by the claimant and the respondents State of Arizona Department of Administration and DOA Risk Management (DOA).³ Altech and Liberty Mutual next brought this appeal.

DISCUSSION

¶7 Liberty Mutual first argues that the ALJ's award is legally insufficient for this court's review, because she failed to resolve material and necessary issues with regard to the expert testimony. Although this court will not "speculate" to reconstruct an ALJ's award, *Post v. Industrial Commission*, 160 Ariz. 4, 7, 770 P.2d 308, 311 (1989), an ALJ is not required to make specific findings on every issue, as long as he or she resolves the ultimate issues in the case. See *CAVCO Indus. v. Indus. Comm'n*, 129 Ariz. 429, 435, 631 P.2d 1087, 1093 (1981) (citation omitted). Further, some findings are implicit in an award. *Pearce Dev. v. Indus. Comm'n*, 147 Ariz. 582, 583, 712 P.2d 429, 430 (1985).

¶8 In this case, the ultimate issue was whether the claimant's low back complaints which recurred after his March

³ See *Hester v. Indus. Comm'n*, 178 Ariz. 587, 589-90, 875 P.2d 820, 822-23 (App. 1993) (ALJ may incorporate parties' memoranda in his award by reference).

26, 2010 industrial injury were related to his prior 2007 injury claim or were a compensable consequence of the 2010 injury. In her award, the ALJ recognized the ultimate issue, recited the applicable law, and summarized the hearing testimony. She concluded:

I find the applicant [claimant] credible and resolve any conflicts in the evidence in his favor. I accept the opinions of Dr. McLean. The applicant's current low back condition is related to the 2010 claim. The petition to reopen the 2007 claim is denied.

We find the ALJ's award legally sufficient for our review.

¶9 Liberty Mutual next argues that the ALJ misinterpreted Dr. McLean's testimony, when she found that it supported compensability of the claimant's recurrent low back complaints in connection with the 2010 injury. The basis for this argument is that Dr. McLean did not have a complete history of the claimant's initial treatment at Concentra from March 26, 2010, to April 23, 2010, when he performed his second independent medical examination (IME). The Concentra medical records, which Liberty argues that the doctor needed for his opinion, focus on the claimant's left knee injury, which was severe and required surgery.

¶10 A review of these records reveals that the claimant described an "immediate onset of burning type pain located in

the back of his left knee" when he was seen at Concentra on March 26, 2010. During his hearing testimony, the claimant stated that this pain behind his knee also went down the back of his leg. He testified that he initially focused on his left knee injury, but within several days, he noticed that his low back symptoms had worsened, become painful, and were radiating down his left leg. The claimant stated that he mentioned these back complaints to Dr. Berger at Concentra, but the doctor concentrated solely on his knee injury. When the claimant's low back pain continued to worsen over the next several weeks, he sought treatment from Dr. Crandall, who had treated him after his 2007 industrial back surgery.⁴ Dr. Crandall ordered an MRI scan that showed a recurrent disk herniation at L5-S1.

¶11 Dr. McLean performed two MRIs on the claimant: February 17, 2009, with regard to his May 2007 back injury, and again on January 25, 2011, with regard to his recurrent back symptoms. The doctor stated that when he saw the claimant in 2009, he obtained an MRI that demonstrated post-operative changes but no evidence of recurrent herniation. He discharged the claimant as stationary and permanent with supportive care

⁴ In May 2007, the claimant sustained a compensable back injury while employed by another employer. In January 2008, this injury required back surgery: bilateral laminotomies, foraminotomies, and a diskectomy. The claimant eventually became stationary and returned to work.

and lifting limitations. When he conducted his second IME, he received a history of the claimant's employment at Altech with lifting requirements well within his prior recommendation. The doctor also reviewed the July 2010 repeat MRI. He testified that it revealed a large recurrent disk herniation at L5-S1.

¶12 With regard to causation for the recurrent herniation, Dr. McLean first testified that if he assumed the reliability of the history provided by the claimant, there was a causal relationship between the March 26, 2010 industrial injury and the recurrent herniation. The doctor explained his qualification regarding the claimant's reliability as a historian by acknowledging that the early medical records did not mention back symptoms. But he stated that in light of the severity of the knee injury, this was understandable, because the knee pain could have been so severe that it masked the back pain.

¶13 On cross-examination, Dr. McLean seemed to recant his initial causation opinion based on questions that erroneously placed the inception of the claimant's initial back complaints at eight to twelve weeks after the March 26, 2010 industrial injury. The ALJ addressed this erroneous foundation:

JUDGE CALDERON⁵: I just wanted to correct one thing. May 7th was the visit with Crandall; correct?

MR. LIEBERMAN: Correct.

JUDGE CALDERON: That's not 12 weeks, that's six weeks.

MR. LIEBERMAN: It's six weeks - yeah.

JUDGE CALDERON: It's six weeks from March 26. But I believe you referenced it as a 12-week gap, Mr. Lieberman. So just so we're all on the same page as far as that goes.

Does that math change anything you said, Dr. McLean?

The claimant's attorney restated the history provided by the claimant, "within a day or two of this incident he began to notice low back pain. And then as he was limping significantly from his knee injury it gradually increased over the next week or two or three," and asked:

BY MR. SNOW:

Q If that is the history, Doctor, would you be able to say that this new injury at least contributed to that pathology?

A Yes, I would. And that's what I actually stated in my report as well. If indeed the history provided was true and accurate, yes, I would agree with that statement.

⁵ Although the ALJ is listed in the ICA hearing transcripts as Karen G. Calderon, on the award, she is listed as K. Gianas.

¶14 Liberty Mutual last argues that Dr. McLean's testimony was equivocal. *State Comp. Fund v. Indus. Comm'n*, 24 Ariz. App. 31, 36, 535 P.2d 623, 628 (1975) (doctor keeps changing his mind and will not commit to an opinion). Based on our review of the doctor's testimony, we do not believe the ALJ abused her discretion by concluding that the doctor did not equivocate. Instead, we find that Dr. McLean's initial statement on cross-examination was the result of inaccurate facts provided to him regarding the delay in the claimant's initial report of back complaints. After being reminded of the correct facts, the doctor returned to his original opinion as stated in his IME report.

¶15 Medical opinions must be based on findings of medical fact. See *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973) (citation omitted). These findings come from the claimant's history, medical records, diagnostic tests, and examinations. See *id.* It is the ALJ's duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). In resolving inconsistencies in a witness's testimony, the ALJ can "accept as true either statement, or, on account of the discrepancy, [can] disregard

the testimony of the witness entirely.” *Royal Globe*, 20 Ariz. App. at 435, 513 P.2d at 973.

¶16 In this case, the ALJ found the claimant’s history credible. That history provided a foundation for Dr. McLean’s causation opinion. For all of the foregoing reasons, we affirm the award.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge