

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: 11/27/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARON L. OLIVER,) 1 CA-IC 12-0006
)
Petitioner,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules
ARIZONA,) of Civil Appellate
) Procedure)
Respondent,)
)
QWEST CORPORATION,)
)
Respondent Employer,)
)
SEDGWICK CLAIMS MANAGEMENT)
SERVICES,)
)
Respondent Insurance Carrier.)
_____)

Special Action - Industrial Commission

ICA Claim No. 91101-042576

Carrier Claim No. UW91AZ2157723000

Anthony Halas, Administrative Law Judge

AWARD AFFIRMED

Baron Oliver, *In Propria Persona*

Wittmann

T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) decision upon hearing and findings and award denying relief. Petitioner Baron Oliver (Mr. Oliver) appeals the administrative law judge's determination that he did not meet the burden of proof to show that his left shoulder injury or condition was caused by the EMG testing done on January 21, 2010, and therefore was not related to his 1991 industrial injury. Because the medical evidence supports a finding that Mr. Oliver's left shoulder injury was not caused by the EMG, we affirm the administrative law judge's determination.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mr. Oliver sustained a compensable industrial injury to his left hand while working for Qwest in 1991. The claim was terminated with a permanent impairment of 20% to the left upper extremity (without involvement of the left shoulder). Mr. Oliver filed a petition to reopen in August 2008 and it was found that his current trigger finger condition was caused by his prior industrial injury. On January 21, 2010, Mr. Oliver underwent EMG testing with Dr. Dilla to address the current condition of his original injury. At that point Mr. Oliver had

no apparent left shoulder issue and Dr. Dilla made no record of untoward symptoms attributable to the EMG procedure.

¶13 Following the EMG in January, petitioner first complained to his physician, Dr. Hooley, of a shoulder injury in April 2010. Although Mr. Oliver asserts he told the physician the pain had been persistent since the EMG, no record was made of that; Dr. Hooley recorded a history that the shoulder strain was caused when Mr. Oliver was interacting with his grandson three weeks earlier. Dr. Hooley's records first reflect any mention of the EMG on May 27, 2010. Mr. Oliver was referred to an orthopedic surgeon for the shoulder and he eventually underwent an MRI which showed a rotator cuff tear. Mr. Oliver received treatment for the shoulder including injections and physical therapy, paid for by the carrier. In July 2010, his trigger finger claim was held in abeyance based on a stipulation that Mr. Oliver was currently unable to tolerate surgery for his trigger finger condition due to an unrelated ulcerous leg condition.

¶14 In March 2011, acting as his own counsel, Mr. Oliver filed a request for hearing and for the first time mentioned in that filing the injury to his left shoulder; Mr. Oliver did not file a new claim for this injury. It was Mr. Oliver's contention that the shoulder injury was sustained during EMG

testing. The administrative law judge held a hearing and testimony was heard from two board-certified orthopedic surgeons: Dr. Brainard and Dr. Rockowitz. Both doctors testified that Mr. Oliver had a rotator cuff tear. Both doctors agreed that the rotator cuff tear could not have been caused by the EMG study itself.

¶15 Dr. Brainard, who had treated Mr. Oliver for nearly twenty years for various orthopedic conditions, opined that the EMG needle likely irritated the biceps tendon, possibly causing a small bleed into the tendon sheath causing an inflammatory response or tendinobursitis and making any pre-existing chronic rotator cuff tear symptomatic. Dr. Rockowitz, who conducted the IME, testified Mr. Oliver had a high grade partial or full thickness tear of the rotator cuff which was the likely pain generator. Given his own examination and review of other medical records including the reported history of the shoulder pain, Dr. Rockowitz testified that to a reasonable degree of medical probability the EMG was not related to or in any way could have caused the pain Oliver was suffering. Dr. Rockowitz further testified that an EMG inserts very small needles into the muscle belly and it had nothing to do with either the joints or the tendons, and "Anatomically they are putting the needles nowhere near the pathology that is involved here."

¶16 The administrative law judge reviewed the relevant medical reports or diagnostic studies from Dr. Dilla, Dr. Mian, Dr. Ricker, Dr. Guidera, Dr. Beauchene, Dr. Brainard, Dr. Davidson, Dr. Rockowitz and Dr. Hooley. Mr. Oliver testified on his own behalf as to his original industrial injury and subsequent injuries, including the left shoulder condition, and treatments. Mr. Oliver testified that he had complained to his former counsel regarding the pain within one or two weeks after the EMG.

¶17 The administrative law judge issued an eleven-page determination, concluding that Mr. Oliver did not meet his burden of proof to show his left shoulder injury or condition was caused by the EMG and therefore it was not a compensable consequence of the original injury. That determination was affirmed on review. Mr. Oliver filed a timely petition for review with this court.

DISCUSSION

¶18 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the administrative law judge'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 administrative law judge's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

¶19 A claimant must prove all elements of a compensable claim. *Toto v. Indus. Comm'n*, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985). Typically, the elements are: (1) an injury, and (2) medical evidence that causally relates the injury to the industrial incident. *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977). A subsequent injury, whether a new injury or an aggravation of the original injury is compensable if, causally, it is a "direct and natural result of a compensable primary injury." *Karber/Interstate Air v. Indus. Comm'n*, 180 Ariz. 411, 414, 885 P.2d 99, 102 (App. 1994) (citations omitted). Unsuccessful or faulty treatment of an injury can be compensable where it is causally related to the original treatment. See *Liberty Mutual Ins. Co. v. W. Cas.*, 111 Ariz. 259, 263, 527 P.2d 1091, 1094 (1974).

¶10 We have reviewed the record, and find there is sufficient evidence to support the administrative law judge's determination that Mr. Oliver did not meet his burden of proof that the EMG conducted on January 21, 2010, was causally related to the injury or condition in his left shoulder. Although there

was conflicting medical testimony, the administrative law judge is the sole judge of witness credibility, as it is his job to resolve all conflicts in the evidence and to draw all warranted inferences, and we must defer to his decision. See *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). Next, while Mr. Oliver correctly asserts that the carrier paid some benefits related to the shoulder injury, the mere payment of benefits does not constitute acceptance of a claim by the carrier. See *Noble v. Indus. Comm'n*, 140 Ariz. 571, 574, 683 P.2d 1173, 1176 (App. 1984). Nor does the twenty-one day requirement of A.R.S. § 23-1061(M), which requires a carrier to accept or deny a claim within a time certain, help Mr. Oliver as the shoulder claim was not a new injury, but rather was alleged to be an injury resulting from treatment for his prior compensable injury.

¶11 Although Mr. Oliver raises several claims of evidentiary error, we find none. We first address Mr. Oliver's assertion that it was error to admit the June 8, 2010, transcript of a bench conference between the then-administrative law judge and counsel as to holding the trigger finger claim in abeyance and the non-applicability of temporary partial disability. We find that the transcript was timely submitted, without any evidence of ex-parte contact, and accessible to Mr.

Oliver. We agree that Mr. Oliver was not entitled to temporary partial disability payments for the delay due to non-industrial reasons. As to Mr. Oliver's assertion that it was error not to issue a subpoena for Dr. Guidera, who recommended the trigger finger surgery, we find no error, as such testimony could not add to the discussion as to whether the EMG caused Mr. Oliver's shoulder pain. See *K Mart Corp. v. Indus. Comm'n*, 139 Ariz. 536, 539, 679 P.2d 559, 562 (App. 1984) (using an abuse of discretion standard in reviewing whether ALJ should have issued a subpoena for a medical witness).

¶12 For the above stated reasons, we affirm.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

DIANE M. JOHNSON, Judge