IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

DANIEL ATKINS, *Petitioner*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent*,

THE HEARD MUSEUM, INC., *Respondent Employer,*

STANDARD FIRE INSURANCE c/o TRAVELERS INSURANCE,
Respondent Carrier.

No. 1 CA-IC 13-0023
FILED 12-10-2013

Special Action - Industrial Commission
ICA CLAIM NO. 20112-550421
CARRIER CLAIM NO. 127CBEGN6706N
Deborah A. Nye, Administrative Law Judge

AFFIRMED

COUNSEL

Daniel Atkins, Phoenix
Petitioner In Propria Persona

Industrial Commission of Arizona, Phoenix
By Andrew F. Wade

Counsel for Respondent ICA

Lester & Norton, P.C., Phoenix
By Steven C. Lester

Counsel for Respondent Employer/Carrier

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Margaret H. Downie and Judge Jon W. Thompson joined.

W I N T H R O P, Presiding Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") Award and Decision Upon Review denying reopening. Two issues are presented on appeal:

> (1) Whether the administrative law judge ("ALJ") denied the petitioner employee ("claimant") a full and fair hearing; and
>
> (2) Whether the ALJ erred by finding the claimant failed to present sufficient medical evidence to support reopening.

Because we find the claimant received a fair hearing and failed to meet his burden of proving a new, additional, or previously undiscovered condition causally related to his September 4, 2011 industrial injury, we affirm the award.

I. JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) and 23-951(A), and Rule 10 of

the Arizona Rules of Procedure for Special Actions.[1] 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 the 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).

II. PROCEDURAL AND FACTUAL HISTORY

¶3 On September 4, 2011, the claimant worked as a security guard for the respondent employer, The Heard Museum, Inc. On that date, he slipped on a rug while closing the museum gift shop and fell to the ground, injuring his lower back. He filed a workers' compensation claim, which was denied for benefits, and he timely requested an ICA hearing. Following the hearing, the ALJ entered an award for a compensable claim. The award was summarily affirmed on administrative review.

¶4 The respondent carrier, Standard Fire Insurance ("Standard"), closed the claimant's claim with no permanent impairment.[2] The claimant timely protested, but before an ICA hearing was held, the parties on July 2, 2012, entered a compromise and settlement agreement ("C&S"). The C&S stated that, in exchange for a payment of $27,000.00,

> The Applicant agrees to withdraw his May 25, 2012 Request for Hearing directed to the Carrier's March 15, 2012 Notice of Claim Status declaring him stationary effective February 6, 2012 with no permanent impairment. . . . The Applicant further agrees that his injury is limited to a lumbar strain from which he has fully recovered with no residuals. The Applicant agrees that by withdrawing his Request for Hearing, the spondylolisthesis at the L4-L5 level will be deemed to have been neither caused by nor permanently aggravated by the industrial injury.

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[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

[2] The closing notice was accompanied by a Notice of Supportive Medical Maintenance Benefits, which provided the claimant with one office visit over the next year to see his treating physician, James Maxwell, M.D.

On July 11, 2012, an ALJ approved the C&S, and that award was allowed to become final without protest.

¶5 On October 4, 2012, the claimant was walking down stairs at his condominium complex and on "the second to the last step . . . [his] left leg just gave out totally, and [he] fell to [his] left side onto [his] hip." The claimant went to Scottsdale Healthcare Urgent Care Center for examination and treatment. He then wrote to Standard requesting reimbursement of the urgent care charges, because "recent medical reports indicate that my fall was caused by the continued residual numbness and weakness in my left leg due to the 9/4/11 injury."

¶6 Standard refused to pay for this visit, and the claimant filed a petition to reopen his industrial injury claim. Standard denied the petition to reopen, and the claimant timely requested an ICA hearing. One hearing was held for the claimant's testimony. The ALJ then entered an Award denying the claimant's petition to reopen, finding he had failed to present legally sufficient medical evidence to establish the causal connection between the September 4, 2011 industrial injury and the October 4, 2012 new injury. The ALJ summarily affirmed her Award on administrative review, and the claimant brought this appeal.

III. ANALYSIS

A. Full and Fair Hearing

¶7 The claimant argues he did not receive a fair hearing because he was not given an adequate opportunity to present all of his evidence. ICA hearings are to be conducted in such a manner as to "achieve substantial justice." A.R.S. § 23-941(F). Every party appearing before the ICA is entitled to receive a fair and impartial hearing, and the failure to receive such a hearing will result in an award being set aside. *See Kosik v. Indus. Comm'n*, 125 Ariz. 535, 538, 611 P.2d 122, 125 (App. 1980).

¶8 Every party to an ICA hearing should have an opportunity to fully develop the evidence *relevant* to the hearing, both by cross-examination of witnesses and by presenting evidence of his own. *See Pauley v. Indus. Comm'n*, 10 Ariz. App. 315, 317-18, 458 P.2d 519, 521-22 (1969). Concomitantly, the ICA "is vested with the sound discretion to regulate and control the witnesses appearing before it." *Travelers Ins. Co. v. Indus. Comm'n*, 18 Ariz. App. 28, 30, 499 P.2d 759, 761 (1972).

¶9 The claimant argues that the ALJ erred by precluding him from making a prepared opening statement. The ALJ explained that at an ICA hearing, "we usually do this in a question/answer format," but the claimant was free to utilize his written materials to answer questions. The ALJ explained that, rather than conducting an interrogation, she was "just trying to get some foundational facts on the record." At several times during his testimony, the claimant attempted to challenge the credibility of Dr. Maxwell, his previous treating physician, and the doctor's opinions given before the C&S. Each time, the ALJ guided the claimant back to the current issue, reopening, on which Dr. Maxwell had not offered any opinion. We have reviewed the entire hearing transcript, and it appears the ALJ gave the claimant substantial latitude in answering her questions.[3]

¶10 At the conclusion of his testimony, the claimant indicated he wanted to present additional testimony from Standard's claims adjuster and Dr. Maxwell. In response to the ALJ's questions regarding the substance of the requested testimony, the claimant agreed it pertained to issues from before the C&S was signed, and accordingly, were not directed to his burden of proof for reopening his claim. We find no indication in the record that the claimant failed to receive a full and fair hearing.

B. Sufficiency of the Medical Evidence

¶11 The claimant also argues that he presented sufficient medical evidence to meet his burden of proof for reopening his claim. In order to reopen a workers' compensation claim, a claimant must establish the existence of a new, additional, or previously undiscovered condition and a causal relationship between that condition and the prior industrial injury. *See* A.R.S. § 23-1061(H); *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, 608, ¶ 22, 2 P.3d 691, 698 (App. 2000). In cases involving a first petition to reopen, the comparison points for establishing the necessary change of condition are the date the claim was closed and the date the petition was filed. *See, e.g., Cornelson v. Indus. Comm'n*, 199 Ariz. 269, 271, ¶ 14, 17 P.3d 114, 116 (App. 2001).

¶12 When the causal connection between the condition and the prior industrial injury is not readily apparent, it must be established by

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[3] We also note that the claimant fully presented his other points and arguments to the ALJ in his April 8, 2013 Request for Review.

expert medical testimony. *Makinson v. Indus. Comm'n*, 134 Ariz. 246, 248, 655 P.2d 366, 368 (App. 1982). The requirement of an expert medical opinion is especially necessary for back injury claims. *See W. Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 528, 647 P.2d 657, 659 (App. 1982). It is the claimant's burden to present sufficient evidence to support reopening. *Hopkins v. Indus. Comm'n*, 176 Ariz. 173, 176, 859 P.2d 796, 799 (App. 1993).

¶13 In this case, the only medical evidence the claimant provided in support of his petition to reopen was his October 4, 2012 Scottsdale Healthcare Urgent Care Center records, which indicated the following:

> **History of Present Illness**
> This 69 year old male presents with:
> **1. back pain**
> Onset this morning with backpain [sic] because his leg went out on the stairs. He also has left leg pain and weakness. Patient was sent to ED for MRI.
> No loss of bladder or bowel control. Chronic ongoing back pain with possible left leg numbness and weakness. Fell this morning, pain 10/10 right hip and lumbar spine, radiating down leg. Almost fell again in waiting room while trying to bear weight on left leg.
>
> . . . .
>
> **Assessment/Plan**
> Comments:
> "ER for stat MRI. This is ongoing with acute worsening. Can cause paralysis at this rate. Patient agrees. Ice pak applied.

These records reveal that x-rays were performed on the claimant's left hip and pelvis and his lumbar spine, but he declined an MRI.

¶14 The claimant argues that these medical records are sufficient to meet his burden of proof for reopening because they "indicate or suggest . . . a correlation or a connection between the weakness and the numbness and the fall." Although this court has found a physician's initial report of injury to be sufficient to support a compensable claim, *see Eldorado Ins. Co. v. Indus. Comm'n*, 27 Ariz. App. 667, 669-70, 558 P.2d 32, 34-35 (1976), the ALJ did not find the medical records here comparable or sufficient to establish the required causal connection between the September 4, 2011 industrial injury and the October 4, 2012 fall, and we agree. These records neither mention the claimant's September 2011 injury nor provide a diagnosis of a new, additional, or previously

undiscovered condition relating back to September 2011. The claimant's medical evidence was insufficient to meet his burden of proof for reopening.

IV. CONCLUSION

¶15 For the foregoing reasons, we affirm the award.