

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TIMOTHY ESTES, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF
ARIZONA, *Respondent,*

CONTRACTED DRIVER SERVICE, *Respondent Employer,*

COMMERCE AND INDUSTRY CO., *Respondent Carrier.*

No. 1 CA-IC 15-0035

FILED 2-2-2016

Special Action - Industrial Commission

ICA No. 20132-960218

INSCA No. 710-894871

The Honorable C. Andrew Campbell, Administrative Law Judge

AFFIRMED

COUNSEL

Timothy Estes, Glendale
Petitioner

Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent ICA

Lundmark, Barberich, LaMont & Slavin, Phoenix
By R. Todd Lundmark
Counsel for Respondent Employer/Carrier

MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Patricia A. Orozco and Judge Kenton D. Jones joined.

J O H N S E N, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona award and decision upon review denying Timothy Lee Estes additional workers' compensation benefits upon a finding that his industrial injury is stationary without permanent impairment. For the following reasons, we affirm the award.

FACTS AND PROCEDURAL BACKGROUND

¶2 Estes, a commercial truck driver, was injured on October 8, 2013, when he fell from his truck. He received benefits until May 12, 2014, when the insurer determined he suffered no permanent impairment. After Estes challenged that decision, an administrative law judge ("ALJ") heard testimony on the matter from Estes, his treating physician, an orthopedic surgeon, and two other physicians who saw Estes for an independent medical examination ("IME").

¶3 Estes testified he injured his head, neck, back, right shoulder, right knee and right wrist when he fell. He first was treated at St. Joseph's Hospital and then at Banner Concussion Center. Estes's treating physician at Banner cleared him for work on May 12, 2014, and recommended follow-up treatment, including two supportive care visits. Estes testified that at the May 12 visit, he told his physician, "I still have the constant headaches, the tunnel vision, the dizziness, the fogginess. My back was still hurting. My neck was still hurting. And just things were not, you know, as clear as they should have been." Dr. Joshua Abrams, an orthopedic surgeon, testified Estes still needed active care related to the industrial injury. Specifically, Abrams recommended surgery to decompress Estes's spinal cord and stabilize his cervical spine.

ESTES v. CONTRACTED/COMMERCE
Decision of the Court

¶4 The two physicians who conducted the IME – Dr. Leo Kahn, a neurologist, and Dr. Kevin Ladin, a physical medicine and rehabilitation specialist - disagreed with Abrams's assessment and testified Estes's current cervical spine issues were unrelated to his industrial accident. Kahn drew support for his opinion from the absence of any documented spinal cord irritation in medical records from St. Joseph's Hospital reflecting Estes's condition immediately after his fall. Kahn opined that the cervical issues Estes reported after he was released to work were "the natural history of progressive underlying degenerative cervical spondylosis or arthritis of the neck." Ladin corroborated Kahn's testimony that the fall caused no spinal injury: "Mr. Estes sustained a cervical strain, which would be a soft tissue injury, not an injury to the spine itself[.]" Accordingly, Ladin did not believe there was any need for further medical treatment or that Estes sustained any permanent impairment as a result of the industrial injury.

¶5 In his Decision Upon Hearing and Findings and Award for Temporary Compensation, the ALJ found a conflict in the medical evidence regarding whether the medical effects of Estes's industrial injury were stationary. The ALJ found Kahn and Ladin's opinions "more probably correct and well founded." Based on the totality of the evidence, the ALJ found Estes's medical condition stationary as of May 12, 2014, without permanent impairment. Estes requested review of the decision and the ALJ summarily affirmed the decision. This special action followed.

¶6 This court has jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(2) (2016), 23-951 (2016) and Rule 10 of the Arizona Rules of Procedure for Special Actions.¹

DISCUSSION

A. Sufficiency of the Evidence.

¶7 Estes challenges the ALJ's finding that his medical condition was stationary without permanent impairment. On review, Estes bears the burden of proving that (1) his medical condition is causally related to the industrial injury and not stationary or (2) the industrial accident resulted in permanent impairment. *See Lawler v. Indus. Comm'n*, 24 Ariz. App. 282, 284 (1975). "If the causal relationship between the industrial incident and the resulting injury is not apparent, causation must be proved by opinion evidence from a competent medical witness." *Raymer v. Indus. Comm'n*, 18

¹ Absent material revision after the relevant date, we cite the statute's current version.

ESTES v. CONTRACTED/COMMERCE
Decision of the Court

Ariz. App. 184, 186 (1972). As the trier of fact, it is the ALJ's duty to resolve any conflicts in the evidence and "it is its privilege to determine which of the conflicting testimony is more probably correct." *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975). We will not disturb the ALJ's resolution of a conflict in the evidence unless the conclusion is wholly unreasonable. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, 343, ¶ 9 (App. 2012).

¶8 On appeal, Estes contends his current cervical spine issues are the result of his fall and that the ALJ erred in adopting the IME results to the contrary. He argues that an MRI showed extensive damage to his cervical spine that was not present before his accident. Nothing in the record, however, supports Estes's contention that the industrial injury caused his current cervical spine pain. Ladin testified the MRI only showed degenerative findings consistent with a CT scan performed when Estes was first treated and that the MRI did not reveal any evidence of "cervical spinal cord injury." Although Abrams testified Estes's cervical pain resulted from the industrial injury, he based his assessment on what Estes told him:

[ALJ]: And you believe that that fusion is a result of the industrial injury from October of 2013?

[Abrams]: Per his subjective history, no other - he reports he had no other prior complaints, so I can only extrapolate it was from that injury.

As the ALJ noted, Abrams came to his conclusion without reviewing the hospital records from immediately after the accident, including the cervical CT taken then, and had not reviewed the records of Estes's treating physician. Contrary to Estes's argument, Abrams testified he formed his opinion without the benefit of those medical records.

¶9 Estes seems to argue that even assuming the degeneration observed in the MRI preexisted his fall, an industrial accident that acts on a preexisting condition to "cause a further injurious result" is compensable. *Kentucky Fried Chicken v. Indus. Comm'n*, 141 Ariz. 561, 564 (App. 1984). But neither Kahn nor Ladin, whose testimony the ALJ accepted, testified the fall aggravated a preexisting cervical condition. And the ALJ accepted Kahn's testimony that Estes's current cervical issues were unrelated to the industrial accident. In his reply brief, Estes cites a memorandum decision of this court concerning a gradual injury that was work-related. There was no testimony of such nature in this case, however.

¶10 Estes contends that because he was not given the record of his appointment with his treating physician on March 25, 2014, he could not

ESTES v. CONTRACTED/COMMERCE
Decision of the Court

provide Abrams with that specific report. Estes, however, received copies of his treating physician's reports dated October 28 and November 25, 2013, and May 12 and July 16, 2014, which he could have provided to Abrams. Moreover, nothing prevented Estes from requesting the records from his treating physician and providing them to Abrams.

¶11 Estes also argues, without citation to authority, that the IME Ladin and Kahn conducted together was not independent because it was conducted by the two physicians at once. The ALJ has wide discretion to control the witnesses who appear before the Industrial Commission. *Travelers Ins. Co. v. Indus. Comm'n*, 18 Ariz. App. 28, 30 (1972). Estes's argument, without further evidence, is insufficient to support his contention that the physicians were biased. Additionally, Estes had the opportunity to cross-examine both physicians. Thus, the ALJ did not err in allowing both to testify.

¶12 Estes further argues the ALJ erred in concluding he did not suffer a permanent impairment as a result of the accident. Estes contends there is no evidence that he is certified to return to work as a commercial trucker. The issue for the ALJ to decide, however, was not whether Estes's current medical condition prevents him from returning to work in his chosen vocation, but whether his current medical condition is causally related to the fall he suffered on the job in October 2013.

¶13 As the trier of fact, the ALJ has the responsibility of resolving conflicts in medical testimony. *See Perry*, 112 Ariz. at 398. The ALJ resolved the conflicting medical testimony in favor of the opinions of Ladin and Kahn. Because reasonable evidence in the record supports the ALJ's decision, we affirm the award.²

B. Subpoena Request.

¶14 Estes also argues that the ALJ improperly refused to issue a subpoena for a witness, K.S. We review an ALJ's refusal to issue a subpoena for an abuse of discretion. *K Mart Corp. v. Indus. Comm'n*, 139 Ariz. 536, 539 (App. 1984).

² On appeal, Estes refers to legal authorities concerning what a claimant must prove to compel reopening of a claim, but the award at issue here did not implicate that issue. He also argues the insurer committed bad faith in handling his claim, but that was not the issue resolved in the award on review.

ESTES v. CONTRACTED/COMMERCE
Decision of the Court

¶15 After Estes asked the ALJ to issue subpoenas for K.S. and four other witnesses, the ALJ subpoenaed one witness but asked Estes to "submit a brief written statement of the substance of the testimony to be presented by each of" the others. In response, as to K.S., Estes said only that "she can testify as to who she spoke with during the time I was being treated and as to how this claim was closed and by who." On the first day of trial, the ALJ explained the basis for his denial of the subpoena request:

[A]s the issue before us is continuing benefits, i.e., whether your injury is medically stationary, whether you need additional active care, and those are the only issues that are before me at this time . . . I did not issue those subpoenas as the claims adjusters and the information that they have are not strictly pertinent to the issues that are going on before us If there is something in addition that you feel they have some direct testimony about your medical condition or your need for additional medical care, let me know, but otherwise, I don't see any basis for issuing those subpoenas.

After hearing these comments from the A.L.J., Estes offered no further explanation for why he wanted to have K.S. testify. At the second day of trial, the ALJ again explained to Estes that he was denying his subpoena request because "the claims adjusters do not have any expertise with respect to your medical condition, and, thus, were not relevant to the issues that I was going to be deciding[.]" Again, Estes said nothing further.

¶16 On appeal Estes argues K.S.'s testimony would have clarified conversations he had with his treating physician during an appointment about a matter the physician was unable to remember. Estes, however, did not explain the relevance of K.S.'s testimony to the ALJ.

ESTES v. CONTRACTED/COMMERCE
Decision of the Court

Accordingly, the ALJ did not abuse his discretion in denying Estes's subpoena request. *See K Mart Corp*, 139 Ariz. at 539 (ALJ may deny a subpoena request that is not material and necessary); *see also* Ariz. Admin. Code R20-5-141(A)(4) ("A presiding administrative law judge shall issue a subpoena requested under this Section if the judge determines that the testimony of the witness is material and necessary[.]").

CONCLUSION

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



Ruth A. Willingham · Clerk of the Court
FILED : ama