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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

REUBEN D. BEGAY, JR., *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

KEN LEACH, (Deceased), KEN'S OLD WEST, INC., GLEN CANYON
STEAK HOUSE, *Respondent Employers,*

SPECIAL FUND DIVISION/NO INSURANCE SECTION, *Respondent*
Party in Interest.

No. 1 CA-IC 16-0016
FILED 2-14-2017

Special Action - Industrial Commission

No. 20132-770002

No. 20142-200183 (consolidated)

The Honorable Michael A. Mosesso, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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By J. Victor Stoffa
Counsel for Petitioner

Industrial Commission of Arizona, Phoenix
By Jason M. Porter
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Cheri L. McCracken Attorney at Law, Phoenix
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By Steven C. Lester, Christopher S. Norton, Rachel Parise Brozina
Counsel for Respondent Party in Interest

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (“ICA”) award and decision upon review for a noncompensable claim. Because we conclude the Administrative Law Judge (“ALJ”) did not err in finding petitioner Reuben Begay’s injury noncompensable, we affirm the award and decision upon review.

FACTUAL AND PROCEDURAL HISTORY

¶2 At the time of injury in September 2013, Begay worked as a cook for Respondent Employer, Ken’s Old West, Inc. (“Ken’s Old West”). Begay filed a Worker’s Report of Injury, claiming he injured his back on September 12, 2013 while lifting a pot of grease for the deep fryer. After his claim was denied, Begay requested a hearing.

¶3 The ALJ held four hearings to take testimony from more than a dozen witnesses, including Begay and three medical experts. The ALJ also considered medical reports from Dr. Major, Dr. Adams, Dr. Holsten, Dr. Barbosa, Dr. Maxwell, and Dr. Moore. Dr. Maxwell testified that Begay’s back injury appeared to be both developmental as well as degenerative and presented no signs of an acute or traumatic-type injury. Dr. Maxwell noted that the injury presented as a preexisting condition and that “the inevitability of Mr. Begay having to undergo this type of operation was

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very, very clear.” In Dr. Maxwell’s opinion, “[t]he inevitability of this [surgery] was building for more than a decade.” In contrast, Dr. Hales testified that it was likely that lifting the grease pot was the cause of Begay’s injury.

¶4 Holly Oran, the kitchen manager at Ken’s Old West, testified that Begay had back problems since beginning his employment and frequently complained about back pain. Oran stated that Begay worked the two days following his alleged injury. Several of Begay’s associates and family members testified that Begay had suffered from back pain for years before the alleged injury. Begay had been seeing a chiropractor for back pain since June 2009. Begay also testified that he had been suffering from back pain since beginning work at Ken’s Old West in 2007 and visited a chiropractor for back pain a few months before the alleged injury. Between June and August 2013, Begay visited a chiropractor twice a week.

¶5 Following the hearings, the ALJ denied Begay’s claim, determining that Begay’s injury was not related to the industrial incident that occurred in September 2013. The ALJ adopted Dr. Maxwell’s medical opinion and found Begay had not proven his injury arose from his employment at Ken’s Old West. Begay requested administrative review, and the ALJ affirmed the award.

¶6 Begay timely filed a special action petition for review. We have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(2) (2016), 23-951(A) (2012), and Rule of Procedure for Special Actions 10.¹

DISCUSSION

¶7 Begay asserts three claims on appeal: (1) that Dr. Maxwell’s opinion was based on inaccurate assumptions; (2) that the ALJ failed to consider testimony that Begay’s injury was the result of a gradual injury; and (3) that the days Begay worked after his alleged injury were a contributing cause of the injury.

I. Standard of Review

¶8 When reviewing ICA awards and findings, 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 (App. 2003) (citation omitted). Our review

¹ We cite to the current version of statutes unless changes material to this decision have occurred.

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is limited to “determining whether or not the commission acted without or in excess of its power and, if findings of fact were made, whether or not such findings of fact support the award, order or decision.” A.R.S. § 23-951(B). We review the evidence only to determine if substantial evidence supported the findings, *Associated Grocers v. Indus. Comm’n*, 133 Ariz. 421, 423-24 (App. 1982) (citation and quotation omitted), and 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 (App. 2002) (citation omitted). We must affirm an award if it can be supported by any reasonable theory of evidence. *Carousel Snack Bar v. Indus. Comm’n*, 156 Ariz. 43, 46 (1988) (citation omitted). We defer to the ALJ for determinations of credibility and to resolve any conflicts in expert testimony, and we will not disturb the ALJ’s resolution of credibility issues and conflicting evidence unless those conclusions are wholly unreasonable. *Stainless Specialty Mfg. Co. v. Indus. Comm’n*, 144 Ariz. 12, 19 (1985) (citation omitted); *Royal Globe Ins. Co. v. Indus. Comm’n*, 20 Ariz. App. 432, 434 (1973) (citations omitted).

II. Dr. Maxwell’s Medical Opinion

¶9 Begay asserts the ALJ should have considered an MRI and found Dr. Hales’ testimony to be more credible than Dr. Maxwell’s. Begay argues Dr. Maxwell’s opinion was “unsupported by the available objective evidence,” namely a preoperative MRI. Dr. Maxwell disagreed with Dr. Hales’ reading of the MRI and reported “not being impressed that there was anything acute, like a big herniated disc.”

¶10 Sufficient evidence supports the ALJ’s adoption of Dr. Maxwell’s opinion as more credible than Dr. Hales’ opinion. Nearly every witness—including Begay—testified Begay has suffered from back pain for years. Even Dr. Hales, the expert with the opinion most favorable to Begay, testified that Begay’s injury would not necessarily require a traumatic event to occur and that the degenerative process was most likely genetic. Thus, the ALJ reasonably found Dr. Maxwell’s opinion to be the most credible.

III. Gradual Injury

¶11 Begay’s argument the ALJ erred by not considering that his injury was a gradual injury fails because Begay raises it for the first time on appeal. See *T.W.M. Custom Framing v. Indus. Comm’n*, 198 Ariz. 41, 44, ¶ 4 (App. 2000) (citation omitted) (noting general rule that we do not consider issues that were not raised before the ICA).

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IV. Days Worked Post-Injury

¶12 Begay also asserts that the days he worked post-injury were a contributing cause of his injury. Essentially, Begay is requesting this court to overturn the ALJ's conclusion that the days worked were evidence that Begay was not injured at work, rather than a contributing factor. However, we review the evidence only to determine whether substantial evidence supported the ALJ's findings. *Associated Grocers*, 133 Ariz. at 423-24 (citation and quotation omitted).

¶13 As discussed above, the ALJ reasonably found Dr. Maxwell's opinion to be the most credible. Dr. Maxwell testified that the fact Begay worked for several days post-injury was very significant. Had Begay immediately complained of severe back pain after lifting the grease pot, Dr. Maxwell observed that would be a very different case when determining causality. However, because Begay was able to work for several days before suffering from extreme back pain, Dr. Maxwell testified that the injury was likely not caused by that single incident and he was very confident the fryer incident did not cause Begay's injury. Substantial evidence supports the ALJ's finding that the days worked post-injury were not a contributing cause of the injury.

CONCLUSION

¶14 For the foregoing reasons, we affirm the ALJ's award and decision upon review.



AMY M. WOOD • Clerk of the Court
FILED: AA