IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

PAMELA E. HERRINGTON,
Petitioner,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DHR OPERATIONS LLC,
Respondent Employer,

CASTLEPOINT NATIONAL INSURANCE COMPANY,
Respondent Carrier.

No. 1 CA-IC 16-0052
FILED 6-8-2017

Special Action - Industrial Commission
ICA Claim No. 20152-020018
Carrier Claim No. 16694981
The Honorable Paula R. Eaton, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Pamela E. Herrington, Scottsdale
Petitioner

The Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent, Industrial Commission of Arizona

Broening Oberg Woods & Wilson PC, Phoenix
By Jerry T. Collen, Kevin R. Myer
Counsel for Respondent Employer and Respondent Carrier

MEMORANDUM DECISION

Presiding Judge Margaret H. Downie delivered the decision of the Court, in which Judge Kenton D. Jones and Judge John C. Gemmill[1] joined.

D O W N I E, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2014, Pamela Herrington tripped and fell while working at a Scottsdale nursery. She filed a workers' compensation claim that was accepted for medical benefits. Herrington later sought additional benefits and temporary disability compensation after her employer placed her on administrative leave.[2] When those claims were denied, she requested a hearing.

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[1] The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] Herrington claimed her employer could not accommodate her work restrictions and therefore placed her on leave. The employer disputed this assertion. The nursery's general manager testified that Herrington disregarded her medical restrictions and was placed on leave because of concerns she would further injure herself. Because the ALJ found that Herrington was not entitled to benefits from or after August 5, 2015 — the date she was placed on leave — this conflict in the evidence need not be resolved.

¶3 After a hearing spanning several days, the Administrative Law Judge ("ALJ") found that as of June 24, 2015, Herrington no longer required medical treatment for her industrial injury and also concluded Herrington was not entitled to temporary compensation benefits. The ALJ affirmed her decision upon review, and Herrington filed a timely petition for special action. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶4 We will not disturb an ICA award if it is reasonably supported by the evidence. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002). It is the ALJ's duty to resolve conflicts in the evidence, and it is her "privilege to determine which of the conflicting testimony is more probably correct." *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975). We review an ALJ's resolution of conflicting evidence for an abuse of discretion. *Madison Granite Co. v. Indus. Comm'n*, 138 Ariz. 573, 577 n.3 (App. 1983).

¶5 Herrington raises six arguments in her opening brief, all of which essentially ask this Court to reweigh the evidence and the sufficiency of the ALJ's findings.[3] This Court, however, does not reweigh the evidence, but instead considers the evidence presented "in the light most favorable for sustaining the award." *Pac. Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214 (1987).

¶6 The testifying medical professionals agreed that Herrington had both a torn ACL and osteoarthritis in her left knee. They disagreed, though, about the cause of the ACL tear and Herrington's ongoing pain.

¶7 Dr. Sahasrabudhe, a board-certified physician specializing in sports medicine, conducted an independent medical examination. He examined Herrington, obtained her account of the injury, and reviewed

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[3] In her reply brief, Herrington attacks the award as being "retroactive" and contrary to Arizona law. We do not address this contention because it was neither raised with the ALJ, *see Brown v. Indus. Comm'n*, 168 Ariz. 287, 288 (App. 1991) ("[W]e will not review an issue which has not been raised in a request for review."), nor in the opening brief, *see State v. Watson*, 198 Ariz. 48, 51, ¶ 4 (App. 2000) (arguments not raised in an opening brief are waived).

her medical records, including an MRI. Dr. Sahasrabudhe could not relate his physical examination findings to Herrington's explication of the circumstances of her industrial injury. He also found no indication that Herrington's ongoing complaints were caused by the industrial injury. The MRI revealed a "chronic ACL tear," fluid collection in the knee joint, extensive cartilage damage "involving all three compartments of the knee," and bone spurs caused by arthritis. A report from a doctor who examined Herrington one month after the industrial injury noted a gradual onset of pain, which Dr. Sahasrabudhe testified was consistent with her preexisting conditions. His opinion "to a reasonable degree of medical probability" was that the ACL tear pre-dated the industrial injury. He also testified that the type of fall Herrington suffered would not cause permanent aggravation of preexisting arthritis.

¶8 Dr. Cummings, a board-eligible doctor in orthopedics and sports medicine, began treating Herrington in August 2015. He testified that the ACL tear was caused by the industrial injury. However, Dr. Cummings had not reviewed records from other doctors, was unaware Herrington had worked for 13 months without restriction after the industrial injury, and testified that he saw Herrington for the purpose of treating her, not to "determine the cause of her knee complaint." Dr. Cummings admitted that the type of industrial injury Herrington reported would not generally cause an ACL tear. He also agreed that the gradual onset of symptoms was consistent with a preexisting condition.

¶9 Dr. Muhich, a chiropractor, treated Herrington continually from November 2014 through June 2015. He opined that the industrial accident was the "initial injury" and that Herrington's previously asymptomatic arthritic knee was aggravated by that injury. He conceded, though, that if Herrington had suffered a complete ACL tear during an acute event, performing her duties at the nursery would have been "very difficult" because her knee would have been unstable.[4] Although Dr. Muhich began treating Herrington in November 2014, he issued her no work restrictions until May 28, 2015.

¶10 Given the conflicts in the evidence, the ALJ acted within her discretion in adopting Dr. Sahasrabudhe's opinions as "more probably correct and well founded on the medical issues." *See Hackworth v. Indus.*

[4] Herrington testified that from the date of her injury until August 2015, she continued to work "40 hours a week doing normal functions without restriction."

Comm'n, 229 Ariz. 339, 343, ¶ 9 (App. 2012) ("When the cause of an injury is not apparent to a lay person, causation must be established by expert testimony . . . and proven 'to a reasonable degree of medical probability.'" (citation omitted)). Dr. Sahasrabudhe was the only witness who offered opinions based on "a reasonable degree of medical probability." He opined that Herrington's ongoing pain was unrelated to the industrial injury and was instead due to her "significant preexisting arthritis of the knee." Although other medical witnesses disagreed with some of Dr. Sahasrabudhe's opinions, the ALJ was permitted to consider the diagnostic methods used, whether the testimony was speculative, and the "qualifications in backgrounds of the expert witnesses and their experience in diagnosing the type of injury incurred." *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46 (1988). When two competing inferences may be drawn from the evidence presented, the ICA "is at liberty to choose either, and this court will not disturb its conclusion unless it is wholly unreasonable." *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217 (1968).

CONCLUSION

¶11 For the foregoing reasons, we affirm the award of the ICA.

COURT OF APPEALS
STATE OF ARIZONA

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