

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: 05-11-2010  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

MERITAGE HOMES, ) 1 CA-IC 09-0017  
)  
Petitioner Employer, ) DEPARTMENT D  
)  
LIBERTY MUTUAL, ) **MEMORANDUM DECISION**  
)  
Petitioner Carrier, ) (Not for Publication -  
) Rule 28, Arizona Rules  
v. ) of Civil Appellate  
) Procedure)  
THE INDUSTRIAL COMMISSION OF ARIZONA, )  
)  
Respondent, )  
)  
SALLY PICKETT (WIDOW), )  
)  
Respondent Employee, )  
)

Special Action - Industrial Commission

ICA Claim No. 20061-920164

Carrier Claim No WC602-322132

J. Matthew Powell, Administrative Law Judge

**AWARD AFFIRMED**

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T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award of death benefits. Two issues are presented on appeal:

(1) whether the medical evidence supports a finding that the Leroy Pickett's (decedent) death was the result of medications ingested for industrially related injury reasons; and

(2) whether Richard D. Gerkin, Jr., M.D.'s medical opinion was legally sufficient to support the award.

Because the medical evidence supports a finding of an industrially related death and Dr. Gerkin's opinion is legally sufficient, we affirm the administrative law judge (ALJ's) 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) (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 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 a 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 June 1, 2006, decedent was employed by the petitioner employer, Meritage Corporation (Meritage). On that date, decedent fell from a cabinet on which he was standing and injured his back. He filed a workers' compensation claim, which was accepted for benefits. Decedent received extensive diagnostic testing, medical treatment, and prescription medication for low back pain following his industrial injury. Decedent's claim subsequently was closed when he died on July 22, 2007. Decedent's surviving spouse filed a claim for dependent's benefits. Her claim was denied for benefits, and she timely requested a hearing. Three ICA hearings were held and testimony was taken from the widow and two independent medical examiners: Dr. Gerkin and Daniel M. Lieberman, M.D.

¶4 Following the hearings, the ALJ entered an award granting death benefits to the widow. He found:

It is concluded that Mrs. Pickett is a credible witness and historian. It is further concluded that the medical conclusions of Dr. Gerkin are more probably correct in this instance than those of Dr. Lieberman. Without speculating or reaching any sort of conclusion as to why or when Mr. Pickett may have stopped taking the narcotic medications that were prescribed for him, it is concluded in accordance with the medical opinions expressed by Dr. Gerkin and as supported by Mrs. Pickett that Mr. Pickett was

suffering from legitimate back pain which (along with other probably unrelated and pre-existing factors) affected his ability to sleep. It is further concluded that Mr. Pickett's June 1, 2006 industrial injury was a contributing cause of that back pain and the sleep problems. Thus, it is also concluded that the combination of medications that Mr. Pickett took on the night before and/or morning of July 22, 2007 that caused his death on that date were taken, at least in part, to alleviate the back pain and sleep problems related to the June 1, 2006 industrial injury. Accordingly, it is concluded that Mr. Pickett's death was causally related to his June 1, 2006 industrial injury; his survivors are entitled to death benefits. A.R.S. § 23-1046.

Meritage timely requested administrative review, and the ALJ summarily affirmed his award. Meritage then brought this appeal.

### III. DISCUSSION

¶15 The dependents of an employee who dies as a result of a compensable industrial injury are entitled to receive death benefits pursuant to the Arizona Workers' Compensation Act. See A.R.S. § 23-1021(A) (2004). 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).

¶16 The ALJ is the sole judge of witness credibility, and it is his job to resolve all conflicts in the evidence and to

draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). The qualifications and backgrounds of expert witnesses and their experience in diagnosing the type of injury incurred may be considered in resolving conflicting evidence. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988).

¶17 In this case, the ALJ specifically found the widow to be a credible witness and historian. The widow married decedent in 2003 and lived with him continually until his death. She testified that he was injured on June 1, 2006, while working for Meritage Homes, when he fell off a counter and struck his back. Although decedent attempted to return to his regular work, he was unable to do so and was moved to a desk job. When the desk job also proved to be too physically strenuous, decedent was placed on FMLA<sup>1</sup> leave in October 2006.

¶18 From October 2006 until his death in July 2007, decedent stayed at home unless he had a doctor's appointment. The widow testified that after the industrial injury, decedent had constant low back pain and was prescribed six or seven different medications in an attempt to relieve it. She stated that she picked up his prescriptions, as well as purchasing him

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<sup>1</sup> Family & Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.*

an over-the-counter sleep aid, "Equate Sleep Aid Tablets."<sup>2</sup> Although decedent kept these medications on a shelf in their master bathroom, the widow did not know what they were nor did she monitor his use of them. She testified that before his industrial injury, decedent did not use any prescription or over-the-counter sleep medications. His difficulty sleeping began after his industrial injury and was due to pain. The widow also testified that her husband did not have a drug abuse problem nor did he use any illegal or recreational drugs.

¶9 The widow testified that on the night of decedent's death, his pain level and mental state seemed to be the same as usual. He went to bed at 6:00 p.m., which was not unusual. When she went to bed at 9:00 p.m., decedent was tossing and turning and he stated that he might have taken too much medication. At some point during the night, she became aware that decedent was not breathing. She called the paramedics, but he was dead. An autopsy was performed, and the medical examiner concluded that the cause of death was "acute doxylamine, tramadol, zolpidem, and promethazine intoxication" and the manner of death was an accident.

¶10 Dr. Gerkin, a physician board-certified in medical toxicology, cardiovascular disease, and internal medicine,

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<sup>2</sup> Doxylamine Succinate Tablets, 25 mg.

testified regarding the causal relationship between decedent's death and his industrial injury. The doctor had reviewed decedent's original medical treatment records, including x-ray reports and MRI's, as well as the autopsy report, paramedic encounter sheet, and a letter summarizing the wife's testimony. Dr. Gerkin opined that decedent's death resulted from a combination of the medications he had taken. He stated that the levels of the individual medications were not high enough to cause death, but instead, the combination of drugs was responsible. Dr. Gerkin stated that the more types of drugs ingested that affect the central nervous system, the higher the probability of an adverse result. The autopsy revealed four medications in decedent's blood: doxylamine, used for coughs, colds, allergies and sleep; tramadol, a pain medication (but not an opioid); zolpidem (a/k/a Ambien), a sleeping pill; and promethazine, an antihistamine also used for pain control.

¶11 Dr. Gerkin testified that decedent's medical records revealed ongoing complaints of back pain following his industrial injury. The pain continued despite treatment with a number of different medications, including opioids, and insomnia, which was compatible with the chronic pain. It was the doctor's opinion that decedent used a combination of both prescription and over-the-counter medications in an attempt to

obtain relief from his industrially-related pain and insomnia. For that reason, he stated that to a reasonable medical probability decedent's industrial injury contributed to his death.

¶12 Meritage argues that the evidence does not support a finding that decedent's death was the result of medications ingested for industrially-related reasons. In that regard, the widow testified that after decedent's industrial injury he was in continuous pain. Further, she stated that her husband never had trouble sleeping until after he began experiencing chronic pain following the industrial injury. Dr. Gerkin had reviewed decedent's medical records. He testified that the records revealed chronic back pain following the 2006 industrial injury and no indication of sleep disturbances until after the industrial injury. This evidence supports the ALJ's conclusion that decedent's death was caused by an overdose of pain and sleep medications taken for industrially related conditions.

¶13 Meritage also argues that Dr. Gerkin's opinion was legally insufficient to support the award because he does not adequately address the issue of decedent's sleep problems and use of sleep aid medications with regard to the industrial



injury.<sup>3</sup> Dr. Gerkin testified that his review of the record revealed that decedent did not appear to have a problem with insomnia prior to the industrial injury nor did it reflect the use of sleep aids. Further, the doctor noted that following the 2006 industrial injury, decedent had chronic back pain and insomnia related to chronic pain.

¶14 We find there is sufficient evidence to support the ALJ's award and we affirm.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Presiding Judge

/s/

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DIANE M. JOHNSEN, Judge

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3 Medical opinions are based on findings of medical fact gleaned from decedent's history, medical records, diagnostic tests, and examinations. See *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973).