DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARY M. CORR-POLONICIC, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, HARRAH'S AK-CHIN CASINO, Respondent Employer, SCF ARIZONA, Respondent Carrier.	)	1 CA-IC 09-0019 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20071-700456

Carrier Claim No. 0654825

Administrative Law Judge J. Matthew Powell

AWARD AFFIRMED

Crossman Law Offices — Phoenix
By Avery N. Crossman
Attorneys for Petitioner Employee

Andrew Wade, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

James B. Stabler, Chief Counsel — Phoenix
SCF Arizona
By Chiko F. Swiney
Attorneys for Respondents Employer and Carrier

G E M M I L L, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a noncompensable claim. The petitioner employee Mary M. Corr-Polonicic ("Claimant") raises three issues on appeal:

> (1) what is the accrual date of a gradual injury claim for purposes of the statute of limitations and forthwith reporting;
>
> (2) whether Claimant sustained a compensable aggravation of a preexisting injury; and
>
> (3) whether Claimant's industrial injury became manifest before April 2007, for purposes of triggering the statute of limitations or forthwith reporting requirements.

Because we find the ALJ's award to be reasonably supported by the evidence of record, we affirm.

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 Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the factual findings of the administrative law judge ("ALJ") 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).

BACKGROUND

¶3 Claimant worked as a blackjack dealer at a casino. In April 2007, she went to the casino's human resources department to request time off because of shoulder problems. The casino's benefit administrator advised Claimant to file a workers' compensation claim. She subsequently filed two worker's reports of injury containing descriptions of her injury:

> [T]able games department - over the course of a year the repetitive motion of the dealing motion is causing . . . [right] shoulder pain, scapular pain radiating into elbow, cont. to get worse over time.
>
> [O]ver the past year I have had severe shoulder, neck [and] elbow pain including headaches - pain was worse as time went by - I believe this is due to the repetitive motion in my position dealing blackjack.

¶4 The respondent carrier, SCF Arizona ("SCF"), denied the claim for benefits, and Claimant timely protested. Three ICA hearings were held for testimony from Claimant, four casino employees, Claimant's treating physician, and an independent medical examiner. Following the hearings, the parties filed simultaneous post-hearing memoranda, and the ALJ entered an award for a noncompensable claim. Claimant timely requested

administrative review, but the ALJ summarily affirmed his award. Claimant next brought this appeal.

DISCUSSION

¶5 Claimant first argues that with a gradual workers' compensation injury each day constitutes a new accident, and therefore, the requirement to report an injury does not begin until the very last day of the exposure. In this case, Claimant asserts that would be the last day she worked at the casino in September 2007. Because she notified human resources on April 27, 2007, she argues that she forthwith reported the injury. Because the claim was filed on June 13, 2007, she also argues that it was timely filed within the statute of limitations.

¶6 The statute of limitations for a workers' compensation claim requires a claim to be filed within one year after "the injury occurred or the right thereto accrued. The time for filing a compensation claim begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that he has sustained a compensable injury." A.R.S. § 23-1061(A) (Supp. 2009).[1]

¶7 The Arizona Supreme Court has held that the one-year period for filing a workers' compensation claim does not begin

[1] We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

to run until the injured employee recognizes: (1) the nature of his injury, (2) the seriousness of the injury, and (3) the probable causal relationship between the injury and the employment. *Pacific Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214, 735 P.2d 820, 824 (1987).

> These three factors are not necessarily of even weight but must be considered together in determining when the injury became manifest or when the claimant knew or should have known that he sustained a compensable injury.
>
> For an injury to be serious and not slight or trivial, the symptoms must be of sufficient magnitude. . . . Awareness of the permanence of a condition is a factor when determining the magnitude of the injury.

Id. (citations omitted).

¶8 Some jurisdictions do use the date of disability as the date of injury in a gradual injury case, i.e., the statute of limitations accrues on the date the gradual injury becomes disabling. *See* 3 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law ("Larson")*, § 50.05 at 50-11 to -13 (2009). But in Arizona, the same accrual standard applicable to traumatic injuries applies to gradual injuries. *See Nelson v. Indus. Comm'n*, 134 Ariz. 369, 371-72, 656 P.2d 1230, 1232-33 (1982) ("In the case of a gradual injury or occupational disease, the date of injury is considered to be the date the

claimant discovered or 'in the exercise of reasonable diligence' should have discovered the relationship between the diagnosed injury or disease and the industrial exposure.")(quoting *Nelson v. Indus. Comm'n*, 120 Ariz. 278, 281-82, 585 P.2d 887, 890-91 (App. 1978) ; *Riley v. Industrial Comm'n*, 24 Ariz. App. 98, 100, 536 P.2d 219, 221 (App. 1975) ("The case law in this jurisdiction is such that the time limit set forth in A.R.S. § 23-1061 does not begin to run in cases of gradual injury, such as this one, until the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should have known that she had sustained a compensable injury.") (citing *Mead v. American Smelting & Refining Co.*, 1 Ariz. App. 73, 399 P.2d 694 (1965); *English v. Industrial Comm'n*, 73 Ariz. 86, 237 P.2d 815 (1951)). The accrual date is ordinarily a question of fact for the ALJ. *Mead*, 1 Ariz. App. at 77, 399 P.2d at 698.

¶9 In this case, the ALJ concluded that both Claimant's testimony and her medical records supported a finding that she was aware that her "pain and other symptoms in her neck, right shoulder and arm . . . were either caused or aggravated by her work activities more than one year before she filed her claim for benefits. . . ." Claimant testified that in April 2007, when she reported to the casino's human resources department,

she already had been going to physical therapy for a year. In April 2007, she also completed a written report for her employer which stated, “over the past year I have been suffering pain in my shoulder, arm (elbow) neck and upper back on the right side. I have been going to physical therapy off and on all along. . . . During work is when my shoulder/arm hurt the worse [sic].”

¶10 Roger L. McCoy, II, M.D., a sports medicine physician, testified that he began treating Claimant in 1999 for neck, back, scapular, and trapezius problems. The doctor’s medical records were placed in evidence and reflected treatment for cervical, trapezius, and scapular complaints related to Claimant’s work dealing blackjack as early as 2003. The doctor reported, “I have been treating . . . [Claimant] since 2005 for cervical, shoulder, and trap pain. All of these conditions were caused and exacerbated by her biomechanically stressful repetitive motions performed as a card dealer at the casino in which she was employed.” Based on this evidence, we believe that the ALJ’s finding -- that Claimant was aware of the nature, seriousness, and probable work connection of her injury more than a year before she actually filed her claim -- is supported by substantial evidence in the record.

¶11 In addition to the timely filing of a workers' compensation claim, Claimant must “forthwith report the accident

and the injury resulting therefrom to the employer." A.R.S. § 23-908(E) (Supp. 2009). The sanction for failure to report forthwith is forfeiture of compensation, but an ALJ may relieve Claimant of this sanction "if it believes after investigation that the circumstances attending the failure . . . are such as to have excused them." *Id*. at -908(F).

¶12 Requiring forthwith notice to the employer serves two purposes. *Magma Copper Co. v. Indus. Comm'n*, 139 Ariz. 38, 43, 676 P.2d 1096, 1101 (1983) (*citing* 3 A. Larson, *The Law of Workmen's Compensation*, § 78.10 (1983)).[2] First, it enables the employer to investigate the facts surrounding the injury as soon as possible, so that reliable evidence can be preserved. *Id*. Second, it gives the employer the opportunity to provide immediate medical diagnosis and treatment so as to minimize the seriousness of the injury. *Id*.

¶13 A claimant has the burden of proving facts which establish an excuse for the failure to forthwith report, and the absence of prejudice to the employer is one factor in establishing a justifiable excuse. *Pacific Fruit*, 153 Ariz. at 215, 735 P.2d at 825. A lack of prejudice may be established by showing that the "injury was not aggravated by the employer's

[2] This section currently is found at 7 *Larson,* § 126.01 at 126-4 to -6.

inability to provide early diagnosis and treatment" and that the "employer was not hampered in making his investigation and preparing his case." *Magma Copper*, 139 Ariz. at 43, 676 P.2d at 1101.

¶14 In this case, lay witness testimony from Claimant's coworkers and supervisors indicates that she did not report a work-related injury to any of them before going to human resources in April 2007. The medical evidence established that Claimant's symptoms began by 1999, had been related to her casino work by 2003, and continued to deteriorate until she was disabled from her work in September 2007. We find that this evidence supports the ALJ's finding that Claimant failed to forthwith report her injury to her employer.

¶15 Although Claimant argues that *Employer's Mutual Liability Ins. Co. v. Indus. Comm'n*, 24 Ariz. App. 427, 539 P.2d 541 (1975), supports her argument that her claim was timely filed, we find it factually distinguishable. In *Employer's Mutual*, the claimant began experiencing pain in her shoulder and was treated by her personal physician for over two years. *Id*. at 428, 539 P.2d at 542. During that time, neither the claimant nor her doctor "gave any consideration to the fact that there might be a work related causal relationship to her problem." *Id*. Subsequently, the claimant saw an orthopedic surgeon who

diagnosed the claimant's condition and related it to her work activities. *Id.* For those reasons, this court concluded that the statute of limitations had not begun to run until the second doctor actually diagnosed the claimant's condition and advised her that it was caused or contributed to by her work activities. *Id*. at 429-30, 539 P.2d at 543-44. In this case, there is evidence that Claimant's condition was both diagnosed and related to her work by Dr. McCoy as early as 2003.

¶16 Claimant also argues that even assuming she had experienced similar physical problems for years before filing her industrial injury claim, she sustained a compensable aggravation while working at the casino in December 2006 and January 2007 and for eight straight days in April 2007. In that regard, she relies on the Arizona Supreme Court's opinion in *Tatman v. Provincial Homes*, 94 Ariz. 165, 382 P.2d 573 (1963). Again, we find the authority to be factually distinguishable.

¶17 Initially, we note that neither the statute of limitations nor the forthwith reporting requirement were at issue in *Tatman*. In that case, a carpenter fell and sustained physical injuries. *Id*. at 166, 382 P.2d at 574. He filed a timely workers' compensation claim, which was accepted for benefits. *Id*. After his claim became medically stationary, the claimant was found to have no physical impairment, but instead a

psychiatric impairment. *Id*. The psychiatric examiners found that 10% of the claimant's total psychiatric disability was related to his industrial injury. *Id*. The ICA refused to award the claimant disability benefits because, despite being psychologically disabled, he physically was able to work. *Id*.

¶18 The Arizona Supreme Court reversed. *Id*. at 170, 382 P.2d at 576. It found that the industrial injury had to some extent aggravated a preexisting mental condition, and this aggravation entitled the claimant to receive disability benefits. *Id*. at 169-70, 382 P.2d at 576. While we recognize that an industrial injury need not be the sole cause of a disability, as long as it is a contributing cause, we do not believe that this excuses a claimant from complying with timely filing and reporting requirements. *See generally Romero v. Indus. Comm'n*, 11 Ariz. App. 5, 461 P.2d 181 (1969).

Conclusion

¶19 For these reasons and for the reasons stated by the ALJ in his award, we affirm.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICK IRVINE, Judge

_____/s/_____
JON W. THOMPSON, Judge