IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/25/2010
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METALCLAD KIRCHER ASBESTOS*, Petitioner Employer, ARGONAUT INSURANCE CO.*, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, JAMES J. McHENRY, Respondent Employee, GLOVER & MILLER AIR CONDITIONING CO.**, Respondent Employer, SCF ARIZONA**, Respondent Carrier.	1 CA-IC 09-0022 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 00007-118320*
0000P-118321**

Carrier Claim No. 73X001049*
8400842**

Administrative Law Judge JoAnn C. Gaffaney

AWARD SET ASIDE; REMANDED

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W I N T H R O P, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review granting reopening of a 1977 industrial injury claim and denying reopening of a 1984 industrial injury claim. Petitioner employer Metalclad Kircher Asbestos ("Metalclad") and petitioner carrier Argonaut Insurance Company ("Argonaut") (collectively, "Petitioners") argue that the administrative law judge ("ALJ") committed reversible error by reopening the respondent employee's ("Claimant's") 1977 claim instead of his 1984 claim. Because we find that the ALJ failed to consider all of the competent and relevant evidence before her, we set aside the award and remand for further proceedings consistent with our decision.

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) and 23-951(A) (1995), and Rule 10, Ariz. R.P. Spec. Act. 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).

¶3 In order to reopen a workers' compensation claim, a claimant must establish the existence of a new, additional, or previously undiscovered condition, and a causal relationship between that condition and the prior industrial injury. *See* A.R.S. § 23-1061(H) (Supp. 2009)[1]; *e.g., Pascucci v. Indus. Comm'n*, 126 Ariz. 442, 444, 616 P.2d 902, 904 (App. 1980). It is the claimant's burden to present sufficient evidence to support reopening. *See Hopkins v. Indus. Comm'n*, 176 Ariz. 173, 176, 859 P.2d 796, 799 (App. 1993).

PROCEDURAL AND FACTUAL HISTORY

¶4 On December 12, 1977, Claimant fell from scaffolding and landed on his right knee while working as a welder for Metalclad, which was insured for workers' compensation benefits by Argonaut. Claimant filed a workers' compensation claim, which was accepted for benefits, and he underwent an open total medial meniscectomy to treat his right knee injury. Claimant's claim eventually was closed with a ten percent scheduled permanent partial impairment of

[1] We cite the current version of the applicable statutes if no revisions material to our analysis have since occurred.

the right lower extremity. Claimant later testified that, although his knee had improved, he continued to experience some swelling and locking. He returned to construction work, primarily working on sheet metal.

¶5 On January 11, 1984, while employed by Glover & Miller Air Conditioning Company ("Glover & Miller"), whose carrier was the State Compensation Fund, or SCF Arizona ("SCF") (collectively, "Respondents"), Claimant fell from an eight-foot ladder and struck his right knee on the rungs. He filed both a new injury claim and a petition to reopen his 1977 industrial injury claim. Both claims were denied for benefits, Claimant timely protested, and consolidated ICA hearings were held. The ALJ entered an award granting reopening of the 1977 injury claim and denying the 1984 new injury claim.

¶6 Metalclad appealed the ICA award, and this court issued a memorandum decision setting it aside. *Metal-Clad v. Indus. Comm'n*, 1 CA-IC 3289, at *1 (Ariz. App. Jul. 25, 1985) (mem. decision). We held that Claimant had sustained his burden of proving a new injury occurred in 1984, and pursuant to the successive injury doctrine, Glover & Miller and SCF were liable for that injury. *Id*. at *7. After we returned the file to the ICA for further processing in accordance with our decision, SCF issued a notice of claim status accepting Claimant's January 11, 1984 industrial injury for benefits. The 1984 claim eventually was closed with an additional fifteen percent scheduled permanent partial impairment to the right

lower extremity and an award of supportive care benefits.[2] Subsequently, the parties settled Claimant's loss of earning capacity, and he received a lump sum award.[3]

¶7 Approximately twenty years later, Claimant filed petitions to reopen both the 1977 and 1984 industrial injury claims. Both petitions were denied for benefits, and Claimant timely requested hearings. Consolidated hearings were held in 2008 for testimony from Claimant, two treating physicians, and two independent medical examiners. Following the hearings, the ALJ resolved the conflicts in the expert medical testimony[4] and entered an award granting reopening of the 1977 industrial injury claim and denying reopening of the 1984 industrial injury claim. Petitioners timely requested administrative review, and the ALJ supplemented and affirmed the award. Petitioners next brought this appeal.

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[2] Successive injuries to the same scheduled body part require the scheduled injury to be converted into and compensated as an unscheduled injury. *See Rodgers v. Indus. Comm'n*, 109 Ariz. 216, 217-18, 508 P.2d 46, 47-48 (1973).

[3] *See* A.R.S. § 23-1067(B) (Supp. 2009); Ariz. Admin. Code R20-5-122(B).

[4] When the causal connection between the condition and the prior industrial injury is not readily apparent, it must be established by expert medical testimony. *See Makinson v. Indus. Comm'n*, 134 Ariz. 246, 248, 655 P.2d 366, 368 (App. 1982). It is the ALJ's responsibility to resolve any conflicts between expert opinions. *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, 605, ¶ 10, 2 P.3d 691, 695 (App. 2000).

ANALYSIS

¶8 Petitioners argue that the award must be set aside because the ALJ failed to properly apply the successive injury doctrine and principles of finality and the law of the case when she reopened Claimant's 1977 industrial injury claim, and she erred in failing to consider a 1987 memorandum written by Peter C. Kilgard, then-counsel for Respondents, who had recommended reopening Claimant's 1984 claim for possible additional arthroscopic procedures. We conclude that the ALJ was not precluded from reopening Claimant's 1977 claim, but her failure or refusal to consider the 1987 Kilgard memorandum requires us to set aside the award.

¶9 As we have noted, it was the responsibility of the ALJ, not this court, to resolve any conflicts between the expert opinions. *See Kaibab*, 196 Ariz. at 605, ¶ 10, 2 P.3d at 695. In that regard, the ALJ adopted the opinions of Drs. Neal L. Rockowitz and Anthony C. Theiler with regard to the relationship between Claimant's current right knee condition and his prior industrial injuries. Dr. Rockowitz performed an independent medical examination of Claimant on March 20, 2008. The doctor found degenerative arthritis in the medial compartment of Claimant's right knee and opined that, because of the advanced arthritic condition of his right knee, Claimant is now a candidate for a total knee replacement. The doctor related the need for replacement to Claimant's 1977 industrial injury.

¶10 Dr. Rockowitz testified that he was aware Claimant had received an additional fifteen percent permanent partial impairment after his 1984 industrial injury.[5] Although the doctor accepted this legal determination for purposes of rendering his opinions, he stated that the 1984 injury did not medically cause a permanent aggravation or an acceleration of Claimant's osteoarthritic symptoms. Dr. Rockowitz testified that Claimant's right knee degenerative and progressive arthritis resulted from the 1978 total medial meniscectomy that was performed to treat his 1977 industrial injury.

¶11 Dr. Theiler testified that he performed an independent medical examination of Claimant on February 27, 2008. The doctor had reviewed Claimant's medical records regarding his treatment for both the December 12, 1977 and January 11, 1984 industrial injuries. The doctor noted that Claimant had undergone an open total medial meniscectomy in 1978 to treat his 1977 industrial injury. He stated that, over time, this caused the knee cartilage

[5] On October 18, 1984, Dr. Charles A. Calkins found "a 25% impairment of the right lower extremity because of pain, discomfort, loss of motion." Later, following this court's 1985 memorandum decision, Dr. Calkins stated that Claimant "can be discharged from my care with a 25% impairment of the right lower extremity, with restriction from any kind of work that requires crawling, climbing, kneeling." At one of the 2008 consolidated hearings, Dr. Calkins attributed the increased permanent impairment rating to a permanent aggravation of Claimant's symptoms, and his anticipation that such symptoms would continue to worsen. But he also acknowledged that the degenerative changes in Claimant's right knee cartilage were related to the 1977 injury and total medial meniscectomy.

to wear away, and it resulted in post-traumatic arthritis. It also was Dr. Theiler's opinion that Claimant's 1984 industrial injury did not permanently aggravate or accelerate the degenerative arthritis. On cross-examination, the doctor testified that, even accepting Claimant legally was awarded an additional permanent impairment following his 1984 industrial injury, that injury plays no part in Claimant's current knee condition. Dr. Theiler also testified that Claimant had no new, additional, or previously undiscovered condition related to his 1984 industrial injury, nor did he require any supportive care related to the 1984 industrial injury.

¶12 Despite the opinions of Drs. Rockowitz and Theiler relating Claimant's current condition solely to the 1977 injury and subsequent surgery, Petitioners argue that this result is precluded by the successive injury doctrine and principles of finality and the law of the case. The successive injury doctrine is a rule of liability preference that generally provides, when two or more potentially liable parties exist, the last in the chain is liable for the whole injury. *See Pearce Dev. v. Indus. Comm'n*, 147 Ariz. 598, 602, 712 P.2d 445, 449 (App.), *approved and adopted in pertinent part*, 147 Ariz. 582, 712 P.2d 429 (1985). Under the successive injury doctrine, if a claimant elects to file both reopening and new injury claims, litigates them, and satisfies the burden of proof as to more than one claim, then the claim that is last in time is wholly responsible for workers' compensation

benefits. *See Vishinskas v. Indus. Comm'n*, 147 Ariz. 574, 577-78, 711 P.2d 1247, 1250-51 (App. 1985).

> [A]n employee's underlying condition may become the responsibility of an employer if the new work activity "causes organic change in the underlying condition." A new employer also may be responsible for symptomatic aggravation but only if it amounts to an additional disability. Therefore, when the aggravation is caused by circumstances that would constitute a new injury, the employer is liable for all disabilities flowing from that aggravation.

Kiabab, 196 Ariz. at 606, ¶ 12, 2 P.2d at 696 (citations omitted).

¶13 Petitioners argue that, because this court found the 1984 industrial injury to be a new injury and applied the successive injury doctrine, the holding is synonymous with a finding that the 1984 industrial injury permanently aggravated Claimant's 1977 right knee condition and all further treatment for that condition is the responsibility of SCF. Although this court applied the successive injury doctrine in our 1985 memorandum decision, we did not find that the 1984 claim was responsible for all of Claimant's future treatment. Instead, we held as follows:

> [I]t is unnecessary for the second injury to cause additional structural damage; the aggravation of symptoms is sufficient if, as here, this aggravation results in a compensable loss. Of course, the responsibility for compensation extends only to this compensable loss. The SCF is not responsible for the underlying arthritis unless it is found that the last injury permanently aggravated it. Argonaut concedes that this question is as yet unanswered at this stage of the proceeding. Obviously, this question must be determined in further hearings.

Metal-Clad, 1 CA-IC 3289, at **7-8. Accordingly, the ALJ in 2008 was not precluded from determining that the accepted medical

testimony from Drs. Rockowitz and Theiler established that the 1984 industrial injury did not permanently aggravate Claimant's underlying arthritis from the 1978 total medial meniscectomy, and that the successive injury doctrine only placed liability on SCF for the 1984 symptomatic aggravation and its treatment.

¶14 Despite our conclusion that preclusion does not apply, we must nonetheless set aside the award because the ALJ failed to consider all of the competent and relevant evidence before her. Specifically, she failed or refused to consider the aforementioned 1987 memorandum written by Peter Kilgard.

¶15 An ALJ must consider all competent and relevant evidence in establishing an award. *See Slover Masonry, Inc. v. Indus. Comm'n*, 158 Ariz. 131, 136, 761 P.2d 1035, 1040 (1988) ("The ALJ must consider all competent and relevant evidence in establishing an accurate rating of functional impairment . . . ."); *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975) ("It is presumed that the Commission considers all relevant evidence." (citation omitted)).

¶16 Petitioners argue that the ALJ erred in failing to consider the memorandum sent by then-counsel for Respondents "dated May 13, 1987 to the then-presiding [ALJ] explicitly accepting liability for the progressing arthritis and agreeing to reopen the claim on that basis." In her decision upon review, the ALJ declined to consider the memorandum, stating, "The memorandum authored by Peter Kilgard dated May 13, 1987 is not considered

evidence, because it was submitted after the last hearing." As Petitioners note, however, that memorandum was and had been a part of Claimant's ICA file even before the consolidated hearings, and therefore should not have been rejected on that specific basis. Consequently, we conclude that the ALJ's failure to consider the 1987 memorandum of Peter Kilgard requires us to set aside the award. *See, e.g., Horan v. Indus. Comm'n*, 167 Ariz. 322, 326, 806 P.2d 911, 915 (App. 1991) (citing 2B Arthur Larson, *Law of Workmen's Compensation* § 79.12 (1989) (stating that an ALJ who excludes admissible evidence cannot be presumed to have reached the correct result if the evidence "might" have supported a contrary result)). We note, however, that the memorandum does not explicitly utilize the terminology attributed to it by Petitioners, and we decline on appeal to ascribe the evidentiary value to the memorandum that Petitioners maintain it deserves. *See Post v. Indus. Comm'n*, 160 Ariz. 4, 7, 770 P.2d 308, 311 (1989) (stating that we "must refrain from taking the factfinder's role"). Instead, the meaning to be derived from and weight, if any, to be afforded this memorandum are questions of fact to be resolved on remand by the ALJ, not by this court. *See generally Young*, 204

Ariz. at 270, ¶ 14, 63 P.3d at 301; *Kaibab*, 196 Ariz. at 605, ¶ 10, 2 P.3d at 695.

¶17 For the foregoing reasons, we set aside the ALJ's award and remand for further proceedings.

/S/
LAWRENCE F. WINTHROP, Judge

CONCURRING:

/S/
PETER B. SWANN, Presiding Judge

/S/
ANN A. SCOTT TIMMER, Chief Judge