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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: 01/28/2010  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

CHRISTOPHER & BANKE, ) 1 CA-IC 09-0039  
)  
Petitioner Employer, ) DEPARTMENT C  
)  
SENTRY CLAIMS SERVICES, ) **MEMORANDUM DECISION**  
)  
Petitioner Carrier, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
v. ) Civil Appellate Procedure)  
)  
THE INDUSTRIAL COMMISSION OF )  
ARIZONA, )  
)  
Respondent, )  
)  
NANCY R. RYAN, )  
)  
Respondent Employee. )  
\_\_\_\_\_ )

ICA Claim No. 20080-650043

Carrier Claim No. 51C712356-424

Administrative Law Judge Paula R. Eaton

**AWARD AFFIRMED**

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**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 compensable claim. The petitioner employer, Christopher & Banke, and petitioner carrier, Sentry Claims Services, (collectively "petitioners") question whether the factual findings of the administrative law judge ("ALJ") were reasonably supported by the evidence. Petitioners argue the testimony of treating physician and expert witness for respondent employee, Nancy R. Ryan ("Ryan"), lacked foundation and should not have been relied on by the ALJ. We find the accepted evidence and testimony in the record supports the ALJ's decision and affirm the award.

**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. We consider the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002) (citation omitted). In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶

14, 63 P.3d 298, 301 (App. 2003) (citation omitted). We review the ALJ's rulings on issues of law de novo. *Vance Int'l v. Indus. Comm'n*, 191 Ariz. 98, 100, ¶ 6, 952 P.2d 336, 338 (App. 1998).

#### **FACTUAL AND PROCEDURAL HISTORY**

¶3 Ryan was injured at work when she missed the bottom step of a ladder and fell. While she did not fall to the ground, she reportedly injured her arm, back and neck in the fall through a combination of hitting the ladder, twisting, and landing hard on one leg. After a variety of conservative medical treatments failed to improve her condition, Dr. Daniel Lieberman recommended and performed a surgical fusion to stabilize an observed segmental instability in Ryan's neck.

¶4 At the hearing, Ryan testified to having been involved in several car accidents at least 17 years prior to the industrial accident, the last of which resulted in some injury to her back. However, Ryan testified to receiving little medical treatment related to these past incidents and only occasional chiropractic treatment since the accidents. Ryan also testified to not having any ongoing problems with her back or neck prior to the industrial injury.

¶5 Dr. Lieberman testified that Ryan's injury was consistent with trauma rather than a degenerative condition and that Ryan had very classic symptoms and radiographic signs

supporting such a diagnosis. Dr. Lieberman indicated that he was unaware of Ryan's previous injury in 1991 or 1992. However, while Dr. Lieberman stated that it was a crucial point that Ryan did not have any prior treatment or significant neck pain, he also indicated it would be inconceivable to have the observed cervical subluxation beginning in 1992 and being asymptomatic until a minor injury in 2008.

¶16 Petitioner's expert, Dr. Edward J. Dohring, testified to his difference in opinion with regard to the evaluation, diagnosis, and treatment of Ryan's injuries. He disagreed with the opinions of Dr. Lieberman, Dr. Bagley (Ryan's first treating physician), the emergency room physician who Ryan visited the day after the injury, and the radiologist who evaluated Ryan's x-rays and MRI. In Dr. Dohring's opinion, Ryan's neck injury was of a degenerative nature, completely unrelated to her fall. It was also his opinion that Ryan's x-rays and MRI films had been misinterpreted by Dr. Lieberman and the radiologist.

¶17 Upon review of the evidence and testimony, the ALJ found Ryan to be credible and that a conflict existed in the medical evidence. The ALJ found the opinions of Dr. Lieberman to be more probably correct and well founded, and on that basis, that Ryan's condition was not medically stationary. The decision was subsequently affirmed upon review and the petitioners filed a petition for special action with this court.

## DISCUSSION

¶18 This is a classic case of conflicting medical opinions, not a foundational issue. The petitioners go to great lengths to try to undermine the testimony and opinions of Dr. Lieberman by arguing they lack foundation. Further, petitioners' reliance on the single case of *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 776 P.2d 797 (1989), is wholly unpersuasive in light of our standard of review.

¶19 In *Fry's*, this court found it significant that a testifying expert witness made an incorrect factual assumption. *Id.* at 121, 776 P.2d at 799. We reasoned that "without an accurate history his testimony had inadequate foundation and thus, is insufficient to support the award." *Id.* However, on appeal, the Arizona Supreme Court found that the testimony in question was only one part of the history that the expert utilized in forming his opinion. *Id.* at 122, 776 P.2d at 800. In addition, it was unclear exactly what the claimant had told the expert witness. *Id.* In contrast, the case which the court of appeals had relied upon for its decision, *Desert Insulations, Inc. v. Indus. Comm'n*, 134 Ariz. 148, 654 P.2d 296 (App. 1982), involved a situation in which the expert had testified that if the facts were different than what he believed, his opinion would be different. *Id.* at 151, 654 P.2d at 299. Because the facts were different, the expert's opinion was without

foundation. See *Fry's* at 122, 776 P.2d at 800 ("the court correctly found the foundation for the doctor's testimony inadequate; the fact in question was highly material to the testimony"). The facts in this case are more similar to those in *Fry's* than in *Desert Insulations*.

¶10 It is clear from the testimony that Dr. Lieberman's opinion was not based solely or substantially on the fact that the claimant had no previous injuries or pain. Instead he provided the necessary foundation for his opinion by testifying that even if Ryan had sustained a past injury, at most it might have predisposed her to the later injury. Dr. Lieberman was clear that Ryan's current injury was very unlikely to have been the direct result of a previous injury or a degenerative condition. In addition, it is clear from Dr. Dohring's testimony that he has a significantly different professional opinion regarding Ryan's condition and that he considers Ryan's past history of injury to be significant.<sup>1</sup> However, Dr. Dohring's opinion is not so much the result of Ryan's medical history as it is the result of Dohring's different interpretation of the medical imaging performed on Ryan. This

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<sup>1</sup> Although Dr. Dohring alleged that Ryan had a history of neck pain and chiropractic treatment, he admitted at trial that he did not see any chiropractic records produced before the injury that supported his allegation.

type of difference in medical opinion is solely within the purview of the ALJ.

¶11 Conflicts in the medical evidence *must* be resolved by the ALJ. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988). While we may reject the ALJ's findings when the medical expert opinion is without critical foundation, this is not such a case. "Many factors enter into a resolution of conflicting evidence, including whether or not the testimony is speculative, consideration of the diagnostic method used, qualifications in backgrounds of the expert witnesses and their experience in diagnosing the type of injury incurred." *Id.* The ALJ was the appropriate arbiter to take these considerations into account in reaching a decision. The record provides a reasonable basis for the ALJ's decision and the petitioners have not presented a sufficient basis upon which to question the result.

#### CONCLUSION

¶12 For all of the foregoing reasons, we affirm the award.

/S/  
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DONN KESSLER, Judge

CONCURRING:

/S/  
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PATRICK IRVINE, Presiding Judge

/S/  
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MICHAEL J. BROWN, Judge