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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



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

CEMEX,) 1 CA-IC 09-0043
)
Petitioner Employer,) DEPARTMENT B
)
BROADSPIRE,) **MEMORANDUM DECISION**
)
Petitioner Carrier,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
GILBERT H. HOLGUIN,)
)
Respondent Employee.)
)

Special Action - Industrial Commission

ICA Claim No. 20070-240383

Carrier Claim No. 152-10709

Administrative Law Judge Harriet L. Turney

AFFIRMED

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N O R R I S, Judge

¶1 Petitioner employer CEMEX and petitioner carrier Broadspire (collectively, "petitioners") timely seek special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for an occupational disease award to claimant Gilbert H. Holguin. Petitioners contend the evidence failed to support the factual findings of the administrative law judge ("ALJ"), who rejected their defense Holguin had disobeyed an employer safety rule. See Ariz. Rev. Stat. ("A.R.S.") § 23-901.04(A) (Supp. 2009).¹ Because the record supports the ALJ's factual findings and decision, we affirm the award.

FACTS AND PROCEDURAL HISTORY²

¶2 Holguin was employed in various positions by CEMEX and its predecessor entities ("CEMEX") from 1954 to 1985 at a rock

¹"[N]o employee . . . shall be entitled to receive compensation for disability from an occupational disease . . . when such disability was caused either wholly or partly by the wilful misconduct, wilful self-exposure or disobedience to such reasonable rules and regulations adopted by the employer and which have been and are kept posted in conspicuous places in and about the premises of the employer, or otherwise brought to the attention of the employee." A.R.S. § 23-901.04(A).

²In reviewing 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 award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

crushing facility south of downtown Phoenix.³ From approximately 1954 until 1960, Holguin was a laborer and primarily worked in the "yard"; occasionally he worked in the "tunnels" when he had to "fill in for the laborer that worked down there." Holguin wore a bandana over his face when conditions were "very dusty," as CEMEX did not provide dust masks or respirators to workers at the facility until sometime around 1968-1970.

¶13 From 1960 until 1985, Holguin worked briefly as a "helper" to the crusher operator, then for approximately 24 years as a journeyman crusher operator. Holguin spent 20 to 30 percent of the time outside the control room, which included time on the grounds or in the tunnels. Until approximately 1975, Holguin's control room was a ground-level shack with no closeable door; then he moved to a newly-constructed, 65-foot-tall, air-conditioned tower.

¶14 A 1985 X-ray revealed Holguin had simple silicosis, which by 2008 had progressed to massive fibrosis. A pulmonologist called by petitioners testified the disease process started sometime in the late 1960s or early 1970s. After hearings in which medical experts, Holguin, and former CEMEX employees testified, the ALJ

³Holguin voluntarily left CEMEX's employ for approximately one year, returning to work in May of 1983.

found Holguin had sustained a compensable injury and later affirmed the decision.⁴ Petitioners then filed this special action.

DISCUSSION

¶15 Petitioners contend Holguin developed silicosis because he failed to wear a protective breathing device -- a mask -- in violation of an unwritten requirement to do so. Thus, they argue the ALJ improperly rejected their defense under A.R.S. § 23-901.04(A). We disagree; the evidence reasonably supports the ALJ's factual finding and rejection of CEMEX's A.R.S. § 23-901.04(A) defense:

[T]he requirement to wear masks was never written down or posted. Violation of the requirement resulted, at most, in a stern "talking to" by the Safety Director, but was never the basis for a reprimand or other type of discipline. All of the witnesses who had worked for [CEMEX] seemed to know that [] masks should be worn while working in the tunnels, but what other conditions or levels of dustiness warranted their use was not clearly defined, delineated, or conveyed.

¶16 The evidence showed CEMEX had no written rule regarding masks during Holguin's employment. Four former CEMEX employees (the "four former employees") testified they knew of no written requirement to wear masks. Even John Testa, CEMEX's safety director from 1967 to 1992, testified he could not remember whether CEMEX had a written rule regarding masks. CEMEX's 1982 written safety policy explicitly mentioned steel toed shoes, safety

⁴The ALJ affirmed the decision with minor amendments not material here.

glasses, hard hats, and lockout devices, but made no mention of masks.

¶17 Although CEMEX had no written rule regarding masks, Testa testified employees were required to wear a "mine safety appliance" ("MSA") when they went outside the plant.⁵ Testa retreated from this statement later when he testified, "[i]f they're just walking through or walking by [outside a closed environment], no. If they're going to work right there and be there for a while, [sic] and when I say a while, [sic] ten, fifteen minutes or longer, yes, they need to wear it."

¶18 Further, although Holguin and the four former employees understood masks should be worn in the tunnels, when employees were to wear masks outside the tunnels was ill-defined, if such a requirement even existed. Although Holguin testified he understood masks were to be worn "[i]n the tunnels That was mostly for the laborers, not the operators." He also understood all employees were to wear masks outside the tunnels when conditions reached some level of dustiness, but it is not clear from his testimony what the threshold was.

¶19 Two of the four former employees testified masks were required only in the tunnels; another testified masks were for the laborers; and the fourth testified there was no rule whatsoever, but he voluntarily wore a MSA in the tunnels where it was "really

⁵An MSA respirator is a rubber mask with a filter that goes over the nose and mouth.

dusty" and he "tried to wear [a particle mask] all the time" he was outside where it was "dusty." Further, Holguin was never reprimanded for not wearing a mask, and the penalty for not wearing one, according to Testa, merely amounted to "[a] good talking to. Good butt chewing sometimes." The wide variety of testimony as to CEMEX's "rules and regulations" regarding masks outside the tunnels amply supports the ALJ's finding "what other conditions or levels of dustiness warranted their use was not clearly defined, delineated, or conveyed."

¶10 To succeed under A.R.S. § 23-901.04(A), CEMEX had to have both adopted a rule and "brought [it] to the attention of the employee." The evidence, however, failed to show -- as the ALJ found -- CEMEX had adopted and conveyed a rule regarding the use of masks outside the tunnels. Thus, the ALJ properly rejected petitioners' A.R.S. § 23-901.04(A) defense.

CONCLUSION

¶11 For the foregoing reasons, we affirm the ALJ's award.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PETER B. SWANN, Judge