DIVISION ONE
FILED: 06-17-2010
PHILIP G. URRY, CLERK
BY: PJL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCHULT HOMES,	)	1 CA-IC 09-0074
	)	
Petitioner Employer,	)	Department B
	)	
XL SPECIALTY INSURANCE CO.,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Petitioner Carrier,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
v.	)	Procedure)
	)	
	)	
THE INDUSTRIAL COMMISSION OF ARIZONA,	)	
	)	
Respondent,	)	
	)	
FILEMON TORRES,	)	
	)	
Respondent Employee.	)	

Special Action – Industrial Commission

ICA Claim No. 20082-490349

Carrier Claim No. 9000755173

Deborah A. Nye, Administrative Law Judge

AWARD AFFIRMED

Steven C. Lester PC — Phoenix
By Steven C. Lester
Attorneys for Petitioners Employer/Carrier

Andrew F. Wade, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorneys for Respondent

Law Offices of Chris T. Johnson PC — Phoenix
By Janell Youtsey
Attorneys for Respondent Employee

N O R R I S, Judge

¶1 Petitioner employer Schult Homes and petitioner carrier XL Speciality Insurance Company (collectively, "petitioners") timely seek special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review awarding workers' compensation benefits to claimant Filemon Torres. Petitioners contend the evidence failed to support the factual findings of the administrative law judge ("ALJ"), who (1) found Torres sustained an on-the-job injury, (2) found the injury Torres sustained caused the medical condition for which he sought treatment, and (3) rejected their defense Torres had not reported his injury "forthwith." *See* Ariz. Rev. Stat. ("A.R.S.") § 23-908(E) (Supp. 2009).[1] Because the record supports the ALJ's factual findings and decision, we affirm the award.

[1]"When an accident occurs to an employee, the employee shall forthwith report the accident and the injury resulting therefrom to the employer." A.R.S. § 23-908(E).

FACTS AND PROCEDURAL BACKGROUND

¶2 Near the end of his shift on Friday, August 22, 2008, Torres dropped a half-full bucket of drywall mud on his left foot from a height of about four inches. Torres felt minimal pain, but by Sunday morning, August 24, he noticed blisters on his foot, primarily over the fourth and fifth digits. Torres drained the blisters.

¶3 Torres reported his injury to his employer on Tuesday, August 26, who sent him to G. Johnston, M.D. for evaluation. Torres's symptoms worsened and Dr. G. Johnston referred Torres to H. Johnston, M.D. at a wound care clinic for further treatment.

¶4 On September 4, Dr. H. Johnston amputated Torres's left fifth toe, "secondary to crush injury and diabetes mellitus and peripheral vascular disease." In January 2009, due to persistent infection, Dr. H. Johnston removed Torres's third and fourth toes.

¶5 Torres, his daughter, Schult's safety manager, Gary Wyatt ("Wyatt"), and three medical experts testified during four days of hearings conducted between February and June 2009. The ALJ heard conflicting medical expert testimony; she also heard conflicting testimony from Torres and his daughter recounting the evolution of his injury. The ALJ resolved these conflicts in favor of Torres and awarded him medical, surgical, and

hospital as well as temporary total and/or partial disability benefits.

DISCUSSION

¶6 In 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).

I. Sufficiency of the Evidence

¶7 Petitioners first argue the evidence does not support the ALJ's finding Torres sustained an on-the-job injury because the account provided by Torres and his daughter concerning the condition of his foot in the days immediately after the accident was not credible. More specifically, petitioners argue because the ALJ made "credibility findings against" Torres and his daughter and "rejected" the medical history he had provided to his treating physicians, he failed to present any "substantial medical evidence to prove his case," thus rendering his claim noncompensable. We disagree. The problem with this argument is its premise -- the ALJ did not find Torres completely lacked credibility. Instead, the ALJ credited the history Torres first gave to his employer and initial treating physician.

¶8 Although the ALJ found Torres's credibility to be "at issue in this proceeding," and noted "many inconsistencies," the ALJ did not find Torres lacked all credibility. Rather, the ALJ resolved these inconsistencies by relying on the statements Torres made to Wyatt, to whom Torres first reported his injury,[2] and to the physician who first treated Torres, Dr. G. Johnston. Torres's statements on these occasions, made closest in time to the injury, related a consistent account of the accident and evolution of his injury, as the ALJ found.[3] The ALJ also found the testimony of Torres's daughter, although lacking in credibility in some areas, corroborated Torres's report he had sustained the work injury on August 22. Because the ALJ, not this court, is the trier of fact, *see supra* ¶ 6, and is the judge of witnesses' credibility, "[i]f a witness makes contradictory statements in regard to the material issues of a case, the trier of fact may accept as true either statement, or, on account of the discrepancy, may disregard the testimony of the witness entirely." *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 435, 513 P.2d 970, 973 (1973). Under these circumstances, the record supports the ALJ's findings Torres was

[2]The ALJ referred to the history Torres provided to Wyatt on the day he reported his injury, August 26, 2008, and in an interview on September 4.

[3]Dr. H. Johnston first saw Torres on August 28. The ALJ noted Dr. H. Johnston's "understanding of the accident was not entirely correct . . . though it was close enough."

involved in an industrial accident on August 22 and he provided a sufficiently credible account of his injury to Wyatt and his treating physicians.

¶9 Second, petitioners argue even if Torres was involved in a work-related accident, the ALJ incorrectly concluded this accident caused his injury. Petitioners essentially argue the ALJ improperly resolved conflicting medical testimony. We disagree.

¶10 "[I]t is the hearing officer's obligation to resolve conflicting medical evidence, and his resolution will not be disturbed unless it is wholly unreasonable." *Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979). Furthermore, we have explicitly rejected any per se rule certain types of witnesses are to receive greater credence than others. *Walters v. Indus. Comm'n*, 134 Ariz. 597, 599, 658 P.2d 250, 252 (App. 1982).

¶11 Although petitioners' medical expert testified Torres's blistering was not consistent with a crush injury, the wound specialist, Dr. H. Johnston, supported by his written histories, testified unequivocally to the contrary.[4] Moreover,

[4]Dr. G. Johnston testified he was initially "skeptical" a dropped bucket caused Torres's injury. Dr. G. Johnston "challenged [Torres] as to the cause," but Torres was "strongly adamant to the cause of the injury was exactly as he told me." Dr. G. Johnston concluded he thought he "was seeing an unusual presentation because of [Torres's] severe diabetic foot."

as noted by the ALJ, petitioners' expert's testimony contradicted his earlier written report in which he stated if Torres "suffered a significant soft tissue injury, we would expect to see either an open laceration or a blister formation at least within 24 hours after the incident."[5] Thus, the record supports the ALJ's resolution of conflicting medical testimony.

II. Reporting Forthwith

¶12 Petitioners also argue the ALJ improperly found Torres reported his injury forthwith and we should therefore set aside the award. We disagree as the evidence supports this finding. Torres reported the injury to Wyatt on Tuesday morning, August 26. According to Wyatt's report, when he asked Torres why he did not report the injury on Monday morning, Torres responded "he didn't realize that it was that bad." Wyatt sent Torres to Dr. G. Johnston that same day. During this examination, Torres reported minimal pain. At an August 28 follow-up visit, Torres reported a significant increase in pain. This evidence supports the ALJ's finding "applicant did not report the accident promptly because it engendered little pain, and he thought the incident to be of no consequence until he discovered blisters on his 5th toe when putting on his boot on Sunday." "An employee need not report every bruise or scrape to his employer. Rather,

[5]The parties do not dispute the wounds to Torres's foot and his advanced diabetes led to the infection that ultimately required amputation of three toes.

an employee must report an injury only when, with the exercise of reasonable care, he should have known that he suffered a compensable injury." *Douglas Auto & Equip. v. Indus. Comm'n*, 202 Ariz. 345, 347, ¶ 10, 45 P.3d 342, 344 (2002).

CONCLUSION

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

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
MAURICE PORTLEY, Judge