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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

RONNIE YOUNG,) 1 CA-IC 09-0076
)
Petitioner,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF ARIZONA,) Rule 28, Arizona Rules
) of Civil Appellate
Respondent,) Procedure)
)
ARIZONA AGGREGATE DELIVERY SERVICES,)
)
Respondent Employer,)
)
SCF OF ARIZONA,)
)
Respondent Carrier.)
)
)
)

Special Action--Industrial Commission

ICA CLAIM NO. 20050-060084

CARRIER NO. 0449657

Administrative Law Judge James B. Long

AWARD AFFIRMED

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W E I S B E R G, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review denying a petition to reopen. On appeal, petitioner Ronnie Young alleges that the award is not supported by substantial evidence. Because evidence in the record supports the finding of the administrative law judge ("ALJ") that Young failed to sustain his burden of proving a new, additional, or previously undiscovered condition that was causally related to the industrial injury, we affirm.

PROCEDURAL BACKGROUND

¶2 On December 20, 2004, Young injured his left knee while working as a dump truck driver for Arizona Aggregate Delivery Services. He had surgery in April 2006. On October 26, 2006, SCF Arizona, the workers' compensation carrier, issued a notice of claim status and closed his claim to active medical care with a permanent impairment. Because Young continued to experience pain and swelling, he protested the closure. After hearings were held before ALJ Fraser, on August 7, 2007, she issued a decision upon hearing and findings and award upholding the closure.

¶13 The ALJ considered the testimony of Dr. Ott and Dr. Kelly, both orthopedic surgeons. Dr. Ott believed that based on his examinations of Young and review of his medical records, Young should have a repeat arthroscopy. He indicated, however, that the MRI scan was not definitive as to whether he had a recurrent tear or residuals from the surgery. Dr. Kelly noted that prior to surgery, he had diagnosed Young with a tear of the medial meniscus. However, as of March 2007 when he again evaluated Young, he believed there were no significant changes since the claim was closed, only some pre-existing degenerative changes in the knee. He did not think surgery was necessary and recommended supportive care. The ALJ found the opinions of Dr. Kelly to be "the more probably correct and well founded" and concluded that Young's "knee condition is stationary with a 2% scheduled permanent impairment effective July 8, 2006" and that he was entitled to supportive care. On September 24, 2007, the ALJ issued a decision on review affirming the decision upon hearing issued August 7, 2007.

¶14 On November 5, 2008, Young filed a petition to reopen based on new, additional or previously undiscovered disability or condition. SCF denied the petition to reopen, and Young filed a timely request for hearing. Hearings were held before ALJ Long on Young's petition to reopen. Young testified that after Dr. Martin performed surgery in April 2006, he returned to work, but his symptoms returned. He began treatment with Dr. Ott in April 2007.

Young reported experiencing pain and swelling and could hear "little popping" in the left knee. He stated that in August 2008, he began treatment with Dr. Campbell who recommended an MRI and bone scan. After the tests were performed, Dr. Campbell recommended surgery. Young testified that he continued to experience the same symptoms of pain and swelling in his left knee and that this condition limited his day-to-day activities.

¶15 Dr. Campbell, board certified in orthopedics, testified that he saw Young in August 2008, ordered an MRI and bone scan, and saw him again on October 31, 2008. He stated that the MRI showed a "tear of the posterior horn of the medial meniscus and a degenerative signal in the anterior horn of the lateral meniscus." He opined that "findings on the MRI were causally related to the December 20, 2004, industrial injury" and recommended reopening Young's case for active medical treatment.

¶16 Dr. Campbell further testified that he reviewed the post-surgical MRI that was done in October 2006 and put both the 2006 and 2008 scans "side by side to review them." He indicated that based upon his personal review of the scans, the 2008 MRI showed a "definite tear of the posterior horn of the medial meniscus" and that "the signal that represented the tear on the medial meniscus was more extensive and went deeper into the body of the meniscus than the 2006 MRI." He concluded that to a reasonable degree of medical probability, the findings in the 2008 MRI reflected a "new,

additional or previously undiscovered condition related to the industrial injury." Dr. Campbell conceded that reading an MRI is a matter of interpretation, that an MRI must be read in light of an individual's medical history and physical examination and that if you take it out of context, it can be "worthless." He concluded, however, that "there was no question that there was an obvious change during that interval" and that this change warranted further surgery.

¶17 Dr. Campbell also acknowledged that the radiologist who performed the 2006 MRI indicated there was a slight irregularity in the posterior horn of the medial meniscus but testified that "looking at both MRIs side by side, that the 2008 showed a definite tear of the posterior horn of the medial meniscus" and opined that "anybody that looks at them side by side can see the difference."

He further testified that the bone scan did not, in his opinion, show degenerative arthritis of the meniscus.

¶18 Dr. Kelly testified that he evaluated Young in March 2007, March 2008 and December 2008. He further testified that he reviewed the post-operative report prepared by Dr. Martin and concluded that the findings on the report reflected degeneration of the meniscus and that such degeneration occurs during the aging process. Dr. Kelly stated that the radiologists' reports from the 2006 and 2008 MRIs showed evidence of "signal changes of a degenerative nature in all three compartments of [Young's] knee,"

but "overall, the scans were fairly comparable." He testified that findings of the bone scan were "consistent with degenerative medial compartment arthritis of both knees." Dr. Kelly opined that having examined Young and reviewed his medical records and diagnostic studies, to a reasonable degree of medical probability, there was nothing "new, additional or previously undiscovered that relates to the industrial injury for which Mr. Young needs active medical care." Dr. Kelly further opined that Young's condition remained stationary and he could return to work without restriction."

¶9 Dr. Kelly admitted that he did not review and compare the 2006 and 2008 MRI scans, only the reports prepared by the radiologists from those scans. He stated, however, that a radiologist is qualified to interpret the MRI scans. He admitted that the radiologist who performed the 2008 MRI scan did not compare it with the 2006 MRI scan, but explained that putting different MRI scans side by side will always reveal some differences because no MRI is ever done exactly the same. He added, however, that in his opinion, the differences between the two MRIs performed in this case did not indicate anything of clinical significance that would warrant surgery.

¶10 Dr. Kelly remarked that in reviewing Dr. Campbell's report, he was concerned that Dr. Campbell had never reviewed Dr. Martin's post-operative report and Dr. Martin's direct findings of a degenerative nature found in Young's knee. He also expressed

concern because Dr. Campbell's notes referred to a microfracture procedure done on Young's knee and that such procedure had not been performed. He disagreed with Dr. Campbell's conclusion regarding the results of the bone scan as the report indicated "modest medial compartment uptake of both knees, likely degenerative." Regarding the 2007 ICA hearings, Dr. Kelly admitted that Dr. Ott had at one time recommended further surgery, but noted that Dr. Ott went "back and forth" on that issue and that he had concerns with Dr. Ott's recommendation. He concluded that based on Young's entire medical record, there was no indication that Young had a "lateral meniscus problem that could be related to the industrial injury" and that with respect to the degenerative changes, Young did not need surgery, only supportive care.

¶11 On June 23, 2009, the ALJ issued a decision upon hearing and findings and award denying petition to reopen ("award"). The ALJ summarized the opinions of both Dr. Campbell and Dr. Kelly and found there was a conflict in the medical evidence that he had to resolve. The ALJ stated that "[t]he conflict in the medical evidence is resolved by accepting the opinions of Douglas Kelly, M.D. as being more well founded and correct" and that Young "failed to sustain his burden of proving a new, additional or previously undiscovered condition causally related to the injury." Young filed a request for review, and the ALJ issued a decision upon review affirming the award.

¶12 Young filed a timely petition for special action from the award and the decision upon review. 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.

DISCUSSION

¶13 Young argues the award was not supported by substantial evidence because Dr. Kelly failed to review and compare the 2006 MRI scan with the 2008 MRI scan, while Dr. Campbell did. He claims that Dr. Kelly's opinion is not based on medical fact, but on speculation, because Dr. Kelly did not reach his conclusion through "personal observation and comparative study of the MRI findings."

Standard of Review

¶14 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 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). This court must uphold an ALJ's resolution of conflicting testimony if the evidence reasonably supports it. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 121, 776 P.2d 797, 799 (1989). Conflicts in medical evidence are resolved by the ALJ. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1366 (1988).

Sufficiency of Medical Evidence to Support Award

¶15 Section 23-1061(H)(Supp. 2009) governs the reopening of workers' compensation claims on the basis of a "new, additional or previously undiscovered temporary or permanent condition" See *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491, ¶ 6, 154 P.3d 391, 393 (App. 2007). The claimant has the burden to prove his entitlement to open his claim on this basis and must also prove a causal relationship between the new condition and the prior industrial injury. *Lovitch*, 202 Ariz. at 105-06, ¶ 17, 41 P.3d at 643-44. "A change of condition may be shown by a change in the claimant's related physical condition or a change in medical procedures necessary to treat a causally related condition." *Id.* A claim shall not be reopened because of "increased subjective pain if the pain is not accompanied by a change in objective physical findings," as A.R.S. § 23-1061(H) provides. *Polanco*, 214 Ariz. at 491, ¶ 6, 154 P.2d at 393.

¶16 Here there was a conflict in medical opinion between Dr. Campbell and Dr. Kelly about whether the change in Young's knee condition constituted a "new, additional or previously undiscovered temporary or permanent condition" that was causally related to the industrial injury. Dr. Campbell testified that the change was a new condition requiring further surgery, while Dr. Kelly testified that the change was the result of an existing degenerative process requiring only supportive care. Although admitting that the ALJ

resolves conflicts in medical evidence, Young contends that because Dr. Kelly did not look at the 2006 and 2008 MRI scans "side-by-side," his opinion was not based on medical fact and did not constitute substantial evidence. We disagree.

¶17 A medical opinion must be based on findings of medical fact in order to support an award. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). These findings come from the claimant's history, medical records, diagnostic tests and examinations. *Id.* However, "medical testimony can be so weakened by proof of an inaccurate factual background that the testimony cannot be said to constitute 'substantial evidence'" to support the award. *Desert Insul., Inc. v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982) (where ALJ made finding of claimant's stationary condition and relied exclusively on one doctor's testimony that was both equivocal and lacked foundation, testimony insufficient to support finding); *Rutledge v. Indus. Comm'n*, 108 Ariz. 61, 65, 492 P.2d 1168, 1172 (1972) (testimony of doctor who did not examine claimant or review medical records but merely reviewed Commission file did not constitute substantial medical evidence to support award); *Pais v. Indus. Comm'n*, 108 Ariz. 68, 70, 492 P.2d 1175, 1177 (1972) (unless physical examination is unnecessary, mere review of Commission file by physician not substantial evidence on which ALJ can resolve conflict in medical testimony).

¶18 Here, Dr. Kelly conducted three physical examinations of Young, one in 2007 and two in 2008. He reviewed all of his prior medical records and diagnostic studies, including the reports of the two MRI scans. He testified that it was not necessary to view the MRI scans together to interpret them as it was reasonable to rely upon the reports of the radiologists who performed the tests. He stated that although there were clearly differences between the 2006 MRI and the 2008 MRI, the differences did not reflect a new or additional condition caused by the industrial injury, but rather reflected differences in the testing procedure itself. Dr. Kelly further testified that his conclusion that Young's condition was stationary and the result of a degenerative process was consistent with his own physical examinations and Dr. Martin's post-operative report, a report that he did not believe Dr. Campbell considered in reaching his opinion. On this point, Dr. Campbell admitted that reading an MRI is a matter of interpretation and that it must be understood in light of all available medical evidence.

¶19 Dr. Kelly's testimony was based upon medical facts and reasoned opinions upon which the ALJ could rely in resolving the conflict in medical testimony between Dr. Campbell and Dr. Kelly. The ALJ's finding that Young failed to sustain his burden of proving he had a new, additional or previously undiscovered condition that was causally related to the industrial injury under A.R.S. § 23-1061(H) was supported by substantial evidence. The

ALJ did not abuse his discretion in denying Young's petition to reopen.

CONCLUSION

¶20 For the foregoing reasons, we affirm the award and the decision upon review affirming the award.

/s/
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
JON W. THOMPSON, Judge