

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED 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: 12/21/2010
RUTH WILLINGHAM,
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ELSEVIER SCIENCE,) No. 1 CA-IC 09-0080
)
Petitioner Employer,) DEPARTMENT A
)
ZURICH AMERICAN INSURANCE c/o) **MEMORANDUM DECISION**
BROADSPIRE SERVICES, INC.,)
) (Not for Publication -
Petitioner Carrier,) Rule 28, Arizona Rules
) of Civil Appellate
v.) Procedure)
)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
BARBARA FALLSTEAD,)
)
Respondent Employee.)
)

Special Action - Industrial Commission

ICA Claim No. 20071-710549

Carrier Claim No. 152-9113-LO

Administrative Law Judge Stephen W. Pogson

AWARD AFFIRMED

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T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review which found the respondent employee (claimant) stationary with an unscheduled permanent impairment. One issue is presented on appeal: whether substantial and competent medical evidence supports the ALJ's conclusion that the claimant sustained an industrially related permanent impairment. Because we find that the medical evidence of record supports the ALJ's award, we affirm.

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 Rules of Procedure for Special Actions 10. 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) (citations omitted). 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) (citation omitted).

FACTUAL AND PROCEDURAL HISTORY

¶3 On May 28, 2007, the claimant was employed as a sales representative by the petitioner employer, Elsevier Science. On that date, she was involved in an industrially related motor vehicle accident. Her vehicle was stopped when it was struck in the rear by a vehicle traveling at thirty-five miles per hour. She filed a workers' compensation claim, which was accepted for benefits. The claimant received conservative medical treatment from a neurologist, physical medicine specialist, and neuropsychologist for neck and back complaints, headaches, and memory and verbal difficulties.

¶4 The petitioner carrier, Zurich American Insurance Company (Zurich), obtained several independent medical examinations including physical medicine, neurology, orthopedics, and neuropsychology. Zurich then closed the claimant's claim with no permanent impairment, and the claimant timely requested a hearing. Hearings were held for testimony from the claimant, her treating neurologist, physical medicine specialist, and neuropsychologist, and independent medical examiners in neuropsychology and neurology. Following the hearings, the ALJ adopted the testimony of the claimant's treating physicians and entered an award finding her stationary with a permanent impairment and a need for supportive care. Zurich timely requested administrative review, and the ALJ summarily affirmed his award. Zurich then brought this appeal.

DISCUSSION

¶5 Zurich first argues that the ALJ's award is internally inconsistent with regard to whether the claimant's medical condition was stationary and had resulted in a permanent impairment. Workers' compensation claims are administered through a progression of separate claims stages. See, e.g., *Hardware Mut. Cas. Co. v. Indus. Comm'n*, 17 Ariz. App. 7, 9, 494 P.2d 1353, 1355 (1972). A claimant becomes stationary when his medical condition is not subject to further improvement, and he is discharged from active medical treatment. See *Janis v. Indus. Comm'n*, 27 Ariz. App. 263, 265, 553 P.2d 1248, 1250 (1976) (citations omitted). When a physician discharges a claimant from active treatment, he is required to determine whether the claimant has sustained any permanent impairment of function resulting from the industrial injury. See Arizona Administrative Code (A.A.C.) R20-5-113(B).

¶6 In this case, the ALJ relied on the testimony of the claimant's three treating physicians, Drs. Flitman, Anghel, and Briggs, to find her stationary with a permanent impairment. See *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968) (it is the ALJ's duty to resolve all conflicts in the evidence and to draw all warranted inferences) (citation omitted).

The ALJ held:

15. I find that applicant's condition was in fact stationary on September 18, 2008 but that she sustained an unscheduled physical and psychological permanent impairment. I further find that she is

entitled to supportive care as recommended by Dr. Anghel, Dr. Flitman and Dr. Briggs.

¶7 Dr. Flitman, a neurologist, testified that by October 24, 2007, he felt the claimant was not likely to improve any further and was medically stationary. He stated that she had a thirty percent permanent impairment based on the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides),

because she had ten percent for mild limitation of her daily functioning, social and interpersonal. Attention, reduced attention focus. That's a concentration problem. That's ten percent. And then five percent each for cervical and lumbar strain.

The doctor testified that at his June 11, 2008 office visit, the claimant seemed to have gotten worse and he was concerned that she might no longer be stationary. But he concluded by stating that he last saw the claimant in August 2008, and his opinion remained unchanged. She was stationary with a permanent impairment and required supportive care.

¶8 Dr. Anghel, a physical medicine and pain specialist, treated the claimant for her neck and low back complaints. He provided facet interarticular steroid injections in both the claimant's cervical and lumbar spine. The doctor stated that the claimant obtained excellent pain relief for several months after each injection. It was his opinion that she could be maintained on supportive care to address her periodic symptom recurrences. Dr.

Anghel recommended twelve physical therapy visits and three to four physician visits per year.

¶9 Dr. Briggs, a neuropsychologist, testified that he had not yet assessed the claimant's stationary status. He stated that her condition had improved during the time that he had treated her, and she might yet improve more. The doctor anticipated evaluating the claimant's stationary status after repeating a battery of neuropsychological tests in September 2009.

¶10 An ALJ is not bound to accept or reject an expert's entire opinion, but instead, is free to combine portions of the expert testimony in a reasonable manner. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 123, 776 P.2d 797, 801 (1989) (citations omitted). In this case, the ALJ relied on portions of the testimony from Drs. Flitman, Anghel, and Briggs to find the claimant stationary with a permanent physical and psychological impairment and a need for supportive care. As a neurologist, Dr. Flitman was qualified to testify as to both the claimant's physical and psychological conditions and he did. It was his opinion that she was stationary, and this opinion was consistent with Dr. Anghel's testimony. We believe that this testimony reasonably supports the ALJ's finding. See *Salt River Project v. Indus. Comm'n*, 128 Ariz. 541, 544-45, 627 P.2d 692, 695-96 (1981) (appellate court will not weigh the evidence but will consider it

in a light most favorable to sustaining the ALJ's finding) (citation omitted).

¶11 Zurich also argues that the testimony adopted in this case is similar to the medical testimony rejected by this court in *Desert Insulations, Inc. v. Industrial Commission*, 134 Ariz. 148, 654 P.2d 296 (App. 1982). We disagree. In *Desert Insulations*, the treating physician himself testified that he had "vacillated" with regard to whether the claimant had sustained a permanent impairment. *Id.* at 150, 654 P.2d at 298. We do not believe that anything in the testimony of Drs. Flitman, Anghel, or Briggs is comparable to this type of vacillation.

¶12 Zurich next argues that Dr. Flitman's opinion is so foundationally deficient that it cannot be used to support an award of permanent impairment. This court has recognized that "medical testimony can be so weakened by proof of an inaccurate factual background that the testimony cannot be said to constitute 'substantial evidence,'" but not every factual inaccuracy will undermine a doctor's opinion and warrant its disregard. See *Desert Insulations, Inc.*, 134 Ariz. at 151, 654 P.2d at 299 (citations omitted); see also *Fry's Food Stores*, 161 Ariz. at 122, 776 P.2d at 800.

¶13 Zurich bases this argument on Dr. Flitman's failure to have considered several "critical" pieces of evidence. This includes the date-of-injury emergency room records and the

claimant's initial follow-up examination records from her primary care physician, neither of which mention head trauma or a loss of consciousness. Dr. Flitman was asked about both of these, and he indicated that neither would affect his opinion:

You know, it's a very common thing with loss of consciousness is that people are [amnesic] for a period, they don't remember some things, and they may appear conscious during that time but, you know, they still suffered a concussion because the very fact that they are [amnesic] means they've had a concussion.¹

¶14 Zurich also argues that Dr. Flitman's failure to know that the claimant drove herself home from the scene of the accident is detrimental to his opinion. This issue was addressed by Dr. Briggs, and he stated that it did not affect his head trauma diagnosis because "people do [drive] all the time with concussions."

¶15 Zurich then argued that Dr. Flitman's opinion is foundationally inadequate because he was unaware of Dr. Blackwood's neuropsychological opinion. Dr. Flitman testified that he had seen "additional evaluations by neuropsychologists." He did not specifically name Dr. Blackwood nor was he specifically asked about Dr. Blackwood's opinion during his testimony. We note that Zurich

¹ In resolving medical conflicts, the ALJ may consider the qualifications and backgrounds of the expert witnesses and their experience in diagnosing the type of injury incurred, as well as considering the diagnostic methods used. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988) (citations omitted). But this court has declined to dictate what diagnostic tools a physician must use in reaching his opinion. See

did not call Dr. Blackwood to testify at the hearings. Instead, it presented testimony from neuropsychologist, Dr. Klonoff, and her testimony was rejected by the ALJ in favor of Dr. Briggs. For all of these reasons, we find that Dr. Flitman had a legally sufficient foundation for his medical opinion.

¶16 Zurich last argues that Dr. Flitman's opinion is legally insufficient to support the award because his impairment rating was violative of Arizona case law and the ICA rules.² The ICA is authorized to adopt rules for rating permanent impairment. See A.R.S. § 23-1044(G). The applicable rule states that, "the physician *should* rate the percentage of impairment using the standards for the evaluation of permanent impairment as published by the most recent edition of the American Medical Association in *Guides to the Evaluation of Permanent Impairment, if applicable*" See A.A.C. R20-5-113(B) (Rule 113(B)) (emphasis added).

¶17 Rule 113(B) has been interpreted in a series of supreme court cases. The court has held that the rule applies only if an impairment *can* be rated under the AMA Guides. See *Smith v. Indus. Comm'n*, 113 Ariz. 304, 307, 552 P.2d 1198, 1201 (1976) (pain not ratable under AMA Guides, so it may be rated by other criteria). The court also recognized that the AMA Guides are not to be blindly

Castillo v. Indus. Comm'n, 24 Ariz. App. 315, 316, 538 P.2d 402, 403 (1975).

² In its reply brief, Zurich argues that the claimant failed to respond to this argument, which constitutes a confession of error and necessitates reversal. We disagree. We believe that this argument was addressed in the Answering Brief at pages 12-14.

applied regardless of a claimant's actual condition but are guidelines to rate impairment only if the rating truly reflects the actual impairment. *W.A. Krueger Co. v. Indus. Comm'n*, 150 Ariz. 66, 68, 722 P.2d 234, 236 (1986) (citations omitted). Finally, in determining whether or not the rating under the AMA Guides truly reflects a claimant's impairment, the physician need not use an alternative objective standard, but instead may rely upon his clinical experience and professional judgment. *Cavco Indus. v. Indus. Comm'n*, 129 Ariz. 429, 434, 631 P.2d 1087, 1092 (1981).

¶18 Thus under Arizona law, a physician can rate a claimant's permanent impairment without using the AMA Guides at all, based solely on his own clinical experience and professional judgment. In this case, Dr. Flitman did use the AMA Guides to rate the claimant's permanent impairment and we find his testimony to be sufficient to support the ALJ's award.³ In reaching this conclusion, we also are cognizant that the ALJ did not award the claimant a specific percentage of permanent impairment. This is in accord with the Arizona Supreme Court's opinion that the percentage of impairment is relatively unimportant for unscheduled injuries since unlike scheduled injuries, the claimant's compensation is determined through proof of a reduction in earning capacity at a

³ The ICA will not substitute its judgment on matters exclusively within the knowledge of medical experts. *Garcia v. Indus. Comm'n*, 20 Ariz. App. 243, 246-47, 511 P.2d 687, 690-91 (1973).

separate proceeding. *Carousel Snack Bar*, 156 Ariz. at 45-46, 749 P.2d at 1366-67 (“In establishing an unscheduled residual impairment, it is not required that a magic percentage figure be set forth.”).⁴

¶19 For all of the foregoing reasons, we affirm the ALJ’s award.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

DANIEL A. BARKER, Judge

⁴ We recognize that Dr. Flitman used the 4th edition of the AMA Guides to rate the claimant’s impairment and acknowledge Rule 113(B)’s preference for the most recent edition of the Guides. At the time the doctor rated the claimant, the 5th edition, published in 2001, was the most recent edition.