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

AMERICAN INTERNATIONAL GROUP**, Petitioner Employer, AMERICAN HOME ASSURANCE**, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, USAA*, Respondent Employer, LIVERTY MUTUAL INSURANCE*, Respondent Carrier, SCOTT I. MCPHEARSON, Respondent Employee.	1 CA-IC 09-0082 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action--Industrial Commission

ICA CLAIM NOS. 20053-390091* and 20082-130422**

CARRIER CLAIM NOS. WC608-390091* and 162-004236**

Administrative Law Judge Joseph L. Moore

AWARD AFFIRMED

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I R V I N E, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") consolidated award and decision upon review for continuing benefits in the respondent employee's ("claimant's") October 27, 2005 industrial injury claim ("2005 claim") and for a compensable new gradual injury in his September 1, 2008 industrial injury claim ("2008 claim"). One issue is presented on appeal: whether the administrative law judge ("ALJ") committed reversible error by applying the successive injury doctrine to award the claimant benefits under his 2008 claim. Because the medical evidence of record supports the ALJ's award, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On October 27, 2005, the claimant was working in insurance sales for the respondent employer, USAA, when he developed pain and pressure in his forearms. He filed a workers' compensation claim, which was accepted for benefits by the respondent carrier, Liberty Mutual Insurance ("Liberty Mutual"). The claimant received in-house conservative treatment at USAA from Dr. Vasquez. Despite ongoing conservative treatment, the claimant

testified that he has continued to experience the same symptoms, and they have gradually worsened over time. These symptoms include forearm pain, a popping sensation when he grasps with his hands, and shooting pain when he rotates his hand.

¶3 In August 2007, the claimant was referred to Mitchell Lipton, M.D., who provided additional conservative treatment. When it failed to improve the claimant's symptoms, Dr. Lipton recommended surgery. Liberty Mutual refused to authorize surgery, and the claimant filed an Arizona Revised Statutes ("A.R.S.") § 23-1061(J) (Supp. 2009) Request for Hearing.[1] Liberty Mutual then closed the claimant's 2005 claim with no permanent impairment, and the claimant timely requested a hearing.

¶4 The claimant also filed a new gradual injury claim against the petitioner employer, American International Group ("AIG"). The parties stipulated that the date for the new gradual injury would be September 1, 2008. The petitioner carrier, American Home Assurance ("American Home"), denied the new injury claim for benefits, and the claimant timely requested a hearing.

¶5 The 2005 claim and the 2008 claim were consolidated for hearing. Four consolidated hearings were held for testimony from the claimant, his AIG supervisor, his treating physician, and two independent medical examiners. Following the hearings, the ALJ

[1] We cite to the current version of statutes when no changes material to this revision have occurred. Under A.R.S. § 23-1061(J), a claimant may request an investigation by the ICA into the payment of benefits, which the claimant believes that he is owed but has not been paid.

entered an award granting continuing benefits in the 2005 claim, finding the 2008 claim compensable, and applying the successive injury doctrine. The petitioners AIG and American Home and the claimant timely requested administrative review. The ALJ summarily affirmed the award, and AIG and American Home brought this appeal.

DISCUSSION

¶6 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 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).

¶7 American Home argues that the ALJ committed reversible error when he applied the successive injury doctrine because the claimant's 2008 claim did not constitute a new compensable gradual injury, but instead, was merely a manifestation of symptoms of the 2005 claim. The successive injury doctrine is a "rule of liability preference: as between two or more potentially liable parties, the last in the chain is liable for the whole injury." *Pearce Dev. v. Indus. Comm'n*, 147 Ariz. 598, 602, 721 P.2d 449, 453 (App. 1985), *approved in part*, 147 Ariz. 582, 712 P.2d 429 (1985). Under the successive injury doctrine, if a claimant elects to file multiple claims, litigates them, and satisfies the burden of proof as to more than one claim, then the claim that is last in time is wholly responsible for continuing workers' compensation benefits.

Vishinskas v. Indus. Comm'n, 147 Ariz. 574, 577-78, 711 P.2d 1247, 1250-51 (App. 1985). In this way,

> an employee's underlying condition may become the responsibility of [a new] employer if the new work activity causes organic change in the underlying condition. A new employer also may be responsible for symptomatic aggravation but only if it amounts to an additional disability. Therefore, when the aggravation is caused by circumstances that would constitute a new injury, the [new] employer is liable for all disabilities flowing from that aggravation.

Kaibab v. Indus. Comm'n, 196 Ariz. 601, 606, ¶ 12, 2 P.3d 691, 696 (App. 2000) (internal citations omitted).

¶8 American Home argues that the ALJ erred by applying the successive injury doctrine in this case, because the medical evidence was insufficient to establish that the 2008 claim was a new gradual injury. The ALJ heard medical testimony from three physicians specializing in hand surgery and the upper extremities.

¶9 Dr. Lipton, the claimant's treating physician, first saw the claimant on August 13, 2007. The doctor diagnosed: (1) bilateral tendonitis at the crossover point, i.e., "a place in the forearm over the dorsum . . . on the radial side . . . that's proximal to the wrist by approximately three inches . . . where several tendons cross-over" and (2) right deQuervain's tenosynovitis, an inflammation of the tendons in the first dorsal extensor compartment. He related these diagnoses to the claimant's keyboarding activities.

¶10 Dr. Lipton initially treated the claimant with therapy, splinting and a steroid injection. After initial improvement, the

claimant's condition deteriorated and the doctor recommended surgical release of the tendons at the crossover point. When Dr. Lipton saw the claimant on November 14, 2007, the claimant was in training for a new position at AIG, which involved keyboarding activities similar to those he had performed at USAA. When the doctor next saw the claimant on January 14, 2008, he made new findings on examination:

> [DR. LIPTON:] Okay. On November 14th I said there's no swelling at the crossover point on the right, while there is on the left, and there was some pain on the left. While 1-14 there was swelling and crepitus at the crossover point on the right.
>
> [MS. LAMONT:] Given that he'd, at that point, been working for a few months at his position at AIG, would you attribute those changes between the visits to his work activities at AIG?
>
> MR. BAKER: Objection. Foundation
>
> JUDGE MOORE: Overruled.
>
> [DR. LIPTON:] Well *I think everything he was doing at that time was contributing to it*, certainly. Obviously he didn't start with a full deck if you would, with his hands. There had been some ongoing problems.

(Emphasis added.)

¶11 William Lovett, M.D., performed an independent medical examination ("IME") of the claimant on June 25, 2007. Following his examination, he diagnosed bilateral deQuervain's tenosynovitis. He initially opined that the claimant's condition was related to his 2005 claim and required additional treatment. The doctor then was asked to compare the claimant's condition as reflected in Dr.

Lipton's office notes on November 14, 2007, and January 14, 2008.

> [MS. LAMONT:] Dr. Lovett, if you assume that Mr. McPherson started a new position with AIG in November of 2007, which Mr. McPherson indicated involved heavy keyboarding comparable to the 2005 position he had at USAA, do you have an opinion to a reasonable degree of medical probability as to whether his work at AIG from November 2007 forward and taking into account the findings in Dr. Lipton's records either contributed to and/or aggravated his pre-existing condition, DeQuervain's or tendinitis at the crossover point?
>
> . . . .
>
> [DR. LOVETT:] It appears from the previous visit of 11/14/07 to 1/14/08 he was improved and now in '08 he is worse in that he has both forearms involved and much worse. So to me whatever -- and I was unaware of his switching jobs. *So this is an exacerbation of some of his previous problem* [sic].
>
> . . . .
>
> JUDGE MOORE: . . . [B]ut when you say this is an exacerbation of a previous problem, would I properly infer from that *you mean this work activity from the new employer [AIG]*?
>
> [DR. LOVETT:] *I assume so*, sir. I don't know when he started at USAA [sic], but it almost appeared that in the November note that Dr. Lipton was almost to the point of discharging him after the January visit and *he shows up in the January visit with significant worsening of his wrist problems*, whether they be DeQuervain's or the crossover tendinitis that Dr. Lipton maintains.

(Emphasis added.) Dr. Lovett testified that after the claimant failed to receive any relief from Dr. Lipton's steroid injection into the first dorsal extensor compartment, the next logical step was surgery, which was at least in part related to the 2005 claim.

¶12 Paul Michael Guidera, M.D. testified regarding the IME he performed on the claimant on January 5, 2009. He received a history of the claimant's work and symptomotology and reviewed his medical records. Dr. Guidera diagnosed deQuervain's tenosynovitis and possible intersection syndrome. He testified that even before the claimant began work at AIG, he was going to require surgery because conservative treatment had failed. The doctor stated that the claimant's history and symptoms demonstrate the natural progression of deQuervain's tenosynovitis.

¶13 Dr. Guidera explained that deQuervain's tenosynovitis is an inflammatory condition, which thickens the walls of the first dorsal extensor compartment with fibrosis and scarring during the first six weeks. After that, the size of the compartment is permanently affected, the condition is established, and it will not change without surgery, leaving patients intermittently symptomatic. Dr. Guidera opined that when he saw the claimant in January 2009, the claimant remained symptomatic and needed surgery, which was not related to his work at AIG.

¶14 It is the ALJ's duty to resolve all conflicts in the medical evidence and to draw warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). In that regard, the ALJ found:

> [T]he aggregate of the medical evidence supports a finding that both applicant's October 27, 2005 injury and his September 1, 2008 injury contributed to his need for continuing care, a need that, on this record, was medically uncontroverted. Furthermore, to

> the extent that there exists a conflict among the opinions of Drs. Lipton, Lovett and Guidera as to the extent of the change in applicant's clinical picture after applicant commenced his employment with AIG, I resolve such conflict in favor of Dr. Lipton's opinion.

¶15 The ALJ concluded that the medical evidence in this case was sufficient to establish that an "organic change" had occurred in the claimant's underlying condition from his 2005 claim, and that the 2008 claim constituted a new gradual injury. He identified the organic change as the "increased swelling and crepitus" at the crossover point on the right identified by Dr. Lipton at his January 14, 2008 examination.

¶16 AIG argues: (1) Dr. Lipton's findings do not constitute an organic change; (2) Dr. Lipton did not use the words "organic change"; and (3) Dr. Lipton's opinion was equivocal. AIG correctly recognizes that an "organic change," as discussed in *Kaibab*, 196 Ariz. at 606, ¶ 12, 2 P.3d at 696, will establish a new injury. The Arizona Supreme Court adopted this language from early English cases to define "an injury by accident" as: "usual exertion lead[ing] to something actually breaking or letting go with an obvious sudden organic or structural change in the body." *Phelps Dodge Corp. v. Cabarga*, 79 Ariz. 148, 153, 285 P.2d 605, 608 (1955).

¶17 In *Industrial Indemnity v. Industrial Commission*, 152 Ariz. 195, 199, 731 P.2d 90, 94 (App. 1986), however, this court recognized that although "a specific precipitant or an organic

change" are certainly sufficient for a new injury, a gradual injury is independently compensable. We held that the exacerbation of the claimant's underlying back symptoms following his performance of new work activities, which caused a need for additional treatment, constituted a new gradual injury for purposes of applying the successive injury doctrine. *Id*. at 198-99, 731 P.2d at 93-94.

¶18 In this case, both Dr. Lipton and Dr. Lovett testified that following the claimant's new job activities at AIG, he experienced a significant worsening or exacerbation of his forearm/wrist symptoms which required surgical treatment. We find this evidence sufficient to support a new gradual injury and the application of the successive injury doctrine.

¶19 Based on this court's holding in *Industrial Indemnity*, an "organic change" is not necessary for a new gradual injury. *Id*. at 199, 731 P.2d at 94. Further, an ALJ may draw reasonable inferences from the medical evidence and medical opinions need not be expressed with "magic words" to be legally sufficient. *Skyview Cooling Co. v. Indus. Comm'n*, 142 Ariz. 554, 559, 691 P.2d 320, 325 (App. 1984). Nor was Dr. Lipton's testimony equivocal. *See, e.g., State Comp. Fund v. Indus. Comm'n*, 24 Ariz. App. 31, 36, 535 P.2d 623, 628 (1975) (doctor keeps changing his mind and will not commit to an opinion). Initially, when asked if he had formed an opinion as to whether claimant's work at USAA or AIG bore a causal relationship to his current condition, the doctor replied that he had not. He went on, however, to state that he could do so, and

later opined that "everything he was doing [between the November 2007 and January 2008 visits] was contributing." For all of these reasons, we find Dr. Lipton's testimony legally sufficient to support the award.[2]

¶20 American Home last argues that the ALJ committed reversible error by closing the 2005 claim. Prior to these hearings, American Home had closed the claimant's 2005 claim with no permanent impairment based on Dr. Lovett's opinion. After the hearings, the ALJ found that the medical testimony supported a finding that both the 2005 claim and the 2008 claim contributed to the claimant's need for surgery. On that basis, he concluded that the claimant would have been entitled to continuing benefits under the 2005 claim. It was that finding that allowed the application of the successive injury doctrine. *See Frito Lay v. Indus. Comm'n*, 196 Ariz. 134, 136, ¶ 11, 993 P.2d 1098, 1100 (successive injury doctrine applies only if claimant satisfies burden as to more than one claim in multiple claims suit). As argued by Liberty Mutual, that is in effect the purpose of applying the successive injury doctrine.

[2] We also recognize that this court will affirm an ALJ's award if it reaches the right result, although for the wrong reason. *ITT Courier v. Indus. Comm'n*, 141 Ariz. 357, 360, 687 P.2d 365, 368 (App. 1984).

CONCLUSION

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

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge