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

RONNIE TERRELL, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, C & S SWEEPING, INC., Respondent Employer, SCF ARIZONA, Respondent Carrier.	)	1 CA-IC 10-0019 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20072-080595

Carrier Claim No. 07-25280

Administrative Law Judge Joseph L. Moore

AWARD AFFIRMED

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N O R R I S, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for temporary disability benefits. Petitioner employee ("Claimant") argues the administrative law judge ("ALJ") should have found his permanent impairment resulting from cervical disc surgery was an "industrial responsibility." We disagree; the record contains reasonable evidence to support the ALJ's finding the industrial injury was not the legal cause of the Claimant's surgery and, thus, the impairment was not an "industrial responsibility." Therefore, we affirm the award.

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 Rule of Procedure for Special Actions 10. In reviewing ICA findings and awards, 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).

FACTS AND PROCEDURAL HISTORY

¶3 Claimant worked for a street sweeping service, the respondent employer, C & S Sweeping, Inc. On July 18, 2007, he was driving a block truck and working in tandem with another driver operating a sweeper truck. The sweeper truck stopped and Claimant ran into the back of it with the block truck. Following the accident, Claimant developed neck and lower back pain. He filed a workers' compensation claim, which respondent carrier, SCF Arizona ("SCF"), accepted for benefits.

¶4 Claimant came under the care of Nicholas Theodore, M.D., a neurosurgeon at Barrow Neurosurgical Associates. When he saw Dr. Theodore, Claimant was experiencing dizziness, headaches, and blackouts. At an ICA hearing, Claimant testified that before the accident he had not experienced these problems. On October 10, 2007, Dr. Theodore operated to fuse Claimant's C1 and C2 cervical discs.

¶5 Claimant also testified he had a congenital defect in his neck, which his chiropractor discovered in 2002 following an automobile accident. After that accident, the chiropractor x-rayed his spine and told Claimant he was missing a bone in his

neck. Claimant testified he understood Dr. Theodore's surgery was intended to fix this congenital defect.

¶6 After Dr. Theodore released Claimant to light-duty work in January 2008, the case manager transferred his care to Atul Patel, M.D., a board-certified physical medicine and rehabilitation specialist. Dr. Patel released Claimant for regular work in March 2008. At SCF's request, Edward Dohring, M.D., a board-certified orthopedic surgeon, fellowship-trained in surgical and non-surgical treatment of spinal disorders, conducted an independent medical examination ("IME") of Claimant on June 12, 2008. Based on Dr. Dohring's IME report, SCF closed Claimant's claim with an unscheduled permanent partial impairment. Claimant timely requested a hearing.[1]

¶7 The ALJ held four ICA hearings. Leo Kahn, M.D., a board-certified neurologist who examined Claimant at SCF's request, testified along with Claimant, Dr. Dohring, and Dr. Patel. Dr. Theodore did not testify.

¶8 Dr. Patel testified he first saw the postoperative Claimant six months after his industrial injury, at which time Claimant reported headaches and intermittent blurry vision. Dr.

[1]A claimant "may void the binding effect" of a notice of claim status by filing a request for hearing. *Church of Jesus Christ of Latter Day Saints v. Indus. Comm'n*, 150 Ariz. 495, 498, 724 P.2d 581, 584 (App. 1986). *See generally Asarco Inc. v. Indus. Comm'n*, 204 Ariz. 118, 120, ¶ 8, 60 P.3d 258, 260 (App. 2003).

Patel reviewed Claimant's medical records including those from the October 2007 surgery, and found Claimant was doing well neurologically, only needing supportive-type care in the form of anti-inflammatory medication, headache medication, and muscle relaxers. He further testified Claimant sustained no permanent impairment from the industrial injury. Dr. Patel expressed no causation opinion with regard to Dr. Theodore's surgery.

¶9 Dr. Kahn examined Claimant on February 27, 2009. He testified, in his opinion, Claimant had not sustained a neurological injury in the July 2007 industrial injury, and no relationship existed between Claimant's symptoms and the industrial injury. Dr. Kahn further testified Claimant had no permanent impairment causally related to the industrial injury and required no supportive care.

¶10 Dr. Dohring testified Claimant had sustained an industrially-related cervical musculoligamentous strain in the accident, which would have resolved without surgery and with minimal residual symptoms in six to nine months if it was left alone. Dr. Dohring explained Dr. Theodore's surgery treated a preexisting congenital condition unrelated to the industrial accident, and any continuing symptoms were postoperative and unrelated to the industrial injury. He testified Claimant was stationary with a five percent permanent impairment from the C1-

C2 fusion and required supportive care related to the surgery.

¶11 In his award, the ALJ expressly found Claimant credible, but correctly noted that "resolution of the issues" required "assessment of the medical evidence." The ALJ then relied on the testimony of Drs. Kahn and Dohring as follows:

> Dr. Kahn and Dr. Dohring . . . unequivocally opined that [Claimant's] condition was medically stationary as of the date of their respective IMEs. They testified, too, that [Claimant's] condition causally related to the injury would not result in permanent medical impairment. Dr. Dohring noted that, while the October 2007 surgery carried out by Dr. Theodore resulted in [Claimant's] having permanent residuals, that surgery addressed a congenital condition that was neither caused nor aggravated by the industrial injury.

Based on this testimony, the ALJ concluded Claimant's cervical surgery treated a preexisting, nonindustrial condition; "the work injury did not result in permanent medical impairment"; and Claimant had failed to meet his burden of proving he was entitled to continuing benefits for his July 18, 2007 industrial injury. Accordingly, the ALJ entered an award for temporary disability benefits from the date of the accident through February 27, 2009. Claimant timely requested administrative review, and the ALJ supplemented and affirmed his award.

DISCUSSION

¶12 Claimant first argues his permanent impairment, which

he asserts was caused by Dr. Theodore's surgery, is an "industrial responsibility" because Dr. Theodore operated on him to treat his industrial injury. Alternatively, or perhaps additionally, he further argues he is entitled to benefits for a permanent impairment because the surgery either aggravated his industrial injury or caused a new and separate injury. In making these arguments, he cites numerous Arizona cases that recognize "an injury is compensable when it is caused by the negligent treatment of a compensable primary injury whether the negligence aggravated the primary injury . . . or caused a new and separate injury . . . ." *Moretto v. Samaritan Health Sys.*, 198 Ariz. 192, 195-96, ¶ 18, 8 P.3d 380, 383-84 (App. 2000).

¶13 Fundamental to this case law is an essential requirement: To be compensable, the medical care must be causally related to the treatment of the underlying industrial injury or a condition causally related to that injury. In addition to *Moretto*, see also *Greer v. Travelers Property Casualty Co*., 203 Ariz. 478, 481, ¶¶ 18-20, 56 P.3d 52, 55 (App. 2002) (unsuccessful surgery intended to alleviate claimant's pain is a "compensable consequence of the industrial injury, regardless whether it is labeled as new or aggravated"); *Pacific Employers Insurance Co. v. Industrial Commission*, 133 Ariz. 408, 412, 652 P.2d 147, 151 (App. 1982) (surgery causally related

when "undertaken only because of, and with the intent to improve, the condition resulting from the industrial injury"); *Allstate Insurance Co. v. Industrial Commission*, 126 Ariz. 425, 427, 616 P.2d 100, 102 (App. 1980) (complications from pre-surgery treatments deemed an industrial responsibility when necessary to place claimant in proper condition to undergo surgery to treat the industrial injury).

¶14 In this case, conversely, Claimant presented no evidence at the ICA hearings that Dr. Theodore's surgery was to treat his industrial injury or a condition causally related to that injury. Instead, as Dr. Dohring testified, Dr. Theodore's surgery was to treat Claimant's congenital defect, and not the industrial injury, and it was that surgery that caused Claimant's permanent impairment. Claimant presented no evidence to the contrary although it was his burden to prove he had sustained a permanent medical impairment causally related to the industrial injury. *Timmons v. Indus. Comm'n*, 83 Ariz. 74, 79, 316 P.2d 935, 938 (1957); *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977).[2] Thus, the ALJ reasonably relied on Dr. Dohring's testimony in concluding Claimant's

[2]Typically, back and spine injuries require expert medical testimony to demonstrate the causal connection between the medical condition and the industrial injury. *W. Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 527-28, 647 P.2d 657, 658-59 (App. 1982).

impairment did not stem from treatment for a condition relating to an industrial injury.[3]

¶15 Claimant also argues SCF's failure to obtain an IME before it authorized Dr. Theodore's surgery -- despite knowing before the surgery the respondent employer believed Claimant's neck condition was a preexisting condition[4] -- should preclude it from now disputing causation.[5] We disagree. First, although A.R.S. § 23-1026(A) (1995) authorizes a carrier to schedule an IME, a carrier is not statutorily required to do so. Second, although we agree that under the statutory compensation scheme, "a degree of expertise on the part of the carrier is implied," *Church of Jesus Christ of Latter Day Saints v. Indus. Comm'n*, 150 Ariz. 495, 498, 724 P.2d 581, 584 (App. 1986), that degree of expertise does not obligate a carrier to order an IME before it authorizes a claimant's medical treatment. Further, our discussion in *Church of Jesus Christ* regarding a carrier's expertise was in the context of whether a carrier could

[3]The record does not reflect Claimant, through counsel, requested the opportunity to call Dr. Theodore (or any other medical expert) as a witness after Dr. Dohring testified.

[4]On ICA Form 101, the Employer's Report of Injury, the respondent employer stated "neck discomfort due to a pre-existing condition; a bone missing from his neck" and "[h]is neck is a pre-existing condition. More research is required."

[5]At oral argument on this case, SCF conceded it authorized Claimant's surgery.

reasonably rely on information from an Industrial Commission employee concerning the finality of a notice of claim when, as we noted, a carrier is charged "under the law with the duty and privilege of making initial ex parte decisions related to the processing of claims and payments of benefits under the Workers' Compensation Act." *Id*. at 498, 724 P.2d at 584. Nothing in our opinion in that case suggests a carrier is under a duty to order an IME before authorizing medical treatment.

¶16 We also disagree with Claimant's argument SCF's payment for Dr. Theodore's surgery and Claimant's post-surgical care estopped it from contending Claimant had not sustained a permanent impairment. This court has consistently rejected the argument that payment of benefits alone establishes liability for a condition. *Kollasch v. Indus. Comm'n*, 162 Ariz. 424, 427 n.1, 783 P.2d 1216, 1219 n.1 (App. 1989); *Noble v. Indus. Comm'n*, 140 Ariz. 571, 573, 683 P.2d 1173, 1175 (App. 1984); *Whitley v. Indus. Comm'n*, 15 Ariz. App. 476, 478, 489 P.2d 734, 736 (1971). Further, we have also recognized if compensability is accepted for one condition and then treatment is provided for another allegedly related condition, the employer and carrier are not precluded from subsequently denying liability for the

latter condition.[6] Thus, we reject Claimant's estoppel argument.

CONCLUSION

¶17 Although we are sympathetic to Claimant's predicament, because reasonable evidence supports the ALJ's finding the permanent impairment from the surgery was not an "industrial responsibility," and the carrier was not precluded, under the facts of this case, from disputing causation, we affirm the award.[7]

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge

[6]*See, e.g., Ky. Fried Chicken v. Indus. Comm'n*, 141 Ariz. 561, 564-65, 688 P.2d 187, 190-91 (App. 1984) (acceptance of leg injury claim does not preclude denial of liability for aggravation of preexisting hip condition); *Noble v. Indus. Comm'n*, 140 Ariz. 571, 574, 683 P.2d 1173, 1176 (App. 1984) (acceptance of claim for fractured vertebra does not preclude denial of coverage for cerebral hemorrhage).

[7]Following the briefing in this case, SCF filed a motion to strike Claimant's reply brief because Claimant asserted therein that SCF "directed" him to undergo Dr. Theodore's surgery. We agree the record does not support this assertion. Thus, we grant the motion in part and have disregarded all such references.