DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BANNER HEALTH, Petitioner Employer, BANNER HEALTH SYSTEM, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, PHILLIP MATTHEWS, Respondent Employee.	)	1 CA-IC 11-0023 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20082-530425

Carrier Claim No. 152416

Administrative Law Judge Harriet L. Turney

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 for continuing benefits. Three issues are presented on appeal:

(1) is an administrative law judge (ALJ) required to show bias or prejudice before recusing himself;

(2) absent such a showing, do hearings de novo before a substituted ALJ result in an arbitrary and capricious award; and

(3) in this case, is the substituted ALJ's award reasonably supported by the evidence.

We hold that an ALJ is not required to show bias or prejudice before he can recuse himself. Further, the substituted ALJ's award is not arbitrary or capricious and is reasonably supported by the evidence of record. For these reasons, we affirm.

I. 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) (2012), and Arizona Rule 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). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'm*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

II. PROCEDURAL AND FACTUAL HISTORY

¶3 The respondent employee (claimant) was employed by the self insured petitioner employer, Banner Health (Banner), as a physician's assistant. As the claimant left work on August 12, 2008, he slipped on water in a stairwell and fell down a flight of steps injuring his head, neck, upper back, right foot, and right ankle. He was unconscious for over ten minutes before being found by a coemployee. He filed a workers' compensation claim, which was accepted for benefits.

¶4 Shortly after the industrial injury, the claimant began to experience dizziness and confusion. In October 2008, he began having periodic blackouts. The claimant underwent diagnostic testing and treatment by a number of specialists to determine the cause of his blackouts. He received a pacemaker and was treated with blood pressure medications and compression hose. His claim eventually was closed with no permanent impairment, and the claimant timely requested a hearing. The ICA held three hearings and received testimony from the claimant

and three physicians specializing in cardiovascular medicine, cardiology, and neurology.

¶5 Following the hearings, the ALJ resolved the medical conflicts in favor of John Michael Powers, M.D., a neurologist, who opined that there was no causal relationship between the claimant's industrial injury and his development of orthostatic hypotension. The claimant timely requested administrative review. ALJ Stoffa then wrote to the parties and recused himself from any further consideration of the case. He stated:

> Due to information I inadvertently acquired after issuance of the decision upon hearing which could give my further involvement in this case the appearance of a conflict of interest, I am recusing myself from any further consideration of this claim and the pending request for review. The matter will be reassigned to another administrative law judge. I anticipate no further action will be taken until counsel have had an opportunity to learn and, if felt necessary, to react to that reassignment. Counsel and their offices were not involved in the circumstances giving rise to this recusal.

¶6 The case was then transferred to Chief ALJ Turney,[1] and she held a telephonic conference with the attorneys to discuss how to proceed. In response to the options presented at

[1] "In the event of the demise, a resignation, retirement, termination of employment, or other incapacitation of the presiding administrative law judge, the award shall be determined by the chief administrative law judge or his appointee." A.R.S. § 23-942(B) (2012).

the telephonic conference, the claimant requested that ALJ Turney hold hearings de novo and issue a new decision. In accordance with the claimant's request, ALJ Turney issued an order vacating ALJ Stoffa's award and set the case for new hearings. The parties subsequently agreed not to recall Ira Erhlich, M.D., and requested that the ALJ rely on the doctor's original January 28, 2010 hearing testimony.[2]

¶7 ALJ Turney heard testimony from the claimant, Mark David Thames, M.D., a cardiovascular physician, and Dr. Powers, a neurologist. Following the hearings, ALJ Turney issued an award adopting Dr. Thames testimony and awarding the claimant continuing medical benefits until his condition became medically stationary. Banner timely requested administrative review, and the ALJ supplemented and affirmed her award. Banner next brought this appeal.

III. DISCUSSION

¶8 Banner first argues that the ALJ had to establish bias or prejudice before he could recuse himself. In support of that argument, it cites *Jenners v. Industrial Commission*, 16 Ariz. App. 81, 491 P.2d 31 (1971), and *Larson v. Industrial*

[2] Absent a stipulation by the parties that the ALJ can rely on prior transcripts, the fact finder must hear and evaluate live testimony. *Ohlmaier v. Indus. Comm'n*, 161 Ariz. 113, 119, 776 P.2d 791, 797 (1989).

Commission, 114 Ariz. 155, 559 P.2d 1070 (App. 1976).[3] We believe that both of these cases are factually distinguishable. Initially, we note that in this case, it is not an interested party seeking a change of ALJ, but instead, the ALJ recusing himself.

¶9 The *Jenners* case predated the applicability of A.R.S. § 23-941(I). For that reason, this court held that a party to an ICA hearing could only disqualify an ALJ upon "a showing of actual bias." 16 Ariz. App. at 83, 491 P.2d at 33. Further, we refused to apply A.R.S. § 12-409, which addressed changing a judge in the superior court, to an ICA proceeding. *Id*. at 82-83, 491 P.2d at 32-33.

¶10 In *Larson*, after the ICA hearings were held, the ALJ retired and the case was assigned to a new ALJ for decision. 114 Ariz. at 157, 559 P.2d at 1072. The claimant first became aware that there was a new judge when she received the decision, and she filed an A.R.S. § 23-941(I) affidavit for change of judge. This court refused to apply A.R.S. § 23-941 holding that it only applied to affidavits for change of judge filed "[w]ithin thirty days after the date of notice of hearing." *Id.* Citing *Jenner*, we noted that an ALJ is subject to disqualification at any time "by a showing of actual bias and

[3] A.R.S. § 23-941(I)-(J) (2012) discuss the timing and grounds for filing an affidavit of change of judge.

prejudice." *Id.* But because the claimant failed to raise that issue on administrative review before the ALJ, she failed to preserve it for this court's review. 114 Ariz. at 158, 559 P.2d at 1073.

¶11 Banner also argues that it never had an opportunity to challenge ALJ Stoffa's recusal before it was a fait accompli. While it is true that ALJ Stoffa did not approach the parties prior to recusal, Banner had several opportunities to object prior to its January 14, 2011 request for review. The recusal occurred on June 1, 2010. ALJ Turney held a telephonic conference on June 4, 2010, to discuss various options for dealing with the recusal, and she issued an order summarizing the results of the telephonic conference on June 24, 2010. At no time during this process or during the subsequent evidentiary hearings did Banner object to the recusal or the manner in which ALJ Turney was proceeding. We previously have recognized that parties need to raise issues as early as possible in the hearing process to allow for thorough consideration and a complete record. *E.g., Priedigkeit v. Indus. Comm'n*, 20 Ariz. App. 594, 598, 514 P.2d 1045, 1049 (1973). Because Banner did not raise this issue until after ALJ Turney had held new hearings and entered an award, we hold that it was waived.

¶12 Banner next argues that ALJ Turney's December 17, 2010 Award is arbitrary and capricious, because she heard "essentially the identical testimony" but came to a "diametrically opposed conclusion[]." We disagree and find guidance in A.R.S. § 23-943(F) which governs administrative review of awards. On administrative review, an ALJ has very broad discretion to revise the award, and he "may affirm, reverse, rescind, modify or supplement the award and make such disposition of the case as is determined to be appropriate." A.R.S. § 23-943(F). In the absence of a clear abuse of discretion, this court will not set aside an award by reason of the ALJ's decision in a request for review. *Howard P. Foley Co. v. Indus. Comm'n*, 120 Ariz. 325, 327, 585 P.2d 1237, 1239 (App. 1978).

¶13 If ALJ Stoffa had performed administrative review of his April 26, 2010 Award, it would have been within his discretion to reverse that award based on the same record he initially reviewed. In this case, with the apparent agreement of the parties, ALJ Turney held hearings de novo, and entered a new decision. We believe it was within her discretion to reach a different conclusion than her predecessor.

¶14 Banner last argues that ALJ Turney erred by resolving the medical conflict in favor of Dr. Thames legally insufficient

opinion. 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.*; *see also Spector v. Spector,* 17 Ariz. App. 221, 226, 496 P.2d 864, 869 (1972) (a physician may base his opinion entirely on a personal examination and observation of a patient or in part on the history as related to him by the patient).

¶15 This Court has recognized that positive knowledge of causation is not always possible but this uncertainty will not prevent a physician from stating a legally sufficient opinion. *See Harbor Ins. Co. v. Indus. Comm'n,* 25 Ariz. App. 610, 612, 545 P.2d 458, 460 (1976).

> Many factors enter into a resolution of conflicting [medical] evidence, including whether or not the testimony is speculative, consideration of the diagnostic method used, qualifications in backgrounds of the expert witnesses and their experience in diagnosing the type of injury incurred.

Carousel Snack Bar v. Indus. Comm'n, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988).

¶16 In this case, Dr. Thames and Dr. Powers presented highly conflicting opinions. Dr. Thames testified that he is a published researcher and expert in the area of the sympathetic

nervous system and orthostatic hypotension. He examined the claimant, took a history, and reviewed medical records, reports, and diagnostic testing. We find no insufficiency in Dr. Thames opinion, and it was within the ALJ's discretion to adopt it.

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

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
MICHAEL J. BROWN, Judge