

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 05/24/2012
RUTH A. WILLINGHAM,
CLERK
BY: sis

PHOENIX CONCRETE/SELECT BUILD,)
)
Petitioner Employer,) 1 CA-IC 11-0040
)
GALLAGHER BASSETT SERVICES,)
)
Petitioner Carrier,) Department D
)
v.)
)
THE INDUSTRIAL COMMISSION OF)
ARIZONA,)
)
Respondent,)
)
MARGARITO REYES,)
)
Respondent Employee.)
)
)

MEMORANDUM DECISION

(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Special Action - Industrial Commission

ICA Claim No. 20070-660413

Carrier Claim No. 002628-003533WC01

Administrative Law Judge Paula Eaton

AFFIRMED

Lester & Norton, P.C.
By Rachel Brozina
Attorneys for Petitioner Employer & Carrier

Phoenix

Taylor and Associates, P.L.L.C.
by Brian Weekley
Attorneys for Respondent Employee

Phoenix

T H O M P S O N, Judge

¶1 Petitioner employer/carrier (herein Phoenix Concrete) appeals from the administrative law judge's determination that there was no enforceable settlement agreement with respondent employee (Reyes) as to loss of earning capacity. Finding no error, we affirm.

¶2 Reyes sustained a lower back injury while working for Phoenix Concrete in 2007. Reyes was treated, awarded temporary partial disability benefits and, after benefits were terminated, determined to have a 15% whole person impairment. In December 2009, the focus of the instant matter, Reyes protested the Industrial Commission's determination that he did not have a loss of earning capacity. The parties' counsel entered into settlement negotiations. An apparent agreement was reached. On or about May 20, 2010, counsel for Phoenix concrete signed a Notice of Compromise and Settlement Agreement and forwarded it to Reyes counsel for signatures. The Agreement provided Reyes would agree to waive his protest of the loss of earning capacity determination in exchange for \$30,000. Neither Reyes nor his counsel signed the Notice. Reyes's counsel notified Phoenix Concrete that there was no "meeting of the minds" on the settlement and that his client, now that he understood the offer, rejected it. Phoenix Concrete requested a hearing to determine the issue of enforceability of the agreement. A hearing was held. The administrative law judge's Decision upon Hearing and Findings and Award issued on March 15,

2011, found the oral agreement was not enforceable. A Request for Review was filed by Phoenix Concrete. That Decision was affirmed upon review. Phoenix Concrete appeals via special action to this Court.

¶3 On appeal, Phoenix Concrete challenges the determination that the oral agreement was not enforceable. We defer to the factual findings of the administrative law judge and review the legal conclusions de novo. *Tabler v. Indus. Comm'n*, 202 Ariz. 518, 522, ¶ 14, 47 P.3d 1156, 1160 (App. 2002) (enforcing an oral settlement agreement where employee died before signing it). The enforceability of a settlement agreement in a workers' compensation claim is determined under contract principles. *Id.* at 520, ¶ 6, 47 P.3d at 1158; *Schuck & Sons Constr. v. Industrial Comm'n*, 192 Ariz. 231, 234, ¶ 9, 963 P.2d 310, 313 (App. 1998) (addressing enforceability of a signed settlement agreement where employee dies prior to approval by administrative law judge).

¶4 Preliminarily, we note there is no rule requiring settlement agreements to be in writing, only that they be approved by the ICA. See *Tabler*, 202 Ariz. at 521, ¶ 10, 47 P.3d at 1159 (citations omitted). In order for there to be an enforceable settlement agreement there must be an offer, acceptance and consideration. *Id.* at 520, ¶ 8, 47 P.3d at 1158 (citations omitted). There must be an intent by the parties to be bound. *Id.* at 521, ¶¶ 8, 10, 47 P.3d at 1159 (citing *AROK Constr. Co. v.*

Indian Constr. Servs., 174 Ariz. 291, 297, 848 P.2d 870, 876 (App. 1993); Restatement (Second) Of Contracts § 27 (1981)). The determination of intent is a factual question for the administrative law judge and the person asserting the existence of the contract has the burden of proof. See *Tabler*, 202 Ariz. at 521, ¶ 12, 47 P.3d at 1159 (citations omitted).

¶5 The administrative law judge here held a hearing over two days. Reyes testified he did not intend to be bound by the contract. He testified he wanted to come to counsel's office with his wife to discuss the matter before making a final decision and the administrative law judge specifically found his statement to be credible. Reyes had particular concern with the fact that he would not be compensated for permanent partial disability benefits between his stationary date and the settlement date. Phoenix Concrete asserts that Reyes gave his counsel authority to settle the matter and points to the fact that the \$30,000 was actually a counteroffer by Reyes's counsel. Reyes testified, and the administrative law judge specifically found, that he "never gave such authorization." We defer to the administrative law judge's factual determinations, including those involving credibility and find Phoenix Concrete did not meet its burden of proof. See *Tabler*, 202 Ariz. at 521, ¶ 12, 47 P.3d at 1159.

¶6 For the above stated reasons, the Decision is affirmed.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

MICHAEL J. BROWN, Judge