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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34



DIVISION ONE
FILED: 01/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TIMOTHY L. COLLINS,) No. 1 CA-IC 11-0046
)
Petitioner,)
) DEPARTMENT A
v.)
)
THE INDUSTRIAL COMMISSION OF) **MEMORANDUM DECISION**
ARIZONA,)
)
Respondent,) Not for Publication -
) (Rule 28, Arizona Rules
A RAINBOW CO. RAINBOW) of Civil Appellate Procedure)
CONSTRUCTION,)
)
Respondent Employer,)
)
SCF ARIZONA,)
)
Respondent Carrier.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20102-810241

Carrier Claim No. 0655120

The Honorable Michael A. Mosesso, Administrative Law Judge

AFFIRMED

Timothy L. Collins
Petitioner *in Propria Persona*

Fort Dodge, IA

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The Industrial Commission of Arizona
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T I M M E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") decision upon review denying Timothy L. Collins' workers' compensation claim for failure to file within the one-year statute of limitations. Ariz. Rev. Stat. ("A.R.S.") section 23-1061(A) (Supp. 2010).¹ Collins argues the administrative law judge ("ALJ") erred in entering his decision because (1) he was erroneously influenced by inaccurate and untruthful testimony, and (2) he should have granted Collins a continuance without being asked because one of Collins' requested and subpoenaed witnesses was not present to testify. For the following reasons, we disagree and therefore affirm.

BACKGROUND

¶2 During the night of March 9, 2006, Collins was asleep in a trailer owned by his employer, Rainbow Demolition ("Rainbow"), and parked on its property. The property had been

¹ We cite to the current version of the applicable statute because no revisions material to this decision have since been made.

robbed on several occasions, and Rainbow wanted Collins to sleep in the trailer in order to notify police of any trespassers he observed. A fire in the trailer broke out, and, while attempting to flee, Collins became temporarily trapped. Before he could escape, Collins suffered "deep second-and third-degree burns" to his face and hands as well as "significant inhalation injury."

¶3 After the injury, Collins continued to work for Rainbow for approximately one year, but his ability to perform manual labor was significantly inhibited by his injuries. Collins was initially given less physical assignments, but he still suffered the effects of his injuries and struggled with his job. Rainbow reduced his hours and ultimately discharged him from employment in 2007.

¶4 Collins filed his claim for workers' compensation on October 7, 2010, over four and one-half years after he sustained his injuries. After a hearing, the ALJ denied the claim as noncompensable because Collins had not timely filed it. After the ALJ affirmed the decision upon review, Collins filed this timely petition for special action. Ariz. R.P. Spec. Act. 10.

DISCUSSION

I. Untimely filing

¶5 Collins argues the ALJ deprived him of a fair hearing because the respondent employer/carrier elicited inaccurate and

false testimony from witnesses concerning the ownership of Rainbow, which therefore casts doubt on all testimony offered by these witnesses. The accuracy of the witnesses' testimony and its effect on the ALJ's rulings, however, are immaterial if the ALJ was correct in ruling that Collins' claim was time-barred. We therefore turn to that issue.

¶16 All claims seeking compensation for injuries must be filed in writing with the ICA within one year of the date the injury was sustained or the claim accrued. A.R.S. § 23-1061(A). The one-year period begins when "the claimant, in the exercise of reasonable diligence, discovers a relationship between a disabling condition and employment." *Nelson v. Indus. Comm'n*, 120 Ariz. 278, 281-82, 585 P.2d 887, 890-91 (App. 1978). If a claim is not timely filed, the ICA lacks jurisdiction to consider it unless the employee delayed filing a claim because (1) he justifiably relied on a material representation made by the ICA, his employer, or the insurance carrier, or (2) he was insane, legally incompetent, or incapacitated at the time of the injury.² A.R.S. § 23-1061(A). We defer to the ALJ's factual findings regarding the timeliness of Collins' claim if they are

² If an employee becomes insane, legally incompetent, or incapacitated *during* the one-year period, the limitations period is suspended. A.R.S. § 23-1061(A). Collins does not contend that occurred here.

reasonably supported by the evidence. *Cornelson v. Indus. Comm'n*, 199 Ariz. 269, 271, ¶ 10, 17 P.3d 114, 116 (App. 2001).

¶17 The record supports the ALJ's finding that Collins did not timely file his claim. Collins does not contest he knew on the date of the fire that his injuries were related to his employment. *Nelson*, 120 Ariz. at 281-82, 585 P.2d at 890-91. Indeed, he was sleeping in the trailer at Rainbow's direction. Because Collins filed his claim more than three years after expiration of the one-year limitations period, he timely filed his claim only if he met one of the statutory exceptions.

¶18 Collins does not contend he was insane, legally incompetent, or incapacitated at the time of the trailer fire or thereafter, and the evidence does not support such a finding. Indeed, Collins testified that he was competent and capable of filing a claim. Rather, he effectively asserts he justifiably relied on material representations made by Rainbow that led him to falsely believe Rainbow had filed a claim on his behalf. At the hearing, Collins testified his supervisors had repeatedly told him the trailer fire "had cost [them a lot] of money," that he was "lucky" both because Rainbow would insure him and because his bills were being paid.³ Although no one explicitly told Collins that a claim had been filed on his behalf, Collins

³ Collins discovered in 2010 that no claim had been filed and that the Arizona Health Care Cost Containment System ("AHCCCS") had been paying his bills.

contends this was an implication of Rainbow's repeated statements, particularly as Rainbow had filed claims on his behalf previously and Collins was not receiving medical bills.

¶9 We reject Collins' argument for two reasons. First, Rainbow never made a "material representation" to him that it had filed a claim on his behalf or paid any workers' compensation fees as a result of the trailer fire. In short, there was no representation to justifiably rely upon. A.R.S. § 23-1061(A).

¶10 Second, even assuming Rainbow's statements constituted material representations, Collins' reliance on them for an extended period of time was not justifiable, as required to excuse a late filing. *Id.* During the four and one-half years between the trailer fire and initiation of his claim, Collins never received a claim number from the ICA or notification of workers' compensation benefits. By his own admission, Collins had prior experience with workers' compensation, so presumably he had received correspondence from the ICA regarding those claims. The ALJ could have reasonably found that Collins' extended reliance on Rainbow's representations was not justifiable in light of the lack of communication from the ICA or anyone else regarding such a claim. Certainly, Collins was not entitled to sit by for four and one-half years and refrain from taking any action to ensure a claim was properly filed on

his behalf and progressing through the ICA - particularly after Rainbow discharged him from employment in 2007.

¶11 For these reasons, the ALJ correctly found that Collins did not timely file his claim, and the ALJ lacked jurisdiction to adjudicate the claim. Thus, whether the witnesses lied about matters unrelated to the timeliness of the filing is irrelevant. The court lacked jurisdiction to consider the merits of the claim.

II. Continuance

¶12 Collins apparently argues the ALJ erred by not continuing the hearing because one of his subpoenaed witnesses did not attend the hearing as directed. Because Collins failed to ask for a continuance, he has waived this issue absent fundamental error, which is applied sparingly outside criminal cases. *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997). Fundamental error occurs when a party loses an essential right, was unable to receive a fair trial, or where the error goes to the foundation of the party's theory of the case. *See State v. Valenzuela*, 194 Ariz. 404, 407, ¶ 15, 984 P.2d 12, 15 (1999).

¶13 We do not detect fundamental error. Collins fails to specify the anticipated testimony from his missing witness, Mario West. Significantly, Collins fails to state that West would have testified regarding Collins' justifiable reliance on

Rainbow's statements to wait four and one-half years to file a claim. As explained, until the ALJ established its jurisdiction by ensuring the timeliness of Collins' claim, testimony about the substantive merit of the claim was not pertinent. Collins had an opportunity to inform the ALJ of the significance of West's testimony after the ALJ informed Collins that West did not appear as directed at the hearing. Collins did not say anything in response. Consequently, because nothing alerted the ALJ that West could shed light on the timeliness issue, the ALJ did not commit fundamental error by failing to decide on his own to continue the hearing in order to secure West's appearance. See Ariz. Admin. Code R20-5-141(B) (providing ALJ can grant a continuance if a subpoenaed witness fails to appear if the party requesting the continuance can demonstrate (1) "[t]he testimony of the witness is material and necessary" and (2) "[g]ood cause is shown as to why the witness failed to appear.").

¶14 The ALJ did not commit fundamental error by failing to continue the hearing to secure West's appearance absent a representation regarding the significance of his anticipated testimony.

CONCLUSION

¶15 For the foregoing reasons, we affirm.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Andrew W. Gould, Judge