DIVISION ONE
FILED: 02/28/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SAMUEL E. MARTIN, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, MJ AND JJ ENTERPRISES, INC., Respondent Employer, SCF ARIZONA, Respondent Carrier.	)	No. 1 CA-IC 11-0053 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20103-420233

Carrier Claim No. 1010367

The Honorable JoAnn C. Gaffaney, Administrative Law Judge

AFFIRMED

Samuel E. Martin — Glendale
Petitioner

Andrew F. Wade, Chief Counsel — Phoenix
Industrial Commission of Arizona

James B. Stabler, Chief Counsel State Compensation Fund Phoenix
By Sharon M. Hensley, Deputy Chief Counsel
Attorneys for Respondent Employer and Respondent Carrier

G O U L D, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") decision affirming the denial of Samuel E. Martin's worker's compensation claim. Martin argues the ICA's decision is unsupported by the evidence. Because we find that the record contains sufficient evidence to support the ALJ's finding of a noncompensable claim, we affirm.

Background

¶2 Martin was employed as a tow truck driver by Sun City Towing (a.k.a. MJ and JJ Enterprises, Inc., hereinafter "Employer"). On October 1, 2010, while loading a motorcycle onto the tow truck, he purportedly "fell back on the rug rail of the tow truck and then rolled off onto the ground" and landed on his left side. Martin testified he felt immediate pain in his right buttocks and right low back, but he did not immediately report the injury. After the incident, Martin went to a chiropractor for adjustments two or three times. When the pain did not subside, he went to Concentra Medical Centers for a medical examination on November 10, 2010. Concentra took X-rays, diagnosed a hip contusion, and placed Martin on modified activity until a follow-up visit was conducted. Following the examination

on November 10, Concentra called Martin's supervisor and reported the injury. The ICA denied Martin's claim, and he requested a hearing.

¶3 At the hearing, Martin testified that on October 1, 2010 he was injured when he fell from his tow truck and struck his right buttocks and low back while falling to the ground. He testified he attempted to treat the injury by receiving chiropractic adjustments after the incident. On cross-examination, Martin was questioned about his prior medical treatment for back pain with Dr. Onisile, a pain management specialist, and Dr. Jay, a chiropractor. Martin claimed that he had not seen Dr. Onisile or Dr. Jay until after the October 1, 2010 incident. Medical records indicated, however, that Martin had seen Dr. Onisile on September 7, 2010 and had seen Dr. Jay on September 28, 2010, and had complained of back pain on both visits. Cross-examination also revealed that Martin had suffered prior injuries to his hips and low back. One injury occurred in 1988, after which his hips would lock up and he experienced low back pain; and another injury occurred in 2008, which left him suffering from fairly constant back and shoulder pain.

¶4 On the issue of whether Martin had sustained a compensable injury, the ALJ concluded Martin failed to meet his burden of proof and denied his claim. Martin filed a request for review, Employer filed a response, and the ALJ issued a decision

upon review affirming the decision finding Martin's claim noncompensable. Martin timely appealed to this court.

Discussion

¶5 Martin asserts that the ICA's decision is not supported by the evidence. When reviewing ICA findings and awards, we defer to the ALJ's factual findings, but we review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We do not reweigh the evidence. *See Walters v. Indus. Comm'n*, 134 Ariz. 597, 599, 658 P.2d 250, 252 (App. 1982). The trier of fact is in the best position to "weigh the evidence, judge credibility, and evaluate the nuances of witness demeanor." *Id.* Our review is limited to determining "whether or not such findings of fact, [if made], support the award, order or decision." Ariz. Rev. Stat. ("A.R.S.") § 23-951(B).

¶6 A claimant bears the burden "to prove by a preponderance of evidence that he is entitled to compensation." *Hahn v. Indus. Comm'n*, 227 Ariz. 72, 74, ¶ 9, 252 P.3d 1036, 1038 (App. 2011). He must show both legal causation, that the accident arose out of and in the course of his employment, and medical causation, that the accident caused the injury. *Keovorabouth v. Indus. Comm'n*, 222 Ariz. 378, 381, ¶ 7, 214 P.3d 1019, 1022 (App. 2009).

¶7 The ICA's finding that Martin failed to prove legal causation is supported by the evidence. Employer submitted reports from Dr. Onisile and Dr. Jay indicating that Martin had complained of back and hip pain a few days before the October 1 incident. Martin did not immediately report the injury to either his supervisor or a medical professional, and Martin's fall was not witnessed by anyone else. Although Martin testified he verbally informed his supervisor of the injury two or three days after the incident, his testimony is contradicted by the supervisor's testimony and the medical documentation submitted by Concentra. The ALJ "need not presume that [a] claimant's testimony is true where there is no corroboration by disinterested witnesses and where the claimant's testimony is impeached by medical evidence." *Newman v. Indus. Comm'n*, 14 Ariz. App. 154, 155, 481 P.2d 524, 525 (1971); *see also Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987) ("[ALJ] may reject testimony if it is self-contradictory, inconsistent with other evidence, or directly impeached.").

Motion to Strike Dr. Shapiro

¶8 In the course of this special action, Martin filed a motion to strike Dr. Shapiro's report from evidence. Dr. Shapiro conducted an independent medical examination of Martin on April 25, 2011, one day before the hearing. After the hearing, the ALJ

admitted Dr. Shapiro's report into evidence.[1] Martin argues he was unable to cross-examine Dr. Shapiro because the report was not available before the hearing and the doctor was not present at the hearing.

¶9 We agree with Martin that the ALJ erred by admitting Dr. Shapiro's report. Martin was never provided an opportunity to rebut Dr. Shapiro's report or cross-examine Dr. Shapiro. To ensure that parties are able to prepare for cross-examination at the hearing, "evidence submitted after a formal hearing is not admissible." *Higgins v. Indus. Comm'n*, 16 Ariz. App. 136, 138-39, 491 P.2d 1138, 1140-41 (1971)*; see also Div. of Finance v. Indus. Comm'n*, 159 Ariz. 553, 556, 769 P.2d 461, 464 (App. 1989) (stating that filing doctor's report as substantive evidence gave rise to right to cross-examine doctor). Under these circumstances it was not proper for the ALJ to consider Dr. Shapiro's report.

¶10 However, even though the ALJ erred by admitting the report, Martin is not entitled to relief because he did not

[1] In anticipation of his report, Employer had requested Dr. Shapiro be called as a witness; however, because the doctor had evaluated Martin the day before the hearing, neither Martin nor Employer had access to the report. Therefore, Dr. Shapiro's report was not admitted into evidence at the time of the hearing. Employer was permitted to give the ALJ a summary of what was expected to appear in the report. In light of Dr. Shapiro's absence, the ALJ stated that another hearing may be needed to give Martin an opportunity to cross-examine the doctor. Ultimately, though, the ALJ did not schedule a second hearing, and Dr. Shapiro's report was admitted into evidence.

suffer prejudice. *Inspiration Consol. Copper v. Indus. Comm'n*, 118 Ariz. 10, 12, 574 P.2d 478, 480 (App. 1977) (holding that the admission of improper evidence does not require award to be set aside if ALJ would have reached the same result if the evidence had been excluded). The ALJ rested his decision on Martin's failure to prove *legal* causation, but Dr. Shapiro's report related to *medical* causation. Because we are satisfied the ALJ's decision regarding legal causation was supported by the evidence, Martin is not entitled to relief.

Conclusion

¶11 For the reasons above, we affirm.

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ANDREW W. GOULD, Judge

CONCURRING:

/S/
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MAURICE PORTLEY, Presiding Judge

/S/
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ANN A. SCOTT TIMMER, Judge