IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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

DONALD R. BUEHLER, Petitioner, v. THE HONORABLE ROBERT F. RETZER, Judge of the INDUSTRIAL COMMISSION OF ARIZONA, Respondent Judge, ACE HARDWARE CORPORATION; FIDELITY & GUARANTY INSURANCE CO.; GALLAGHER BASSETT SERVICES, INC., Real Parties in Interest.	)	1 CA-SA 12-0013 ICA Claim No. 20060-390063** 20060-390064* 20061-310925*** Carrier Claim No. 002170001701WC01** 002170-001993-WC-01* 002170002376WC01*** **DECISION ORDER**

In this special action, petitioner, Donald R. Buehler, argues an Industrial Commission of Arizona administrative law judge ("ALJ") abused his discretion in scheduling hearings in Phoenix instead of in Yavapai County -- more specifically Prescott -- where he lived at the time of his industrial injury. Because the issue raised by Buehler concerns venue,

IT IS ORDERED the court, Presiding Judge Patricia K. Norris, and Judges Michael J. Brown and Philip Hall participating, accepts special action jurisdiction, *see Buehler v. Retzer ex rel. Indus. Comm'n*, ___ Ariz. ___ n.3, ¶ 15, 260

P.3d 1085, 1088 n.3 (App. 2011) (citations omitted), but denies the relief requested.

Arizona Revised Statutes ("A.R.S.") section 23-941(D) (1995) states "[h]earings shall be held in the county where the workman resided at the time of the injury or such other place selected by the administrative law judge." The record before us reflects the ALJ assigned to Buehler's claims informed him that because of budget constraints, the hearing would be held in Phoenix rather than in Prescott. In his petition, Buehler asserts the Industrial Commission has adopted a policy of scheduling all hearings in Phoenix and, thus, has removed the discretion given to an ALJ under this statute to select "such other" location for the hearings. Buehler also suggests this "policy" violates the rights of claimants who live in Arizona but are injured outside Pima and Maricopa Counties. Based on the record presented, Buehler's arguments are not well taken.

First, the ALJ assigned to Buehler's claims specifically advised Buehler he had exercised his discretion in scheduling the hearings in Phoenix.

Second, even assuming the Industrial Commission has, as Buehler asserts, adopted some sort of policy whereby hearings should be held in Phoenix because of budget constraints, the record before us contains no evidence the Commission has prohibited its administrative law judges from selecting other locations, regardless of the circumstances.

Third, on this record, the ALJ did not abuse his discretion in scheduling the hearing in Phoenix. Although in

requesting a change of venue, Buehler asserted his doctors would "be upset" if they were pulled away from their practices to testify, the ALJ specifically advised Buehler his medical witnesses would be allowed to testify telephonically from their offices in Prescott, and we note an ALJ may rely on telephonic testimony in assessing credibility. *T.W.M. Custom Framing v. Indus. Comm'n*, 198 Ariz. 41, 48, ¶ 22, 6 P.3d 745, 752 (App. 2000) ([T]elephonic testimony is different from mere transcription of testimony because the "telephonic medium preserves paralinguistic features such as pitch, intonation, and pauses that may assist an ALJ in making determinations of credibility."); *cf. State Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997) (rejecting argument respondent denied due process when not allowed to personally appear at child support hearing; appearance by telephone appropriate alternative to personal appearance); *In re MH 2004-001987*, 211 Ariz. 255, 120 P.3d 210 (App. 2005) (rejecting constitutional challenges to telephonic testimony in involuntary mental health treatment proceeding).

Finally, we reject Buehler's reliance on *Miceli v. Industrial Commission*, 135 Ariz. 71, 659 P.2d 30 (1983), and cases similar to it. These cases have generally recognized there must be a reasonable showing of good cause before an employee may be required to submit to an examination that requires travel. Notably, the statute at issue in these cases required the employee to submit to a medical examination from time to time "at a place reasonably convenient for the

employee." A.R.S. § 23-1026(A) (1995). No such or similar requirement is contained in A.R.S. § 23-941(D). Thus, an ALJ is entitled to consider a number of factors, including budgetary constraints, in scheduling hearings.

For the foregoing reasons, therefore, we deny the relief requested by Buehler.[1]

/s/
PATRICIA K. NORRIS, Presiding Judge

[1]We also deny Buehler's "Motion to Strike Answering Brief of Employer and Respondent Carrier, in the alternative, Motion to Exclude Exhibit I to the Brief and Motion to Find the Commission has Confessed Error in Failing to File an Answering Brief." The real parties in interest are the respondent employer and carrier, and they are entitled to support their response to Buehler's petition by "documents in the record before the trial court," which, in this case, is the respondent judge. *See* Ariz. R.P. Spec. Act. 7(e).