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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GARY R. DITTMANN, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, FREEPORT-MCMORAN MORENCI, INC., Respondent Employer, GALLAGHER BASSETT SERVICES, INC., Respondent Insurer.	2 CA-IC 2011-0016 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20082040141

Insurer No. 48846-72824

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

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H O W A R D, Chief Judge.

¶1 In this statutory special action, petitioner Gary Dittmann challenges the administrative law judge's (ALJ) decision finding his injury was not caused by his industrial accident. On review he argues the ALJ erred by refusing to permit him to cross-examine one doctor and to offer additional testimony. He also contends insufficient evidence supported the decision. Because sufficient evidence supports the ALJ's decision and Dittmann has waived his other arguments, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's award.[1] *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). Dittmann worked for respondent Freeport-McMoran

[1]Respondents state they "make no effort to cite to the record for uncontested facts." We note that Rule 13(a)(4), Ariz. R. Civ. App. P., requires appellate briefs to contain a statement of facts "with appropriate references to the record," and that we will disregard statements of fact unaccompanied by citations to the record, *In re Estate of Killen*, 188 Ariz. 562, 563 n.1, 937 P.2d 1368, 1369 n.1 (App. 1996); *see also* Ariz. R. P. Spec. Actions 10(k) (Arizona Rules of Civil Appellate Procedure generally apply to special action review of industrial commission awards).

Morenci Copper Company as a "heavy-duty mechanic." In June 2008, Dittmann slipped on some grease on the engine bay of a truck and fell to the ground with his left arm outstretched. Dittmann had pain and stiffness in his neck, left shoulder, and left arm, resulting in two procedures.

¶3 Freeport initially accepted the claim for benefits and paid temporary compensation. In June 2010, Freeport issued a notice of claim status stating the injury had resulted in permanent disability and awarding two-thirds of the difference between Dittmann's previous average monthly wage and his current monthly wage. It also awarded two medical visits a year to terminate in two years.

¶4 In September 2010, Dittmann discovered he had a problem with his left subclavian artery. He requested a hearing before the commission, arguing his supportive care award was inadequate and alternatively he was totally disabled or needed active medical care or had a greater percentage disability than awarded. After three days of hearings, the parties agreed the ALJ could decide the question of causation of the subclavian artery obstruction without considering other closure issues. The ALJ adopted the medical opinion of respondents' expert, Dr. Raymond Schumacher, as more probably correct and concluded the subclavian artery stenosis had not been caused by the industrial accident and was not compensable. Following Dittmann's request for review, the ALJ reaffirmed her decision. This petition for special action followed.

Examination of Expert Witnesses

¶5 Dittmann first argues the ALJ erred in denying him his fundamental rights to cross-examine Dr. Jolyon Schilling, a vascular surgeon who co-authored a group report on his condition from an Independent Medical Examination, and to present expert testimony from Dr. Kaoru Goshima, his vascular surgeon. Accordingly, he asserts the ALJ erred by refusing to issue requested subpoenas for Goshima and Schilling. The ALJ has sound discretion in regulating and controlling the witnesses appearing before it. *Benafield v. Indus. Comm'n*, 193 Ariz. 531, ¶ 26, 975 P.2d 121, 129 (App. 1998). We review the ALJ's decision not to issue subpoenas for an abuse of discretion. *See K Mart Corp. v. Indus. Comm'n*, 139 Ariz. 536, 539, 679 P.2d 559, 562 (App. 1984).

¶6 The right to present a witness on a party's own behalf "is a fundamental tene[]t of due process to which an ALJ generally must adhere in order to 'achieve substantial justice.'" *Benafield*, 193 Ariz. 531, ¶ 26, 975 P.2d at 129, *quoting* A.R.S. § 23-941(F). Additionally, the right to cross-examine a witness is fundamental and "[w]henever the Commission receives any kind of evidence, either in testamentary or documentary form, there must be full and complete opportunity to cross-examine the person or persons giving such evidence." *A.J. Bayless Markets, Inc. v. Indus. Comm'n*, 134 Ariz. 243, 245, 655 P.2d 363, 365 (App. 1982). However, a party may waive both rights. *See K Mart Corp.*, 139 Ariz. at 539-40, 679 P.2d at 562-63 (party may choose whether to waive right to examine witness); *A.J. Bayless Markets, Inc.*, 134 Ariz. at 245,

655 P.2d at 365 ("party may not idly stand by" waiting for ALJ's decision and then assert right to cross-examine witness was denied).

¶7 Before the three hearings were held in this case, Dittmann submitted two letters, both requesting the ALJ to issue subpoenas, the first for the direct examination of Goshima and the latter for the cross-examination of Schilling. Dittmann made no further mention of his request for subpoenas until the end of the last day of the hearing, when he informed the ALJ he had requested subpoenas for the testimony of Goshima and another doctor, but did not mention Schilling. The ALJ stated she thought Goshima's testimony would be cumulative to the testimony of another doctor who had appeared as Dittmann's expert witness, but she left the issue open, asking both sides to send her a letter "if anybody thinks there is additional testimony from any other witnesses that might glean some important information on the issue at hand."

¶8 In a letter submitted the same day, Dittmann stated he was "willing to allow [the issue of causation] of the subclavian artery" to be decided "right now." He further stated that he wanted "to remind the Court that . . . Goshima, M.D., the vascular surgeon (whose report is in evidence) supports causation vis-a-vis this injury." In his letter, he did not mention Schilling or his request for the ALJ to issue subpoenas for Goshima or Schilling. After the ALJ issued her decision, Dittmann filed a request for review and further hearings, where he stated that he "renew[ed] all subpoena requests and cross-examination requests." He subsequently filed an addendum to his request for review and

asked the ALJ to rescind her decision or, "in the alternative, bring in both vascular experts, Drs. Goshima and Schilling, to testify in accord with their opinions."

¶9 On appeal, Dittmann argues the ALJ erred in not granting his request to issue subpoenas for Goshima and Schilling. But, because Dittmann affirmatively requested that the ALJ decide the issue of causation without again requesting the subpoenas, he waived his right to cross-examine Schilling and provide testimony from Goshima. *See A.J. Bayless Markets, Inc.*, 134 Ariz. at 245, 655 P.2d at 365. Additionally, he has not cited any authority that the ALJ erred on review by not re-opening evidence after being requested to decide the issue without any additional evidence, nor has he identified that as the issue on appeal. Therefore, he has waived that issue. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

Sufficiency of the Evidence

¶10 Dittmann next contends insufficient evidence supported the ALJ's decision because there was "inadequate medical foundation" for Schumacher's conclusions. We limit our review of the ALJ's findings "to whether they are reasonably supported by the evidence, but we review all questions of law de novo." *Benafield v. Indus. Comm'n*, 193 Ariz. 531, ¶ 11, 975 P.2d 121, 125 (App. 1998) (internal citations omitted).

¶11 We will disturb the ALJ's findings only if the conclusion cannot be supported by any reasonable theory of the evidence, even if we would have reached a

different conclusion. *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987). "When more than one inference may be drawn, the [ALJ] may choose either, and we will not reject that choice unless it is wholly unreasonable." *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). It is the ALJ's duty to determine witness credibility, *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973), and resolve conflicts in the medical testimony, *see Johnson-Manley Lumber*, 159 Ariz. at 13, 764 P.2d at 748.

¶12 Medical conclusions must be based on medical facts such as patient history, medical records, diagnostic tests, and examinations. *Royal Globe Ins. Co.*, 20 Ariz. App. at 434, 513 P.2d at 972. A conclusion may be insufficient evidence to support a decision if it is based on "an inaccurate factual background." *Desert Insulations, Inc. v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982). However, "not every error in fact renders the opinion fatally flawed" and only errors in material assumptions will cause the opinion to be discarded. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 122, 776 P.2d 797, 800 (1989).

¶13 Dittmann identifies no inaccuracies in Schumacher's factual assumptions, but instead asserts "Schumacher's understanding of the evidence is inconsistent with a preponderance of the evidence." He also contends two of the tests performed by earlier doctors and relied on by Schumacher were not verifiable or reproducible, and argues Schumacher should not have reviewed one of the records but should have instead "left

[it] to the vascular specialists."[2] None of these arguments show a material factual error in Schumacher's assumptions, but are instead questions of witness credibility and conflicting medical opinion. Therefore, we will affirm the ALJ's conclusion unless it is wholly unreasonable. *Johnson-Manley Lumber*, 159 Ariz. at 13, 764 P.2d at 748.

¶14 Schumacher, a specialist in occupational medicine, co-authored the Independent Medical Examination report with Schilling, a vascular specialist. Schumacher testified he had reviewed medical records from at least fifteen doctors, diagnostic studies, and radiographic reports concerning Dittmann and had examined Dittmann. He concluded that based on the medical literature "it [wa]s not mechanically plausible that [Dittmann's condition] would be caused by the type of injury . . . described." Furthermore, Schumacher noted that Dittmann had "repeated documentation of radial pulses and normal arterial function" after the accident. Instead, he concluded Dittmann had "a gradually developing atherosclerotic lesion," which is "[a] very common disorder."

¶15 And in their medical report, Schumacher and Schilling noted "[t]he CT angiogram appearance is typical for atheromatous stenosis" and "[t]he clinical course is entirely compatible with atheromatous stenosis of gradual development." They concluded Dittmann's condition was not "causally related in any way to the 06/29/08 industrial injury." Schilling and Schumacher's medical opinions were based on medical

[2]We note that although Schumacher is not a vascular specialist, he co-authored the medical report with Schilling, a vascular specialist. In the report the doctors reached the same conclusion as Schumacher did in his testimony.

fact and the ALJ reasonably could have relied on their opinions to resolve any conflicting testimony. Because the ALJ's conclusions were supported by a reasonable theory of the evidence, sufficient evidence supported her conclusion. *See Phelps*, 155 Ariz. at 506, 747 P.2d at 1205.

Conclusion

¶16 For the foregoing reasons, we affirm.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge