FILED BY CLERK
NOV 27 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ALBERT P. DUNN, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, TUCSON MEDICAL CENTER, Respondent Employer, CORVEL CORPORATION, Respondent Insurer.	)	2 CA-IC 2011-0018 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20100-270319

Insurer No. TH-09-010141

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

Tretschok, McNamara & Miller, P.C.
By Patrick R. McNamara
Tucson
Attorneys for Petitioner Employee

The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
Attorney for Respondent

Zingg Law Office, P.L.L.C.
By Jo Fox Zingg — Tucson
Attorney for Respondents Employer and Insurer

H O W A R D, Chief Judge.

¶1 In this statutory special action, petitioner Albert Dunn challenges the administrative law judge's (ALJ) conclusion that a surgical procedure was not related to or reasonably required by Dunn's industrial injury. Additionally, Tucson Medical Center (TMC) requests that we review the ALJ's use of the unexplained injury rule. Because TMC's request was untimely and substantial evidence supports the ALJ's conclusion, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). Albert Dunn worked in TMC's laundry department for twenty-seven years. In October 2009, Dunn fell down on the concrete floor of his department, breaking his nose and upper plate, knocking out some of his teeth, and injuring his shoulder and neck. Dunn asserted that the fall occurred because he tripped over a cart and box of scrubs. However, no other witness saw him fall or was able to corroborate the presence of the cart, the box, or any other nearby object that Dunn could have tripped

over. After the fall, Dunn received treatment in TMC's emergency room. In November 2009, Dr. Thomas Norton, a board-certified neurological surgeon, performed spinal surgery on Dunn to prevent future catastrophic harm should he fall again.

¶3 In January 2010, Dunn filed a claim for worker's compensation benefits, which TMC's carrier, CorVel Corporation, denied in February 2010. In March 2010, Dunn timely protested this decision and requested a hearing with the Industrial Commission, claiming that both the immediate medical care he received in TMC's emergency room and the surgery the following month were compensable care and reasonably necessary. Pursuant to the request, the Industrial Commission held formal hearings in the latter half of 2010 and early 2011.

¶4 After these evidentiary hearings with testimony from numerous doctors and co-workers, the ALJ determined the surgery was not related to the industrial injury and therefore was not compensable. To reach this conclusion, he adopted the medical opinion of respondents' expert, Dr. John Beghin, a board-certified orthopaedic surgeon, as most probably correct and well-founded. However, the ALJ did award compensation for the period between the fall and when Dunn became medically stationary, sometime before the surgery. Following Dunn's request for review, the ALJ reaffirmed his decision. This petition for special action followed.

Unexplained Injury Rule

¶5 We first address TMC's request in its answering brief that we review the ALJ's use of the unexplained injury rule. Dunn counters that such review is prohibited because TMC failed to file timely a notice of appearance stating it was requesting

affirmative relief. A party wishing to petition this court for a writ of certiorari to review an Industrial Commission award must do so within thirty days from the mailing of the decision upon review. A.R.S. § 23-943(H). A party responding to a writ of certiorari who also wishes to seek affirmative relief from this court is required to include a request for that relief in its notice of appearance under Rule 10(f), Ariz. R. P. Spec. Actions. That rule requires requests for affirmative relief to be made within ten days from the date of service of the petition and writ of certiorari. Rule 10(f), Ariz. R. P. Spec. Actions; *see also* Rule 5(c), Ariz. R. Civ. P.; Rule 6(e), Ariz. R. Civ. P. (five day extension for service by mail); Rule 5(a), Ariz. R. Civ. App. P. (incorporating Rule 6(a), (e), Ariz. R. Civ. P.); Rule 10(k), Ariz. R. P. Spec. Actions (incorporating Arizona Rules of Civil Appellate Procedure). Service is effective as of the date of mailing. Rule 10(d), Ariz. R. P. Spec. Actions.

¶6 In this case, Dunn timely filed his petition for review on September 15, 2011, and copies were mailed to the other parties. Adding ten days after service plus five days for service by mail, September 30 was the last day a responding party could file a notice of appearance and also request affirmative relief. *See* Ariz. R. P. Spec. Actions 10(a), (f); Ariz. R. Civ. P. 6(e). TMC filed its notice of appearance on June 18, 2012, but that notice did not include a request for affirmative relief. Finally, on July 19, 2012—more than nine months after the September 30, 2011 deadline under Rule 10(f)—TMC filed an amended notice of appearance with a statement that it intended to request affirmative relief. Because TMC has not explained this delay or otherwise argued it should not be precluded from raising this issue pursuant to Rule 10(f), it has waived any

request for affirmative relief. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (failure to present argument can constitute abandonment and waiver of claim). Accordingly, we do not address this argument further.

Compensability of Surgery

¶7 Dunn argues the ALJ erred by accepting Beghin's medical opinion and concluding Dunn's surgery was not related to the industrial accident and therefore not compensable. He bases his argument on Beghin's statement that Dunn's symptoms had resolved prior to his surgery, which was based on a note by Norton, Dunn's treating neurological surgeon. But Norton testified that Dunn's symptoms had improved but not totally resolved. Dunn claims, based on Norton's testimony, that Beghin's opinion is so weakened by proof of an inaccurate factual background that his testimony cannot constitute substantial evidence.

¶8 In reviewing findings and awards of the Industrial Commission, we review an ALJ's findings of fact for an abuse of discretion, *Ford v. Indus. Comm'n*, 145 Ariz. 509, 519, 703 P.2d 453, 463 (1985), but independently review any legal conclusions, *Young v. Indus. Comm'n*, 204 Ariz. 267, ¶ 14, 63 P.3d 298, 301 (App. 2003). We will not disturb an ALJ's decision if it is supported by "substantial evidence." *Caganich v. Indus. Comm'n*, 108 Ariz. 580, 581, 503 P.2d 801, 802 (1972). The petitioner bears the burden of demonstrating the Commission erred. *Bergstresser v. Indus. Comm'n*, 118 Ariz. 155, 157, 575 P.2d 354, 356 (App. 1978).

¶9 Section 23-1062(A), A.R.S., provides that injured employees are entitled to medical benefits for care that is "reasonably required at the time of the injury, and

during the period of disability." What treatment "is reasonably required is a medical question and requires expert medical testimony." *Patches v. Indus. Comm'n*, 220 Ariz. 179, ¶ 6, 204 P.3d 437, 439 (App. 2009); *see also Beasley v. Indus. Comm'n*, 175 Ariz. 521, 522, 858 P.2d 666, 667 (App. 1993) (causal connection required between industrial injury and treatment for subsequent injuries or aggravations). In determining whether treatment is reasonably required by the injury, the ALJ has discretion to determine the credibility of testimony and to resolve conflicts in expert medical testimony. *See Bergstresser*, 118 Ariz. at 157, 575 P.2d at 356 (noting importance of conflicting testimony of medical experts). Its findings will not be disturbed "unless wholly unreasonable." *Id*.

¶10 However, "medical testimony can be so weakened by proof of an inaccurate factual background that the testimony cannot be said to constitute 'substantial evidence.'" *Desert Insulations, Inc. v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982), *quoting Russell v. Indus. Comm'n*, 98 Ariz. 138, 145, 402 P.2d 561, 565 (1965). But "not every error in fact renders the opinion fatally flawed" and only errors in material assumptions may cause the opinion to be discarded. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 122, 776 P.2d 797, 800 (1989).

¶11 Dunn argues Beghin's opinion cannot constitute substantial evidence because his statement that Dunn's spinal injury had "resolved" at the time of the surgery was based on Norton's report, yet Norton testified the injury was actually only "resolving" at the time of the surgery and his condition had not resolved. But as TMC points out, the distinction between resolving and resolved is not material to the issue of

whether the surgery was prophylactic as opposed to being reasonably required by the industrial injury. Moreover, although Beghin was informed on cross-examination that Norton, the treating surgeon, said Dunn still had some symptoms prior to his surgery, he nonetheless did not change his opinion. And Norton said the "surgery was done to prevent this from happening again" and that the surgery was not performed to correct any problem from the injury. The ALJ could rely on this testimony—despite the difference between "resolved" and "resolving"—to reach the conclusion that the surgery was preventative rather than a treatment necessitated by the industrial injury. We cannot say the testimony was so weakened by proof of an inaccurate factual background that it could not constitute "substantial evidence" upon which the ALJ could rely in reaching its conclusion.

¶12 Dunn further argues the surgery was either palliative care or would be covered under the "but for" standard. Palliative care is "designed to prevent or reduce the continuing symptoms of an industrial injury after the injury has become stabilized." *Capuano v. Indus. Comm'n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986). Such care is compensable, but has to be related causally to the industrial injury. *Id.* The *Beasley* "but for" standard does not change this basic causation requirement. *See Beasley*, 175 Ariz. at 522-23, 858 P.2d at 667-68 (treatment unrelated to industrial injury compensable when treatment would not happen "but for" industrial injury).

¶13 The ALJ found Dunn's surgery bore no causal connection to his industrial injury. The ALJ reached this conclusion based on both Beghin's and Norton's testimony. Norton did testify that he would not have operated but for the injury, but he also agreed

with Beghin that the surgery was not performed to correct a problem arising from the industrial injury. And Beghin testified no connection existed between the industrial injury and the surgery. Therefore, even if the operation can be regarded as palliative, without the required causation it is not compensable. Accordingly, we cannot say the ALJ's decision was not supported by reasonable evidence.

Conclusion

¶14 For the foregoing reasons, we affirm the ALJ's decision.

/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*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.