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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVE E. SMITH,)
) No. 1 CA-IC 12-0003
)
) Petitioner,) DEPARTMENT C
)
) v.)
) **MEMORANDUM DECISION**
)
) THE INDUSTRIAL COMMISSION OF)
) ARIZONA,) Not for Publication -
) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
)
) Respondent,)
)
) HANDICAP VEHICLE SPECIALISTS)
) INC.,)
)
) Respondent Employer,)
)
) SCF ARIZONA,)
)
) Respondent Carrier.)
)

Special Action - Industrial Commission
ICA CLAIM NO. 20100-600044
CARRIER CLAIM NO. 1001654
Deborah Nye, Administrative Law Judge

AWARD AFFIRMED

Steve E. Smith Phoenix
Petitioner *in Propria Persona*

James B. Stabler, Chief Counsel of SCF Arizona Phoenix
By Kenna L. Finch
Attorneys for Respondent Employer/Carrier

H A L L, Judge

¶1 This is a special-action review of an Industrial Commission of Arizona decision affirming the decision upon hearing, findings, and award that Petitioner Steve E. Smith's industrial injury became medically stationary effective February 1, 2011, without permanent impairment or the need for supportive care. Because we find that the medical evidence of record supports the Administrative Law Judge's (ALJ) award, we affirm.

BACKGROUND

¶2 On February 10, 2010, Smith stated that he had been working as a service installation technician for Respondent Employer Handicap Vehicle Specialists, Inc., when he was injured lifting a wheelchair from a table. As soon as he lifted the wheelchair, Smith felt "a sharp pain down [his] left leg" and fell onto the wheelchair, and then to the floor. Smith claimed he suffered an injury to his lower back and left leg as a result of the incident. On February 4, 2010, six days prior to this incident, Smith was injured in a non-industrial accident while being transported handcuffed in a police car. Smith stated that the police officer made a U-turn with the vehicle and Smith was thrown "across the floor and [] hit the passenger door with [his] head." He sustained injuries to his neck and lower back.

¶3 On May 12, 2010, James Hawkins, M.D., a board-certified orthopedic surgeon, evaluated Smith and concluded that

Smith's magnetic resonance imaging (MRI) had an "overall normal appearance" and Smith did not need to change his work status.

¶4 Smith reported that he was injured at work a second time on September 22, 2010 and "that was the injury that actually caused [him] to be considered disabled." Smith elaborated that on that day he had been installing a track underneath a transport van for a wheelchair, when his legs began hurting and he had to be extricated from underneath the van. Prior to the September 22 incident, Smith reported that the pain in his lower back was "semi-constant," but after the incident, the pain was "always there." Smith admitted that he failed to file a new claim for the September 22 incident, despite it being the injury that "caused [him] to be considered disabled" and required him to "take time off work." Smith resigned from his position On February 14, 2011.

¶5 In December 2010, Vivek Gupta, M.D., a board-certified diagnostic radiologist, conducted a musculoskeletal sonography on Smith and found the sonograms "normal" and "no abnormal mass or fluid collection" and "no evidence of muscular, tendinous or ligamentous injury." Also in December 2010, Michael Brown, M.D., conducted an electrophysiological nerve conduction study on Smith and found the results were "normal" and revealed "no evidence of peripheral nerve dysfunction."

¶6 The ALJ held a four-day hearing ending in November 2011 to determine whether Smith was entitled to any continuing active medical care. Gary Lee Wagoner, a chiropractic physician, testified that he examined Smith on June 12, 2010, and concluded that the injury to Smith's lumbar spine, a herniated disk, and left lower extremity were "apportioned 100 percent" to the February 10 industrial injury. Dr. Wagoner recommended that Smith change his occupation and receive continued care to improve his situation. Dr. Wagoner also wrote a letter on April 21, 2011 that Smith had not made a full and complete recovery and was still receiving treatment, primarily chiropractic and medicinal, for his injuries.

¶7 Terry E. McLean, M.D., a board-certified orthopedic spine surgeon, performed an independent medical examination (IME) on Smith on November 18, 2010. Dr. McLean found that Smith was "embellish[ing]" his symptoms and there was no "causal relationship between his cervical complaints and the industrial episode of 02/10/2010." Dr. McLean testified that he disagreed with Dr. Wagoner's findings that Smith had a herniated disk. Dr. McLean stated that Smith had degenerative bulging and annular tears, which are part of the natural process of aging. He concluded that there were no objective findings that Smith's complaints pertained to the industrial injury and Smith was "permanent and stationary with a zero percent impairment."

¶8 Dr. McLean stated he had "yellow flags" with Smith given his review of the medical record showed that Dr. Hawkins examined Smith and found painless range of motion in the cervical lumbar spine and normal gait with only mild tenderness. Additionally, Dr. McLean noted that a report submitted by a neurologist found no neurological deficits or any physiological reason for the leg pain or limp. However, Smith presented to Dr. McLean with a moderate limp and voluntarily limited his range of motion in his back. Thus, Dr. McLean could not conclude with a reasonable degree of medical certainty that Smith's complaints were causally related to the February 10, 2010 injury. Dr. McLean authored several addenda to the IME, most recently on July 5, 2011, and his findings remained the same—Smith was stationary effective February 1, 2011, with no permanent impairment, and did not require any working restrictions or supportive medical care based on the February 10, 2010 episode.

¶9 The ALJ concluded that Smith's "industrial injury became medically stationary effective February 1, 2011, without permanent impairment or the need for supportive care." The ALJ awarded Smith medical, surgical, and hospital benefits from February 10, 2010, through February 1, 2011. Smith requested a review of the ALJ's findings and conclusions. The ALJ affirmed

the decision upon hearing and findings and award for non-compensable claim.

¶10 Smith timely appeals and argues the ALJ erred: (1) by not reviewing all relevant evidence; (2) because the findings are not supported by the evidence; (3) by not issuing a subpoena for Dr. Porter; and (4) by allowing Dr. McLean's reports into evidence.

¶11 We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(2) (2003), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶12 We consider the evidence in the light most favorable to upholding the award, *Lovitch v. Industrial Commission*, 202 Ariz. 102, 105 ¶ 16, 41 P.3d 640, 643 (App. 2002), and deferentially review all factual findings. *PFS v. Indus. Comm'n*, 191 Ariz. 274, 277, 955 P.2d 30, 33 (App. 1997).

¶13 Smith has the burden of establishing that his condition is causally related to his industrial injury, that the injury has not become stationary and he is entitled to continuing benefits, or that he has permanent impairments. See, e.g., *Spears v. Indus. Comm'n*, 20 Ariz.App. 406, 407, 513 P.2d 695, 696 (1973). In order to prevail, Smith must show: (1) an accident arose out of and in the course of the employment, (2) the accident resulted in an injury, and (3) that the injury was

caused by the conditions of the employment. *Dunlap v. Indus. Comm'n*, 90 Ariz. 3, 6, 363 P.2d 600, 602 (1961). When the results of an injury "are not apparent to a layman," the injury as well as its cause, and the need for further treatment or the existence of a permanent impairment must be established "by competent medical evidence." *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977).

¶14 First, Smith argues that the ALJ failed to review all relevant evidence. "We must presume that the judge considered . . . all relevant evidence of record," *Tyree v. Industrial Commission*, 159 Ariz. 92, 95, 764 P.2d 1151, 1154 (App. 1988), including the medical records, Smith's testimony detailing his ailments, the incidents that resulted in his injuries, and the experts' testimony and reports. We also accept the ALJ's reasonable resolution of conflicting evidence and witness credibility. See *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 121, 776 P.2d 797, 799 (1989); see also *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 505, 747 P.2d 1200, 1204 (1987) ("An [ALJ] has the prerogative to resolve conflicting medical opinions."). The ALJ weighed the medical evidence of record and testimony at the hearing, and reasonably found that Smith's "industrial injury became medically stationary effective February 1, 2011, without permanent impairment or the need for supportive care." We cannot say that the ALJ failed to consider

the relevant evidence based on our review of the entire record. See *Stemkowski v. Indus. Comm'n*, 27 Ariz.App. 457, 460, 556 P.2d 11, 14 (1976).

¶15 Second, Smith contends that the ALJ's findings are not supported by the evidence. We disagree. This court will not disturb the ALJ's findings if the conclusion is supported by any reasonable theory of the evidence, even if this court would have reached a different conclusion. See *Phelps*, 155 Ariz. at 506, 747 P.2d at 1205. "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). The record is replete with evidence supporting the ALJ's decision: Dr. Hawkins found Smith's MRI normal; Dr. Gupta concluded that Smith's sonograms were normal; Dr. Brown opined that Smith's tests were normal; and Dr. McLean concluded that there were no objective findings that Smith's complaints were related to the industrial injury and that Smith was "permanent and stationary with a zero percent impairment." We therefore discern no error.

¶16 Third, Smith maintains the ALJ erred by not issuing a subpoena for Dr. Porter. The ALJ "has wide discretion to regulate and control the witnesses who appear before" her. *Artis v. Indus. Comm'n*, 164 Ariz. 452, 453, 793 P.2d 1119, 1120

(App. 1990). We review an ALJ's denial of a request to issue a subpoena for an abuse of discretion. *K Mart Corp. v. Indus. Comm'n*, 139 Ariz. 536, 539, 679 P.2d 559, 562 (App. 1984).

¶17 Here, Smith requested the ALJ issue a subpoena for Dr. Porter to testify, and the ALJ denied the request, explaining that "[t]reating doctors and other specialists routinely rely upon and testify about the significance of EMG/NCS tests conducted by specialists like Dr. Porter. Provide Dr. Wagoner a copy of Dr. Porter's tests before he testifies, so you can ask him about the test results and their significance." While answering questions from the ALJ, Dr. Wagoner testified about the contents of Dr. Porter's report. Smith, however, failed to ask Dr. Wagoner about Dr. Porter's report. We detect no error, let alone prejudice.

¶18 Dr. Porter's report was admitted into evidence and Dr. Wagoner testified about the contents of Dr. Porter's report. Dr. Porter's report concluded that "[a]ll nerve conduction studies . . . were within normal limits," there was no active radiculopathy in the lower extremities, no active neuropathy or myopathy, and "there are subtle findings to suggest in the EMG and NCS of a possible established L4/5 involvement with the left being more involved than the right." Thus, Dr. Porter's report did not support Smith's claim of permanent impairment due to an industrial injury. Finally, the ALJ stated that the tests and

findings performed by Dr. Porter were routinely testified about by other doctors and it was not necessary for Dr. Porter to testify himself as to those results. See Ariz. Admin. Code R20-5-141(A)(4) ("A presiding administrative law judge shall issue a subpoena requested . . . if the judge determines that the testimony of the witness is material and necessary"); see also *K Mart Corp.*, 139 Ariz. at 539, 679 P.2d at 562 (ALJ can deny request for subpoena when "it is clearly shown in the statement itself that the solicited testimony would not be material and necessary."). Because Dr. Porter's testimony was not "material and necessary" and the report as well as his findings were introduced into evidence and explained at the hearing, the ALJ did not abuse her discretion by denying Smith's request to subpoena Dr. Porter and Smith was not prejudiced by the ALJ's denial.

¶19 Last, Smith argues that the ALJ erred by allowing Dr. McLean's reports into evidence because the reports did not contain Dr. McLean's signatures and therefore did not comply with Arizona Administrative Code R20-5-113. Smith, however, failed to present this argument to the ALJ. Smith's failure to raise the issue with the ALJ precludes him from doing so before this court on appeal. See *Releford v. Indus. Comm'n*, 120 Ariz. 75, 78, 584 P.2d 56, 59 (App. 1978).

CONCLUSION

¶20 For the foregoing reasons, we affirm.

_____/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_____/s/_____
PETER B. SWANN, Judge

_____/s/_____
SAMUEL A. THUMMA, Judge