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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 4/4/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL V. DELGADO,) No. 1 CA-IC 12-0034
)
Petitioner,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
THE INDUSTRIAL COMMISSION OF) (Not for Publication -
ARIZONA,) Rule 28, Arizona Rules
) of Civil Appellate
Respondent,) Procedure)
)
HEALTHSOUTH CORPORATION,)
)
Respondent Employer,)
)
ESIS/ACE USA (AZ),)
)
Respondent Carrier.)

Special Action - Industrial Commission

ICA Claim No. 20111-920262

Carrier Claim No. 27704941308670812

Administrative Law Judge Margaret A. Fraser

AWARD AFFIRMED

Taylor & Associates P.L.L.C.
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Phoenix

Andrew F. Wade, Chief Counsel
The Industrial Commission of Arizona
Attorney for Respondent

Phoenix

K E S S L E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a noncompensable claim. The petitioner employee Michael V. Delgado ("Delgado") raises two issues on appeal, whether the administrative law judge ("ALJ"):

(1) erred by deferring to a doctor's legal interpretation of Arizona Revised Statutes ("A.R.S.") section 23-1043(1) (1995); and

(2) failed to provide a sufficiently sound factual basis to deny compensation of Delgado's claim under A.R.S. §23-1043(2).

Because we find that the ALJ's award is legally sufficient and is reasonably supported by the evidence, we affirm.

JURISDICTION AND STANDARD OF REVIEW

¶2 This Court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10.¹ In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider

¹ We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

FACTUAL AND PROCEDURAL HISTORY

¶3 Delgado was employed as a medical transport driver by the respondent employer, HealthSouth Valley of the Sun Rehabilitation Hospital ("HealthSouth"). In September 2010, approximately nine months before the injury, Delgado underwent surgery to donate a kidney to his father. After the operation, his surgeon warned him that he was more prone to developing a hernia due to weakened abdominal muscles, and recommended that Delgado refrain from any heavy lifting for four to six weeks.

¶4 Delgado alleged that he sustained a hernia on June 27, 2011 while lifting an obese patient into his medical transport van. After lifting the patient, Delgado felt a sharp pain in his left abdomen area, which immediately ceased. Four days later, Delgado felt a bump in the same part of his abdomen. Delgado obtained treatment at Banner Estrella Hospital. Delgado did not mention the lifting incident to anyone at the hospital, but did state that he had been playing with and throwing his kids in the pool before he felt the bump. The hospital performed an ultrasound on Delgado's stomach, and detected a hernia. Delgado also saw several other doctors who reached the same conclusion, and stated that he needed to have the hernia surgically repaired.

One of the doctors recommended that Delgado not perform any lifting over ten pounds.

¶15 On July 5, 2011, eight days after the incident, Delgado spoke with Robert Rosene, an employee in HealthSouth's human resources department, to inform him of the lifting restrictions. Delgado indicated to Mr. Rosene that immediately prior to visiting Banner Estrella Hospital he had been at home lifting and throwing his children in the pool. Mr. Rosene expressed some doubts about whether this was a work-related injury, and stated that he needed to contact HealthSouth's insurance carrier. After contacting the insurance carrier, Mr. Rosene met with Delgado on the following day and completed an accident report.

¶16 In August 2011, Delgado underwent surgery to have his hernia repaired. Delgado missed approximately four weeks of work following his surgery. On August 4, 2011, the insurance carrier denied Delgado's claim. Delgado protested the denial, and filed a request for a hearing on August 10, 2011. At the hearing, Delgado presented testimony from his surgeon, Dr. King, indicating that lifting an obese patient could cause a real traumatic hernia. Dr. King also stated that but for Delgado's prior kidney donation, he would not have suffered a hernia while lifting a patient. Dr. King did not state whether he thought the hernia was a Type I or

Type II hernia.² HealthSouth also presented medical testimony from Dr. Glass, the doctor who examined Delgado after the hernia repair surgery, indicating that Delgado suffered a Type II hernia based on the existing abdominal weakness rather than a Type I hernia. Dr. Glass based his conclusion on Delgado's pre-existing abdominal weakness resulting from his prior kidney donation.

¶7 The ALJ accepted Dr. Glass's medical opinion that Delgado had a weakened abdomen, and suffered a Type II hernia as a result of lifting the patient. The ALJ also found that Delgado had not proved the additional requirements for compensation of a Type II hernia. Accordingly, the ALJ denied the claim for compensation.

¶8 Delgado filed a request for review of the ALJ's decision. After a review, the ALJ affirmed the finding and award of a non-compensable injury. Delgado subsequently brought this timely appeal.

DISCUSSION

A. TYPE I HERNIA

¶9 Delgado first argues that the ALJ erred by deferring to Dr. Glass's interpretation of A.R.S. § 23-1043 and finding that the injury was a Type II hernia. In the award, the ALJ stated

² By statute, a Type II hernia is one based on a pre-existing weakness in the abdominal wall, and is not compensable under workers' compensation unless the claimant proves certain additional requirements. A.R.S. § 23-1043(2).

that “[b]ased on the evidence as a whole, I accept Dr. Glass’s medical opinions regarding the proper medical interpretation of the statute. I also accept his opinion that [Delgado] had a type 2 hernia”

¶10 A review of the record does not indicate the ALJ simply deferred her legal analysis to Dr. Glass. Whether a hernia is a Type I or Type II hernia is primarily a medical question. *Figueroa v. Indus. Comm’n*, 112 Ariz. 473, 476, 543 P.2d 785, 788 (1975). As the trier of fact, the ALJ must determine which of the conflicting testimony is probably more correct. *Perry v. Indus. Comm’n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). We will not disturb the ALJ’s findings as long as her conclusion is reasonably supported by the evidence. *Id.* at 398-99, 542 P.2d at 1097-98. Here, Dr. Glass provided a medical opinion that the injury was a Type II hernia. The ALJ accepted Dr. Glass’s testimony. We find no error in the ALJ’s conclusion.

B. TYPE II HERNIA

¶11 Delgado next argues that the ALJ failed to provide a factually sound basis to deny compensation of his claim as a Type II hernia under A.R.S. § 23-1043(2), and that he met the statutory requirements to be compensable. A Type II hernia is not compensable unless it is proved:

- (a) That the immediate cause, which calls attention to the presence of the hernia, was a

sudden effort or severe strain or blow received while in the course of employment.

(b) That the descent of the hernia occurred immediately following the cause.

(c) That the cause was accompanied or immediately followed by severe pain in the hernial region.

(d) That the facts in subdivisions (a), (b) and (c) of this paragraph were of such severity that they were noticed by the claimant and communicated immediately to one or more persons.

A.R.S. § 23-1043(2).

¶12 In denying the claim as a compensable Type II hernia, the ALJ found that the descent of the hernia did not occur immediately following the incident, and so Delgado did not meet A.R.S. § 23-1043(2)(b). The ALJ also found that Delgado did not immediately report or communicate the injury to anyone, and did not satisfy A.R.S. § 23-1043(2)(d). The Arizona Supreme Court requires ALJs to "explicitly state their resolution of conflicting evidence on material and important issues, find the ultimate facts, and set forth their application of law to those facts." *Post v. Indus. Comm'n*, 160 Ariz. 4, 8, 770 P.2d 308, 312 (1989). The ALJ here did exactly that. She stated which parts of Delgado's testimony she accepted, which parts of the medical testimony she accepted, and found that this Type II hernia was not compensable under the statute. We find no error.

¶13 Delgado further asserts that the descent of the hernia occurred immediately after the accident, and that he reported the hernia within a reasonable amount of time, making his hernia compensable.

¶14 It is uncontested that Delgado initially felt the pain in his abdomen on June 27, 2011 after lifting a patient; that he first noticed the bulge in his abdomen on July 1, 2011 and visited the hospital the same day; and that he did not report this to his supervisor until July 5, 2011. The delay between the incident at work and the descent of the hernia was four days, and the delay between the incident and Delgado reporting the incident was eight days. The ALJ found that these delays did not satisfy the requirements of A.R.S. § 23-1043(2)(b).

¶15 There is no strict timeframe for a hernia to descend in order to be compensable. Rather, "the requirement of immediate descent is satisfied if the hernia descended soon enough and in such a manner as to make it appear clear that the descent was the effect of the industrial incident." *Superstition Constr. v. Indus. Comm'n*, 139 Ariz. 337, 339, 678 P.2d 522, 524 (App. 1984) (citation and internal quotation marks omitted). Similarly, the word "immediately," as it pertains to "descent" in A.R.S. § 23-1043(2), generally means "within minutes or hours." *Bliven v. Indus. Comm'n*, 24 Ariz. App. 78, 80, 535 P.2d 1309, 1311 (1975). The requirement of immediate communication [for purposes of

subsection (2)(d)] is satisfied by communication within a reasonable time" *Superstition*, 139 Ariz. at 339, 678 P.2d at 524.

¶16 There is sufficient evidence to find that the descent of the hernia was not a result of the work incident, nor was it immediately communicated to another person. The four day wait between the incident and noticing the bulge, the testimony showing that Delgado was lifting his children in the pool immediately before he noticed the bulge, and the four-day period between obtaining treatment for the hernia and reporting it collectively support the ALJ's conclusion that Delgado's injury did not meet the requirements of A.R.S. § 23-1043(2)(b), (d). We find no error in the ALJ's conclusion that Delgado did not meet the requirements of A.R.S. § 23-1043(2).

CONCLUSION

¶17 For the foregoing reasons, we conclude the evidence supports the ALJ's decision, and we affirm.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

JOHN C. GEMMILL, Presiding Judge

/S/

JON W. THOMPSON, Judge