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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: 04/02/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CHRISTOPHER H. ALFORD,) 1 CA-IC 12-0039
)
Petitioner) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules
ARIZONA,) of Civil Appellate
) Procedure)
Respondent,)
)
HORIZON WASTE SERVICES,)
)
Respondent Employer,)
)
LEGION INSURANCE C/O SCF ARIZONA,)
)
Respondent Carrier.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20010-810169
Carrier Claim No. 05585

The Honorable Michael A. Mosesso, Administrative Law Judge

AWARD AFFIRMED

Christopher H. Alford
Petitioner Employee

Phoenix

Andrew F. Wade, Chief Counsel
Industrial Commission of Arizona

Phoenix

James B. Stabler, Chief Counsel State Compensation Fund Phoenix
By Sharon M. Hensley, Deputy Chief Counsel
Attorneys for Respondent Employer and Respondent Carrier

O R O Z C O, Judge

¶1 Petitioner Christopher H. Alford (Alford) seeks special action review of an Industrial Commission of Arizona (ICA) Decision upon Review affirming the ICA's Decision upon Hearing and Findings and Award. Alford argues on appeal that the administrative law judge (ALJ) erred by accepting Dr. McLean's testimony as true in denying his petition to reopen his claim because the evidence did not support it. Because the ALJ's findings were supported by substantial evidence in the record, we affirm.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.2 (2003) and 23-951.A (2012) and Arizona Rule of Procedure for Special Actions 10. In reviewing ICA decisions, 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 the evidence in a light most favorable to upholding the ALJ's decision. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

FACTUAL AND PROCEDURAL HISTORY

¶13 On March 14, 2001, Alford was injured while working for Horizon Waste Services. Legion Insurance C/O SCF Arizona (SCF) accepted Alford's workers' compensation claim, and Alford underwent treatment for his injury. SCF subsequently closed Alford's claim effective June 7, 2001, after medical reports found his condition to be medically stationary with no permanent disability.

¶14 On August 21, 2002, Alford filed a petition to reopen his claim, which was denied. Alford filed a request for hearing to reopen his claim on October 10, 2002, but after litigation, the ALJ denied the petition to reopen. On December 29, 2010, Alford filed a new petition to reopen, which was denied. Alford filed a request for hearing with the ICA to review his petition to reopen.

¶15 The ICA proceeding took place over the course of four days. The ALJ noted in his findings that the appropriate comparison dates for the injury are from when Alford first filed a petition to reopen in August 2002, which was denied in July 2003, and the date of Alford's most recent petition to reopen that was filed on December 29, 2010.

¶16 At the initial hearing on July 19, 2011, Alford testified about the details surrounding the incident that caused his back injury. He stated that his pain level remained

consistent from 2002 to 2010. Alford also testified that he had recently undergone surgery in January 2011 under the care of Dr. Yeung, a board-certified orthopedic spine surgeon, to correct his back pain.

¶17 During the second hearing on October 11, 2011, Dr. McLean, a board-certified orthopedic spine surgeon and SCF's medical expert witness, testified that he evaluated Alford in February 2011 and authored an Independent Medical Examiner's report. Dr. McLean stated that there were two other incidents, a motor vehicle accident in 2007 and a quad/ATV accident in November 2001 that aggravated Alford's symptoms after the original industrial injury. Dr. McLean concluded that he "could not to a reasonable degree of medical probability say that there is indeed a causal relationship between [Alford's] symptoms when [he] saw him . . . and the episode back in 2001."

¶18 At a subsequent hearing on February 15, 2012, Dr. Yeung, Alford's medical expert witness, testified that he had evaluated Alford periodically from February 2003 to the present and had recently performed surgery. He stated that over time it was his belief that "the herniation either worsened or []his nerve started getting some neurologic deficits because [of] continued compression and . . . he was finally getting some nerve damage." The ALJ asked Dr. Yeung whether these symptoms were related to the industrial injury in any way, and Dr. Yeung

responded “[y]es.” However, on cross-examination, Dr. Yeung agreed that the subsequent ATV and motor vehicle accidents could be the cause of Alford’s continuing pain. He testified that “any traumatic episode subsequent to his industrial injury could cause a disk herniation.”

¶9 At the final hearing on April 3, 2012, Dr. McLean testified that he “c[ould]n’t say that the current signs and symptoms are related to the original 2001 injury.” He further opined that the symptoms in 2010 could not be causally related to the industrial injury because Alford developed different symptoms over time that did not exist when the case was initially closed in 2001.

¶10 On April 26, 2012, the ALJ issued the Decision upon Hearing, in which he found that Alford had not met his burden of proof to have his claim reopened because he had not shown a new, additional, or previously undiscovered condition causally related to his industrial injury. After Alford filed a Request for Review, the ALJ issued the Decision upon Review that affirmed the Decision upon Hearing.

DISCUSSION

¶11 On appeal, Alford claims the ALJ committed error by accepting Dr. McLean’s opinions and conclusions as true over the testimony of Dr. Yeung. Specifically, he argues that there is insufficient evidence to support Dr. McLean’s findings.

¶12 We will affirm an ICA decision when it is reasonably supported by the evidence. *Lovitch*, 202 Ariz. at 105, ¶ 16, 41 P.3d at 643. “[An appellant] has the burden to prove [his] entitlement to reopen [his] claim by showing a new, additional, or previously undiscovered condition and a causal relationship between that new condition and the prior industrial injury.” *Id.* at 105-06, ¶ 17, 41 P.3d 643-44; see also A.R.S. § 23-1061.H (Supp. 2012).¹ In other words, Alford must present competent evidence that he has developed a new or previously undiscovered condition and the new condition is causally related to his prior industrial injury.

¶13 It is the duty of the ICA to resolve conflicts in the evidence presented and to determine which of the conflicting evidence is more probably correct. *Lazarin v. Indus. Comm’n*, 135 Ariz. 369, 373, 661 P.2d 219, 223 (App. 1983). Although medical diagnoses are binding upon the ICA, medical conclusions and opinions are not. *Tashner v. Indus. Comm’n*, 62 Ariz. 333, 337, 157 P.2d 608, 610 (1945). The ALJ determines the credibility of witnesses, *Royal Globe Ins. Co. v. Indus. Comm’n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973), and resolves conflicts in the evidence. *Johnson-Manley Lumber v. Indus. Comm’n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). If

¹ Absent material revisions, we cite to the current version of the statute.

findings of fact were made, our review is limited to determining "whether or not such findings of fact support the award, order or decision." A.R.S. § 23-951.B.

¶14 In this case, the record reflects a conflict between the testimony of Dr. McLean and Dr. Yeung concerning whether Alford's current condition is related to the industrial injury. Dr. McLean testified on two separate occasions that it was his opinion that Alford's current condition was not due to the industrial injury because it was unusual with this type of injury for Alford to be experiencing new symptoms that were not present at the time of the original injury. He stated that he "cannot causally relate it to the episode because [Alford] wasn't having symptoms from a herniated disc with nerve symptoms at the time of the injury."

¶15 Dr. Yeung testified that it was his belief that the continued pain Alford was experiencing could be causally related to the industrial injury. However, he admitted that the subsequent motor vehicle and ATV accidents could have also contributed to that pain or worsened it. Furthermore, Dr. Yeung stated that he also would have expected Alford to experience the pain he was complaining of in 2010 within a few weeks of the original injury.

¶16 In resolving conflicting testimony, the ALJ may consider the diagnostic methods used, the background and

qualifications of the expert witnesses, whether the testimony is speculative, and any bias and interest in the case. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988). After considering the evidence presented by the two doctors, the ALJ determined that Dr. McLean's opinion was "most probably correct and well founded." Because it is the ALJ's duty to resolve such conflicts in the evidence, the ALJ's decision will not be disturbed on appeal. See *Pac. Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214, 735 P.2d 820, 824 (1987) (reasoning that the appellate court does not reweigh the evidence and considers it in the light most favorable to sustaining the ALJ decision).

¶17 The record supports the ALJ's determination that Alford did not establish by reasonable preponderance of the evidence an objective change related to the industrial injury. Therefore, we find the ALJ's decision to deny the reopening of the claim to be sufficiently supported by the record.

CONCLUSION

¶18 For the foregoing reasons, we affirm the ICA Review, which affirmed the ICA Decision, denying Alford's petition to reopen his claim.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

PETER B. SWANN, Judge

/S/

BARRY C. SCHNEIDER, Judge Pro Tempore*

*The Honorable Barry C. Schneider, (Retired) and Judge Pro Tempore of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147 (2003).