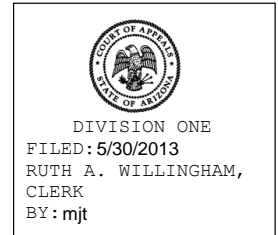


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



RURAL METRO,) No. 1 CA-IC 12-0042
)
Petitioner Employer,) DEPARTMENT D
)
ACE AMERICAN INSURANCE COMPANY &) **MEMORANDUM DECISION**
GALLAGHER BASSETT SERVICES,)
) (Not for Publication -
Petitioner Carrier,) Rule 28, Arizona Rules
) of Civil Appellate
v.) Procedure)
)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
AARON G. CHAMNEY,)
)
Respondent Employee,)
)

Special Action - Industrial Commission

ICA Claim No. 20111-450250

Carrier Claim No. 001881-032098-WC-01

Administrative Law Judge Michael A. Mosesso

AWARD AFFIRMED

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T H O M P S O N, Presiding Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review for a compensable claim. The petitioner employer, Rural Metro, presents five issues on appeal:

- (1) whether the hypothetical question relied upon by Dr. Ghebleh for his causation opinion was so factually inaccurate as to render his opinion insufficient to support the award;
- (2) whether Dr. Ghebleh's medical opinion was equivocal and legally insufficient to support the award;
- (3) whether the administrative law judge (ALJ) ignored uncontroverted medical evidence when he found the respondent employee's (claimant's) claim compensable;
- (4) whether Rural Metro was prevented from receiving a fair hearing as a result of the ALJ's rulings on its objections; and
- (5) whether the ALJ committed legal error when he allowed the claimant to change his testifying medical expert.

Because we find that Dr. Ghebleh's opinion was legally sufficient to support the ALJ's award, and that Rural Metro received a fair hearing, we affirm.

I. JURISDICTION AND STANDARD OF REVIEW

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

II. PROCEDURAL AND FACTUAL HISTORY

¶13 The claimant was employed by Rural Metro as a fire captain and paramedic. He worked at Rural Metro for over seventeen years and became a captain in May 2009. In July 2010, the claimant contracted West Nile Virus and was off work until December 2010. He then returned to work until February 18, 2011, when he developed bilateral pneumonia and Valley Fever. The claimant was hospitalized and came under the care of Farid Ghebleh, M.D., board certified in internal medicine, pulmonary disease, and critical care.

¶14 Dr. Ghebleh testified that he followed the claimant for several months after his hospitalization. During his treatment, he obtained both X-rays and CT scans of the

claimant's chest and ribs. At his March 29, 2011 office visit, the doctor released the claimant to return to work on April 7, 2011. The claimant testified that he returned to work for one shift, but he had insufficient lung capacity to perform his job duties.

¶15 On April 22, 2011, the claimant had a CT scan of his ribs, which revealed "healing left rib fractures." Dr. Ghebleh reportedly told the claimant that based on the CT scan, his pneumonia had improved but he had a small fracture of the 8th rib. The doctor's April 28, 2011 office note stated that the claimant was released to return to work again on May 4, 2011.

¶16 When the claimant contacted Rural Metro regarding his return to work, he was told that he would first need a fitness-for-duty examination. The claimant testified that when he arrived at STI Physical Therapy & Rehabilitation (STI) for the examination, he felt anxious because he wanted to get back to work and he was concerned about his lung capacity after the April 7, 2011 shortness of breath. He also stated that he suffered from high blood pressure, but it was fine on the morning of the examination.

¶17 The claimant testified that the fitness for duty examination consisted of four parts: initial paperwork, range of motion testing, EMS station, and firefighting station. One

portion of the range of motion testing required twisting the upper trunk of the body from the waist, first as far as possible to the left and then to the right. The claimant testified that he twisted to the left with no problem, but when he twisted to the right, "about 120 degrees from facing forward to facing back," he felt "a pop" almost like "a knuckle crack[ing]." The claimant completed the range of motion testing. But when the examiner took his vital signs in preparation for the functional portions of the exam, his blood pressure was elevated in excess of what STI would allow for testing and the exam was stopped.

¶18 The claimant testified that on the morning of the STI appointment he also was experiencing some tenderness and discomfort on the lower left side of his chest and rib cage. The paperwork the claimant completed at STI reflected those symptoms. The claimant stated that his blood pressure was still elevated when he got home, and he was sweating profusely. By late that afternoon, the claimant had developed an ache in his rib cage where he had felt the popping sensation, and by bedtime, the ache had become severe pain. He was unable to get comfortable or sleep that night, because it felt like "bones moving together" or "something was rubbing."

¶19 The following day, the claimant saw Matthew Cockett, M.D., at Southwest Family Practice. He told the doctor about a

number of medical problems including: high blood pressure, a rash from one of the Valley Fever medications, excruciating left chest pain, and excessive sweating. Dr. Cockett sent the claimant for a full series of rib X-rays, which were performed immediately after his office appointment. The claimant testified that the X-ray technician told him, "you need to go home, lay on your right side. Don't lay on your back . . . and if you start having trouble breathing, you probably punctured your lung."

¶10 The X-ray report stated:

CLINICAL HISTORY: Coughing; history of pneumonia; complaining of chest and left rib pain.

COMPARISON: Comparison is made with a CT dated 04/22/11.

EXAM: PA view of the chest and multiple views of the left ribs.

FINDINGS: Cardiomedial silhouette is within normal limits. No focal consolidations or pleural effusions. No pneumothorax. There is a 5 mm nodular density in the right lower lung which corresponds to a calcified granuloma seen on the CT. *There is a displaced fracture involving the left ninth rib toward the lateral aspect which appears displaced by approximately one bone width (8mm). The displacement is new compared to the CT. Minimal, if any, callus formation at this location.* Nondisplaced fracture with callus involving the left eighth rib corresponds to the CT finding.

IMPRESSION: *There is a displaced left ninth rib fracture. Fracture was present previously, displacement appears to be new.*

Healing left eighth rib fracture in anatomic alignment with some callus formation noted.

¶11 Dr. Cockett's office notes from the May 4, 2011 examination state:

Chief Complaint and HPI: f/u pulmonologist/fracture rib/trouble breathing

This patient is a 46 years old male here for a follow up from Pulm - Dr. Ghebleh. [S]ays was admitted to WVH for 5 days in Feb. Was diagnosed with Valley Fever and given Diflucan. Says is off Diflucan for 6 days b/c is changing to new meds and developed rash to body.

Rib fracture. Says during his admission suffered a rib fracture with forceful cough.

HTN. Says has been taking Bystolic 10mg for many years. Prior cough with Lisinopril.

Rash to arms and lower legs for 2 weeks. Dr Ghebleh felt that this may be due to Diflucan he's been taking for 2-3 months. Therefore, his med was stopped and a new med is getting auth.

Works as Fire Fighter and has been off work for couple months. Needs to perform a Fire Performance test, but is in lots of pain with his rib fracture. Says unable to sleep on his back or on his left side.

After Dr. Crockett reviewed the X-ray report, he added the following notation:

5/6/2011 6:52:36 PM

xray report reviewed. 8mm displaced fracture of 9th rib. Worse compared to CT scan in April. Callous to 8th rib.

pt notified. Aware of xray findings. Still with chest pain. No difficulty breathing/SOB. Strict ED precautions given. pt expresses understanding of potential for Pneumothorax. Pt is off work until further notice. pt in agreement.

will refer to chest surgery for further eval.

¶12 The claimant filed a workers' compensation claim for the displaced 9th rib fracture. It was denied for benefits, and he timely requested an ICA hearing.¹ The ALJ heard testimony from the claimant, a former coworker, Mr. Hyland, the STI examiner, and Drs. Ghebleh and Zoltan. The ALJ entered an award for a compensable claim, and Rural Metro requested administrative review. The ALJ supplemented and affirmed his Award on administrative review, and Rural Metro brought this appeal.²

III. DISCUSSION

¶13 Rural Metro argues that the ALJ erred by finding that the claimant's displaced rib fracture constituted a compensable industrial injury. Compensability requires an injury by accident arising out of and in the course of employment. See A.R.S. § 23-1021(A) (2012). This involves both legal and medical causation. *DeSchaaf v. Indus. Comm'n*, 141 Ariz. 318, 320, 686 P.2d 1288, 1290 (App. 1984). It is the claimant's burden to prove all elements of a compensable claim. *Toto v.*

¹ The Employer's Report of Injury stated that it doubted the validity of the claimant's claim "due to previous condition and fx of 8th rib previous to this one."

² The ALJ also amended his Award with two Orders Nunc Pro Tunc: May 14, 2012 and May 18, 2012.

Indus. Comm'n, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985). Unless the industrial injury immediately causes injuries that are obvious to a layman, expert medical evidence is required to establish a causal relationship between the industrial injury and its alleged consequences. *W. Bonded Prod. v. Indus. Comm'n*, 132 Ariz. 526, 527-28, 647 P.2d 657, 658-59 (App. 1982).

¶14 In this case, Rural Metro argues that the ALJ erred by relying on Dr. Ghebleh's opinion because it lacked an adequate factual foundation and was equivocal. Medical opinions must be based on findings of medical fact. See *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). These findings come from the claimant's history, medical records, diagnostic tests, and examinations. *Id.* This court has recognized that "medical testimony can be so weakened by proof of an inaccurate factual background that the testimony cannot be said to constitute 'substantial evidence,'" but not every factual inaccuracy will undermine a doctor's opinion and warrant its disregard. See *Desert Insulations, Inc. v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982) (citations omitted); see also *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 122, 776 P.2d 797, 800 (1989).

¶15 Rural Metro asserts that the hypothetical question relied upon by Dr. Ghebleh for his causation opinion is so factually inaccurate that the doctor's opinion cannot support the Award.

Q. [By Attorney Kurth] Now assume you were treating Aaron for this valley fever condition that he had. Assume that you had done a CT scan of his chest on April 22nd of 2011, and that CT of the chest showed healing left rib fractures. Assume that you saw him on April 28th of 2011, six days later and wrote that he could return to work as of May 4th. Now, assume that in the process of returning to work, he was sent by his employer to STI for a fitness-for-duty evaluation to see if he could physically return to work as a firefighter.

* * * *

Okay. Now, assume that when he got to that evaluation, it was done on May 3rd at STI. It started in the morning about 8:00 o'clock or so. Assume at that point, he was only having intermittent pain in his left lower rib cage area from those healing fractures at what appears to be the eighth and ninth ribs.

Now, assume that he had previous hypertension problems and that he was very anxious and hadn't sleep well the night before³ but he starts this evaluation during which the therapists that are working with him have him do trunk rotation and that as he is turning sharply to the right with the trunk of his body, he says that he feels a knuckle, crack-like pop in the left lower rib cage area and feels weird and says he tells one of the therapists about it, but he doesn't

³ The claimant provided this history to the STI examiner during a discussion of his elevated blood pressure.

feel extreme pain;⁴ although, he also took a hydrocodone pill before he started the evaluation that morning.

Assume that immediately thereafter his blood pressure shoots up, and they stop the evaluation, and he stays at the facility while they monitor his blood pressure for another couple hours, and then he goes home, and as that hydrocodone pill wears off later in the afternoon, he starts to feel what becomes increasingly severe pain in his left lower rib cage.

Assume that the very next day, he goes to a doctor and the doctor does X-rays of his rib cage, and they find what they report as a new eight-millimeter displacement of the left ninth rib fracture.

If you assume that the facts I'm telling you are true, would you have an opinion to a reasonable degree of medical probability as to whether the rotation of his trunk to the right, when he felt the pop in his left rib cage and a weird sensation, would you have an opinion to a reasonable degree of medical probability as to whether that motion would have displaced that fracture or would have caused that fracture of the ninth rib to become displaced?

* * * *

A. [Dr. Ghebleh] Yes. It is completely within reasonable probability that the movement, when a fractured rib is healing, could displace the fracture and open up the fracture again.

¶16 With regard to the hypothetical, Rural Metro first argues that Dr. Ghebleh was unaware the claimant suffered rib fractures during his February 2011 hospitalization. Although the claimant testified that coughing during his hospitalization

⁴ It was the claimant's testimony that he had continued to experience left-sided rib pain on a daily basis after his February 2011 hospitalization.

caused rib fractures, Dr. Ghebleh was his treating physician during that period and he stated that there were no rib fractures during the hospitalization. No documentary evidence was presented to contradict the doctor's statement. This fact was not part of the hypothetical question and the fractures were reflected on the April 2011 imaging study that was used in the hypothetical.

¶17 Rural Metro next argues that Dr. Ghebleh did not know which of the claimant's ribs were fractured after May 3, 2011. Dr. Cockett saw the claimant the day after the STI exam. Dr. Ghebleh did not see the claimant until June 2011, and this information was provided to the doctor by hypothetical. We note that the purpose of the hypothetical question was not to determine which ribs were fractured, but whether the claimant's work-related activities had caused a displaced rib fracture. We further recognize that the context of the testimony was that Dr. Ghebleh was at the hospital, on his cell phone, without his copies of the medical records, which therefore required the use of the hypothetical question by claimant's counsel.

¶18 In reaching an award, the ALJ considers all relevant evidence, both testamentary and documentary. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). An ALJ is not bound to accept or reject an expert's entire opinion, but

instead, he is free to combine portions of the expert testimony in a reasonable manner. *Fry's*, 161 Ariz. at 122-23, 776 P.2d at 800-01. In this case, the hypothetical question answered by Dr. Ghebleh appropriately included medical information from other treating physicians.

¶19 Rural Metro next argues that the hypothetical question erroneously stated that the claimant made a "sharp" movement during his trunk rotation testing. Although the claimant does not specifically state that his movement was sharp, it was not an unreasonable supposition in light of the claimant's testimony that he felt a cracking/popping sensation while performing the maneuver. The nature of the description is also supported by the May 4th X-rays which revealed a new displaced rib fracture.

¶20 Rural Metro also argues that the hypothetical is erroneous because it includes the supposition that the claimant's blood pressure shot up after the trunk rotation testing. The STI examiner testified that he took the claimant's blood pressure both before and after the range of motion testing. The claimant testified he was an EMT in the habit of taking his own blood pressure. He testified that based on his experience with his blood pressure it did not feel elevated prior to the range of motion testing. Claimant testified that the first time his blood pressure was taken at STI was

immediately following the range of motion testing. He testified that the reading was so high that the examiners then tried taking his blood pressure on his other arm and with a different device. It is undisputed that after the range of motion testing, claimant's blood pressure was elevated to a point at which the examination had to be stopped.

¶21 The ALJ is the sole judge of witness credibility. *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). It is the ALJ's duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). Where more than one inference may be drawn, the ALJ is at liberty to choose either and this court will not disturb his conclusion unless it is wholly unreasonable. *Id.* In this case, the ALJ resolved all conflicts in the evidence, including the issue over blood pressure changes, in the favor of the claimant whom he explicitly found credible.

¶22 Rural Metro also argues the hypothetical was erroneous because Dr. Ghebleh was asked to assume that a single hydrocodone pill on the morning of the examination could mask the symptoms of a displaced rib fracture. We disagree that the doctor was asked to assume that the medication masked the claimant's symptoms. The hypothetical question did include the

claimant's statement that he had taken a hydrocodone pill on the morning of the examination and his attorney's supposition that the pain would become more apparent as the medication waned. But as a medical professional, we believe Dr. Ghebleh would draw his own conclusions from this information and would have so stated if he found the proposition untenable.

¶23 Many factors enter into a resolution of conflicting evidence, including whether or not the testimony is speculative, consideration of the diagnostic method used, qualifications and backgrounds of the expert witnesses and their experience in diagnosing the type of injury incurred. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988). In this case, the ALJ explicitly found the claimant credible and resolved the medical conflict in favor of Dr. Ghebleh. We do not find that any of the alleged inadequacies in the hypothetical question were sufficient to undermine Dr. Ghebleh's causation opinion. See *Aguiar v. Indus. Comm'n*, 165 Ariz. 172, 173-74, 797 P.2d 711, 712-13 (App. 1990).

¶24 Rural Metro next argues that Dr. Ghebleh's opinion was equivocal, and therefore, legally insufficient to support the Award.

"Equivocal" . . . refers to that which is "subject to two or more interpretations"; to "equivocate" means "to avoid committing one's self in what one says". Arizona case law is consistent with such definitions

of "equivocal", and the rule that equivocal testimony cannot create a conflict is not necessarily applied merely because testimony is couched in terms of "possibility".

State Comp. Fund v. Indus. Comm'n, 24 Ariz. App. 31, 36, 535 P.2d 623, 628 (1975). This rule is recited in instances in which the doctor keeps changing his mind, i.e., expresses one opinion, reverses himself, retreats to his initial position, and then states he needs to conduct further examination. *Id.*

¶125 In this case, Dr. Ghebleh responded to the hypothetical question regarding causation on direct examination and stated that it was within reasonable medical probability that the claimant's rotation movement during the STI exam could have displaced his healing rib fracture. We have reviewed the cross-examination from the ICA hearing, and we do not find anything that would constitute equivocation or undermine this opinion. For that reason, we find Dr. Ghebleh's opinion legally sufficient.

¶126 Rural Metro next argues that the ALJ ignored uncontroverted testimony from its medical expert, Jon Zoltan, M.D., that a displaced rib fracture would have caused immediate pain.⁵ We do not believe that this opinion from the doctor

⁵ When medical evidence is uncontroverted and based on matters peculiarly within the realm of medical knowledge, the findings are binding on the ALJ. *Cammeron v. Indus. Comm'n*, 98 Ariz. 366, 371, 405 P.2d 802, 805 (1965).

constitutes a medical fact or uncontroverted evidence which could not be rejected by the ALJ. Instead, this was a part of Dr. Zoltan's opinion, which the ALJ rejected in favor of Dr. Ghebleh's opinion. We believe that it was reasonable for Dr. Ghebleh to have a different opinion regarding the onset of pain following a displaced rib fracture.

¶127 Rural Metro next argues that it failed to receive a fair ICA hearing as a result of the ALJ's evidentiary rulings given counsel's leading questions and speaking objections. ICA hearings are to be conducted in a manner so as to achieve "substantial justice." A.R.S. § 23-941(F) (2012). In accomplishing this objective, the ALJ is not bound by the technical rules of evidence and procedure which normally govern judicial proceedings. *Nolden v. Indus. Comm'n*, 127 Ariz. 501, 503, 622 P.2d 60, 62 (App. 1980). We have carefully reviewed the transcripts of the hearings conducted in this case, and we do not believe that the ALJ's rulings precluded Rural Metro from receiving a fair hearing.

¶128 Rural Metro last argues that the ALJ abused his discretion by allowing the claimant to substitute Dr. Ghebleh for Dr. Amabile as his testifying medical witness at the ICA hearing. To this end, Rural Metro cites *Amey v. Industrial Commission*, for the proposition that the ALJ should have

undertaken to inquire more about the substitution. 156 Ariz. 390, 752 P.2d 43 (App. 1988). We disagree. Dr. Ghebleh was listed in the claimant's September 12, 2011 Rule 41 statement⁶ as a potential witness. Dr. Amabile's medical records were in evidence and available to Dr. Zoltan and Rural Metro's counsel, and the two discussed Dr. Amabile's opinions on January 27, 2012. Claimant was forthright regarding the reason for the change from Dr. Amabile to Dr. Ghebleh and we find Rural Metro did not incur any additional costs or prejudice from the switch. The ALJ was not under a duty to make further inquiries into the change.

¶29 The ALJ has broad discretion to regulate and control the witnesses appearing before him. *See Travelers Ins. Co. v. Indus. Comm'n*, 18 Ariz. App. 28, 30, 499 P.2d 759, 761 (1972). In ICA proceedings, there is also a preference for matters to be decided on the merits and not on procedural technicalities. *In re Trull*, 21 Ariz. App. 511, 513, 520 P.2d 1188, 1190 (1974). In this case, we find no abuse of discretion.

⁶ See Arizona Administrative Code R20-5-141.A.2 (procedure to subpoena medical witnesses).

¶130 For all of the foregoing reasons, the award is affirmed.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

DONN KESSLER, Judge

/s/

PATRICIA K. NORRIS, Judge