DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

OLD WORLD TILE AND MARBLE CO. INC., Petitioner Employer,	No. 1 CA-IC 12-0047 DEPARTMENT D
SEQUOIA INSURANCE c/o BROADSPIRE SERVICES, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, MARCELINO GALLARZO, Respondent Employee.	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20112-420290

Carrier Claim No. 186213143001

Administrative Law Judge Anthony F. Halas

AWARD AFFIRMED

Lester & Norton, PC — Phoenix
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Attorneys for Petitioner Employer/Carrier

Taylor & Associates By Benjamin F. Manion Attorneys for Respondent Employee	Phoenix
Andrew Wade, Chief Counsel The Industrial Commission of Arizona Attorneys for Respondent	Phoenix
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D O W N I E, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a compensable claim. Petitioner employer, Old World Tile and Marble Co. Inc., and petitioner carrier, Sequoia Insurance (collectively, "Petitioners"), challenge the award in favor of Marcelino Gallarzo. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Gallarzo worked for over 15 years as a tile setter. He began experiencing knee pain in February 2010. Gallarzo initially saw Dr. Roberto Ruiz, who referred him to an orthopedic surgeon, Dr. Stacey McClure, in September 2010. Dr. McClure performed arthroscopic surgery on Gallarzo's right knee in February 2011 and on his left knee in March 2011. Gallarzo did not return to work until August 2011. At that time, he informed his employer for the first time that he believed his

knee injuries were work-related, and he filed an ICA Worker's Report of Injury on August 25, 2011. Gallarzo asserted "[g]radual injury to both knees from 15 years of tile setting."

¶3 The carrier denied the claim. Gallarzo requested a hearing, which was held. Petitioners argued: (1) Gallarzo did not file his claim within one year of the date of injury, as required by Arizona Revised Statutes ("A.R.S.") section 23-1061(A); and (2) Gallarzo failed to "forthwith" report his injury, as required by A.R.S. § 23-908(E) and (F).

¶4 Gallarzo testified that he spent 30-35 hours a week on his knees, laying tile. He stated he did not realize his knee problems were work-related until after the first surgery. At that time, Dr. McClure told Gallarzo his knee problems were "due to [his] job."

¶5 The administrative law judge ("ALJ") concluded Gallarzo's claim was compensable. Petitioners requested review, but the ALJ affirmed his decision. Petitioners filed a timely petition for special action. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A) and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶6 In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but we review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d

298, 301 (App. 2003) (citations omitted). We consider the evidence in the 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) (citation omitted).

¶7 Petitioners first contend Gallarzo's claim was untimely. Pursuant to A.R.S. § 23-1061(A), an employee must file a claim for compensation for an industrial injury "in writing within one year after the injury occurred or the right thereto accrued." The filing time "begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that the claimant has sustained a compensable injury." A.R.S. § 23-1061(A).

¶8 "The determination of when the injury became manifest is exclusively the province of the Commission as the trier of fact and not for this court." *Pac. Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214, 735 P.2d 820, 824 (1987). "We are limited in our review to a determination of whether or not there is evidence in the record which would justify the finding of the Commission." *Id.* The filing time "begins to run when the injured employee perceives the nature and seriousness of the injury *and recognizes the causal relationship between his injury and his employment*." *Id.* (Emphasis added.)

¶9 In deeming Gallarzo's claim timely, the ALJ relied on an August 26, 2010 report authored by Dr. Ruiz that attributed

the knee injuries to "direct trauma overuse of the joint and while working." The ALJ ruled that "the earliest date on which applicant Gallarzo knew, or should reasonably have known of the possible relationship of his knee condition to his work as a tile setter, was on August 26, 2010."

¶10 Considering the evidence in the light most favorable to upholding the award, *Lovitch*, 202 Ariz. at 105, ¶ 16, 41 P.3d at 643, the record supports the ALJ's determination. In urging a contrary interpretation of the evidence, Petitioners focus on an August 19, 2010 report by Dr. Ruiz stating that Gallarzo experienced "direct trauma overuse of the joint." But unlike the August 26 report, the August 19 report does not include the words "while working." And nothing in the record suggests that, prior to August 26, Dr. Ruiz advised Gallarzo that his knee problems were work-related.

¶11 Based on the evidence presented, the ALJ could reasonably conclude that Gallarzo neither knew nor reasonably should have known that his knee injuries were work-related prior to August 26, 2010. His compensation claim was filed within one year of that date. We therefore affirm the determination that Gallarzo's claim was timely filed.

¶12 We next consider Petitioners' contention that Gallarzo failed to forthwith report his injury, as required by A.R.S. § 23-908(E). *See, e.g., Magma Copper Co. v. Indus. Comm'n*, 139

Ariz. 38, 43, 676 P.2d 1096, 1101 (1983) ("The periods for reporting injury and for filing a claim for compensation are distinct."). Whether an employee has satisfied this requirement is ordinarily a question of fact to be resolved by the ALJ. *Mead v. Am. Smelting & Ref. Co*., 1 Ariz. App. 73, 76-77, 399 P.2d 694, 697-98 (1965).

¶13 Requiring prompt notice of an industrial injury serves two purposes. "First, a prompt report of injury allows an employer to ensure that the injured employee receives early medical treatment, which prevents aggravation of the injury. Second, timely notice affords the employer an opportunity to investigate the accident close in time to its occurrence." *Douglas Auto & Equip. v. Indus. Comm'n*, 202 Ariz. 345, 347, ¶ 5, 45 P.3d 342, 344 (2002) (internal citations omitted).

¶14 By delaying for almost one year from the August 26, 2010 date relied on by the ALJ, Gallarzo failed to forthwith report his injury. *See, e.g., Md. Cas. Co. v. Indus. Comm'n*, 33 Ariz. 490, 493, 266 P. 11, 12 (1928) (delay of three months is not "forthwith" reporting). Although the sanction for failing to report forthwith is typically forfeiture of compensation benefits, the ICA may relieve a claimant of this sanction "if it believes after investigation that the circumstances attending the failure on the part of the employee or his physician to

report the accident and injury are such as to have excused them." A.R.S. § 23-908(F).

¶15 Gallarzo bore the burden of establishing, by a preponderance of the evidence, an excuse for his failure to report forthwith. *See Douglas Auto*, 202 Ariz. at 347 n.1, ¶ 7, 45 P.3d at 344 n.1 (citation omitted). In this regard, our supreme court has stated:

> We have recognized at least two instances in which the Commission may excuse non-compliance with section 23-908.D: 1) when the employee "had no way of knowing either that the injury had occurred or that the injury was causally related to employment;" or 2) when the employer has not been prejudiced by the employee's lack of diligence in reporting the injury.

Id. at 347, 45 P.3d at 344.

¶16 Based on *Douglas Auto*, we next consider whether the record and the ALJ's findings support the determination that the employer was not prejudiced by Gallarzo's delay in reporting. *See Post v. Indus. Comm'n*, 160 Ariz. 4, 7-8, 770 P.2d 308, 311-12 (1989) (ALJ must make specific findings on all "material issues").

¶17 Lack of prejudice may be established by showing that the "injury was not aggravated by the employer's inability to provide early diagnosis and treatment" and that the "employer was not hampered in making his investigation and preparing his

case." *Pac. Fruit*, 153 Ariz. at 215-16, 735 P.2d at 825-26. The ALJ made specific findings regarding these factors, stating:

> 13. A. Relative to the question whether Gallarzo forthwith reported his gradual injury in a manner sufficient to prevent prejudice to his employer's ability to investigate the circumstances of his claim, the nature of the claim as gradual injuries to his knees renders essentially moot whatever investigation the employer might conduct after the fact – and despite the presumed knowledge of the employer as to the exertional demands tile setting required, no evidence was presented contravening Gallarzo's testimony as to those demands in his own performance of that work over time.

¶18 The record supports the ALJ's findings. There was no specific industrial accident for the employer to investigate. Nor was there evidence that Gallarzo's "failure to seek accommodations after he became aware in August 2010 of the possible relationship of the condition of his knees to his work resulted in any anatomical worsening of that bilateral condition." And the ALJ's determination that the knee surgeries "were reasonable under the circumstances" is a reasonable interpretation of the conflicting medical evidence.

¶19 Petitioners also contend Dr. McClure's testimony was "foundationally deficient and should not have been used as competent medical evidence to establish a compensable claim." We conclude otherwise. Dr. McClure testified it was "more likely than not, and very probable" that Gallarzo's work as a tile

setter caused the knee injuries. Dr. Anthony Theiler, an orthopedic surgeon who performed an independent medical examination, also testified. He opined that Gallarzo's work "did not accelerate his preexisting degenerative changes." Dr. Theiler attributed Gallarzo's knee problems to "genetic predisposition to arthritis."

¶20 The ALJ resolved the conflicts in the medical evidence in favor of Dr. McClure. It is the ALJ's duty to resolve conflicts in the evidence, and he may draw any inference from the evidence that is not "wholly unreasonable." *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988); *Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979).

¶21 Finally, Petitioners contend Dr. McClure's testimony was based on facts he "made up without any input from the applicant." But this argument goes to the weight to be given Dr. McClure's testimony, not its admissibility. The ALJ resolved the conflicts in the medical evidence "in favor of Dr. McClure's findings and conclusions as more probably correct and well-founded." The ALJ acted within his authority in weighing the conflicting medical testimony and ruling based on the medical evidence he found most persuasive.

CONCLUSION

¶22 For the reasons stated, we affirm the ALJ's award.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
ANDREW W. GOULD, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge