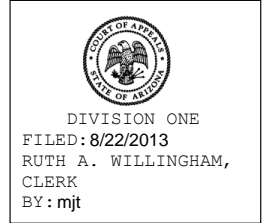


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



FLORENTINO DELEON,) No. 1 CA-IC 12-0068
)
Petitioner,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
THE INDUSTRIAL COMMISSION OF ARIZONA,) (Not for Publication -
) Rule 28, Arizona Rules
Respondent,) of Civil Appellate
) of Civil Appellate
ALBERTSON'S,) Procedure)
)
Respondent Employer,)
)
SPECIALTY RISK SERVICES,)
)
Respondent Carrier.)
)
)
)

Special Action - Industrial Commission

ICA Claim No. 20111-080392

Carrier Claim No. YME36762C

Administrative Law Judge Karen Gianas

AWARD AFFIRMED

Thomas C. Wilmer, P.C. Phoenix
By Thomas C. Wilmer
Attorney for Petitioner Employee

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

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Christopher D. Hill
Attorneys for Respondents Employer and Carrier

T H U M M A, Judge

¶1 This is a statutory special action review of an Industrial Commission of Arizona (ICA) award and decision upon review for a scheduled permanent impairment. Three issues are raised with this court:

(1) whether reasonable evidence of record supports the administrative law judge's (ALJ) finding that the petitioner employee (Claimant) is medically stationary;

(2) whether the ALJ's award is internally inconsistent by relying on portions of medical opinions provided by two doctors; and

(3) whether the ALJ's finding that the Claimant is medically stationary can be sustained in the absence of a medical examination.

Because the record reasonably supports the ALJ's conclusion that Claimant's condition is medically stationary, and because there is no improper inconsistency in the ALJ's adoption of portions of medical opinions from two doctors, the award is affirmed.

FACTUAL AND PROCEDURAL HISTORY

¶2 On April 8, 2011, while working as a baker for respondent employer Albertson's, Claimant injured his left knee

when he slipped and fell. Claimant filed a workers' compensation claim, which was accepted for benefits. Claimant then had arthroscopic surgery on his left knee and his claim was closed with a scheduled permanent partial impairment. Claimant timely protested and requested an ICA hearing.

¶13 The ALJ heard testimony from Claimant and medical doctors Richard A. Peairs and Anikar Chhabra. On the evidence presented, the ALJ entered an award for a scheduled permanent partial impairment. Among other things, the ALJ found:

8. I accept Dr. Peairs opinions regarding permanent impairment and work restrictions and Dr. Ch[h]abra's opinion that the recommendation for a total knee replacement is not related to the industrial accident. Therefore, the applicant's condition is medically stationary with a twenty-six percent permanent disability of the left lower extremity compensated at seventy-five percent of the average monthly wage.

After Claimant requested administrative review, the ALJ affirmed and supplemented the Award, finding among other things that Claimant "is not a credible historian." On Claimant's timely request for review, this court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) and 23-951(A) and Arizona Rule of Procedure for Special Actions 10.¹

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

DISCUSSION

I. Standard Of Review

¶4 This court defers to the ALJ's factual findings, but reviews questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). The evidence is considered 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. The ALJ Properly Considered Dr. Chhabra's Testimony.

¶5 Claimant argues Dr. Chhabra erroneously believed that the fall had to have caused both Claimant's historical arthritis and his ongoing knee symptoms before knee surgery would become an industrial responsibility. An employer takes an employee "with whatever peculiar vulnerabilities to injury the employee may have." *Murphy v. Indus. Comm'n*, 160 Ariz. 482, 486, 774 P.2d 221, 225 (1989) (quoting *Kelley's Case*, 477 N.E.2d 582, 584 (Mass. 1985)). When an industrial injury aggravates a pre-existing disease such that the worker is disabled, the result is compensable. See *Tatman v. Provincial Homes*, 94 Ariz. 165, 169, 382 P.2d 573, 576 (1963). But more is required than merely establishing an aggravation of a preexisting disease or infirmity and an inability to work. *Arellano v. Indus. Comm'n*, 25 Ariz. App. 598, 603-04, 545 P.2d 446, 451-52 (1976).

¶16 In *Arellano*, the claimant had been a laborer for 28 years and experienced no back problems until he sustained an industrial back injury while operating a jackhammer. *Id.* at 599, 545 P.2d at 447. Thereafter, the claimant was unable to return to work because of continuing back pain. *Id.* at 600, 545 P.2d at 448. The carrier closed the claim with no permanent impairment, and the claimant protested. *Id.* at 599, 545 P.2d at 447. Following ICA hearings, the ALJ resolved a conflict in the medical testimony in favor of the carrier's independent medical examiner, who testified that the claimant's industrial injury had resolved and any continuing symptomatology was attributable to the claimant's preexisting degenerative arthritis. *See id.* at 600-02, 545 P.2d at 448-50.

¶17 On appeal, the claimant in *Arellano* argued permanent disability because of his continuing pain and inability to work as a jackhammer operator. *Id.* at 600, 545 P.2d at 448. In affirming, this court noted the ALJ's resolution of the conflicting medical evidence and recognized that the claimant had the burden of establishing more than an aggravation of an underlying condition; the claimant needed to show that the industrial injury caused an aggravation that had not terminated and continued to contribute to the ongoing pain. *Id.* at 600, 603-04, 545 P.2d at 448, 451-52.

¶18 Applying *Arellano* here, the ALJ resolved the conflicting medical evidence in favor of Dr. Chhabra, a board certified orthopedic surgeon, fellowship trained in knee disorders. Dr. Chhabra reviewed Claimant's medical records pertaining to his industrially-related treatment, took a history from Claimant and performed a clinical examination. Dr. Chhabra also noted that Claimant had a prior left knee problem ten years before he slipped and fell and, at that time, another doctor told Claimant he would need knee replacement by the time he was 60 or 65 years old. Dr. Chhabra diagnosed degenerative joint disease in Claimant's left knee and opined that the preexisting degenerative arthritic changes predisposed Claimant to have meniscal pathology.

¶19 It is true that Drs. Chhabra and Peairs agreed Claimant needed a total knee replacement. But Dr. Chhabra clarified that the knee replacement was needed because of Claimant's preexisting degenerative arthritis, not the fall. Dr. Chhabra based that opinion on the severe arthritic changes visible on Claimant's April 15, 2011 magnetic resonance imaging, which was performed one week after the industrial injury, and another doctor's May 2011 arthroscopic surgery report and photos, which demonstrated extensive preexisting left knee arthritis.

¶10 Dr. Chhabra disagreed that the fall had any causal relationship with the increase in severity of Claimant's arthritis. Dr. Chhabra testified that the fall did not cause Claimant's preexisting arthritis, which is why he needs knee replacement surgery. Dr. Chhabra also testified that the fall could have exacerbated the symptoms of Claimant's preexisting arthritis, but not the arthritis itself. Dr. Chhabra testified that there was no causal relationship between the industrial injury and Claimant's need for a knee replacement.

¶11 In short, Dr. Chhabra testified that Claimant's arthritis (not his fall) is what necessitated his knee replacement; that Claimant's arthritis and the cause of that arthritis were present before the fall and that it was uncertain Claimant would have developed the symptoms "even without the fall." When asked whether the fall expedited the need for knee replacement surgery, Dr. Chhabra answered "I can't say that with probability because I don't know when [Claimant's] symptoms would have started."

¶12 On this record, Dr. Chhabra's testimony supports the ALJ's conclusion that Claimant's industrial injury symptomatically aggravated his preexisting arthritis, making his claim compensable, but that it did not worsen Claimant's preexisting arthritis, which would make the knee joint

replacement surgery an industrial responsibility. Thus, the ALJ properly considered Dr. Chhabra's testimony.

III. The ALJ's Decision Is Not Internally Inconsistent.

¶13 Claimant next argues that the award is internally inconsistent and must be set aside because the ALJ relied on portions of both Dr. Chhabra's and Dr. Peairs' opinions. Contrary to Albertson's argument, Claimant properly preserved this issue in his Request for Review.

¶14 An ALJ is not bound to accept or reject an expert's entire opinion, but instead, is free to combine portions of the expert testimony in a reasonable manner. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 123, 776 P.2d 797, 801 (1989). As applied, the ALJ found that Claimant was stationary with a 26 percent scheduled permanent impairment of the left lower extremity. The ALJ adopted Dr. Chhabra's opinion that Claimant was medically stationary and Dr. Peairs' opinion regarding the percentage of permanent impairment. Both doctors were asked to provide an opinion as to the percentage of permanent impairment assuming that Claimant's condition was found to be medically stationary. On this record, the ALJ did not abuse her discretion in using a combination of the medical opinions to find Claimant stationary, but award him the higher percentage of permanent impairment.

IV. The ALJ Did Not Err In Finding Claimant's Condition Was Medically Stationary.

¶15 Claimant argues Dr. Chhabra never specifically stated his condition had become medically stationary, and therefore, his opinion cannot support the ALJ's award. A claimant becomes stationary when the relevant medical condition is not subject to further improvement. See *Janis v. Indus. Comm'n*, 27 Ariz. App. 263, 265, 553 P.2d 1248, 1250 (1976). When a physician discharges a claimant from active treatment, the physician is required to determine whether the claimant sustained any permanent impairment of function resulting from the industrial injury. See Arizona Administrative Code R20-5-113.B.

¶16 Dr. Chhabra saw Claimant once, three months after arthroscopic surgery, and at that time Claimant was not yet stationary. In an independent medical examination (IME) report, Dr. Chhabra noted an expectation that Claimant's condition would become stationary in six weeks Claimant received recommended "viscosupplementation injections" and physical therapy. Three months later, Dr. Chhabra authored an addendum to the IME report that rated Claimant's permanent impairment, indicating Dr. Chhabra viewed Claimant as stationary. At the hearing before the ALJ, Dr. Chhabra testified Claimant was medically stationary. Taken as a whole, this evidence shows that Dr. Chhabra viewed Claimant's condition as stationary by the time of the IME report

addendum. As such, the ALJ did not abuse her discretion in finding Claimant's condition was medically stationary.

CONCLUSION

¶17 Because Claimant has shown no reversible error, the ALJ's award is affirmed.

/S/ _____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/ _____
MAURICE PORTLEY, Presiding Judge

/S/ _____
DONN KESSLER, Judge