IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

YUMA REGIONAL MEDICAL CENTER, *Petitioner Employer*,

SAFETY NATIONAL CASUALTY CORP./MATRIX ABSENCE MANAGEMENT, INC., *Petitioner Carrier,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

BARBI ERWIN, *Respondent Employee.*

No. 1 CA-IC 13-0004
FILED 11-21-2013

Special Action –Industrial Commission
ICA Claim No. 20071-560305 Carrier Claim No. 1956660
The Honorable Layna Taylor, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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By Donald L. Cross

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The Industrial Commission of Arizona

Counsel for Respondent

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By James L. Stevenson

Counsel for Respondent Employee

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Patricia A. Orozco joined.

T H U M M A, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review awarding Michael Erwin surviving death benefits for the death of respondent employee Barbi Erwin. Petitioner employer Yuma Regional Medical Center (Yuma) raises three issues on appeal: (1) whether the record contains legally sufficient evidence to support the administrative law judge's (ALJ's) conclusion that the medications causing Ms. Erwin's death were prescribed for an industrially-related condition; (2) whether the ALJ properly resolved conflicting medical evidence and (3) whether Ms. Erwin's use of carisoprodol was a supervening cause making her death noncompensable. Finding no error, the ALJ's award is affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 On May 22, 2007, Ms. Erwin worked for Yuma as a registered nurse and, while pushing a bed, felt a pull in her left calf muscle. After being seen in the hospital emergency room, Ms. Erwin was evaluated by orthopedic surgeon Alan Horowitch, M.D. Dr. Horowitch

[1] 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).

diagnosed a medial meniscus tear and a magnetic resonance imaging scan (MRI) confirmed the tear.

¶3 Ms. Erwin filed a workers' compensation claim, which was accepted for benefits. Following an independent medical examination (IME) confirming Dr. Horowitch's diagnosis, Ms. Erwin underwent arthroscopic surgery on August 10, 2007. On December 18, 2007, Dr. Horowitch concluded that Ms. Erwin had reached maximum medical improvement (MMI), despite ongoing pain along the lateral joint line of her left knee. He rated Ms. Erwin with a scheduled two percent permanent impairment. Based on Dr. Horowitch's report, Ms. Erwin's claim was closed with a two percent scheduled permanent impairment of the left lower extremity and an award of supportive care benefits.

¶4 In January 2008, Ms. Erwin's left knee gave out at work and she returned to Dr. Horowitch with ongoing complaints regarding the lateral aspect of her left knee. Dr. Horowitch obtained a new MRI scan and recommended a second arthroscopy. Petitioner carrier Safety National Casualty Corporation (Safety) sent Ms. Erwin to Neal L. Rockowitz, M.D., for an IME. Dr. Rockowitz opined that Ms. Erwin did not need surgery but recommended aggressive physical therapy for six to eight weeks for her "chronically deconditioned knee." Dr. Rockowitz stated that Ms. Erwin was not stationary at the time of his February 2008 IME.

¶5 Safety issued a notice of claim status denying additional knee surgery based on this IME, and Ms. Erwin timely requested a hearing. Following ICA hearings, where Ms. Erwin, Dr. Horowitch and Dr. Rockowitz testified, the ALJ found Ms. Erwin stationary as of June 11, 2008, with a five percent scheduled permanent partial impairment to the left lower extremity.

¶6 After her claim closed, Ms. Erwin continued to experience left knee pain and remained on light duty.[2] Dr. Horowitch continued to treat Ms. Erwin through late 2008, and he prescribed narcotic medication for her ongoing knee pain. Dr. Horowitch discharged Ms. Erwin when he

[2] Barbara Biro, Yuma's program coordinator for employee health services, confirmed that although Ms. Erwin was released to return to full duty when her industrial claim closed, she was transferred to a case manager position.

closed his medical practice, and she then received treatment from Alaa Babiker, M.D., and Charles Olivera, M.D.

¶7 In December 2008, Dr. Babiker, an internist and Ms. Erwin's family physician, began prescribing a rapid acting hydrocodone with Tylenol. During this same period, Dr. Olivera, a board-certified neurologist and pain management specialist, began prescribing Oxycontin, a long acting narcotic pain medication. The medical records reflect ongoing knee pain related to Ms. Erwin's May 2007 industrial injury and gradually increasing doses of opioid medications prescribed for the pain.[3]

¶8 In August 2009, Ms. Erwin began to see Dr. Awar, M.D., who prescribed Vicoprofen, a narcotic medication with Motrin. On August 18, 2009, Ms. Erwin hit her left knee on a filing cabinet at work and an emergency room physician prescribed additional hydrocodone. As a result, Ms. Erwin filed a new workers' compensation claim, which was accepted for benefits but closed after her death.

¶9 On August 30, 2009, Ms. Erwin went to bed early because she was tired and did not feel well. Her husband Michael Erwin testified that he checked on her at 10 or 11 p.m., and she was fine. When he checked on her again between 3 and 4 a.m., she was not breathing. Following a 9-1-1 call, Ms. Erwin was taken to the hospital, where she was pronounced dead. At the time of her death, Ms. Erwin had an appointment to see an orthopedic surgeon for her ongoing left knee pain.

¶10 Mr. Erwin filed a claim for death benefits, which was denied. He timely requested a hearing, and three ICA hearings were held. After hearing testimony from Mr. Erwin, Ms. Biro, Dr. Genrich and Dr. Greenberg, the ALJ awarded compensable death benefits. The ALJ found:

> 8. While the factual details of this case cannot be determined because they are known only to [Ms. Erwin], resulting in a more complex case than even the typical death benefits case, the legal standard to be applied is the same, and a simple one, as set forth in Reynolds

[3] Dr. Greenberg testified he agreed with Dr. Genrich's summary of the medications that Ms. Erwin was taking during the time leading up to her death.

> Metals [Co. v. Industrial Commission, 22 Ariz. App. 349, 527 P.2d 308 (App. 1974)]. The medical records, despite the lack of physical examinations or extensive workup, establish that the opioid medications and the Lexapro were prescribed for knee pain and the depression related thereto. . . . [Mr. Erwin] credibly testified that [Ms. Erwin] was in pain on a daily basis. Medical records from when the claim was open describe the chronic atrophy around the affected knee. The fact that the Soma [carisoprodol] was never prescribed does not make it a supervening cause, as it is only "a" cause of the poly drug overdose described by Dr. Greenberg. Neither doctor opined that the Soma [carisoprodol] by itself would have caused [Ms. Erwin's] death. [Ms. Erwin] had been taking Lortab even before the claim was closed.
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> 9. The evidence of record, including the medical opinions of both Drs. Genrich and Greenberg, establish that medication prescribed for pain resulting from the 2007 knee injury and its sequelae was "a" cause of [Ms. Erwin's] death. Reynolds Metals Co. v. Industrial Commission, 22 Ariz. App. 349, 527 P.2d 308 (App. 1974). Therefore, the application for dependents' benefits is approved.

Yuma timely requested administrative review, and the ALJ summarily affirmed the award. Yuma then sought special action review. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2), 23-951(A) (2013) and Arizona Rule of Procedure for Special Actions 10.[4]

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

DISCUSSION

¶11 In reviewing findings and awards of the ICA, 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).

I. The Sufficiency Of The Evidence.

¶12 Yuma first argues that there is legally insufficient evidence to show a causal connection between Ms. Erwin's industrial injuries (on May 22, 2007 and August 18, 2009) and her death. A dependent of an employee killed as a result of a compensable industrial injury is entitled to receive death benefits pursuant to the Arizona Workers' Compensation Act. A.R.S. § 23-1021. The applicant must prove all elements of a compensable claim, typically: (1) an injury and (2) medical evidence that causally relates the injury to the industrial incident. *Toto v. Indus. Comm'n*, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985); *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977).

¶13 A dependent filing for death benefits resulting from an industrial injury must show that the death resulted from an accident arising out of, and in the course of, employment. *Gaumer v. Indus. Comm'n*, 94 Ariz. 195, 198, 382 P.2d 673, 674 (1963). An "injury by accident" occurs when either the "external cause or the resulting injury itself is unexpected or accidental." *Paulley v. Indus. Comm'n*, 91 Ariz. 266, 272, 371 P.2d 888, 893 (1962). To be compensable, the industrial injury needs only have contributed to or be "a" cause of the employee's death (and does not have to be the sole or only cause). *Reynolds Metals Co. v. Indus. Comm'n*, 22 Ariz. App. 349, 352, 527 P.2d 308, 311 (1974).

¶14 Where the result of an industrial injury is not clearly apparent to a layperson, expert medical testimony is required. *W. Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 527, 647 P.2d 657, 658 (App. 1982). The qualifications and backgrounds of expert witnesses and their experience in diagnosing the relevant type of injury may be considered in resolving conflicting evidence. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988). The ALJ is the sole judge of witness credibility and is to resolve all conflicts in the evidence and draw warranted inferences from that evidence. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968).

¶15 As applied, Mr. Erwin had the burden of proving that Ms. Erwin's death from a drug overdose was causally related to her industrial injuries. This causal relationship was not obvious to a layperson and, accordingly, had to be established by medical evidence. The first question then is whether the narcotic medications that Ms. Erwin took were prescribed for her industrial left knee injuries and resulting pain.

¶16 Mr. Erwin testified that Ms. Erwin's May 2007 industrial left knee injury caused her to have daily pain until her death. He testified Ms. Erwin took both hydrocodone and Oxycontin for her pain, and these medications were prescribed for her by Drs. Horowitch, Babiker and Olivera. Mr. Erwin testified each doctor was aware of the medications being prescribed by the other doctors.

¶17 When Ms. Erwin's claim closed in June 2008, Dr. Horowitch recommended additional arthroscopic surgery to treat her May 2007 industrial left knee injury. Dr. Horowitch prescribed narcotic pain medication for this condition through 2008. Ms. Erwin then was treated by Drs. Babiker and Olivera, who continued to prescribe narcotic pain medications. Dr. Olivera's medical records from March and April 2009, quoted in substantial detail, relate the medications to Ms. Erwin's May 2007 industrial left knee injury.

> DATE OF SERVICE: March 11, 2009
>
> CHIEF COMPLAINT: Left knee pain after May 27, 2007 after transferring the patient.
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> HISTORY OF PRESENT ILLNESS: This is a 41-year-old white woman complaining of left knee pain since May of 2007. This injury occurred at work while working as a nurse. The patient complained of swelling and pain at the medial aspect of the knee. . . . The patient is still having swelling and pain. Pending reevaluation by orthopedic surgeon again. She has been told the meniscus continue to tear. Pain at this time is rated at 7/10 and severity at worse would be 9/10. At best would be rated 4-5/10. The patient has been using ibuprofen 800 mg in the morning and her blood work is being followed. She has been following for any liver or kidney toxicity and so far has been

okay. The patient also using Lortab in the evening 5/500 and has taken up to two pills at night. During the day, [s]he may take total of 5-6 pills. Pain is described as an achy, sharp and burning thriving type of pain. The patient has had injections to the knee but last helped only for one week. The patient denies any significant side effects from the medications such as constipation, nausea, vomiting or sedation. The pain is continuous and exacerbated with physical activity.

IMPRESSION:

1. Left knee arthropathy.

* * * *

RECOMMENDATIONS:

3. Routine blood work from neurological standpoint including vitamin and B12, homocystine level, CRP cardiac and vitamin D.
4. Try diclofenac (Cataflam 50 mg) one twice a day whenever needed for pain.
5. Continue hydrocodone 10/500 maximum three per day.

* * * *

7. The patient informed from neurological standpoint about condition diagnosis, management and medications side effects and she agrees to proceed with recommendations. The patient will require to continue follow-up with orthopedic surgeon for knee pain.

* * * *

DATE OF SERVICE: April 15, 2009

PROBLEMS:

1. Left knee arthropathy.

* * * *

SUBJECTIVE: This is a follow-up visit for this 41-year-old woman, registered nurse presented follow-up. The patient has severe pain throbbing and achy of the knee on the left side. The pain is rated at 8/10 worse, with use of medications will be down to 4/10. The patient is taking OxyContin 20mg twice a day, usually taking only at night. Lortab 10/500 taking 4-5 per day. The patient took recently extra one due to migraine headache and it tended to help per patient. The patient is able to sleep now with the use of OxyContin. The patient denies any constipation and denies any drowsiness with these medications. The patient used diclofenac but it provided no relief. She thinks that ibuprofen helps even more. . . . The patient's level of energy is not good per patient.

* * * *

IMPRESSION:

1. As above.
2. Persistent left knee pain.

RECOMMENDATIONS:

1. Continue same regime of medications including OxyContin 20 mg twice a day. The patient may increase the dose of to 2 pills up to 20 mg is needed for severe pain. Continue hydrocodone 10/500 one every six hours whenever needed for breakthrough pain, maximum two per day. The patient is advised to minimize[] its use. The patient understands and will follow recommendations.

* * * *

> 4. The patient was treated today with trigger point injection to the left knee in order to provide some help.

¶18 Ms. Erwin sustained a second compensable industrial left knee injury on August 18, 2009, and her treatment included additional narcotic pain medication. The record contains legally sufficient evidence to establish that Ms. Erwin's industrial knee injuries caused ongoing pain and disability for which she sought medical treatment and took large quantities of narcotic medication up to the time of her death.[5]

¶19 This leaves the question of whether the narcotic pain medications prescribed for Ms. Erwin's left knee injuries and her death from a drug overdose were causally related. The ALJ heard testimony from Dr. Genrich, a doctor of pharmacy, and Dr. Greenberg, board certified in addiction medicine. Dr. Genrich reported:

> I would like to clarify the significant increase in the amount of hydrocodone that Mrs. Erwin was taking on a daily basis. Prior to August 1st, she was taking an average of eight (8) tablets daily of the hydrocodone/apap 10/500mg or 80mg of hydrocodone per day. As of August 2nd, it appears from the dispensing records that she was not only taking the hydrocodone prescribed by Dr. Babiker but also the hydrocodone in the generic Vicoprofen tablets that were prescribed by Dr. Awar. . . . As a result, with not even counting the twenty (20) hydrocodone/apap 5/500 tablets that the ER physician gave her on

[5] An injured claimant's condition becomes stationary when nothing further in the way of medical treatment is indicated to improve the condition. *See, e.g.*, *Home Ins. Co. v. Indus. Comm'n*, 23 Ariz. App. 90, 94, 530 P.2d 1123, 27 (1975). "The persistence of pain may not of itself prevent a finding that the healing period is over, even if the intensity of the pain fluctuates from time to time, provided again that the underlying condition is stable." 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 80.03[3], at 80-6 to 80-7 (2000).

> 8/19 . . .she increased from 80mg per day to 140mg . . . per day on a regular basis . . .
> * * * *
> . . . It is my opinion that the sudden, sustained increase in Mrs. Erwin's intake of hydrocodone . . . manifested itself in increased side effects, especially the respiratory depression. It is a very high pharmacological probability that this increase in respiratory depression caused by the need for more analgesics following the second knee injury stopped her heart and resulted in her demise.

¶20 At the time of Ms. Erwin's death, a blood test revealed the presence of Soma (carisoprodol) and its metabolite meprobamate in Ms. Erwin's system. Although Ms. Erwin had not been prescribed carisoprodol, Mr. Erwin had taken carisoprodol for years to treat leg cramps. With regard to the decedent's "poly drug overdose death," Dr. Greenberg reported: "My medical opinion is that the inappropriate ingestion of a contraindicated drug, [carisoprodol], was the *main* contributor to the death of the otherwise opioid tolerant patient."[6]

¶21 At the ICA hearing, Dr. Greenberg testified that he agreed with the autopsy results of Eric D. Peters, M.D., "a competent, experienced toxicologist." Dr. Peters listed the primary cause of death as "combined drug intoxication, including opioids . . . [Carisoprodol] and Citalopram . . . ." On cross-examination, Dr. Greenberg agreed that hydrocodone, Oxycodone and carisoprodol were each "a cause of death" and "that the Lexapro played a role in it too." Dr. Greenberg testified that it was not possible to state the percentage of contribution for each drug because Ms. Erwin died of a poly drug overdose and all of these drugs were implicated.

¶22 Yuma argues that Dr. Genrich was not competent to provide a causation opinion. A non-medical witness may offer expert testimony as long as he possesses the necessary qualifications to be deemed an expert on the subject. *Madison Granite Co. v. Indus. Comm'n*, 138 Ariz. 573, 577-78,

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[6] Dr. Greenberg also criticized the "substandard chronic pain medical care provided" by Drs. Babiker and Olivera, an issue not relevant to the resolution of this appeal.

676 P.2d 1, 5-6 (App. 1983). *Madison Granite* held that the weight to be given testimony of an expert witness who is not a medical doctor is solely within the discretion of the ALJ. *Id.* at 577 n.3, 676 P.2d at 5. Such an expert witness may give a causation opinion as long as the witness has the qualifications required by the rules of evidence governing expert testimony and by the facts of the particular case. *Id.* at 577-78, 676 P.2d at 5-6. As applicable here,

> [a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Ariz. R. Evid. 702. Dr. Genrich's expert qualifications on pharmaceuticals were sufficiently established at the ICA hearing to allow him to testify about the drugs at issue. Accordingly, the ALJ did not err in relying upon Dr. Genrich's opinion in reaching her Award.

II. Resolution Of Conflicting Medical Evidence.

¶23 Yuma argues that the ALJ failed to resolve the medical conflict between Drs. Genrich and Greenberg. Contrary to Yuma's argument, as relevant here, the testimony of these doctors can be read to be consistent, because both doctors recognized that the drugs in Ms. Erwin's blood were each contributing factors to her death. Further, the ALJ is not bound to accept or reject an expert's entire opinion, but instead, may accept and combine portions of different expert's testimony in a reasonable manner. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 123, 776 P.2d 797, 801 (1989).

III. Ms. Erwin's Use Of Carisoprodol.

¶24 Yuma last argues that Ms. Erwin's ingestion of carisoprodol on the night of her death broke the causal chain between her use of narcotic pain medications prescribed for her industrial left knee injuries and her death. This concept more typically arises in reopening cases where there has been an intervening injury. An intervening injury contributing to the current condition does not break the causal chain, indicating an intervening injury breaks the causal chain only if it is the sole cause of the claimant's current condition. *See, e.g.*, *Parnau v. Indus. Comm'n*, 87 Ariz. 361, 366, 351 P.2d 643, 646 (1960); *Klosterman v. Indus.*

Comm'n, 155 Ariz. 435, 437-38, 747 P.2d 596, 598-99 (App. 1987). If the industrial injury is one of multiple causes of the claimant's current condition, the connection is sufficient for reopening unless it becomes so attenuated that the current condition cannot be said to be a direct and natural result of the original injury. *See Mercante v. Indus. Comm'n,* 153 Ariz. 261, 264, 735 P.2d 1384, 1387 (App. 1987). Assuming *arguendo* that this legal test applies here, there is no evidence of record that carisoprodol was the sole cause of death (as opposed to a contributing cause). *See Reynolds Metal Co.*, 22 Ariz. App. at 352-53, 527 P.2d at 311-12. Accordingly, the ALJ did not err in addressing Ms. Erwin's use of carisoprodol.

CONCLUSION

¶1 The ALJ's award of death benefits is affirmed.