IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DEBORAH L. KORTH, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

THE CHEESECAKE FACTORY, *Respondent Employer*,

INDEMNITY INS. CO. OF NA/GALLAGHER BASSETT,
Respondent Carrier.

No. 1 CA-IC 15-0013
FILED 3-24-16

Special Action - Industrial Commission

ICA Claim No. 20131-34047
Carrier Claim No. 001687-018801-WC-01

J. Matthew Powell, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Fendon Law Firm, PC, Phoenix
By J. Victor Stoffa
Counsel for Petitioner

Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent

Lundmark, Barberich, LaMont & Slavin, P.C., Phoenix
By R. Todd Lundmark
Counsel for Respondents Employer and Carrier

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Lawrence F. Winthrop joined.

K E S S L E R, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for temporary disability benefits. Three issues are presented on appeal, whether the administrative law judge ("ALJ"):

> (1) erred by refusing to recall the petitioner employee ("claimant") for additional testimony;
>
> (2) made legally sufficient findings to resolve the medical conflict; and
>
> (3) erroneously refused to admit the claimant's work performance review into evidence.

Because we find that the evidence of record reasonably supports the ALJ's award finding the claimant's industrial injury stationary with no permanent impairment, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 The claimant worked for the respondent employer, The Cheesecake Factory, as a server for six years when, on March 23, 2013, she sustained a left knee strain when she slipped in water on the floor. She filed a workers' compensation claim, which was accepted for benefits. The claimant received conservative medical treatment and continued to perform her regular work. Based on the treating physician's recommendation, the respondent carrier, Indemnity Insurance Co. of NA ("Indemnity"), closed the claimant's claim with no permanent disability. The claimant timely requested a hearing.

¶3 The ALJ held three ICA hearings for testimony from the claimant and two orthopedic surgeons. Following the hearings, the ALJ entered an award for temporary disability benefits. The claimant timely requested administrative review, and the ALJ summarily affirmed the award. The claimant brought this appeal.

¶4 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (2012). *See* Ariz. R.P. Spec. Act. 10.[1]

DISCUSSION

¶5 In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. *See Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003). 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 (App. 2002).

¶6 The claimant first argues that the ALJ committed legal error when he did not permit her to be recalled to provide additional testimony after both doctors testified. The basis for the argument is that this deprived the claimant of personally testifying regarding her improvement following surgery.

¶7 A party to an ICA hearing should have an opportunity to develop the evidence relevant to the hearing, both by cross-examination of witnesses and by presenting evidence of his own. *Pauley v. Indus. Comm'n*, 10 Ariz. App. 315, 317 (1969). But the ICA "is vested with sound discretion to regulate and control the witnesses appearing before it." *Travelers Ins. Co. v. Indus. Comm'n*, 18 Ariz. App. 28, 30 (1972). If it appears that the testimony would be redundant or unnecessary to a resolution of the issues, the ALJ has the discretion to refuse to issue a subpoena for a witness. *Reinprecht v. Indus. Comm'n*, 27 Ariz. App. 7, 10 (1976).

¶8 In this case, there was a conflict between the testifying doctors as to the appropriate method for treating the claimant's industrial left knee injury. Gary Purcell, M.D., a board-certified orthopedic surgeon, first saw the claimant on March 14, 2014. He initially provided conservative treatment, but on June 5, 2014, he performed a left medial meniscectomy. Dr. Purcell testified that after the surgery, the claimant returned to her

[1] We cite the current version of applicable statutes unless revisions material to this decision have occurred since the events in question.

preinjury condition with essentially no knee pain and the ability to perform most of her normal activities. It was his opinion that the surgery was necessitated by the industrial injury and was not related to claimant's preexisting degenerative arthritis. He last saw the claimant on August 13, 2014, and had not yet released her from treatment.

¶9 Steven R. Kassman, M.D., board-certified in orthopedics, first saw the claimant on June 24, 2013. On physical examination of the left knee, he found the claimant had a "bow-legged deformity" from "significant medial inner-sided arthritis" and "pseudolaxity . . . [from] loss of cartilage in the inner aspect of the knee." The doctor stated that these findings were consistent with his review of claimant's May 18, 2013 MRI. Dr. Kassman testified that claimant had advanced Grade 4 degenerative arthritic changes, predominantly in the medial compartment of her left knee, and that these changes had allowed the joint to collapse with resulting complex tearing of the medial meniscus. He recommended conservative treatment of analgesics, anti-inflammatories, and steroid injections. The doctor reported that the only other appropriate treatment would be a total knee replacement.

¶10 Dr. Kassman also reviewed Dr. Purcell's records including his operative report.[2] In that regard, he testified that arthroscopy is not an appropriate treatment for end-stage arthritis. As to any "improvement" in the claimant's knee condition, the doctor explained that medical literature documents a transient improvement after arthroscopy in this type of situation, perhaps simply from the irrigation of the knee by washing out inflammatory agents which can last "[s]everal weeks, several months. I don't know. Six months. Whatever [but] not any sustained improvement." It was Dr. Kassman's opinion that the industrial injury caused only a

[2] Claimant suggests that Kassman's opinion was foundationally flawed because he was unable to recall certain facts from her medical history and records. Contrary to claimant's assertion, a physician may base an opinion entirely on personal observation and examination. *Spector v. Spector*, 17 Ariz. App. 221, 226 (1972).

temporary exacerbation of the claimant's underlying degenerative arthritis.[3]

¶11 While we recognize claimant's interest in again testifying, both doctors recognized that claimant believed that her left knee condition had improved following Dr. Purcell's arthroscopic surgery. But each doctor had a different opinion as to the cause and permanency of this improvement. We do not believe that the ALJ erred by refusing to recall the claimant at the conclusion of the final hearing so that she could testify that she believed that her knee had improved post-surgery. Further, claimant's subjective opinion concerning improvement does not satisfy the requirement of qualified medical opinion based on objective signs, symptoms, and findings; accordingly, her testimony was of little to no relevance in this regard.

¶12 Claimant next argues that the ALJ erred by failing to adopt Dr. Purcell's testimony because he was the only doctor to actually observe claimant's knee during surgery. We note that Dr. Kassman reviewed Dr. Purcell's operative report and testified:

> I know she underwent the arthroscopy. I did review the operative report. . . .he references an indication that the MRI demonstrated some degenerative changes. I think that's not a totally accurate or honest depiction of what the MRI demonstrated.
>
> He makes absolutely no comment, or at least it's not accurately transcribed because there's a blank there, but the trochlear groove blank space cartilage changes tested the

[3] A symptomatic aggravation of a preexisting condition, which requires additional medical treatment or results in additional disability, can constitute a compensable claim. *See Mandex, Inc. v. Indus. Comm'n*, 155 Ariz. 567, 570 (App. 1986); *Indus. Indem. Co. v. Indus. Comm'n,* 152 Ariz. 195, 199 (App. 1986). But to establish a permanent impairment, the claimant has the burden of showing more than a temporary aggravation of an underlying condition; she must show the industrial injury caused an aggravation which has not terminated and continues to contribute to her ongoing disability. *Arellano v. Indus Comm'n,* 25 Ariz. App. 598, 603-04 (1976).

> femoral condyle and medial tibial plateau. *So it's impossible to know what he saw because it's largely blank there.*

(Emphasis added.)

¶13 Medical testimony is generally necessary to establish the nature and extent of the claimant's injury and its probable causal relationship to the industrial injury. *McNeely v. Indus. Comm'n*, 108 Ariz. 453, 455 (1972); *see Lawler v. Indus. Comm'n*, 24 Ariz. App. 282, 284 (1975). As the trier of fact, 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 (1968). This is particularly true of conflicts in expert medical testimony. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975). Resolving conflicting evidence involves consideration of many factors including:

> whether or not the testimony is speculative, consideration of the diagnostic method used, qualifications in 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 (1988).

¶14 In this case, both testifying doctors are board-certified in orthopedics and each treated claimant over a period of months. Both doctors recognized that claimant had preexisting degenerative arthritis in her left knee and a torn medial meniscus. The doctors' opinions only differed as to what caused the tear and its appropriate treatment. We do not find that Dr. Purcell's surgery affects the ALJ's duty to resolve the medical conflict.[4]

¶15 Claimant last argues that the ALJ erred by refusing to admit her September 28, 2012 work performance evaluation to corroborate her testimony that she was not experiencing any knee problems prior to the industrial injury.

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[4] Claimant also argues that her surgery should be compensable under *Chappell v. Industrial Commission,* 174 Ariz. 220 (App. 1992). However, *Chappell* is distinguishable because in that case, we specifically noted that the claimant should file a petition to reopen before undergoing self-procured treatment. 174 Ariz. at 223. Further, we recognized that it remains the prerogative of the ALJ to determine whether the surgical procedure was reasonably required under all of the circumstances of the case. *Id*. at 222.

> MR. STOFFA: I'd move to admit this into evidence, your Honor.
>
> . . . .
>
> MR. LUNDMARK: I don't know what the relevance is.
>
> JUDGE POWELL: I'm not sure I know either.
>
> MR. STOFFA: The relevance is to show that any limitations that she has have occurred since this accident and there is no preexisting component of this injury that has affected her ability to work in any way.
>
> JUDGE POWELL: Well, that doesn't prove that. She told us that there isn't any and nobody's contending that.
>
> MR. STOFFA: It may keep the doctor from assuming she must have had some problems from her work.
>
> JUDGE POWELL: Well, if a doctor wants to rely on that, then we'll take it when the doctor testifies. Otherwise, it's not going to make any difference to me.

In this case, both doctors received a history from claimant that included being asymptomatic prior to her industrial injury. Further, the performance evaluation was not timely filed into evidence. *See* Ariz. Admin. Code R20-5-155(B), (D).

CONCLUSION

¶16 For the foregoing reasons, we affirm the award.