

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

EDWARD KIM, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

PAYBACK PEST CONTROL, *Respondent Employer,*

REPUBLIC FIRE & CASUALTY, *Respondent Carrier.*

No. 1 CA-IC 16-0038
FILED 4-20-2017

Special Action - Industrial Commission

ICA Claim No. 20151-200231

Carrier Claim No. None

The Honorable J. Matthew Powell, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Day Law Office, Mesa
By Linda C. Day, John F. Day
Counsel for Petitioner Employee

Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent

Jardine, Baker, Hickman & Houston, PLLC, Phoenix
By Stephen C. Baker
Counsel for Respondents Employer and Carrier

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) Decision Upon Review Affirming Decision Upon Hearing and Findings and Award of Noncompensable Claim. Edward Kim (Petitioner) appeals the Administrative Law Judge's (ALJ) determination and award in favor of Payback Pest Control (Respondent Employer) and Republic Fire & Casualty (Respondent Carrier). Concluding that the evidence supported a finding that Petitioner's medical condition was not work-related, the ALJ entered an award in favor of Respondent Employer and Carrier. We also affirm.

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) (2016), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10 (2009). On appeal, 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).

¶3 "[N]either the findings nor an award of an Industrial Commission can be based upon surmise, conjecture, speculation or mere possibilities, . . . they must be based upon facts or inferences deducible therefrom." *Treadway v. Indus. Comm'n*, 69 Ariz. 301, 307-08, 213 P.2d 373, 377 (1950). A worker is not entitled to compensation absent a showing of "a causal connection between his employment, or his place of employment, or his illness-something which happened to him in the performance of his duties, or some contact he made at this place of employment while on duty there-which forms the connecting link between his employment and the contraction of the illness." *Id.* at 307, 213 P.2d at 377 (citation omitted).

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¶4 The record shows that Petitioner was admitted to Mercy Gilbert Medical Center (Mercy) on January 4, 2015. There, Petitioner was observed to show symptoms of necrotizing fasciitis. Two days prior, Petitioner had been to an urgent care facility with “fever, chills, body aches, and fatigue” onset three to four days before being seen at the urgent care.

¶5 Petitioner’s subsequent application for worker’s compensation benefits was denied by the Respondent Carrier, and Petitioner requested a hearing. At the hearing, Petitioner claimed that he became symptomatic after crawling under mobile homes in a mobile home park, applying treatment for termites, while working for Respondent Employer. After reviewing his records, Respondent Employer’s owner testified that the only time Petitioner was working under a mobile home within the time-frame of his illness was on January 2, 2015. Further, although Petitioner testified to “believ[ing]” he had been bitten by a spider while working, he did not have any actual recall of being bitten by any insect, nor did he recall any specific incident of trauma.

¶6 Peter C. Kelly, M.D. (Dr. Kelly), an infectious disease specialist, performed an independent medical evaluation on Petitioner. Dr. Kelly concluded that Petitioner suffered from an “[a]cute necrotizing fasciitis caused by group A beta-hemolytic *Streptococcus* also known as *Streptococcus pyogenes*.” He testified that *Streptococcus*, Group A, is the “single most likely cause of necrotizing fasciitis.” He noted that the organism is not an environmental organism that would be found “in dirt or on the ground. Rather it is an organism that you carry on yourself fairly commonly.” He continued: “Most of the time it lives [on an individual’s skin] quiescently and does not cause infection but under certain circumstances and with certain strains of that organism it can cause devastating infections.” Furthermore, in some cases, like this one, there is “no clear cut obvious portal of entry” by the organism into the skin. Here, there was no established portal of entry, even though both Petitioner’s treating doctor at Mercy and Dr. Kelly acknowledged that Petitioner arrived at Mercy with “an enlarging lesion . . . on his left upper thigh.”

¶7 Given that a *Streptococcus*, Group A infection could naturally occur, and that Petitioner did not give Dr. Kelly a history of being bitten at work and could not pinpoint an incident of work-related trauma, Dr. Kelly concluded that the infection was not likely a work-related injury.

¶8 We agree that Petitioner’s claim fails due to the lack of identifiable connection between his work and contraction of his illness. Dr.

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Kelly's conclusion that the infection was not connected to Petitioner's work is not negated by Petitioner's position that there were no other events of "potential exposure." Absent an identifiable work incident leading to the infection, one can only speculate, at best, about the illness's origin. As noted, Petitioner cannot successfully base his claim for an ICA award on speculation. *See supra* ¶ 3. The speculation becomes even more wanting of evidence given the fact that Petitioner's infection is of a kind that may occur without any identifiable trigger.

¶9 Because the evidence in the record supports the ALJ's award and decision upon review, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA