IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

RICHARD KILLE, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

WALMART STORES, INC., *Respondent Employer*,

WALMART ASSOCIATES INC. C/O CLAIMS MANAGEMENT, INC.,
Respondent Carrier.

No. 1 CA-IC 16-0047
FILED 5-9-2017

Special Action - Industrial Commission
ICA Claim No. 20141-880203
Carrier Claim No. 6443747
Michael A. Mosesso, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Joel F. Friedman, PLLC, Phoenix
By Joel F. Friedman
Counsel for Petitioner

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

Hoffman Kelley Lopez, LLP, Scottsdale
By Carolanne D. McCaskill, Kevin E. Karges
Counsel for Respondent Employer and Respondent Carrier

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

C A T T A N I, Judge:

¶1 Richard Kille seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a noncompensable claim. He argues that the administrative law judge ("ALJ") erred by finding Kille's work was not a factor in the severity of his injuries resulting from a stroke and by declining to take judicial notice of documentary evidence filed for the first time on administrative review. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Kille was employed as a truck driver by the respondent employer, Walmart Stores, Inc. He was a day driver working out of a distribution center in Buckeye. On August 26, 2011, Kille and Eli Garza, Walmart's service manager for the Buckeye location, drove to Tucson to pick up Kille's truck at Freightliner, where it had undergone repairs. Garza and Kille inspected the repaired truck, then Garza left to drive back to Buckeye.

¶3 Kille suffered a stroke while sitting in his truck sometime after Garza's 1:00 p.m. departure. Freightliner employees found Kille at 3:00 p.m. after being contacted by Walmart employees.

¶4 Kille filed a workers' compensation claim, and Walmart denied the claim for benefits. Kille timely challenged the denial, which lead to an evidentiary hearing at which the ALJ considered testimony from Kille, his wife, two Walmart employees, two Freightliner employees, and two neurologists. The ALJ entered an award for a noncompensable claim and, after Kille requested administrative review, the ALJ supplemented and affirmed the award.

¶5 Kille timely filed this special action. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(2) and 23-951(A), and Arizona Rule of Procedure for Special Actions 10.[1]

DISCUSSION

¶6 On review of a workers' compensation award, we defer to the ALJ's factual findings, but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003). We consider the evidence in the light most favorable to upholding the award, and will affirm unless there is no reasonable basis for the ALJ's decision. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

¶7 By statute, a perivascular injury such as a stroke is not compensable unless "some injury, stress or exertion related to the employment was a substantial contributing cause of the heart-related or perivascular injury." A.R.S. § 23-1043.01(A). Unless the causal connection between the employment and the injury is obvious to a lay person, expert medical testimony is required to establish that the claimant suffered an injury and that the injury was causally related to the employment. *W. Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 527–28 (App. 1982). Because strokes and heart attacks may be caused by a myriad of factors, many of which are often unrelated to employment, expert medical testimony is almost always necessary to prove the requisite causal connection in this context. *Emp'rs Mut. Ins. Co. v. Indus. Comm'n*, 15 Ariz. App. 288, 289 (App. 1971). The ALJ has primary responsibility to resolve any conflicts in the medical experts' testimony, *see, e.g.*, *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217 (1968), and we defer to the ALJ's resolution of such conflicts unless "wholly unreasonable." *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19 (1985).

¶8 Here, Kille acknowledges that the stroke itself was not causally related to his employment, but argues that he sustained a compensable industrial injury because the effects of the stroke were worsened by the delay between the time the stroke occurred and the time he was discovered in his truck. At the hearing, Kille offered causation testimony from Dr. Allan Block, M.D., a board-certified neurologist, which Kille argues established that the delay exacerbated his injury. Dr. Block testified that Kille's condition seemed to have deteriorated over the time he remained in the truck, but did not opine whether this deterioration was due

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[1] Absent material revisions after the relevant date, we cite a statute's current version.

to the delay or simply a normal progression after the initial stroke (that would have occurred even if treatment had begun). Dr. Block noted that "[l]ying in the truck certainly didn't help" because immobility could lead to muscle breakdown and the heat could contribute to dehydration, but he stopped short of concluding that Kille had actually suffered these conditions or that they contributed to the severity of the effects of the stroke.

¶9 Moreover, Dr. Block's main basis for concluding that the delay potentially led to harmful consequences was that, if found earlier, Kille would have been a candidate to receive (and, in Dr. Block's view, likely would have received) tPA treatment at the hospital. Dr. Block noted that patients who receive tPA, a "clot busting drug," statistically have better recoveries than those who do not, but that FDA guidelines require that tPA be given within three hours of initial symptoms.

¶10 On this particular issue, however, Dr. Block's opinion differed from that offered by Dr. Leo Kahn, M.D., a board-certified neurologist who (along with two other doctors) performed an examination of Kille at the employer's request. Dr. Kahn testified, based on an in-person examination and review of extensive medical records (from both before and after Kille's stroke) and of the evidence previously presented to the ALJ, that the delay in locating Kille did not contribute to the severity of the effects of the stroke, and that the time delay was not the reason Kille did not receive the tPA treatment.

¶11 Dr. Kahn explained that the window for tPA treatment has been expanded from three hours to four and a half hours. He noted that given the timeline—Kille last seen (pre-stroke) by Garza around 1:00 p.m., found unresponsive by Freightline employees around 3:00 p.m., arrived at the emergency room at 3:38 p.m., and completed a CT scan (relevant to propriety of tPA treatment) at 4:21 p.m.—Kille would have been a candidate for tPA treatment if the treating physicians had deemed it appropriate. Dr. Kahn further testified that there is no evidence supporting a link between earlier tPA administration within the treatment window and better outcomes. Accordingly, the record provides a reasonable basis for the ALJ's resolution of this conflict in medical testimony regarding causation in favor of Dr. Kahn's opinion. *See Stainless Specialty*, 144 Ariz. at 19.

¶12 Kille next argues that the ALJ erred by refusing to take judicial notice of new documentary evidence—filed with his request for review—regarding the appropriate time period for administering tPA. But "[a] fact to be judicially noticed must be certain and indisputable, requiring no

proof, and no evidence may be received to refute it." *Town of El Mirage v. Indus. Comm'n*, 127 Ariz. 377, 382 (App. 1980) (quoting *Utah Constr. Co. v. Berg*, 68 Ariz. 285, 291 (1949)); *see also* Ariz. R. Evid. 201(b). And here, the medical evidence revealed that the time period for administering tPA to stroke patients is not certain and indisputable, but rather is in fact subject to differing medical opinions. Accordingly, this evidence was not appropriate for judicial notice.

CONCLUSION

¶13 We affirm the award.

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