

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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 H. TOW, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

STARWOOD HOTELS & RESORTS WORLDWIDE INC.,
Respondent Employer,

ZURICH AMERICAN INSURANCE C/O SEDGWICK,
Respondent Carrier.

No. 1 CA-IC 17-0025
FILED 12-14-2017

Special Action – Industrial Commission
ICA Claim No. 20161-270088
Carrier Claim No. 30165303337-0001

The Honorable Rachel C. Morgan, Administrative Law Judge

AWARD AFFIRMED

APPEARANCES

Edward Tow, Scottsdale
Petitioner

Lundmark, Barberich, LaMont & Slavin, P.C., Phoenix
By Kirk A. Barberich
Counsel for Respondent Employer and Respondent Carrier

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

MEMORANDUM DECISION

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

B E E N E, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (“ICA”) award and decision upon review finding the claim of the petitioner employee, Edward Tow (“Tow”), not compensable. The administrative law judge (“ALJ”) resolved the issues in favor of the respondent employer, Starwood Hotels & Resorts Worldwide, Inc., and respondent carrier, Zurich American Insurance. Because the ALJ’s determinations are reasonably supported by substantial evidence, we affirm the award and decision upon review.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2016, Tow worked as a banquet bartender at Starwood Hotels Westin Kierland (“Starwood”). While preparing for an event, a beverage container fell and made a loud noise, causing pain in Tow’s right ear. Tow told his supervisor about the incident, but continued working.

¶3 For several weeks after the incident, Tow continued to experience hearing loss. Tow filed a claim in April 2016, which the insurer denied. Tow protested the denial and requested a hearing with the ICA.

¶4 At the hearing, Tow testified he was evaluated by an audiologist who noted his hearing had decreased since his last audiogram and recommended he be evaluated for hearing aids. Tow followed up with Sean Kane, a nurse practitioner with an ear, nose and throat specialty. At the hearing, Kane testified that he performed a hearing test on Tow and compared the results with Tow’s audiograms from 2011 and 2012. Kane

TOW v. STARWOOD/ZURICH
Decision of the Court

further testified that although Tow's hearing decreased over the years, it is impossible to know whether the loss was a result of the incident.

¶5 Dr. Leon Zeitzer, a board-certified otolaryngologist, conducted an independent medical examination of Tow. Dr. Zeitzer found that Tow's hearing was impaired in both ears, and the type of hearing loss he was experiencing was consistent with genetic causes. Dr. Zeitzer's report further stated it was not within medical probability that the incident Tow described could have caused his hearing loss and that Tow's hearing loss was not consistent with the amount of noise that would be produced by a plastic item hitting the ground.

¶6 In its decision, the ALJ found that based on the medical evidence presented, Tow did not sustain a work-related injury. Tow requested review and the ALJ affirmed the decision. This timely special action followed.

¶7 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶8 In reviewing the ICA's awards and findings, we defer to the ALJ's factual findings and review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003). The ALJ has discretion to resolve any conflicts in the evidence. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975). We consider the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002). So long as the ALJ's findings are not unreasonable, we will not disturb them. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, 343, ¶ 9 (App. 2012).

¶9 Tow argues that Dr. Zeitzer's finding that the incident did not cause hearing loss is erroneous because he incorrectly considered that the beverage container contained fluid when it fell from the shelf. The evidence presented to the ALJ, however, does not support Tow's claim. In his report, Dr. Zeitzer concluded that "[i]t is not at all within medical probability that the incident described was responsible for any hearing loss." The incident, as described to Dr. Zeitzer, recounted that the beverage container was empty when it fell from the shelf. Moreover, Dr. Zeitzer stated that a falling plastic container would not "reach the level of acoustic energy to cause hearing loss." Dr. Zeitzer's testimony constituted substantial medical

TOW v. STARWOOD/ZURICH
Decision of the Court

evidence that supported the ALJ's findings. *See Russell v. Indus. Comm'n*, 98 Ariz. 138, 145 (1965).

¶10 Tow also argues he was not aware that a hearing date had been rescheduled to March 14, 2017. Tow failed to appear on this date and he alleges the hearing was rescheduled multiple times to "try to confuse people." The record, however, indicates Tow was properly notified of the rescheduled hearing, and the ALJ informed Tow that the proceedings would go forward without him if he failed to appear. Tow presents no evidence of a reasonable excuse for failing to attend the hearing, nor does he specify how his absence was prejudicial. *See Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163 (App. 1993) (carelessness is not equivalent to reasonable neglect). Despite Tow's absence, the ALJ allowed Tow's medical expert to testify. The expert's testimony did not support Tow's assertion that the industrial incident caused his hearing loss.

¶11 The claimant has the burden to prove the elements of the claim by a preponderance of the evidence. *Lawler v. Indus. Comm'n*, 24 Ariz. App. 282, 284 (1975). Here, the ALJ's finding that Tow did not prove his injury was compensable is supported by substantial evidence.

CONCLUSION

¶12 For the foregoing reasons, we affirm the award and decision upon review.



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