IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

PEG BRANNIGAN, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

AMERICAN HOSPICE MANAGEMENT, LLC, *Respondent Employer*,

WAUSAU UNDERWRITERS INSURANCE COMPANY, *Respondent Carrier*.

No. 1 CA-IC 17-0043
FILED 7-10-2018

Special Action - Industrial Commission
ICA Claim Nos. 20123-100046, 20121-870108
Carrier Claim Nos. WC197-A42352, WC197-A3561
The Honorable Rachel C. Morgan, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

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By Chad T. Snow
Counsel for Petitioner

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By Lisa M. LaMont, Danielle S. Vukonich
Counsel for Respondents Employer and Carrier

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Jennifer M. Perkins joined.

S W A N N, Judge:

¶1 Peg Brannigan petitions for special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for scheduled disability benefits. Two issues are presented on appeal: (1) whether the administrative law judge ("ALJ") applied an arbitrary and subjective standard for what constitutes disfigurement under A.R.S. § 23-1044(B)(22); and (2) whether the ALJ erred by failing to compensate Brannigan's right thumb injury at 75% of her average monthly wage. For reasons that follow, we set the ALJ award aside.

FACTS AND PROCEDURAL HISTORY

¶2 Brannigan worked as a registered nurse for the respondent employer, American Hospice Management, LLC. While at work on June 25, 2012, Brannigan lost her balance and fell, striking her head against a door and lacerating her forehead. Brannigan went to the emergency room and received fifteen stitches above her left eye, and returned to work the next day. She filed a workers' compensation claim, and the respondent carrier, Wausau Underwriters Insurance Company, accepted the claim for benefits as "no time lost," and accordingly did not offer her temporary compensation benefits. *See* A.R.S. § 23-1061(F), (M) (medical expenses not payable unless claimant misses more than seven days of work); *Arizona Workers' Compensation Handbook* ("*Handbook*") § 9.4.1.3, at 9-11 (Ray J. Davis, et al. eds., 1992 & Supp. 2015) (same). Several years later, American closed Brannigan's claim with no permanent impairment, and she timely protested that the facial scar from the laceration constituted a scheduled permanent impairment.

¶3 Brannigan sustained a second industrial injury on August 16, 2012, while assisting a combative dementia patient who grabbed her right thumb and bent it backwards towards her wrist. She filed a workers' compensation claim, which Wausau accepted for benefits. Dr. Matthew Conklin provided Brannigan conservative medical treatment, followed by a surgical reconstruction of her right thumb. After the thumb became

medically stationary, Dr. Conklin rated her injury with a 30% scheduled permanent impairment, and she returned to her regular work.[1]

¶4 Four months later, however, Brannigan's thumb required additional surgery. Brannigan experienced complications after the surgery, so Dr. Conklin referred her to Dr. Mark Leber, a board-certified orthopedic hand surgeon. Dr. Leber performed two additional surgeries on the thumb, and testified that, although it remained stiff with some weakness, it had become stable, and ultimately found it stationary with the same 30% scheduled permanent impairment. Dr. Leber explained that although Brannigan's permanent impairment rating remained the same, the additional surgeries resulted in functional limitations. For that reason, he provided her with work restrictions—lifting limited to twenty pounds, and limited grasping and pinching with the right thumb. Wausau closed Brannigan's claim, and she timely protested, asserting that, based on her previous scheduled scar injury, her thumb injury should have been unscheduled under *Ronquillo v. Industrial Commission*, 107 Ariz. 542, 544 (1971), which requires that two separate scheduled impairments be converted into an unscheduled impairment for purposes of awarding permanent disability benefits.

¶5 Brannigan's attorney referred her to board-certified hand surgeon, Dr. Mitchel Lipton, for an independent medical examination. Dr. Lipton's report noted that Brannigan's injured thumb was shorter than her other, and that it had stiffness and an inability to manipulate objects. Dr. Lipton concluded that Brannigan had a 57% permanent impairment of the right thumb, explaining that she had undergone two additional surgeries resulting in increased functional limitations:

> I agree completely with Dr. Leber in terms of the restrictions; 20 pounds is appropriate. Although I do feel she could pinch and grip occasionally, as she does in the course of normal daily activities, certainly tasks done on a repetitive basis or with precision, such as putting in an I.V. or a Foley catheter, it would be more difficult. I am not saying it would be

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[1] When a compensable industrial injury results in a permanent impairment, an award of permanent disability benefits is made depending on the character of the impairment as either "scheduled" or "unscheduled." Scheduled injuries are listed in A.R.S. § 23-1044(B), and are conclusively presumed to adversely affect a claimant's earning capacity. *Handbook*, § 7.2.4.1, at 7-4. Unscheduled impairments are compensated only upon a showing of a loss of earning capacity. *Handbook*, § 7.4, at 7-16 to -18.

> impossible, but, frankly, I would not want her putting an I.V. in my arm and I will not comment as to the Foley catheter.

¶6 After hearings and considering testimony from Brannigan and Drs. Leber and Lipton, the ALJ entered a consolidated award for a scheduled permanent impairment. The ALJ found that Brannigan's facial scar did not constitute a permanent impairment and that her right thumb injury had a 30% impairment. Brannigan requested administrative review, and the ALJ affirmed the award. Brannigan petitions for special action to this court.

JURISDICTION AND STANDARD OF REVIEW

¶7 This court has jurisdiction under A.R.S. §§ 12-120.21(A)(2) and 23-951(A), and Ariz. R.P. for Spec. Act. 10. In reviewing findings and awards of the ICA, 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 a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

DISCUSSION

¶8 Brannigan first argues that the ALJ erred by misapplying A.R.S. § 23-1044(B)(22), which designates a permanent disfigurement of the head or face, such as scarring, as a statutorily scheduled injury. The evidence in this case established that Brannigan sustained a work-related laceration on her forehead which required a trip to the emergency room and fifteen stitches. The emergency room medical records stated that it would take at least six months for the cut to fully heal, and that the scar would not change significantly in appearance after those first six months.

¶9 Facial disfigurement is subject to the statutory procedure found in A.R.S. § 23-1047:

> A. [W]hen the physical condition of the injured employee becomes stationary . . . the employer or insurance carrier within thirty days shall notify the commission and request that the claim be examined and further compensation, if any, be determined. A copy of all medical reports necessary to make such determination shall also be furnished to the commission.
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> B. Within thirty days after the commission receives the medical reports, the claim shall be examined and further

> compensation, if any, determined under the commission's supervision.
>
> C. The commission shall mail a copy of the determination to all interested parties. Any such party may request a hearing under [A.R.S.] § 23-941 on the determination made under subsection B of this section within ninety days after copies of the determination are mailed.

The ICA has also set forth its own similar procedure for issuing facial scar awards. *See Handbook*, § 7.5.2.3.4, at 7-34 (referring to the ICA Procedures Manual).

¶10 In this case, neither the statutory nor the ICA procedures were followed. Wausau did not close Brannigan's laceration/scar claim for several years after the injury, and the record contains no evidence that Wausau forwarded medical records to the ICA or requested an initial determination as to whether the scar constituted a permanent impairment. The ICA therefore never entered the statutorily required initial determination. *See* A.R.S. § 23-1047(A); *see also Handbook*, § 7.5.2.3.4, at 7-34 (facial disfigurement is compensable in an amount determined by the ICA after the carrier issues a notice that claimant sustained permanent facial disfigurement). And because there was no initial determination here, there was nothing to which Brannigan's appeal rights could attach. Accordingly, the appeal of this issue is premature and the ALJ erred by addressing it. The award must be set aside.

¶11 Brannigan also argues that the ALJ erred by failing to compensate her scheduled thumb injury at 75% of her average monthly wage instead of 50%. Because this issue may recur, we address it here. *See Uhlig v. Lindberg*, 189 Ariz. 480, 481 (App. 1997).

¶12 If an employee is unable to return to the work they were performing at the time of the industrial injury, "compensation . . . shall be calculated based on [75%] of the average monthly wage." A.R.S. § 23-1044(B)(21). Here, Brannigan testified that she performed most of her nursing duties with her right hand and testified about the various job functions of hospice nursing that she could no longer perform. And although Drs. Leber and Lipton disagreed about the rate of impairment (30% vs. 57%), they agreed that Brannigan's thumb had functional limitations, resulting in work restrictions. Moreover, there is no evidence in the record to suggest that Brannigan would be able to fulfill all job functions as a hospice nurse given her limitations. For these reasons, we

find that the evidence does not support the ALJ's conclusion that Brannigan could return to her date-of-injury employment, and we set aside the award.

CONCLUSION

¶13 For the foregoing reasons, we set aside the award.

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