IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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CITY OF GLENDALE, *Petitioner Employer*,

CITY OF GLENDALE c/o CORVEL CORP., *Petitioner Carrier*,

*v.*

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

KORY RAFFERTY, *Respondent Employee.*

No. 1 CA-IC 17-0049
FILED 6-5-2018

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Special Action - Industrial Commission

ICA Claim No. 20162-240125
Carrier Claim No. 0487-WC-16-0000311
Paula R. Eaton, Administrative Law Judge

**AWARD SET ASIDE**

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COUNSEL

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Industrial Commission of Arizona, Phoenix
By Jason M. Porter
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**MEMORANDUM DECISION**

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and Judge James P. Beene joined.

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**T H O M P S O N**, Judge:

**¶1** This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a compensable claim. Two issues are presented on appeal:

> (1) whether the administrative law judge ("ALJ") erred by finding that the respondent employee ("claimant") was unaware of a work-related mental injury before December 1, 2015; and
>
> (2) whether the ALJ erred by failing to find that the claimant had constructive notice of a work-related mental injury before December 1, 2015.

Because we find that the ALJ's award is not supported by the evidence of record, we set it aside.

**JURISDICTION AND STANDARD OF REVIEW**

**¶2** This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2018), 23-951(A) (2018), and Arizona Rule of Procedure for Special Actions 10 (2018).[1] 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

[1] We cite to te current version of any statute unless the statute was amended after the pertinent events and such amendment would affect the result of this appeal.

upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

## PROCEDURAL AND FACTUAL HISTORY

**¶3** The claimant worked for the petitioner employer, City of Glendale ("Glendale"), as a police officer from October 2005 through November 2016. He filed a worker's report of injury on August 5, 2016, for post-traumatic stress disorder ("PTSD") arising out of three separate incidents where he shot suspects. **[**The petitioner carrier, City of Glendale c/o Corvel Corp., denied the claimant's claim for benefits, and he timely requested an ICA hearing.

**¶4** The ALJ held hearings for testimony from the claimant, and two of his treating psychologists: Joyce H. Vesper, Ph.D., and Amy Paul, Ph.D. Following the hearings, the parties submitted post-hearing memoranda and the ALJ entered an award for a compensable claim. Glendale requested administrative review, but the ALJ summarily affirmed the award. Glendale next brought this appeal.

## DISCUSSION

**¶5** Glendale argues that the ALJ erred by finding the claimant's workers' compensation claim was timely filed**.** The statute of limitations for workers' compensation claims requires a claim to be filed within one year after "the injury occurred or the right thereto accrued. The time for filing a compensation claim begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that the claimant has sustained a compensable injury." *See* A.R.S. § 23-1061(A) (2018).

**¶6** The Arizona Supreme Court has held that the one-year period for filing a workers' compensation claim does not begin to run until the injured employee recognizes: (1) the nature of his injury, (2) the seriousness of the injury, and (3) the probable causal relationship between the injury and the employment. *Pacific Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214 (1987).

> These three factors are not necessarily of even weight but must be considered together in determining when the injury became manifest or when the claimant knew or should have known that he sustained a compensable injury.

> For an injury to be serious and not slight or trivial, the symptoms must be of sufficient magnitude. . .. Awareness of the permanence of a condition is a factor when determining the magnitude of the injury.

*Id*. (citations omitted).

**¶7** In this case, the claimant's work-related PTSD claim was based on three incidents where he shot suspects, two of whom died. The first incident occurred on September 23, 2008, when he shot and killed a burglary suspect. After the shooting, the claimant followed Glendale's protocol: three days on administrative leave, requalification on a new firearm with a firearms instructor, and a single visit to a department-appointed psychologist, Stacey Kaufman. He testified that afterwards, he returned to his regular work without difficulty. On cross-examination, he agreed that after the first shooting, he began to drink and experienced occasional nightmares.

**¶8** The second shooting occurred on March 4, 2011, during a drug deal taking place in a parked vehicle. The driver of the vehicle attempted to run down the claimant, and he shot at him striking the driver in the hand. Following this incident, the claimant again followed Glendale's protocol and saw department-appointed psychologist, Jenny McCutchen. After the three-day administrative leave, he continued to perform his regular work. On cross-examination, the claimant was questioned with his deposition testimony where he stated that after the second shooting his drinking became a nightly occurrence, his nightmares intensified, and he became irritable with his family.

**¶9** The third shooting occurred two months later on May 11, 2011, when the claimant shot and killed a suspect who had pulled a handgun and pointed it at him. The suspect turned out to be the son of a fellow officer and friend. The claimant again followed Glendale's protocol, and he was again sent to see Jenny McCutchen. The claimant testified that he specifically asked Dr. McCutchen if he should be concerned about PTSD, and she assured him that it was not a concern. The claimant again returned to his regular work.

**¶10** After the third shooting, the claimant's symptoms again worsened and his wife expressed concerns about their relationship. They saw a marriage counselor, and the counselor recommended that the claimant see someone who works with people in public safety. A coworker recommended Dr. Vesper "because she dealt with PTSD," and the claimant

began to see her in October 2012. On cross-examination, the claimant testified that in his own mind, some of the issues he was experiencing could have been related to PTSD.

**¶11** The claimant saw Dr. Vesper until July 2013, when she moved her practice too far away. He testified that the doctor never gave him a diagnosis or recommended that he file a workers' compensation claim.

> Q. [By Mr. Engle] Okay. So why – why don't you file a worker's comp claim then in 2012 or 2013?
>
> A. [Claimant] I was never even aware about filing a workman's comp claim for - - because you are angry or you have a hard time sleeping.

By fall 2014, the claimant's symptoms had worsened to the point that he could no longer remain on patrol and he transferred to a desk job.

**¶12** The claimant testified that he began to have anxiety attacks, and he sought additional treatment from Dr. Paul. He first saw her on December 1, 2015, and began regular treatment. Dr. Paul diagnosed PTSD and recommended medication. In August 2016, Dr. Paul took the claimant off work and he filed a workers' compensation claim. The claimant eventually took a medical retirement and moved out-of-state to be near family.

**¶13** Dr. Vesper testified that she is a clinical psychologist specializing in abuse and trauma. She first saw the claimant on October 9, 2012, for symptoms of "arousal and reactivity… jumpy… hypervigilant, unable to deal with loud noises," memory issues, and the inability to calm down. She stated that the claimant did not associate his symptoms with any particular event. Over the course of her treatment, Dr. Vesper diagnosed the claimant with PTSD causally related to the three shooting incidents. The doctor testified that at some point during her treatment, she would have shared her diagnosis with the claimant**.** Although Dr. Vesper discussed medical retirement with the claimant, she never suggested that he file a workers' compensation claim, because he did not want to stop working in public safety. She last saw the claimant in July 2013.

**¶14** Dr. Paul testified that she is a clinical psychologist focusing on first responders and trauma work. She first saw the claimant on December 1, 2015, for his concerns about anger, stress, and frustration with his home life. Although she diagnosed PTSD at their first appointment, she stated that it took the claimant several months to become open and willing

to accept that he had a mental condition. Dr. Paul testified that she would have shared her diagnosis with the claimant, and that sometime in 2016, he made the connection between the shootings and his PTSD.

**¶15** The ALJ is the sole judge of witness credibility. *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551 (App. 1984). It is her duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n,* 103 Ariz. 213, 217 (1968). When more than one inference may be drawn from the evidence in an ICA proceeding, the ALJ may choose either and her conclusion will not be disturbed unless it is wholly unreasonable. *Reynolds Metal Co. v. Indus. Comm'n,* 22 Ariz. App. 349, 352 (1974).

**¶16** In this case, the ALJ held:

> 10. I find that the applicant's to be credible [sic] and I find that he was not aware until December 1, 2015, that he had PTSD related to his work activities for the defendant employer. I find Dr. Vesper's testimony to be tentative and equivocal as to whether or not she told the applicant about his diagnosis. Her testimony was, at times, based on generalizations about her usual practice. Based upon the applicant's testimony, I find that the applicant's PTSD, including the seriousness of his condition, did not become manifest until December 1, 2015 and that his claim was, therefore, timely filed.

**¶17** Regarding Dr. Vesper's testimony, she stated that she reached a "tentative" diagnosis of PTSD at her first appointment with the claimant. She testified that she probably would not have shared her diagnosis with the claimant that early on because she needed to gather and verify his symptoms. Over the course of her treatment, Dr. Vesper became confident of her PTSD diagnosis, and at that point, she shared her diagnosis with the claimant:

> Q. [By Mr. Lundmark] You said you wouldn't necessarily share your impression with the patient at the first visit but you also said a moment ago you would educate the patient, so at some point did you tell him candidly, 'I think this is what you have?'
>
> A. [Dr. Vesper] Yes.
>
> * * * *

> Q. And just so we're sure we have this on the record, you also told the patient that that was your professional judgment at that time, correct?
>
> A. The diagnosis?
>
> Q. Yeah.
>
> A. Yes.
>
> Q. And it's relationship to the three shootings at work?
>
> A. Yes.

**¶18** Equivocation is found when a doctor's testimony is subject to two or more interpretations or the doctor avoids committing to a particular opinion. *See Rosarita Mexican Foods v. Indus. Comm'n,* 199 Ariz. 532, 536, ¶ 13 (2001). After reviewing Dr. Vesper's testimony as a whole, we do not find it to be equivocal. The doctor clearly testified that she told the claimant that he had work-related PTSD during her treatment of him.

**¶19** A claimant is not expected to know the nature of his injury or its relationship to his employment before those matters are reasonably ascertainable by the medical profession. *Villegas v. Indus. Comm'n,* 149 Ariz. 382, 384 (App. 1986). Further, a claimant's personal knowledge of symptoms is not the equivalent of a medical diagnosis. *See Henry v. Indus. Comm'n,* 157 Ariz. 67, 69-70 (1988).

**¶20** In this case, the claimant began to experience physical and mental symptoms after the first shooting. These symptoms continued to worsen after each additional shooting. The claimant testified that he sought psychological treatment in 2012, after a marriage counselor recommended that he see someone. Although the claimant denied receiving a diagnosis from Dr. Vesper, the doctor testified that she told the claimant that he had work-related PTSD by July 2013. By fall 2014, the claimant testified that his symptoms prevented him from remaining on street patrol and he transferred to a desk job until his medical retirement.

## CONCLUSION

**¶21** We conclude that the ALJ erroneously found Dr. Vesper's testimony equivocal. Further, she did not make a credibility finding regarding the doctor's testimony and this court has refused to imply a rejection of credibility. *See Joplin v. Indus. Comm'n*, 175 Ariz. 524, 528 (App. 1993). Because we are unable to determine what effect a correct reading of Dr. Vesper's testimony would have had on the ALJ's award, we set it aside.


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