

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

ANTHONY COPERNICO, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent*

ARIZONA DEPARTMENT OF CORRECTIONS, *Respondent Employer,*

STATE OF ARIZONA, *Respondent Carrier,*

ICA SPECIAL FUND DIVISION, *Respondent Party in Interest.*

No. 1 CA-IC 17-0057
FILED 12-27-18

Special Action - Industrial Commission
ICA Claim No. 20082-690251
Carrier Claim No. W200803573
Layna Taylor, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Anthony Copernico, Buckeye
Petitioner

Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent

Arizona Attorney General's Office, Phoenix
By Charles W. Ferris, Jr.
Counsel for Respondent Employer and Respondent Carrier

Industrial Commission of Arizona, Phoenix
By Scott J. Cooley
Counsel for Respondent Party in Interest

MEMORANDUM DECISION

Judge Maria Elena Cruz delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Randall M. Howe joined.

C R U Z, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") decision denying respondent employee's ("Claimant") request for rearrangement of a previous disability award. The single issue on appeal is whether the Administrative Law Judge ("ALJ") gave proper weight to Claimant's expert's testimony.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2), 23-951, and Arizona Rule of Procedure for Special Actions 10. This court will affirm the ICA so long as substantial evidence supports the award. *Davis v. Indus. Comm'n*, 16 Ariz. App. 535, 537 (1972). We consider the evidence in the light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

FACTS AND PROCEDURAL HISTORY

¶3 Claimant injured his back while working as a correctional officer in the Perryville Prison ("defendant employer") in Goodyear on September 5, 2008. Claimant went on to have surgery fusing his L4-L5 vertebrae. After litigating Claimant's loss of earning capacity, the parties

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stipulated to an award in the amount of \$1200.00 per month for permanent partial disability, which the ICA approved. Three years after the original award, Claimant filed a petition for rearrangement, which the ICA granted. The defendant employer appealed the grant; an ALJ determined Claimant was able to work twenty hours per week and awarded Claimant \$1,294.91 per month.

¶4 Asserting he cannot work the twenty hours a week, Claimant filed a new petition for rearrangement. At a hearing, the ALJ heard testimony of Claimant and three expert witnesses: Drs. Eric Feldman and Terry McLean and rehabilitation counselor Lisa Clapp.

¶5 Dr. McLean, an orthopedic surgeon, testified to the functionality of Claimant's back after the lumbar fusion. He testified that Claimant's neurological exam was normal, with no significant changes from an examination conducted in 2013. He found no abnormal weakness and no substantial reflex changes in Claimant's condition. As such, Dr. McLean affirmed his original assessment, given three years prior, recommending part-time work for Claimant.

¶6 Next, Taylor drew from her background as a rehabilitation counselor to testify to the effect Claimant's injury had on his ability to work in the labor market. She testified that, based on Claimant's work history and education, and considering his disability, Claimant was suited for customer service, and could find work as a telephone sales representative or a parking lot attendant. Finally, she testified that the award of \$1,294.91 per month was proper.

¶7 The final expert, Dr. Feldman, testified that Claimant was unable to work because of chronic pain. In Dr. Feldman's opinion, Claimant has developed chronic pain syndrome. His examination revealed no neurological defects; Dr. Feldman testified he based his opinion on Claimant's own assessment of his pain and capabilities. Dr. Feldman testified that, from an objective analysis, Claimant's condition had not changed since the previous award of \$1,294.91 per month. Additionally, Dr. Feldman stated that Claimant's functionality has slightly improved. However, the doctor did emphasize the pain syndrome would offset any slight improvements in functionality, and therefore concluded Claimant remained unable to work.

¶8 Claimant testified that Dr. Feldman lowered his dosage of pain medication to improve his cognitive function and that as a consequence, he was experiencing increased pain. This increased pain,

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according to Claimant, has kept him from being able to sleep, and he cannot function during the day because of this lack of sleep. Claimant testified he would be working if he could, but was unable to do any work in his current state of pain.

¶9 At the conclusion of testimony, the ALJ entered an award denying rearrangement. Claimant brought this appeal.

DISCUSSION

¶10 Claimant argues on appeal that the ALJ did not properly weigh Dr. Feldman's opinion that he is unable to work.¹ The ALJ resolved the conflicting medical opinions in favor of Dr. McLean's opinion. See *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217 (1968) (it is the ALJ's duty to resolve all conflicts in the evidence and to draw all warranted inferences). Determinations of witness credibility are left solely in the discretion of the ALJ. *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506 (1987). Findings of the ALJ will only be disturbed if the "conclusion cannot be reasonably supported on any reasonable theory of evidence." *Id.*

¶11 The evidence in the record supports the ALJ's conclusion. Dr. McLean is a board certified orthopedic surgeon and testified to the extent of Claimant's injuries from that perspective. He testified that Claimant's condition had not substantively changed, no new neurological damage had occurred, and his functionality has remained constant since the previous petition for rearrangement. The ALJ was justified in relying on Dr. McLean's medical opinion.

¶12 Additionally, the ALJ properly considered Dr. Feldman's medical opinion, but ultimately determined Dr. McLean was more credible regarding Claimant's ability to work. Dr. Feldman testified that he found no objective changes in Claimant's condition, but if anything, Claimant's functionality has slightly improved. Dr. Feldman did testify that Claimant

¹ Claimant has attached medical evaluations in his opening brief to support his claim. However, the fact-finding process in workers' compensation proceedings ends at the conclusion of the last scheduled hearing. See *Nurseries v. Indus. Comm'n*, 133 Ariz. 171, 174 (App. 1982). Any records the ALJ did not consider are not properly part of the certified record on appeal before this court, and this court will not consider documents on appeal that are not part of the certified record. See, e.g., *Wood v. Indus. Comm'n*, 126 Ariz. 259, 262 (App. 1980); *Shockey v. Indus. Comm'n*, 140 Ariz. 113, 116 n.1 (App. 1983).

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had developed a pain syndrome, but this determination was based on Claimant's subjective pain rating. The ALJ considered the evidence and concluded Dr. McLean's analysis of Claimant's current condition was more credible. This decision was within the ALJ's discretion and not in error.

¶13 We affirm.



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