IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAMES MOE, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent*,

BAZA TRANSPORT, INC., *Respondent Employer*,

PROTECTIVE INSURANCE, *Respondent Carrier*.

No. 1 CA-IC 18-0052
FILED 3-19-2019

Special Action - Industrial Commission
No. ICA 20172440125
Carrier Claim No. IW00012731
The Honorable Amy L. Foster, Administrative Law Judge

AWARD SET ASIDE

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MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court, in which Judge Kent E. Cattani and Judge James P. Beene joined.

W E I N Z W E I G, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona decision denying Petitioner James Moe's claim for workers' compensation as time-barred under A.R.S. § 23-1061. The record indicates Moe's claim was timely. We set aside the Commission's decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Moe was an interstate long-haul truck driver for Baza Transport, Inc. who worked four to five day shifts. He and a co-driver were returning to Phoenix from a multi-day shift on the evening of July 17, 2016. The co-driver was driving as Moe rested in the sleeper. The truck had just crossed from New Mexico into Arizona when the co-driver fell asleep and plowed into a guard rail along the highway. Moe was catapulted from the sleeper into the cab, landing on his right side beneath the steering wheel; his right hand "pressed" under the gas and brake pedals. Moe got dressed and left the truck. His right side was sore, including his hip, shoulder, elbow, wrist and hand. He had a small cut on his right index finger.

¶3 Police responded, along with fire personnel and EMTs. Moe reported no injuries at the scene. He returned to Phoenix in a taxicab, then drove home in his pickup truck. Later that night, Moe took and passed a required drug test.

¶4 The next morning, Moe went to a previously-scheduled diabetes checkup with Dr. Manoj Makhija, his primary care physician. Since being diagnosed as diabetic in 2015, Moe had regular checkups to monitor his condition. Before leaving for the appointment, Moe placed a band-aid on the "minor cut" in "the crease of [his] right index finger."

¶5 Moe informed Dr. Makhija about his motor vehicle accident and complained he was "hurting all over," including a "little kink in [his] neck," soreness in his right arm and wrist, and "right hand pain and swelling." The medical records do not mention or discuss a cut on Moe's finger, and the doctor did not remove the band-aid to examine the minor

cut. The doctor examined Moe's hand for swelling and ordered x-rays of the right hip, knee, hand and cervical spine.

¶6 Moe returned to Dr. Makhija the next week. He again complained of soreness on his right side, including his knee, hip and wrist. The doctor reviewed the x-ray results. The hand x-ray indicated: "Degenerative change of the wrist is present. Mild soft tissue swelling over the dorsum of the hand is present. No visible fracture or dislocation of bony structures." Based on the x-rays, Dr. Makhija diagnosed Moe with right knee effusion, diffuse osteoarthritis in his hip and "right wrist edema likely from the impact of the accident." He directed Moe to take Tylenol and wear a wrist brace for two weeks, but ordered no other treatment.

¶7 Moe returned to work a couple weeks later. He continued using a band-aid to cover the small cut on his right finger along with antibiotic cream. The finger had not healed by the end of 2016, over five months after the accident.

¶8 Moe returned to Dr. Makhija on April 10, 2017. This was the first time Moe sought medical assistance for his finger. The medical records now explained that "[p]atient has a wound on the right forefinger." Moe said he was "not sure how it began but it is getting deeper." While the laceration had healed, Moe said the finger "looked like it was in trouble." His fingertip had turned white and started to drain, and the fingernail was disintegrating into "pieces." The doctor prescribed antibiotics and "strongly advised" Moe to see a surgeon. He noted that Moe was "aware of the risk and complications because of his uncontrolled diabetes." Moe took the medication, but never visited a surgeon because of the "heavy cost."

¶9 The finger continued to deteriorate. Four months later, Moe returned to Dr. Makhija on August 7 and August 8. His finger had gone "wild." The doctor observed "redness traveling up the hand" and drainage. The wound was "foul smelling" and Moe was "experiencing fever and chills." Moe received antibiotic injections. Dr. Makhija told Moe to immediately visit an emergency room, emphasizing his diabetic condition. Moe refused, citing lack of insurance. Dr. Makhija warned it might be osteomyelitis, a bone infection, and mentioned the risks of gangrene and amputation.

¶10 Dr. Makhija also ordered an MRI. The MRI revealed osteomyelitis in Moe's finger. The doctor described this diagnosis as "a real

problem." Moe admitted himself into the hospital on August 10, 2017. The next day, his right index finger was amputated.

¶11 Moe filed his workers' compensation claim on August 22, 2017, which the insurance carrier denied. Moe protested and requested a hearing. Respondents asked the administrative law judge ("ALJ") to limit the hearing to the statute of limitations issue and whether the claim is time-barred. The ALJ agreed and held the hearing in April 2018. Only Moe testified. The ALJ received medical records. The ALJ found that the medical records were sufficient to decide the case and no medical testimony was needed.

¶12 The ALJ issued a written decision on May 2, 2018. She determined that Moe failed to timely file his claim because the limitations period began to run "[o]nce [Moe] knew he was injured in the motor vehicle accident [and] had compensable consequences from the accident." The ALJ emphasized that Moe "sought medical care two days [sic] after the accident and underwent extensive imaging to determine if there was damage," describing his injury as not "slight or trivial." In the end, she found the injuries, diagnosis and treatment Moe received around the time of the accident showed he "knew, or should have known, of the existence of a compensable industrial injury by July 17, 2016 and therefore, any claim for the same, had to be filed within one year of July 17, 2016."

¶13 On review, the ALJ affirmed her decision on June 25, 2018. She rejected Moe's argument that he did not immediately know the severity of his injury, emphasizing that "multiple imaging studies were performed" within days of the accident. She found Moe "knew that he was hurt in the motor vehicle accident and sought treatment," and "[w]hile he may not have known his finger was going to become infected and require amputation, he certainly knew he was injured enough to require treatment." Moe timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶14 We must determine whether the evidence justifies the ALJ's decision that Moe's claim was time-barred. *See Saylor v. Indus. Comm'n*, 171 Ariz. 471, 473 (App. 1992) ("When an injury became manifest is a matter for the Industrial Commission to determine and we will set aside that determination only if it is not justified by the evidence."). We view the

evidence in the light most favorable to upholding the ALJ's decision. *Micucci v. Indus. Comm'n*, 108 Ariz. 194, 195 (1972).

¶15 An employee must file a workers' compensation claim within one year after an "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." A.R.S. § 23-1061(A). The limitations period starts running when a reasonable person would recognize three factors: (1) the nature of the injury, (2) its seriousness and (3) the causal relationship between the injury and employment. *Pac. Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214 (1987). A slight or trivial injury is not compensable. *Id*. at 213-14. "[W]hen an injury is slight or trivial at the time and noncompensable and later on develops unexpected results for which the employee could not have been expected to make a claim and receive compensation, then the statute runs, not from the date of the accident, but from the date the results of the injury became manifest and compensable." *Id*. (quotation omitted).

¶16 Moe filed his claim on August 22, 2017. As such, the question here is whether a reasonable person would have understood the nature, seriousness and compensability of Moe's minor flesh wound *before* August 22, 2016, which was 36 days after the industrial accident. *See Villegas v. Indus. Comm'n*, 149 Ariz. 382, 384 (App. 1986).

¶17 The record contains insufficient evidence for the ALJ's conclusion that a reasonable person would have understood within 36 days of the accident that a small cut on Moe's hand would devolve into a bone infection and amputated limb in August 2017. Moe had no reason to suspect the minor flesh wound on his finger would morph into an incurable bone infection and amputated limb. *Pac. Fruit Express*, 153 Ariz. at 214 ("Awareness of the permanence of a condition is a factor when determining the magnitude of the injury."). The minor cut sparked little or no concern from Moe for several months. Moe's concern is best measured with his medical response—a simple band-aid. And then, the morning after the accident, Moe did not even mention the minor cut to his doctor, much less seek medical assistance. If Moe understood the nature of the injury at that time and believed it to be serious, he would have (at a minimum) mentioned it to the doctor. But he treated it as a temporary annoyance rather than a permanent disability. *M.M. Sundt Constr. Co. v. Indus. Comm'n*, 124 Ariz. 94, 96 (1979) ("Except for a temporary discomfort, respondent had no basis for suspecting a permanent disability.").

¶18 By contrast, Moe complained to his doctor the morning after the accident about a sore hip, shoulder, elbow, wrist and hand. Moe concedes the limitations period commenced for those injuries at that time.

¶19 The doctor's reaction is also important. An employee "is not expected to know the nature of the disability or its relationship to the employment before they are reasonably ascertainable by the medical profession." *Sherman v. Indus. Comm'n*, 158 Ariz. 177, 180 (App. 1988). Moe visited the doctor on two occasions before August 22, 2016; the medical records reflect *no* concern or questions about the minor cut (then covered by a band-aid). The doctor neither ordered an MRI nor diagnosed the bone infection until August 2017; at first, he x-rayed Moe's sore parts. The early medical records stand in stark contrast to the palpable concern and urgency reflected in later medical records.

¶20 Moe's rapid return to work is more evidence that the hand wound was initially slight and trivial. Moe returned to work after two weeks, continuing to drive the long-haul trucks with only a simple band-aid on the cut. *S. Hartford Accident & Indem. Co. v. Indus. Comm'n*, 43 Ariz. 50, 54-56 (1934) ("We have held, in more than one case, that you cannot require a person to give notice of an accident when it is apparently trivial, and does not deprive the man of the ability to work immediately after, and when honestly he did not think that it was anything else but a trivial knock on the leg.") (quotation omitted).

¶21 This case is analogous to *Sherman*, where the claimant filed a claim for workers' compensation in 1985 based on a rash that first emerged in 1975 and led to osteomyelitis in 1985. 158 Ariz. at 178. Sherman argued his claim did not accrue until he was diagnosed with osteomyelitis in 1985. *Id.* at 179. The ALJ dismissed the claim as time-barred. *Id.* This court disagreed, explaining the "record contain[ed] substantial evidence that Sherman initially considered his rash to be slight and trivial." *Id.* at 180. We held:

> We are of the opinion that, prior to medical diagnosis, Sherman could not have perceived that the rash, (a relatively minor condition), was a compensable injury, nor that it might lead to septicemia, (a more serious condition), and ultimately lead to osteomyelitis and permanent residual bone damage, (very serious and permanent conditions), as he now alleges. If he did not know he had osteomyelitis, he could not have related it to his employment until after it was diagnosed.

Id.; *see also Williams v. Indus. Comm'n*, 3 Ariz. App. 403 (1966) (setting aside award because employee filed claim within a year after the extent and seriousness of a thumb injury became manifest). The same is true here. Moe's symptoms were not serious enough to seek medical relief for his finger until April 2017, and he was not diagnosed with osteomyelitis until August 2017. There is no basis in the record from which to conclude that Moe should have known the severity of his finger injury before August 22, 2016 (a year before he filed his claim).

¶22 Respondents raise several unpersuasive arguments. They assert that Moe should have understood the seriousness of a minor hand wound because he suffered from diabetes. "[E]ven a small laceration like this poses potentially serious implications to a diabetic, and the realization of the seriousness of this injury would have happened well within a month." We are not persuaded. The relevant inquiry is that of a reasonable person, *Pac. Fruit Express*, 153 Ariz. at 214, and there is no basis in the record to assume a reasonable person would have recognized the seriousness of a minor cut within a month, even a diabetic, 11 A. Larson et al., Larson's Workers' Compensation Law § 126.05(5) (2018) ("[The seriousness factor] is a salutary requirement, since any other rule would force employees to rush in with claims for every minor ache, pain, or symptom.").

¶23 Respondents further argue that Moe's claim began to run after the accident because he knew he sustained other compensable injuries; his finger injury is not severable from other injuries sustained in the same accident; and he may only recover for new injuries by reopening a previously filed claim. We disagree. The statute is injury-specific. The plain language provides that the limitations period starts when "*the injury* occurred or the right thereto accrued." A.R.S. § 23-1061(A) (emphasis added). The question of timeliness hinges on the particular injury and whether a reasonable person would understand the nature, seriousness and cause of that injury, rather than the date of the industrial accident or whether other injuries from the accident were manifest at an earlier date. And nothing requires employees to reopen an existing claim instead of filing a new claim when new injuries develop, as happened here.

¶24 The ALJ found Moe's claim was time-barred based on the injuries he reported to his doctor after the accident and the treatment he received for them. But Moe is not seeking benefits for those injuries; he concedes they are time-barred. He only seeks compensation for a bone infection that was not diagnosed, present or discernable until months after the accident.

CONCLUSION

¶25 We set aside the ALJ's decision under A.R.S. § 23-951(D).

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