IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOE HULVERSON, *Petitioner Employee*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

AZ CASTINGS II, *Respondent Employer*,

BENCHMARK INSURANCE, *Respondent Carrier*.

No. 1 CA-IC 20-0016
FILED 11-17-2020

Special Action - Industrial Commission
ICA Claim No. 20173-330027
Carrier Claim No. BN1700005514
The Honorable Michelle Bodi, Administrative Law Judge

AFFIRMED

COUNSEL

Greenberg Law Center LLC, Phoenix
By Justin A. Greenberg
Counsel for Petitioner Employee

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

Jardine, Baker, Hickman & Houston PLLC, Phoenix
By K. Casey Kurth
Counsel for Respondent Employer and Carrier

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Cynthia J. Bailey joined.

H O W E, Judge:

¶1 Petitioner Joe Hulverson appeals the Industrial Commission of Arizona's ("ICA") award closing Hulverson's right shoulder injury claim because his shoulder is medically stationary. Hulverson argues that the evidence does not support the award and that the administrative law judge erred by not shifting the burden to Respondents on a critical, disputed issue. We affirm the award.

FACTS AND PROCEDURAL HISTORY

¶2 Hulverson injured his right shoulder at work in 2017. Based on an MRI conducted in January 2018, he was diagnosed with a partial rotator cuff tear in that shoulder and treated with several injections for pain management. In April 2018, Anthony Theiler, M.D., performed an independent medical examination ("IME") and diagnosed Hulverson's right shoulder injury as a possible sprain that had become stationary and he imposed no work restrictions. Respondent Benchmark Insurance issued a notice to close the claim with no permanent impairment as of April 2018. Hulverson challenged that notice by requesting a hearing.[1]

¶3 While the hearing process progressed over the next months, Hulverson had another MRI performed in November 2018 that showed a

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[1] At the hearing, the claim included more than the right shoulder injury. However, Hulverson appeals only that part of the award that pertains to the right shoulder, so we do not address any other injury.

massive rotator cuff tear in the right arm. The tear shown in this MRI became a significant issue in the hearing.

¶4 The administrative law judge took testimony from Hulverson and three physicians: David Stone, M.D., Sumit Dewanjee, M.D., and Anthony Theiler, M.D. Dr. Stone, who had treated Hulverson for pain management due to a foot condition for years, treated Hulverson's right shoulder condition in 2018. Dr. Stone opined that Hulverson's return to full duty work in April 2018 contributed to the rapid progression of his right shoulder deterioration. He testified that Hulverson's right shoulder was not stationary and needed further active treatment due to the work injury. Dr. Dewanjee, an orthopedic surgeon, treated Hulverson in 2019 and recommended surgery for his right shoulder. He too testified that heavy labor of the type that Hulverson returned to in April 2018 could have caused the large tear evident in the November 2018 MRI. He testified that Hulverson's right shoulder was not stationary.

¶5 Finally, Dr. Theiler testified at the hearing that he reviewed the November 2018 MRI, compared it to the January 2018 MRI, and concluded that the condition shown in November could not happen merely by wear and tear from working but would involve acute trauma that would tear the rotator cuff and result in significant pain. He was unaware of any right shoulder trauma that Hulverson experienced during the time between the two MRIs and noted that Hulverson did not mention any event of that sort to him. He maintained that the work injury to Hulverson's right shoulder was stationary and that the condition shown in the November 2018 MRI was not work-related.

¶6 The administrative law judge reviewed the evidence and found Dr. Theiler's opinion to be more credible than the others. Therefore, the award closed Hulverson's right shoulder claim as of April 2018 with no permanent impairment. Hulverson requested administrative review. Upon review, the administrative law judge affirmed her conclusions, noting again that she found Dr. Theiler's opinion most credible:

> The conflict in the medical evidence was resolved in favor of Anthony Theiler, M.D., who opined that the cause of [Hulverson]'s massive right shoulder tear was *not* related to [Hulverson]'s work duties. [Hulverson], therefore, did not sustain *his* burden of demonstrating the need for continued active medical care related to the industrial injury.

Hulverson has timely appealed.

DISCUSSION

¶7 On appeal, Hulverson argues that the administrative law judge should not required him to produce evidence that the large tear in his rotator cuff was work-related, and should not have relied on Dr. Theiler. Hulverson claims that he was entitled to a presumption that the injury was work-related. He claims the burden to produce evidence of the rotator cuff tear's cause shifted to Respondents to show that it was not work-related. We disagree for the following reasons.

¶8 In reviewing awards issued by the ICA, "[w]e defer to the ALJ's factual findings unless no reasonable evidence supports them and view the evidence in the light most favorable to upholding the award." *Danial v. Indus. Comm'n*, 246 Ariz. 81, 83 ¶ 11 (App. 2019). We review issues of law *de novo*. *Ibarra v. Indus. Comm'n*, 245 Ariz. 171, 174 ¶ 12 (App. 2018). We will only set aside the findings of the ICA when they are not supported by substantial evidence. *Lowry v. Indus. Comm'n*, 92 Ariz. 222, 224 (1962).

¶9 Hulverson has the burden to prove the material elements of his claim by a preponderance of the evidence. *Brooks v. Indus. Comm'n*, 24 Ariz. App. 395, 399 (1975). In this matter, he had to prove that his condition was not stationary by showing that he needed active treatment for a condition related to the work injury. Dr. Theiler testified that Hulverson did not require active treatment for the work-related right shoulder injury, and the record contains substantial evidence to support that testimony. The administrative law judge did not err by relying on Dr. Theiler's testimony.

¶10 Hulverson also argues that Respondents were required to show a non-work-related cause of the right rotator cuff tear, based on *Farish v. Indus. Comm'n*, 167 Ariz. 288 (App. 1990). That case involved a hospital custodian whose left knee gave way for no apparent reason while pushing a mop bucket at work. He suffered a torn medial meniscus that required surgery. Because the injury occurred in the course of employment, but the cause of it was unknown (it was "neither distinctly employment nor distinctly personal"), we held that it was appropriate to presume that the injury arose out of the employment and allow the employer to show a non-work-related cause then. *Id*. at 290.

¶11 *Farish* is not applicable here. Hulverson did not establish that the rotator cuff tear occurred in the course of his employment. Instead, Dr. Theiler testified that the tear could not have happened absent an acute traumatic incident. Hulverson submitted no evidence of an acute traumatic event to his right shoulder at work or elsewhere that could have caused the

tear. His theory was that the tear was caused by overuse over many months at his employment, a view that Dr. Theiler rejected as not consistent with the evidence. The administrative law judge agreed.

ATTORNEYS' FEES

¶12 Arizona Castings and Benchmark Insurance request Hulverson be sanctioned and ordered to pay their costs and attorneys' fees on appeal under Rule 25 of the Arizona Rules of Civil Appellate Procedure,[2] alleging that this petition for review was frivolous. Absent an allegation of improper motive, if the appellant raises issues supportable by any reasonable legal theory or presents a colorable legal argument about which reasonable attorneys could differ, the argument is not frivolous. *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258 (1989). While Hulverson did not prevail on appeal, his petition was not so devoid of merit or colorable arguments to warrant the imposition of sanctions. Accordingly, we deny the request for attorneys' fees. Respondents are, however, awarded their costs on appeal as the prevailing party subject to compliance with ARCAP 21.

CONCLUSION

¶13 Finding no error, we affirm the award.

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

[2] The briefing requests relief under ARCAP 26. Since ARCAP 26 relates to voluntary dismissals whereas ARCAP 25 relates to sanctions, we recognize the request as being under ARCAP 25.