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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SILVIA CERVANTES,) 1 CA-IC 09-0027
)
Petitioner,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF ARIZONA,) Rule 28, Arizona Rules
) of Civil Appellate
Respondent,) Procedure)
)
SUNLAND BEEF,)
)
Respondent Employer,)
)
ACE AMERICAN INSURANCE CO c/o GALLAGHER)
BASSETT,)
)
Respondent Carrier.)
)
)

Special Action--Industrial Commission

ICA CLAIM NO. 20070-750381

CARRIER NO. 001500-022114-WC-01

Administrative Law Judge Anthony Halas

AFFIRMED

Silvia Cervantes Phoenix
Petitioner *In Propria Persona*

Andrew F. Wade, Chief Counsel Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

Jardine, Baker, Hickman & Houston Phoenix
by Scott H. Houston
Attorneys for Respondents

B A R K E R, Judge

¶1 Silvia Cervantes ("Cervantes") appeals the Industrial Commission's denial of her request to reopen her claim. For the following reasons, we affirm.

Facts and Procedural History

¶2 On February 15, 2007, Cervantes suffered a compensable industrial injury while working for Sunland Beef. Her injury involved a lump on her left elbow area and pain in her right hip. Cervantes was treated, released from care, and returned to full work status on March 23, 2007, although she continued to have the elbow lump and pain when she worked. Ace American Insurance Co. ("Ace American") adopted the discharge and issued a closed claim notice for March 23, without permanent impairment. Cervantes continued to work until she went on maternity leave in August 2007. She testified that after she stopped working she only felt pain when she exerted herself. Cervantes did not see a doctor for her elbow from August 2007 to August 2008 when she filed the petition to reopen her claim.

¶3 Dr. G.M., an orthopedic surgeon, conducted an independent medical examination of Cervantes on November 18, 2008. He recommended a MRI be performed, which "showed she had evidence of, perhaps, a slight tendonitis or tendonopathy of the triceps tendon." Dr. G.M. testified that the "triceps tendon is actually

posterior to the elbow" and is "not in the medial aspect of the elbow where the patient was complaining of her original complaints of pain and certainly wasn't consistent with where she was complaining of tenderness when [he] examined her." He also testified that he did not see "any new, additional, or previously undiscovered medical condition as of the time of [his] evaluation that [he] could attribute to the original industrial injury of February 15 of 2007."

¶14 The administrative law judge ("ALJ") issued a decision upon hearing on March 13, 2009, finding that: "On due consideration of applicant's testimony and the medical record relative to reopening, I determine and conclude that applicant has failed to demonstrate, by a preponderance, a new, additional, or previously undiscovered condition related to the subject industrial injury. For that reason, her Petition to Reopen must be denied." Cervantes requested a review of this decision because she still has the "same problem" and her doctor said she needs surgery. On April 15, 2009, the decision upon review affirmed the decision upon hearing, finding the March 13 decision was fully supported by the evidence.

¶15 Cervantes filed a timely special action. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 23-951 (1995), and Rule of Procedure for Special Actions 10.

Discussion

¶16 We "'must consider all evidence in the light most favorable to sustaining the Commission's award.'" *Cent. Mgmt. Co. v. Indus. Comm'n of Ariz.*, 162 Ariz. 187, 189, 781 P.2d 1374, 1376 (App. 1989) (quoting *Hunt Bldg. Corp. v. Indus. Comm'n of Ariz.*, 148 Ariz. 102, 106, 713 P.2d 303, 307 (1986)). The award will be sustained if reasonably supported by the evidence. *Id.*

¶17 Cervantes has the burden of showing the presence of either new, additional or a previously undiscovered condition. *Stainless Specialty Mfg. Co. v. Indus. Comm'n of Ariz.*, 144 Ariz. 12, 16, 695 P.2d 261, 265 (1985). Section 23-1061(H) provides:

On a claim that has been previously accepted, an employee may reopen the claim to secure an increase or rearrangement of compensation or additional benefits by filing with the commission a petition requesting the reopening of the employee's claim upon the basis of a new, additional or previously undiscovered temporary or permanent condition, which petition shall be accompanied by a statement from a physician setting forth the physical condition of the employee relating to the claim. . . . A claim shall not be reopened because of increased subjective pain if the pain is not accompanied by a change in objective physical findings. A claim shall not be reopened solely for additional diagnostic or investigative medical tests, but expenses for any reasonable and necessary diagnostic or investigative tests that are causally related to the injury shall be paid by the employer or the employer's insurance carrier.

A.R.S. ¶ 23-1061(H) (Supp. 2009). Cervantes needed to prove a new, additional or a previously undiscovered condition by competent

medical evidence because it was not apparent to a layman that any of these conditions existed. *Cf. Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977) (holding competent medical evidence necessary to prove the existence of a physical injury). The statute states that even increased pain is not sufficient to reopen a claim without the showing of "objective physical findings." A.R.S. § 23-1061(H). Here, Cervantes provided no objective physical findings or any evidence about a change in her condition.

¶8 Both Cervantes' complaint at the time of injury and her petition to reopen complained of a lump in her left elbow with pain. Although Cervantes asserted that her doctor recommended surgery, she did not present any medical evidence at all. Thus, there was not any evidence of a new, additional or previously undiscovered condition. In contrast, Ace American did present the medical testimony of Dr. G.M., who testified that when he examined Cervantes he did not find "any new, additional, or previously undiscovered medical condition as of the time of [his] evaluation that [he] could attribute to the original industrial injury of February 15 of 2007." Therefore, we find that the ALJ's decision to deny reopening Cervantes' case is reasonably supported by the evidence.

Conclusion

¶19 For the reasons stated above, we affirm.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge