

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE  
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 05-11-2010  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

FERNANDO MORALES, ) 1 CA-IC 09-0050  
)  
Petitioner, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
THE INDUSTRIAL COMMISSION OF ) Rule 28, Arizona Rules  
ARIZONA, ) of Civil Appellate  
) Procedure)  
Respondent, )  
)  
MILLING MACHINERY INC., )  
)  
Respondent Employer, )  
)  
SCF ARIZONA, )  
)  
Respondent Carrier. )  
\_\_\_\_\_ )

Special Action - Industrial Commission

ICA Claim No. 20062-780780

Carrier Claim No. 0639424

J. Matthew Powell, Administrative Law Judge

**AFFIRMED**

Fernando Morales  
Petitioner *in propria persona*

Eloy

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

Phoenix

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State Compensation Fund of Arizona  
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O R O Z C O, Judge

¶1 This is a special action review of the denial of a petition to reopen the worker's compensation claim brought by Fernando Morales (Claimant). For the following reasons, we affirm the Administrative Law Judge's (ALJ) decision.

**FACTS AND PROCEDURAL HISTORY**

¶2 On September 21, 2006, Claimant suffered an injury while working as a welder for Respondent Employer, Milling Machinery Inc. (Milling). While Claimant was working on the installation of a catwalk, a crane used to install catwalk handrails shifted unexpectedly. The handrails the crane was lifting struck Claimant in his left flank region.

¶3 Claimant was subsequently treated for "back and rib pain." Claimant filed a worker's compensation claim with the Industrial Commission of Arizona (ICA). Respondent Carrier, State Compensation Fund Arizona (SCF), was the insurance carrier for Milling when Claimant was injured. SCF accepted the claim for benefits. On December 18, 2006, Charles G., D.O. (Dr. G.) opined that Claimant had reached a permanent and stationary

status regarding his reported injury and that no further medical treatment was needed. SCF then terminated Claimant's temporary compensation and active medical treatment, effective December 18, 2006. Claimant requested a hearing regarding SCF's termination. During the hearing, Claimant and SCF stipulated to be bound by the opinions of Irwin S., M.D. (Dr. S.), who conducted an independent medical exam of Claimant on May 27, 2008.

¶14 Dr. S. agreed with Dr. G.'s opinion that Claimant's status was probably stationary as of December 18, 2006. He also found no evidence of permanent injury that could be reasonably attributed to Claimant's September 21, 2006 industrial accident.

¶15 On January 18, 2008, the ALJ awarded Claimant benefits beginning September 21, 2006, and terminating December 18, 2006. On May 2, 2008, Claimant filed a petition to reopen his claim based on a new, additional, or previously undiscovered disability or condition. Formal hearings on Claimant's Petition to Reopen were held on September 9, 2008, December 8, 2008, and January 15, 2009. During the hearings, Dr. S. and Claimant's treating physician, Rubin W., M.D. (Dr. W.), testified.

¶16 Dr. W. testified that he had been treating Claimant for issues related to Claimant's neck and upper back area. He also stated that Claimant was suffering from "a cervical and a

trapezius strain as a result of [Claimant's] work-related condition." However, Dr. W. also stated that Claimant's condition was "more or less" static at the time he was testifying. Additionally, he testified that since he began treating Claimant, he could not discern any material change in Claimant's medical condition.

¶17 Dr. S. testified that Claimant was not suffering from any new, additional, or previously undiscovered condition related to the September 21, 2006 industrial injury. He disagreed with part of Dr. W.'s opinion. Dr. S. opined that Claimant's current condition was due to degenerative disc disease, which was not related to a traumatic injury. Additionally, Dr. S. testified that Claimant's "tortuosity of the aorta" was not related to a traumatic injury; rather, it only meant Claimant's aorta was curved.

¶18 On April 10, 2009, the ALJ denied Claimant's petition to reopen his claim. The ALJ found that to the extent there was conflict between the opinions of Dr. S. and Dr. W., he resolved that conflict in favor of Dr. S.'s opinions as being the more probably correct. The ALJ further found that Claimant had no new, additional, or previously undiscovered conditions related to his September 21, 2006 industrial accident.

¶9 On May 8, 2009, Claimant requested the ALJ review his April 10, 2009 decision. On May 22, 2009, the ALJ affirmed the April 10, 2009 decision. Claimant filed a timely petition for special action and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.2 (2003), 23-951.A (1995) and Rule 10 of the Arizona Rules of Procedure for Special Actions.<sup>1</sup>

#### DISCUSSION

¶10 On appeal, Claimant offers no legal argument to support his contention that the ALJ's decision denying reopening was entered in error. Rather, Claimant simply restates his medical history and asks this Court to reexamine the ALJ's decision. When reviewing an ICA award, we view the facts in the light most favorable to sustaining the decision and will not set it aside if it is reasonably supported by the evidence. *Delgado v. Indus. Comm'n of Ariz.*, 183 Ariz. 129, 131, 901 P.2d 1159, 1161 (App. 1994).

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<sup>1</sup> On June 22, 2009, Claimant filed a request for review of the ALJ's May 22, 2009 decision affirming the ALJ's April 10, 2009 decision. Because the ALJ no longer had jurisdiction over Claimant's action, see A.R.S. § 23-943.H (1995), Claimant's request for review was forwarded to this Court. Claimant's request for review was filed in this Court on June 29, 2009. Although Claimant's request for review was filed with this Court after the thirty-day filing deadline, Claimant's petition is nevertheless considered timely. See *Martinez v. Indus. Comm'n of Ariz.*, 213 Ariz. 531, 533, ¶ 8, 144 P.3d 1260, 1262 (App. 2006).

¶11 In order to reopen a worker's compensation claim, a claimant must show that the original industrial injury has caused a "new, additional or previously undiscovered" medical condition. A.R.S. § 23-1061.H (Supp. 2009). The claimant bears the burden of proving the "new, additional, or previously undiscovered condition and a causal relationship between that new condition and the prior industrial injury." *Lovitch v. Indus. Comm'n of Ariz.*, 202 Ariz. 102, 105-06, ¶ 17, 41 P.3d 640, 643-44 (App. 2002). "When the causal connection between the condition and the prior industrial injury is not readily apparent, it must be established by expert medical testimony." *Sun Valley Masonry, Inc. v. Indus. Comm'n of Ariz.*, 216 Ariz. 462, 465, ¶ 11, 167 P.3d 719, 722 (App. 2007). Where a conflict in expert medical testimony exists, the ALJ has the responsibility of resolving the conflict, and we must uphold that resolution if the evidence reasonably supports it. *Fry's Food Stores v. Indus. Comm'n of Ariz.*, 161 Ariz. 119, 121, 776 P.2d 797, 799 (1989).

#### **Conflict in Expert Medical Testimony**

¶12 Dr. W. testified that Claimant was suffering from "a cervical and a trapezius strain as a result of [Claimant's] work-related condition." Although Dr. W.'s diagnosis suggested a new condition, it conflicted with Dr. S.'s diagnosis. Dr. S.

stated that Claimant's current condition was a result of degenerative disc disease, which was not related to a traumatic injury.

¶13 The ALJ resolved the conflict in favor of Dr. S.'s opinions. We find the record reasonably supports the ALJ's resolution of the conflict between the opinions of Dr. W. and Dr. S. *Id.* Several magnetic resonance imaging (MRI) results showed Claimant suffered from mild degenerative disc disease present at the C5-C6 and C6-C7 levels. These results reasonably support Dr. S.'s opinion that Claimant's condition was a product of degenerative disc disease. Moreover, the MRI results are inconsistent with Dr. W.'s opinion that Claimant was suffering from "a cervical and a trapezius strain as a result of [Claimant's] work-related condition." Accordingly, we do not disturb the ALJ's resolution of the conflict in expert medical testimony in favor of Dr. S.

**The Evidence Reasonably Supports the ALJ's Decision**

¶14 Our review of the record indicates the ALJ correctly determined that Claimant failed to meet his burden of proving a new, additional, or previously undiscovered condition existed as a result of the September 21, 2006 industrial injury. *Lovitch*, 202 Ariz. at 105-06, ¶ 17, 41 P.3d at 643-44. It was not readily apparent that Claimant's condition was causally related

to his original industrial injury; thus, expert medical testimony was required to establish the causal connection. *Sun Valley Masonry, Inc.*, 216 Ariz. at 465, ¶ 11, 167 P.3d at 722. Claimant's only evidence suggesting a new, additional, or previously undiscovered condition came from Dr. W.'s testimony, which was in conflict with Dr. S.'s opinion. However, the ALJ acted within his discretion in resolving the conflict in expert medical testimony in favor of Dr. S. Basing his opinion on Claimant's medical record, Dr. S. testified that Claimant was not suffering from any new, additional, or previously undiscovered condition related to the September 21, 2006 industrial injury. This testimony reasonably supports the ALJ's decision denying reopening. Accordingly, we do not disturb the decision.

**CONCLUSION**

¶15 For the reasons previously stated, we affirm the ALJ's decision.

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

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DIANE M. JOHNSEN, Judge

/S/

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JON W. THOMPSON, Judge