

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07-13-2010
PHILIP G. URRY, CLERK
BY: GH

BRIAN T. DOWLE,)
)
Petitioner,) 1 CA-IC 09-0078
)
v.) DEPARTMENT D
)
THE INDUSTRIAL COMMISSION OF)
ARIZONA,)
) **MEMORANDUM DECISION**
Respondent,) (Not for Publication -
) Rule 28, Arizona Rules
ATLAS FORKLIFT RENTALS,) of Civil Appellate
) Procedure)
)
Respondent Employer,)
)
NATIONAL UNION FIRE INS. CO. OF)
PITTSBURGH PA c/o AIG DOMESTIC)
CLAIMS, INC.,)
)
Respondent Carrier.)
_____)

Special Action--Industrial Commission

ICA CLAIM NO: 20082-96040

CARRIER NO. 710-563816

Administrative Law Judge J. Victor Stoffa

AWARD AFFIRMED

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T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review. Petitioner Dowle asserts the administrative law judge (ALJ) erred in finding his Request for Hearing untimely and that his right eye injury should have been compensable. Finding no error, we affirm.

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) (2008), 23-951(A) (2008), and Arizona Rule of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

¶3 The threshold issue is whether petitioner made a timely request for hearing after the Respondent Insurance Carrier denied his claim on November 12, 2008. Under section 23-947 (2008), petitioner was required to file a request for hearing within ninety

days after the notice was sent unless he meets one of the enumerated exceptions.

¶14 The injury to petitioner occurred on October 6, 2008 when, after hours but on premises, a coworker shot a potato gun resulting in petitioner being struck in the right eye with a fragment of some sort and blindness resulted. The ALJ took evidence on the legal causation issue and found credible that petitioner was an observer rather than an active participant in the "horseplay." The ALJ found dispositive that petitioner's request for hearing was untimely. The carrier mailed a notice of claim status denying the claim to petitioner's last known address. Petitioner testified he moved twice in short succession and did not receive the notice of claim status. Petitioner admits receiving an email copy of the notice of claim status on December 12, 2008. Petitioner filed his request for hearing on March 5, 2009, eighty-three days after learning of the denial of his claim. The court's findings are supported by the record. See *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 439 P.2d 485 (1968).

¶15 On appeal, petitioner asserts that under A.R.S. § 23-947(B)(3), he has shown that he did not receive the notice mailed by the carrier and that to deny him a hearing would deprive him of due process as in *Iphaar v. Indus. Comm'n*, 171 Ariz. 423, 831 P.2d 422 (App. 1992). In *Iphaar*, however, the claimant did not have constructive notice of the denial of benefits until after the

ninety-day period had run. *Id.* at 424, 831 P.2d at 423. Rather, the ALJ found clear and convincing evidence that although the notice was properly mailed to the correct address, claimant did not receive it. *Id.*

¶16 We find, as did the ALJ, that petitioner had constructive notice of the denial thirty days into the ninety-day filing period. Section 23-947(C) provides: "The late filing shall not be excused under subsection B of this section if the person to whom the notice is sent or the person's legal counsel knew or, with the exercise of reasonable care and diligence, should have known of the fact of the notice at any time during the filing period." Subsection C is intended for "constructive notice" situations. *See Epstein v. Indus. Comm'n*, 154 Ariz. 189, 194, 741 P.2d 322, 327 (App. 1987); *Black v. Indus. Comm'n*, 149 Ariz. 81, 82, 716 P.2d 1018, 1019 (App. 1985). Petitioner had sufficient constructive notice that application of the ninety-day rule does not deprive him of his due process rights.

¶7 For the foregoing reasons, the award is affirmed.

/S/

JON W. THOMPSON, Judge

CONCURRING:

/S/

PATRICIA A. OROZCO, Presiding Judge

/S/

DIANE M. JOHNSEN, Judge