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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
FILED: 01/6/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DONALD R. BUEHLER,) 1 CA-IC 09-0089
)
Petitioner,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
THE INDUSTRIAL COMMISSION OF ARIZONA,) (Not for Publication -
) Rule 28, Arizona Rules
Respondent,) of Civil Appellate
) Procedure)
ACE HARDWARE*, **)
)
Respondent Employer,)
)
FIDELITY & GUARANTY INSC. CO. c/o ,)
GALLAGHER BASSETT SERVICES, INC.*, **,)
Respondent Carrier.)
_____)

Special Action--Industrial Commission

ICA CLAIM NO. 20060-390063**; 20060-390064* and 20061-310925***

CARRIER NO. 002170001701WC01**, 002170001993WC01* and
002170002376WC01***

Administrative Law Judge Robert F. Retzer

AWARD AFFIRMED

Donald R. Buehler Prescott Valley
Petitioner Employee In *Propria Persona*

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

Jardine, Baker, Hickman & Houston Phoenix
By Stephen Baker
Attorneys for Respondent Employer and Carrier

G E M M I L L, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") order denying Petitioner Donald Buehler's request for a protective order. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In February 2006, Buehler filed a workers' compensation claim for injuries to his hip and shoulder purportedly suffered in October 2005 while working for Respondent Ace Hardware in Prescott Valley. Respondent Gallagher Basset Services, Inc. ("Gallagher") denied Buehler's claim and Buehler requested an ICA hearing.

¶3 In December 2007 and March 2008, hearings were held in Phoenix and Prescott before an Administrative Law Judge ("ALJ"). The hearings consisted of testimony from Buehler, his supervisors, his coworkers, and various physicians. After the hearings, the ALJ entered a consolidated award for noncompensable claims, finding Buehler's failure to forthwith report his injuries constituted a forfeiture of his claim for benefits. Buehler appealed to this court and we set aside the ALJ's award. *Buehler v. Indus. Comm'n*, 1CA-IC 08-0031 (Ariz. App. May 21, 2009) (mem. decision). The matter was returned to the ICA and a hearing was scheduled for September 4, 2009 in Phoenix. The hearing was subsequently rescheduled for January 2010.

¶4 In October 2009, Respondents Ace Hardware and Gallagher

(collectively "Ace") sent a letter to Buehler, informing him that he had been scheduled for an independent medical examination ("IME") with Dr. Gerald Moczynski in Phoenix. Dr. Moczynski, an orthopedic surgeon, had performed an IME on Buehler in 2006 in Phoenix. During the ICA hearings in 2007 and 2008, Dr. Moczynski testified that Buehler's hip problem was degenerative and not work-related. He also testified that Buehler had arthritis in his shoulder and that the arthritis was not a work-related injury. Enclosed with Ace's October 2009 letter to Buehler was a check for \$127.86, which was intended to cover Buehler's travel and meal expenses.

¶15 In response to the letter, Buehler moved for a protective order, requesting he be excused from attending the IME. He asserted that the IME was not reasonably convenient under Arizona Revised Statutes ("A.R.S.") section 23-1026(A) (1995) and that Ace could not schedule an IME because they had denied Buehler's claim. Ace opposed the motion, asserting that a second evaluation by Dr. Moczynski was necessary because it had been several years since he had last examined Buehler and Buehler's medical records had been updated since the 2006 IME. Ace also noted that "[t]here are not that many physicians in the Prescott area who conduct IMEs and Defendants have the right to have the Applicant seen for an IME by the physicians of their choosing."

¶16 On November 9, 2009, the ALJ filed a consolidated

findings and order denying Buehler's request for a protective order. On December 9, 2009, Buehler petitioned this court for special action review of the ALJ's order.

JURISDICTION

¶17 On November 19, 2010, we issued an order requesting supplemental briefing on several questions pertaining to the proper characterization, appealability, and potential finality of the ALJ's order of November 9, 2009 that Buehler is challenging. After considering the parties' supplemental briefs and applicable statutes and cases, we conclude that we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003), 23-948 (1995), and Arizona Rule of Procedure for Special Actions 10(a). See *Miceli v. Indus. Comm'n*, 135 Ariz. 71, 73, 659 P.2d 30, 32 (1983) (exercising statutory special action jurisdiction to address challenge to ICA order requiring claimant to travel from Tucson to Phoenix for IME); *Israel v. Indus. Comm'n*, 137 Ariz. 124, 126, 669 P.2d 102, 104 (App. 1983) (explaining that "a recent decision of the Arizona Supreme Court [*Miceli*] has determined that an order denying a motion for protective order is interlocutory" and "can be challenged pursuant to A.R.S. § 23-948 by a special action").

ANALYSIS

¶18 Buehler contends that the ALJ erred by denying his motion for a protective order. Specifically, Buehler argues that Ace did not have a "right or privilege to request or compel an IME"

because they had denied Buehler's claim and, even if they had the right to have an IME performed, the record did not establish that Buehler should attend an IME in Phoenix. "We deferentially review the ALJ's factual findings but independently review his legal conclusions." *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, 12, ¶ 6, 90 P.3d 211, 213 (App. 2004), *aff'd*, 211 Ariz. 67, 117 P.3d 786 (2005).

¶9 In denying Buehler's motion for a protective order, the ALJ concluded that, in accordance with A.R.S. § 23-1026(A), Ace is "entitled to an IME even though the claim has been denied." In addition, the ALJ found that a second IME by Dr. Moczynski in Phoenix was justified because Buehler had been examined by Dr. Moczynski in 2006, it had been three years since Dr. Moczynski examined Buehler, and Buehler's medical records had been updated since the 2006 IME. The ALJ also instructed Ace to pay Buehler for his loss of pay, if any (in addition to travel expenses). Because the ALJ correctly interpreted § 23-1026(A) and made sufficient findings that support requiring Buehler to attend the IME in Phoenix, we affirm the ALJ's order.

¶10 First, we agree with the ALJ's interpretation of § 23-1026(A). Our goal in interpreting statutes is to determine and apply the legislature's intent. *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990). "We look first to the plain language of the statute as the most reliable indicator of its

meaning." *State v. Mitchell*, 204 Ariz. 216, 218, ¶ 12, 62 P.3d 616, 618 (App. 2003). We apply a common sense approach, striving to interpret a statute to harmonize all its provisions. See *State v. Rodriguez*, 205 Ariz. 392, 396, ¶ 11, 71 P.3d 919, 923 (App. 2003).

¶11 The plain language of § 23-1026(A) requires an employee submit to an IME, even if the employee's claim has been denied. That section provides:

An employee *who may be entitled to compensation* under this chapter shall submit himself for medical examination from time to time at a place reasonably convenient for the employee, if and when requested by the commissioner, the state compensation fund, his employer or the insurance carrier. A place is reasonably convenient even if it is not where the employee resides if it is the place where the employee was injured and the employer or the insurance carrier pays in advance the employee's reasonable travel expenses, including the cost of transportation, food, lodging and loss of pay, if applicable.

(Emphasis added.) Here, Buehler asserts a claim for injuries purportedly suffered while working for Ace Hardware and that claim is being heard before the ICA to determine whether it is compensable. Because Buehler "may be entitled to compensation," we conclude that § 23-1026(A) is applicable and Buehler may be required to submit to an IME even though his claim has thus far been denied.

¶12 The next question is whether Buehler could be required to come to Phoenix for the IME. Because Buehler resides in Prescott

Valley and asserts a claim for injuries sustained while working at Ace Hardware in Prescott Valley, Phoenix does not qualify as a "reasonably convenient" location under the second sentence of A.R.S. § 23-1026(A). Nonetheless, subsection 23-1026(F) -- when read together with subsection 23-1026(A) -- provides authority for the ALJ to require Buehler attend the IME in Phoenix:

An employee shall be excused from attending a scheduled medical examination if the employee requests a protective order and the administrative law judge finds that the scheduled examination is unnecessary, would be cumulative or could reasonably be timely scheduled with an appropriate physician where the employee resides. *If a protective order is requested the burden is on the employer or insurance carrier to establish that a medical examination should be scheduled at a place other than where the employee resides.*

A.R.S. § 23-1026(F) (emphasis added). Here, Buehler requested a protective order because Phoenix was not a "reasonably convenient" location and, as a result, Ace had the burden of establishing that the IME should be conducted in Phoenix with Dr. Moczynski.

¶13 As previously noted, Ace asserted and the ALJ found that a second evaluation by Dr. Moczynski in Phoenix was justified because it had been several years since he had last examined Buehler and Buehler's medical records had been updated since the 2006 IME. We conclude these findings by the ALJ are sufficiently supported by the record and evidence, and the ALJ acted within his discretion in ordering Buehler attend the IME with Dr. Moczynski in Phoenix. Dr. Moczynski testified for the respondents in this

matter at the hearings held in 2007 and 2008 and it is reasonable to assume he would testify again during the upcoming hearings. The ALJ did not abuse his considerable discretion in denying Buehler's motion for a protective order and determining that Ace is entitled to have Dr. Moczynski re-examine Buehler.

¶14 Buehler relies on our supreme court's decision in *Miceli* to support his contention that the ALJ erred in denying his motion for a protective order. In *Miceli*, the supreme court held that there must be an "arguable reason for requiring the employee to submit to examination in a locality other than his or her place of residence." 135 Ariz. at 75, 659 P.2d at 34. The court concluded that the ALJ erred by denying the petitioner's protective order because the respondents "presented no reason for an examination in Phoenix and the [ALJ] made no finding with regard to any such reason." *Id.* Here, unlike in *Miceli*, Ace asserted and the ALJ found that the evaluation by Dr. Moczynski in Phoenix was justified because it had been several years since he had last examined Buehler and Buehler's medical records had been updated since his previous IME. A further distinction exists because, at the time *Miceli* was decided, subsection (F) to § 23-1026 had not been enacted. See 1987 Ariz. Sess. Laws, ch. 2, § 5 (3d Spec. Sess.). Accordingly, we do not find Buehler's reliance on *Miceli* persuasive.

¶15 Buehler also contends that Ace and the ICA violated his

constitutional rights to equal protection and due process. Buehler, however, has not developed these arguments and therefore they are waived. See *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491-92 n.2, ¶ 6, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives the issue on appeal). Even if not waived, we do not discern any constitutional violations.

¶16 In addition, Buehler argues in his reply brief that if an employer requests its employee undergo a medical examination pursuant to A.R.S. § 23-908(F) (2010), the same doctor must be used to administer the IME exam under § 23-1026(A). Because Buehler raises this issue for the first time in his reply brief, we deem it waived. See *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204 n.3, 119 P.3d 467, 471 n.3 (App. 2005) (issue raised for first time in reply brief waived on appeal).

¶17 Moreover, even if this issue is not waived, we find Buehler's argument unpersuasive. Pursuant to § 23-908(F), when a work-related accident occurs that causes injury to an employee, the employer may designate a physician to examine the extent and character of the employee's injuries. We are unable to identify from the statutes or case law any requirement that the same doctor chosen to examine the employee under § 23-908(F) must also perform an IME under § 23-1026(A).

CONCLUSION

¶18 For the foregoing reasons, we affirm the ALJ's order.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge