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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/27/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

REX A. EARLY,) 1 CA-IC 10-0015
)
Petitioner,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
THE INDUSTRIAL COMMISSION OF ARIZONA,) - Rule 28, Arizona
) Rules of Civil
Respondent,) Appellate Procedure)
)
ADA CONSTRUCTION MANAGERS COMPANY,)
INC.,)
)
Respondent Employer,)
)
SCF ARIZONA,)
)
Respondent Carrier.)
_____)

Special Action--Industrial Commission

ICA CLAIM NOS. 20090-560345*/20090-640140**

CARRIER NOS. 0832824*/0903371**

Administrative Law Judge Paula R. Eaton

AWARD AFFIRMED

Rex A. Early
Petitioner *in propria persona*

Peoria

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The Industrial Commission of Arizona
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B A R K E R, Judge

¶1 This is a special action review of the Industrial Commission of Arizona's denial of Rex Early's claims for industrial injuries that allegedly occurred on or about November 30, 2008. Early's sole claim on appeal is that the Administrative Law Judge's finding that his testimony lacked credibility was arbitrary and unsupported by evidence. For the reasons set forth below, we affirm.

Jurisdiction and Standards of Review

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules 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 ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

Facts and Procedural History

¶13 Petitioner Early was employed by Respondent Employer ADA Construction in 2008 and 2009 as a field superintendent in charge of scheduling and overseeing construction workers. In 2006 and 2007, prior to his job with ADA, he was employed by another construction company, R.W. Johnson Custom Builders. Early had also worked for ADA for approximately five to seven years prior to his job with R.W. Johnson. In early February 2009, ADA informed Early that he would be temporarily laid off.

¶14 On February 12, 2009, Early filed a Worker's Report of Injury making a claim for a left foot injury that allegedly occurred from stepping on a nail on November 30, 2008. ADA's insurance carrier denied Early's claim on March 18, 2009. Early then filed a timely request for hearing.¹ On February 23, 2009, Early signed another claim form alleging that he injured his back and legs on February 10, 2009 while picking up concrete blocks. The carrier also denied that claim, and Early filed a request for hearing.

¶15 In his written answers to interrogatories prior to his hearing, Early claimed that he had injured his back picking up concrete blocks and loading them into a backhoe bucket on

¹ Petitioner has abandoned his claim for the alleged foot injury and appeals only his later second claim related to his lower back. We therefore address only the back claim.

February 10, 2009. In his deposition, he testified that he hurt his back moving concrete in late January 2009 and that on February 10 he hurt his back shoveling out a water box. Prior to the hearing, Early amended the date of injury to December 4, 2008.

¶16 At the hearing, Early testified that he felt some back pain while lifting a piece of concrete. Early did not report any injury to the ADA personnel who were working with him at the site of the injury. He testified that he did not think he was injured at the time because he "ha[d] aches and pains all the time." Early continued to work and did not mention the problem about his back to anyone at ADA or to his wife. He then claimed that he developed pain a week after the incident. When he was admitted to the hospital on December 27, 2008 on an unrelated matter, he did not mention any recent back injuries.

¶17 Early offered the testimony of two witnesses who worked at a construction site with Early in 2008. They testified that in December 2008 they saw Early struggling to dig near a sewer line and that at that time Early had complained about his back hurting. Early's wife testified that Early was having back problems in fall of 2008 around Thanksgiving.

¶18 Early's doctor, Dr. Demers, started treating Early on February 23, 2009 for his back pain. Early had told Dr. Demers

that he was picking up concrete blocks when he injured his back. He gave December 18, 2008 and February 10, 2009 as the dates of his accident. Early never told Dr. Demers that he experienced any symptoms while shoveling. Dr. Demers had no record of a shoveling incident on February 10, 2009.

¶9 Early did not miss any work in December or January due to back problems. Nor did he miss any work in February prior to being laid off. Early's primary care physician reported in mid-April of 2009 that Early had complained of back problems with a potential cause of lifting at work in November and subsequently lifting a 24-pack of beer at his father's house. Terry McLean, another physician, reviewed Early's medical history and noted that Early had a preexisting lumbar degenerative disk and prior surgery. He believed that the absence of back pain complaints in Early's December hospital visit raised a credibility question as to whether an injury had occurred in early December.

¶10 At the hearing, the ALJ found that Early lacked credibility and denied his claims for benefits. The ALJ specifically stated that she was "unable to conclude that the applicant sustained any injury to his back or foot in the course and scope of his employment regardless of the testimony of the other witnesses who may support his claims." Early timely appealed the ALJ's findings.

Discussion

¶11 On appeal, Early contends that the ALJ's credibility finding was "arbitrary and capricious" and that her reasoning was "unsupported by the record and contrary to uncontradicted reliable evidence." In a claim for workman's compensation benefits, the employee bears the burden of proving that an injury is compensable. *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977). For an injury to be compensable, it must "ar[ise] out of and in the course of [] employment," and the employee must establish "a causal relationship between work activity and injury." *O'Donnell v. Indus. Comm'n*, 125 Ariz. 358, 360, 609 P.2d 1058, 1060 (App. 1979).

¶12 Although Early attempted to meet this burden by testifying that his injury was caused by events that occurred while he was at work, "[t]he administrative law judge is the sole judge of witness credibility." *Holder v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). An ALJ "may not reject a claimant's testimony simply because it is self-interested," but she "may reject it if it is self-contradictory, inconsistent with other evidence, or directly impeached." *Id.*

¶13 Here, evidence in the record supports the ALJ's determination that Early's testimony lacked credibility.

Early's testimony was inconsistent as to the cause of his injury, including his stating at one point that he injured himself lifting concrete blocks and at another point that he hurt himself while shoveling. His testimony as to the date of injury was inconsistent, ranging from December of 2008 to early February of 2009. When Early entered the hospital on December 27, 2008, he failed to mention any recent back injuries. And, Early did not even file a claim for compensation or seek medical treatment for his alleged injuries until after he heard that he was going to be temporarily laid off.

¶14 Assuming Early is correct in his contention that minor inconsistencies alone are not enough to reject a claimant's history of an accident, *Allen v. Industrial Commission*, 124 Ariz. 173, 175, 602 P.2d 841, 843 (App. 1979), these inconsistencies were more than simply minor; his account of what events took place changed entirely from a lifting accident to a shoveling accident. Early also attempts to explain his date-of-injury inconsistencies by stating that he was told to use the February 10 date as the date of injury by Dr. Demers' office because "worker's comp 'goes crazy' if two dates of injury are utilized." Even if the ALJ had believed this testimony, she could reasonably have interpreted this account as tending to decrease Early's credibility rather than increase it. Such

behavior could indicate that Early was willing to revise his description of his injury to meet the perceived guidelines of the workman's compensation program, thus decreasing his credibility overall.

¶15 Early also offered the testimony of Dr. Demers in support of his claim that he was injured while working for ADA. The value of Dr. Demers' testimony, however, is minimal. Medical opinion testimony relating to causation is only as valuable as the accuracy of the facts on which it is based, see *Desert Insulations, Inc. v. Industrial Commission*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982), and Demers' opinion was based on Early's own recitation of his prior injuries. Additionally, a different physician's report noted the presence of a preexisting back condition and an uncertain causal relationship between Early's work for ADA and his back injury. In the face of this competing testimony, the ALJ could have reasonably decided that the report discrediting Early was more reliable than the one supporting his statements. Therefore, sufficient evidence existed in the record for the ALJ to find that Early did not sustain his burden of proof in showing that he sustained a back injury caused by his work for ADA.

¶16 Early claims that the testimony of Stan Warren, a project manager at ADA, corroborates his claim that his back

injuries were caused at work. Warren testified that he saw Early "walking funny" and that Early had said his back hurt. He also testified that he saw Early loading concrete into a backhoe. This testimony does not establish that Early's back injury, or even his back pain, was caused by loading concrete.

¶17 Early also asserts that his claims are corroborated by the similar testimony of two additional coworkers. Both workers testified that they saw Early shoveling toward the end of 2008 and that his back hurt while he was shoveling. As Early testified, physical aches and pains were common in his job. His coworkers' testimony does not necessarily establish that Early was injured as a result of his digging. Early's failure to seek any medical attention for a back injury until he learned that he would be laid off from his job also supports an inference that any pain that he experienced while digging was not serious enough to prevent Early from working. Additionally, the coworkers' testimony failed to establish that any serious injury originated with the digging incident.

Conclusion

¶18 For the foregoing reasons, we affirm the award.

/s/

DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

MICHAEL J. BROWN, Judge