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: 05/24/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRUCE STEWART, Petitioner-Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, PAUL REVERE TRANSPORTATION LLC, Respondent-Employer, SCF PREMIER INSURANCE CO., Respondent-Carrier.	No. 1 CA-IC 10-0058 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20091-480452

Carrier Claim No. 08P02263

Administrative Law Judge Anthony F. Halas

AWARD AFFIRMED

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W E I S B E R G, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for forfeiture of workers' compensation benefits. The petitioner employee ("claimant") presents one issue on appeal: whether the administrative law judge ("ALJ") erred by finding that he must forfeit his workers' compensation benefits for an otherwise compensable gradual injury because he failed to forthwith report. Because the record contains reasonable evidence to support the ALJ's finding of a failure to forthwith report the back injury to the employer, we affirm.

JURISDICTION AND STANDARD 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 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 a 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).

PROCEDURAL AND FACTUAL HISTORY

¶3 At the time of his gradual injury, the claimant worked as a shuttle bus driver for the respondent employer, Paul Revere Transportation, LLC ("PRT"). The claimant testified at the ICA hearing that he made fifteen separate stops on his route, and he drove his route six to seven times in an eight-hour workday. He stated that his work involved numerous repetitive motions, which included engaging and disengaging the emergency brake. This required leaning forward, twisting to the left, and dropping his left shoulder.

¶4 The claimant testified that in August 2008, he began to experience twinges of low back pain. His pain steadily worsened and began to radiate down his left leg. After speaking with another shuttle bus driver, in September 2008, the claimant sought chiropractic care for sciatica. He testified that when he saw the chiropractor, he believed his sciatica was caused by his work as a shuttle bus driver.

¶5 On September 24, 2008, the claimant was hospitalized for treatment of deep vein thrombosis ("DVT"). During that hospitalization, he reported back pain but gave inconsistent histories regarding its onset, i.e., using a treadmill in early September 2008 and a back injury occurring several months earlier.

¶6 The claimant filed a workers' compensation claim for back pain in May 2009. When questioned as to why he didn't file a claim

before May 2009, the claimant stated that no doctor had told him what was wrong with his back. During the entire time, the claimant continued to perform his regular job duties and to pass his physicals for his commercial driver's license.

¶7 The claimant's shift supervisor testified that PRT holds safety meetings. She stated that if the claimant had reported a work-related injury, PRT would have completed an incident report, provided the necessary insurance information, and sent him to be examined by a doctor. The supervisor stated that the claimant had never reported a work-related back injury to her.

¶8 PRT's project manager provided similar testimony. She stated that if the claimant had reported a back injury to her, she would have had him fill out an incident report and would have sent him to a doctor for assessment. The claimant, however, had never told her that he had back problems related to his work.[1] The project manager also testified that based on input from the claimant and other drivers, the general manager changed PRT's parking brake policy to require the brake's less frequent use.

¶9 Donald Hales, M.D., a board certified orthopedic surgeon, fellowship trained in back care, first saw the claimant on December 7, 2009 for complaints of back and left leg pain. He received the claimant's history of an onset of back pain during August or

[1]The project manager was aware that the claimant had filed a worker's report of injury following his September 24, 2008 hospitalization for DVT. The DVT condition was later determined to be a compensable industrial injury.

September 2008. At the time of Dr. Hale's examination, the claimant was continuing to perform his regular job duties, but required medication.[2]

¶10 On physical examination, Dr. Hales found positive straight leg raising on the left, indicative of sciatic nerve irritation, and weakness in the claimant's extensor muscle to the great toe. He also reviewed a March 2009 MRI, which revealed degenerative disc disease and an acute disc herniation that explained the claimant's complaints of back pain. It was the doctor's opinion that the claimant had preexisting degenerative changes that made his L4-5 disc annulus weak and that his work activities acted on the weakness to result in herniation. Dr. Hales recommended a microdiscectomy to treat the herniation followed by rehabilitation for the back pain. Alternatively, if this treatment was unsuccessful, the doctor recommended replacing the L4-5 disc with an artificial disc.

¶11 The claimant filed a worker's report of injury in May 2009 for a gradual back injury on August 3, 2008. SCF denied the claim for benefits, and the claimant timely requested a hearing. SCF then raised the affirmative defense of failure to forthwith report the injury.

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[2]The respondent carrier, SCF Premium Insurance Company ("SCF"), presented medical testimony from Irwin Shapiro, M.D., but the ALJ resolved the conflict in favor of Dr. Hales. *See Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968)(ALJ

¶12 Three ICA hearings were held for testimony from the claimant, two lay witnesses and two physicians. At the conclusion of the hearings, the ALJ entered an award finding that the claimant had sustained a compensable gradual back injury, but he would forfeit all benefits because he had failed to forthwith report his back injury to his employer. The ALJ summarily affirmed the award on administrative review, and the claimant brought this appeal.

DISCUSSION

¶13 In the case of a gradual injury, the date of injury is considered to be the date that the claimant discovered or "in the exercise of reasonable diligence" should have discovered the relationship between the injury and the employment. *Nelson v. Indus. Comm'n*, 120 Ariz. 278, 281-82, 585 P.2d 887, 890-91 (App. 1978). An injured employee must report the accident and the injury resulting therefrom to the employer "forthwith." *See* A.R.S. § 23-908(E)(Supp. 2010).

¶14 Requiring forthwith notice to the employer serves two purposes. First, it enables the employer to investigate the facts surrounding the injury as soon as possible so that reliable evidence can be preserved. Second, it gives the employer the opportunity to provide immediate medical treatment so as to minimize the seriousness of the injury. *Magma Copper Co. v. Indus. Comm'n*, 139 Ariz. 38, 43, 676 P.2d 1096, 1101 (1983)(citing 3 A.

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resolves all conflicts in the evidence and draws all warranted

Larson, The *Law of Workmen's Compensation* § 78.10(1983)).[3] The sanction for failure to report forthwith is forfeiture of workers' compensation benefits. *See* A.R.S 23-908(F). The ICA may relieve the claimant of this sanction "if it believes after investigation that the circumstances attending the failure . . . are such as to have excused" the failure to report forthwith. *Id.*

¶15 The claimant has the burden to prove facts that establish an excuse for his failure to report forthwith, and the absence of prejudice to the employer is but one factor in establishing a justifiable excuse. *Pacific Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 215, 735 P.2d 820, 825 (1987). A lack of prejudice may be established by showing that the "injury was not aggravated by the employer's inability to provide early diagnosis and treatment," and that the "employer was not hampered in making his investigation and preparing his case." *Id.* at 216, 735 P.2d at 826.

¶16 In this case, the claimant argues that the ALJ erred by finding that he had a duty to forthwith report his injury before he saw Dr. Hales and that there was no showing of prejudice to PRT in making its investigation or preparing its case. The ALJ specifically addressed both of these contentions in the award:

> 15. A. However, if must further be determined whether applicant Stewart "forthwith reported" the injury

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inferences).

[3]This section currently is found at 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 126.01 at 126-4 to -6.1 (2010).

resulting therefrom as required by A.R.S. § 23-908(E). Stewart concedes that by the time he sought chiropractic treatment for his low back and leg pain in September 8, 2008, he thought his symptoms were the result of his work as a bus driver, yet he further concedes that he did not report them as such to his employer any time before filing the claim with the Commission in May 2009. This despite his October 27, 2008 letter to Cann in which he very clearly and emphatically reported those same activities as the cause of separate abdominal hernia and left calf DVT conditions, with no mention made of low back pain or radicular symptoms into the left leg.[4] While the overlap of symptoms attributable to those conditions may have created some difficulty in isolating diagnosis and treatment of the separate low back condition for a period of time, it does not seem reasonable for that period to extend until May 2009, particularly when Stewart was very able to express in writing how his repetitive work activities contributed to his physical condition.

B. In addition, the medical record contains histories inconsistent with the basis for his claim that his repetitive activity driving the bus culminated in the onset of symptoms while doing so on August 3, 2008: e.g., a several week history of low back pain while using a treadmill, as recorded in the emergency room admission on September 22, 2008.

C. I conclude that despite the employer's contemporaneous knowledge that Stewart claimed his driving activities had caused his hernia (later determined non-compensable) and DVT (later determined compensable), such knowledge did not obligate the employer to investigate those activities as the cause of a low back condition it was not made aware of any earlier than May 2009. Stewart's failure to forthwith report the low back condition prejudiced his employer, particularly in terms of its opportunity to promptly obtain medical evidence to determine the nature and extent of any such injury and distinguish its extent from his other conditions, but also to investigate the circumstances of injury prior to the ambiguities presented by interim inconsistent histories as to the onset of the problem.

[4]This letter is contained in the Award at Finding No.6.

¶17 The claimant's testimony established an onset of back pain in August 2008 while operating the parking brake on his shuttle bus. This pain steadily worsened and radiated down his left leg causing the claimant to discuss it with another driver. The claimant then sought chiropractic care for sciatica in September 2008. He also discussed this condition with Dr. Bronstein at a clinic visit on September 24, 2008. This evidence is sufficient to support the ALJ's conclusion that the claimant knew or with the exercise of reasonable diligence should have known of the relationship between his injury and his employment long before May 2009. *Mead v. Am. Smelting and Ref. Co.*, 1 Ariz. App. 73, 77, 399 P.2d 694, 698 (1965) (when claimant knew or should have known he sustained a compensable injury is a question of fact to be resolved by the ALJ).

¶18 With regard to prejudice to the PRT, the evidence of record supports the ALJ's conclusion that the failure to forthwith report the back injury precluded the employer from promptly obtaining a diagnosis or treatment for the condition. Dr. Hales also testified that the longer the claimant continued to perform his job duties and repetitive use of the parking brake, the more it contributed to his disc herniation.

¶19 With regard to whether PRT was hampered in making its investigation and preparing its case, the claimant argues that two drivers he worked with in fall 2008 were still employed by PRT at

the time he filed his claim and PRT could have talked to them about his back injury. However, PRT's project manager testified that she had no reason to interview these drivers or conduct any investigation because the claimant never reported a back injury to her. Further, a delay of nine months between the onset of the claimant's symptoms and his report may have adversely affected the witnesses' ability to accurately recall their conversations with claimant about his back injury.

CONCLUSION

¶20 For all of the foregoing reasons, we affirm the ALJ's award.

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SHELDON H. WEISBERG, Judge

CONCURRING:

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MAURICE PORTLEY, Presiding Judge

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LAWRENCE F. WINTHROP, Judge