DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PRESCOTT VALLEY BODY & PAINT, Petitioner Employer, v. SCF ARIZONA, Petitioner Carrier, THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, ALVIN P. MORRIS, Respondent Employee.	1 CA-IC 10-0062 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20092-010200

Carrier Claim No. 0911367

Administrative Law Judge Anthony F. Halas

AWARD AFFIRMED

James B. Stabler, Chief Counsel, SCF Arizona — Phoenix
By Deborah E. Mittelman
Attorneys for Petitioners Employer/Carrier

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

Alvin P. Morris Glendale
In *Propria Persona*

J O H N S E N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona Decision Upon Review affirming an award by the Administrative Law Judge ("ALJ") that excused Alvin Morris's untimely request for hearing. For the following reasons, we affirm the award.[1]

FACTS AND PROCEDURAL BACKGROUND

¶2 Morris filed an initial report of injury form in which he asserted he was injured at work. On the form, he listed his address as 1032 S. Ocotillo Dr., Cottonwood, AZ 86326. On July 27, 2009, the carrier issued a Notice of Claim Status ("Notice") denying the claim. The Notice was addressed to Morris at 1032 S. Acotillo Dr., Cottonwood, AZ 86326. It stated that if Morris did not agree with the Notice, he must submit a Request for Hearing within 90 days after the date the Notice was mailed.

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[1] Morris failed to file an answering brief on appeal. We could construe this as confession of error. *Thompson v. Thompson*, 217 Ariz. 524, 526, ¶ 6, n.1, 176 P.3d 722, 724 (App. 2008). In an exercise of our discretion, however, we will decide the appeal on its merits. *See Gibbons v. Indus. Comm'n of Ariz.*, 197 Ariz. 108, 111, ¶ 8, 3 P.3d 1028, 1031 (App. 1999).

¶3 On December 3, 2009, 129 days after the Notice was mailed, Morris filed a Request for Hearing. The ALJ set a hearing to determine whether the request was timely and, if not, whether the untimeliness should be excused. At the hearing, Morris testified he did not receive the Notice in the mail until shortly before December 3, 2009. He said he moved from the Ocotillo address in late July 2009 and asked the Post Office to forward his mail to a Post Office box. Thereafter, he said, his mail delivery was "inconsistent." In fact, he said, during the same time period, he did not receive the usual reminder form to renew the registration on his motorcycle. On cross-examination, Morris acknowledged that he called the carrier on August 13, 2009, to inquire about his claim and learned then that his claim had been denied.

¶4 The ALJ issued an award excusing the untimely filing. The ALJ accepted Morris's testimony that he did not receive the Notice until shortly before he filed the request for hearing. The ALJ also cited evidence that the Notice was addressed to an incorrect address and what the ALJ called the uncontroverted evidence that delivery of mail to Morris's Post Office box and home was inconsistent during that time. The ALJ also found that although Morris was aware in August that his claim had been denied, there was no evidence that he knew or should have known

about the Notice itself. After the ALJ affirmed his award on review, this special action followed.

DISCUSSION

¶5 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2011), 23-951(A) (2011) and Rule 10 of the Arizona Rules of Procedure for Special Actions. On review of a decision by the ICA, "we defer to the ALJ's factual findings but review questions of law *de novo*." *Sun Valley Masonry, Inc. v. Indus. Comm'n of Ariz.*, 216 Ariz. 462, 463-64, ¶ 2, 167 P.3d 719, 720-21 (App. 2007). We view the evidence in the light most favorable to sustaining the award, *id.* at 464, ¶ 2, 167 P.3d at 721, and we will not set aside the award unless it is unsupported by any reasonable theory of the evidence, *Phelps v. Indus. Comm'n of Ariz.*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987). We also defer to the ALJ's determinations regarding witnesses' credibility. *Adams v. Indus. Comm'n of Ariz.*, 147 Ariz. 418, 421, 710 P.2d 1073, 1076 (App. 1985).

¶6 The carrier asserts the ALJ abused his discretion in excusing Morris's late filing and contends the ALJ's findings were insufficient to support such a conclusion under A.R.S. § 23-947 (2011). In relevant part, that statute provides:

> B. . . . The industrial commission or any court shall not excuse a late filing unless any of the following applies:
>
> * * *
>
> 3. The person to whom the notice is sent shows by clear and convincing evidence that the notice was not received.
>
> C. 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.

A.R.S. § 23-947(B)(3), (C).

¶7 The carrier first argues insufficient evidence supports the ALJ's conclusion that Morris did not receive the Notice until shortly before December 3, 2009. It contends that in light of Morris's "equivocal" hearing testimony, the ALJ could not reasonably conclude there was clear and convincing evidence that Morris did not receive the Notice until then. At the hearing, Morris initially stated that he did not remember whether he received the Notice. Later, Morris explained that he *had* eventually received the Notice that he referenced in his Request for Hearing:

> ALJ: I want to show you the Notice of Claims Status, at least the copy that I have in my file. . . . Do you recall receiving this at some point in time?

> Morris: I can't remember. It could be that I got one. I just don't remember. This is all dragging out so long. I need to go over all my paperwork and dig it all out. I'm just trying to keep in line with what needs to get done here.
>
> ALJ: The reason I ask is because on your Request for Hearing that you did file and date December 3rd, 2009 . . . [y]ou reference the Notice of Claims Status issued 7/27/09.
>
> Morris: I got that notice.
>
> ALJ: That's the one I just showed you. So I presume at some point you knew about it. Whether you'd seen it, I don't know. That's this July 27th notice here. So presumably by December 3rd at least, you got a copy of that notice, somewhere or other?
>
> Morris: Yes, sir.
>
> ALJ: Do you have any recollection of about when you might have received that? Would it have been just within days before you filed that Request for Hearing?
>
> Morris: Probably days.

Viewed in its entirety, and accepting as we must the ALJ's determination of credibility, Morris's testimony supports the ALJ's finding that Morris did not receive the Notice until shortly before December 3, 2009.

¶8 Morris also testified that his house was foreclosed upon in late July, and he had submitted a change of address with the Post Office to have his mail forwarded to a Post Office box. He testified mail delivery to the Post Office box had been

unreliable, and he continued to check the mailbox at his former residence and occasionally received pieces of mail there as well. Based on Morris's testimony and the incorrect mailing address, the ALJ reasonably could conclude that Morris did not receive the Notice until shortly before he filed his Request for Hearing, so that his late filing was excused under A.R.S. § 23-947(B)(3). *See Associated Grocers v. Indus. Comm'n of Ariz.*, 133 Ariz. 421, 423-24, 652 P.2d 160, 162-63 (App. 1982) (court of appeals does not apply "clear and convincing" standard in reviewing sufficiency of evidence to support ALJ's finding; court will affirm finding if it is supported by "reasonable and substantial" evidence (citation omitted)).

¶9 The carrier also argues the ALJ erred by excusing Morris's untimely filing because, the carrier asserts, Morris had actual or constructive knowledge of the Notice during the filing period. Under A.R.S. § 23-947(C), a late filing is not excused "if the person to whom the notice is sent . . . 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." The term "notice," as used in the statute, refers to the physical form denominated "Notice of Claim Status." *Black v. Indus. Comm'n of Ariz.*, 149 Ariz. 81, 83, 716 P.2d 1018, 1020 (App. 1985). If a claimant receives actual or constructive

notice of the notice form during the 90-day filing period and fails to act upon it, an untimely request for hearing may not be excused. *See Epstein v. Indus. Comm'n of Ariz.*, 154 Ariz. 189, 194, 741 P.2d 322, 327 (App. 1987); *Black*, 149 Ariz. at 84, 716 P.2d at 1021.

¶10 The carrier contends that on cross-examination, Morris admitted actual knowledge of the Notice within the filing period:

> Q: Now, we also discussed at your deposition the fact that you actually knew about this Notice of Claims Status that denied your claim by August of 2009 because you called [the carrier] on August 13th of 2009 and you asked why the claim was denied, correct?
>
> A: Yes, ma'am.

The ALJ, who heard and saw this exchange in person, concluded it did not constitute an admission by Morris. To the contrary, the ALJ concluded, "While it is apparent that Morris knew of the fact of the denial by August 13, 2009, the evidence does not demonstrate one way or another whether he knew or should have known of the Notice which formally accomplished that denial."

¶11 The carrier argues the ALJ "somehow overlooked" Morris's testimony about his telephone call with the carrier. The record does not support the carrier's assertion; indeed, the carrier raised the asserted "admission" in the request for

review it filed from the ALJ's award. After reviewing the carrier's request for review, the ALJ concluded his earlier decision "is fully supported by the evidence."

¶12 We conclude the ALJ did not abuse his discretion by finding that the exchange recounted above did not necessarily constitute an admission by Morris that he knew of the "fact of the notice" during the filing period. The question to Morris arguably was compound and assumed a fact not then in evidence (that Morris knew of the fact of the Notice), making it difficult to discern with certainty what Morris intended by his answer. The question contained at least five components: (1) "We discussed at your deposition" (2) "the fact that you actually knew about this Notice of Claims Status" (3) "that denied your claim" (4) "because you called [the carrier] on August 13th of 2009" and (5) "you asked why the claim was denied." A trial objection to a lengthy and complicated question that assumes a fact not in evidence typically is sustained, *see generally U.S. v. Smith*, 354 F.3d 390, 396 (5th Cir. 2003), but Morris was not represented at the hearing and of course did not raise the objection by himself. As the *Smith* court explained, when a question "assumes as true matters to which the witness has not testified, and which are disputed between the parties," the answer can be misleading if the

witness answers without distinguishing the assumption the question contains. *Id.*, n.5 (quoting *McCormick on Evidence* § 7 (5th ed. 1999)).

¶13 Based on the ALJ's assessment of the particular circumstances at the hearing, including the complexity of the question, the ALJ's perception of the witness and his ability to remember and understand the question, the ALJ was entitled to conclude that Morris's simple "Yes, Ma'am" response to the question was not intended to signify his agreement with every element the question contained. At the hearing, the carrier asked no more questions of Morris on the topic; nor did it offer into evidence the transcript of the deposition referenced in the question. On this record, we cannot conclude the ALJ abused his discretion in finding that although Morris's testimony showed that he knew his claim had been denied, it did not show he knew of the "fact of the" Notice.

¶14 Alternatively, citing *Black*, the carrier argues Morris had constructive knowledge of the Notice. In *Black*, the carrier sent the Notice to the claimant and also sent the claimant and his counsel a letter stating it had filed a Notice of Claim Status and a letter from the ICA informing counsel the carrier had denied the claim. 149 Ariz. at 82, 716 P.2d at 1019. The court determined that, although counsel did not receive a copy

of the Notice, "counsel knew or with the exercise of reasonable care and diligence should have known, of the fact of the notice of claim status during the filing period." *Id*. at 84, 716 P.2d at 1021.

¶15 By contrast, there was no evidence presented in this case that the carrier separately wrote to Morris informing him that it had issued the Notice. Nor did the carrier offer evidence that during the August 13 telephone call, it told Morris that the Notice had been sent or informed him of the contents of the Notice or of the deadline by which he needed to file a request for hearing on the denial of his claim.

¶16 A party seeking a statutory benefit generally has the burden to prove "that he comes within the ambit of the statute." *Harvest v. Craig*, 195 Ariz. 521, 524, ¶ 15, 990 P.2d 1080, 1083 (1999). However, when the statute "also contains an exception to the benefit, *and* the exception does not appear in the portion of the statute granting the benefit but appears in another clause of the statute, the party seeking the benefit of the exception has the burden of proving its entitlement thereto." *Id.*

¶17 Subsection B of A.R.S. § 23-947 lists three exceptions that would excuse a late filing. Subsection C is a statutory exception that operates to nullify the exception in subsection B

if the person to whom the Notice was sent "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." A.R.S. § 23-947(C).

¶18 Accordingly, Morris had the burden under A.R.S. § 23-947(B)(3) to show that he did not receive the Notice. It was the carrier's burden, thereafter, to prove, pursuant to A.R.S. § 23-947(C), that the exception in subsection (B) did not apply because Morris "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." The carrier, however, did not offer any evidence of any information it gave to Morris during the August 13 call or at any other time concerning the Notice.

¶19 An applicant is not necessarily charged with constructive notice of the contents of the ICA's file. *Epstein*, 154 Ariz. at 194, 741 P.2d at 327. Although the carrier argues on appeal that with the exercise of reasonable care and diligence, Morris should have known of the fact of the Notice, the carrier offered no evidence of what steps it contends Morris could and should have taken, under the circumstances, after the August 13 call. In the absence of such evidence, the ALJ was

entitled to conclude that the carrier failed to meet its burden to prove that Morris had constructive knowledge of the Notice.

CONCLUSION

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

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
JOHN C. GEMMILL, Judge