DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOELLE WARZECHA, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, SCOTTSDALE HEALTHCARE, Respondent Employer, AVIZENT, Respondent Carrier.	)	No. 1 CA-IC 10-0075 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20091-700159

Carrier Claim No. 2008-69498

Administrative Law Judge Layna Taylor

AWARD AFFIRMED

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K E S S L E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a noncompensable claim. The petitioner employee ("claimant") raises three issues on appeal:

(1) whether the administrative law judge's ("ALJ's") credibility finding is legally sufficient;

(2) whether the ALJ erroneously found that the claimant failed to forthwith report her gradual industrial injury; and

(3) assuming *arguendo* that the claimant failed to forthwith report, whether that failure should be excused.

Because we find that the ALJ's award is legally sufficient and is reasonably supported by the evidence, we affirm.

I. 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.[1] 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.

[1] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

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).

II. PROCEDURAL AND FACTUAL HISTORY

¶3 The claimant was employed as a registered nurse by the self-insured respondent employer, Scottsdale Healthcare ("SHC"). She alleged that she sustained a gradual repetitive trauma injury to her arms and shoulders. The claimant sought treatment from numerous medical practitioners before filing a workers' compensation claim on June 17, 2009. In support of her claim, she filed a medical report by Richard J. Sanders, M.D., dated October 6, 2008. His report concluded that the claimant had symptomatic "bilateral thoracic outlet syndrome," and her nursing work "could be the etiology of her symptoms." SHC denied the claim for benefits and the claimant timely protested. *See* A.R.S. § 41-1993(B) (2011).

¶4 The ICA held a hearing in which the claimant, Dr. Sanders, and an independent medical examiner, Robert J. Standerfer, M.D., testified. Following the hearing, the ALJ entered an award for a noncompensable claim. The claimant timely requested administrative review, but the ALJ summarily affirmed the award. The claimant next brought this appeal.

III. DISCUSSION

¶5 The claimant first argues that the ALJ's award is legally insufficient because the judge did not explain the basis for her credibility finding. The finding states:

> 5. Upon a review of the totality of the evidence, it is found that the applicant is not credible. Accordingly, any conflicts in the evidence are resolved against the applicant.

¶6 In *Post v. Industrial Commission*, 160 Ariz. 4, 770 P.2d 308 (1989), the Arizona Supreme Court reassessed the specificity necessary for a legally sufficient award. *Post* requires ALJs to "explicitly state their resolution of conflicting evidence on material and important issues, find the ultimate facts, and set forth their application of law to those facts." 160 Ariz. at 8, 770 P.2d at 312. The court amplified this point in *Douglas Auto & Equipment v. Industrial Commission*, 202 Ariz. 345, 347, ¶ 9, 45 P.3d 342, 344 (2002), stating that specific findings are preferred

> not only to encourage judges to consider their conclusions carefully, but also to permit meaningful judicial review. Although findings need not be exhaustive, they cannot simply state conclusions. Judges must make factual findings that are sufficiently comprehensive and explicit for a reviewing court to glean the basis for the judge's conclusions.

(citations omitted).

¶7 We will not address this first issue because we find that it was not preserved for appeal. In general, this court will not consider an issue on appeal that was not raised before the

ALJ. *See T.W.M. Custom Framing v. Indus. Comm'n,* 198 Ariz. 41, 44, ¶ 4, 6 P.3d 745, 748 (App. 2000). This rule stems in part from the requirement that a party must develop its factual record before the agency and give the ALJ an opportunity to correct any errors. *See Kessen v. Stewart*, 195 Ariz. 488, 493, ¶ 19, 990 P.2d 689, 694 (App. 1999); *see also Spielman v. Indus. Comm'n*, 163 Ariz. 493, 496, 788 P.2d 1244, 1247 (App. 1989) (stating failure to request credibility finding from the ALJ precludes raising insufficiency of findings on appeal).

¶8 Although the claimant timely requested administrative review, she did not raise the sufficiency of the credibility finding in her request for review before the ALJ. Because administrative remedies must be exhausted before judicial review is sought, we decline to address this issue on appeal.

¶9 The claimant next argues that the ALJ erred by finding that she had failed to forthwith report her industrial injury. In the case of a gradual injury, the date of injury is considered to be the date the claimant discovered or, "in the exercise of reasonable diligence," should have discovered the relationship between the diagnosed injury and the employment. *Nelson v. Indus. Comm'n,* 120 Ariz. 278, 281-82, 585 P.2d 887, 890-91 (App. 1978). Ordinarily, this is a question of fact to be resolved by the ALJ. *Mead v. Am. Smelting & Refining Co.*, 1 Ariz. App. 73, 77, 399 P.2d 694, 698 (1965).

¶10 To comply with the statutory requirement, an employee must "forthwith report the accident and the injury resulting therefrom to the employer." A.R.S. § 23-908(E) (Supp. 2010). The sanction for failing to report forthwith is forfeiture of compensation. A.R.S. § 23-908(F). But an ALJ may relieve the claimant of this sanction "if [he] believes after investigation that the circumstances attending the failure . . . are such as to have excused" the failure to report forthwith. *Id.*

¶11 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. *Magma Copper Co. v. Indus. Comm'n*, 139 Ariz. 38, 43, 676 P.2d 1096, 1101 (1983) (citing 3 Arthur Larson, *The Law of Workmen's Compensation* § 78.10 (1983)).[2] Second, it gives the employer the opportunity to provide immediate medical diagnosis and treatment so as to minimize the seriousness of the injury. *Id.*

¶12 To satisfy the forthwith reporting requirement, the claimant must advise the employer that she has sustained an injury for which a workers' compensation claim may be filed. *Thompson v. Indus. Comm'n*, 160 Ariz. 263, 266, 772 P.2d 1116, 1119 (1989). The mere fact that an employer knows that the claimant does not

[2] This section currently is found at 7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 126.01 (2011).

feel well or is in pain is not sufficient, unless other information is available to indicate to a "reasonably conscientious" employer that the claimant's problem may be industrial in origin. *Id.* at 266-67, 772 P.2d at 1119-20.

¶13 In this case, the claimant testified that her job duties as a floor nurse at SHC included a lot of patient transfers. She described reaching and stretching in awkward positions to lift patients weighing up to three-hundred pounds. Beginning in January 2008, the claimant gradually developed pain in her arms and shoulders. She initially sought medical treatment on February 6, 2008.

¶14 The claimant testified that she believed her symptoms were the result of a combination of her "duties at work and just probably everything else in general that requires any type of movement of the upper extremities." Although she told her coworkers that she was going to the doctor, she did not provide her supervisor with that information. In April 2008, the claimant began treatment with Marshall Cook, M.D. By July 2008, the doctor had recommended light-duty work and noted a potential work connection for the claimant's symptoms. Despite this information, the claimant did not report a work-related injury to SHC until June 2009 when she filed her claim. We believe that the totality of the evidence supports the ALJ's finding that the claimant failed to forthwith report her injury.

¶15 The claimant last argues that assuming *arguendo* she failed to forthwith report, SHC was not prejudiced. The claimant has the burden of proving a lack of prejudice. *Pac. Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 215-16, 735 P.2d 820, 825-26 (1987). The ALJ concluded that she did not present any evidence to carry her burden of proof.

¶16 The claimant initially developed symptoms in January 2008, but continued to perform her regular work through July 21, 2008, when she was placed on light duty. Further, the medical records and the testimony reveal that the claimant was examined and treated by fifteen or more physicians over an eighteen-month period. On its face, this sheer number of practitioners would make it difficult for the claimant to have received any type of cohesive treatment. Thus, our review of the record supports the finding and an inference that the lengthy delay in reporting may have prejudiced SHC's ability to obtain a prompt diagnosis and appropriate medical treatment for the claimant and to investigate her claim relative to her employment activities.

CONCLUSION

¶17 For all of the foregoing reasons, we believe the evidence supports the ALJ's decision, and we affirm.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge