

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



DIVISION ONE
FILED: 12/15/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

HILTON HOTELS THE BOULDERS RESORT,

Petitioner Employer,

SPECIALTY RISK SERVICES,

Petitioner Carrier,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

ZINETA KURTIC,

Respondent Employee.

1 CA-IC 11-0036

DEPARTMENT A

MEMORANDUM DECISION

(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Special Action--Industrial Commission

ICA Claim No. 20101-030552
Carrier Claim No. YSN01117C

Administrative Law Judge Michael A. Mosesso

AWARD AFFIRMED

Manning & Kass, Ellrod, Ramirez, Trester
by Robert B. Zelms
Scott A. Alles
Pari K. Scroggin
Attorneys for Petitioner Employer

Scottsdale

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

Phoenix

I R V I N E, Judge

¶1 Hilton Hotels The Boulders Resort ("Hilton") and its insurance carrier, Specialty Risk Services (collectively, "petitioners") request special action review of the industrial commission award in favor of the respondent employee, Zineta Kurtic. For the reasons that follow, we affirm the award.

¶2 Kurtic worked for thirteen years as a housekeeper at Hilton. In January 2010, Kurtic felt soreness and pain in her back and right leg after working for about two weeks without a day off. She received a MRI and epidural shots to treat the symptoms.

¶3 On April 5, 2010, Kurtic injured her lower back ("April injury") while moving furniture at work. Kurtic felt a sharp pain extend from her lower back down her right leg to her toes. Kurtic received physical therapy and went back to work, but continued to feel numbness and tingling. After a few days, she stopped working because of the pain, which prevented her from driving.

¶4 In May 2010, Dr. LaPrade performed back surgery on Kurtic to remove a herniated disk. Kurtic felt better for about

a month after surgery, but the pain returned and worsened in June, requiring a second surgery in July. Kurtic applied for benefits, which the insurance carrier denied.

¶15 At an evidentiary hearing, Dr. LaPrade testified that he was informed of Kurtic's related history of back pain, including the January 2010 incident and her epidural treatments. Based on this and his examination of Kurtic, Dr. LaPrade opined that the April injury worsened a pre-existing condition, resulting in the need for surgery.

¶16 Dr. Maxwell, who performed an Independent Medical Examination, testified that he could not identify any impairment as a result of the April injury and Kurtic was essentially the same before and after the April injury. Accordingly, Dr. Maxwell concluded the April injury did not contribute to the need for surgery, and surgery was probably unnecessary.

¶17 The administrative law judge ("ALJ") noted the conflicting expert opinions and adopted Dr. LaPrade's conclusion that the April injury contributed to the need for surgery "as being most probably correct and well founded." It awarded benefits to Kurtic.

¶18 Petitioners requested review arguing that the ALJ misunderstood that Dr. LaPrade had testified Kurtic was not a surgical candidate in February 2010. The ALJ affirmed its

decision upon review and additionally found:

Dr. LaPrade's testimony taken as a whole reflects his ultimate opinion that the [April] injury contributed to the need for the surgeries he performed. Dr. LaPrade understood that Applicant had a preexisting herniated disk and his opinion is based upon Applicant's history. This supplements the findings in the Award, which the undersigned adopted in resolving the medical conflict.

The ALJ also found credible Kurtic's testimony that the epidural treatments she received alleviated her back and leg pain initially, but that it returned after the April injury.

¶9 Petitioners timely appeal.

DISCUSSION

¶10 The only issue on appeal is whether the ALJ erred in determining that Kurtic's April injury was a medical cause of the surgeries based on its interpretation of the evidence. "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). As trier-of-fact, the ALJ determines the credibility of witnesses. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). The ALJ has the duty to resolve all conflicts in the evidence and to draw inferences therefrom. *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). "When more than one inference may be drawn, the [ALJ] may choose either, and we will not

reject that choice unless it is wholly unreasonable." *Id.*

¶11 Petitioners phrase their argument as follows: "Significant inconsistencies and contradictions were present in applicant's evidence, and in her medical records that warranted the court ruling in favor of petitioners." Although petitioners appear to argue that the ALJ relied on evidence that was not credible, their reply brief asserts that they are not asking this Court to reweigh the evidence. Rather, they explain the point of their appeal "is that the ALJ erred in not accurately documenting Dr. LaPrade's testimony." Specifically, petitioners contend the ALJ incorrectly noted that Dr. LaPrade testified Kurtic "was [getting] better and NOT a surgical candidate" in February 2010, even though he testified to the contrary. Petitioners misstate the record.

¶12 In interpreting Dr. LaPrade's opinions and conclusions, the ALJ stated, "If applicant was better after the epidural in February 2010, *then* she would not have been a surgical candidate. After the industrial injury, applicant never got better." (Emphasis added.) This is a reasonable inference from Dr. LaPrade's testimony.

¶13 When asked how he would have treated Kurtic in February if "there was only *temporary* relief from the epidural injections," Dr. LaPrade responded that surgery would have been

an "option." (Emphasis added.) In response to the question of how he actually treated her in May, Dr. LaPrade explained that he recommended surgery because the epidural treatment was in fact not working. On redirect examination, Dr. LaPrade was asked whether, based on another doctor's notes that Kurtic was responding well to epidural treatment, Dr. LaPrade believed Kurtic would have been "a surgical candidate" in February 2010. He replied, "No. She was getting better." He agreed, however, that it was fair to say that the April injury "not only worsened" her symptoms, "but she never got better."

¶14 In context, Dr. LaPrade's testimony shows that he believed Kurtic would not have been a surgical candidate in February as long as the epidural treatments were working. But if her relief was only temporary, then he would have recommended surgery at that time. Because he determined in May that the treatments actually did not work, and she would not get better, he recommended surgery. Therefore, the trial court's interpretation of Dr. LaPrade's testimony was correct.

¶15 "[W]here the causal connection between work and injury is peculiarly in the knowledge of the medical profession, we will not disturb the findings of the Commission based upon conflicting medical evidence of causation." *O'Neal v. Indus. Comm'n*, 13 Ariz. App. 550, 553, 479 P.2d 427, 430 (1971).

Petitioners state that they are not challenging the ALJ's acceptance of Dr. LaPrade's conclusions over that of Dr. Maxwell. Dr. LaPrade opined "to a reasonable degree of medical probability" that the April injury caused or contributed to the surgeries. Although Dr. Maxwell reached a contrary conclusion, he also stated that the surgery was at least causally related to Kurtic's symptoms in January, and surgery was not unreasonable. Because Dr. LaPrade's opinions and conclusions are sufficient to support a finding of medical causation, we find no error.

¶16 Kurtic requests attorneys' fees and costs as sanctions against petitioners for raising a groundless appeal in bad faith and with the purpose to annoy or harass, pursuant to Arizona Rule of Civil Appellate Procedure 21, Arizona Rule of Civil Procedure 11, and Arizona Revised Statutes section 12-349 (2003). Although we affirm the award, we cannot conclude that the appeal constitutes harassment or was filed in bad faith. Therefore, we deny her request for fees. As the prevailing party, Kurtic is entitled to costs on appeal upon compliance with ARCAP 21.

CONCLUSION

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

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
DANIEL A. BARKER, Judge