IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JEFFREY S. WHITNEY,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

THE HOME DEPOT,
Respondent Employer,

HELMSMAN MANAGEMENT SERVICES, INC.,
Respondent Insurer.

No. 2 CA-IC 2013-0009
Filed November 27, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

SPECIAL ACTION – INDUSTRIAL COMMISSION
ICA Claim No. 20051290843
Insurer No. WC608-621644
The Honorable Gary M. Israel
Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Jeffrey S. Whitney, Vail
In Propria Persona

The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent

Jardine, Baker, Hickman & Houston, PLLC, Phoenix
By Charles G. Rehling
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Kelly and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 In this statutory special action, petitioner Jeffrey Whitney challenges the findings of the administrative law judge (ALJ) that he is capable of working ten hours per week and therefore entitled to partial disability benefits only. For the following reasons, we affirm the ALJ's findings and award.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to sustaining an ALJ's award." *Sw. Gas Corp. v. Indus. Comm'n*, 200 Ariz. 292, ¶ 2, 25 P.3d 1164, 1166 (App. 2001). In January 2005, Whitney suffered a neck injury while working as a department supervisor for respondent employer. Respondent insurer accepted Whitney's claim for temporary disability, and his average monthly

wage was set at $2,400, an amount reflecting the statutory maximum at the time.

¶3 Approximately one year later, Whitney underwent cervical surgery to address his neck injury. In August 2009, he was determined to have reached maximum medical improvement, and his claim was closed by the insurer based on a determination of permanent partial disability. Thereafter, respondent Industrial Commission of Arizona (ICA) found that Whitney was entitled to a monthly award of $863.15 based on his ability to work ten hours per week. In March 2010, following a hearing requested by the insurer, ALJ Luann Haley affirmed the ICA's finding that Whitney was capable of working only ten hours per week.

¶4 In July 2012, Whitney filed a Petition for Rearrangement or Readjustment of Compensation pursuant to A.R.S. § 23-1044(F) alleging that his condition had worsened and that his disability status should be amended to reflect his total incapacity for employment. Based on Whitney's petition, the ICA issued a finding of total disability and awarded him $1,600.08 per month. The employer and insurer then requested a review of the ICA's findings and award. Whitney, in turn, sought a hearing pursuant to A.R.S. § 23-1061(J) on his related request for additional neurological testing to determine whether a tremor he was experiencing was linked to his workplace injury. Both requests were heard before ALJ Gary Israel over three days in early 2013.

¶5 Dr. John Beghin, a board-certified orthopedic surgeon specializing in spinal surgery and spinal disorders, appeared at the ICA hearing. He testified that in addition to reviewing Whitney's medical records, he had performed two separate independent medical evaluations of Whitney's condition—one in February 2010 and one in December 2012. Based on these examinations, he concluded there was "no significant objective difference" between Whitney's condition in 2010 and his condition in 2012. He also compared the results of Whitney's most recent cervical MRI study, performed in September 2012, to an MRI study performed in 2009 and again found no objective change in Whitney's condition. In Beghin's opinion, there was "no medical necessity for restrictions" on Whitney's activity, and no objective basis to reduce his

employment capacity determination from ten hours per week to unemployable. Beghin offered additional testimony regarding Whitney's tremor, which he characterized as a "non-spinal-cord type tremor" that had "nothing to do with" Whitney's workplace injury. Noting that it "would go away when [Whitney] relaxed," Beghin concluded the tremor was driven by stress.

¶6 Respondents also introduced into evidence the report of Dr. Colin Bamford,[1] a board-certified neurologist who had examined Whitney in January 2013. Bamford diagnosed Whitney with a "benign essential tremor," which, according to his report, is most commonly a hereditary condition. Like Dr. Beghin, Bamford stated without reservation that Whitney's tremor" would not have been caused by the trauma to the neck." He also echoed Beghin's conclusion that Whitney's tremor was attributable, at least in part, to anxiety.

¶7 In addition to testifying himself about his physical limitations and symptoms, Whitney called as a witness Dr. Hillel Baldwin, a board-certified neurosurgeon who had performed his cervical surgery. Baldwin testified that Whitney's condition had worsened over time and noted that his MRI and radiology reports confirmed his deterioration. However, when describing the nature of this decline, Baldwin focused almost exclusively on Whitney's tremor and cognitive state. Nevertheless, when asked to disregard any conditions that had not yet been proven to relate to Whitney's industrial injury, Baldwin responded that he still considered Whitney unemployable.

¶8 Dr. Baldwin also testified about potential sources of Whitney's tremor. He recommended further testing by a movement disorder specialist to determine whether the tremor was linked to Whitney's workplace injury. Baldwin did not express a concrete opinion as to whether the two conditions were related; rather, he opined that a relationship was possible and recommended additional neurological testing because it "seem[ed] reasonable to at least cover all the bases." Baldwin conceded on cross-examination

[1]Neither party elected to examine Dr. Bamford at the hearing.

that when he first learned of Whitney's tremor in 2007, "[i]t didn't really come up . . . that the tremor would be industrially related." And he could not identify any efforts he had made to cause the insurer to accept responsibility for Whitney's tremor condition.

¶9 In April 2013, the ALJ issued a decision awarding Whitney partial disability compensation based on a finding that he had sustained no change to his covered condition that would prevent him from working ten hours per week. The ALJ noted in his decision that he had resolved the conflict in the medical testimony by accepting the opinions of Drs. Beghin and Bamford over those of Dr. Baldwin. Whitney's request for additional neurological testing also was denied. Following Whitney's motion for review, the ALJ affirmed his findings and award. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A) and Ariz. R. P. Spec. Actions 10.

Discussion

¶10 As a preliminary matter, we address respondents' contention that Whitney's opening brief does not comply with the Rules of Civil Appellate Procedure. Rule 13(a), Ariz. R. Civ. App. P., requires the appellant's brief to "concisely and clearly set forth under the appropriate headings" a statement of the case, the facts relevant to the appeal, and the issues presented for review.[2] In addition, the brief must include an argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Ariz. R. Civ. App. P. 13(a)(6). To the extent evidentiary matter is cited in the statement of facts, "a reference shall be made to the record or page of the certified transcript where such evidence appears." Ariz. R. Civ. App. P. 13(a)(4).

[2] Rule 10(k), Ariz. R. P. Spec. Actions, provides that the Arizona Rules of Civil Appellate Procedure apply to special action review of industrial commission awards. *See also Heredia v. Indus. Comm'n*, 190 Ariz. 476, 478, 949 P.2d 969, 971 (1997).

¶8 Although Whitney's opening brief nominally incorporates the four components identified in Rule 13(a), our analysis is compromised by his failure to identify specific legal grounds for vacating the ALJ's decision and connect each of his points to specific evidence in the record. *See* Ariz. R. Civ. App. P. 13(a)(4), (6). Such failures could be viewed as a waiver of his claim on appeal. *See Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, n.2, 263 P.3d 683, 686 n.2 (App. 2011). In our discretion, however, we elect to decide this appeal on its merits based on our own review of the record.[3] *See Adams v. Valley Nat'l Bank*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (recognizing court preference for resolving cases upon merits).

ALJ's Resolution of Conflicting Medical Testimony

¶11 Whitney principally disputes the ALJ's adoption of Dr. Beghin's opinion of his employment capacity over that of his own witness, Dr. Baldwin. Whitney maintains that Beghin's evaluation was not supported by a comprehensive review of his medical records, and he characterizes Beghin's report as "not correct [or] well founded" and "filled with controversy and fabrication."[4]

¶12 It is the ALJ's responsibility to resolve conflicts in the medical evidence, and "its privilege to determine which of the conflicting testimony is more probably correct." *Perry v. Indus.*

[3] We note that respondents too have failed to adhere to requirements of Rule 13(a)(4); their brief suffers multiple lapses in its connection of factual statements to evidence in the record.

[4] Whitney also suggests the employer and insurer attempted to subvert the review process by omitting the first page of a medical questionnaire from their submission to the ALJ. However, correspondence in the file establishes that the information in question was provided to Whitney and the ALJ as soon as it was identified by Dr. Beghin, and there is no indication of any intent to obstruct discovery. We see no reason for the ALJ to have discounted or rejected Beghin's testimony on this basis. *See King v. Indus. Comm'n*, 160 Ariz. 161, 164, 771 P.2d 891, 894 (App. 1989) (discovery sanctions must account for intent of party).

Comm'n, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975); *see also Gamez v. Indus. Comm'n*, 213 Ariz. 314, ¶ 15, 141 P.3d 794, 796 (App. 2006). Where the ALJ has adopted one expert opinion over another, we will not disturb that finding unless it is "wholly unreasonable." *Gamez*, 213 Ariz. 314, ¶ 15, 141 P.3d at 796 (affirming as "not unfounded" ALJ's decision to adopt medical testimony of one doctor over another). "Many factors enter into a resolution of conflicting evidence, including whether or not the testimony is speculative, consideration of the diagnostic method used, qualifications in backgrounds of the expert witnesses and their experience in diagnosing the type of injury incurred." *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988). A witness's demeanor may also be material in resolving conflicts in expert testimony. *See Ohlmaier v. Indus. Comm'n*, 161 Ariz. 113, 776 P.2d 791 (1989).

¶13 The ALJ considered the evidence and concluded that Dr. Beghin's opinion of Whitney's condition and employment capacity was "most probably correct and well[-]founded" and that Whitney was capable of working ten hours per week. In so finding, he noted that Dr. Baldwin's contrary opinion of Whitney's overall disability appeared to be predicated on several conditions that had never been proven to relate to Whitney's workplace accident and were therefore outside the scope of review on a petition to rearrange, but not reopen, Whitney's award.[5] *Compare* A.R.S. § 23-1044(F) (award subject to rearrangement upon change in physical condition arising out of covered injury), *with* A.R.S. § 23-1061(H) (claim may be reopened based on "new, additional or previously undiscovered" condition); *see also Dutton v. Indus.*

[5] While the ALJ did consider the relationship between Whitney's workplace injury and his tremor for the purposes of evaluating his A.R.S. § 23-1061(J) request, he ultimately concluded there was no causal link between the two. *See infra* ¶ 17. Moreover, as the ALJ noted, Whitney's request for a hearing to determine whether he was entitled to additional diagnostic testing did not necessitate a reopening of his claim pursuant to A.R.S. § 23-1061(H). "A claim shall not be reopened solely for additional diagnostic or investigative medical tests." *Id.*

Comm'n, 162 Ariz. 464, 468, 784 P.2d 290, 294 (App. 1989) ("workers' compensation law . . . allows reopening for previously undiscovered conditions and rearrangement for changes in earning capacity"). Specifically, the ALJ found that Dr. Baldwin focused on Whitney's "lumbar condition, cognitive issues and tremors, all of which are unrelated to this accident." It was not unreasonable for the ALJ to afford Baldwin's opinion less weight because it was informed by factors outside the scope of Whitney's covered injury.

¶14 Whitney's claim that Dr. Beghin failed to conduct a comprehensive review of Whitney's medical records is not supported by the record. Beghin conducted a detailed analysis of Whitney's medical history dating back to 2003 and analyzed records from no fewer than seven providers. Moreover, Beghin stated repeatedly in his testimony that he had reviewed all records since 2010 that were material to his assessment of any change in Whitney's condition. The ALJ's decision to adopt Beghin's opinion of Whitney's condition and employment capacity over that of Dr. Baldwin is supported by evidence in the record and was not unreasonable.

¶15 We likewise reject Whitney's claim that the ALJ erroneously disregarded the opinions of his primary care physician and pain management specialist, who each had expressed the view that he should not work. However, while these doctors' impressions were contained in treatment records Whitney submitted to the ALJ, neither of them testified at the hearing[6] or prepared a report. And neither appeared to specialize in spinal injuries. *See Meeks v. Indus. Comm'n*, 7 Ariz. App. 150, 154, 436 P.2d 928, 932 (App. 1968) (testimony of relevant medical specialist may be ascribed more weight than testimony of general practitioner). We therefore find it

[6]Although Whitney contends the ALJ "would not let [him] call Dr. Abraham as a witness," we are unable to discern a basis for this claim in the record. Whitney did state in a post-hearing letter to the ALJ that he "would have liked to have my Workers Compensation and primary care doctor, Dr. William Abraham, testify," but there is no indication in the transcript or claims file that he made any attempt to call Abraham as a witness.

was not unreasonable for the ALJ to accord this evidence less weight in making his determination.

¶16 Whitney also contends the ALJ should have given greater weight to the opinion of Antonio Escobar, a claims administrator for the ICA whose name appears on ICA documents relating to the prior compensation determination. But there is no evidence to suggest that Escobar was qualified to render a medical opinion of Whitney's condition. *See Madison Granite Co. v. Indus. Comm'n*, 138 Ariz. 573, 676 P.2d 1 (App. 1983) (expert providing testimony at ICA review hearing must be qualified under Ariz. R. Evid. 702). And any evidence regarding the initial ICA determination had no relevance to the proceeding before the ALJ. *See Le Duc v. Indus. Comm'n*, 116 Ariz. 95, 98, 567 P.2d 1224, 1227 (App. 1977) ("interim award of the commission, once it is protested, . . . becomes a nullity and cannot, in and of itself, afford an evidentiary basis for future awards").

¶17 We likewise do not fault the ALJ's determination that additional neurological testing to determine the source of Whitney's tremor was unnecessary. Two board-certified doctors who had examined Whitney stated unequivocally that his tremor was not caused by his workplace injury. And although Dr. Baldwin recommended further testing by a movement disorders specialist to rule out any association between Whitney's tremor and his 2005 workplace injury, that injury was only one of several possible causes he cited. In addition, Baldwin conceded he did not initially attribute Whitney's tremor to the covered neck injury, and had not taken steps to cause the insurer to assume responsibility for that aspect of Whitney's condition. Accordingly, we find it was not unreasonable—much less wholly so—for the ALJ to resolve the conflicting evidence on this point as he did. *See Gamez*, 213 Ariz. 314, ¶ 15, 141 P.3d at 796. Accordingly, we uphold his decision to deny the request for additional neurological testing.

ALJ's Consideration of the Evidence

¶18 Whitney next argues the ALJ failed to consider "[a]ll current medical records . . . as required by workers[']compensation law." When the ICA conducts a workers' compensation hearing, "it

should be inclusive of all pertinent data available as of the date of the hearing." *Lugar v. Indus. Comm'n*, 9 Ariz. App. 44, 49, 449 P.2d 61, 66 (App. 1968). In evaluating an appeal from the ICA's decision, however, we presume the ALJ has considered all relevant evidence. *Perry*, 112 Ariz. at 398, 542 P.2d at 1097; *accord Lopez v. Indus. Comm'n*, 162 Ariz. 578, 579, 785 P.2d 98, 99 (App. 1989). And even were we not to apply that presumption here, the record confirms the ALJ was thoroughly versed in the facts of this case.

¶19 In addition to stating that he had "fully considered the file, records and all matters hereunto appertaining," the ALJ in his decision cited numerous documents that were contained in the ICA's claims file but not introduced into evidence at the hearing. Indeed, the decision refers to records and reports from Dr. William Abraham, Whitney's primary care physician; Dr. Brad Manny, Whitney's pain management specialist; and Dr. Diane Benenati, a partner of Dr. Baldwin who examined Whitney's tremor in 2007. The ALJ's reliance on all records in the case, even those not introduced into evidence at the hearing, indicates that he thoroughly reviewed the record for relevant material before reaching his determination.

¶20 Finally, Whitney's argument that the ALJ failed to consider his "driving disabilities" is not supported by the record. It is clear from both the transcript of the hearing and the ALJ's decision that he did consider Whitney's ability to drive. But he declined to adopt Whitney's characterization of that factor due to an absence of medical support for any driving limitations imposed by his condition, as well as evidence that Whitney possessed a valid driver's license. As noted above, we will not disturb an ALJ's resolution of conflicting evidence unless "wholly unreasonable." *Gamez*, 213 Ariz. 314, ¶ 15, 141 P.3d at 796. Because there was support in the record for the ALJ's determination that Whitney was capable of driving to and from his job, the decision to award partial disability was not unreasonable on that basis.

Conclusion

¶21 For all of the reasons stated above, the ALJ's award is affirmed.