IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

GARY D. HACKWORTH,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

ATLAS COPCO NORTH AMERICA,
Respondent Employer,

LIBERTY MUTUAL INSURANCE GROUP,
Respondent Insurer.

No. 2 CA-IC 2014-0015
Filed May 28, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Special Action – Industrial Commission
ICA Claim Nos. 20103340121, 20101940006, and 20113500071
(Consolidated)
Insurer Nos. WC608666648, WC608000000, and WC608A08328
Jacqueline Wohl, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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By J. Patrick Butler, Tucson
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The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
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MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 In this statutory petition for special action, petitioner Gary Hackworth challenges the portion of the administrative law judge's (ALJ's) award denying his gradual back injury claim. He argues the "undisputed evidence" establishes compensability of the claim. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We consider the evidence in the light most favorable to upholding the award, reviewing all factual findings made by the ALJ deferentially. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2, 275 P.3d 638, 640 (App. 2012). Hackworth began working for respondent Atlas Copco North America, a mining distribution company, in 2005. As a warehouse supervisor, one of his responsibilities was packaging mining materials for shipping, which

involved heavy lifting. On a daily basis, Hackworth lifted "[b]etween 15 and 20" drill bits, each weighing between 189 and 308 pounds and spent about "[n]inety percent of the day" "on [his] feet."

¶3 On November 22, 2010, Hackworth filed a claim for workers' compensation benefits alleging a gradual back injury that was caused, contributed to or aggravated by his job duties while employed by the defendant employer. That claim was deemed denied and timely protested by stipulation of the parties. Hackworth's gradual back injury claim was consolidated with other industrial injury claims, and formal hearings were held in 2013 and early 2014.[1]

¶4 At the consolidated hearings, Hackworth testified that he complained "early on" that his "back was sore at times" during his employment with Atlas Copco and that the soreness "got worse" after he had begun having "problems with [his right] foot in [20]08."[2] He described his back problems at the time of the hearing as "constant pain in [his] lower back, . . . most concentrated . . . in the center, but . . . radiat[ing] across the back on both sides and occasionally . . . down [his right] leg." He testified his pain became "gradually . . . worse during [his] time at Atlas Copco," and was aggravated by "lifting, . . . walking too much on a regular basis, twisting, and stooping."

¶5 Dr. William Horace Noland, an Arizona licensed and board-certified neurologist, began treating Hackworth in November 2009. When Noland first examined Hackworth, he noted an absence of a right "ankle jerk," which he testified was consistent with "an S1 radiculopathy," and "recommended an MRI of the lumbar spine." Hackworth's MRI "demonstrated bilateral L5-S1

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[1]Hackworth also submitted claims for a gradual foot injury and an acute back injury, neither of which is at issue in this special action.

[2]Hackworth was diagnosed with Morton's neuroma in 2008 and his industrial injury claim arising from that condition was deemed compensable.

neuro-foraminal stenosis," but was "otherwise unremarkable." A second MRI of Hackworth's back performed in 2011 showed "[m]ild degeneration of L5/S1 disk" and "moderate foraminal narrowing," but Noland noted it "was really unchanged from the prior scan." Noland testified that, given Hackworth's work history, he was not "surprise[d] . . . that he ha[d] foraminal narrowing," and concluded that his "back condition was contributed to by the repeated loading on his spine from the heavy lifting and bending." He opined it was "medically probable . . . that [Hackworth's] work history contributed to his current back condition," and that it was more likely than not that repeated heavy lifting would accelerate Hackworth's degenerative changes.

¶6 Dr. Marjorie Eskay-Auerbach, a licensed and board-certified orthopedic surgeon, performed an independent medical examination (IME) in May 2013 to assess Hackworth's gradual back injury claim. In her report, she noted Hackworth "was a poor historian," providing "very little consistent detail regarding the onset of his symptoms," and she concluded his "clinical presentation and complaints" were "not consistent with any specific low back injury." Eskay-Auerbach testified Hackworth "reported constant low back pain," but she noted "no objective findings at the time of his examination" and found he exhibited "a number of positive Waddell signs," [3] suggesting a "nonorganic component" to his complaints. She also stated his MRI was "unremarkable for any specific findings," other than showing "moderate bilateral narrowing at L-5/S-1, which is a degenerative change that [one] would expect to see over time," and not indicative of a gradual injury. She diagnosed his condition as nonspecific, "chronic low back pain," did not attribute it to his employment, and concluded the condition did not require any work restrictions.

[3]Dr. Eskay-Auerbach explained "Waddell signs" are used to "assess nonorganic findings" when evaluating a patient's complaints of pain, and her report listed several specific physical tests and indicators.

¶7 The ALJ denied Hackworth's gradual back injury claim in a written decision.[4] Adopting the testimony and opinions of Eskay-Auerbach, the ALJ noted inconsistencies in Hackworth's accounts regarding the onset of his back pain and concluded he "did not sustain his burden of proving that [his degenerative] changes were caused, contributed to or aggravated by his job duties." Hackworth filed a request for review shortly thereafter, and the ALJ affirmed the award. This petition for special action followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Actions.

Discussion

¶8 The statutory elements of compensability are an injury by accident arising out of and in the course of employment. A.R.S. § 23-1021. Gradual injuries are recognized as accidents within the meaning of the statute. *Reilly v. Indus. Comm'n*, 1 Ariz. App. 12, 15, 398 P.2d 920, 923 (1965). It is the claimant's burden to establish all elements of a compensable gradual injury claim by a preponderance of the evidence. *See Inglis v. Indus. Comm'n*, 11 Ariz. App. 368, 369, 464 P.2d 814, 815 (1970); *Hahn v. Indus. Comm'n*, 227 Ariz. 72, ¶ 9, 252 P.3d 1036, 1038-39 (App. 2011) (claimant must prove by preponderance of evidence that condition is causally related to work injury).

¶9 Back and spine injuries typically require expert medical testimony to demonstrate the causal connection between the claimant's medical condition and the industrial accident. *W. Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 527-28, 647 P.2d 657, 658-59 (App. 1982). When expert medical testimony conflicts, it is the ALJ's duty to resolve those conflicts. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975); *see also Flores v. Indus. Comm'n*, 11 Ariz. App. 566, 568, 466 P.2d 785, 787 (1970) ("[t]he privilege and duty of resolving conflicts in evidence in compensation proceedings rests on The Industrial Commission"). On appeal, we defer to the

[4]The ALJ found Hackworth's gradual foot injury compensable and closed his acute back injury claim.

ALJ's factual findings but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, ¶ 14, 63 P.3d 298, 301 (App. 2003).

¶10 Hackworth contends it is undisputed that his work duties involved repeated heavy lifting, which "caused or contributed to his condition, diagnosed by [both Noland and Eskay-Auerbach] as back pain, not otherwise specified, and that such evidence is sufficient to establish [a] compensable industrial claim" as a matter of law. He concedes that "the ALJ was within her discretion to choose the testimony of . . . Eskay-Auerbach over [Noland]," *see Perry*, 112 Ariz. at 398, 545 P.2d at 1097, and that "for purposes of this appeal[, her testimony] . . . control[s]." He nevertheless argues that "[e]ven without considering [Noland's] opinion, the evidence from [Eskay-Auerbach wa]s sufficient" to establish his claim. We therefore proceed by examining that evidence and whether the ALJ erred in denying Hackworth's claim.

¶11 Although the strenuous nature of Hackworth's work duties and the diagnosis of nonspecific back pain are not in dispute, causation is, and the record supports the ALJ's conclusion that Hackworth failed to prove by a preponderance of the evidence that he sustained a compensable back injury "arising out of and in the course of his employment." § 23-1021.

¶12 First, the ALJ expressly adopted Eskay-Auerbach's testimony and opinion that there were no objective findings to explain Hackworth's back pain. She also agreed with the conclusion that Hackworth was a "poor historian with regard to the initiation of his back pain," noting the "medical records submitted contain[ed] inconsistent reports from [Hackworth] about when his back pain began[,] with dates ranging from 2006 to 2009." *Cf. Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984) (ALJ, in determining witness credibility, may reject inconsistent testimony).

¶13 Hackworth argues the ALJ erred as a matter of law in finding his claim non-compensable because Arizona's Worker's Compensation scheme does not require objective findings to establish a compensable gradual injury claim. Relying on *Mandex, Inc. v. Indus. Comm'n*, 151 Ariz. 567, 729 P.2d 921 (App. 1986) and *Smith v. Indus. Comm'n*, 113 Ariz. 304, 552 P.2d 1201 (1976), he asserts

that a claimant meets his burden by showing "increased symptoms of a pre-existing physical condition are related to work activity and result in medical treatment," and that subjective reports of pain suffice to satisfy this showing. Because Dr. Eskay-Auerbach diagnosed his condition as "nonspecific chronic low back pain" and acknowledged that heavy lifting may cause people to report symptoms of lower back pain, Hackworth urges that her testimony was "sufficient to establish a compensable industrial claim."

¶14 In *Mandex*, the ALJ found the claimant had met her burden of establishing an industrial injury after hearing uncontradicted expert testimony that the claimant's work-related typing activity increased the pain symptoms of her pre-existing myofascial syndrome, requiring additional medical treatment. 151 Ariz. at 569-70, 729 P.2d at 923-24. This court upheld the award, concluding that a claim is compensable if work activity combines with a pre-existing condition to cause a further injurious result. *Id.* In *Smith*, our supreme court determined that pain presenting with "no objective finding[s]" is compensable where "subjective pain is determined to constitute a permanent impairment." 113 Ariz. at 306-07, 552 P.2d at 1200-01.

¶15 Although Hackworth is correct that subjective pain resulting from, or exacerbated by, an industrial injury may be compensable, it does not follow that every complaint of subjective pain allegedly arising from an industrial activity requires compensation. *See, e.g.*, *Simpson v. Indus. Comm'n*, 189 Ariz. 340, 345, 942 P.2d 1172, 1177 (App. 1997) ("'pain is compensable as an impairment only when it is disabling'"), *quoting Cassey v. Indus. Comm'n*, 152 Ariz. 280, 283, 731 P.2d 645, 648 (App. 1987); *see also Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 10, 154 P.3d 391, 394-95 (App. 2007) (subjective pain, standing alone, is not a compensable injury within the meaning of article XVIII, § 8 of the Arizona Constitution). Stated differently, an employee is not precluded from receiving compensation for subjective pain arising from an industrial injury, but he or she does not automatically establish a valid claim by merely reporting pain symptoms. *Cf. Polanco*, 214 Ariz. 489, ¶¶ 11-12, 154 P.3d at 395-96 (defining "accidental injury" as occurring "'when usual exertion leads to something actually

breaking or letting go with an obvious sudden *organic or structural change in the body*,'" and excluding subjective pain from this definition), *quoting Phelps Dodge Corp. v. Cabarga*, 79 Ariz. 148, 153, 285 P.2d 605, 608 (1955) (emphasis in *Polanco*). When a diagnosis of a condition is based solely on subjective complaints, the claimant's testimony, and the weight the ALJ assigns to that testimony, becomes crucial in establishing a claim. And where there are inconsistencies, the ALJ, as the trier of fact, is entitled to resolve any conflict or discrepancies in the testimony against the claimant. *See Holding*, 139 Ariz. at 552, 679 P.2d at 575.

¶16 Here, Hackworth's underlying condition—nonspecific chronic low back pain—was presented with no objective findings consistent with any "specific anatomic injury."[5] Eskay-Auerbach testified her diagnosis was based entirely on Hackworth's subjective complaints of back pain, and she found no objective findings indicative of a back injury.[6] Moreover, the gradual injury Hackworth sought compensation for—aggravation of his nonspecific chronic low back pain—also lacked corroboration by objective findings and was based solely upon his subjective complaints of pain. Eskay-Auerbach additionally noted that it was "hard to glean anything from [Hackworth] in terms of understanding dates or progression of symptoms," and that his records were "more consistent with intermittent episodes of low back pain," rather than a progressive condition. Finally, "based on

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[5]Though Noland noted an absence of a right "ankle jerk," which he testified was an objective finding consistent with "an S1 radiculopathy," Eskay-Auerbach testified that an "[a]bsent ankle jerk by itself is not significant for anything." *Cf. Perry*, 112 Ariz. at 398, 542 P.2d at 1097. She also stated that the "moderate bilateral narrowing at L-5/S-1" shown on Hackworth's MRI was a "degenerative change that you would expect to see over time."

[6] Eskay-Auerbach stated she "would distinguish between symptoms and an injury," explaining that a "patient [might] report an increase in symptoms with heavy lifting," but that she "wouldn't consider that an anatomic change or an aggravation of [nonspecific chronic low back pain]."

the information [provided, Eskay-Auerbach was] . . . unable to say that there's a causal relationship between any type of back injury and [Hackworth]'s work history that involved heavy lifting." Her opinion was "to a reasonable degree of medical probability based on the medical literature."

¶17 As noted earlier, a claimant may establish an injury based on aggravation of a pre-existing condition. *See Mandex*, 151 Ariz. at 570, 729 P.2d at 924. But where both the underlying condition and new complaints of the condition's symptoms are subject to conflicting expert opinions concerning objective findings, it is the ALJ's role to determine the credibility of those complaints, *Holding*, 139 Ariz. at 551, 679 P.2d at 574, and to resolve any conflicting medical testimony, *see Post v. Indus. Comm'n*, 160 Ariz. 4, 7-8, 770 P.2d 308, 311-12 (1988) (ALJ must resolve all conflicts in expert medical testimony). As Hackworth acknowledges, the ALJ acted within her discretion in crediting the testimony of Eskay-Auerbach. *See Perry*, 112 Ariz. at 398, 542 P.2d at 1097. Based on that testimony, the ALJ concluded Hackworth had failed to meet his burden of establishing a gradual back injury arising from his employment. Because there is reasonable evidence in the record to support the ALJ's decision, we will not disturb it on appeal. *See Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 16, 41 P.3d 640, 643 (App. 2002).

Disposition

¶18 For the foregoing reasons, the ALJ's award is affirmed.