IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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JOSE JAIMEZ JR.,
*Petitioner Employee*,

*v.*

THE INDUSTRIAL COMMISSION OF ARIZONA,
*Respondent*,

CITY OF TUCSON,
*Respondent Employer*,

PINNACLE RISK MANAGEMENT SERVICES,
*Respondent Insurer*.

No. 2 CA-IC 2014-0019
Filed April 28, 2015

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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NOT FOR PUBLICATION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).

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Special Action – Industrial Commission
ICA Claim Nos. 20131190142 and 20132610065
Insurer Nos. WCTUC2013718745 and WCTUC2013725134
Gary M. Israel, Administrative Law Judge

**AWARD AFFIRMED**

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COUNSEL

Jose Jaimez Jr., Tucson
*In Propria Persona*

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

Moeller Law Office, Tucson
By M. Ted Moeller
*Counsel for Respondents Employer and Insurer*

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**MEMORANDUM DECISION**

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

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V Á S Q U E Z, Judge:

**¶1** In this statutory special action, Jose Jaimez Jr. challenges the administrative law judge's (ALJ) consolidated award denying both his September 2013 claim for workers' compensation benefits and his petition to reopen his April 2013 claim. He essentially argues there was insufficient evidence to support the award. We affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to upholding the ALJ's award. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2, 275 P.3d 638, 640 (App. 2012). Jaimez was employed as a well mechanic for the City of Tucson, removing and installing water well pumps. On April 16, 2013, a crane operator prematurely lifted the opposite end of a large pipe Jaimez was holding, shifting the

pipe's weight toward Jaimez.[1] Jaimez was unable to let go with his right hand, and "[a]s the pipe was lifted, it yanked [his] arm down." Although his "whole arm was hurting," he reported to work for several days after the injury. The following week, Jaimez saw Dr. Richard Seckinger for treatment because his arm had "swelled up." Seckinger recommended a prescription pain medication, physical therapy, and cold packs for Jaimez's right forearm. Jaimez filed a workers' compensation claim, which the city's insurer, Pinnacle Risk Management Services, accepted and closed without permanent disability on May 20, 2013.

**¶3** On September 5, 2013, Jaimez was again working on a well when he reached for a heavy wrench with his right hand and felt "a shock of lightning pain" that, he later testified, radiated from his right shoulder down through his arm. Seckinger examined Jaimez's arm but was unable to determine whether the new injury was work related. Seckinger therefore instructed Jaimez to contact his primary care physician, who referred him to Dr. Jesse Wild, an orthopedic surgeon. Wild ordered an MRI[2] of Jaimez's shoulder, which revealed a full-thickness tear of the supraspinatus, a partial-thickness tear of the subscapularis, and tendonopathy to the biceps tendon. Wild operated on the shoulder, performing arthroscopic rotator cuff repair, arthroscopic biceps tenodesis, debridement of the labrum, and decompression removal of a bone spur. Jaimez filed a petition to reopen his April 2013 claim, as well as a new workers' compensation claim for the September 5, 2013 injury. Pinnacle denied both.

**¶4** In November 2013, Jaimez requested a consolidated hearing to dispute the claim denials. Dr. John Hayden, a specialist in "upper extremity surgery," conducted an independent medical

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[1]Jaimez testified that this incident actually occurred on April 18, 2013, not April 16, 2013. However, we use April 16, 2013, throughout this decision because it was the date originally reported in his workers' compensation claim and the date the ALJ used in its decision.

[2]Magnetic resonance imaging.

examination. At the subsequent hearing, Hayden testified there was no definitive link between Jaimez's shoulder condition and the April 2013 industrial injury. And, he stated that the September 2013 incident was "not consistent with a rotator cuff tear." Wild also testified at the hearing and concluded Jaimez had likely injured his shoulder on April 16, 2013, and reinjured his shoulder on September 5, 2013.

**¶5** The ALJ adopted "the testimony, report and opinions of . . . Hayden as being most probably correct and well-founded" and therefore denied the petition to reopen and the new claim. Jaimez filed a request for review, and the ALJ affirmed his prior consolidated decision. 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

**¶6** Jaimez argues the ALJ's decision "is not supported by any reasonable theory." Our review is limited to "determining whether or not the [ALJ] acted without or in excess of its power" and whether the ALJ's findings of fact support the award. A.R.S. § 23-951(B). In conducting that review, we defer to the ALJ's factual findings, *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004), and will sustain an award if "reasonably supported by the evidence," *Lawson v. Indus. Comm'n*, 12 Ariz. App. 546, 547, 473 P.2d 471, 472 (1970). Moreover, we defer to the ALJ's resolution of any conflicts in the evidence, including those among medical experts. *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988); *see 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.").

### Petition to Reopen April 2013 Claim

**¶7** An employee may petition to reopen a previously accepted and closed claim "to secure an increase or rearrangement of compensation or additional benefits . . . upon the basis of a new, additional or previously undiscovered temporary or permanent

condition." A.R.S. § 23-1061(H). The employee bears the burden of "showing a new, additional, or previously undiscovered condition and a causal relationship between that new condition and the prior industrial injury." *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 17, 41 P.3d 640, 643-44 (App. 2002).

**¶8** Sufficient evidence supports the ALJ's conclusion that Jaimez failed to show a new, additional, or previously undiscovered right shoulder condition that was causally related to the April 2013 industrial injury. At the hearing, Jaimez testified that after the pipe had "yanked" it, his "whole arm was hurting," including his right shoulder. But when he first visited Seckinger after the April 2013 injury, Jaimez completed a patient information form on which he indicated that he had injured his "right hand or for[e]arm by lifting a pipe." He also circled the right forearm on a diagram to show where he was experiencing pain. Seckinger's notes from April and May 2013 discuss only an injury to Jaimez's right forearm, wrist, and hand and do not mention any shoulder pain or injury. Additionally, Seckinger had referred Jaimez for physical therapy, and the physical therapist's notes likewise contain no reference to any shoulder pain or injury. Hayden thus concluded that "to a reasonable degree of medical probability" Jaimez's shoulder condition was not related to the April 2013 industrial injury.

**¶9** In contrast, Wild testified Jaimez's shoulder problems had been "under reported or under[]appreciated" but nevertheless "linked back to the work injury" of April 2013. He noted that Jaimez had reported a history of shoulder and arm problems stemming from that injury. This was consistent with Jaimez's testimony that his "whole arm" had been hurting after the April 2013 incident and that his shoulder had "continued to have pain" through September 2013. Two of his coworkers also testified at the hearing and corroborated his account, noting that after the first incident, Jaimez had pain in his shoulder. Thus, Wild stated Jaimez's shoulder problems "would represent new, additional or previously undiscovered conditions since the closure of the April 16, 2013 injury."

**¶10** Wild stated that his opinion was based on Jaimez's oral history and that Jaimez "seemed honest," his coworkers' stories

were "exactly consistent," and Seckinger's documentation may have been "poor." On cross-examination, however, Wild admitted he was unaware that Jaimez himself had "filled out and circled body parts" on the medical records in describing the location of his pain and injury. The city and Pinnacle's attorney asked Wild:

> If you assume hypothetically that on his first visit to the doctor after the April 16, 2013 injury . . . that the doctor's notes don't say anything about shoulder pain; and assume that the written account of the injury, written for the doctor by . . . Jaimez, says nothing about injuring his shoulder[,] his upper arm[,] or about having shoulder pain. And that the pain diagram filled out by . . . Jaimez indicates that he had forearm pain, but no pain in any other location.
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> And then if you also assume that when . . . Jaimez made his written report of injury for the Worker[s'] Compensation claim, he mentions the right hand and the forearm, but made no mention of the right shoulder or right shoulder pain or upper arm pain. And if you assume that in all of his treatment records and physical therapy records between April 16, 2013 and September 5, 2013, the shoulder was never mentioned.
>
> If you assume all that to be true, isn't it more of a possibility than a probability that he injured his shoulder on April 16, 2013?

Based on the hypothetical, Wild conceded that "it's perhaps more likely" that the April 2013 industrial injury was limited to "his elbow, forearm, [and] hand." He also acknowledged the type of shoulder injury Jaimez had sustained could "occur absent a trauma as a degenerative problem."

**¶11** Hayden acknowledged that "it's hard to resolve the history between" Seckinger's medical records and Jaimez's account. Hayden nevertheless stated that he had to rely on Seckinger's notes, which included information provided by Jaimez about the location of the injury. Seckinger suggested that the impressions of the coworkers were less reliable than the medical records because they were "not medical physicians" and "didn't perform . . . a physical exam on the patient."

**¶12** In sum, although Wild, at least initially, stated the shoulder injury was most likely a new, additional, or previously undiscovered condition related to the April 2013 industrial injury, we cannot say the ALJ erred by adopting Hayden's testimony instead. It was the ALJ's duty to resolve any conflict in the medical testimony, and we will not reweigh the evidence presented by the experts on appeal. *See Carousel Snack Bar*, 156 Ariz. at 46, 749 P.2d at 1367.

**¶13** Jaimez nevertheless asserts that Hayden's opinion was "equivocal." An equivocal opinion from a medical expert "is insufficient to support an award or to create a conflict in the evidence." *Hackworth*, 229 Ariz. 339, ¶ 10, 275 P.3d at 642. "Testimony is 'equivocal' if it is subject to two or more interpretations or if the expert avoided committing to a particular opinion." *Rosarita Mexican Foods v. Indus. Comm'n*, 199 Ariz. 532, ¶ 13, 19 P.3d 1248, 1252 (App. 2001).

**¶14** During his testimony, Hayden stated a person could suffer a full-thickness rotator cuff tear and "be totally asymptomatic," which might explain why Seckinger's medical records did not mention any shoulder issues. This statement, however, did not render Hayden's opinion equivocal. Although he seemingly acknowledged the possibility that Wild's medical opinion was correct, Hayden still maintained that a causal link could not be shown to a reasonable degree of medical probability because the medical records upon which he based his conclusion were more reliable than the layperson accounts. *See Rosarita Mexican Foods*, 199 Ariz. 532, ¶ 13, 19 P.3d at 1252; *Walters v. Indus. Comm'n*, 134 Ariz. 597, 600, 658 P.2d 250, 253 (App. 1982) (concession that another medical conclusion was "conceivable" affected weight of testimony,

not competence). We cannot say the ALJ's decision to adopt Hayden's interpretation of the medical records was "unreasonable." *Johnson-Manley Lumber*, 159 Ariz. at 13, 764 P.2d at 748. Accordingly, the ALJ did not err by denying Jaimez's petition to reopen the April 2013 claim. *See Lawson*, 12 Ariz. App. at 547, 473 P.2d at 472.

**September 2013 Claim**

**¶15** To be compensable, an injury must arise out of and be sustained in the course of employment. A.R.S. § 23-1021. In addition, the injury must be causally related to the work accident. *Lamb v. Indus. Comm'n*, 27 Ariz. App. 699, 701, 558 P.2d 727, 729 (1976); *see also Grammatico v. Indus. Comm'n*, 211 Ariz. 67, ¶¶ 19-20, 117 P.3d 786, 790 (2005) (discussing legal and medical causation). When not readily apparent, the injury and causal relationship must be established by expert medical testimony. *Lamb*, 27 Ariz. App. at 701, 558 P.2d at 729. The employee bears the burden of proving all elements of the claim. *LaRue v. Indus. Comm'n*, 16 Ariz. App. 482, 483, 494 P.2d 382, 383 (1972).

**¶16** Sufficient evidence supports the ALJ's conclusion that Jaimez failed to prove he had sustained an industrial injury in September 2013. In describing this incident, Jaimez testified he had been "going to reach for a wrench and [he] got this pain in [his] whole arm." He said the pain had extended from his shoulder to his wrist and he even felt it in his chest, which caused him to think he "was going to have a heart attack." Wild testified that this incident had "probably reaggravated the shoulder" injury that Jaimez suffered in April 2013.

**¶17** Hayden explained, however, that a rotator cuff injury is normally accompanied by a "tearing, wrenching-type aching pain," whereas Jaimez had described a "hot electrical pain." Hayden also stated, "[I]t's hard to explain how his entire right upper extremity from the fingertips all the way up to the shoulder would get worse with just a rotator cuff [injury]."

**¶18** Instead, Hayden suggested the September 2013 incident was more consistent with "nerve pain, like sciatica or somebody bumping their funny bone." He also noted that the medical records

indicated Jaimez had "an abnormality at [the] C3-C4" cervical discs in his spine. Thus, Hayden concluded "to a reasonable degree of medical probability" that the shoulder injury, as diagnosed by Wild, had not occurred when Jaimez was reaching for the wrench.

**¶19** Because there is reasonable evidence to support it, *see Lawson*, 12 Ariz. App. at 547, 473 P.2d at 472, we defer to the ALJ's decision to adopt Hayden's opinion over Wild's, *see Carousel Snack Bar*, 156 Ariz. at 46, 749 P.2d at 1367. In turn, we cannot say the ALJ erred by denying Jaimez's September 2013 claim. *See id.*

## Disposition

**¶20** For the foregoing reasons, we affirm the ALJ's award.