

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

RICHARD G. REYES,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

TUCSON PLUMBING & HEATING, INC. II,
Respondent Employer,

COPPERPOINT WESTERN INSURANCE COMPANY,
Respondent Insurer.

No. 2 CA-IC 2019-0001
Filed December 9, 2019

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NOT FOR PUBLICATION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);
Ariz. R. P. Spec. Act. 10(k).

Special Action - Industrial Commission
ICA Claim No. 20173400533
Insurer No. 17W01274
LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Dee-Dee Samet P.C., Tucson
By Dee-Dee Samet
Counsel for Petitioner Employee

REYES v. INDUS. COMM'N OF ARIZ.
Decision of the Court

The Industrial Commission of Arizona, Phoenix
Gaetano Testini, Chief Legal Counsel
By Stacey Rogan, Assistant Chief Counsel
Counsel for Respondent

CopperPoint Western Insurance Company, Tucson
Mark A. Kendall, VP, Legal Services
By Joseph N. Lodge
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 In this statutory special action, Richard Reyes challenges the administrative law judge's (ALJ) decision upon review affirming CopperPoint Mutual Insurance Company's closure of his worker's compensation case in February 2018. Reyes argues the ALJ's award should be reversed because it relied on an expert whose findings were unsupported by the record. We affirm the ALJ's decision.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the decision and will not set aside an award if the evidence reasonably supports it. *Finnegan v. Indus. Comm'n*, 157 Ariz. 108, 109 (1988). Reyes sustained an industrial injury to his lower back in June 2017. He underwent lower back surgery in May 2018. In February 2018, before the surgery, CopperPoint closed Reyes's claim, determining the "[i]njury resulted in no permanent disability." Reyes requested a hearing before an ALJ to contest the closure.

¶3 At the hearing, Reyes testified that, in June 2017, while placing pipe into a trench, an action that required twisting and shoveling, he experienced cramping in his lower right back, which radiated into his buttocks and down his right leg. When the pain did not resolve, he sought treatment first with a chiropractor, then with a medical doctor, who took MRI images and administered steroid injections. When these treatments did not relieve his pain, Reyes received a referral to Dr. Matthew Wilson, a

board-certified neurosurgeon who conducted lower back surgery. Reyes reported that, since the surgery, the pain had improved to the point that he felt able to return to work.

¶4 Dr. Wilson testified that, based on his review of an MRI taken in September 2017 and his physical examination, he believed Reyes had suffered spinal stenosis and lumbar spondylolisthesis in the L4-5 region of his spine. He stated that “in the absence of any alternative explanation of any documented history of low-back problems,” he believed “the onset of symptoms occurred as a result of this injury at work.” On cross-examination, he agreed that imaging indicated Reyes had degeneration in the L4-5 region of his spine, which he suspected preexisted the injury. He further stated that some of Reyes’s stenosis may have been preexisting and asymptomatic, which in his experience may hinder a person’s recovery after an abrupt injury.

¶5 Dr. James Maxwell, a board-certified orthopedic surgeon and board-certified spinal surgeon, testified that, at CopperPoint’s request, he examined Reyes in February 2018 and reviewed his medical records and MRI. He diagnosed Reyes with a lumbar sprain or strain resulting from the shoveling injury and testified that the conditions for which Reyes received surgery—specifically spinal stenosis and lumbar spondylolisthesis in the L4-5 region—were chronic and were not caused or aggravated by the industrial injury. He noted that Reyes’s MRI showed a “potpourri” of chronic, “age-related changes at L4-5” and that the same condition was present higher up in Reyes’s spine. Maxwell concluded that Reyes sustained no permanent impairment related to the industrial injury.

¶6 In November 2018, the ALJ affirmed CopperPoint’s closure, concluding Reyes was “stable and stationary without permanent impairment.” Upon Reyes’s request, the ALJ reviewed and affirmed that award in February 2019. This petition for special action followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-943(H), 23-951, and Rule 10, Ariz. R. P. Spec. Act.

Discussion

¶7 Reyes argues the ALJ’s decision was not reasonably supported by the evidence because it relied on the flawed testimony of Dr. Maxwell. He claims the record did not support Maxwell’s conclusions that a chronic degenerative condition precipitated the symptoms requiring lower back surgery and that the sprain arising from Reyes’s industrial injury did not cause or aggravate his chronic condition. He further argues

REYES v. INDUS. COMM'N OF ARIZ.

Decision of the Court

that, through Dr. Wilson's testimony, he proved by a preponderance of the evidence that the industrial injury was the legal cause of the pain requiring surgery. Thus, Reyes contends that "the issue in this case is a legal issue and not a factual issue."

¶8 However, in asking us to overturn the ALJ's determination that Dr. Maxwell's testimony was "most credible and supported by the objective evidence in this case," Reyes essentially raises an issue of fact regarding conflicting experts' interpretations of the medical evidence. "[C]onflicts in medical evidence must be resolved by the trier of fact." *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46 (1988). "In determining the facts, it is the ALJ, not this court, who has the responsibility of resolving conflicts in expert opinions, and we will affirm an ALJ's resolution of conflicting opinions absent an abuse of his discretion." *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 10 (App. 2000). We must "uphold an ALJ's resolution of conflicting testimony when the evidence reasonably supports it." *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 121 (1989). And although "[a]n expert opinion based on an incorrect factual assumption may be rejected if the factual assumption was material," "not every error in fact renders the opinion fatally flawed." *Fry's*, 161 Ariz. at 122. Rather, the error must amount to a "foundational problem" that significantly weakens an expert's testimony. See *Desert Insulations, Inc. v. Indus. Comm'n*, 134 Ariz. 148, 151 (App. 1982).

¶9 Reyes argues Dr. Maxwell's testimony was fatally flawed because: (1) he based his opinion on the incorrect supposition that Reyes had lower back pain before the injury; (2) he mistakenly testified Reyes did not experience tenderness over his sacroiliac joint, but later had to correct that testimony to reflect Reyes did have such pain; and (3) he failed to consider Reyes's "radicular leg pain after the injury."

¶10 Although we agree that these portions of Dr. Maxwell's testimony conflicted with Dr. Wilson's testimony, we find no error rendering Maxwell's testimony fatally flawed. Maxwell testified that, even if Reyes's lower back pain arose only after the injury, he would not agree the injury necessarily contributed to the pain. And, he opined, sacroiliac tenderness would not indicate a need for surgery.

¶11 Although portions of the record contradict Dr. Maxwell's conclusion that Reyes suffered no radicular pain, other portions of the record support that claim. Dr. Gossler diagnosed Reyes with spondylosis without radiculopathy and Lisa Payne's March 2018 medical report

confirmed no radiculopathy was diagnosed for Reyes. This evidence supported Maxwell's finding of no radicular pain.

¶12 Reyes correctly argues that a worker is entitled to compensation if an underlying condition is aggravated by an industrial injury. See *Tatman v. Provincial Homes*, 94 Ariz. 165, 169-70 (1963). But, the worker must show that the condition was actually aggravated by the injury. See *id.* (experts' uncontested testimony indicated workplace injury aggravated existing condition); *Revoles v. Indus. Comm'n*, 88 Ariz. 67, 77 (1960) (same); *Murray v. Indus. Comm'n*, 87 Ariz. 190, 196-201 (1960) (same). The record here contains conflicting testimony as to whether the industrial injury aggravated or caused Reyes's symptoms. In fact, Dr. Maxwell unequivocally denied that the injury aggravated the underlying conditions requiring surgery. He testified that Reyes suffered from either no spinal stenosis or very little and that the repetitive action of shoveling would not cause that condition. Maxwell acknowledged that Reyes suffered from spondylolisthesis, or vertebrae displacement. But he testified that trauma often causes a vertebrae to move forward. In Reyes's case, however, Maxwell observed that the vertebrae had moved backward, which is consistent with aging. Further, Dr. Wilson's testimony and the supporting medical records indicate that Reyes did, in fact, suffer from preexisting and chronic degenerative conditions in the L4-5 region of his spine.

¶13 We recognize Dr. Wilson—a treating physician—had considerably more contact with Reyes than Dr. Maxwell. And Wilson specifically suggested that practice-based opinions were more reliable than Maxwell's. But, we do not substitute our judgment for that of the Industrial Commission when the record reasonably may be read to support the ALJ's findings. *Preuss v. Indus. Comm'n*, 15 Ariz. App. 515, 516-17 (1971). The record—including Wilson's testimony—supports the material elements of Maxwell's testimony, specifically that Reyes suffered from a chronic, degenerative condition that may have been wholly separate from the injury he suffered while at work. None of the errors Reyes identifies in Maxwell's testimony goes to the foundation of his conclusion that the injury did not aggravate Reyes's preexisting condition. Thus, we cannot find an abuse of discretion in the ALJ's decision to rely on Maxwell's testimony and to affirm its award.

Disposition

¶14 For the foregoing reasons, the award is affirmed.