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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

WAL-MART ASSOCIATES, INC., Petitioner Employer, CLAIMS MANAGEMENT INC., Petitioner Insurer, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, and ISMAEL A. PALAFOX, Respondent Employee.	2 CA-IC 2010-0003 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20083300027

Insurer No. 5612357

Deborah P. Hansen, Administrative Law Judge

AWARD AFFIRMED

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K E L L Y, Judge.

¶1 In this statutory special action review of an Industrial Commission decision, petitioners Wal-Mart Associates, Inc. and Claims Management Inc. ("Wal-Mart") challenge the award of the administrative law judge (ALJ) accepting respondent/employee Ismael Palafox's claim for workers' compensation benefits. Wal-Mart contends the ALJ erred in finding Palafox had been stung or bitten by an insect while engaged in work activities, that his medical complications were a result of this injury, and that his claim was therefore compensable. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's findings and the award. *Polanco v. Indus. Comm'n*, 214 Ariz.

489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). On the morning of August 2, 2008,[1] Palafox was stung or bitten by a spider or other insect inside his left pant leg while watering plants in the garden center of Wal-Mart in Nogales, where he was employed. He immediately crushed the insect through his pants, stomped his leg, and saw brown pieces of a spider or other insect fall from his pants' leg and wash away. Shortly after he began work the next day, he started perspiring and limping, developed an upset stomach, and asked to go home because he was feeling "real bad." He awoke the following morning feeling very ill, went to a Nogales hospital, and was transferred by helicopter to a Tucson hospital, where he underwent several surgeries and was hospitalized for weeks. Palafox, who was a "very poorly controlled diabetic," arrived in Tucson in septic shock and had no recollection of his hospitalization until about ten days after his transfer to a second Tucson facility.

¶3 Palafox filed a claim for workers' compensation benefits, and after it was denied, he requested a hearing before the Industrial Commission. Following an evidentiary hearing, the ALJ found his claim was compensable. Wal-Mart filed a request for review, and the ALJ affirmed the award. Wal-Mart then brought this special action.

Standard of Review

¶4 "We deferentially review the ALJ's factual findings but independently review [her] legal conclusions." *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004). The ALJ determines the credibility of witnesses and resolves

[1]The date of the incident was listed as July 30, 2008, on Palafox's "report of injury," but was corrected at the Industrial Commission hearing.

conflicts in the evidence. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). "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*. This court must uphold an ALJ's resolution of conflicting testimony if the evidence reasonably supports it. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 121, 776 P.2d 797, 799 (1989).

Discussion

¶5 Wal-Mart asserts the ALJ erred in finding Palafox's claim for workers' compensation benefits compensable, arguing Palafox did not sustain his burden of proving he had sustained a compensable injury at work. "To be compensable, an injury must both arise out of and be sustained in the course of employment." *PF Chang's v. Indus. Comm'n*, 216 Ariz. 344, ¶ 14, 166 P.3d 135, 138 (App. 2007); *see* A.R.S. § 23-1021(A). "The 'in the course of' [statutory] requirement is satisfied if the claimant shows the injury occurred during the time, place, and circumstances of the claimant's employment." *Hypl v. Indus. Comm'n*, 210 Ariz. 381, ¶ 6, 111 P.3d 423, 426 (App. 2005). "Compensability requires both legal and medical causation." *DeSchaaf v. Indus. Comm'n*, 141 Ariz. 318, 320, 686 P.2d 1288, 1290 (App. 1984); *see also Grammatico v. Indus. Comm'n*, 211 Ariz. 67, ¶ 19, 117 P.3d 786, 790 (2005). "Legal causation concerns whether the injury arose out of and in the course of employment" and "medical causation" is established by showing "that the industrial accident caused the injury." *DeSchaaf*, 141 Ariz. at 320, 686 P.2d at 1290.

¶6 Thus, Palafox was first required to prove that the sting or bite he sustained while at work was the legal cause of his injuries. *See id.* Relying in part on *Bennett v. Industrial Commission*, 163 Ariz. 534, 789 P.2d 401 (App. 1990), Wal-Mart asserts "the ALJ erred when she found legal causation had been proven based on speculative inferences derived from non-probative facts."[2] But, in her detailed findings, the ALJ noted that "[t]he applicant's testimony and the contemporaneous accounts of his wife and the documents submitted into evidence and those referred to by Dr. Schumacher in his report" supported the conclusion that Palafox had sustained a sting or bite from an insect while watering plants, which was part of his employment.

¶7 Palafox testified that he had been bitten or stung by an insect while watering plants. He pinched his pants and saw pieces of a spider fall from his pants' leg. Both Palafox's wife and an assistant manager at the Wal-Mart store testified that before he went to the hospital, Palafox had told them he had been bitten by a spider at work. His wife testified that the area [of the injury] was "like a sty . . . was swollen . . . red and had . . . little white balls [around it]." We disagree with Wal-Mart's characterization of this evidence as non-probative. *See Bennett*, 163 Ariz. at 538, 789 P.2d at 405. And, although Wal-Mart is correct that this court may reject an ALJ's finding of fact where he or she has merely drawn "speculative inferences based on non-probative facts," *id.*, what

[2]Wal-Mart initially failed to include the transcripts of the Industrial Commission hearing in the record on review. As the appellant, Wal-Mart was obligated to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b)(1). We note that in its opening brief Wal-Mart does not mention that several witnesses testified Palafox had told them he had been bitten by a spider or stung by an insect while at work.

Wal-Mart essentially asks us to do here is to ignore or reweigh the evidence, which we will not do. *See Pacific Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214, 735 P.2d 820, 824 (1987) (appellate court does not weigh evidence, and considers evidence in light most favorable to sustaining ALJ's decision).

¶8 Next, Wal-Mart claims the ALJ erred in finding Palafox had sustained his burden of establishing medical causation because "neither doctor could say to a reasonable degree of medical probability that [Palafox]'s condition was related to work activities." Wal-Mart correctly argues that "where the result of an accident is not one which is clearly apparent to a layman, the physical condition of an injured employee after an accident and the causal relation of the accident to such condition must be determined by expert medical testimony." *See Spielman v. Indus. Comm'n*, 163 Ariz. 493, 496-97, 788 P.2d 1244, 1247-48 (App. 1989). Palafox concedes "that medical testimony is required to establish a causal link between his infection and the insect or spider bite."

¶9 Medical opinions "must be based upon the finding of medical fact by the doctor involved." *Royal Globe*, 20 Ariz. App. at 434, 513 P.2d at 972. Such facts may come from the claimant's history, medical records, diagnostic tests, and examinations. *T.W.M. Custom Framing v. Indus. Comm'n*, 198 Ariz. 41, ¶ 18, 6 P.3d 745, 751 (App. 2000). As Wal-Mart argues, medical conclusions regarding causation must be based upon probabilities rather than upon possibilities. *Employers Mut. Liab. Ins. Co. of Wis. v. Indus. Comm'n*, 17 Ariz. App. 516, 519, 498 P.2d 590, 593 (1972). Although medical opinions should ordinarily be stated to a reasonable medical probability, we have never required that the physician actually use the term "reasonable medical probability," or that

the absence of these "magic words" is fatal. *See Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987). Instead, we review the physician's testimony to determine whether, in its context, the testimony establishes that a workplace injury substantially contributed to the ensuing condition. *See id.*

¶10 Both of the physicians who testified acknowledged that because personnel at the Nogales hospital had made an incision in the location of the wound, it was no longer possible to see what had started the process in the skin. Palafox's medical history was therefore the only source of information available to the doctors as to the origin of the break in his skin. The findings necessary to form a medical opinion may "come from the claimant's history, medical records, diagnostic tests, and examinations." *T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 18, 6 P.3d at 751. And, although inaccuracies in a claimant's factual background may weaken medical testimony to the point it cannot be regarded as substantial evidence, that is not the case here. *See id.*

¶11 Dr. Khan, who treated Palafox at the Tucson hospital, testified that Palafox had described his original injury to various doctors as a mosquito bite, a spider bite, or a pimple, but Dr. Khan attributed these inconsistencies to Palafox's condition. He testified that because Palafox was in septic shock, he was confused and his mental alertness or capacity to understand what was going on was impaired.[3] He testified that he did not think Palafox's "sensorium was clear at that time, . . . he was not as alert and oriented . . .

[3]Palafox testified that he had no memory of being transported to the Tucson hospital by helicopter, the weeks in the hospital, or the surgeries. He stated that his memories resumed about ten days after he was admitted to the second medical facility in Tucson.

because of his infection, fever, elevated white count and all those things going on. . . . [T]hat's why his description varied to different physicians on the same day."

¶12 Dr. Schumacher, who examined Palafox about ten months later, testified that during the examination, Palafox had reported that while he was watering plants at Wal-Mart, "[h]e felt something like an ant bite, and he pointed to his left groin[, and] . . . he subsequently pinched this region, and then . . . he saw fragments that appeared to be insect parts subsequently coming out of the pant leg." Thus, although Palafox exhibited some confusion at the height of his illness, as also discussed above, he consistently reported having been bitten by a spider or stung by an insect, and the doctors' reliance on his history in forming their opinions was well-founded. *See id.*

¶13 In giving his opinion, Dr. Khan testified that Palafox had developed a bad infection, eventually diagnosed as necrotizing fasciitis, a life-threatening condition. Dr. Khan acknowledged that "any insult causing a breach in the skin continuity, whether it is a mosquito bite or just a scratch, can lead to this." And he acknowledged that:

> if it[] [were] true that [Palafox] was stung . . . then the wound to his leg is consistent with that and the care that he received in the hospital, starting at Holy Cross and then at Saint Mary's, would be consistent with all of this starting with a mosquito bite or a spider bite while he was doing his work at Wal[-]Mart.

¶14 Dr. Schumacher agreed that "any break in the skin could trigger these types of infections in diabetics." He testified that although it is possible for a person to develop an infection without a break in the skin, there is "a greater risk for an infection if you have a break in the skin than if you don't." Dr. Schumacher acknowledged that part of

"the reason you can't say this is related to any bite or sting, from a medical standpoint, is because you couldn't find any references to that in the records because, by the time it's documented, it was already destroyed."

¶15 Neither doctor used the term "reasonable medical probability" and Dr. Schumacher specifically refused to do so. But, as noted above, the law does not require that such "magic words" be used. *See Howard P. Foley Co. v. Indus. Comm'n*, 120 Ariz. 325, 327, 585 P.2d 1237, 1239 (App. 1978). The medical opinion testimony here, although qualified, was sufficient to allow the ALJ to have made the findings she did. *See Harbor Ins. Co. v. Indus. Comm'n*, 25 Ariz. App. 610, 613, 545 P.2d 458, 461 (1976) ("'Testimony of a less than positive degree must be considered in combination with all other evidence and given what weight, if any, the trier of fact deems warranted.'"), *quoting State Compensation Fund v. Indus. Comm'n*, 24 Ariz. App. 31, 37, 535 P.2d 623, 629 (1975). In her findings, the ALJ concluded that Palafox had been bitten or stung by something, and "accept[ed] as credible the testimony of both doctors." She further found:

> Both doctors testified that the applicant's age and untreated diabetes left him vulnerable to infection where there was a break in the continuity of the skin. Having concluded that there was such a break in the continuity of the skin . . . , I conclude that the applicant sustained a compensable injury to his left upper thigh . . . .

¶16 To the extent the ALJ resolved any conflicts in the two doctors' testimony in favor of Palafox, we defer to her conclusions. *See Gamez v. Indus. Comm'n*, 213 Ariz. 314, ¶ 15, 141 P.3d 794, 796 (App. 2006) (ALJ's responsibility to resolve conflicts in

medical evidence). And, as this court has noted, "positive knowledge of causation is not always possible and this uncertainty will not prevent a physician from stating a legally sufficient opinion." *T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 18, 6 P.3d at 751. Although Dr. Khan noted that any break in the skin could cause the infection, he stated clearly that Palafox's condition was entirely consistent with a spider bite sustained at work. "Qualifications of medical opinions do not necessarily make them uncertain or equivocal." *Harbor Ins. Co.*, 25 Ariz. App. at 612, 545 P.2d at 460. Rather, such qualifications go to the weight of the testimony, a matter for the ALJ. *See id.* at 613, 545 P.2d at 461.

¶17 Furthermore, Palafox's medical records contain descriptions of his injury as an abscess or bullous lesion on his thigh that was markedly erythematous (abnormally red). Because this abscess or lesion appeared at the site of the bite and was the source of the infection, even without medical causation testimony the ALJ could have found it clearly apparent that the bite was the reason for the infection and could reasonably have inferred causation in the same way that a lay person might. *See* 2 A. Larson, *Workmen's Compensation Law* § 79.51(c) (Desk Edition 1996) (in the absence of contrary evidence, causation may be inferred when injury appears shortly after accident, at physical situs of accident, with symptoms observable to laymen).

¶18 The ALJ accepted Palafox's testimony that he had been stung or bitten by something while at work and credited Dr. Khan's and Dr. Schumacher's opinions that although they had not seen the original wound, the infection and the time frame in which it developed was consistent with Palafox's report of an insect or spider bite. Given that

evidence, and the fact that the infection emanated from the same area on the same leg where Palafox had said he had been bitten or stung just after it happened, and before he could have known of the coming complications, the ALJ reasonably could infer the bite had caused the infection. "Because the A.L.J.'s interpretation was reasonable, this court must accept it." *Spielman*, 163 Ariz. at 496, 788 P.2d at 1247; *see also Breidler v. Indus. Comm'n*, 94 Ariz. 258, 262-63, 383 P.2d 177, 179-80 (1963) (prima facie case for causation "where there is expert testimony that the accident 'could' produce the injury coupled with the fact that the petitioner did not have the injury before the accident but did have it after the accident").

Disposition

¶19 For the reasons stated above, we affirm the award.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge