

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

TA OPERATING, LLC,
Petitioner Employer,

ZURICH AMERICAN INSURANCE CO./GALLAGHER BASSETT,
Petitioner Insurer,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

MARIE MCALLISTER,
Respondent Employee.

No. 2 CA-IC 2014-0011
Filed December 12, 2014

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NOT FOR PUBLICATION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. 20121160003
Insurer No. 001834-013548-WC-01
The Honorable LuAnn Haley,
Administrative Law Judge

AWARD AFFIRMED

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COUNSEL

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

Tretschok, McNamara & Miller, P.C., Tucson
By Meghan McNamara Miller
Counsel for Respondent Employee

MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 In this statutory special action, petitioners TA Operating, LLC and Zurich American Insurance Company (collectively, "TAO"), challenge the administrative law judge's (ALJ) award concluding Marie McAllister's permanent impairment was unscheduled, rather than scheduled. For the following reasons, we affirm the award.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming the Industrial Commission's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In April 2012, while working as a dishwasher for TAO, McAllister fell and fractured her wrist. In January 2013, her orthopedic surgeon

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concluded she had reached maximum improvement in her condition and could return to work. Another doctor concluded she suffered a five percent permanent impairment to her arm. The carrier issued a notice of claim status calculating benefits for a permanent scheduled disability, and McAllister filed a request for hearing. The only issue was whether her preexisting intellectual capabilities impacted her earning capacity, which would render her injury an unscheduled impairment. After four days of testimony, the ALJ concluded McAllister was stable and stationary with an unscheduled permanent impairment. TAO requested review and the ALJ affirmed the award. This petition for special action followed.

Consideration of Oregon Records

¶3 TAO argues the ALJ erred by considering vocational rehabilitation records from Oregon without allowing cross-examination of the author or authors. An ALJ is given broad discretion when considering evidentiary questions, *Frazier v. Indus. Comm'n*, 145 Ariz. 488, 492, 702 P.2d 717, 721 (App. 1985), and is “not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct the hearing in any manner that will achieve substantial justice,” A.R.S. § 23-941(F). “Substantial justice,” however, generally requires an ALJ to allow a party to cross-examine the author of any document that the ALJ considers as substantial evidence. *Coulter v. Indus. Comm'n*, 198 Ariz. 384, ¶ 13, 10 P.3d 642, 645 (App. 2000). An exception to this general rule is when the ALJ determines “the expected testimony would not be material or otherwise necessary.” *Hughes v. Indus. Comm'n*, 188 Ariz. 150, 152, 933 P.2d 1218, 1220 (App. 1996).

¶4 The disputed documents were ten-year-old records of the Oregon Office of Vocational Rehabilitation Services.¹ The

¹The records were sent to the ALJ the day before the final hearing, preventing TAO from filing a timely request for cross-examination. TAO objected to the untimely disclosure, but the record reflected that McAllister had requested the records earlier, only to be informed they had been destroyed. The state located the

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records reflect that McAllister participated in vocational rehabilitation for about two years and stopped participating when she moved to Arizona. They describe McAllister's psychosocial impairment and her difficulties with communication, her poor interactions with co-workers, and her minimal work skills in spelling, reading, and math.

¶5 Even if the ALJ erred, any error was harmless. *See Inspiration Consol. Copper v. Indus. Comm'n*, 118 Ariz. 10, 12, 574 P.2d 478, 480 (App. 1977) (admission of improper evidence prejudicial only if the reviewing court unable to say trier of fact would have reached the same result if evidence excluded). TAO does not argue on appeal why cross-examination of the authors of the Oregon records was necessary. In its request for review before the ALJ, but not in its initial objection to the evidence, TAO suggested the records contained medical determinations not confirmed by a medical expert and, without cross-examination, the methodology supporting the conclusions was unknown. The records, however, contain mostly medical history and McAllister's self-reports of her disability.

¶6 Additionally, the ALJ limited consideration of the Oregon records "to the extent that they're corroborated by the testimony of Ms. McAllister." The portions of the Oregon records noted in the ALJ's decision merely corroborated McAllister's own testimony that she had poor math, communication, and writing skills that prevented her from working as a secretary or working at a cash register. To the extent the Oregon records confirm that McAllister once qualified for a vocational rehabilitation program, McAllister testified she had received vocational rehabilitation, further explaining how it had helped her. Additionally, TAO did not dispute that McAllister qualified for vocational rehabilitation in 2004.

¶7 The records also are cumulative to other evidence in the record. The ALJ adopted as more probably correct the opinions of

records, however, and faxed them two days before the hearing. The ALJ overruled the timeliness objection.

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McAllister's experts, Dr. Jill Plevell, a psychologist, and Ruth Van Vleet, a labor market consultant. Plevell testified that McAllister had a verbal learning disorder and a borderline intelligence quotient (IQ), which affected her ability to work. Notably, TAO's psychological expert also concluded McAllister's borderline IQ was consistent with her ability to work at unskilled jobs and agreed she may have difficulty with jobs requiring a high level of concentration and creative thinking.

¶8 The limited nature of the Oregon records also is reflected in the absence of a conflict with TAO's theory that McAllister did not suffer an earning capacity disability because she could hold higher-paying unskilled jobs. TAO's vocational expert—who did not evaluate McAllister—focused on the possibility that some unskilled jobs pay better than others; and, McAllister testified in deposition that she had never been fired for being slow or unable to follow instructions.² Van Vleet challenged the vocational expert's conclusions, testifying that she had conducted labor market research supporting a conclusion that workers with low IQs earn less money than others. The Oregon records had no bearing on this argument.

¶9 TAO cites several cases in which courts found the denial of cross-examination to be reversible error. In each of these, however, the claimant was denied the opportunity to cross-examine a doctor who provided a diagnosis. See *Obersteiner v. Indus. Comm'n*, 161 Ariz. 547, 548, 779 P.2d 1286, 1287 (App. 1989); *Tyree v. Indus. Comm'n*, 159 Ariz. 92, 93-94, 764 P.2d 1151, 1152-53 (App. 1988); *Jones v. Indus. Comm'n*, 1 Ariz. App. 218, 220-21, 401 P.2d 172, 174-75 (1965). These cases are inapposite. Workers' compensation laws are generally construed liberally to ensure injured employees receive maximum benefits, see *Aitken v. Indus. Comm'n*, 183 Ariz. 387, 392, 904 P.2d 456, 461 (1995), and because of this, reversible error is more likely to occur by excluding admissible evidence than including

²The latter point was disputed because McAllister explained at the hearing that she was once moved from a secretarial position to a cleaning crew because she was "not capable of answering the phones and writing down information."

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incompetent evidence, *see Gordon v. Indus. Comm'n*, 23 Ariz. App. 457, 460, 533 P.2d 1194, 1197 (1975). Because the trial court's limited consideration of the Oregon records merely corroborated McAllister's undisputed statements, and the testimony of Dr. Plevell and Van Vleet, any error in considering the records is harmless.³ *See Employers Mut. Liab. Ins. Co. v. Indus. Comm'n*, 15 Ariz. App. 590, 593, 490 P.2d 35, 38 (1971) (harmless records admitted without cross-examination did not change outcome).

Application of Adams Insulation

¶10 TAO contends the ALJ erred in concluding McAllister proved the combination of her borderline IQ and learning disability qualified as an earning capacity disability under *Adams Insulation v. Indus. Comm'n*, 163 Ariz. 555, 789 P.2d 1056 (1990). We review deferentially the factual findings of the ALJ, but review legal conclusions de novo. *Lane v. Indus. Comm'n*, 218 Ariz. 44, ¶ 9, 178 P.3d 516, 519 (App. 2008). The ALJ must resolve conflicts in the opinions of experts. *See Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985).

¶11 In *Adams Insulation*, our supreme court concluded a borderline IQ may be considered disabling. 163 Ariz. at 559, 789 P.2d at 1060. It reiterated, however, that the burden is on the claimant to show any loss of earning capacity. *Id.* Further, the court noted that although the petitioner had adapted to his marginal IQ to the point he was able to function at work, the record demonstrated he was illiterate and of marginal intelligence, which supported the ALJ's conclusion that his disability limited his earning capacity in ordinary employment. *Id.*

³TAO also contends that McAllister's vocational expert "relied upon these records as the foundation of her testimony." While it is true she reviewed the records at the time of her testimony she also relied on an interview with McAllister, the psychological examination results, and the employment records. More important, she had not reviewed the Oregon records at the time of her report in which she reached the same conclusion.

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¶12 TAO argues McAllister's earning capacity was not affected by her IQ, relying on McAllister's own statements that she had never been fired from a job, never struggled in a job, and had never been disciplined or told she was too slow. But McAllister also testified she was moved to a new job because she could not answer phones and write down messages and could not be a cashier because she could not count change.

¶13 Further, Van Vleet, who also served as McAllister's earning capacity expert, testified McAllister had an earning capacity disability related to her borderline IQ and learning impairments. As noted above, the ALJ accepted McAllister's expert's opinion as the more probably correct, an opinion we will not disturb unless it is wholly unreasonable. *See Stainless Specialty Mfg.*, 144 Ariz. at 19, 695 P.2d at 268. As in *Adams Insulation*, McAllister met her burden of showing a loss of earning capacity. 163 Ariz. at 559, 789 P.2d at 1060. The ALJ did not err.

Request to Overturn *Adams Insulation*

¶14 Finally, TAO argues the *Adams Insulation* case should be overturned, because low IQ is a "hidden disability" and therefore an "undiscoverable risk to employers"; further, low IQ is "a poor predictor of work performance." But we are bound by the decisions of our supreme court and have no authority to reverse them. *Sell v. Gama*, 231 Ariz. 323, ¶ 31, 295 P.3d 421, 428 (2013).

Disposition

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