

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ARMANDO MONGE,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

HACIENDA AMADO LLLP,
Respondent Employer,

COPPERPOINT MUTUAL INSURANCE COMPANY,
Respondent Insurer.

No. 2 CA-IC 2014-0023
Filed August 25, 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NOT FOR PUBLICATION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. 20040510010 and 20052550345 (Consolidated)
Insurer Nos. 0402815 and 0548620
Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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COUNSEL

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The Industrial Commission of Arizona, Phoenix
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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 In this statutory special action, petitioner Armando Monge challenges the administrative law judge's (ALJ) decision denying his petition to reopen a claim and affirming the closure of a second claim. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). Monge sustained a work-related injury to his lower back in January 2004. The carrier accepted the claim for benefits but paid no compensation because Monge had not lost more than seven days of work due to

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the injury. In May 2004, the carrier terminated active medical treatment and it closed the claim with a finding of no permanent impairment.

¶3 Monge filed a petition to reopen the claim in January 2006, but he failed to provide medical evidence to support the petition. Two years later he filed a second petition to reopen the claim, which the carrier denied. Monge did not protest the denial, and it became final. He filed a third petition to reopen but later withdrew it and filed a fourth petition, which the carrier denied in January 2014. Monge then requested a hearing.

¶4 Monge sustained a second work-related injury to his right knee in August 2005. The carrier accepted the claim and determined he was entitled to temporary compensation for his injury. The carrier subsequently determined that Monge was entitled to permanent disability benefits and supportive medical maintenance benefits and terminated his temporary compensation and active medical treatment as of April 24, 2009. Monge filed a request for hearing and in January 2010, the ALJ closed the claim effective April 24, 2009, with a 13 percent impairment of the right lower extremity. In July 2011, Monge filed a petition to reopen, which the carrier initially denied but subsequently accepted. The carrier then issued a notice of claim status terminating temporary compensation and active medical treatment as of July 9, 2013. The carrier also issued a notice of permanent disability benefits and a notice of supportive medical maintenance benefits. Monge again requested a hearing.

¶5 The two matters were consolidated and hearings were held before the ALJ. Dr. Marjorie Eskay-Auerbach, a board-certified orthopedic surgeon, testified she had examined Monge and diagnosed him with "nonspecific back pain" that could not be attributed to the 2004 injury because he "had no specific findings in 2004." Eskay-Auerbach explained "[t]he natural history of low back pain is that it waxes and wanes, there are increased episodes [and] decreased episodes [but] nonspecific low back pain is not generally attributable to a particular pathology or a particular injury." She disagreed with Monge's treating physician's conclusion that Monge

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had suffered a herniated disc in his back as a result of the 2004 injury, stating there was no description in the records at the time of the injury that was consistent with such an injury. She concluded, “within a reasonable degree of medical probability,” there was “no new, additional or previously undiscovered condition related to his previous industrial injury.”

¶6 Dr. Scott Forrer, a neurologist who treated Monge beginning in September 2013, testified Monge “had a lumbar herniated disc that historically would date to the fall of 2004” and “progressive lumbosacral radiculopathy as a result of the disc.” His opinion was based in part on the results of an electromyogram and nerve conduction velocity (EMG/NCV) study, which “showed that there was evidence of injury involving the nerves going from the back into the legs, the main nerves to both the right and left.” Forrer conceded he was not able to compare Monge’s condition in 2008, the time of his last petition to reopen, with his condition in September 2013.

¶7 The ALJ denied the petition to reopen the claim for the 2004 injury and affirmed the closure of the 2005 claim. In denying the petition to reopen, the ALJ found Monge’s low back condition not related to the 2004 injury.¹ The ALJ adopted the testimony, opinions, and report of Dr. Eskay-Auerbach “as being most probably correct and well-founded” and concluded that Monge had “failed to establish by objective medical evidence expressed to a reasonable, unequivocal medical probability that he has any new, additional or previously undiscovered low back condition, disability

¹The ALJ did not specifically address whether Monge’s low back condition was attributable to the 2005 injury, and Monge’s appeal argues only that the ALJ erred in denying his petition to reopen the 2004 claim based on the testimony of the medical experts. Indeed, Monge states “the only question before the ALJ in this case was whether [he] had a ‘new, addition [sic] or previously undiscovered’ injury related to the 2004 industrial accident.” We therefore do not consider the closure of the 2005 claim.

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or limitations related to [the 2004 injury] or its sequelae." The ALJ affirmed the award on review, and this special action followed.

Discussion

¶8 Our review is limited to "determining whether or not the commission acted without or in excess of its power" and whether the findings of fact support the ALJ's decision. A.R.S. § 23-951(B). "On review of an award, we deferentially review an ALJ's factual findings reasonably supported by the record but review [its] legal conclusions de novo." *Hypl v. Indus. Comm'n*, 210 Ariz. 381, ¶ 5, 111 P.3d 423, 425 (App. 2005).

¶9 Section 23-1061(H), A.R.S., states in relevant part:

On a claim that has been previously accepted, an employee may reopen the claim to secure an increase or rearrangement of compensation or additional benefits by filing with the commission a petition requesting the reopening of the employee's claim upon the basis of a new, additional or previously undiscovered temporary or permanent condition.

The claimant has the burden of proving that reopening is warranted. *See Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 17, 41 P.3d 640, 643-44 (App. 2002).

¶10 "[R]eopening is permissible when a change in physical circumstances or medical evaluation creates a need for treatment, and the legitimacy of that need was not and could not have been adjudicated at the time of the last award." *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 18-19, 695 P.2d 261, 267-68 (1985). Thus a change in physical condition or medical needs is a "prerequisite of reopening for a new or additional condition." *Id.* at 19, 695 P.2d at 268. Conditions "'existing and known'" when the claim was closed last are precluded. *Perry v. Indus. Comm'n*, 154

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Ariz. 226, 229, 741 P.2d 693, 696 (App. 1987), quoting *Stainless Specialty*, 144 Ariz. at 16, 695 P.2d at 265.

¶11 We cannot say the ALJ erred in concluding Monge had not established that his low back condition was a “new, additional or previously undiscovered temporary or permanent condition.” The conclusions of Dr. Eskay-Auerbach and Dr. Forrer were diametrically opposed: Forrer opined Monge had suffered a herniated disc in the 2004 industrial injury and that was the cause of his current low back condition, while Eskay-Auerbach diagnosed Monge with nonspecific low back pain that was not attributable to a particular injury. The ALJ expressly found Eskay-Auerbach’s opinion “most probably correct and well-founded.” Resolution of conflicting medical evidence is the province of the ALJ, *Malinski v. Indus. Comm’n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968), and we will not disturb its resolution of medical conflicts unless “wholly unreasonable,” *Stainless Specialty*, 144 Ariz. at 19, 695 P.2d at 268. The ALJ “is the sole judge of witness credibility,” *Holding v. Indus. Comm’n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984), and that “determination is beyond the limited role of the reviewing court,” *Villanueva v. Indus. Comm’n*, 148 Ariz. 285, 288, 714 P.2d 455, 458 (App. 1985). We do not reweigh on appeal the evidence that was presented by the experts. See *Carousel Snack Bar v. Indus. Comm’n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988).

¶12 The ALJ’s conclusion was not “wholly unreasonable.” Dr. Eskay-Auerbach’s opinions were amply supported by the results of her examination of Monge and her review of his medical records and study results. She testified her examination had revealed no “specific findings other than right-sided tenderness to the low back,” so her diagnosis was “nonspecific back pain” not attributable to a specific injury. Eskay-Auerbach also discussed the EMG/NCV study performed by Dr. Forrer and explained that the changes shown in that study could not be dated and the results of that study were inconsistent with her findings and the results of magnetic resonance imaging (MRI). She provided reasons for her disagreement with Forrer’s diagnosis of a herniated disc, stating the

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records from the time of the 2004 injury were not “consistent with a lumbar disc herniation.”

¶13 Monge argues, however, that the ALJ erred in crediting Dr. Eskay-Auerbach’s testimony because it was both “speculative” and “equivocal.” He first contends she “ignored the EMG/NCV findings,” which “render[ed] her opinion speculative.” In support of this contention, he asserts that Eskay-Auerbach “admitted that she ignored the EMG/NCV findings even though she admitted that she does not perform these tests and therefore they are not within her area of expertise.”

¶14 As Monge points out, to support an award, a medical opinion must be based on a proper foundation. *T.W.M. Custom Framing v. Indus. Comm’n*, 198 Ariz. 41, ¶ 18, 6 P.3d 745, 751 (App. 2000). Generally, medical opinions are based on the claimant’s history, medical records, diagnostic tests, and examinations. *Id.* “Equivocal or speculative medical testimony is insufficient to support an award or to create a conflict in the evidence.” *Hackworth v. Indus. Comm’n*, 229 Ariz. 339, ¶ 10, 275 P.3d 638, 642 (App. 2012). In addition, “medical testimony can be so weakened by proof of an inaccurate factual background that the testimony cannot be said to constitute ‘substantial evidence.’” *Desert Insulations, Inc. v. Indus. Comm’n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1992).

¶15 The record, however, does not support Monge’s assertion that Dr. Eskay-Auerbach “ignored” the EMG/NCV study results. She testified that, although the EMG/NCV study showed “moderate chronic L5 and S1 radiculopathy, and active right L5 radiculopathy,” there was no way to date the onset of those changes. She explained, with respect to the 2004 injury, there were no findings documented on examination that would be consistent with radiculopathy. Eskay-Auerbach further testified that when she had examined Monge, he did not have any clinical findings that would be consistent with the active acute right L5 radiculopathy shown in the EMG/NCV study, and the imaging studies did not show anything that would explain it. She opined that the 2009 MRI was inconsistent with the EMG/NCV study and stated she could not attribute any of the findings on the MRI to Monge’s 2004 injury

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because they were “nonspecific degenerative changes” that could not “be attributed to a specific incident.”

¶16 It is clear from the record that Dr. Eskay-Auerbach considered the results of the EMG/NCV study but concluded they were inconsistent with her findings and the results of the MRI. Monge has not shown that Eskay-Auerbach relied on any incorrect facts or that she speculated when there were no facts in the record. See *T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 18, 6 P.3d at 751; *Desert Insulations*, 134 Ariz. at 151, 654 P.2d at 299.

¶17 Monge next argues Dr. Eskay-Auerbach’s testimony was equivocal because she “gave unsupported suppositions about the cause of [Monge’s] complaints or declined to include in her opinion all of the available medical tests (EMG/NCV by Dr. Forrer) or order the ones that she said were lacking (MRI).” “Medical testimony is equivocal when it is subject to more than one interpretation or when the expert avoids committing to a particular opinion.” *Hackworth*, 229 Ariz. 339, ¶ 10, 275 P.3d at 638.

¶18 In *Hackworth*, we set aside an award of no compensation that had been based on the ALJ’s adoption of the testimony of an independent medical examiner. *Id.* ¶¶ 14, 21. Noting that the doctor’s testimony was flawed insofar as it was subject to two interpretations, both of which found support in the record, we determined his “limited opinion,” *id.* ¶ 13, was equivocal because he “was noncommittal” and “avoided taking a definite position on the causation issue,” *id.* ¶ 14.

¶19 Here, Dr. Eskay-Auerbach took a definite position on whether Monge’s low back condition had been caused by the 2004 injury. As set forth above, she unequivocally opined that it had not, and, unlike the medical examiner in *Hackworth*, her testimony was not subject to more than one interpretation. And on cross-examination, she did not alter or qualify her opinion. We conclude the ALJ did not err in relying on Eskay-Auerbach’s testimony in denying the petition to reopen the 2004 claim.

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Disposition

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