

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CAROL LYNNE WATSON,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DUNKIN DONUTS,
Respondent Employer,

COPPERPOINT MUTUAL INSURANCE COMPANY
Respondent Insurer.

No. 2 CA-IC 2015-0004
Filed September 17, 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NOT FOR PUBLICATION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 No. 0000P109976
Insurer No. 7941536
Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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COUNSEL

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By Andrew F. Wade
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Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 In this statutory special action, petitioner employee Carol Watson challenges the award of the administrative law judge (ALJ) denying her petition to reopen her claim. She contends the award is not supported by sufficient evidence and the ALJ erred in denying her request to subpoena her psychologist as a witness. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 “On review, we consider the evidence in the light most favorable to upholding the award, and we deferentially review all factual findings made by the ALJ.” *Hackworth v. Indus. Comm’n*, 229 Ariz. 339, ¶ 2, 275 P.3d 638, 640 (App. 2012) (citation omitted). In 1979, Watson suffered a femoral hernia as a result of a work-related accident. She underwent seven surgeries to correct the problem and its resulting complications from infections. She then had six more

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surgeries, one of which included an abdominal muscle graft to close her wound. When she later developed an incisional hernia, the wound reopened, and an additional muscle graft was required. In all, seventeen surgeries resulted from Watson's industrial accident, and her claim was accepted and closed with a permanent unscheduled disability in 2007.

¶3 After filing a petition to reopen that was denied on May 21, 2013, Watson again sought treatment in a hospital and filed another petition to reopen in March 2014. Her treating physician, Dr. John Corcoran, testified at the hearing on the petition that Watson's condition had changed since the 2013 decision, with Watson having active hernias, a partial bowel obstruction, and dysmotility syndrome related to her industrial accident.

¶4 Dr. Jolyon Schilling performed an independent medical examination in this case and disagreed with Dr. Corcoran. Schilling testified that the present hernia did not cause any bowel obstruction or pain, and it was "not . . . clinically significant." He found no objective evidence Watson had dysmotility syndrome or a bowel obstruction. To the extent she had any intra-abdominal adhesions, as Corcoran testified, Schilling believed these were more likely the result of a hysterectomy that preceded the industrial accident.

¶5 As a result of these findings, Dr. Schilling testified that Watson likely had a psychological condition known as factitious disorder, which is characterized by the falsification of signs or symptoms of injury or disease. The ALJ permitted Schilling to be cross-examined about factitious disorder and allowed evidence of it to be admitted into the record, including a report from Watson's treating psychologist, Dr. Steven Gurgevich. The ALJ denied Watson's request to subpoena this witness, however, explaining later that he did not rely on any testimony concerning Schilling's psychological diagnosis and believed it to be irrelevant to the issues presented.

¶6 The ALJ found Dr. Schilling's testimony concerning Watson's physical condition to be more likely correct and well-founded, and he consequently denied the petition to reopen. The ALJ affirmed the award after Watson filed a request for

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administrative review. We have jurisdiction to review these rulings pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951, as well as Rule 10, Ariz. R. P. Spec. Actions.

Discussion

¶7 Watson first challenges the medical testimony of Dr. Schilling that supports the award. Section 23-1061(H), A.R.S., provides that an employee may petition to reopen a claim that had previously been accepted for benefits “upon the basis of a new, additional or previously undiscovered temporary or permanent condition.” An employee has the burden of establishing the new condition and its causal relationship to the prior industrial injury. *Stainless Specialty Mfg. Co. v. Indus. Comm’n*, 144 Ariz. 12, 16, 19, 695 P.2d 261, 265, 268 (1985). When a previous petition to reopen has been denied, the employee must show a new, additional, or previously undiscovered condition since the time of the last petition to reopen, here May 21, 2013. *See Phx. Cotton Pickery v. Indus. Comm’n*, 120 Ariz. 137, 138, 584 P.2d 601, 602 (App. 1978). In reviewing the denial of a petition to reopen a claim, we defer to the ALJ’s findings of fact but independently review the ALJ’s legal conclusions. *See Young v. Indus. Comm’n*, 204 Ariz. 267, ¶ 14, 63 P.3d 298, 301 (App. 2003). We will affirm the decision so long as it is supported by substantial evidence. *Price v. Indus. Comm’n*, 23 Ariz. App. 1, 4, 529 P.2d 1210, 1213 (1975).

¶8 Relying on *Desert Insulations, Inc. v. Industrial Commission*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982), Watson argues Dr. Schilling’s medical testimony accepted by the ALJ was “foundationally infirm” because it was based on the erroneous assumption that “none of her prior [work-related] surgeries pierced [the] abdominal wall.” That precedent is distinguishable, however, and Watson’s argument on this point misstates the record. In *Desert Insulations*, a physician testified the claimant’s injury was stationary and resulted in permanent impairment. *Id.* at 149, 654 P.2d at 297. The doctor also stated that his opinion would be different if the claimant had returned to his regular work, which other evidence showed to be the case. *Id.* at 151, 654 P.2d at 299.

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¶9 Here, Dr. Schilling testified that Watson's abdominal or "peritoneal cavity was not really violated during any of the multiple procedures that she underwent." He further clarified that he saw only one entry into the abdominal cavity to excise peritoneal fat. Thus, unlike the doctor in *Desert Insulations*, Schilling did not predicate his testimony on a false assumption or broadly assert that the abdominal wall was "never pierced," as Watson now claims. Schilling acknowledged one such invasion had occurred. He nonetheless believed the invasion was relatively minor and any current problems Watson was experiencing were more likely the result of an earlier hysterectomy unrelated to the industrial injury. Thus, because the record reasonably supports Schilling's conclusions, we must accept the ALJ's resolution of the conflicting medical evidence. See *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 121, 776 P.2d 797, 799 (1989).

¶10 Watson also challenges the award due to the testimony about her alleged factitious disorder. Specifically, she maintains (1) this issue was precluded as a matter of res judicata when her earlier claims were found to be compensable and (2) the ALJ erred in refusing her request to subpoena Dr. Gurgevich to rebut Dr. Schilling's testimony. With respect to res judicata, we note that Schilling testified he was neither disputing the industrial nature of Watson's original injury nor disturbing any claims that already had been paid and established as "a matter of law," and the ALJ construed his testimony accordingly. In any event, the question of a factitious disorder was not a material issue in the case.

¶11 Assuming the ALJ erred either by accepting evidence related to a factitious disorder or refusing to subpoena Dr. Gurgevich to testify on the topic, any error was harmless because it did not influence the result. See *Pima Cmty. College v. Indus. Comm'n*, 137 Ariz. 137, 142, 669 P.2d 115, 120 (App. 1983) (finding error harmless when "it could not have swayed the result"). Contrary to Watson's assertion, the diagnosis of a factitious disorder was not critical to Dr. Schilling's other medical testimony. The ALJ correctly noted that this psychological diagnosis did not play a causal role in Schilling's physical diagnosis, but was rather the product of it. Once objective tests ruled out a motility disorder,

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bowel obstruction, or other intra-abdominal problem, Schilling explained he was left with the conclusion “by default” that Watson’s subjective complaints concerned “things that weren’t actually happening, therefore [she had a] factitious disorder.” Ultimately, the ALJ disregarded Schilling’s opinion that Watson suffered from a factitious disorder, finding it irrelevant. Accordingly, because any error concerning evidence of factitious disorder was harmless, we will not disturb the award on this basis.

Disposition

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