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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

FRY'S FOOD STORES OF ARIZONA INC., *Petitioner Employer,*

SEDGWICK CMS, INC., *Petitioner Insurance Carrier,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

JEFFREY CANTRELL, *Respondent Employee.*

No. 1 CA-IC 22-0039

FILED 6-1-2023

Special Action - Industrial Commission

ICA Claim No. 20173420105

Carrier Claim No. 30178775184-0001

The Honorable Janet Weinstein, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

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MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Judge Daniel J. Kiley joined.

M O R S E, Judge:

¶1 In this case, we review an Industrial Commission of Arizona ("ICA") award finding that claimant, Jeffrey Cantrell, is medically stationary, has a permanent impairment, and requires supportive care. Specifically, we review a procedural order of the ICA administrative law judge ("ALJ") that precluded the employer/carrier from submitting, after the hearing process was well underway, a new independent medical examination ("IME") report or calling a new expert witness to testify. Because the factual basis for this procedural ruling is unclear and did not achieve substantial justice as required by A.R.S. § 23-941(F), we set aside the award.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2017, Cantrell injured his groin while lifting a heavy object at work. He was diagnosed with traumatic, left testicular epididymis (injury to a testicle) and inflammatory hydrocele (fluid build-up) secondary to the epididymis. This led to the eventual surgical removal of his left testicle (orchiectomy) and epididymis. However, he kept experiencing pain in the area and began treatment with Matthew Doust, M.D., a pain management specialist. In April 2021, Cantrell was cleared to return to work full-time with restrictions, such as refraining from lifting more than 20 pounds and not walking on uneven terrain. Based on an IME conducted in May 2021 by a urologist, Rahul Mehan, M.D., the workers' compensation carrier, Sedgwick CMS, Inc.,¹ issued a notice in June 2021 closing the claim with no permanent impairment. Cantrell protested, and the case was set for a hearing beginning July 2021.

¹ Hereinafter, the employer, Fry's Food Stores of Arizona, Inc., and the carrier will be collectively referred to as "Sedgwick."

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¶3 In late May 2021, Cantrell requested a postponement of the hearing date because his attorney had recently withdrawn from the case, and he needed time to prepare. This request was granted, and the initial hearing date was reset to September 2021. In June 2021, newly retained counsel for Cantrell requested a postponement due to a calendar conflict. The initial hearing date was postponed for two weeks. Meanwhile, Cantrell and Sedgwick filed witness lists and exhibits. Sedgwick's exhibits included an IME performed by Dr. Mehan, who was to be Sedgwick's sole witness.

¶4 Cantrell testified on September 16, 2021. In December, the ICA scheduled the testimony of Dr. Doust for early January 2022.

¶5 Dr. Doust testified on January 5, 2022. Dr. Doust treated Cantrell's groin pain in 2020 and 2021, both before and after the orchiectomy, with pain medication and ilioinguinal nerve block injections. He opined that Cantrell had reached maximum medical improvement and had a permanent impairment related to the 2017 work injury. He admitted that determining where a patient's pain originates in the groin area can be "quite complicated." When asked to rate the impairment, Dr. Doust testified that he had never given an impairment rating after an orchiectomy. He said he would review the American Medical Association impairment rating guidelines and send a written rating. He also testified that Cantrell needed supportive care consisting of three annual nerve block injections. On cross-examination, he clarified that "a large portion . . . of [Cantrell's] pain is coming from the ilioinguinal nerve itself." Dr. Doust admitted that no objective clinical findings support the connection between the nerve pain and the work injury; his opinion was based solely on Cantrell's "subjective report," which he found reasonable.

¶6 The same day Dr. Doust testified, the ICA scheduled the testimony of Dr. Mehan for March 2, 2022. A month after Dr. Doust testified, in February 2022, he issued a written statement giving Cantrell an 11% whole-person permanent impairment rating.

¶7 The day before Dr. Mehan was scheduled to testify, Sedgwick's counsel filed a letter informing the ALJ that Cantrell's counsel had agreed to a "short continuance" of the hearing for Sedgwick to decide how to proceed. Sedgwick's counsel stated that Dr. Mehan was declining "to testify regarding a permanent impairment rating or supportive care" related to Cantrell's nerve pain and that Sedgwick needed time to consider stipulating to the 11% rating and supportive care recommendation. The ALJ canceled the March 2 hearing date without further comment.

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¶8 On March 29, 2022, having heard nothing from the parties, the ALJ issued an order that gave the parties until April 15, 2022, to inform her of the resolution of "the disputed issue." Sedgwick responded on April 8, 2022. After learning that Dr. Mehan would not testify, Sedgwick asked Dr. Louis Glass, a general surgeon who had co-authored the 2019 IME with Dr. Mehan, to testify. According to counsel, Dr. Glass was "unable to testify" about permanent impairment and supportive care for Cantrell. Thus, Sedgwick retained a neurologist, Dr. J. Michael Powers, to perform an IME scheduled for May 10, 2022. Sedgwick asked the ALJ to schedule a hearing date for Dr. Powers to testify. Sedgwick also requested a subpoena for Dr. Powers.

¶9 Cantrell objected to the proposed IME by requesting a protective order from the ALJ, blocking him from having to attend the May 10 exam. Cantrell accused Sedgwick of "doctor shopping" and causing delay. Cantrell asked the ALJ to "deny the IME and proceed with a ruling on the evidence submitted." The ALJ gave Sedgwick a week to respond to the request to close the record without further evidence.

¶10 Sedgwick responded by stating that the issues for the hearing had become narrower during litigation. Dr. Mehan had declined to testify because Cantrell's "pain now seems to be reportedly stemming from his ilioinguinal nerve," a condition for which care and treatment are "outside the scope of urology." Dr. Glass also declined to testify, ostensibly for the same reason. Thus, Sedgwick obtained the services of a neurologist because "the [anticipated expert] witnesses were unable to testify now that [Cantrell's] condition has become more specifically articulated."

¶11 The ALJ was not persuaded and issued a procedural order on April 20, 2022, characterizing Sedgwick's response as an admission that, rather than "stipulating to certain issues . . . the continuance [during March] was used to find a substitute expert after they realized that Dr. Mehan could not, or would not, testify." The ALJ expressed dissatisfaction that Sedgwick "did not inform [her] that they were seeking to call a new expert and did so only after" she gave them the April 15 deadline for response. The ALJ then found:

At this stage of the proceedings and under these circumstances it would cause undue delay and be prejudicial to [Cantrell] to allow [Sedgwick] to choose a new expert to perform an IME, submit an IME report into evidence and present testimony. [Cantrell] would have to be afforded the opportunity to review the IME report and depending upon

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the opinions and matters stated in the report, recall Dr. Doust and/or potentially engage or call another or additional medical expert. Thereafter, a completely new round of further hearings would need to be scheduled and held, and in the interim, [Cantrell] would be precluded from the determination and payment of permanent disability benefits and the potential availability of supportive medical care. This would undermine one of the central purpose[s] of workers' compensation, the expeditious processing and resolution of claims and rendition of benefits.

The ALJ thus denied "leave to call a newly identified medical expert [witness]" because it was untimely under ICA Rule A.A.C. R20-5-141 and would prejudice Cantrell if granted. The ALJ also prohibited Sedgwick from offering "an IME report for consideration." But she denied the protective order requested by Cantrell, stating that Sedgwick was "within their rights to request an IME." After declining to issue a subpoena for Dr. Powers' testimony, she closed the evidentiary record.

¶12 The ALJ gave her decision on May 4, 2022. Finding Dr. Doust's medical opinion credible, she issued an award in Cantrell's favor. While the ALJ acknowledged Dr. Mehan's IME report as part of the record, she did not analyze or discuss the contents of it, nor did she indicate that she weighed it against Dr. Doust's opinion.

¶13 Sedgwick asked the ALJ to vacate her decision on administrative review, arguing that she erred by precluding the requested IME with Dr. Powers. In the request, Sedgwick sets forth the events leading to the request for an IME with Dr. Powers, which we summarize here:

- January 5, 2022 – Dr. Doust testifies
- January 7, 2022 – letter to Dr. Mehan confirming ability to testify about supportive care and impairment rating
- January 10, 2022 – Dr. Mehan confirms receipt of letter
- February 21, 2022 – having not heard from Dr. Mehan, Sedgwick requests a response
- February 25, 2022 – Dr. Mehan says he will not "be able to testify regarding [Cantrell]"
- Parties agree to "short continuance" to allow Sedgwick to consider stipulating to issues
- March 18, 2022 – Sedgwick asks Dr. Glass to testify
- March 29, 2022 – ALJ issues order requiring status update by April 15

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- March 30, 2022 – Dr. Glass says he cannot provide an opinion on a rating or supportive care, recommends neurologist or physical medicine/rehabilitation specialist
- April 7, 2022 – Dr. Powers obtained; exam of Cantrell scheduled for May 10
- April 8, 2022 – Cantrell seeks protective order from ALJ

¶14 Cantrell responded to Sedgwick's review request by criticizing Sedgwick for not carrying forward with the Dr. Powers IME so that it could make an offer of proof.

¶15 The ALJ affirmed the award upon review, noting that Sedgwick had failed to make an offer of proof that "the medical witness they requested to be subpoenaed to testify would be able to provide a medical opinion . . . in support of" its position. She further commented that "two prior medical experts . . . had either declined to offer opinions in this matter or held opinions that were not in support of" Sedgwick.

¶16 Sedgwick brought this special action review. This court has jurisdiction under A.R.S. §§ 12-120.21(A)(2) and 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶17 Whenever possible, cases should be decided on the merits. *Cook v. Indus. Comm'n*, 133 Ariz. 310, 311 (1982). This is especially true in workers' compensation cases since "it is as much the duty of the Commission to encourage and evaluate proper claims fairly as it is to expose and reject improper claims." *Lugar v. Indus. Comm'n*, 9 Ariz. App. 44, 49 (1968); see *United Asphalt of Ariz. v. Indus. Comm'n*, 141 Ariz. 209, 212 (App. 1984) (concluding ALJ erred by not waiving deadline for untimely-filed request for review of order dismissing claim). Furthermore, parties before the ICA have a fundamental right to present witnesses. *Benafield v. Indus. Comm'n*, 193 Ariz. 531, 539, ¶ 26 (App. 1998).

¶18 Administrative law judges are required to conduct hearings according to the ICA statutes and rules and in a manner that achieves substantial justice. A.R.S. § 23-941(F). While A.A.C. R20-5-141 generally requires ICA subpoena requests to be filed at least 20 days before the initial hearing date, an ALJ is also required to issue subpoenas for material and necessary testimony. A.A.C. R20-5-141(A)(4). Dr. Powers' findings after an

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IME focusing on Cantrell's ilioinguinal nerve pain and its relationship to the industrial injury would certainly be material and necessary.

¶19 The critical issue, in this case, is whether Sedgwick was surprised by Dr. Doust's testimony that the (1) ilioinguinal nerve was the primary source of Cantrell's pain; and (2) damage to that nerve was part of the industrial injury. If reasonably surprised, a party should be afforded an opportunity to respond. See *Sanchez v. Indus. Comm'n*, 13 Ariz. App. 82, 82 (1970) (affirming ALJ's grant of further hearing when carrier/employer was surprised by testimony of claimant's expert witness). But the ALJ did not make any findings of fact on the issue of surprise. Instead, the ruling is based on delay rather than the cause of the delay. If Sedgwick should not have been surprised by Dr. Doust's testimony about the ilioinguinal nerve, it would follow that Sedgwick caused any delay and that the preclusion of further medical expert evidence was warranted. But if genuinely surprised, Sedgwick was not the cause of the delayed proceedings and should be afforded a chance to respond appropriately. Perhaps the ruling is based on the premise that Sedgwick caused undue delay by lack of diligence in not requesting a neurological IME sooner than April 8. But the ruling does not include such a finding. The order hints that Sedgwick was disingenuous when it asked for a postponement to consider stipulating to the issues but then used that time to "find a substitute expert." Instead, the ruling discusses the delay that would come with allowing a new IME, new medical testimony, and new rebuttal. We agree that unnecessary delay should be avoided, but if delay is not the fault of either party, neither party should be held responsible.

¶20 The basis for holding Sedgwick accountable for the delay is not clear in the record before us. The rationale for the ruling is unspecified "delay," but the history shows that some delay early in the process was attributable to Cantrell. For instance, the initial hearing date was postponed twice at Cantrell's request. The record shows good cause for those delays, but that is the point. A postponement for reasons outside the control of the parties is acceptable. Without findings showing how Sedgwick caused undue delay in this case, we cannot determine whether the ruling has achieved substantial justice. And since the order effectively precluded Sedgwick from presenting medical expert testimony on the dispositive issue, there should be a clear factual basis for a conclusion that Sedgwick unreasonably caused delay.

¶21 Cantrell argues that (1) Sedgwick should not have been surprised, and (2) Sedgwick should have pursued completion of the IME and then made an offer of proof as to Dr. Powers' anticipated testimony.

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We reject the second argument. The ALJ closed the evidentiary record immediately after denying Cantrell's request for a protective order. Until then, Sedgwick was awaiting a ruling on the protective order request and had no authority to request an IME. After the ruling denied the protective order, the record was closed, and the case was under advisement. Any further efforts to seek an IME were futile after that.

¶22 Whether Sedgwick was reasonably surprised is a closer question. As noted, the ALJ made no findings on this issue. Our review of the record did not reveal a clear indication that Cantrell's ilioinguinal nerve pain would be causally linked to the work injury until Dr. Doust testified on January 5, 2022. Therefore, we cannot say that Sedgwick should have reasonably anticipated that testimony. *See supra* ¶ 19. However, we do not find any unreasonable delay after January 5, 2022. Sedgwick contacted both doctors who had been involved in the existing IME before it turned to Dr. Powers. But without further evidence in the record, we cannot conclude on appeal that Sedgwick caused any undue delay before January 5, 2022. Such issues are better resolved in the first instance by the ALJ.

CONCLUSION

¶23 Because the record does not reveal whether Sedgwick was surprised by new evidence, we cannot determine whether the award achieved substantial justice. Accordingly, we set aside the award and remand for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court
FILED: AA