DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAWRENCE A. RIESLAND, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, LA PAZ COUNTY, Respondent Employer, ARIZONA COUNTY INSURANCE POOL, Respondent Carrier.	No. 1 CA-IC 11-0057 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 96274-989298

Carrier Claim No. 96001445624

Administrative Law Judge J. Matthew Powell

AWARD SET ASIDE

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J O H N S E N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review finding that the respondent carrier, Arizona County Insurance Pool ("Arizona"), "presented viable evidence warranting a consideration" of its petition to rearrange a September 28, 2007 permanent total disability benefits award in favor of Lawrence Riesland. Because the record lacks sufficient evidence of increased earning capacity, we set aside the award.

FACTS AND PROCEDURAL BACKGROUND

¶2 Riesland injured his back in an industrial accident in 1996. He filed a workers' compensation claim, which was accepted for benefits. In 2007, the ICA entered its findings and award for permanent total disability benefits. In that proceeding, Arizona obtained an independent medical examination ("IME") by Kevin S. Ladin, M.D., who opined that Riesland was not "capable of functioning in any [employment] capacity."

Ladin concluded Riesland was "totally disabled and incapable of functioning in any gainful occupation at the present time." Based on Ladin's opinion, Arizona did not protest the ICA's award, which became final.

¶3 Two years later, Arizona obtained a repeat IME by a group of physicians that included Ladin. It then filed a petition for rearrangement, requesting a reduction of Riesland's permanent total disability benefits. The ICA entered a findings and award denying the petition for rearrangement, finding Arizona had failed to demonstrate Riesland had any additional earning capacity beyond that determined by the 2007 award.

¶4 Arizona timely requested a hearing, at which the administrative law judge ("ALJ") heard testimony from Riesland, Ladin and others. The ALJ found Arizona had presented sufficient medical evidence to proceed to a hearing "to determine whether employment consistent with [Riesland's] remaining work restrictions is available," and, if so, "whether that employment results in a loss of earning capacity that entitles [him] to partial permanent disability benefits." Riesland timely requested administrative review, but the ALJ summarily affirmed his award, and Riesland next brought this appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (West 2012), 23-

951(A) (West 2012), and Arizona Rule of Procedure for Special Actions 10.[1] *See Meva v. Indus. Comm'n*, 15 Ariz. App. 20, 24, 485 P.2d 844, 848 (1971) (appealable "award" includes any ruling that "contains a direct determination of some issue in relation to the claim of a particular injured workman").[2]

DISCUSSION

¶5 On appeal, Arizona argues it is entitled to rearrangement pursuant to A.R.S. § 23-1044(F)(3) (West 2012), which allows rearrangement "[u]pon a showing that the employee's earning capacity has increased subsequent to . . . [the prior] findings and award." The party seeking rearrangement has the burden of proof. *Pima County Bd. of Supervisors v. Indus. Comm'n*, 149 Ariz. 38, 45, 716 P.2d 407, 414 (App. 1986).

¶6 Arizona does not argue that Riesland's physical condition has changed since 2007. Its expert witness, Ladin, acknowledged during the hearing that Riesland's physical condition had not changed. But Ladin and his colleagues who examined Riesland in the repeat IME concluded he was exaggerating his pain symptoms. Although Ladin had concluded in 2007 that Riesland was unable to work, he testified in the

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[1] Absent material revision after the date of the events at issue, we cite a statute's current version.

[2] The court commends the joint brief regarding jurisdiction that the parties filed after our oral argument in this matter.

proceeding on the 2009 petition that his opinion had changed. As his report stated, "It is the opinion of the consultants the claimant should be capable of returning to gainful employment. Indeed, the consultants feel strongly that return to some form of employment would likely prove therapeutic for the claimant from both a physical and emotional perspective."

¶7 After hearing the evidence, the ALJ described the issue as "whether a change in medical opinion, without a change in the applicant's physical condition, can serve as a basis for a rearrangement of permanent disability benefits." The ALJ concluded that under the circumstances, § 23-1044(F)(3) "does not require medical proof of a change in an underlying physical condition to support a petition to rearrange."

¶8 In reviewing the award, we start with the proposition that after a findings and award become final, the doctrine of *res judicata* operates to bar relitigation of issues that were or could have been decided in that proceeding. *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 15, 695 P.2d 261, 264 (1985). In applying the doctrine in workers' compensation cases, we balance the need for finality against the remedial purposes of workers' compensation, including the need to accommodate changes in earning capacity caused by the employee's physical condition or by the labor market. *Id.* at 16, 695 P.2d

at 265. In striking that balance, the legislature has provided two statutory exceptions to finality: Reopening, pursuant to A.R.S. § 23-1061(H), and rearrangement, pursuant to A.R.S. § 23-1044(F). *See* A.R.S. §§ 23-1061(H), -1044(F) (West 2012); *Epstein's Custom Carpentry v. Indus. Comm'n*, 155 Ariz. 284, 287, 746 P.2d 25, 28 (App. 1987).

¶9 To discern whether Riesland's earning capacity increased after 2007, we compare the facts determined by the 2007 award with those at the time of the rearrangement petition. *See Gallegos v. Indus. Comm'n*, 144 Ariz. 1, 5-6, 695 P.2d 250, 254-55 (1985); *see also Pima County*, 149 Ariz. at 44, 716 P.2d at 413 ("anything that demonstrates increased earning capacity is relevant").

¶10 Riesland concedes that rearrangement may be ordered pursuant to A.R.S. § 23-1044(F)(3) in the absence of a change in physical condition. *See Pima County*, 149 Ariz. at 44, 716 P.2d at 413 ("All that is necessary is that the increase [in earning capacity] occur."). But he asserts that Ladin's changed medical opinion, by itself, is insufficient to satisfy the statute. We agree.

¶11 Citing *res judicata*, our supreme court in *Stainless* expressly rejected the proposition that a change in a medical opinion, by itself, would support reopening under A.R.S. § 23-

1061(H). 144 Ariz. at 19, 695 P.2d at 268. The court in that case drew a distinction between a physician's change of opinion and a subsequent advancement in medical procedures required to treat a claimant's condition. *Id.* Although reopening is allowed in the latter situation, it is not allowed in the former:

> We hold . . . that reopening 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.
>
> We do not hold that different medical opinion will justify reopening a claim. . . . Thus, if new evidence is found to controvert that produced at the hearing or if a doctor changes his mind, reopening would be an attempt to relitigate issues which were or could have been litigated, and will not be allowed under principles of *res judicata*.

Id. at 18-19, 695 P.2d at 267-68. We apply the same principle in a rearrangement proceeding. *Brown v. Indus. Comm'n*, 199 Ariz. 521, 524, ¶ 13, 19 P.3d 1237, 1240 (App. 2001).

¶12 On appeal, Arizona argues that Riesland's "continued symptoms no longer preclude [him] from returning to work." But Arizona offered no evidence that Riesland's symptoms or physical abilities had changed since the 2007 award. The only change it cites is Ladin's revised opinion that Riesland can and should return to work. It offers no legal authority, however, for the

proposition that such evidence is sufficient to establish a right to rearrangement pursuant to A.R.S. § 23-1044(F).

¶13 Citing *Stainless*, Arizona further argues Ladin's medical evaluation and opinion have "evolved" and contends his testimony is a sufficient basis on which to proceed with rearrangement. But as noted, the *Stainless* court made clear that while a change in "medical evaluation" might permit rearrangement, such a change must be based on "new techniques or discoveries" in the medical field, not simply a physician's change of mind. 144 Ariz. at 18-20, 695 P.2d at 267-69.

¶14 Arizona also argues that the opinion Ladin expressed at the hearing on rearrangement was based on new evidence, namely, his observed "increase in Waddell signs and striking inconsistencies and nonorganic findings on examination." But Ladin did not associate these observations with any change in Riesland's physical condition. Rather, they tend to show only that Ladin's earlier conclusion may have been a mistake.

¶15 There was no evidence at the hearing on the rearrangement that Riesland was working and earning wages or that his wages or earning capacity had changed. Nor was there evidence that he had received any additional education or training or that there were employment opportunities available to one with his physical abilities that were not available in

2007.[3] Thus, we conclude the ALJ erred by holding Ladin's changed opinion was a sufficient basis on which to proceed with rearrangement.

CONCLUSION

¶16 For the foregoing reasons, we set aside the award.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PATRICIA K. NORRIS, Judge

[3] Arizona does not contend that Ladin's revised opinion was based on a posited change in the open labor market for an employee with Riesland's capacities. *Cf*. 8 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 131.03D[1][e], at D131-92 (2011). "[I]t should not be forgotten that disability in the compensation sense has an economic as well as a medical component; accordingly a change in claimant's ability to get or hold employment, or to maintain his earlier earning level, should logically be considered a 'change in condition,' even though claimant's physical condition may have remained unchanged." Id. at § 131.03[1][e], at 131-25.