

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ARAMARK, *Petitioner Employer,*

INDEMNITY INSURANCE COMPANY OF ARIZONA, *Petitioner Carrier,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

AUGUST W. CHRISTER, *Respondent Employee.*

No. 1 CA-IC 16-0034
FILED 2-9-2017

Special Action - Industrial Commission
ICA Claim No. 20069-05583
Carrier Claim No. 300-249866
Gaetano Testini, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Jardine Baker Hickman & Houston PLLC, Phoenix
By Stephen M. Venezia
Counsel for Petitioner Employer and Carrier

Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent

Crossman Law Offices PC, Phoenix
By Avery N. Crossman
Counsel for Respondent Employee

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Maurice Portley¹ joined.

CATTANI, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona award and decision upon review denying reopening and granting additional supportive care. Petitioner employer Aramark and petitioner insurance carrier Indemnity Insurance Company of Arizona (“Petitioners”) argue that the term “24-hour care” as used in the decision is too ambiguous to be enforceable, and ask us to set aside the award. For reasons that follow, we affirm the award.

FACTS AND PROCEDURAL BACKGROUND

¶2 In June 2006, August Christer was in the course of his regular employment working on a boating dock when he slipped and hit his head. Christer sustained significant injuries that continue to require medical care. Since the accident, his wife has been his primary caregiver.

¶3 Christer’s claim was closed for active medical care in March 2010. In December 2012, an administrative law judge (“ALJ”) approved a stipulation for supportive care.² Under this stipulation, Petitioners would

¹ The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² Supportive care awards, under which a carrier continues to provide certain benefits after a claimant’s industrial injury no longer requires active care, are not specifically authorized by Arizona’s workers’ compensation statutes. *Capuano v. Indus. Comm’n*, 150 Ariz. 224, 226 (App. 1986). However, Arizona courts have consistently recognized the validity of such administrative awards. *Id.* at 226–27. These awards are intended

ARAMARK/INDEMNITY v. CHRISTER
Decision of the Court

reimburse Christer for two visits per year to his neurologist and three visits per year to his primary care physician.³ Christer also received visits from a nurse twice weekly, and from a certified nursing assistant five times per week, but he would pay for this in-home assistance through his own health insurance.

¶4 In July 2015, Christer filed a request for a hearing seeking reopening of the claim or, in the alternative, an increase in the supportive care award. The ALJ granted the request for a hearing, and considered medical testimony from Dr. Janeen Bjork, Christer's primary care physician, and Dr. Kevin Ladin, a physician who had performed medical evaluations of Christer on Petitioners' behalf.

¶5 Dr. Bjork testified that she had been treating Christer since 2010, and that his medical issues stem from his industrial injury as opposed to his advanced age. She opined that Christer requires "24-hour care" and that "his wife needs some respite care . . . to give her some break from taking care of him 24/7." Dr. Bjork also testified that Christer would require 24-hour care from a professional if his wife were to pass away. In addition to 24-hour care, Dr. Bjork recommended that Christer receive a walk-in bathtub and four visits to her office each year.

¶6 Dr. Ladin agreed that Christer's supportive care award should include regular visits to his primary care physician and a walk-in bathtub. He also recommended that Christer be given supplies such as gloves, creams, and diapers. Dr. Ladin did not specifically recommend that Christer receive 24-hour care, and he called Christer's current in-home nursing visits "adequate." However, he acknowledged that 24-hour care would be required if Christer's wife were to pass away or otherwise become unable to care for him.

¶7 The ALJ denied Christer's petition to reopen, but granted additional supportive care.⁴ The ALJ's decision adopted the testimony of Dr. Bjork as to the appropriate level of supportive care, and adopted Dr. Ladin's uncontroverted testimony as to supplies. Thus, the ALJ ordered that Christer's supportive care benefits include "24-hour care, a walk-in

"to prevent or reduce the continuing symptoms of an industrial injury after the injury has become stab[il]ized." *Id.* at 226.

³ Because Christer's neurologist is located in Utah, Petitioners also agreed to pay his travel expenses for those appointments.

⁴ Christer did not seek review of the denial of his petition to reopen.

ARAMARK/INDEMNITY v. CHRISTER
Decision of the Court

shower to prevent falls, supplies, . . . and four visits with his primary physician per year.”

¶8 Petitioners requested that the ALJ review his decision, claiming the award of “24-hour care” was “impossible to comply with.” The ALJ affirmed the award on review, and Petitioners timely filed this special action. We have jurisdiction under Arizona Revised Statutes (“A.R.S.”) §§ 12-120.21(A)(2) and 23-951, and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶9 Petitioners argue that the ALJ’s award should be set aside because it is impermissibly ambiguous. In reviewing the award, we give deference to the ALJ’s factual findings, but review any legal conclusions de novo. *Young v. Indus. Comm’n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003). We will not disturb the ALJ’s resolution of conflicting evidence “unless it is wholly unreasonable.” *Henderson-Jones v. Indus. Comm’n*, 233 Ariz. 188, 191-92, ¶ 9 (App. 2013).

¶10 Petitioners assert that Dr. Bjork’s testimony is equivocal, and that her failure to embrace a precise definition of “24-hour care” renders the award so vague, speculative, and ambiguous that it cannot be complied with “in any meaningful manner.” “Testimony is ‘equivocal’ if it is subject to two or more interpretations or if the expert avoided committing to a particular opinion.” *Rosarita Mexican Foods v. Indus. Comm’n*, 199 Ariz. 532, 536, ¶ 13 (App. 2001). Equivocal testimony by one expert is insufficient to create a conflict with unequivocal testimony by another expert. *Harbor Ins. Co. v. Indus. Comm’n*, 25 Ariz. App. 610, 612 (App. 1976). When one expert’s medical testimony is unopposed, the ALJ must accept that testimony as true. *Hackworth v. Indus. Comm’n*, 229 Ariz. 339, 343, ¶ 9 (App. 2012).

¶11 Although Dr. Bjork did not make a specific recommendation as to the precise supportive care Petitioners should provide, her testimony is not equivocal. Dr. Bjork opined that Christer required 24-hour care. She agreed with Christer’s counsel that 24-hour care included “assistance in all manners of life [and] activities of daily living,” and noted that Christer’s wife currently provides “the vast majority of” that care. Dr. Bjork recommended that Christer’s wife receive “respite care to give her some break from taking care of him 24/7.” She remarked that Christer would continue to require 24-hour care should his wife pass away or otherwise become unavailable to care for him. And she agreed with the

ARAMARK/INDEMNITY v. CHRISTER
Decision of the Court

conclusion of Christer's neurologist, who did not testify, that Christer required "full-time care from either Mrs. Christer or a professional health care worker." In sum, Dr. Bjork's testimony was consistent: Christer required constant care, his wife provided the majority of that care but required respite care, and if his wife were to become unable to care for him, he would require constant professional health care.

¶12 By adopting Dr. Bjork's testimony, the ALJ awarded a flexible amount of supportive care reasonably necessary "to prevent or reduce the continuing symptoms" of Christer's injury, *Capuano*, 150 Ariz. at 226, without limiting Christer to the fixed number of nursing visits recommended by Dr. Ladin. Although the ALJ's award does not specify the ultimate amount that must be paid, it is not so ambiguous that the award must be set aside. *Cf. Bernard v. Indus. Comm'n*, 24 Ariz. App. 136, 137-39 (App. 1975) (setting aside an award finding a claimant's challenge to be time-barred based on ambiguity of the Notice of Claim Status, which had accepted the claim for benefits but contemporaneously terminated the medical benefits with no permanent disability and no compensable time lost). Christer is entitled to 24-hour supportive care that is required as a result of his work injury. Thus, based on current circumstances, the award is supported by sufficient evidence and its meaning is reasonably clear.

CONCLUSION

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



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