

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JEFFERY J. BYERLY, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*
PCL CONSTRUCTION ENTERPRISES, INC., *Respondent Employer,*
ZURICH AMERICAN INSURANCE GROUP, *Respondent Carrier.*

No. 1 CA-IC 16-0074
FILED 7-6-2017

Special Action – Industrial Commission
ICA Claim No. 20132-030280
Carrier Claim No. 6800002317
The Honorable Janet Weinstein, Administrative Law Judge

AFFIRMED

COUNSEL

Jeffery J. Byerly, Chino Valley
Petitioner

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

Jardine, Baker, Hickman & Houston, P.L.L.C., Phoenix
By Stephen M. Venezia
Counsel for Respondent Employer/Carrier

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Lawrence F. Winthrop joined.

B E E N E, Judge:

¶1 Jeffery Byerly challenges the Industrial Commission of Arizona’s (“ICA”) decision terminating his temporary disability payments. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Byerly was employed as a laborer for PCL Construction, and in June 2013, he was injured while at work. Byerly sought medical treatment from two doctors for pain and numbness in his legs. Dr. Robert Bowen diagnosed Byerly with thoracic and lumbosacral radiculitis and facet syndrome. Dr. Gregory Johnston diagnosed Byerly with a strain/sprain of the lumbar region with persistent radiculopathy.

¶3 Byerly filed a worker’s compensation claim. Both Dr. Bowen and Dr. Johnston attributed Byerly’s symptoms to the industrial incident in June 2013, while a third doctor testified that Byerly’s symptoms were not caused by the industrial incident. The administrative law judge (“ALJ”) accepted Dr. Bowen and Dr. Johnston’s reports, and awarded Byerly temporary partial disability benefits until his condition became medically stationary. The ALJ did not set forth the nature or extent of Byerly’s injury. This court affirmed the award. *See PCL Constr. Enters., Inc. v. Indus. Comm’n of Ariz.*, 1 CA-IC 14-0091, 2015 WL 5772256 (Ariz. App. Oct. 1, 2015).

¶4 In 2015, based on an independent medical examination and report by Dr. Terry McLean, a Board-certified spinal specialist, PCL Construction issued a notice of claim status, indicating Byerly’s condition related to the industrial injury was medically stationary, and closing Byerly’s claim without any permanent impairment. Byerly protested that notice, and the ICA held a hearing to determine whether Byerly’s industrial injury was stationary, or whether he was in need of active medical treatment and thus still eligible for temporary partial disability benefits. In support of Byerly’s position, Dr. Bowen testified that Byerly’s current

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condition was caused by the June 2013 work incident and subsequent improper treatment.

¶5 Dr. McLean testified that the industrial incident likely resulted in a lumbar strain/sprain, which typically heals after three months. Dr. McLean opined that Byerly reached maximum medical improvement as of August 2015. Further, Dr. McLean stated that Byerly’s current physical complaints and subjective symptoms – degenerative arthritis and spinal stenosis – are age-related, and pre-existed the industrial episode.

¶6 After assessing the credibility of the doctor’s opinions, the ALJ determined that “Dr. McLean’s opinions are well founded and more probably correct[.]” The ALJ adopted Dr. McLean’s opinion that Byerly’s industrially related injury was medically stationary and did not require further supportive care. The ICA terminated Byerly’s temporary partial disability benefits.

¶7 After exhausting his administrative appeals, Byerly timely filed a petition for special action. This court has jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(2) (2017), 23-951 (2017)¹ and Rule 10 of the Arizona Rules of Procedure for Special Actions.

DISCUSSION

¶8 Byerly asserts that the doctrine of *res judicata* precludes PCL Construction from relitigating whether Byerly had a compensable claim. Byerly also claims that the ALJ erred by ignoring evidence and allowing Dr. McLean to testify. In reviewing factual findings and awards of the ICA, we defer to the ALJ’s factual findings, but review questions of law *de novo*. *Young v. Indus. Comm’n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003). We view the evidence in the light most favorable to upholding the ALJ’s decision, and will affirm unless there is no reasonable basis for the decision. *Lovitch v. Indus. Comm’n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

¶9 An ICA decision may have *res judicata* effect, and preclude relitigation of issues and claims already decided. *Circle K Corp. v. Indus. Comm’n*, 179 Ariz. 422, 428 (App. 1993). Issue preclusion prevents relitigation of issues of fact that were actually litigated and essential to a final judgment. *Red Bluff Mines, Inc. v. Indus. Comm’n*, 144 Ariz. 199, 204-05 (App. 1984). Claim preclusion prevents relitigation of claims that were

¹ Absent material revisions after the relevant date, we cite a statute’s current version.

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actually decided or could have been decided after a timely protest. *W. Cable v. Indus. Comm'n*, 144 Ariz. 514, 518 (App. 1985).

¶10 The ICA's decision to terminate Byerly's temporary disability benefits was not contrary to issue or claim preclusion limitations. When an applicant is awarded temporary or partial disability, medical benefits and temporary disability compensation are proper until the condition becomes medically stationary. See A.R.S. § 23-1044(F) (2017). Here, PCL Construction was litigating whether Byerly's injury was now medically stationary, which was never litigated in the previous proceeding. Further, the earlier decision awarding temporary disability benefits to Byerly did not define the nature of the compensable industrial injury. Therefore, when the ALJ determined that Byerly's industrial incident caused a strain/sprain of the lumbar region, it did not reexamine any issue that had already been decided.

¶11 Byerly also argues that the ALJ erred by ignoring evidence of his temporary disability, claiming there was no finding of fact that he was medically stationary after receiving radiofrequency nerve ablation. An applicant has the burden of proof by a preponderance of the evidence to prove all material elements of the claim, including that he is entitled to continued disability benefits. *Stephens v. Indus. Comm'n*, 114 Ariz. 92, 94 (App. 1977). "Preponderance of the evidence means such evidence as when weighed with that opposed to it has more convincing force[.]" *Brooks v. Indus. Comm'n*, 24 Ariz. App. 395, 399 (App. 1975) (quoting *Ison v. W. Vegetables Distribs.*, 48 Ariz. 104, 111 (1936)).

¶12 Here, the ALJ did not ignore medical testimony that Byerly was not medically stationary. The ALJ was faced with conflicting expert medical testimony. When there is conflicting medical evidence, the ALJ "is at liberty to determine which testimony is more probably correct[.]" *Bergstresser v. Indus. Comm'n*, 118 Ariz. 155, 157 (App. 1978). The ALJ accepted the expert medical opinion of Dr. McLean, finding it more credible and correct than Dr. Bowen's expert medical opinion. Dr. McLean's testimony constituted substantial medical evidence, and supported the ALJ's findings. See *Russell v. Indus. Comm'n*, 98 Ariz. 138, 145 (1965).

¶13 Lastly, Byerly argues that Dr. McLean's testimony should have been precluded because it was inaccurate and incomplete. The ALJ, however, has broad discretion to admit expert witness testimony. See *Epperson v. Indus. Comm'n*, 26 Ariz. App. 467, 471 (App. 1976). There is nothing in the record to support Byerly's contention. Dr. McLean is a board certified orthopedic surgeon who specializes in surgery and disorders of

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the spine. Dr. McLean testified that he reviewed Byerly's entire medical history, and MRI results and opined, *inter alia*, that Byerly's current symptoms were not a result of the industrial incident. Dr. McLean's testimony evidences his knowledge of Byerly's medical history. Therefore, the ALJ did not err by admitting Dr. McLean's testimony.

CONCLUSION

¶14 For the foregoing reasons, we affirm the ICA's decision to terminate Byerly's temporary disability benefits.



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