IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARANA UNIFIED SCHOOL DISTRICT,
Petitioner Employer,

ARIZONA SCHOOL ALLIANCE FOR WORKERS COMPENSATION,
Petitioner Insurer,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DEBRA SOTO,
Respondent Employee.

No. 2 CA-IC 2015-0011
Filed April 4, 2016

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NOT FOR PUBLICATION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);
Ariz. R. P. Spec. Actions 10(k).

Special Action – Industrial Commission
ICA Claim No. 20123260152
Insurer No. 2012001405A
Jacqueline Wohl, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 In this statutory special action, petitioner employer Marana Unified School District (hereafter Marana Unified) challenges the administrative law judge's (ALJ) decision to reopen respondent employee Debra Soto's claim, contending she did not have "a new, additional or previously undiscovered temporary or permanent condition." A.R.S. § 23-1061(H). Because the ALJ did not err, we affirm.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to sustaining the Industrial Commission's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). Soto injured her sacroiliac (SI) joint in October 2012, in the course and scope of her employment with Marana Unified, when she stepped backwards and fell into a tree well. Her subsequent workers' compensation claim was accepted in March 2013, with no

permanent disability. Soto filed a request for hearing which was granted and hearings were held before ALJ Thomas Ireson in October 2013 and February 2014. In March 2014, ALJ Ireson issued an award finding that Soto had "bilateral SI dysfunction symptoms causally related to the industrial injury" but was "medically stationary by October 14, 2013 with a two percent whole person impairment." ALJ Ireson did not award supportive care.[1]

¶3 In June 2014, Soto filed a petition to reopen based on a surgery recommended by Dr. Hillel Baldwin "due to [Soto's] worsening condition." The petition to reopen was denied for benefits in July 2014, and Soto subsequently filed a request for hearing which was granted.

¶4 After conducting evidentiary hearings in May 2015, ALJ Jacqueline Wohl reopened Soto's claim. Marana Unified requested review of that decision. On review, ALJ Wohl affirmed the award, finding that Soto was able to show "a change in circumstances since the closure of her claim." Marana Unified subsequently filed this statutory special action. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A).

Reopening a claim under A.R.S. § 23-1061

¶5 Marana Unified argues, on four related bases, that the ALJ erred by reopening the claim even though, as Marana Unified contends, Soto did not present any evidence of "an objective change in condition." On review, we defer to the ALJ's factual findings but review legal conclusions de novo. *Polanco*, 214 Ariz. 489, ¶ 6, 154 P.3d at 393-94. "Where there is a conflict in expert testimony, it is the responsibility of the [ALJ] to resolve it," and "[w]e will not disturb [that] resolution . . . unless it is wholly unreasonable."

[1]Supportive care awards are issued "'to prevent or reduce the continuing symptoms of an industrial injury after the injury has become stabilized.'" *Bank One Corp. v. Indus. Comm'n*, 226 Ariz. 134, ¶ 7, 244 P.3d 571, 573 (App. 2010), *quoting Capuano v. Indus. Comm'n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986).

Stainless Specialty Mfg. Co. v. Indus. Comm'n, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985).

¶6 "Section 23-1061(H) governs the reopening of workers' compensation claims and requires an employee to prove the existence of 'a new, additional or previously undiscovered temporary or permanent condition' to reopen a claim." *Polanco*, 214 Ariz. 489, ¶ 6, 154 P.3d at 393, *quoting* § 23-1061(H). To meet this burden, "the employee must show a causal relationship between the new condition and a prior industrial injury." *Id.* Claims based on "conditions that were 'existing and known' when the claim was closed" are precluded from being reopened. *Perry v. Indus. Comm'n*, 154 Ariz. 226, 229, 741 P.2d 693, 696 (App. 1987), *quoting Stainless*, 144 Ariz. at 16, 695 P.2d at 265.

¶7 However, "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." *Stainless*, 144 Ariz. at 18-19, 695 P.2d at 267-68. And a claim may be reopened "based upon qualitatively different evidence that could not have been presented at the first hearing." *Bayless v. Indus. Comm'n*, 179 Ariz. 434, 441, 880 P.2d 654, 661 (App. 1993). "Where the true cause of the worker's physical or mental disability was not definitely known at the time of the prior award finding no permanent disability, the discovery of the true cause is grounds for a reopening under the 'previously undiscovered' clause of A.R.S. § 23-1061(H)." *Salt River Project v. Indus. Comm'n*, 128 Ariz. 541, 544, 627 P.2d 692, 695 (1981).

¶8 Marana Unified claims Soto is attempting to obtain the same surgery that Baldwin had suggested would be necessary before the October 2013 hearing. Soto counters that she was unable to present Baldwin's testimony at the first hearing in front of ALJ Ireson because she did not see Baldwin until four days before the hearing.

¶9 It is a "basic rule of [claim preclusion[2]] that a final award is conclusive as to all facts actually litigated and as to all facts that could have been litigated at that time." *Fid. & Guar. Ins. Co. v. Indus. Comm'n*, 129 Ariz. 342, 346, 631 P.2d 124, 128 (App. 1981). Whether a medical witness's opinion could have been presented and adjudicated at the initial hearing is determined by "whether the claimant knew or should have known of the evidence in time to request a subpoena" in compliance with the applicable rule of procedure. *Id.* at 346-47, 631 P.2d at 128-29. "If the claimant cannot do so, principles of [claim preclusion] will not prevent reopening thereafter." *Id.* at 347, 631 P.2d at 129. Subpoenas for medical witnesses must be requested at least twenty days prior to the initial hearing. Ariz. Admin. Code R20-5-141(A)(2).

¶10 In the hearings on Soto's original claim, Dr. Randall Prust testified for Soto. He opined that she had bilateral SI dysfunction but that the majority of the pain was from her pre-existing lumbar condition. He asserted she was stable in October 2013. Soto had seen Baldwin four days before the October 18, 2013 hearing and his notes which indicated she would need SI surgery were included in Prust's testimony. But, Soto did not subpoena or call Baldwin as a witness.

¶11 Soto did not have Baldwin's opinion in time to subpoena him as a witness.[3] *See* Ariz. Admin. Code R20-5-141(A)(2). Principles of claim preclusion therefore do not prevent his opinion

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[2]We use the more modern term "claim preclusion" over the older term "res judicata" in this opinion. The two terms are synonymous. *Howell v. Hodap*, 221 Ariz. 543, n.7, 212 P.3d 881, 884 n.7 (App. 2009); *see also Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425, 880 P.2d 642, 645 (App. 1993).

[3]Although it is true that Baldwin rendered his opinion before the October 18 hearing, he did not examine Soto far enough in advance to be called to testify himself. Soto could only have presented Prust's opinion as medical evidence. Further, as explained *infra*, the Baldwin opinion that is at issue in this case is qualitatively different from that issued in October 2013.

from being the basis for a reopening. *Fid. & Guar. Ins.*, 129 Ariz. at 346-47, 631 P.2d at 128-29.

¶12 Marana Unified claims that Soto could have requested a late subpoena but did not do so. But the court in *Fidelity & Guaranty Insurance* distinguished between "what respondent was entitled to assert procedurally before the Commission contrasted with what might have been allowed by reason of the exercise of discretion by the administrative law judge" and held claim preclusion depends on the time for the issuance of a subpoena set forth in the rule. 129 Ariz. at 346, 631 P.2d at 128. Marana Unified does not cite any authority to the contrary. Because Soto was unable to subpoena Baldwin in time for the hearing, claim preclusion does not bar reopening Soto's claim on the basis that Baldwin's opinion was not presented at the first hearing. *See id.* at 346-47, 631 P.2d at 128-29.

¶13 Marana Unified further argues Soto failed to show an objective change in her condition. But, as noted above, she could not call Baldwin as a witness and his testimony is not barred by claim preclusion principles.

¶14 Additionally, even if claim preclusion did apply, Baldwin's testimony and the basis for that testimony are qualitatively different than Prust's testimony and its basis; Baldwin's testimony thus constitutes evidence of an objective change in condition. *Bayless*, 179 Ariz. at 441, 880 P.2d at 661. At the hearing on Soto's original claim, Prust had testified on Soto's behalf that most of the back pain stemmed from Soto's pre-existing, non-industrial back injury. He opined the industrial injury was stable as of October 2013. ALJ Ireson found that Soto had "bilateral SI dysfunction symptoms causally related to the industrial injury" and was stationary as of October 2013. He also ruled Soto did not need supportive care.

¶15 In the proceedings to reopen Soto's claim before ALJ Wohl, Baldwin testified that when he saw Soto in January 2015, she had undergone surgery for lumbar hardware removal, which was related to her non-industrial back condition. The removal did not change her symptoms. He further testified that she had received an "SI joint pain injection some time ago in July" that caused "a 50

percent reduction in symptoms." Based on this history, Baldwin continued to diagnose Soto with SI joint dysfunction and to recommend the SI joint fusion. Baldwin further testified that if Soto did not receive the SI joint fusion, she would experience "continued pain and disability."

¶16 ALJ Wohl found Baldwin's testimony to be "the most probably correct and well-founded." She adopted his opinion that the source of the pain was not the low back, but rather the SI joint. ALJ Wohl then reopened Soto's petition. In response to Marana Unified's response for review, ALJ Wohl clarified that although ALJ Ireson "adopted the findings of Dr. Randall Prust . . . that [Soto's] symptoms were most likely related to pre-existing back problems and not to SI joint dysfunction," Soto has met her burden to show "a change in circumstances since the closure of her claim, namely the January 5, 2015 surgery and the applicant's response to the SI joint injections."

¶17 Therefore, Baldwin's testimony at the re-opening hearing is qualitatively different from Prust's testimony in support of Soto's original petition. *Bayless*, 179 Ariz. at 441, 880 P.2d at 661. Just as in *Bayless*, Soto's surgery provided evidence which was unavailable at the original hearings. Accordingly, Baldwin's opinion constitutes objective evidence of a newly discovered condition, supporting reopening Soto's claim under § 23-1061(H). *See Salt River Project*, 128 Ariz. at 544, 627 P.2d at 695; *see also* 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 131.03, at 131-41 ("[T]he intervention of serious surgery, such as disc operations, leading to a new appraisal of claimant's condition, will warrant a reopening."). Thus, the ALJ's finding was based on "a change in . . . medical evaluation [that] create[d] a need for treatment" that "was not and could not have been adjudicated at the time of the last award." *Stainless*, 144 Ariz. at 18-19, 695 P.2d at 267-68. Therefore, the ALJ did not err in determining that this testimony justified re-opening.

¶18 Marana Unified further argues that Soto needed to show "an objective change in condition," rather than an increase in subjective pain. Section 13-1061(H) specifically prohibits an ALJ from reopening a claim "because of increased subjective pain if the

pain is not accompanied by a change in objective physical findings." § 23-1061(H).

¶19 ALJ Wohl did not reopen the claim based on a subjective increase in pain, but rather on a change in medical circumstances, specifically the results of Soto's surgery and her reaction to the SI pain injection. *See Polanco*, 214 Ariz. 489, ¶ 10, 154 P.3d at 395. Marana Unified attempts to characterize Soto's lack of relief from the removal of the lumbar hardware as an increase in subjective pain. It asserts that reopening is therefore improper. But the lack of relief after surgery, not an increase in subjective pain complaints, was the basis for Baldwin's conclusion. Thus, the ALJ did not err by reopening the claim.

¶20 Marana Unified also argues that construing a surgery for a non-industrial low-back injury as a changed condition for an industrial injury to the SI joint is "unreasonable" and "based on illogic." This argument misconstrues the ALJ's finding. As mentioned above, the ALJ adopted a medical finding that the surgery on the low back ruled out a possible cause of pain. Thus, we cannot say that ALJ Wohl erred in finding a changed circumstance warranting reopening Soto's claim.

Factual Foundation

¶21 Marana Unified also appears to argue that ALJ Wohl's opinion rests on an inaccurate factual foundation in contravention of *Bishop v. Indus. Comm'n*, 94 Ariz. 65, 381 P.2d 598 (1963), *Lowry v. Indus. Comm'n*, 92 Ariz. 222, 375 P.2d 572 (1962), and *Aguiar v. Indus. Comm'n*, 165 Ariz. 172, 797 P.2d 711 (App. 1990). Marana Unified mentions this issue in the "Standard of Review" and "Issue Presented" discussion, but fails to develop this argument. Its position is based on statements regarding factual errors in the ALJ's finding that were later changed by stipulation. Marana Unified claims that the ALJ's "decision upon review is specifically based upon [an] inaccurate finding" but does not cite to the ALJ's decision to buttress this contention, nor does Marana Unified explain how such a reliance would affect the final resolution. Thus, this argument is waived. *See* Ariz. R. Civ. App. P. 13(a)(7) ("An 'argument' . . . must contain . . . [a]ppellant's contentions concerning

each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies."); Ariz. R. P. Spec. Actions 10(k) (Arizona Rules of Civil Appellate Procedure apply to Industrial Commission special actions); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2 (appellant's failure to develop and support waives issue on appeal).

Disposition

¶22 For the foregoing reasons, we affirm the ALJ's award and decision upon review.