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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 12/20/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

TRANSPAY, INC., ) 1 CA-IC 11-0082  
)  
Petitioner, ) DEPARTMENT B  
)  
WAUSAU BUSINESS INS. C/O IRVING ) **MEMORANDUM DECISION**  
MIDDLE MARKET CLAIM, )  
) (Not for Publication -  
Petitioner Carrier, ) Rule 28, Arizona Rules  
) of Civil Appellate  
v. ) Procedure)  
)  
THE INDUSTRIAL COMMISSION OF ARIZONA, )  
)  
Respondent, )  
)  
PETER FAULKNER, )  
)  
Respondent Employee. )

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Special Action - Industrial Commission

ICA Claim No. 20081-070246

Carrier Claim No. WC197-070246

Administrative Law Judge Michael A. Mosesso

**AWARD AFFIRMED**

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and

Phoenix

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**P O R T L E Y**, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review granting the respondent employee additional supportive care benefits for pain management. Two issues are presented on appeal:

(1) whether the uncontradicted medical evidence and the applicable law precluded the administrative law judge ("ALJ") from granting the claimant a spinal cord stimulator ("SCS") trial under his existing supportive care award; and

(2) whether the applicable law precluded the ALJ from requiring the petitioner carrier, Wausau Business Insurance ("Wausau") to provide additional psychological counseling for the claimant under the existing supportive care award.

The record contains reasonable medical evidence to support the ALJ's award of an SCS trial and additional psychological counseling. Further, the existing supportive care award, stipulated to by the parties, provides treatment for pain

management directed by Jeffrey Bucholz, M.D. For these reasons, we affirm the award.

#### **JURISDICTION AND STANDARD OF REVIEW**

¶2 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10 (2009). In reviewing ICA findings and awards, 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, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

#### **FACTS AND PROCEDURAL HISTORY**

¶3 The claimant, Peter Faulkner, was a flight mechanic for Swift Aviation. While lifting bags out of an airplane on February 14, 2008, he felt a pop in his low back. He testified that he gradually developed low back and left leg pain, and numbness and weakness in his left toes and ankle. He filed a workers' compensation claim, which was denied for benefits.<sup>1</sup> He timely requested a hearing, and following that hearing, Wausau agreed to assume liability for his claim. The ALJ then entered

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<sup>1</sup> The claim was initially accepted for benefits as a no time lost ("NTL") claim, but following a May 30, 2008 independent medical examination ("IME"), a new notice of claim status ("NCS") was issued denying the claim.

an award of a compensable claim, and Wausau issued an NCS accepting the claim for benefits.

¶14 Faulkner subsequently had two back surgeries. Ali Araghi, M.D., removed disk material at L4-5 which was putting pressure on the nerve root in January 2009. Faulkner testified that the surgery improved the numbness in his left leg and the weakness in his left toes. Four months later, Daniel Lieberman, M.D., performed back surgery for a spinal fluid leak. The surgery improved Faulkner's headaches and the feeling of pressure in his low back.

¶15 Dr. Lieberman made post-surgical recommendations, which included pain management and trigger point injections because of scar tissue at the low back surgical site. Faulkner was released to return to work at Swift by Dr. Lieberman in July 2009. At his next visit with Dr. Lieberman, Faulkner was still experiencing back pain and had been unable to get the recommended pain management because of insurance issues. He filed a request for hearing pursuant to A.R.S. § 23-1061(J) ("J" request), stating, "[t]he carrier has failed to authorize pain management requested by Dr. Daniel Lieberman."<sup>2</sup>

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<sup>2</sup> A.R.S. § 23-1061(J) provides that a claimant may request an investigation by the ICA into the payment of benefits that the claimant believes he is owed but has not been paid.

¶16 Wausau sent Faulkner to Jon Zoltan, M.D., for an IME. Dr. Zoltan found him stationary with a twelve percent permanent impairment, and recommended supportive care of four physician visits a year for evaluation and pain medication. Following the IME, Wausau closed Faulkner's claim with an unscheduled twelve percent permanent partial impairment and awarded him the recommended supportive care. Faulkner filed a hearing request based on the closure of his claim and the ALJ consolidated it with the "J" request.

¶17 Prior to a hearing, the parties entered into a stipulation.<sup>3</sup> The stipulation provided in pertinent part:

The parties have agreed to stipulate to the following terms:

1. Defendant Carrier agrees to authorize pain management under supportive care with Dr. Jeffrey Bucholz.

2. Applicant agrees he is medically stationary as of September 23, 2009, with a 12% permanent impairment as assigned by Dr. Zoltan and supportive care as recommended by Dr. Bucholz.

. . . .

4. At the time of entering into this Stipulation, Dr. Bucholz' specific recommendations for treatment are unknown. The parties acknowledge that the Supportive Care award shall be subject to annual

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<sup>3</sup> Parties to an ICA proceeding may stipulate to any fact or issue after a party files a request for hearing. See Arizona Administrative Code R20-5-152.A.

review, and that the carrier shall be given notice of any proposed surgery or invasive procedures in sufficient time to obtain a second opinion should it disagree with the proposal. The carrier agrees to promptly seek such a second opinion.

The ALJ approved this stipulation and incorporated it into his award.

¶18 Nine months later, Faulkner filed another "J" request listing six separate times Wausau failed to provide the stipulated and awarded supportive care. The parties were unable to resolve the dispute, and an ICA hearing was scheduled. The ALJ heard testimony over six occasions from Faulkner, Dr. Bucholz, Petra Peper, Ph.D., independent medical examiner Stephen Borowsky, M.D., and independent psychological examiner, John T. Beck, Ph.D. The ALJ entered an award finding Faulkner credible and resolving the medical and psychological conflicts in favor of his treating physician, Dr. Bucholz, and his treating psychologist, Dr. Peper. Wausau timely requested administrative review, but the ALJ supplemented and affirmed Faulkner's award. Wausau next brought this appeal.

#### **DISCUSSION**

¶19 The ALJ's determinative finding on supportive care provides:

17. When all the evidence is considered in its entirety and upon a resolution of the conflicts in the evidence it is found herein

that Applicant has established by reasonable preponderance of the evidence that visits to Dr. Bucholz as outlined by Dr. Borowsky are to be monthly, while rotating and monitoring Applicant's medications and once they are stable they are to be provided quarterly. If [sic] is further found that the trial of a spinal cord stimulator recommended by Dr. Bucholz be approved and that the appropriate protocol as he described be followed before implementation. It is also found that the psychological counseling with Dr. Pep[er] is appropriate and should continue. Applicant has established these by a preponderance of the credible evidence and thus is entitled to those benefits pursuant to the Workers' Compensation Act of the State of Arizona.

¶10 Wausau first argues that the psychological assessment performed by Dr. Beck constitutes uncontroverted evidence that Faulkner is not a suitable candidate for an SCS trial.<sup>4</sup> Both Drs. Bucholz and Borowsky agreed that part of the established protocol for an SCS trial is an acceptable psychological evaluation. Dr. Bucholz testified that he would not send Faulkner for the evaluation until the SCS trial was approved. He stated that he was not aware that Faulkner was having any psychiatric issues prior to his industrial back injury. The doctor testified that Faulkner's psychological symptoms began with his industrially-related chronic pain, which was the reason for Dr. Peper's treatment.

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<sup>4</sup> We note that both in his psychological report and in his ICA testimony Dr. Beck deferred to the pain management doctors for the final conclusion as to the appropriateness of the SCS trial.

¶11 Dr. Bucholz had reviewed Dr. Beck's opinion, and he disagreed that Faulkner's subjective complaints were due to either psychological pain or a personality disorder. He testified that Faulkner had a legitimate physical origin for his pain, i.e., prolonged nerve root compression. The doctor concluded by stating that based on Dr. Peper's treatment of Faulkner, his treatment, and his review of Dr. Beck's psychological evaluation, he believed that Faulkner was a candidate for an SCS trial.

¶12 When medical evidence is uncontroverted and based on matters peculiarly within the realm of medical knowledge, the findings are conclusive. *Cammeron v. Indus. Comm'n*, 98 Ariz. 366, 370, 405 P.2d 802, 804 (1965). But if expert medical testimony conflicts, it is the ALJ's duty to resolve that conflict. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). If more than one inference may be drawn from the medical evidence, the ALJ is at liberty to choose either, and we will not disturb his conclusion unless it is wholly unreasonable. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968).

¶13 Here, we agree that only Dr. Beck had performed a psychological evaluation intended for an SCS trial at the time of the hearing. We disagree, however, that the evaluation



precluded the ALJ from authorizing an SCS trial. Dr. Bucholz testified that part of his trial protocol would involve obtaining an acceptable psychological evaluation. Merely because it had not been conducted at the time of the ICA hearing regarding the suitability of an SCS trial did not make Dr. Beck's testimony uncontroverted or binding on the ALJ.<sup>5</sup>

¶14 Wausau also argues that the ALJ erred as a matter of law by authorizing the SCS trial under the supportive care award. Wausau contends that the SCS trial constitutes active medical care, which necessitated a petition to reopen.

¶15 In order to reopen a workers' compensation claim, a claimant must establish the existence of a new, additional, or previously undiscovered condition and a causal relationship between that condition and the prior industrial injury. See A.R.S. § 23-1061(H); *Pascucci v. Indus. Comm'n*, 126 Ariz. 442, 444, 616 P.2d 902, 904 (App. 1980). Newly available medical treatment for the industrially-related injury will also satisfy

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<sup>5</sup>In fact, the record does contain another psychological evaluation filed as an offer of proof. See, e.g., *Gordon v. Indus. Comm'n*, 23 Ariz. App. 457, 460, 533 P.2d 1194, 1197 (1975). The evaluation concluded that the claimant would make an "excellent candidate for spinal cord stimulation." The claimant sought to present Dr. Nelson's testimony to establish that Dr. Beck used an incorrect form of the MMPI, an objective standardized psychological test, when he performed his examination, but the ALJ refused to allow Dr. Nelson to testify. The claimant filed her report in evidence as an offer of proof. *Id.*

the statute. *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 18, 695 P.2d 261, 267 (1985).

¶16 "Active care" is medical treatment intended to improve rather than to maintain a condition. See *Home Ins. Co. v. Indus. Comm'n*, 23 Ariz. App. 90, 95-96, 530 P.2d 1123, 1128-29 (1975). But if the purpose of the additional medical treatment is to maintain rather than to improve a claimant's condition, continuing medical care is provided through a "supportive care" award. *Capuano v. Indus. Comm'n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986).

¶17 In this case, the ALJ adopted Dr. Bucholz's testimony with regard to the SCS trial:

So in Peter's case, I would expect this would be done primarily for his buttock and leg pain much more than his back pain. Very good modality in patients who have failed conservative modalities or - and do not - and are not realistic candidates for corrective surgical prevention. *It's a palliative modality. It's not curative.*

*It does not change the structural pathology that is seen on an MRI, and basically replaces nerve pain in the extremity with something that people like, and it's done as a way to manage pain where there's nothing much left to do.*

Dr. Bucholz also testified that he hoped the SCS trial would better control Faulkner's pain, with an associated reduction in necessity of pain medication. On cross-examination, the doctor

agreed that if the SCS trial is a success and Faulkner's pain is decreased, then he may also have improved function.

¶18 Based on the accepted medical testimony, the SCS trial is supportive and not active medical care. There is no suggestion that Faulkner's back injury or scar tissue are subject to revision, which will improve his condition. In fact, Dr. Bucholz testified that Faulkner's underlying injury had remained the same since September 2009. As Professors Larson have recognized, "the persistence of pain may not of itself prevent a finding that the healing period is over, even if the intensity of the pain fluctuates from time to time, provided again that the underlying condition is stable." 4 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 80.03[3], at 80-6 to 80-7 (2000). Accordingly, Faulkner's pain management is appropriately provided under the supportive care award.

¶19 Wausau also contends that the ALJ erred as a matter of law when he interpreted the supportive care stipulation to include "unlimited psychological counseling" with Dr. Peper. Initially, we note that the supportive care award is not "unlimited," since it is "subject to annual review." We do agree that "the parties' rights and obligations relating to [the] [c]laimant's supportive care benefits are controlled by

the explicit language of the settlement agreement." See *Bank One Corp. v. Indus. Comm'n*, 226 Ariz. 134, 136, ¶ 9, 244 P.3d 571, 573 (App. 2010) (settlement agreements governed by contract principles).

¶20 Here, the parties stipulated that Wausau would provide pain management with Dr. Bucholz under the supportive care award. The pain management would consist of supportive care as recommended by the doctor, and the parties acknowledged that his specific recommendations were unknown at the time of the stipulation. Dr. Bucholz then recommended treatment with Dr. Peper "for behavioral health assessment and treatment in [an] effort to improve [Faulkner's] ability to manage his chronic pain" arising out of his industrial back injury. Dr. Peper testified that she provides "behavioral medicine treatment for chronic-pain patients who are having pain-related emotional distress and difficulty adjusting to their chronic pain . . . ." We believe that Dr. Peper's treatment is consistent with the language of the stipulation.

**CONCLUSION**

¶21 Based on the foregoing, we affirm the award.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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PATRICIA A. OROZCO, Judge

/s/

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RANDALL M. HOWE, Judge