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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 1/15/2013  
RUTH A. WILLINGHAM,  
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KAIBAB INDUSTRIES, ) 1 CA-IC 11-0083  
)  
Petitioner Employer, ) DEPARTMENT C  
)  
SCF ARIZONA, ) **MEMORANDUM DECISION**  
)  
Petitioner Carrier, ) (Not for Publication -  
) Rule 28, Arizona Rules of  
v. ) Civil Appellate Procedure)  
)  
THE INDUSTRIAL COMMISSION OF )  
ARIZONA, )  
)  
Respondent, )  
)  
LEO COX, )  
)  
Respondent Employee. )  
)

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Special Action - Industrial Commission

ICA Claim No. 90018-008880

Carrier Claim No. 8115057

Administrative Law Judge J. Victor Stoffa

**AWARD SET ASIDE**

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**T H U M M A**, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review denying respondent employee Leo Cox's request for supportive care benefits and petition to reopen. One issue is presented in this matter: whether the administrative law judge (ALJ) erred by finding that res judicata precluded a determination on the merits as to causation of the claimant's kidney condition. Because the ALJ erred, the award is set aside.

**FACTS AND PROCEDURAL HISTORY**

¶2 Petitioner Kaibab Industries employed Cox as a log cutter and, on May 6, 1981, Cox was struck by a tree limb and sustained acute cervical fractures. Cox filed a workers' compensation claim, which was accepted for benefits and then eventually closed with an unscheduled permanent partial impairment. Over the years, Cox's claim was reopened and reclosed several times for additional treatment of ongoing cervical and lumbar issues.

¶13 In mid-2005, Cox filed a petition to reopen based on his treating physician's recommendation for additional cervical spine treatment. See Ariz. Rev. Stat. (A.R.S.) § 23-1061(H).<sup>1</sup> Petitioner carrier, SCF Arizona (SCF), obtained an independent medical examination (IME), which concurred with the recommendation to reopen, and SCF accepted the petition. Approximately one year later, SCF obtained a reexamination of Cox, and based on that report, reclosed the claim. Cox filed a hearing request protesting both the reclosure of his claim and the supportive care award that was part of the reclosure. On May 2, 2007, prior to a hearing on those requests, the parties entered a stipulation settling the matter. As relevant here, that stipulation provided that Cox's supportive care award was to include "two blood tests for kidney function studies annually as per the recommendations from Dr. Ott; one annual office visit with nephrologist Dr. Abinash Roy." That same day, an ALJ approved the stipulation and incorporated its terms in an award.

¶14 Cox continued to receive the stipulated supportive care benefits until April 2010, when his physician changed his blood pressure medication and SCF denied coverage for the prescription. Cox then filed a request for hearing challenging

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<sup>1</sup> Absent material revision after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

that denial. See A.R.S. § 23-1061(J). SCF responded by stating that it had "not received medical documentation from . . . any . . . physician explaining the relationship of the blood pressure medication . . . to [Cox's] 5-6-81 industrial injury." Cox also filed a new petition to reopen his claim; SCF denied that petition and Cox timely requested a hearing on that issue.

¶15 The ALJ held four hearings and heard testimony from Cox, his treating family practitioner, his treating nephrologist and an independent medical examiner. The ALJ entered an award finding Cox was not entitled to receive additional supportive care benefits and denying the petition to reopen. In doing so, relying on the terms of the May 2, 2007 stipulation and award, the ALJ found that "the issue of whether [Cox's] chronic kidney disease is related to the industrial injury is res judicata and the relitigation of that issue is precluded." Both Cox and SCF timely requested administrative review and the ALJ summarily affirmed the award. SCF brought this timely appeal. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

#### **DISCUSSION**

¶16 In reviewing findings and awards of the ICA, this court defers to the ALJ's factual findings, but reviews questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267,

270, ¶ 14, 63 P.3d 298, 301 (App. 2003). SCF argues that the ALJ legally erred by finding that causation of the claimant's kidney condition was res judicata. The pertinent finding states:

13. At the time of the May 2, 2007 Findings and Award Approving Stipulation, at issue was the closure of applicant's claim and supportive care. The parties at the time agreed that the claim should remain closed effective September 20, 2006 with unscheduled impairment. The parties agreed that applicant's loss of earning capacity is \$625.00 per month and the parties agreed to applicant's supportive care.<sup>[2]</sup> *That included monitoring of applicant's kidney function and an annual visit to a nephrologist, Dr. Abinash Roy. The award that approved the Stipulation became final. The parties had an opportunity to litigate these issues and the findings in the award based upon the Stipulation were essential to the determination. Thus the issue of whether*

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<sup>2</sup> The stipulation's provision for supportive care reads as follows:

15. The Applicant's supportive care award issued on 9/28/06 shall be amended to show the following: 6 office visits with Dr. Darin Ott, 12 physical therapy sessions as prescribed by Dr. Darin Ott, analgesic agent such as Ultracet as recommended by Drs. Palmer and Kahn, muscle relaxants such as Flexeril, Cymbalta or an equivalent medication secondary to the chronic pain syndrome under the medical management of Dr. Darrin [sic] Ott; *two blood tests for kidney function studies annually as per the recommendations from Dr. Ott; one annual office visit with nephrologist Dr. Abinash Roy; one annual office visit with Dr. Lynn M. Gaufin.*

(Emphasis added.)

*applicant's chronic kidney disease is related to the industrial injury is res judicata and the relitigation of that issue is precluded.*

(Emphasis added.)

¶7 An ICA award can have preclusive effect by application of principles of issue or claim preclusion. See *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 428, 880 P.2d 642, 648 (App. 1993). Stated simply, issue preclusion bars relitigation of an issue of fact that is actually litigated and determined by a valid final judgment and is essential to that final judgment. *Red Bluff Mines, Inc. v. Indus. Comm'n*, 144 Ariz. 199, 204-05, 696 P.2d 1348, 1353-54 (App. 1984). Claim preclusion bars relitigation of a claim actually decided or that could have been decided after a timely protest. *Western Cable v. Indus. Comm'n*, 144 Ariz. 514, 518, 698 P.2d 759, 763 (App. 1985).

¶8 The basis for the ALJ's preclusion finding was the parties' May 2, 2007 stipulation and award. As relevant here, that stipulation provided that Cox's supportive care award was to include "two blood tests for kidney function studies annually as per the recommendations from Dr. Ott; one annual office visit with nephrologist Dr. Abinash Roy." Contrary to the ALJ's preclusion finding, the parties' stipulation did not provide that Cox's chronic kidney disease was related to his industrial injury. Moreover, given that the parties resolved the matter by

stipulation, the issue of whether Cox's chronic kidney disease was related to his industrial injury was never actually litigated (let alone decided), as would be required for issue preclusion to apply.

¶19 The record at the time of the stipulation and the nature of supportive care awards further show that the stipulation does not preclude litigation over whether Cox's chronic kidney disease is related to his industrial injury. At the time of the stipulation, the evidence with regard to Cox's kidney condition was:

(1) "He has been on Daypro for years, twice a day to kind of control his cervical and lumbar spine pain. It should be noted though that his renal function [sic] and has had increased blood pressure which I feel is secondary to chronic NSAID [nonsteroidal anti-inflammatory drug] use, which is concerning."

(2) "**PAST MEDICAL HISTORY:** . . . . He also has a history of developing kidney disease, secondary to prolonged use of nonsteroidal anti-inflammatories. For a while this caused increased blood pressure, but he no longer requires medication for the blood pressure."

(3) "Renal insufficiency. This is definitely secondary to chronic NSAID use. He has been on Daypro for years. We have taken him off of it and his creatinine function has actually improved."

(4) "Dr. Ott referred him to nephrology (Dr. Roy) 2/06 with diagnosis of chronic kidney disease stage II attributed to NSAIDs with ultrasound showing bilateral small kidneys consistent with chronic kidney disease most

likely from NSAIDs."

(5) "**PAST MEDICAL HISTORY:** . . . He also had some transient renal dysfunction. The renal dysfunction was felt to be secondary to [NSAID] usage. He had been taking this medication for approximately ten years."

The contested closure of Cox's claim occurred on September 28, 2006. The closure was based on the IME conducted by Drs. Kahn and Palmer on September 20, 2006. At the time of the closure, a supportive care award was issued that provided no kidney function monitoring.

¶10 Cox objected to the supportive care award in his hearing request. He also requested a subpoena for his nephrologist, Dr. Roy, to testify at the hearing. No litigation actually occurred because the parties settled the issues in the stipulation. The only significant difference between the supportive care award issued by SCF at closure and the stipulated supportive care award was the addition of "two blood tests for kidney function studies annually as per the recommendations from Dr. Ott; one annual office visit with nephrologist Dr. Abinash Roy."

¶11 Given the unique and elastic nature of supportive care awards, this stipulation for three annual medical contacts does not equate to an admission that Cox has chronic kidney disease, let alone that any such disease is related to his industrial



injury. In *Capuano v. Industrial Commission*, this court recognized that the Workers' Compensation Act does not expressly authorize supportive care awards, but instead, such awards are issued voluntarily by workers' compensation carriers "to prevent or reduce the continuing symptoms of an industrial injury after the injury has become stabilized." 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986).

¶12 Supportive care awards are subject to annual review by the workers' compensation carrier to determine if there is "a future continuing need for supportive care benefits." *See id.* Indeed, by petition, supportive care awards may be reviewed and adjusted *at any time*, without formal reopening. *Id.* at 227, 722 P.2d at 395 (emphasis added). *Capuano* concluded that "in the absence of a[n] [A.R.S.] § 23-1061(J) hearing" (i.e., *litigation*), notices of supportive care are not entitled to the same *res judicata* effect as notices of claim status. *Id.*

[u]nprotested notices of claim status are, in contrast [to notices of supportive care], by statute made final adjudications that resolve whether a claimant is entitled to benefits. Formal procedures for reopening constitute the only avenue toward reevaluating a notice of claim status determination.

*Id.*

¶13 *Brown v. Industrial Commission*, presents the exception noted by *Capuano* for supportive care awards that have been

litigated to a final award and, therefore, become res judicata. 199 Ariz. 521, 19 P.3d 1237 (App. 2001). In *Brown*, the claimant's entitlement to supportive care benefits was actually litigated and decided by an ALJ. *Id.* at 522-23, ¶¶ 3-6, 19 P.3d at 1238-39. When the workers' compensation carrier terminated those benefits based on a new IME, the claimant protested. On appeal, *Brown* held:

Respondents did not seek review of . . . [the ALJ's initial] award [of supportive care] and it became final. . . . And, absent some change in Brown's physical condition or in medical procedures, respondents insurer and employer are precluded from relitigating the supportive care issue merely by filing a notice of claim status. Preclusionary effect is given to prior awards not because they are correct but despite the fact they are incorrect.

199 Ariz. at 525, ¶ 17, 19 P.3d at 1241 (citations omitted). Because Cox's entitlement to supportive care has never been litigated and decided, *Brown* does not apply. See also *Capuano*, 150 Ariz. at 227, 722 P.2d at 395 ("payment of medical benefits does not preclude a succeeding determination that the claimant's condition is not causally related to the industrial injury").

¶14 In this case, the parties could have litigated supportive care benefits at the time of the 2007 stipulation but they did not. For this reason, and given the terms of the stipulation and the intrinsic differences between supportive

care awards and other types of workers' compensation benefit awards, the stipulated supportive care award here is not preclusive. Accordingly, the issue of whether any chronic kidney disease is related to the industrial injury must be resolved in future proceedings based on evidentiary proof and by award.

**CONCLUSION**

¶15 The award is set aside.

/S/\_\_\_\_\_  
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/\_\_\_\_\_  
PHILIP HALL, Presiding Judge

/S/\_\_\_\_\_  
PETER B. SWANN, Judge