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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/21/2013
RUTH A. WILLINGHAM,
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BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

US AIRWAYS GROUP, INC.,)
) No. 1 CA-IC 12-0023
)
Petitioner Employer,) DEPARTMENT E
)
NEW HAMPSHIRE INS. CO. C/O)
CHARTIS,) **MEMORANDUM DECISION**
)
Petitioner Insurance Carrier,) Not for Publication -
) (Rule 28, Arizona Rules
) of Civil Appellate Procedure)
v.)
)
THE INDUSTRIAL COMMISSION OF)
ARIZONA,)
)
Respondent,)
)
KRISTINE MILLER,)
)
Respondent Employee,)
)
AMERICA WEST AIRLINES,)
)
Respondent Employer,)
)
NATIONAL UNION FIRE INSURANCE OF)
PITTSBURGH C/O BROADSPIRE,)
)
Respondent Carrier.)
)

Special Action - Industrial Commission
ICA CLAIM NO. 20101-120259; 99007-405119
CARRIER CLAIM NO. 710-683138; 9000206754
Karen Gianas, Administrative Law Judge

AWARD SET ASIDE

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H A L L, Judge

¶1 In this statutory special action, petitioner employer US Airways Group, Inc. (US Airways) contends the administrative law judge (ALJ) erred by granting respondent claimant Kristine Miller's petition to reopen her 2010 workers' compensation claim. Because we find that no objective medical evidence supports the reopening of the claim, as required pursuant to Arizona Revised Statutes (A.R.S.) section 23-1061(H) (Supp. 2012), we set aside the ALJ's order to reopen and remand for proceedings consistent with this decision.

FACTUAL AND PROECURAL BACKGROUND

¶2 "On review of an Industrial Commission award, we must view the evidence in the light most favorable to sustaining the Industrial Commission's findings and award." *Roberts v. Indus. Comm'n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). The claimant began working for America West Airlines, US Airways'

predecessor, as a flight attendant in 1988. In 1998, an aircraft in which she was working hit severe turbulence and she sustained a burst fracture of her spine at L3-4 and a fracture dislocation of her right ankle. The claimant filed a workers' compensation claim, which was accepted. Her back fracture was treated by orthopedic spine surgeon Michael Winer, M.D., who performed an "instrumented posterior fusion" from L2 through L4. The claimant responded "very well" to the surgery and subsequent physical therapy and was "released to regular duty without restriction" on September 28, 1999. The claimant was provided a 13% impairment at the time of closure.

¶3 The claimant sought continued care from Dr. Winer in December 2000 after she "was reinjured when she was bounced around in turbulence and slid to the floor." After that incident, the claimant reported increased back, buttocks and leg pain. She began to "occasionally [use] a cane," but continued to work as a flight attendant.

¶4 In April 2003, the claimant sustained another work-related injury when a passenger suffered a massive cardiac arrest and died on the plane and she had to move his body. When she was examined by Dr. Winer on May 29, 2003, the claimant had limited mobility with increased pain.

¶5 On October 15, 2003, the claimant sustained another injury to her back after being "slammed against a counter in the

galley" during extreme air turbulence. She reported increased back pain and numbness in her right leg to Dr. Winer. She continued to work as a flight attendant, aided by prescription medication to help manage her pain.

¶6 In January 2004, the claimant filed a petition to reopen her 1998 claim. Her petition was denied.

¶7 Over the ensuing years, the claimant continued to receive treatment by Dr. Winer under successive supportive care awards. She demonstrated limited mobility and increased pain. She used a cane "when away from work" and used prescription medication to reduce her pain.

¶8 On April 18, 2010, the claimant experienced a "pop" and "pinch" in her back while lifting her luggage from the conveyor belt at the security checkpoint and was unable to stand upright. The next day, she sought treatment at the US Airways Medical Clinic and was diagnosed with a sprain in the thoraco/lumbar/sacral region. She resumed work after seeing her chiropractor and a massage therapist.

¶9 The claimant filed a petition for benefits, which was accepted. On June 23, 2010, the petitioner carrier sent the claimant a letter inquiring whether she received any additional treatment for her April 2010 industrial injury and requesting that she submit any "outstanding bills in connection with [her] medical treatment." The letter further notified the claimant

that her claim would be closed if she did not notify the carrier within 20 days that she had not fully recovered from her injury. The claimant did not respond to the carrier's letter and the carrier closed her claim effective April 28, 2010 for "temporary compensation and active medical treatment terminated on 4/28/2010" with no permanent disability.

¶10 In October 2010, the claimant experienced worsening pain while working the food carts during a flight. She reported severe back pain and bilateral radiating leg pain that was aggravated by moderate to strenuous activity and only alleviated when she lay down.

¶11 On January 28, 2011, the claimant filed a petition to reopen the April 2010 claim. On March 10, 2011, the claimant filed a petition to reopen the 1998 claim. Both petitions to reopen were denied by the respective carriers and the claimant protested the denials. The matters were consolidated for hearing.

¶12 The ALJ received testimony and reports from three doctors. The claimant also testified.

¶13 Terry E. McLean, M.D., a board-certified orthopedic spine surgeon, performed two independent medical examinations (IME) on the claimant, one in September 2004 and the other in June 2011. In his September 2004 IME, Dr. McLean noted the claimant did "not exhibit any pain behavior" and experienced no

difficulty moving "from a sitting to a standing position." Dr. McLean observed that the claimant "ambulate[d] with a trace limp" and had "difficulty with heel and toe walking on the right side." Dr. McClean also noted that the claimant had mild lumbosacral tenderness and complained of discomfort "at the extremes of flexion and extension." He also documented that the claimant had decreased sensation below her right knee and evidence of "give-way weakness" below her right knee. Ultimately, Dr. McLean opined that "there doesn't appear to be anything new, additional or previously undiscovered that would warrant reopening of her [1998] case." In his June 2011 IME, Dr. McLean again observed that the claimant ambulates with a trace limp and has some difficulty with heel and toe walking on the right side. He also noted that she has lumbosacral tenderness. Dr. McLean concluded that the claimant sustained a "simple thoracolumbar strain/sprain" in April 2010, "which has resolved." He again concluded that there was no new, additional, or previously undiscovered condition that would warrant reopening her 1998 or 2010 claims. In an addendum to his IME report, dated September 27, 2011, Dr. McLean stated that the claimant had been under the effects of an epidural during her June 8, 2011 examination and that her subjective pain level is higher than before the April 2010 episode. He concluded that

the 2010 episode "did result in further aggravation of a preexisting chronic condition."

¶14 Dr. Winer conducted an examination of claimant on February 8, 2011. He noted that the claimant has decreased sensation in her lower right leg and thoracic tenderness. Dr. Winer specifically noted that the claimant demonstrated "similar" numbness and weakness "on the right side" when he examined her in April 2003. Dr. Winer ordered that the claimant undergo x-ray and MRI testing, and, after reviewing the diagnostic imaging, Dr. Winer opined that the claimant is unable to resume work as a flight attendant "due to the injury of December 1998, and the aggravation of this injury by recent episodes." Dr. Winer concluded the claimant's "industrial injury should either be reopened for the 12/21/98 injury based on the significant changes seen at L4-5 and L5-S1 on her plain x-rays and MRIs when compared to those done at the time of [the 1998] closure, or alternatively, her case should be reopened due to cumulative injury as a result of multiple industrial injuries including at least two in 2003 and two in 2010."

¶15 James H. Maxwell, M.D., a board-certified orthopaedic spine surgeon, conducted an IME of claimant on March 10, 2011. Dr. Maxwell concluded that the claimant sustained a thoracolumbar strain/sprain in April 2010, which has since resolved. He further opined that no new, additional, or

previously undiscovered condition warranted reopening her April 2010 claim.

¶16 On July 14, 2011, the claimant testified she has had a series of epidural injections to manage her pain since the April 2010 injury. The epidurals provide temporary relief, but eventually wear off and the pain returns. She also testified that she has developed some pain in her right foot since the April 2010 injury, a condition she did not experience before that date.

¶17 On November 9, 2011, Dr. Winer testified consistently with the conclusions in his examination report. Additionally, Dr. Winer opined that the claimant's need for active treatment is related, "at least in part," to the April 18, 2010 industrial injury. When asked to compare the claimant's diagnostic imaging from 2005 and 2011, Dr. Winer acknowledged that there is "a lot of similarity between the films," was unable to identify any difference between the imaging studies, and stated "[w]e treat symptoms and patients, not necessarily x-rays."

¶18 On November 16, 2011, Dr. Maxwell testified regarding his March 10, 2011 examination of the claimant and his review of diagnostic imaging of claimant from June 2005 and March 2011. Dr. Maxwell testified that a comparison of the diagnostic imaging revealed no objective changes. In the absence of any objective change, Dr. Maxwell opined that the claimant's

"complaints" relate to her 1998 industrial injury, not the 2010 industrial injury.

¶19 In his November 29, 2011 testimony, Dr. McLean testified regarding his physical examinations of the claimant in September 2004 and June 2011. Dr. McLean's testimony tracked his IME findings, noting that the claimant ambulated with a trace limp, experienced difficulty with heel and toe walking, and experienced lumbosacral tenderness. Dr. McLean testified that the claimant presented "about the same" clinically and subjectively in June 2011 as September 2004. Dr. McLean also noted that he amended his IME report after reviewing the claimant's deposition testimony and concluded that "the 2010 episode had some influence or subjectively increased her overall pain complaints that she had prior to the 2010 episode." "[G]iven the chronicity of her pain complaints," Dr. Mclean opined that "there were relative indications for surgery." On cross-examination, Dr. McLean testified that he did not see, "from an objective standpoint," any permanent aggravation and further stated that the only basis for finding permanent aggravation is subjective, predicated on "the believability of the Claimant." He further reiterated on cross-examination that he did not "find any objective change in the clinical presentation."

¶20 On February 15, 2012, the ALJ issued a decision upon hearing and findings and award denying the claimant's petition to reopen the 1998 claim and granting the petition to reopen the 2010 claim. The ALJ found, in pertinent part:

6. In 2010, [the claimant] was going through security and when she lifted her bag onto the conveyor belt she experienced back pain so severe she "couldn't stand up straight." She "laid on the floor until one of my supervisors drove me home." In comparing the two accidents [the 1998 and April 2010 accidents] she stated, "my back has always hurt since 1998 and then when I hurt it in April of 2010 it just wouldn't bounce back to where I could control it anymore."

7. Dr. Winer first saw the [claimant] on January 5, 1999. . . . Over the years the [claimant] has had "flare-ups" after which she was "able to quickly return to work." . . . In his opinion, the April 2010 accident "aggravated her condition enough that she has not been able to return to work since then."

8. Dr. Maxwell saw the [claimant] on March 10, 2011. . . . The 2010 accident caused a thoracolumbar sprain that remains stationary with no permanent impairment. In his opinion the applicant has "clinical overlay."

9. Dr. McLean saw the [claimant] in 2004 and 2011. In 2011 the [claimant] had "back pain and right greater than left leg pain." Following review of the [claimant's] testimony and the most recent imaging studies, Dr. McLean opined the 2010 accident had "some influence or subjectively increased her overall pain complaints that she had prior to the 2010 episode."

10. I find the [claimant] credible and resolve any conflicts in the evidence in her favor. I accept Dr. Winer's opinions. I adopt the [claimant's] memorandum. The petition in the 1998 claim is denied. The 2010 claim is reopened.

¶21 US Airways filed a request for review, arguing the claimant had failed to present any objective physical findings

that would support a reopening of the 2010 claim, and the ALJ entered a decision upon review summarily affirming the previous decision. US Airways filed a timely petition for special action from the award and decision upon review. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10.

DISCUSSION

¶22 US Airways argues the ALJ's award is not supported by objective physical findings as required by A.R.S. § 23-1061(H). Specifically, US Airways contends the only evidence supporting reopening is the claimant's increased subjective pain, which is legally insufficient.¹

¶23 Although we defer to factual findings of an ALJ, including determinations of witness credibility, the interpretation of a statute is a question of law subject to our

¹ In its opening brief, US Airways argues, for the first time, that the claimant is barred by the doctrine of *res judicata* from attempting to reopen the 2010 claim and prove she sustained a permanent disability. Because US Airways failed to raise this argument to the ALJ, it is precluded from asserting the claim before this court, see *Releford v. Indus. Comm'n*, 120 Ariz. 75, 78, 584 P.2d 56, 59 (App. 1978), and we therefore decline to consider the argument. Even if US Airways had raised its *res judicata* argument before the ALJ, it would have no application here. See *Stainless Specialty Mfg. v. Indus. Comm'n*, 144 Ariz. 12, 17, 695 P.2d 261, 266 (1985) (recognizing the limited application of *res judicata* principles in the workers' compensation setting, including reopening under A.R.S. § 23-1061(H)).

de novo review. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003); *Schwarz v. City of Glendale*, 190 Ariz. 508, 510, 950 P.2d 167, 169 (App. 1997). Conflicts in medical evidence are resolved by the ALJ, *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1366 (1988), and we uphold an ALJ's resolution of conflicting medical testimony if the evidence reasonably supports it. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 121, 776 P.2d 797, 799 (1989).

¶24 The workers' compensation law is liberally construed so as to effectuate its remedial purpose. *Stainless Specialty*, 144 Ariz. at 16, 695 P.2d at 265. But "[a] liberal construction is not synonymous with a generous interpretation." *Nicholson v. Indus. Comm'n*, 76 Ariz. 105, 109, 259 P.2d 547, 549 (1953). We may "not impose burdens and liabilities which are not within the terms or spirit" of the Workers' Compensation Act. *Bergstresser v. Indus. Comm'n*, 13 Ariz.App. 91, 93, 474 P.2d 450, 452 (1970).

¶25 "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 v. Indus. Comm'n*, 214 Ariz. 489, 491, 154 P.3d 391, 393 (App. 2007). The claimant must also demonstrate "a causal relationship between the new condition and a prior industrial injury." *Id.* In 1999, A.R.S. § 23-1061(H) was modified "to

preclude reopening a claim based on an claimant's 'increased subjective pain if the pain is not accompanied by a change in objective physical findings.'" *Id.* (quoting 1999 Ariz. Sess. Laws, ch. 331, § 9).

¶26 In cases involving a first petition to reopen a closed claim, the relevant comparison points for showing a changed condition are the dates of the claim's closure and the petition's filing. *Cornelson v. Indus. Comm'n*, 199 Ariz. 269, 271, ¶ 14, 17 P.3d 114, 116 (App. 2001). When the causal relationship between the changed condition and the industrial injury is not apparent to a lay person, that showing must be established by expert medical testimony. *Stainless Specialty*, 144 Ariz. at 19, 695 P.2d at 268. A medical opinion must be based on findings of medical fact in order to support an award. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz.App. 432, 434, 513 P.2d 970, 972 (1973). These findings come from the claimant's history, medical records, diagnostic tests and examinations. *Id.*

¶27 The narrow issue before us is whether the claimant demonstrated through objective physical findings that, since April 28, 2010 (the effective date her 2010 claim closed), she has developed a new, additional, or previously undiscovered condition causally related to her April 2010 industrial injury. We conclude she did not.

¶28 The claimant, both personally and through the testimony and reports of her attending physicians, demonstrated that she has experienced increased pain since her April 2010 injury that has at times abated with epidural treatment, but ultimately persists. No objective physical findings corroborating the reports of increased subjective pain were presented. Drs. McLean and Maxwell opined that the claimant has not experienced a new, additional or previously undiscovered condition that would justify reopening the April 2010 claim. Dr. Winer, whose opinions the ALJ expressly accepted, testified that reopening of the 1998 and 2010 claims was warranted, but only identified objective changes that occurred by comparing diagnostic imaging from 2003 to those taken in 2011. He was not able to identify any difference in the diagnostic images from 2005 (apparently the most recent diagnostic images taken of claimant prior to 2011) compared to 2011. When pressed to identify any other type of objective physical change in the claimant's condition since the closure of the April 2010 claim, Dr. Winer testified that he treats patients and symptoms, not tests. Moreover, although Dr. Winer characterized the April 2010 injury "as the straw that broke the camel's back" (acknowledging that "there were a lot of straws"), that testimony does not address the relevant issue, namely, whether any new, additional or previously undiscovered condition *has*

arisen since the closure of the April 2010 injury, which was accepted for benefits and closed uncontested. The claimant's testimony of her increased subjective pain and Dr. Winer's opinion that reopening is warranted, untied to any objective physical findings regarding a change in the claimant's condition since April 28, 2010, does not meet the statutory standard. Therefore, the ALJ erred as a matter of law by granting the petition to reopen because the evidence presented to support the reopening is legally insufficient.²

² In reaching this conclusion, we acknowledge "the remedial purpose of the compensation law" and, as previously mentioned, *supra* ¶ 24, recognize "that its provisions should be construed liberally so as to effectuate the purposes of the act." *Stainless Specialty*, 144 Ariz. at 16, 695 P.2d at 265. Nonetheless, we are constrained by the 1999 amendment to A.R.S. § 23-1061(H) that expressly and unambiguously bars a reopening "because of increased subjective pain if the pain is not accompanied by a change in objective physical findings."

CONCLUSION

¶29 For the foregoing reasons, we set aside the award and remand for proceedings consistent with this decision. We also deny the claimant's request for attorneys' fees on the basis that US Airways' request for special action review is frivolous.

 /s/
PHILIP HALL, Judge

CONCURRING:

 /s/
MARGARET H. DOWNIE, Presiding Judge

 /s/
MAURICE PORTLEY, Judge