DIVISION ONE
FILED: 5/21/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CIGNA CORPORATION, Petitioner Employer, ESIS/ACE USA (AZ), Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, ANDEÉ OTT, Respondent Employee,	1 CA-IC 12-0058 Department E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 93055-284277

Carrier Claim No. C780C9447995811

Karen Gianas, Administrative Law Judge

AWARD SET ASIDE

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Andeé Ott, *In Propia Persona* Phoenix
Respondent Employee

N O R R I S, Judge

¶1 In this special action review of an Industrial Commission of Arizona award and decision upon review, Cigna Corporation, as the petitioner employer, and ESIS/ACE USA (AZ), as the petitioner carrier (collectively "Carrier"), argue the administrative law judge ("ALJ") should not have awarded Andeé Ott, respondent employee, supportive care because the ALJ did not have jurisdiction to do so. The issue raised by the Carrier is one of law, and thus is subject to our de novo review. *Young v. Indus. Comm'n of Ariz.*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). As we explain, we agree with the Carrier.

¶2 Ott sustained an industrial injury in 1993. The Carrier eventually closed her claim with an unscheduled permanent partial impairment, and in 2002, authorized supportive care. By a notice of claim status mailed May 5, 2011 ("May NCS"), the Carrier closed the supportive care relying on a medical report by Zoran Maric, M.D., who, after conducting an independent medical examination of Ott, concluded she did not have "a clinical condition that would require ongoing supportive care." Although the May NCS advised Ott that if she disagreed with the Carrier's action, she could request a hearing if she did so within 90 days after its mailing date, Ott did not do so.

Instead, Ott requested a hearing two days after expiration of the 90-day period.

¶3 Over the Carrier's objection, the ALJ treated Ott's request for a hearing as a request for supportive care under Arizona Revised Statute ("A.R.S.") section 23-1061(J) (Supp. 2012), a statute that authorizes the Industrial Commission to investigate and review any claim "in which it appears to the commission that the claimant has not been granted the benefits to which such claimant is entitled." After considering testimony from Ott, her attending physician, Allan L. Rowley, M.D., and Dr. Maric, the ALJ found Ott was entitled to supportive care and affirmed that decision upon review.

¶4 The ALJ was not entitled to treat Ott's request for a hearing as a request for supportive care under A.R.S. § 23-1061(J). The Arizona workers' compensation system is designed to allow carriers to make unilateral benefit determinations, which are subject to a claimant's right to protest and request a hearing within 90 days. A.R.S. § 23-1061(F) (insurance carrier shall "promptly report to the commission and to the employee by mail . . . any denial of a claim, any change in the amount of compensation and the termination thereof"); A.R.S. § 23-947(A) (2012) (establishing 90-day deadline); A.R.S. § 23-901(5) (2012) (compensation "means the compensation and benefits provided by [workers' compensation] chapter"). If a party does not timely

request a hearing within the allotted time, the notice of claim status becomes "final and res judicata to all parties." A.R.S. § 23-947(B); *see also Church of Jesus Christ of Latter Day Saints v. Indus. Comm'n of Ariz.*, 150 Ariz. 495, 498, 724 P.2d 581, 584 (App. 1986).[1]

¶5 When a notice of claim status becomes final, it is treated the same way as any other award of the Industrial Commission. *Maricopa Cnty. v. Indus. Comm'n of Ariz.*, 134 Ariz. 159, 162, 654 P.2d 307, 310 (App. 1982); *Phoenix Cotton Pickery v. Indus. Comm'n*, 120 Ariz. 137, 138, 584 P.2d 601, 602 (App. 1978) ("A.R.S. § 23-947 gives the same final effect to unprotested Notices of Claim Status as is given to awards of the Industrial Commission which becomes final."); *see also Special Fund Div./No Insurance Section v. Indus. Comm'n of Ariz.*, 226 Ariz. 498, 500-01, ¶¶ 15-16, 250 P.3d 564, 566-67 (App. 2011) (unchallenged final notice of claim status is "legally analogous" to post-hearing ALJ award). Our supreme court has held a party may not employ A.R.S. § 23-1061(J) to collaterally "attack the findings, orders, or awards of the Industrial Commission." *Massie v. Indus. Comm'n*, 113 Ariz. 101, 104, 546 P.2d 1132, 1135 (1976). Accordingly, a party may not employ

[1]Res judicata, also known as claim preclusion, bars relitigation of a claim actually decided or one that could have been decided. *Western Cable v. Indus. Comm'n of Ariz.*, 144 Ariz. 514, 518, 698 P.2d 759, 763 (App. 1985).

A.R.S. § 23-1061(J) to collaterally attack a notice of claim status, which has become final and is entitled to be treated the same as any other final Industrial Commission award.

¶6 Here, Ott failed to request a hearing within the requisite 90 days. If Ott had timely requested a hearing, she would have been entitled to contest the Carrier's termination of supportive care. But, because she did not do so, the May NCS became final and the ALJ did not have jurisdiction to consider the "matter[] determined in the notice," *Phoenix Cotton Pickery*, 120 Ariz. at 139, 584 P.2d at 603, which in this case was whether she was entitled to supportive care based on her physical condition as of May 5, 2011. The ALJ's decision to treat Ott's untimely request for a hearing as a request for a hearing under A.R.S. § 23-1061(J), thus allowed Ott to collaterally attack the May NCS. Under the foregoing authorities, this was impermissible and Ott was not entitled to relief under A.R.S. § 23-1061(J).

¶7 Our workers' compensation statutes attempt to balance finality with remedial principles. Thus, a claimant may reopen a claim to secure additional benefits if he or she can show "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 Specialty Mfg. Co. v. Indus. Comm'n of Ariz.*, 144

Ariz. 12, 18-19, 695 P.2d 261, 267-68 (1985). Thus, as relevant, A.R.S. § 23-1061(H) states:

> On a claim that has previously been accepted, an employee may reopen the claim to secure an increase or rearrangement of compensation or additional benefits by filing with the commission a petition requesting a reopening of the employee's claim upon the basis of a new, additional or previously undiscovered temporary or permanent condition.

¶8 Accordingly, if Ott had been able to prove she had experienced a change in her physical condition that warranted supportive care after May 5, 2011, her request that the ALJ order the Carrier to continue the supportive care would not be barred. *See Lovitch v. Indus. Comm'n of Ariz.*, 202 Ariz. 102, 105-06, ¶ 17, 41 P.3d 640, 643-44 (App. 2002) (claimant has burden to prove reopening warranted). Although Dr. Rowley testified Ott's supportive care should be continued, he did not testify her physical condition had changed after the May NCS became final. Indeed, in a June 10, 2011 letter he wrote to the Carrier, which Ott introduced into evidence, Dr. Rowley stated Ott's "symptoms have not changed and I see no reason to discontinue her use of medications."

¶9 Therefore, for the foregoing reasons, we agree with the Carrier the ALJ did not have jurisdiction to grant Ott supportive care. We therefore set aside the award.[2]

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge

[2]In her answering brief, Ott argues the Industrial Commission misinformed her that her request for a hearing would be considered timely as long as she mailed it and it was postmarked by the "deadline date." Ott did not raise this argument before the ALJ and it is not, therefore, properly before us. *Magma Copper Co. v. Indus. Comm'n of Ariz.*, 139 Ariz. 38, 49, 676 P.2d 1096, 1107 (1983). Ott also argues her request for a hearing was timely, relying on what appears to be a rule promulgated by the United States Supreme Court. That rule has no applicability to workers' compensation proceedings.