IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ALEJANDRO CHAVEZ, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

BLUE STAR RESORTS AND GOLF, LLC, *Respondent Employer*,

FEDERAL INSURANCE CO/CHUBB SERVICES, *Respondent Carrier*.

No. 1 CA-IC 15-0026
FILED 5-19-2016

Special Action - Industrial Commission

ICA Claim No. 20110-610254
Carrier Claim No. 022911000630
WC2011357454

Deborah A. Nye, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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By Erica R. González-Meléndez
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Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
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MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Randall M. Howe joined.

T H U M M A, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award by an administrative law judge (ALJ), finding Claimant Alejandro Chavez' back condition was not a compensable permanent impairment. Chavez alleges the ALJ erred by failing to find that claim preclusion prevented respondent carrier Federal Insurance Company (Federal) from litigating the compensability of his back condition. Because claim preclusion does not apply, and because the record supports the ALJ's decision, the award is affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Chavez worked as a landscaper for Blue Star Resorts and Golf, LLC. In February 2011, while at work, Chavez fell and injured his left knee. Chavez filed a timely workers' compensation claim, which was accepted for benefits without any hearing or award, initially as a "no time lost" claim but soon changed to a "time lost" claim. Chavez received medical treatment for his knee for an extended period.

¶3 When Chavez complained of back pain months after the fall, back treatment was provided under the open workers' compensation claim. The back treatment was provided without any hearing or award.

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[1] The evidence is considered in the light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n,* 202 Ariz. 102, 105 ¶ 16 (App. 2002).

¶4 In January 2014, Chavez' claim was closed with an unscheduled permanent partial impairment based on a medical report by his treating physician Dr. Sanjay R. Patel. Chavez timely filed a protest and requested an evidentiary hearing. At the hearing, the ALJ heard testimony from Chavez, Dr. Patel and independent medical examiners Drs. Terry McLean and James Maxwell. The ALJ also received as exhibits an April 2011 independent medical examination (IME) from Dr. Alan Rothbart and a February 2012 IME from Dr. Gerald Moczynski. The parties offered argument, including whether providing back treatment precluded Federal from later claiming back issues were not causally related to the industrial injury, with the ALJ observing "we know that the law is that they can pay for things, and then they can later say [']but it's not causally related.'" Federal avowed it was not seeking reimbursement for back pain treatment expenses.

¶5 After considering the conflicting evidence, the ALJ found Dr. Maxwell's opinion that Chavez' lower back pain was not related to his work injury more credible and adopted it. The ALJ rejected Chavez' assertion that his condition was not stationary and resulted in permanent impairment, and entered an award for temporary disability benefits. Chavez timely requested administrative review, arguing "claim preclusion should have prevented the issue of compensability of the low back injury from being litigated three years after the initial injury" and the ALJ had incorrectly weighed the competing medical evidence. After considering the request and response, the ALJ affirmed the award.

¶6 This court has jurisdiction over Chavez' timely request for review pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2), 23-951(A) (2016),[2] and Arizona Rules of Procedure for Special Actions 10.

DISCUSSION

¶7 Resolution of this case involves (1) whether claim preclusion prevents Federal from litigating the compensability of Chavez' back issues and (2) whether the ALJ incorrectly weighed the conflicting medical evidence. 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 (App. 2003). Chavez had the burden of proving all elements of a

[2] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

compensable claim, including causation. *See Lawler v. Indus. Comm'n,* 24 Ariz. App. 282, 284 (1975). With exceptions not applicable here, "the employer is not liable for conditions that do not result from the industrial injury." *Beasley v. Indus. Comm'n,* 175 Ariz. 521, 522 (App. 1993) (citing authority).

¶8 "'Claim preclusion' occurs when a party has brought an action and a final, valid judgment is entered after adjudication or default. The party is foreclosed from further litigation on the claim only when the policies justifying preclusion are furthered." *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425 (App. 1993) (citation omitted). An ALJ's award may provide the basis for claim preclusion, meaning issues that were decided, or could have been decided, in the award cannot later be relitigated. *See id.* at 428; *Western Cable v. Indus. Comm'n*, 144 Ariz. 514, 518 (App. 1985). As applied, however, there was no such ALJ award that precluded entry of the award Chavez challenges here. As noted above, the back treatment was provided without any hearing or award.

¶9 In support of his claim preclusion argument, Chavez points to his January 2012 request for change of doctor, which states his treating physician "Dr. Ellis is recommending spinal Evaluation/Treatment therefore the applicant is requesting that his care be transferred from Scott Ellis, MD to Dr. McLean." By statute, an employee may not change doctors "without the written authorization of the insurance carrier, the commission or the attending physician." A.R.S. § 23-1071(B). Federal did not object to this January 2012 request, meaning the change became effective. *See* A.R.S. §§ 23-941, -947. But Chavez has not shown how a carrier's failure to object to an administrative request to change doctors results in claim preclusion that would establish his back pain was causally related to his industrial injury, an issue "requir[ing] medical evidence." *Noble v. Indus. Comm'n,* 140 Ariz. 571, 574 (App. 1984). Moreover, Chavez does not account for his subsequent request for change in doctors, filed October 2012 and to which Federal did not object, stating that he was "no longer needing orthopedic care however pain management has been recommended." Accordingly, Chavez has not shown that claim preclusion applies to the carrier's failure to object to his request for change of doctor. *See Circle K Corp.*, 179 Ariz. at 426-28.

¶10 Chavez also cites to *Noble* and *Aldrich v. Industrial Commission,* 176 Ariz. 301, 306 (App. 1993) as support for his claim preclusion argument. *Noble*, however, *rejected* claim preclusion, finding the initial acceptance of a claim "did not decide the issue of whether [a cerebral] hemorrhage was causally related to the industrial accident, since claimant did not claim for

the hemorrhage and since that issue required medical evidence." 140 Ariz. at 574; *see also id.* at 574 n.2 (noting ICA "is without jurisdiction to consider a particular injury in the absence of a formal claim for that injury") (citing *Van Sickle v. Indus. Comm'n*, 121 Ariz. 115 (App. 1978)). *Aldrich* involved a "no time lost" claim governed by ICA procedures not applicable here. 176 Ariz. at 306, and *Aldrich* expressly limited its preclusion analysis to such claims. 176 Ariz. at 306 ("[W]e conclude that preclusion must apply to informal acceptances of no time loss claims."). And Chavez provides no persuasive argument why *Aldrich* should apply beyond the "no time lost" context. Thus, *Aldrich* does not support Chavez' preclusion argument.

¶11 Chavez clearly received treatment for back pain months after the industrial injury under his open workers' compensation claim. It is equally clear, however, that "payment of medical benefits does not preclude a subsequent determination that a certain injury is not causally related to the industrial injury." *Noble*, 140 Ariz. 573; *see also Capuano v. Indus. Comm'n,* 150 Ariz. 224, 227 (App. 1986) (similar; citing cases); *Whitley v. Indus. Comm'n,* 15 Ariz. App. 476, 478 (1971) (similar). More specifically, where compensability is accepted for one condition and treatment is provided for another allegedly related condition, the carrier is not precluded from subsequently challenging liability for the later condition. *See, e.g., Kentucky Fried Chicken v. Indus. Comm'n*, 141 Ariz. 561, 564-65 (App. 1984) (acceptance of leg injury claim did not preclude denial of liability for aggravation of preexisting hip condition). Once Chavez protested the closure with a permanent impairment, all issues covered by the notice of closure were open for consideration at the hearing. *See, e.g., Parkway Mfc. v. Indus. Comm'n*, 128 Ariz. 448, 452 (App. 1981) (noting timely hearing request opens all issues addressed by closing for consideration at an ICA hearing). Because causation for Chavez' back complaints had never been litigated, and there had never been a prior protest where that issue (which turns on medical evidence) could have been litigated, claim preclusion does not apply.

¶12 Turning to the evidence at the hearing, Chavez relies on the IMEs by Drs. Rothbart and Moczynski. As a factual matter, those IMEs do not establish that Chavez' back pain was attributed to his industrial injury. Dr. Rothbart's August 2011 IME noted Chavez' subjective complaints of back pain and recommended an MRI. Dr. Moczynski's February 2012 IME noted similar complaints, but did not opine on a possible herniated disc because he was not provided the MRI, apparently conducted after Dr. Rothbart's August 2011 report. Dr. Moczynski's report noted he reviewed a December 2011 report from another professional stating Chavez had "lumbar degenerative disk disease and lumbar facet arthropathy and

radicular left leg pain." There is no indication this December 2011 report contained the necessary causal link between the industrial injury and Chavez' complaints of back pain.

¶13 Focusing on the testimony received at the hearing, the ALJ adopted "the opinion of Dr. Maxwell as more probably correct," concluding that Chavez' "lower back was not injured in or aggravated by his accidental fall in February, 2011**."** Dr. Maxwell, who specializes in spinal disorders, testified he took a history of Chavez through an interpreter, performed a physical examination and reviewed his related medical records. Dr. Maxwell testified that Chavez has multi-level degenerative disc disease that was not caused by the industrial injury. While he acknowledged that the industrial injury could have temporarily aggravated this disease, he opined that Chavez' ongoing complaints are more likely related to his cervical myelopathy, the result of a preexisting injury unrelated to the February 2011 industrial injury. Although Chavez correctly notes there was contrary medical evidence, he has not shown the ALJ abused her discretion by adopting this conclusion.

CONCLUSION

¶14 Because Chavez has shown no error, the award is affirmed.

Ruth A. Willingham · Clerk of the Court
FILED: ama