IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MILES R. DRUEBERT, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

ALLIED WASTE REFUSE/TRI-STATE, *Respondent Employer*,

INSURANCE CO OF THE STATE OF PA
c/o AIG CLAIMS SVC, *Respondent Carrier*.

No. 1 CA-IC 16-0030
FILED 4-6-2017

Special Action - Industrial Commission

ICA Claim No. 20003-480113
Carrier Claim No. 070-115288
C. Andrew Campbell, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

Messer Law Group, LLC, Mesa
By Steven J. Messer
Counsel for Petitioner Employee

Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent

Jardine, Baker, Hickman & Houston, PLLC, Phoenix
By Stephen C. Baker
Counsel for Respondents Employer and Carrier

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Kenton D. Jones joined.

G E M M I L L, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review issued in 2016 denying petitioner employee Miles R. Druebert supportive medical maintenance benefits. The dispositive issue is whether the administrative law judge ("ALJ") erred in finding a change in condition sufficient to allow relitigation of Druebert's 2006 supportive care award. Because the evidence did not establish the required change in physical condition or medical procedures to overcome finality of the 2006 award, we set aside the ALJ's award issued in 2016.

PROCEDURAL AND FACTUAL HISTORY

¶2 On November 2, 2000, while working as a truck driver for respondent employer, Allied Waste Refuse/Tri-State, Druebert sustained a compensable low back injury. He underwent surgery, and his condition eventually became stationary with a 10% unscheduled permanent partial impairment, a 74.51% loss of earning capacity, and disability benefits of $983.50 per month. Druebert was also provided supportive medical maintenance benefits.

¶3 In December 2004, Druebert petitioned to reopen his claim for additional medical treatment. Respondent carrier Insurance Company of the State of Pennsylvania c/o AIG Claim Services Inc. ("AIG") denied the petition for benefits, and Druebert timely protested. The ALJ heard testimony from Druebert, his treating physician, Mark Kabins, M.D., and independent medical examiner, James Maxwell, M.D. At that hearing, Dr. Kabins testified as follows:

Q. [By Druebert's counsel] What would you feel would be appropriate now as far as supportive care goes?

A. [Dr. Kabins] The supportive care should go monthly medications. He probably should see a physician six times a year, every other month. He needs to be regulated very closely due to his numerous co-morbidities.[1]

Q. What type of medications would he be on?

* * * *

A. Pain control could include medications such as Lortab or Soma, the painkillers, spasm reliever. I would prefer to minimize those medications and maximize medications such as neuroleptics. Neuroleptics are such as Neurontin or Topamax as well as medications such as anti-depressants. Not for depression but for helping the nerve pain that he may have.

Q. Now, are those the type of medications that the FDA requires that you only write a 30-day script for?

A. Not that I'm aware of. The only ones that require a 30-day script are the heavy duty narcotics, such as Percocet or Oxycontin. Lortab, Soma, neuroleptics and anti-depressants can be more than 30 days.

Q. And if it's found that these weaker medications are insufficient –

A. Well if it turns out that he has to have heavy duty narcotics and require every 30-days, then he's going to need to see a physician every 30 days.

* * * *

Q. [By AIG's counsel] In regard to the supportive care, would you agree that should be renewed annually to see if it needs to be increased, decreased, or otherwise modified?

A. I have no issue with it being reviewed as often – every year would be fine. I'm not sure that it has to be reviewed every year because I would tell you that he's probably in – as long

[1] These included obesity and diabetes.

> as we know we're not going to surgery, he's probably in a fairly status quo state….

After considering the evidence, the ALJ entered an award denying the petition to reopen but increasing Druebert's supportive care award as recommended by Dr. Kabins. This court affirmed the ALJ's award in an unpublished memorandum decision.

¶4 In February 2015, Druebert filed an A.R.S. §23-1061(J)[2] petition with the ICA alleging AIG refused to "[p]ay outstanding medical bills and prescriptions." The ICA set the matter for hearing, and the ALJ heard testimony from Druebert, his current treating physician, Benjamin Venger, M.D., and two independent medical examiners, James Maxwell, M.D., and Stephen Borowsky, M.D.

¶5 The ALJ entered an award denying supportive medical maintenance benefits. Druebert requested administrative review, and the ALJ supplemented and affirmed the award. Druebert next brought this statutory special action. This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (2012), and Arizona Rules of Procedure for Special Actions 10 (2009).[3]

DISCUSSION

¶6 AIG asserted that there were sufficient changed conditions, consisting of Druebert's alcohol and medical marijuana use and early narcotic prescription refills, to allow relitigation of the 2006 supportive care award. Druebert responded that these facts did not establish the required change in physical condition, and issue preclusion prevented relitigation. The ALJ agreed with AIG, which Druebert claims is error. In reviewing findings and awards of the ICA, 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 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002). We review de novo whether issue preclusion applies in this case. *See Bayless v. Indus. Comm'n*, 179 Ariz. 434, 439 (App. 1993) ("a deferential standard of review applies to resolutions of disputed facts when

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[2] 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.

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

supported by reasonable evidence; an independent judgment standard of review applies to the ultimate conclusion that these facts do or do not trigger preclusion").

¶7 In ICA award has res judicata effect by application of principles of issue and claim preclusion. *See Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 428 (App. 1993). Issue preclusion bars relitigation of an issue of fact that is actually litigated and is essential to a final judgment. *Red Bluff Mines, Inc. v. Indus. Comm'n*, 144 Ariz. 199, 204-05 (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 (App. 1985).

¶8 This court discussed the finality of supportive care awards in *Capuano v. Industrial Commission*, 150 Ariz. 224 (App. 1986). Recognizing the Arizona Workers' Compensation Act does not specifically authorize supportive care awards, *Capuano* noted such awards are usually issued voluntarily by workers' compensation carriers "to prevent or reduce the continuing symptoms of an industrial injury after the injury has become stabilized." *Id*. at 226. Supportive care awards created by notices of supportive care are subject to an annual review by the workers' compensation carrier to determine if there is "a future continuing need for supportive care benefits." *Id*. Such awards may be reviewed and adjusted at any time by an A.R.S. § 23-1061(J) petition without formal reopening under A.R.S. § 23-1061(H).

¶9 *Capuano* concluded that in the absence of an A.R.S. § 23-1061(J) hearing -- that is, in the absence of actual *litigation* -- notices of supportive care are not entitled to the same res judicata effect as unprotested notices of claim status. *Id*. at 227. In contrast, res judicata in the form of claim preclusion does apply when supportive medical maintenance has been litigated. *Id*.

¶10 The res judicata effect of a final, litigated supportive care award can be overcome, however, when there has been a change in the claimant's physical condition or in available medical procedures to help the claimant. *Brown v. Indus. Comm'n*, 199 Ariz. 521, 525, ¶ 17 (App. 2001). In *Brown*, the claimant's entitlement to supportive care benefits was litigated and decided by an ALJ. When the workers' compensation carrier then terminated those benefits based on a new independent medical examination (IME), the claimant protested. In reviewing the decision, this court held:

> Respondents did not seek review of . . . [the ALJ's initial] award [of supportive care] and it became final. … And, absent some change in . . . [claimant'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. …

Id. (citations omitted).

¶11 In this case, Druebert's 2006 supportive care award was litigated at the ICA and affirmed by this court. Thus, it became final absent one of the exceptions recognized in *Brown*. The current ALJ recognized the applicability of *Brown* and *Capuano*, and concluded that the medical evidence did not establish either a change in Druebert's physical condition or in available medical procedures. He nevertheless concluded:

> It is determined and found that the nine year history of opioid pain medication along with the more recent history of alcohol use and medical marijuana use, in addition to the use of opioid pain medication, is a sufficient change of condition allowing litigation of Applicant's current need for opioid pain medication as the result of the industrial injury.

After reviewing the medical evidence in this record, however, this court concludes that the evidence does not establish any recognized exception for allowing changes to a final, litigated supportive care award.

¶12 Dr. Venger, board certified in neurosurgery and board eligible in addiction and pain medicine, testified that he had treated Druebert since July 2012. He diagnosed failed back syndrome, following the industrially related laminectomy, and chronic knee pain. Dr. Venger stated that Druebert's back condition is worsening, and his rehabilitation potential is poor. He added that Druebert's pain levels precluded any attempt to reduce his pain medications.

¶13 Dr. Venger knew that Druebert drank alcohol, and acknowledged that this was cause for some concern based on Druebert's medications. But Dr. Venger stated that Druebert only drank occasionally and socially, and that he does not have an alcohol problem. The doctor was also aware that Druebert had a medical marijuana card, but he testified that this did not cause any concern in this case. Dr. Venger noted that in the rural area where he practices, patients can have difficulty obtaining their medications in a timely manner and it is necessary to maintain a flexible treatment approach. Further, he regularly performs drug tests to monitor alcohol, marijuana, and narcotic use.

¶14 Dr. Maxwell, a board certified orthopedic surgeon, conducted four IMEs of Druebert: 2003, 2005, 2012, and 2015. At each IME, Druebert had a diagnosis of failed back syndrome, and his condition remained the same with nothing new, additional or previously undiscovered.

¶15 Dr. Borowsky, board certified in pain medicine and anesthesiology, testified that he conducted IMEs of Druebert in 2012 and 2014. He agreed that there had been no change in Druebert's physical condition, and that his diagnosis remained failed back syndrome. It was Dr. Borowsky's opinion that no amount of alcohol or marijuana in combination with narcotic medication was appropriate. For that reason, he testified Druebert should be weaned off all narcotic medications. He further explained:

> Well, it has - - it's been brought out more recently with all of the studies that have shown all the deaths that have come from the more free flowing narcotic prescriptions. There was a change in the culture from, you know, we need to treat pain to we need to be more realistic and safe about it because the deaths that have occurred from abuse and overdoses have exceeded at this point in time, travel accidents, you know, motor vehicle accidents.

¶16 The *Brown* language requiring a change in physical condition or medical procedures to avoid issue preclusion for an otherwise final supportive care award was based on *Stainless Specialty Manufacturing Co. v. Industrial Commission*, 144 Ariz. 12, 19 (1985). In *Stainless*, our supreme court explained:

> We do not hold that a different medical opinion will justify reopening a claim. We adhere to the general rule that the claimant is not entitled to relitigate those matters upon which he was free to introduce evidence in a prior proceeding, even if additional evidence is later available.… Thus, if new evidence is found to controvert that produced at the hearing or if a doctor changes his mind, reopening would be an attempt to relitigate issues which were or could have been litigated, and will not be allowed under principles of *res judicata*. However, where there is evidence that the circumstances have changed since closing, *because of a difference either in the claimant's physical condition or in the medical procedures necessary to treat that condition, reopening will be supported*….

Id. at 19 (citation omitted) (emphasis added).

¶17 In this case, the ALJ resolved the medical conflict in favor of Dr. Borowsky.[4] His testimony described a change in medical opinion for the medical community at large, i.e., there are too many prescriptions being written for narcotic medication, which are associated with increasing numbers of narcotic-related deaths. This does not demonstrate a change in Druebert's physical condition or in medical procedures available to treat his industrially injured back. Instead, this merely represents a new medical opinion.[5] *See Stainless*, 144 Ariz. at 19 (indicating a new or different medical opinion will generally not be sufficient for reopening); *Brown*, 199 Ariz. at 524-25, ¶ 15 (finding no material change in medical condition or treatment justifying a change in a supportive-care award when insurer's expert at hearing provided no "qualitatively…different" evidence from that presented by the insurer's different expert at the prior proceeding). For

[4] It is the ALJ's duty to resolve all conflicts in the evidence and to draw all warranted inferences. *See, e.g., Malinski v. Indus. Comm'n*, 103, Ariz. 213, 217 (1968).

[5] Arizona appellate court cases may not foreclose the possibility that, on a different record, a sea change in medical opinion regarding treatment of a particular condition might be sufficient to overcome the finality of a litigated supportive care award. The change in medical opinion would need to meet the *Stainless* requirement of "a difference…in the medical procedures necessary to treat [the] condition." 144 Ariz. at 19. The testimony does not demonstrate such a change.

these reasons, Druebert's 2006 supportive care award remains final and res judicata.

CONCLUSION

¶18 We set aside the ALJ's award.

AMY M. WOOD • Clerk of the Court
FILED: AA