

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TANYA WINTERS, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

FNF CONSTRUCTION INC., *Respondent Employer,*

ZURICH AMERICAN INSURANCE COMPANY, *Respondent Carrier.*

No. 1 CA-IC 16-0067
FILED 7-25-2017

Special Action - Industrial Commission
ICA Claim No. 98155-295758
Carrier Claim No. 2620028906
The Honorable Paula R. Eaton, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Tanya Winters, Payson
Petitioner Employee

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

Lester Norton & Brozina, PC, Phoenix
By Rachel Parise Brozina
Counsel for Respondent Employer and Respondent Carrier

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Tanya Winters seeks special action review of an Industrial Commission of Arizona award and decision upon review denying her petition to reopen her 1998 workers' compensation claim. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In June 1998, Winters was hit by a truck while working as a flagger for FNF Construction, Inc. She suffered a fractured pelvis, a fracture to her right femur, and a closed head injury. The carrier accepted Winters's workers' compensation claim for benefits, and the claim was closed effective August 1999 with a 5% permanent impairment to her lower right extremity.

¶3 Since that time, Winters has filed several petitions to reopen the claim to cover allegedly new or previously undiscovered conditions related to the industrial injury. *See* Ariz. Rev. Stat. ("A.R.S.") § 23-1061(H).¹ In November 2001, she filed a petition to reopen the claim asserting memory issues; an ALJ denied the request to reopen. In July 2004, Winters filed a petition to reopen related to a seizure disorder; the carrier denied reopening, and Winters did not challenge the denial.

¶4 In March 2012, Winters petitioned to reopen based on a seizure disorder as well as cognitive impairment and associated emotional distress, all of which she attributed to the 1998 head injury. The parties presented conflicting medical evidence regarding the scope and source of Winters's conditions through extensive documentation and four days of

¹ Absent material revisions after the relevant date, we cite a statute's current version.

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formal hearings. The ALJ assessed the conflicting medical evidence and determined that (1) the seizure disorder was not causally related to Winters's industrial injury, (2) Winters had failed to show an objective change in her neurocognitive condition, and (3) Winters's emotional and behavioral difficulties were unrelated to (and in fact preexisted) her industrial injury. This December 2012 award became final.

¶5 In January and again in June 2016, Winters filed petitions to reopen the claim for cognitive impairment. She relied entirely on a May 2012 Social Security disability insurance determination finding her to be disabled due to cognitive impairment and unable to work effective February 2009. The ALJ denied the petition to reopen, finding that Winters had not submitted any medical evidence to show a new, additional, or previously undiscovered condition justifying reopening the claim and noting that the social security disability award was legally insufficient to establish grounds to reopen.

¶6 The ALJ summarily affirmed the decision upon review, and Winters brought this statutory special action. We have jurisdiction under A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶7 The workers' compensation system provides a mechanism to reopen a previously closed claim if the claimant shows the existence of a "new, additional or previously undiscovered temporary or permanent condition" caused by the prior industrial injury. A.R.S. § 23-1061(H); *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 18-19 (1985); *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 106, ¶¶ 18-19 (App. 2002). The claimant bears the burden to establish both the existence of a new/unknown condition and its causal connection to the industrial injury. *Sun Valley Masonry, Inc. v. Indus. Comm'n*, 216 Ariz. 462, 464-65, ¶ 11 (App. 2007). This causal relationship generally must be proven by expert medical evidence. *Id.* at 465, ¶ 11.

¶8 On review of an award denying reopening, we defer to the ALJ's factual findings but review legal conclusions de novo. *Id.* at 463-64, ¶ 2. We consider the evidence in the light most favorable to upholding the award, and will affirm if reasonable evidence supports it. *Lovitch*, 202 Ariz. at 105, ¶ 16.

¶9 As she did before the ALJ, Winters argues that the May 2012 Social Security disability award in itself establishes a new or additional

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condition that warrants reopening. But the Social Security decision involved the same condition—cognitive impairment—addressed in the 2012 workers’ compensation proceedings, and thus did not involve any “new, additional or previously undiscovered . . . condition” as required to justify reopening. *See* A.R.S. § 23-1061(H); *see also Lovitch*, 202 Ariz. at 106, ¶ 18 (noting that reopening does not apply to conditions “existing and known” when the claim was previously closed).

¶10 Moreover, Winters has never established a causal connection between her cognitive impairment and the industrial injury; in fact, the issue of causation was previously litigated and determined against her in the December 2012 award. *See Lovitch*, 202 Ariz. at 107, ¶ 23. The Social Security decision, while addressing Winters’s then-existing physical/mental condition and ability to work, neither addressed nor established the cause of that condition. The decision’s few passing references to the cause of her disability simply recount Winters’s own statements attributing her impairment to the 1998 accident. This provides no medical basis to override the December 2012 award finding no causal relationship between Winters’s cognitive impairment and the industrial injury. *See also id.* at 106, ¶ 18 (noting that issue preclusion applies to prohibit re-litigation of issues actually litigated and essential to a final workers’ compensation award).

¶11 Accordingly, the ALJ did not err by denying Winters’s petition to reopen.

CONCLUSION

¶12 The award is affirmed.



AMY M. WOOD • Clerk of the Court
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