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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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LAYNE L. SARGENT, *Petitioner,*

*v.*

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

AMERICA WEST AIRLINES, *Respondent Employer,*

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,  
*Respondent Carrier.*

No. 1 CA-IC 17-0006

FILED 10-24-2017

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Appeal from the Industrial Commission of Arizona

ICA Claim No. 91182-076997

Carrier Claim No. 095CBD992674N

The Honorable Aryka S. Radke, Administrative Law Judge

**AFFIRMED**

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APPEARANCES

Layne L. Sargent, Surprise  
*Petitioner*

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

Lundmark, Barberich, LaMont & Slavin, P.C., Phoenix  
By R. Todd Lundmark, Danielle S. Vukonich  
*Counsel for Respondent Employer/Carrier*

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**MEMORANDUM DECISION**

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Randall M. Howe and Judge Kent E. Cattani joined.

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**B E E N E**, Judge:

¶1 Layne Sargent (“Sargent”) seeks special action review of an Industrial Commission of Arizona (“ICA”) award denying her request for additional supportive care benefits. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 In June 1991, while working for America West Airlines, Sargent sustained an industrial injury to her left hand and was diagnosed with Complex Regional Pain Syndrome (“CRPS”). She has not worked in over 22 years. America West Airlines’ insurance carrier, Travelers Property Casualty Company of America (“Travelers”), has provided Sargent with extensive supportive care benefits, including an in-ground whirlpool, a zero-gravity recliner, a Tempur-Pedic bed, psychological counselling, and medication.

¶3 In February 2014, at Travelers request, Dr. Stephen Borowsky conducted an independent medical examination (“IME”) of Sargent.<sup>1</sup> Dr. Borowsky found that Sargent’s medication regime was unreasonable and that Sargent’s CRPS diagnosis was not credible. In March 2014, relying on Dr. Borowsky’s findings, Travelers issued a notice of supportive medical maintenance concerning Sargent that recommended “[p]sychiatric hospitalization during which the full measure of medications in her system

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<sup>1</sup> The record does not indicate the reason for Travelers’ request for an IME.

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can be determined and a more thorough investigation of her psychiatric condition can be accomplished.” Also, the notice determined that “[t]here is no indication for the continuation of any controlled substances or, in fact, any medication with regard to this condition since the whole picture is not one of a credible CRPS syndrome.”

¶4 In April 2015, after considering Sargent’s response to Travelers’ notice, Administrative Law Judge (“ALJ”) Mosesso issued an award finding (1) Sargent’s CRPS diagnosis was credible and (2) Sargent should, with continued psychological counselling, be weaned from using narcotic pain medication. Neither party timely challenged the April 2015 award, making it final.

¶5 In January 2016, Sargent requested an investigation and hearing seeking clarification of Finding No. 12 of the ALJ’s April 2015 award (“Finding No. 12”) that concerned the plan to phase out Sargent’s opioid pain medication. Sargent also requested approval for additional supportive care benefits, including Botox injections, trigger point injections, and massage therapy. In March 2016, Travelers requested sanctions pursuant to Arizona Revised Statutes (“A.R.S.”) section 23-1026(C), asserting Sargent obstructed an IME that same month.

¶6 ALJ Weinstein reviewed Sargent’s January 2016 request. The ALJ heard testimony from Sargent who testified that her pain management medical provider, nurse practitioner Sandra Gallo, recommended the additional supportive care. Sargent also stated that since the April 2015 award (1) her pain had become more intense, (2) she attended only two sessions of her required mental health counseling, (3) she could not hold anything with her left hand, and (4) her treating medical professionals did not physically touch or examine her left arm at appointments. She further testified that her daily morphine intake was 380 MED<sup>2</sup> at the time of the April 2015 award.

¶7 ALJ Weinstein also heard testimony from several medical experts who examined Sargent. Dr. Leonard Bodell, a board-certified orthopedic surgeon, testified that he initially treated Sargent at the time of her industrial injury. He had last treated Sargent two years prior to the hearing and had noted then that she experienced pain and stiffness in her left arm and had psychological issues related to her industrial injury.

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<sup>2</sup> “MED” is morphine equivalent dose.

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¶8 Dr. Lisa Sparks, board-certified in internal medicine, testified that she had treated Sargent several times, but that Sargent had primarily been treating with Ms. Gallo. Dr. Sparks testified that she made no effort to reduce Sargent's opioid pain medication to conform with the April 2015 award, and that she and Ms. Gallo believe Sargent's current pain medications and doses were appropriate to address her medical condition. Dr. Sparks further testified she was unsure if Botox injections, trigger point injections, or massage therapy would effectively or appropriately address Sargent's pain.

¶9 Dr. Paul Guidera, a board-certified hand and upper extremity surgeon, attempted to perform an IME of Sargent in March 2016. He testified that at the IME, Sargent refused to allow him to examine or touch her, and that in his experience, most patients will allow at least a limited examination. He also testified that Sargent prematurely terminated the IME.

¶10 Dr. Borowsky, board-certified in pain management and anesthesiology, performed IMEs on Sargent in February 2014 and December 2015. He opined that long-term opioid pain medication usage was ineffective for pain control and presented other serious health risks. He testified that Sargent's prescriptions total an intake of 350 MED per day, an "exorbitantly high" amount that should not exceed 120 MED per day. He opined that Sargent should be weaned from her long-term use of opioid pain medication and outlined a plan, recommending in-patient detoxification treatment for Sargent, but suggesting that an out-patient treatment plan with gradual tapering of the opioid pain medication could be implemented. He also stated that Botox injections, trigger point injections, and massage therapy were inappropriate as supportive care treatment to reduce Sargent's CRPS pain and symptoms.

¶11 In her October 2016 ruling, ALJ Weinstein found that Sargent had failed to establish by a preponderance of the evidence that Botox injections, trigger point injections, and massage therapy were appropriate to treat her condition. The ALJ adopted Dr. Bodell's opinion that Sargent had chronic pain and psychological issues related to her industrial injury and Dr. Borowsky's opinion that Sargent should be weaned from opioid pain medication. The ALJ also determined that Finding No. 12 required Sargent to make sincere efforts to taper herself from her opioid pain medication using the time frame set forth by Dr. Borowsky, and that Sargent's prescribed MED use under the supportive care award should not exceed 120 MED per day.

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¶12 Lastly, ALJ Weinstein found that Dr. Guidera’s testimony was credible regarding Sargent’s conduct during her March 2016 IME. The ruling noted that Sargent (1) did not permit Dr. Guidera to conduct a complete IME, (2) unreasonably refused to permit any physical examination of her left upper extremity, and (3) terminated the IME prematurely. As a sanction, ALJ Weinstein awarded Travelers a credit for expenses resulting from the March 2016 IME.

¶13 In November 2016, Sargent requested review of ALJ Weinstein’s decision. In January 2017, ALJ Radke affirmed the award and findings of ALJ Weinstein’s decision. Thereafter, Sargent sought special action review by this court. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

**DISCUSSION**

¶14 In reviewing factual 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 view the evidence in the light most favorable to upholding the ALJ’s decision, and will affirm unless there is no reasonable basis for the decision. *Lovitch v. Indus. Comm’n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

**I. ALJ Weinstein Did Not Err in Finding Sargent Did Not Need Additional Supportive Care**

¶15 Sargent argues that ALJ Weinstein erred in determining she did not need additional supportive care beyond what was outlined in the April 2015 award, including that Sargent failed to establish that Botox injections, trigger point injections, and massages were appropriate treatment for her condition.

¶16 Sargent has the burden of proof to show by a preponderance of the evidence that her request for additional supportive care is reasonably required. *Bishop v. Indus. Comm’n*, 17 Ariz. App. 42, 44 (1972); *Stephens v. Indus. Comm’n*, 114 Ariz. 92, 94 (App. 1977). When supportive care issues are litigated, decided, and essential to a final award, the parties are precluded from relitigating the same issues unless evidence is presented of a change in the claimant’s medical condition or medical procedures. *Brown v. Indus. Comm’n*, 199 Ariz. 521, 524-25, ¶¶ 11, 17 (App. 2001). “Whether a particular type of treatment is reasonably required is a medical question that requires expert medical testimony.” *Patches v. Indus. Comm’n*, 220 Ariz. 179, 181, ¶ 6 (App. 2009).

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¶17 ALJ Weinstein heard and considered testimony from Drs. Bodell, Sparks, Guidera, and Borowsky. The ALJ adopted Dr. Borowsky and Dr. Bodell’s opinions because they were well founded in determining that Sargent’s condition remained substantially the same since the April 2015 award.<sup>3</sup> Dr. Bodell determined that Sargent experienced pain and stiffness in her left arm, while Dr. Borowsky determined that Botox injections, trigger point injections, and massage therapy were not appropriate to treat Sargent’s pain and symptoms.

¶18 ALJ Weinstein was faced with conflicting medical testimony as to whether Sargent should be awarded additional supportive care. Where expert medical testimony is in conflict, the ALJ may determine which testimony is more probably correct, and the determination will not be disturbed unless wholly unreasonable. *Bergstresser v. Indus. Comm’n*, 118 Ariz. 155, 157 (App. 1978); 118 Ariz. at 157; *Perry v. Indus. Comm’n*, 112 Ariz. 397, 398–99 (1975) (deferring to ALJ’s findings when there is conflicting evidence if it can be “reasonably supported on any reasonable theory of evidence.”). Because ALJ Weinstein’s reliance on the testimony of Dr. Bodell and Dr. Borowsky was reasonable, the ALJ did not err in finding that Sargent failed to establish the need for additional supportive care.

**II. ALJ Weinstein Did Not Err in Clarifying Finding No. 12**

¶19 Next, Sargent argues that ALJ Weinstein incorrectly clarified Finding No. 12 by concluding that (1) Sargent must make sincere efforts to wean herself from her opioid pain medication using the time frame set forth by Dr. Borowsky and (2) Sargent’s supportive care award must not provide for medication that delivers greater than 120 MED per day.

¶20 If there is a conflict in medical opinion evidence, the ALJ has the duty to resolve it, and the ALJ’s resolution will not be disturbed if it can be reasonably supported on any reasonable theory of the evidence. *Perry*, 112 Ariz. at 398–99. The ALJ also has the duty to determine which conflicting testimony is more probably correct. *Id.* at 398.

¶21 Dr. Sparks and Dr. Borowsky proffered conflicting testimonies as to Finding No. 12. Dr. Sparks testified that she (1) made no effort to reduce Sargent’s opioid pain medication to conform with the April 2015 award, (2) believed the daily opioid dose delivered through Sargent’s current medications was not excessive, and (3) believed Sargent’s current

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<sup>3</sup> The April 2015 award adopted Dr. Borowsky’s opinion on the issue of appropriate pain management supportive care for Sargent.

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pain medications and doses were appropriate to address her medical condition.

¶22 Dr. Borowsky opined that long-term opioid pain medication usage was ineffective for pain control and presented other serious health risks. He testified that Sargent’s daily intake of 350 MED was “exorbitantly high,” and should not exceed 120 MED per day. He opined that Sargent should be weaned from her long-term use of narcotic pain medication and outlined a plan for detoxification treatment.

¶23 ALJ Weinstein found that Dr. Borowsky’s opinion concerning Sargent’s use of opioid pain medication and his guidelines for implementing a weaning plan as outlined in Finding No. 12 were correct. Reasonable evidence supports ALJ Weinstein’s determination that Dr. Borowsky’s testimony was more probably correct than that of Dr. Sparks. Therefore, ALJ Weinstein did not err in clarifying Finding No. 12 by relying upon Dr. Borowsky’s testimony.

**III. ALJ Weinstein Did Not Err in Imposing Sanctions Due to Sargent’s Behavior at Her IME with Dr. Guidera**

¶24 Sargent argues that ALJ Weinstein inappropriately granted sanctions against her based on her behavior at the March 2016 IME with Dr. Guidera. An ALJ may impose sanctions against a party who obstructs an IME. Ariz. Admin. Code R20-5-157; A.R.S. § 23-1026(C). As the trier of fact, the ALJ is in the best position to determine the credibility of witnesses. *Russell v. Indus. Comm’n*, 98 Ariz. 138, 145 (1965).

¶25 ALJ Weinstein found Dr. Guidera’s testimony to be credible and awarded Travelers a credit to be applied against Sargent’s disability benefits. Dr. Guidera testified that Sargent cut the examination short and would not let him touch or examine her, which was rare in his experience with CRPS patients. Viewing ALJ Weinstein’s credibility finding in the light most favorable to affirming her decision, *see Lovitch*, 202 Ariz. at 105, ¶ 16, we affirm the grant of sanctions.

**IV. There Was No Error in ALJ Weinstein Overseeing Subsequent Hearings Instead of ALJ Mosesso**

¶26 Sargent argues, for the first time on appeal, that it was error for ALJ Weinstein to oversee subsequent hearings in 2015 and 2016 instead of ALJ Mosesso. “We will not consider on review an issue not raised before the Industrial Commission where the petitioner has had an opportunity to do so.” *Larson v. Indus. Comm’n*, 114 Ariz. 155, 158 (App. 1976). Here,

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Sargent had ample opportunities to raise this issue before the ICA and failed to do so, therefore this issue is waived.

**CONCLUSION**

¶27 For the reasons stated above, we affirm the ICA award.



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