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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

SHAWN HARSHAW, *Petitioner Employee,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

NESCO RESOURCES SERVICE COMPANY dba NESCO RESOURCES,
Respondent Employer,

ACE AMERICAN INSURANCE CO., *Respondent Carrier.*

No. 1 CA-IC 20-0007

FILED 11-19-2020

Special Action - Industrial Commission

ICA Claim No. 20131-900142

Carrier Claim No. C494C3369388/801

The Honorable Paula R. Eaton, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Cynthia J. Bailey joined.

C A T T A N I, Judge:

¶1 Shawn Harshaw challenges an Industrial Commission of Arizona award and decision upon review denying his request to reopen his workers' compensation claim. For reasons that follow, we set aside the award.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2013, Harshaw injured his neck while working for Nesco Resources Service Company. After Nesco's insurance carrier accepted the claim, Harshaw had spinal fusion surgery to treat the injury, and the claim was closed in 2015.

¶3 Two years later, Harshaw filed a petition to reopen for a newly developed spinal condition, which Nesco's insurance carrier denied. Two doctors testified at the ensuing hearing before an administrative law judge ("ALJ"). Both agreed that Harshaw had developed adjacent segment disc bulges above and below the fusion area. Additionally, both doctors recommended only observation – not active medical treatment. Although Harshaw's condition could warrant decompression surgery, surgery would not be recommended until he lost weight or developed a neurological crisis. The ALJ denied reopening, relying on "uncontroverted" medical evidence that Harshaw did not currently need active medical treatment and reasoning that Harshaw had thus failed to prove "that he has a new, additional or previously undiscovered condition causally related to his . . .

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industrial injury *which necessitates active medical treatment.*" (Emphasis added.)

¶4 Harshaw requested administrative review, arguing that the uncontroverted evidence of his adjacent segment disease established a new or additional condition related to his work injury that justified reopening, regardless whether he required active medical treatment. The employer and carrier did not dispute that Harshaw had a new or additional condition caused by the work injury but argued that reopening would be pointless because no active treatment was recommended, meaning Harshaw would not receive any medical benefits upon reopening. They also suggested that the ALJ amend the award to specify that Harshaw could reopen his claim when he lost weight and was approved for surgery.

¶5 The ALJ issued an amended award denying reopening but expressly permitting Harshaw to file a petition to reopen when he obtains approval for surgery. Harshaw timely petitioned for review, and we have jurisdiction under A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10 of the Arizona Rules of Procedure for Special Actions.

DISCUSSION

¶6 Harshaw argues the ALJ erred by requiring a need for active medical treatment as a prerequisite to reopening. On review of a workers' compensation award, we generally defer to factual findings that are reasonably supported by the evidence but independently review the ALJ's legal conclusions. *Warren v. Indus. Comm'n*, 202 Ariz. 10, 12, ¶ 12 (App. 2002).

¶7 To reopen a previously accepted claim and secure a change in or additional award of benefits, a worker must show "a new, additional or previously undiscovered" condition and a causal connection between that condition and the industrial injury. A.R.S. § 23-1061(H); *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 16, 19 (1985). These two elements—condition and causation—are the only requirements; a resulting need for active medical treatment is not essential to reopening. *Sneed v. Indus. Comm'n*, 124 Ariz. 357, 359 (1979). The Arizona Supreme Court held as much several decades ago:

Petitioner need not show he is in need of active treatment in order to reopen his claim. He need only show the existence of a new, additional or previously undiscovered condition. The medical benefits available or the appropriate treatment for the new, additional or previously undiscovered condition,

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as well as any adjustment or modification in the amount of compensation payable, or degree of disability established, can be appraised after the claim has been reopened.

Id. And this court has echoed this principle on multiple occasions. *See, e.g., Hopkins v. Indus. Comm'n*, 176 Ariz. 173, 177 (App. 1993); *Wyckoff v. Indus. Comm'n*, 169 Ariz. 430, 435 (App. 1991); *Indus. Indem. Co. v. Indus. Comm'n*, 162 Ariz. 503, 508 (App. 1989).

¶8 Here, the ALJ erred by adding the requirement of a need for active medical treatment. By expressly permitting Harshaw to request reopening once he obtains approval for surgery, the ALJ's amended award implicitly agreed that Harshaw has a new, additional, or previously undiscovered condition related to the industrial injury—the only two elements required for reopening. *See* A.R.S. § 23-1061(H); *Stainless Specialty*, 144 Ariz. at 16, 19. The need for active medical treatment is not required to justify reopening, *Sneed*, 124 Ariz. at 359, and the ALJ thus erred by denying reopening based on Harshaw's failure to prove such a need.

¶9 Nesco and its insurance carrier agree that proof of the need for active treatment is not required to reopen a claim but argue that reopening the claim would be pointless if no active treatment is needed. But a claim may be reopened not just for additional medical benefits but also, for example, for an increase of compensation or change in degree of disability. *See* A.R.S. § 23-1061(H). A worker need not prove that some medical benefit will be available to him to justify reopening.

¶10 Nesco and the carrier also argue that the ALJ's amended award, premised on *Savage Welding Supplies v. Industrial Commission*, 120 Ariz. 592, 594 (App. 1978), cured any error by allowing Harshaw to reopen once he obtains approval for surgery. In *Savage Welding*, however, the issue before the ALJ was whether to *close* a claim because the claimant's condition had become stationary—that is, whether the claimant no longer required additional medical treatment related to the injury. *Id.* The ALJ found that surgery was the only treatment available to improve the claimant's condition and that the claimant had previously refused to undergo surgery. *Id.* at 593. The ALJ crafted a conditional award based on these findings: the claimant's condition was not stationary if the claimant would consent to the surgery and was stationary otherwise. *Id.* at 593. We affirmed the award because although unusual, it was not too indefinite and was based on a reasonable interpretation of the evidence. *Id.* at 594.

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¶11 *Savage Welding* is simply inapposite here. The necessity of active medical treatment (and the claimant's willingness or ability to undergo that treatment) is not a requirement for *reopening* a claim under A.R.S. § 23-1061(H). *See also Sneed*, 124 Ariz. at 359.

CONCLUSION

¶12 The ALJ erred by imposing an additional requirement to justify reopening, and we therefore set aside the award.



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