

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

UNIVERSITY OF ARIZONA)	
HEALTH NETWORK, fka)	2 CA-IC 2012-0010
UNIVERSITY MEDICAL CENTER,)	DEPARTMENT A
)	
Petitioners Employer and Insurer,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 28, Rules of Civil
)	Appellate Procedure
THE INDUSTRIAL COMMISSION)	
OF ARIZONA,)	
)	
Respondent,)	
)	
MARY M. SALINAS,)	
)	
Respondent Employee.)	
_____)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20090420217

Insurer No. 1000530

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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Attorney for Petitioners Employer and Insurer

The Industrial Commission of Arizona
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M I L L E R, Judge.

¶1 In this statutory special action, petitioner University of Arizona Health Network (Health Network) challenges an Industrial Commission of Arizona award that reopened the claim of respondent Mary M. Salinas as it pertained to a pain disorder. Health Network argues preclusion bars the reopening because the condition was “existing and known” rather than “previously undiscovered.” For the reasons given below, we affirm the award.

Factual and Procedural Background

¶2 In January 2009, Salinas was working as a patient care technician at University of Arizona Medical Center¹ when she injured her back, right arm, and right knee while moving a patient. She had surgery on her right elbow and received pain medication and physical therapy.

¶3 Health Network closed the claim effective February 9, 2011, with a finding of three percent permanent impairment in her right arm. Salinas timely protested the

¹At the time of the injury, the hospital was known as University Medical Center, which was also the name of the self-insured employer that accepted Salinas’s injury for benefits. The hospital is now known as University of Arizona Medical Center, and the ultimate employer responsible for the benefits is Health Network. We refer to the employer as Health Network throughout.

closure, which resulted in various proceedings over the next several months regarding her arm and knee. Neither party contests those rulings, and we do not discuss them further.

¶4 Unbeknownst to Health Network, Salinas began seeing psychiatrist David Ruben in April 2011. She complained she had been frustrated by matters relating to her health and employment situation, and she had frequent bouts of crying. Dr. Ruben diagnosed her with preexisting bipolar disorder and anxiety. In February 2012, Salinas made an allegation that her mental condition was related to her industrial injury. Health Network denied her petition to reopen, and Salinas requested a hearing. Health Network demanded a psychiatric independent medical examination by Joel Parker. Dr. Parker made an Axis I diagnosis of “Pain Disorder Associated with Both Psychological Factors and a General Medical Condition,” based on DSM-IV and DSM-IV-TR criteria. He also acknowledged Salinas’s bipolar disorder, which he found was unrelated to her industrial injury. Both psychiatrists testified at the hearing about their examination and diagnosis of Salinas. The administrative law judge (ALJ) concluded Dr. Parker’s diagnosis represented a new diagnosis. The ALJ awarded Salinas temporary disability compensation as well as medical benefits for her pain disorder.

¶5 Health Network timely requested administrative review of the award on the basis of claim preclusion, but the ALJ summarily affirmed and Health Network brought this statutory special action. We have jurisdiction to review the ALJ’s rulings pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951.

Discussion

¶6 Health Network argues claim preclusion applies because Salinas knew or should have known of her pain disorder in time to raise it while litigation was pending on her arm and knee pain. It characterizes the pain disorder diagnosed by Dr. Parker as a psychiatric condition for which she had already been receiving treatment from Dr. Ruben. It further contends that Dr. Parker’s diagnosis is simply a “different medical opinion,” which does not fall within the exception to preclusion carved out in A.R.S. § 23-1061(H).

¶7 On review, we consider the evidence in the light most favorable to upholding the ALJ’s findings and award. *Polanco v. Indus. Comm’n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). However, the applicability of claim preclusion is a mixed question of fact and law. *See Bayless v. Indus. Comm’n*, 179 Ariz. 434, 439, 880 P.2d 654, 659 (App. 1993). “[A] deferential standard of review applies to resolutions of disputed facts when supported by reasonable evidence; an independent judgment standard of review applies to the ultimate conclusion that these facts do or do not trigger preclusion.” *Id.* Preclusion applies when the claimant knew or should have known of the condition at a time when it could have been presented as a matter of right before the award became final. *See Fidelity & Guar. Ins. Co. v. Indus. Comm’n*, 129 Ariz. 342, 346, 631 P.2d 124, 128 (App. 1981); *see also Mehan v. Indus. Comm’n*, 167 Ariz. 509, 512, 80 P.2d 1261, 1264 (App. 1991). Specifically, § 23-1061(H) allows reopening if the employee can prove the existence of a “new, additional or previously undiscovered temporary or permanent condition.” *Polanco*, 214 Ariz. 489, ¶ 6, 154 P.3d at 393.

¶8 A new diagnosis may satisfy the requirements and allow reopening under § 23-1061(H). See *Stainless v. Specialty Mfg. Co v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985). Although our supreme court held in *Stainless* that reopening would not be allowed “if new evidence is found to controvert that produced at the hearing or if a doctor changes his mind,” it also noted that “if that change in testimony involves a ‘previously undiscovered’ condition, A.R.S. § 23-1061(H) would be applicable.” *Stainless*, 144 Ariz. at 19 & n.3, 695 P.2d at 268 & n.3. Further, “[w]here the true cause of the worker’s physical or mental disability was not definitely known at the time of the prior award . . . the discovery of the true cause is grounds for a reopening under the ‘previously undiscovered’ clause of A.R.S. § 23-1061(H).” *Salt River Project v. Indus. Comm’n*, 128 Ariz. 541, 544, 627 P.2d 692, 695 (1981) (affirming reopening where surgery confirmed degenerative disc after closure of claim and original hearing had focused on back strain or hysterical personality as basis of pain); see also *Bayless v. Indus. Comm’n*, 179 Ariz. 434, 441-42, 880 P.2d 654, 661-62 (App. 1993) (reviewing earlier “undiscovered condition” cases and affirming reopening where surgery revealed disc bulge and claim had previously been closed upon a finding claimant was feigning injury).

¶9 Here, Dr. Parker concluded that the pain disorder was a “new, additional, or previously undiscovered condition” and that he was “aware of no relationship” between Salinas’s preexisting bipolar disorder and the pain disorder. He also testified that to the best of his knowledge, he was the first doctor who had diagnosed Salinas with a pain disorder. He supported his diagnosis by detailing how several previous doctors had not

been able to account for Salinas's arm pain despite full work-ups and multiple treatments including surgery. Dr. Ruben, on the other hand, testified that he did not believe Salinas fit the full criteria for the pain disorder diagnosed by Dr. Parker. The ALJ found Dr. Parker's diagnosis to be the "most probably correct," and the evidence reasonably supports that conclusion. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398-99, 542 P.2d 1096, 1097-98 (1975) (ALJ's determination of conflicting expert medical testimony will not be disturbed unless "its conclusion cannot be reasonably supported on any reasonable theory of the evidence.").

¶10 Contrary to Health Network's contention that Dr. Ruben and Dr. Parker had similar diagnoses, Dr. Ruben testified his diagnosis was that chronic pain aggravated Salinas's bipolar disorder and anxiety, whereas Dr. Parker testified the pain disorder was a previously undiscovered cause of Salinas's arm pain. The doctors' treatment recommendations also differed. Dr. Ruben prescribed psychiatric medication for anxiety, depression, and bipolar disorder as well as pain medication, trigger point injections, and some counseling. Dr. Parker recommended intensive treatment of Salinas's bipolar disorder to stabilize her mood before six months of weekly psychotherapy for the pain disorder itself.

¶11 Finally, we note that the diagnosis of the pain disorder was not made until March 23, 2012, which was months after the ALJ entered his decision closing the claim related to physical treatment of the arm and knee. The pain disorder could not have been raised in the prior proceedings because it was not known, nor could have been discovered. *See Fidelity & Guar. Ins. Co.*, 129 Ariz. at 346, 631 P.2d at 128.

Disposition

¶12 For the foregoing reasons, we conclude that claim preclusion does not apply to Salinas’s pain disorder condition, and we affirm the award.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge