IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARVIN SPENCER,
Petitioner Employee/Cross-Respondent Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

LENNOX INDUSTRIES, INC.,
Respondent Employer/Cross-Petitioner Employer,

ACE AMERICAN INSURANCE/ESIS,
Respondent Insurer/Cross-Petitioner Insurer,

No. 2 CA-IC 2014-0004
No. 2 CA-IC 2014-0008
(Consolidated)
Filed January 9, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Special Action – Industrial Commission
ICA Claim No. 20101-180719
Insurer No. C494C1486045/810
Margaret A. Fraser, Administrative Law Judge

DISMISSED IN PART;
AWARD AFFIRMED IN PART

COUNSEL

Marvin Spencer, Maricopa
In Propria Persona

The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent

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By Eric W. Slavin
Counsel for Respondents and Cross-Petitioners Employer and Insurer

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MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 In this statutory special action, petitioner/cross-respondent Marvin Spencer challenges the Industrial Commission administrative law judge's (ALJ) denial of his petition to reopen his claim for workers' compensation benefits. In a cross-petition for review, Ace American Insurance Co./ESIS, the respondent insurance carrier, and Lennox Industries, Inc., the respondent employer (collectively "Respondents"), challenge the ALJ's refusal to alter her findings regarding an injury underlying Spencer's claim. For the following reasons, we dismiss Spencer's petition for lack of jurisdiction and, with respect to Respondents' cross-petition, affirm the award.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to sustaining the ALJ's findings." *Tucson Unified Sch. Dist. v. Indus. Comm'n*, 198 Ariz. 133, ¶ 2, 7 P.3d 142, 143 (App. 2000). In April

2010, Spencer was injured while servicing commercial air conditioning units. Respondents accepted Spencer's claim for workers' compensation benefits and he received medical treatment that included surgeries for his cervical spine, carpal tunnel syndrome, and the partial amputation of a finger on his left hand. His claim was closed for active medical care benefits on March 29, 2012, effective March 9, with an unscheduled permanent impairment to his cervical spine and left upper extremity. Supportive medical maintenance benefits were authorized to provide continuing treatment for his neck, cervical spine, and left arm.

¶3 Claiming continuing pain to his left side, Spencer filed a petition to reopen his claim in February 2013 based on a "new, additional or previously undiscovered disability or condition." The respondent carrier denied his petition and Spencer requested a hearing before an ALJ. After the hearings, the ALJ entered her Decision Upon Hearing, denying Spencer's petition to reopen. The ALJ also denied Respondents' request that she find Spencer's cervical and low back conditions unrelated to his industrial injury based on his having failed to "provide any [of] the treating physician[s] . . . with any history pertaining to his cervical spine which preexisted" the industrial injury. As to this request, the ALJ—in what the parties refer to as "finding 6"—found the closure of Spencer's claim as unscheduled based on permanent impairments to his cervical spine and left upper extremity was "final and res judicata as to all parties."

¶4 In a letter Spencer submitted to the ALJ requesting review, an exact copy of which he sent to this court, Spencer stated he "disagree[d] with the industrial commission's refusal to reopen [his] case." Respondents filed a response, asserting the ALJ's decision denying Spencer's petition was correct, but requesting that the ALJ "reverse finding 6 by finding that [Spencer's] cervical condition is unrelated to the industrial injury." The ALJ agreed to "review the record of proceedings and any memoranda and response submitted." On February 7, 2014, she entered her Decision Upon Review, affirming the award and her conclusion that Spencer "had not established the elements necessary to reopen his claim,"

and declining to reverse finding 6. The Respondents filed a timely petition for special-action review.[1]

Discussion

Spencer's Petition for Review

¶5 We have an independent duty to examine our jurisdiction over an appeal. *Baker v. Bradley*, 231 Ariz. 475, ¶ 8, 296 P.3d 1011, 1014 (App. 2013). This court's jurisdiction is "defined by statute, and we must dismiss an appeal over which we lack jurisdiction." *Id.* We have jurisdiction to review Industrial Commission awards pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951. For the following reasons, we conclude we lack jurisdiction to consider Spencer's petition.

¶6 A party who wishes to challenge an award first must seek review by the ALJ by filing a request for review within thirty days of the mailing of the award. A.R.S. §§ 23-942(D), 23-943. Upon review, the ALJ may "affirm, reverse, rescind, modify or supplement the award and make such disposition of the case as is determined to be appropriate." § 23-943(F). A party may then seek review by this court of the ALJ's decision upon review pursuant to §§ 12-120.21(A)(2) and 23-951(A) by filing a special-action petition. *See Martinez v. Indus. Comm'n*, 213 Ariz. 531, ¶ 3, 144 P.3d 1260, 1261 (App. 2006), *citing* § 23-943(H); *see also Brown v. Indus. Comm'n*, 168 Ariz. 287, 288, 812 P.2d 1105, 1106 (App. 1991) (Industrial Commission award final unless request for review filed within thirty days of entry of award; parties required to exhaust administrative remedies before seeking relief in court of appeals); *Ross v. Indus. Comm'n*, 20 Ariz. App. 353, 354-55, 513 P.2d 143, 144-45 (1973) ("[A] party aggrieved by an award of a hearing officer of The Industrial

[1]As noted below, Spencer's letter to this court initially was treated as a petition for special-action review. When Respondents filed their special action after the ALJ entered her February 7 Decision Upon Review, we treated the petition as a cross-petition and consolidated the two.

Commission must first request review by the Commission before he may raise questions" before court of appeals.).

¶7 Our review of an Industrial Commission award is commenced by the filing of a timely petition for special action pursuant to § 23-951(A) and in accordance with Rule 10, Ariz. R. P. Spec. Actions. A petition for special action must be filed within thirty days after the ALJ's decision upon review is mailed to the parties. *See* § 23-943(H); *see also* § 23-951(A) (party "affected by" decision upon review "may apply to the court of appeals for a writ of certiorari to review the lawfulness of the award, order or decision upon review"). This requirement is jurisdictional, "and the petitioner's right to review . . . is lost by failure to file within that time." *Contreras v. Indus. Comm'n*, 98 Ariz. 221, 223, 403 P.2d 535, 537 (1965); *Smith v. Indus. Comm'n*, 27 Ariz. App. 100, 101, 551 P.2d 90, 91 (1976).

¶8 When the ALJ entered the Decision Upon Hearing on January 8, she informed the parties, consistent with § 23-942(D), that the award would become final unless either party "file[d] a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within thirty . . . days after the mailing of this Award." As stated above, on January 12, Spencer sent a letter to both the ALJ and to this court challenging the ALJ's Decision Upon Hearing. On January 15, this court "acknowledge[d] receipt" of Spencer's letter. The ALJ treated Spencer's letter as a request for review pursuant to §§ 23-942(D) and 23-943(A), (B). The ALJ entered her Decision Upon Review on February 7, "supplementing and affirming" the Decision Upon Hearing. Spencer did not file a petition for special-action review of the ALJ's February 7 Decision Upon Review. *See* § 23-943(H); § 23-951. Because Spencer did not file a timely petition for review following the ALJ's February 7 Decision Upon Review, we dismiss his special action for lack of jurisdiction. *See Smith*, 27 Ariz. App. at 101, 551 P.2d at 91.[2]

[2]Assuming Spencer's letter may be construed as a petition for special-action review, it was a nullity. It was legally ineffective as to the January 8 Decision Upon Hearing because Spencer was required

Respondents' Cross-Petition for Review

¶9 Respondents claim the "provision of benefits for [Spencer's] cervical spine [was] based upon the false information initially provided by Spencer to various doctors regarding his prior cervical spine problems." They maintain that the ALJ's "refusal to . . . eliminate[] Spencer's cervical spine condition as a part of [his industrial injury] claim is contrary to the law and the evidence."

¶10 Although we defer to the ALJ's factual determinations, viewing the evidence in the light most favorable to sustaining the award, we review de novo questions of law. *Aguayo v. Indus. Comm'n*, 235 Ariz. 413, ¶ 2, 333 P.3d 31, 32 (App. 2014). "[W]here an award is based on conflicting medical testimony, we must affirm and are not at liberty to interpose a decision based on our review of conflicting testimony." *Balbuze v. Indus. Comm'n*, 15 Ariz. App. 309, 310, 488 P.2d 665, 666 (1971). We will uphold the ALJ's conclusions if supported by "reasonable or substantial" evidence. *Hopper v. Indus. Comm'n*, 27 Ariz. App. 732, 734, 558 P.2d 927, 929 (1976); *see also Special Events Serv., Inc. v. Indus. Comm'n*, 228 Ariz. 332, ¶ 6, 266 P.3d 358, 360 (App. 2011) (appellate review limited to whether ALJ acted in excess of power and whether factual findings support decision).

¶11 At the hearings on Spencer's petition to reopen, Dr. Attias and Dr. Shapiro testified regarding Spencer's cervical spine injury and whether it existed before the industrial injury. Attias, who treated Spencer's cervical spine injury beginning in November 2010, testified that based on his knowledge of Spencer's condition, the cervical spine injuries were caused by the industrial accident. But Shapiro, who first examined Spencer in May 2013, testified he did not believe Spencer's cervical spine injury was related to the industrial injury. At the close of evidence, Respondents requested that the ALJ make a "specific finding that the cervical and low back

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to first seek review by the ALJ, *see* § 23-942(D), and he had, in fact, sought such review simultaneously with filing his petition in this court. And it was premature as to the February 7 Decision Upon Review.

conditions are unrelated to [Spencer's] industrial injury." The ALJ agreed to "take that into consideration."

¶12 The ALJ denied Respondents' request in finding 6 of her Decision Upon Hearing. In their response to Spencer's request for review, Respondents again asked the ALJ to "reverse finding 6 by finding that [Spencer's] cervical condition is unrelated to the industrial injury." The ALJ again denied this request, concluding Respondents had

> presented no evidence of fraud on [Spencer's] part, they never raised this issue before the close of the hearings and . . . that the cases cited in [Respondents'] response to request for review do not apply to this case. The closure of the claim as unscheduled because of the permanent impairments to the cervical spine and the left upper extremity is final and res judicata as to all parties. Finding number 6 will not be reversed.

(Emphasis omitted.)

¶13 Respondents maintain that "[s]ince the provision of benefits for the cervical spine [was] based upon the false information initially provided by Spencer to various doctors," the ALJ was "required . . . to implement Dr. Shapiro's accepted expert opinions of a lack of causation of Spencer's neck problems to this injury despite the prior closure of the claim that included acceptance of that condition." They argue "that the ALJ's refusal to do so based upon her incorrect interpretation of the *res judicata* effect of the prior notices [of claim] closing the claim constitutes reversible error."

¶14 Res judicata precludes further litigation on a claim when "a prior claim has become a valid and final judgment through litigation or by application of A.R.S. [§] 23-947(B)" and no statutory exception applies. *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425, 428, 880 P.2d 642, 645, 648 (App. 1993); *see also Phx. Cotton Pickery v. Indus. Comm'n*, 120 Ariz. 137, 138-39, 584 P.2d 601, 602-03 (App.

1978) (unprotested notice of claim status final as to merits of carrier's determination). Section 23-947(A), states that a notice of claim status providing supportive care benefits—such as those for Spencer's cervical spine injury—becomes a final judgment unless a party challenges the conclusions contained in the notice by filing a request for a hearing within ninety days following its entry. In addition to filing a request for a hearing, a carrier is also permitted to "unilaterally rescind or amend a previously issued Notice of Claim Status within the 90 day statutory period [to] . . . void the binding effect of a Notice of Claim Status." *Church of Jesus Christ of Latter Day Saints v. Indus. Comm'n*, 150 Ariz. 495, 498, 724 P.2d 581, 584 (App. 1986). If no party files a request for a hearing or otherwise protests a notice of claim status within ninety days, the determination "is final and res judicata to all parties." § 23–947(B); *see also Church of Jesus Christ of Latter Day Saints,* 150 Ariz. at 498, 724 P.2d at 584 (res judicata takes effect after ninety days).

¶15 Spencer's claim was closed for active medical care benefits in March 2012 by a notice of claim status that concluded, in part, that Spencer had an unscheduled permanent impairment to his cervical spine. It is undisputed that Respondents did not file a request for a hearing or issue a new notice of claim status within ninety days after Spencer's claim was closed. Therefore, unless an exception applies, the March 2012 notice of claim status awarding supportive care benefits for Spencer's cervical spine injury was final and the doctrine of res judicata bars any party from re-litigating the matter.

¶16 There are two statutory exceptions to the application of res judicata: a claimant's ability to petition to reopen a previously closed case upon a showing of a "new, additional or previously undiscovered temporary or permanent condition," A.R.S. § 23-1061(H), and a claimant, carrier, or employer's ability to seek rearrangement of a claim upon a showing that a claimant's earning capacity has been increased or reduced, A.R.S. § 23–1044(F); *see also Arizona Workers' Compensation Handbook* § 11.3, at 11-15 (Ray J. Davis et al. eds., 1992). Although Spencer properly petitioned to reopen his claim pursuant to § 23-1061(H), Respondents sought no affirmative relief other than making their request after the third day

of the hearings and in their response to Spencer's request for review. Thus, neither statutory exception applies to Respondents' request to revisit the conclusions contained in the March 2012 notice of claim status.

¶17 A common-law exception to the rules of finality applicable to notices of claim status and the fact-finding process may exist when a claim of fraud has been established. *Sw. Nurseries v. Indus. Comm'n*, 133 Ariz. 171, 174, 650 P.2d 473, 476 (App. 1982). Indeed, "[o]ur supreme court has said that there is no statute of limitations or rule of law which prevents the Industrial Commission from upsetting a former finding that claimant's condition was compensable when such a finding was procured by fraud." *Id.* at 173, 650 P.2d at 475, *citing Scott v. Wasielewski*, 89 Ariz. 29, 31, 357 P.2d 614, 616 (1960); *see generally Hopper*, 27 Ariz. App. 732, 558 P.2d 927. Such a claim of fraud, however, must be established by clear and convincing evidence.[3] *Hopper*, 27 Ariz. App. at 734, 558 P.2d at 929.

¶18 Here, the ALJ found that Respondents had "presented no evidence of fraud on [Spencer's] part." It therefore concluded the closure of his claim was "final and res judicata as to all parties." Although Respondents have characterized the ALJ's ruling as a misapplication of the principles of res judicata, we disagree. Rather, we construe the ALJ's finding 6 as a conclusion that Respondents

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[3]In *Hopper*, we noted

> The purpose of the 'clear and convincing' standard is to guide the trier of fact in the consideration of the evidence. It is not a test to be applied to an appellate court in passing on the sufficiency of the evidence. Therefore the finding of the trier of fact should be sustained if the evidence furnishes reasonable or substantial support therefor.

27 Ariz. App. at 734, 558 P.2d at 929 (citations omitted).

had not provided clear and convincing evidence of fraud as required to overcome the finality of the notice of claim status. *Id.* at 734, 558 P.2d at 929; *Sw. Nurseries*, 133 Ariz. at 173, 650 P.2d at 475. We conclude the ALJ properly applied the law and that reasonable and substantial evidence supports her determination.[4] *Hopper*, 27 Ariz. App. at 735, 558 P.2d at 930.

¶19 Both Spencer and the doctors testified at the hearings. Although this testimony included Dr. Shapiro's conclusions that Spencer's cervical spine injury pre-dated his industrial injury and had not been disclosed by Spencer to his doctors, it also included Dr. Attias's opinions to the contrary. Attias testified that Spencer's problems with his neck, spine, and left hand were causally related to the industrial injury. He stated that a patient can have a pre-existing injury and still be able to function, but can lose that ability after additional injury. He explained that in Spencer's case, "the [industrial] injury was the factor that put him off balance for his cervical spine, his neck and probably his hand." Attias noted it was his "philosophy" to believe his patients' complaints about when their pain started and what caused it. And although he "wasn't aware" of Spencer's prior cervical spine injury, when questioned about whether Spencer had denied having problems with his cervical spine before the industrial injury, Attias said, "I don't think I said that. I think he denied having the same problem."

¶20 This testimony is consistent with Spencer's testimony. He explained that in 2005, his work involved "climbing up ladders with a hundred-pound backpack [and] bringing up compressors" by himself. This "hurt[] a little bit" and caused "soreness" in his neck. Spencer stated that his doctor at the time told him he could either have surgery or could stop doing the repetitive lifting work and let the condition repair itself. Spencer characterized this choice as a "no-brainer" and sought training for a different job, causing the problem to "stabilize[]." When asked whether he "had always

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[4] In light of our conclusion, we do not address the ALJ's findings that Respondents untimely raised the issue of Spencer's alleged fraud and failed to cite appropriate authority for their contentions.

denied having prior neck problems" to his doctors, Spencer testified he had "never really had a problem" because it "went away like the doctor said," and that it was not a "major thing" for him. We conclude this evidence is both reasonable and substantial, and adequately supports the ALJ's conclusions. *See Hopper*, 27 Ariz. App. at 734, 558 P.2d at 929.

¶21 Respondents argue that by denying Spencer's petition to reopen, the ALJ necessarily found Dr. Shapiro more credible and thus erred by not relying on Shapiro's conclusions regarding Spencer's cervical spine condition. We disagree. First, the ALJ did not find Shapiro more credible; rather, in denying Spencer's petition to reopen, the ALJ merely concluded that she "accept[ed] Dr. Shapiro's opinion that there is nothing new, additional or previously undiscovered which would warrant reopening [Spencer's] claim" and that Spencer "had not established the elements necessary to reopen his claim." Dr. Attias's testimony did not directly contradict this conclusion, as it focused on Spencer's continuing pain stemming from his industrial injury.

¶22 Additionally, even if the ALJ had found Dr. Shapiro more credible as to whether Spencer had sustained a "new, additional or previously undiscovered" condition, *see* § 23-1061(H), she was free to reject other portions of Shapiro's testimony—such as his testimony regarding Spencer's cervical spine condition. The ALJ is responsible for weighing and resolving conflicts in the evidence, *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 10, 2 P.3d 691, 695 (App. 2000), and "is the sole judge of witness credibility," *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). Thus a determination of witness credibility regarding Spencer's cervical spine condition "is beyond the limited role of the reviewing court," *see Villanueva v. Indus. Comm'n*, 148 Ariz. 285, 288, 714 P.2d 455, 458 (App. 1985), and will be disturbed only if the determination "cannot be reasonably supported on any reasonable theory of the evidence," *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398-99, 542 P.2d 1096, 1097-98 (1975). By finding no evidence that Spencer had committed fraud, the ALJ necessarily resolved the conflicting evidence regarding his cervical spine injury by adopting the testimony of Dr. Attias and Spencer. *Cf. Villanueva*, 148 Ariz. at 289,

714 P.2d at 459 (appellate court will not imply a rejection of credibility). The ALJ's conclusion that Respondents had failed to establish fraud regarding Spencer's cervical spine condition is supported by the evidence, and we will not disturb it. *Cf. Pacific Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 214, 735 P.2d 820, 824 (1987) (appellate court will not re-weigh evidence and views evidence in light most favorable to sustaining award).

Disposition

¶23 For the foregoing reasons, we dismiss Spencer's special action for lack of jurisdiction. With respect to Respondents' special action, we affirm the award.