IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

LYNN GARLOW,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

BOWEN MACHINE AND FABRICATING,
Respondent Employer,

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Respondent Insurer.

No. 2 CA-IC 2015-0007
Filed October 26, 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NOT FOR PUBLICATION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);
Ariz. R. P. Spec. Actions 10(k).

Special Action – Industrial Commission
ICA Claim No. 94263598661
Insurer No. 095CBVUF4165R
Gary M. Israel, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 In this statutory special action, Lynn Garlow petitions this court for review of an award of supportive medical maintenance benefits (SMMB) by the administrative law judge (ALJ) in his decision upon review. For the following reasons, the ALJ's award is set aside.

Factual and Procedural Background

¶2 In 1994, Garlow was injured at work. She received workers' compensation benefits for approximately one year before the insurer closed the claim. Garlow later filed a petition to reopen her claim, arguing she previously had been misdiagnosed. The petition was granted and she received an award of medical benefits and temporary compensation. Ultimately, in 1999, the insurer closed the claim with an unscheduled permanent partial disability and provided Garlow with SMMB including chiropractic visits, office visits, injections, and medication.

¶3 In 2014, the insurer terminated Garlow's supportive care based on the results of an independent medical examination. Garlow timely protested and requested a hearing. The ALJ awarded her SMMB of two office visits per year and a prescription of Lyrica or Gabapentin. This petition for special action followed.

¶4 Garlow contends the ALJ's award of SMMB lacks factual foundation. Factual questions are to be resolved by the Industrial Commission, and we will not set aside its findings "unless there is no reasonable basis for the determination." *Brooks v. Indus. Comm'n*, 136 Ariz. 146, 149, 664 P.2d 690, 693 (App. 1983). We do not reweigh the evidence, and we consider the evidence in the light most favorable to sustaining the ALJ's award. *Hunt Bldg. Corp. v. Indus. Comm'n*, 148 Ariz. 102, 106, 713 P.2d 303, 307 (1986).

¶5 Here, the ALJ heard testimony from two physicians. Dr. Debra Walter, Garlow's treating physician from August of 1996 until October of 2008, testified that Garlow had a sacroiliac dysfunction. She recommended a treatment plan including approximately eighteen yearly chiropractic visits, pain management medication monitored in four to six yearly office visits, muscle relaxers, and a sacroiliac belt.

¶6 In contrast, Dr. John Beghin, the physician who examined Garlow at the request of the insurer, testified that he "d[id] not give credence to" Dr. Walter's diagnosis. He diagnosed Garlow as having a lumbar sprain or strain, or, alternatively, a "conjoint nerve root." He recommended treatment with Lyrica or Gabapentin and two office visits per year to treat her nerve condition.

¶7 The ALJ adopted Dr. Walter's testimony as to diagnosis, but adopted Dr. Beghin's testimony as to the appropriate treatment.[1] In so doing, the ALJ relied on our supreme court's decision in *Fry's*

[1]The parties dispute whether Garlow's diagnosis was a matter of res judicata. Because the ALJ agreed with Garlow on the issue of diagnosis, and the employer and insurer have not challenged this ruling, we need not address the issue.

Food Stores v. Industrial Commission, stating, "'Nothing binds the factfinder to accept or reject an expert's entire opinion.'" 161 Ariz. 119, 123, 776 P.2d 797, 801 (1989). However, the court's decision in that case included an important caveat: "A factfinder is free to put together parts of expert testimony *in a reasonable manner*." *Id.* (emphasis added).

¶8 In *Fry's Food Stores*, one medical expert testified the claimant had "baker's lung" from exposure to flour dust at work. *Id.* at 120, 776 P.2d at 798. The opposing expert testified the claimant had chronic obstructive pulmonary disease due to his long-term smoking. *Id.* at 121, 776 P.2d at 799. The doctor who made the diagnosis of baker's lung had erroneously assumed the claimant did not wear a mask while working. *Id.* The opposing expert testified that whether the claimant wore a mask was not relevant to determining whether he had baker's lung. *Id.* The court concluded that the ALJ could use the second doctor's testimony to cure the "foundational problem" in the testimony of the first doctor. *Id.* at 122-23, 776 P.2d at 800-01. The combined fact findings from the first doctor and the second doctor created a logical, reasonable conclusion.

¶9 "Although it is the administrative law judge's prerogative to resolve conflicting medical opinions, his resolution must be based upon factual support in the record and be consistent with the findings as a whole." *Circle K Corp. v. Indus. Comm'n*, 134 Ariz. 51, 53, 653 P.2d 699, 701 (App. 1982) (citation omitted). Here, the ALJ adopted Dr. Walter's opinion that Garlow had sacroiliac joint dysfunction. But there is no support in the record that the awarded SMMB, Lyrica or Gabapentin, would be the proper treatment for this condition. Dr. Walter did not suggest using either of these drugs, and Dr. Beghin testified only that these drugs would be appropriate for a "conjoint nerve root." If one doctor were to diagnose a viral illness and recommend bed rest, and a second doctor diagnosed a bacterial infection and prescribed an antibiotic, it would be unreasonable to find the patient had a viral illness and should be treated with an antibiotic unless one of the doctors also opined that an antibiotic could be used to treat either condition. Here, notwithstanding Bowen's implied contention that the

treatment is only "slightly different," there is no suggestion in the record that the doctors' treatment recommendations were interchangeable, equivalent, or even complementary. As a matter of law, an ALJ cannot resolve a conflict between medical opinions by finding a claimant has one condition and awarding the claimant SMMB for an entirely different condition.

¶10 Accordingly, we must conclude there was "no reasonable basis" for the ALJ's award of SMMB. *Brooks*, 136 Ariz. at 149, 664 P.2d at 693. The award is set aside.