

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

STEVE MCAVOY
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

SENERGY PETROLEUM, LLC,
Respondent Employer,

COPPERPOINT AMERICAN INSURANCE COMPANY,
Respondent Insurer.

No. 2 CA-IC 2015-0013
Filed July 20, 2016

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NOT FOR PUBLICATION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); Ariz. R. Civ. App. P. 28(a)(1), (f); Ariz. R.
Spec. Act. 10(k).*

Special Action - Industrial Commission
ICA Claim No. 20140520230
Insurer No. 14A00172
LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Bryan Clymer, Tucson
Counsel for Petitioner

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

Copperpoint American Insurance Company
Mark A. Kendall, Associate General Counsel
By Veronique Pardee, Tucson
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 In this statutory petition for special action, petitioner Steve McAvoy contends the administrative law judge (ALJ) erred as a matter of law in terminating treatment due to a lack of an objective change in his condition. He also argues there was no substantial evidence to support the ALJ's award of "Supportive Medical Maintenance Benefits." For the following reasons, we affirm.

Factual and Procedural Background

¶2 We consider the evidence in the light most favorable to upholding the Industrial Commission's award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). McAvoy sustained an industrial injury in February 2014, when he was "lifting [a] hose up [a] ladder" while employed as a truck driver for Senergy Petroleum. Shortly after the incident, he began experiencing pain in his left shoulder and the left side of his neck that required treatment. McAvoy filed a worker's compensation claim, which was accepted by Copperpoint, Senergy Petroleum's insurance carrier.

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¶3 In April 2014, McAvoy began receiving treatment for headaches, which he attributed to his work injury. Despite extensive conservative care, he reported no improvement of his symptoms. In February 2015, Copperpoint issued a notice informing McAvoy that his temporary benefits and active medical treatment had been terminated. McAvoy requested a hearing, claiming his condition required further active treatment or, if it had stabilized, constituted a permanent impairment.

¶4 At the hearing, the ALJ heard testimony from one of McAvoy's treating physicians, Dr. Matthew Wilson, and the insurance company's medical expert, Dr. Marjorie Eskay-Auerbach. The physicians disagreed as to whether the industrial injury had exacerbated McAvoy's preexisting degenerative cervical disc disease to the extent that it continued to cause McAvoy's complaints of pain and headaches.

¶5 Dr. Wilson, a board-certified neurosurgeon, testified that McAvoy was referred to him in September 2014 "predominantly for neck pain and headaches." Upon physical examination, Wilson found "extreme spasm and discomfort in [McAvoy's] trapezius and rhomboids on the left side," and review of magnetic resonance imaging (MRI) and x-rays revealed "arthritic changes at multiple levels in his neck," "a malalignment of the bones" in the cervical area, and "severe degenerative disk disease" in the neck area. Wilson opined that the industrial injury "without question" was "something that caused [McAvoy's previously asymptomatic] degenerative disk disease to become symptomatic." He also disagreed with the independent medical examiners' report, which concluded McAvoy's ongoing "medical problems" were attributable to his preexisting disc disease and "pectus excavatum" condition, associated with shortness of breath that "likely" caused him to assume "abnormal postures."

¶6 Dr. Eskay-Auerbach, a board-certified orthopedic surgeon, testified on behalf of a group of three doctors who had evaluated McAvoy in January 2015. She stated the industrial injury had caused a "temporary exacerbation" of McAvoy's preexisting degenerative cervical condition, which had since become stationary,

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and opined that his ongoing complaints of neck pain and headaches were related to that condition. She further opined that the industrial injury did not permanently aggravate McAvoy's cervical condition, basing her opinion on the lack of any acute findings in McAvoy's diagnostic studies as well as a lack of evidence of cervical radiculopathy on his physical exam. In reaching that conclusion, Eskay-Auerbach also cited the definition of "aggravation" promulgated by the American Medical Association (AMA), noting that McAvoy's injury had not anatomically or objectively changed the preexisting cervical disc degeneration that was visible from MRI. She additionally testified that a mere change in symptoms based on subjective complaints would not qualify as a permanent aggravation unless they were also associated with objective findings.

¶7 The ALJ accepted Dr. Eskay-Auerbach's opinion as the "most probably correct and well founded," determining that McAvoy's condition was stationary without impairment. The ALJ nonetheless authorized supportive care for up to one year "to treat Mr. McAvoy's ongoing subjective pain complaints." McAvoy timely requested administrative review, and the ALJ summarily affirmed the award. This petition for special action followed; we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

Standard of Review

¶8 We deferentially review an ALJ's factual findings, but review her legal conclusions de novo. See *PFS v. Indus. Comm'n*, 191 Ariz. 274, 277, 955 P.2d 30, 33 (App. 1997). We will not disturb the ALJ's resolution of any conflicts in the medical evidence unless "wholly unreasonable." *Gamez v. Indus. Comm'n*, 213 Ariz. 314, ¶ 15, 141 P.3d 794, 796 (App. 2006), quoting *Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979).

Termination of Active Treatment

¶9 McAvoy first contends the ALJ erred as a matter of law in terminating "active treatment without a permanent impairment" due to a lack of an objective change in McAvoy's preexisting cervical

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degenerative disc disease. He argues the ALJ “ignored Arizona case law” by “requir[ing] an objective worsening of a pre-existing condition” in order to prove legal causation and “adopted a legally deficient medical opinion” that “misapplied the law by misreading the AMA Impairment Guides’s definition of aggravation.” Copperpoint responds that the ALJ’s decision to terminate treatment was not solely based on a lack of “organic change to his condition,” and instead contends it was merely one factor considered and the ALJ correctly based its decision on the “totality of the evidence.”

¶10 To receive continuing medical benefits, a claimant has the burden of proving that his physical condition is causally related to his industrial injury and that he was not yet medically stationary. *Aguayo v. Indus. Comm’n*, 235 Ariz. 413, ¶ 10, 333 P.3d 31, 33 (App. 2014); *see also W. Bonded Prods. v. Indus. Comm’n*, 132 Ariz. 526, 527, 647 P.2d 657, 658 (App. 1982). A symptomatic aggravation of a preexisting condition that requires additional medical treatment is compensable, *see Mandex, Inc. v. Indus. Comm’n*, 151 Ariz. 567, 570, 729 P.2d 921, 924 (App. 1986), but a claimant must do more “than merely establish[] an aggravation of a preexisting disease or infirmity” and an inability to work, *Arellano v. Indus. Comm’n*, 25 Ariz. App. 598, 603-04, 545 P.2d 446, 451-52 (App. 1976). He must also establish a causal connection between the industrial injury and subsequent symptomatology. *Id.* at 604, 545 P.2d at 452.

Schreven and Arellano

¶11 McAvoy argues the ALJ erred in applying *Arellano* to the facts of his case because, unlike the claimant in that case, he is “not trying to establish a ‘permanent impairment.’” He maintains *Schreven v. Indus. Comm’n*, 96 Ariz. 143, 393 P.2d 150 (1964), controls instead, arguing that, like the claimant in *Schreven*, he is seeking “further active treatment” to improve the “[s]ymptomatic aggravation of [his] pre-existing” degenerative condition. Copperpoint contends the ALJ “correctly relied” on *Arellano*, a case “more closely aligned with the facts presented” here, and asserts that *Schreven* is distinguishable because there was no conflicting medical evidence in that case.

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¶12 *Arellano* involved a laborer with no history of back problems who was unable to return to work after sustaining an industrial back injury while operating a jackhammer. 25 Ariz. App. at 599-600, 545 P.2d at 447-48. Following hearings, the ALJ resolved a conflict in the medical testimony in favor of the carrier, whose medical expert testified the claimant's industrial injury had resolved and any continuing symptomatology was attributable to the claimant's preexisting degenerative arthritis. *See id.* at 600-02, 545 P.2d at 448-50. In affirming the ALJ, this court concluded the claimant had not shown his industrial injury caused an aggravation of his degenerative arthritis that had not terminated and continued to contribute to his ongoing pain. *Id.* at 600, 603-04, 545 P.2d at 448, 451-52.

¶13 The claimant in *Schreven* was a bricklayer with a preexisting "asymptomatic, nondisabling congenital deformity of the spine" that became symptomatic after he sustained a lumbosacral strain at work. 96 Ariz. at 143, 393 P.2d at 143. He tried returning to work after the strain resolved, but it caused him severe back pain. *Id.* At a hearing on the matter, the only medical witness testified the medical cause of Schreven's injury was his congenital abnormality, but concluded the industrial injury triggered his back pain. *Id.* at 144-45, 393 P.2d at 152. The ALJ refused to authorize rehabilitation on the grounds that the industrial injury was not the cause of Schreven's disability. *See id.* Our supreme court reversed, noting that no evidence was presented "contradicting the legal cause" of Schreven's back pain and holding the claim was thus compensable. *See id.*

¶14 McAvoy contends "[t]he facts in the case at bar establish a symptomatic aggravation of [his] cervical [degenerative disc disease] just as they did in *Schreven*." Although the facts in *Schreven* are somewhat analogous to the facts presented here, as Copperpoint notes, McAvoy overlooks the fact that *Schreven* is "distinguishable in one very important respect": unlike the present case, *Schreven* did not involve a conflict in the medical evidence. *Cf. Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (App. 1985) (ALJ's duty to resolve any conflict in expert testimony).

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The *Schreven* court concluded the ALJ erred in finding the industrial injury was not the cause of Schreven's disability when the undisputed medical evidence established that it was. 96 Ariz. at 145, 393 P.2d at 152. Here, the ALJ was presented with conflicting medical evidence and *Schreven*, therefore, is not controlling.

¶15 Nor do we find the ALJ erred in relying upon *Arellano*. McAvoy contends *Arellano* is inapplicable because it involved a permanent impairment, which McAvoy says he "is not trying to establish." But McAvoy is expressly seeking "further active treatment" or a "permanent impairment" "[i]n the event his condition is stabilized." And, in any event, he has not provided, nor are we aware of, any authority suggesting *Arellano* is limited to cases involving permanent impairment. See Ariz. R. P. Spec. Act. 7(e) (arguments must be supported with citations to authorities).

¶16 McAvoy also suggests the ALJ cited *Arellano* for the proposition that "an applicant must show an underlying organic change in his physical condition" to "carry [his] burden of proof," but the record undercuts this suggestion. The ALJ's decision makes clear that she cited *Arellano* for the proposition that it was McAvoy's burden to "show [his] industrial injury caused an aggravation that has not terminated and continues to contribute to his ongoing disability." Accordingly, the ALJ did not err in applying *Arellano* to this matter.

¶17 In a related argument, McAvoy contends that "subjective complaints in cases of symptomatic aggravation . . . carry the burden needed to keep a claim open for active treatment," and the ALJ's decision erroneously raised that burden by requiring more than a "show[ing of] symptomatic aggravation" to establish an industrial claim. Though "[c]redible subjective complaints combined with a doctor's testimony" attributing those complaints to an industrial injury can "carry the burden and show symptomatic aggravation" of a preexisting condition, see *Mandex*, 151 Ariz. at 569-70, 729 P.2d at 923-24, it does not follow that every credible "subjective complaint[] in cases of symptomatic aggravation" automatically requires the ALJ "to keep a claim open for active treatment," even when conflicting medical testimony is presented.

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Such complaints, in the face of conflicting medical evidence, are subject to the ALJ's resolution of the evidentiary conflict, and we will not disturb her ruling unless it is "wholly unreasonable." See *Stainless Specialty Mfg.*, 144 Ariz. at 19, 695 P.2d at 269 (ALJ's responsibility to resolve any conflict in expert testimony).

¶18 In the instant case, it is undisputed that McAvoy has cervical degenerative disc disease that was present but asymptomatic prior to the industrial injury and that, after the injury, he has continued to have neck and shoulder pain. Thus, the conflict in expert testimony concerns whether McAvoy suffered only a temporary aggravation of his preexisting condition due to the injury and whether his ongoing complaints of pain are causally related to the industrial accident.

¶19 At the hearing, Dr. Wilson opined that McAvoy's preexisting neck condition was aggravated by the work injury, causing the previously asymptomatic condition to become symptomatic. He also recommended McAvoy receive ongoing treatment to improve his condition. Dr. Eskay-Auerbach concluded the industrial injury "temporar[il]y exacerbat[ed]" McAvoy's preexisting condition, but did not cause a "permanent aggravation." She stated she could not find a mechanism of injury specific to the neck, noted there were no clinical findings consistent with an acute injury, and attributed the headaches and complaints of neck and shoulder pain to the pre-existing degenerative disc disease. She thus concluded McAvoy's temporary exacerbation had resolved and his neck pain could no longer be attributed to the industrial injury.

¶20 In her decision, the ALJ expressly found Dr. Eskay-Auerbach's opinion "most probably correct and well founded" on the issues of "permanent impairment and ongoing active care." Because an expert may conclude that an aggravation of a preexisting condition is temporary even if the underlying symptom was asymptomatic before the industrial injury and continues to be symptomatic after the injury, *Arellano*, 25 Ariz. App. at 603-04, 545 P.2d at 451-52, we cannot say the ALJ erred in resolving the conflict by adopting Eskay-Auerbach's opinion on this issue, see *Gamez*, 213 Ariz. 314, ¶ 15, 141 P.3d at 796.

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AMA Impairment Guides

¶21 McAvoy further asserts the ALJ erred by “rel[ying] on a medical opinion that misunderstood the AMA [Impairment] Guides as requiring evidence of objective change when [his] condition [wa]s not stationary.” Specifically, he contends Dr. Eskay-Auerbach’s medical opinion “lacked proper foundation” because she misinterpreted the AMA Impairment Guides’s definition of “aggravation” as “requir[ing] evidence of an objective change” to establish a worker’s injury is not stationary.

¶22 At the hearing, Eskay-Auerbach testified that she did not attribute any of McAvoy’s ongoing pain symptoms to the industrial accident because it resulted in no permanent change to McAvoy’s degenerative disc disease. She based her opinion, in part, upon the AMA Causation Guides’s definition of “aggravation.” That definition reads:

Permanent worsening of a preexisting condition. A physical, chemical, biological or other factor results in an increase in symptoms, signs and/or impairment that never returns to baseline or what it would have been except for the aggravation (the level predetermined by the natural history of the antecedent injury or illness).

Eskay-Auerbach interpreted the definition of “aggravation” as requiring “a permanent change in the [preexisting] condition in order to say that there’s a permanent aggravation, and there was no change in his condition.” When questioned further, she opined that the AMA’s definition “would preclude as a permanent aggravation . . . an increase in subjective complaints after an industrial injury,” unless those complaints are “associated with objective findings that explain them.” Stating “there’s no indication [of] a permanent aggravation or a permanent change in [McAvoy’s preexisting] condition as a result of the industrial injury in question,” Eskay-Auerbach concluded the industrial injury resulted in a sprain or strain that “temporar[il]y exacerbat[ed]” McAvoy’s preexisting

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degenerative disc disease, which had resolved and no longer required “further active care.”

¶23 Dr. Eskay-Auerbach’s interpretation of the AMA Guides was not inconsistent with Arizona law regarding permanent aggravation of a preexisting condition. *See Arellano*, 25 Ariz. App. at 600, 603, 545 P.2d at 448, 451 (affirming ALJ’s finding of no permanent disability where ALJ accepted medical opinion of expert who found no permanent worsening of the underlying condition due to lack of objective findings). Though a claimant may establish a permanent impairment by showing an industrial injury caused an increase in symptomatology relating to a preexisting condition, *see, e.g., Schreven*, 96 Ariz. at 145, 393 P.2d at 152, we are aware of no authority that *requires* a medical expert to conclude that those subjective complaints constitute a permanent worsening of the underlying condition.

¶24 Moreover, the proper interpretation of the AMA Guides is within the realm of medical expertise, best left to medical experts, whose credibility can be challenged during cross-examination. *Cf. id.* at 603, 545 P.2d at 451 (disregard of “competent medical evidence . . . exceeds the boundaries of judicial review and makes us doctors rather than judges”); *see also Kentucky River Enters., Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003); *In re Hurt*, 355 P.3d 375, 381 (Wyo. 2015) (improper to discount expert opinion by substituting judicial interpretation of AMA Guides and medical records).

¶25 Nor did Dr. Eskay-Auerbach neglect to “decide whether McAvoy requires further active treatment to improve his condition,” as he alleges on review. She expressly determined “to a reasonable degree of medical probability” that McAvoy “suffered a temporary exacerbation of cervical spine disease as a result of the industrial accident” and required “no further active care . . . as it related to the industrial injury.” She additionally stated that the treatment recommended by McAvoy’s treating physicians would treat “the underlying condition which is unrelated to the industrial injury.” We find no error in the ALJ’s reliance on Eskay-Auerbach’s testimony.

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AMA Causation Guides

¶26 McAvoy next contends the ALJ impermissibly relied on the AMA Guides to the Evaluation of Disease and Injury Causation (Causation Guides) in reaching her decision, because the Guides are “not sanctioned by the Industrial Commission and because she took judicial notice of certain facts without giving [him] the opportunity to respond.” He also argues the ALJ erroneously cited Ariz. Admin. Code R20-5-13(B)(1) “as allowing her the authority to do so.”

¶27 In reaching her decision “regarding impairments,” the ALJ noted she was “guided by the AMA Guides, 6th Edition and the associated publications when ‘evaluating functional impairment,’” citing R20-5-113(B)(1) in support of that reliance. R20-5-113(B)(1) provides that when a physician discharges a claimant from treatment, the physician:

[s]hall determine whether the claimant has sustained any impairment of function resulting from the industrial injury. The physician should rate the percentage of impairment using the standards for the evaluation of permanent impairment as published by the most recent edition of the American Medical Association in Guides to the Evaluation of Permanent Impairment, if applicable.

We agree with McAvoy that R20-5-113(B)(1) does not stand for “the proposition that [the ALJ] should be guided by the ‘associated [AMA] publications when “evaluating functional impairment” in workers’ compensation claims.’” But it is unclear whether the ALJ was citing R20-5-113(B)(1) to support her use of the Causation Guides specifically or to establish the propriety of considering AMA Guides generally. And even if she did intend the former and did erroneously interpret R20-5-113(B)(1), it does not follow that her decision to refer to the Causation Guides was also erroneous.

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¶28 “There is no limit to which a court or quasi-judicial body may go in referring to encyclopedias, dictionaries and scientific publications for . . . material which will assist in the clarification or interpretation of evidence.” *Utah Constr. Co. v. Berg*, 68 Ariz. 285, 291, 205 P.2d 367, 371 (1949). Additionally, in an ICA hearing, an ALJ is not bound by common law or statutory rules of evidence and may conduct the hearing in any manner that will achieve substantial justice. A.R.S. § 23-941(F); *see also Gordon v. Indus. Comm’n*, 23 Ariz. App. 457, 460, 533 P.2d 1194, 1197 (1975) (§ 23-941(F) allows “liberalization” of common law and statutory rules of evidence so greatest amount of competent evidence is available to ALJ for deliberation upon an award).

¶29 Contrary to McAvoy’s assertion, the ALJ did not “tak[e] judicial notice of certain facts,” nor did she accept the AMA Causation Guides as fact. Instead, she reviewed the Guides to assist in interpreting the evidence presented in this case and concluded they were “helpful” in reaching her decision “on the issue of permanent impairment and ongoing active care.” *Cf. Berg*, 68 Ariz. at 291, 205 P.2d at 371 (ALJ may refer to materials that will assist in clarification or interpretation of evidence). McAvoy also suggests the ALJ “impermissibly relied on” the Causation Guides because “she already ha[d] case law to guide her.” But McAvoy has provided no authority, nor are we aware of any, that supports his position. And, in any event, it is clear from the record that the ALJ did not ignore relevant case law, but rather considered the Causation Guides in conjunction with “all of the medical evidence” and relevant case law in reaching her conclusion “on the issue of permanent impairment and ongoing active care.” We find no abuse of discretion in the ALJ’s use of the Causation Guides in this manner.

Supportive Care Award

¶30 McAvoy lastly contends the trial court erred as a matter of law in ordering supportive care instead of keeping his case open for active treatment. After determining McAvoy’s condition was “stationary without impairment,” the ALJ ordered Copperpoint to pay for ongoing care related to McAvoy’s preexisting degenerative

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disc condition. McAvoy asserts the ALJ's award was unsupported by the evidence because "no medical expert from either side recommended supportive medical care."

¶31 Although the Arizona Workers' Compensation Act does not specifically authorize awards of supportive medical benefits, "the propriety of granting such benefits has been recognized where a continuing need for such care is causally related to the industrial injury." *Capuano v. Indus. Comm'n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986). Supportive care benefits are medical benefits "designed to prevent or reduce the continuing symptoms of an industrial injury after the injury has become stabilized." *Id.* The determination of supportive care benefits necessarily presents a transitory issue, based on a claimant's evolving physical condition in relation to his industrial injury. *Brown v. Indus. Comm'n*, 199 Ariz. 521, ¶ 14, 19 P.3d 1237, 1240 (App. 2001).

¶32 The ALJ concluded it would be "harsh to abruptly discontinue treatment for [McAvoy's] subjective complaints, when these symptoms began after the work event" and ordered Copperpoint to authorize supportive care for McAvoy to include up to six office visits with his pain management physician, Dr. Bhola. Though McAvoy correctly points out that neither medical expert recommended supportive care, we will not disturb the award if it is supported by medical evidence. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975).

¶33 Dr. Wilson testified that McAvoy would benefit from pain management treatment with Dr. Bhola, and recommended that he pursue that treatment before considering surgery. Bhola reported that he had performed "[d]iagnostic cervical medical branch blocks" on McAvoy, the first of which provided "excellent relief." Because the ALJ's award of supportive care is based on the pain management recommendations of Wilson and Bhola, we conclude the ALJ's award is supported by the record and we see no reason to disturb it on appeal. *See id.* at 398, 542 P.2d at 1097. Accordingly, the ALJ did not err in awarding McAvoy supportive care benefits.

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Disposition

¶34 For the foregoing reasons, the ALJ's award is affirmed.