IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

TERRI WIDGER,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

TUCSON MEDICAL CENTER,
Respondent Employer,

CORVEL CORPORATION,
Respondent Insurer.

No. 2 CA-IC 2016-0003
Filed May 22, 2017

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NOT FOR PUBLICATION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. Act. 10(k).

Special Action – Industrial Commission
ICA Claim No. 20061110329
Insurer No. TH060000046
Deborah Nye, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

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The Industrial Commission of Arizona, Phoenix
By Jason M. Porter
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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this statutory special action, petitioner Terri Widger challenges the Industrial Commission's award denying her petition to reopen her workers' compensation claim. Widger argues the administrative law judge (ALJ) erred by considering the testimony of a physician as comparative medical evidence and by making several findings of fact. She also challenges the sufficiency of the evidence to support the award. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the award. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2, 275 P.3d 638, 640 (App. 2012). On April 10, 2006, while working

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

for respondent employer Tucson Medical Center, Widger injured her lower back when she bent down to open a roll-up door. The pain extended down both her legs.

¶3 Widger was seen by Dr. Eugene Mar, who ordered an MRI[2] scan. Based on those results, Dr. Mar recommended epidural injections and physical therapy. Widger complied, and Dr. Mar released her from his care on August 10, 2006, finding Widger "ha[d] reached maximal medical improvement." In his report of that date, Dr. Mar listed the following "impressions":

> 1. L4-5 right foraminal disc herniation reported from incident from 4-10-06.
>
> 2. L3-4 Grade I spondylolisthesis with moderate to moderately severe central spinal stenosis which is pre-existent and not industrially related.
>
> 3. L2-3 left paracentral disc herniation which is pre-existent and not industrially related.

The workers' compensation claim was closed with Widger having a "5% general physical functional disability" but "no reduced monthly earning capacity."

¶4 After experiencing the "same pain down the back of [her] legs and [in her lower back]," Widger filed a petition to reopen her claim in September 2015. She attached a report from Dr. Greg Feathers, indicating the need for another MRI scan because he was considering additional injections. Respondent insurer CorVel Corporation denied the petition, and Widger filed a request for a hearing.

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[2]Magnetic resonance imaging.

¶5 At the hearing, Dr. Kevin Henry—Dr. Feathers's partner—testified on behalf of Widger. He discussed Widger's November 2015 MRI scan, which showed:

> L3-L4: Grade 1 degenerative spondylolisthesis secondary to severe facet arthropathy with hypertrophic changes. Diffusely bulging degenerative disc. Severe central stenosis and severe bilateral lateral recess and foraminal stenoses, worse on right.
>
> L4-L5: Diffusely bulging degenerative disc. Moderate facet arthropathy. Canal is patent. Moderate to severe right lateral recess stenosis and mild left lateral recess stenosis.

In his November 30, 2015 report, Dr. Henry opined that Widger was suffering from "symptomatic spinal stenosis," which, based on his review of Widger's 2006 MRI scan, "look[ed] the same as it did in 2006." Dr. James Maxwell, who completed an independent medical evaluation (IME), also testified. He maintained that Widger had no "new, additional, or previously undiscovered condition . . . relate[d] to her industrial injury of April 10, 2006." Dr. Maxwell agreed that Widger currently exhibited symptoms of degenerative spondylolisthesis and significant spinal stenosis, but he stated those conditions predated and were unrelated to the 2006 industrial injury.

¶6 The ALJ denied the petition to reopen. She found that "[t]here [was] really no medical dispute in the record" because Dr. Henry "was never asked, and did not opine . . . whether since the claim closed in 2006, [Widger had] some objective evidence of a new, additional or previously undiagnosed condition causally related to [her] L4-L5 industrial injury." But to the extent there was any conflict, the ALJ stated that she adopted Dr. Maxwell's opinions as "more probably correct." Widger filed a request for review, and the ALJ affirmed the prior decision. 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

¶7 To reopen a workers' compensation claim, an employee must show the existence of "a new, additional or previously undiscovered temporary or permanent condition." A.R.S. § 23-1061(H). In addition, "the employee must show a causal relationship between the new condition and a prior industrial injury." *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 6, 154 P.3d 391, 393 (App. 2007). "Section 23-1061(H) was modified in 1999 to preclude reopening a claim based on an employee's 'increased subjective pain if the pain is not accompanied by a change in objective physical findings.'" *Id.*, *quoting* 1999 Ariz. Sess. Laws, ch. 331, § 9. In cases involving a first petition to reopen a closed claim, the relevant comparison points for showing a changed condition are the dates of the claim's closure and the petition's filing. *Cornelson v. Indus. Comm'n*, 199 Ariz. 269, ¶ 14, 17 P.3d 114, 116 (App. 2001).

¶8 Our review is limited to "determining whether or not the [ALJ] acted without or in excess of its power" and whether the findings of fact support the award. A.R.S. § 23-951(B). The ALJ determines witness credibility and resolves conflicts in the evidence. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). Although we review questions of law de novo, *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004), we will not disturb the ALJ's findings of fact "unless they cannot be supported by any reasonable theory of the evidence," *Mustard v. Indus. Comm'n*, 164 Ariz. 320, 321, 792 P.2d 783, 784 (App. 1990). Thus, we will affirm an award so long as it is reasonably supported by the evidence. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 16, 41 P.3d 640, 643 (App. 2002).

Comparative Medical Evidence

¶9 Widger contends the ALJ erred by "considering the testimony of Dr. Maxwell as comparative medical evidence." Specifically, she argues that "Dr. Maxwell's testimony explicitly

rejected and contradicted the medical findings determined in the initial claim, facts that were res judicata." Relying on *Gallegos v. Industrial Commission*, 144 Ariz. 1, 695 P.2d 250 (1985), she maintains that Dr. Maxwell was bound by the "medical findings determined in the initial claim." She points to various parts of Dr. Maxwell's testimony in which he purportedly disagrees with statements from Dr. Mar's 2006 reports.

¶10 In *Gallegos*, our supreme court determined, "As long as the prior award is final, whatever was decided is final and so is every fact necessary to that decision." 144 Ariz. at 4, 695 P.2d at 253. In other words, "the facts determined by the final order are binding" on both parties, regardless of whether they are later determined to be right or wrong. *Id.* However, *Gallegos* involved a rearrangement, not a petition to reopen and, therefore, is distinguishable.[3] *See Cornelson*, 199 Ariz. 269, ¶ 24, 17 P.3d at 118. "In a rearrangement, the administrative record will reflect the facts determined by the prior award; in a reopening, no administrative record exists." *Id.*

¶11 Nonetheless, an award of the Industrial Commission is entitled to finality, as is a notice-of-claim status. *Phx. Cotton Pickery v. Indus. Comm'n*, 120 Ariz. 137, 138-39, 584 P.2d 601, 602-03 (App. 1978); *see Tucson Steel Div. v. Indus. Comm'n*, 154 Ariz. 550, 554, 744 P.2d 462, 466 (App. 1987) ("The prerequisites for preclusion include a final judgment on the merits."). Failure to contest either "means that the determination by the commission, insurance carrier or self-insuring employer is final and res judicata to all parties." A.R.S. § 23-947(B).

¶12 Here, in the September 2006 notice-of-claim status, the insurer accepted Widger's claim and noted that her injury "resulted in permanent disability" but that "active medical treatment

[3]"[A] rearrangement under A.R.S. § 23-1044(F)(1) is based on changed medical condition, but it applies only to changes in earning capacity; a reopening provides for payment of medical bills for temporary or permanent conditions which do not necessarily impact on earning capacity." *Pima Cty. Bd. of Supervisors v. Indus. Comm'n*, 149 Ariz. 38, 43 n.3, 716 P.2d 407, 412 n.3 (1986).

terminated" on August 10, 2006. At that time, the insurer also authorized supportive medical maintenance benefits. In March 2007, the Industrial Commission issued its "Findings and Award for Unscheduled Permanent Partial Disability," which included the determinations made by the insurer and added that Widger had "no reduced monthly earning capacity as a result" of her disability. It therefore ordered that "no further compensation be awarded." Widger never requested a hearing. Consequently, there is no administrative record to reflect "every fact necessary to [the insurer's] decision." *Gallegos*, 144 Ariz. at 4, 695 P.2d at 253. And Dr. Mar's statements in his reports do not constitute a "determination by the commission, insurance carrier or self-insuring employer" that would be res judicata. § 23-947(B).

¶13 Moreover, although Dr. Maxwell may have characterized the precise nature of the 2006 industrial injury differently than Dr. Mar, he agreed the injury was work related. In reaching his conclusion, Dr. Maxwell compared the 2006 and 2015 MRI scans, as were relevant here. *See* § 23-1061(H) (in petition to reopen, employee must show changed condition); *Cornelson*, 199 Ariz. 269, ¶ 14, 17 P.3d at 116 (providing comparison points for petition). And Dr. Maxwell testified that the scans "are read as being essentially the same" and that Widger "looks [like] essentially the same patient" as she did in 2006.[4] We therefore cannot say the ALJ erred by considering Dr. Maxwell's testimony. *See Grammatico*, 208 Ariz. 10, ¶ 6, 90 P.3d at 213.

Findings of Fact

¶14 Widger also challenges three of the ALJ's findings of fact: (1) that she experienced bilateral back pain prior to 2015, (2) that she suffered two intervening back injuries, and (3) that Dr.

[4]Moreover, as we discuss below, the ALJ did not err in finding Widger failed to establish through her own expert "a new, additional or previously undiscovered temporary or permanent condition." § 23-1061(H); *see Lovitch*, 202 Ariz. 102, ¶ 17, 41 P.3d at 643-44 (claimant has burden of proving reopening is warranted).

Henry thought her condition preexisted her 2006 industrial injury. We address each finding in turn.

¶15 First, the ALJ found, "[Widger] testified that after her claim closed, and other than getting some epidural steroid injections in 2007, she did not get further treatment for her back, though she continued to have varying degrees of back and bilateral leg pain." Widger, however, contends that "the first instance of any reported bi-lateral (or left leg pain) was upon visiting Dr. Henry in 2015." There appears to have been some confusion at the hearing about whether Widger had experienced pain in one or both legs immediately following the 2006 industrial injury. For example, during cross-examination, Widger initially stated that the pain was only in her right leg, but she later admitted that she could not remember if she had previously said it was the right or the left.

¶16 Nonetheless, other portions of Widger's testimony, including some during direct examination, indicate that she experienced pain in both legs as a result of the 2006 industrial injury. Specifically, Widger testified that "the pain [was] going down [her] legs." She described the pain as radiating down her right leg and as a "tingling" or "numbness" in her left. She also stated she was "dragging [her] left leg." The ALJ's finding is therefore reasonably supported by the evidence. *See Mustard*, 164 Ariz. at 321, 792 P.2d at 784; *see also Royal Globe*, 20 Ariz. App. at 435, 513 P.2d at 973 ("If a witness makes contradictory statements in regard to the material issues of a case, the trier of fact may accept as true either statement, or, on account of the discrepancy, may disregard the testimony of the witness entirely.").

¶17 Second, the ALJ found, "[Widger] had two intervening injuries to her low back in 2010, and 2011, where her back was treated for each injury over a period of a few months." The record includes reports from November 2010, when Widger "bent down to pick up a toner cartridge box and felt a pop and twist in [her] right lower back," experiencing "immediate pain." The physician who treated her diagnosed a "lumbar strain." In addition, the record includes evidence of an October 2011 right-shoulder injury, and, during follow-ups for that injury, the reports show Widger was also

experiencing "right lower back pain." The doctor diagnosed a lumbosacral sprain/strain.

¶18 Widger nevertheless argues that "the only reference to back pain in these records was in the history [she] reported to the doctor[s]." That is plainly not the case with the 2010 injury when she was seen specifically for lower right back pain. With the 2011 right-shoulder injury, under a description of her "Present Illness," the follow-up reports state, "Now with also right lower back pain." This present-tense language shows that Widger was not simply recounting her medical history but had since her first visit developed the back pain. Indeed, the final report shows, "No longer with lower back pain." The ALJ's finding is therefore reasonably supported by the evidence. *See Mustard*, 164 Ariz. at 321, 792 P.2d at 784.

¶19 Third, the ALJ found that Dr. Henry "thought [Widger's] condition was an aggravation of pre-existing spondylolisthesis, which [as described in Dr. Mar's August 10, 2006 report] was not determined to be part of the industrial injury" and that Dr. Henry "was never asked, and did not opine . . . whether since the claim closed in 2006, [Widger had] some objective evidence of a new, additional or previously undiagnosed condition causally related to [her] L4-L5 industrial injury." Widger points to the following testimony as proof that Dr. Henry thought "[t]he industrial injury was the producing cause":

> Well, so, she initially was seen and treated with some injections and physical therapy back in 200[6] and she got better. Then about a year or so ago before she saw us she started noticing pain in the same location, same character, apparently, that it was back in 200[6]. So it appeared to be the same distribution of pain. And so I believed it was an, or a reaggravation, so to speak, of that preexisting spondylosis that she has.

She contends that the "ALJ has confused medical concepts" because "[s]pondylosis simply means that [Widger] was suffering from pain and degeneration."

¶20 Widger is correct that "spondylosis" can be used generally to describe "any lesion of the spine of a degenerative nature." *Spondylosis*, Stedman's Medical Dictionary 1181 (3d ed. 1972). However, given such a broad definition, Dr. Henry's testimony is somewhat ambiguous—he appears to be saying the pain was the same as it was in 2006, but he is not necessarily relating it to the 2006 industrial injury. Indeed, Dr. Mar found that in 2006 Widger was suffering from "spondylolisthesis with moderate to moderately severe central spinal stenosis" that preexisted her industrial injury. In his November 30, 2015 report, Dr. Henry opined that Widger was suffering from "symptomatic spinal stenosis," which he noted had also been symptomatic in 2006. Thus, this appears to be the "preexisting spondylosis" to which Dr. Henry was referring. If that was not the case, it was Widger's burden to clarify the issue, *see Polanco*, 214 Ariz. 489, ¶ 6, 154 P.3d at 393, and it was within the ALJ's discretion to "reject testimony when it appears that there are matters which impair its accuracy," *see Royal Globe*, 20 Ariz. App. at 434, 513 P.2d at 972.

¶21 Moreover, Dr. Henry testified that, while stenosis can be caused by an injury, it "usually occurs" naturally based on "multiple factors." He stated that Widger may have developed a stenosis at L4-L5 "because of degeneration over time." He also explained that spondylolisthesis "can cause some exacerbation at the level of the listhesis and the vertebrae at that level and the level adjacent to it." Dr. Henry further asserted,

> [E]mpirically, if someone has an injury at the L4-5 with a disk herniation, there shouldn't be problems at other levels from that injury. I mean, just wear and tear and continued stenosis from arthropathy and bulging disks, ligament hypertrophy are kind of a normal aging process and can contribute to pain.

Notably, the report from Dr. Feathers, which was attached to Widger's petition to reopen, also lacked any reference to the 2006 industrial injury. The record thus reasonably supports the ALJ's finding that Dr. Henry did not testify as to a new, additional, or previously undiscovered condition causally related to Widger's 2006 industrial injury. *See Mustard*, 164 Ariz. at 321, 792 P.2d at 784.

Sufficiency of the Evidence

¶22 Widger also contends the ALJ erred in concluding that "Dr. Henry's testimony did not address causation" and that she failed to present evidence of an objective or subjective change in "condition pertaining [to] her L4-5." As we understand these arguments, Widger is essentially challenging the sufficiency of the evidence to support the award.

¶23 As evidence of causation, Widger again cites Dr. Henry's testimony that her current pain was "a reaggravation, so to speak, of that preexisting spondylosis." She maintains that proof of causation does not require the use of "magic words." As objective evidence of a change in her condition, Widger points to the MRI scans from 2006 and 2015, as well as the physical examinations by Drs. Mar, Henry, and Maxwell. Widger further asserts that she "presented uncontroverted evidence of the subjective change in conditions that she has experienced since the date of closure," including increased pain that spread to both of her legs.

¶24 As discussed above, the ALJ's finding that Dr. Henry "was never asked, and did not opine . . . whether since the claim closed in 2006, [Widger had] some objective evidence of a new, additional or previously undiagnosed condition causally related to [her] L4-L5 industrial injury" was reasonably supported by the evidence. Although we agree with Widger that "magic words" were not necessary, *see Skyview Cooling Co. v. Indus. Comm'n*, 142 Ariz. 554, 559, 691 P.2d 320, 325 (App. 1984), the record lacks clear testimony that otherwise undermines the ALJ's finding. Notably, evidence of the causal connection was particularly important here as it was not "clearly apparent to a layperson." *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985); *see also W. Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 528, 647 P.2d 657, 659

(App. 1982) (expert testimony particularly important with back injuries).

¶25 In contrast, Dr. Maxwell testified that, to "a reasonable degree of medical probability," Widger had not suffered any "new, additional, or previously undiscovered condition . . . relate[d] to her industrial injury of April 10, 2006." He acknowledged that the 2015 MRI scan showed spondylolisthesis and stenosis, which he noted was not related to the 2006 industrial injury. He explained that a worsening of the stenosis is "something that one would expect [over time] . . . regardless of any injury." He also testified that the herniated disc Dr. Mar had identified in 2006 was "essentially the same" as the bulging disc identified on the 2015 MRI scan. In addition, as discussed above, Widger herself testified that she had pain in both legs following the 2006 industrial injury. *See Polanco*, 214 Ariz. 489, ¶ 6, 154 P.3d at 393 (evidence of subjective pain alone not enough to reopen claim). Reasonable evidence therefore supports the award. *See Lovitch*, 202 Ariz. 102, ¶ 16, 41 P.3d at 643.

Disposition

¶26 We affirm the award. Respondents have requested their attorney fees and costs, pursuant to Rule 25, Ariz. R. Civ. App. P., as a sanction for "defending [a] frivolous appeal." In our discretion, we deny their request. *See Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982) ("Because the line between a frivolous appeal and one which simply has no merit is fine, indeed, the power to punish attorneys or litigants for prosecuting frivolous appeals 'should be used most sparingly . . . .'"), *quoting In re Marriage of Flaherty*, 646 P.2d 179, 188 (Cal. 1982) (omission in *Price*).