IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

STEVEN D. KELLY,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

PIMA COUNTY,
Respondent Employer,

TRISTAR RISK MANAGEMENT,
Respondent Insurer.

No. 2 CA-IC 2017-0001
Filed August 3, 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NOT FOR PUBLICATION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. Spec. Act. 10(k).

Special Action – Industrial Commission
ICA Claim No. 96173934853
Insurer No. 96CO00439
Jacqueline Wohl, 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

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

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

¶1 In this special action, petitioner Steven Kelly challenges the Industrial Commission's award denying his petition to reopen his workers' compensation claim. Kelly complains the administrative law judge (ALJ) erred by adopting the opinions of a medical expert that directly opposed the findings of a prior notice-of-claim status and a prior award. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the award and will affirm a decision if reasonably supported by the evidence. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 16, 41 P.3d 640, 643 (App. 2002). In June 1996, while working as a

[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.

correctional officer, Kelly sustained an injury as he restrained an inmate during a fight in the Pima County Jail. Kelly filed an industrial injury claim that Pima County Risk Management ("Risk Management") accepted by notice-of-claim status in July 1996. In March 1997, supported by Dr. Wayne Peate's report assessing him with a "Grade 1 anterior spondylolisthesis of [vertebrae] L5 to S1," Risk Management terminated Kelly's temporary benefits but left his lost earning capacity to be determined. In August 1998, ALJ Israel adopted the diagnosis of Dr. Roger Grimes that Kelly had suffered a "lumbar sprain and strain superimposed upon pre-existing spondylolisthesis of L5 on S1" and awarded him $714.59 per month in permanent partial disability compensation.

¶3 In June 2015, after multiple modalities of conservative treatment failed, Kelly filed a petition to reopen his claim seeking coverage for surgery to alleviate increased pain from his previously diagnosed spondylolisthesis. When Risk Management denied the petition, Kelly sought review by the Industrial Commission. In September 2016, ALJ Wohl issued a Decision Upon Hearing and Award Denying Petition to Reopen ("1998 Award") in which she adopted the opinion of Dr. James Maxwell that Kelly's spondylolisthesis predated his industrial injury and that the industrial injury had not aggravated or caused that condition. The ALJ found Kelly had "not met his burden of proving a new, additional, or previously undiscovered condition or disability causally related to the industrial injury." After the ALJ affirmed her award, Kelly timely sought review with this court. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A).

Reopening Workers' Compensation Claim

¶4 Kelly challenges the ALJ's award denying his petition to reopen his workers' compensation claim. In order to reopen a workers' compensation claim, an employee must demonstrate he suffers from "a new, additional or previously undiscovered . . . condition." A.R.S. § 23-1061(H). Also, "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). Both legal and medical causation are required. *Id.* ¶ 7. Whereas legal causation concerns a nexus with employment,

"medical causation . . . is established by showing that the accident caused the injury." *Id.*, *quoting Grammatico v. Indus. Comm'n*, 211 Ariz. 67, ¶ 20, 117 P.3d 786, 790 (2005).

¶5 Here, the parties dispute whether the injury that led to Kelly's surgical procedure was medically caused by his struggle with the inmate. To that end, Kelly argues that the 1997 Notice-of-Claim Status ("1997 Notice") and 1998 Award conclusively established his industrial injury caused or permanently aggravated his spondylolisthesis. Accordingly, Kelly urges us to apply res judicata and conclude that the ALJ erred by deviating from those binding determinations.

¶6 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). Although we review questions of law de novo, *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004), *aff'd*, 211 Ariz. 67, ¶ 36, 117 P.3d at 794, we will not disturb the ALJ's findings "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).

Res Judicata

¶7 "An [Industrial Commission] award has preclusive effect through application of principles of issue preclusion and claim preclusion." *Miller v. Indus. Comm'n*, 240 Ariz. 257, ¶ 8, 378 P.3d 434, 436 (App. 2016); *see Holmes Tuttle Broadway Ford v. Indus. Comm'n*, 27 Ariz. App. 128, 130, 551 P.2d 577, 579 (1976). With respect to issue preclusion, once an issue that was essential to a final judgment has been litigated and determined, it may not subsequently be relitigated, particularly when successive stages of a claim share common issues of fact or law. *Miller*, 240 Ariz. 257, ¶ 8, 378 P.3d at 436. Although courts examine the issues raised and evidence presented during litigation of earlier awards, *see id.* ¶ 10, preclusive effect is only given to those issues that are actually litigated and determined and that are essential to an award or uncontested notice-of-claim status. *See id.* ¶¶ 7-9.

¶8 By contrast, claim preclusion is broader, barring relitigation of "matters actually decided *or that could have been decided after a timely protest*." *Miller*, 240 Ariz. 257, ¶ 8, 378 P.3d at 436 (emphasis added). Kelly argues Risk Management cannot now litigate whether the 1998 Award had determined the industrial injury permanently aggravated his spondylolisthesis because even if that issue had not been decided, it could have been.

¶9 But claim preclusion and its broader standard do not apply here. As a threshold matter, claim preclusion "bars further *claims* . . . based on the same cause of action." *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 13, 146 P.3d 1027, 1033 (App. 2006) (emphasis added); *see Magma Copper Co. v. Indus. Comm'n*, 115 Ariz. 551, 553-54, 566 P.2d 699, 701-02 (App. 1977) (employee barred from reopening claim for additional condition existing, known when original claim filed). Although Risk Management asserted new arguments and sought to determine issues not previously resolved—namely, whether Kelly's spondylolisthesis was caused or permanently aggravated by his industrial injury—these were not new *claims*. Rather, Risk Management was entitled to defend against Kelly's petition to reopen by litigating any issue not barred by issue preclusion. *See Miller*, 240 Ariz. 257, ¶ 8, 378 P.3d at 436. Insofar as Kelly argues claim preclusion with respect to the 1997 Notice, the doctrine is likewise inapplicable.

1997 Notice-of-Claim Status

¶10 Kelly argues the 1997 Notice conclusively diagnosed his industrial injury as spondylolisthesis and that issue preclusion prevents relitigation of this determination. The 1997 Notice, however, resolved two issues; it determined: (1) Kelly had been discharged from active medical treatment, triggering termination of temporary compensation; and (2) his lower-back injury resulted in permanent disability. Importantly, whether Kelly's industrial injury caused or aggravated his spondylolisthesis was not squarely at issue in the 1997 Notice. Neither were these questions essential to determining the issues resolved. Thus, the notice does not carry preclusive weight with respect to the diagnosis or cause of his spondylolisthesis. *See id.* ¶ 8. As such, and contrary to Kelly's argument, the 1997 Notice was not impermissibly subject to attack on the merits by the ALJ's decision

here. *See Holmes Tuttle Broadway Ford*, 27 Ariz. App. at 130, 551 P.2d at 579.

¶11 Relying on *Calixto v. Indus. Comm'n*, 126 Ariz. 400, 616 P.2d 75 (App. 1980), Kelly argues that Dr. Peate's medical report, assessing him with spondylolisthesis and permanent, partial impairment of seven percent of his whole person, "effectively bec[a]me[] part of the notice" and is "final and binding" on all parties because it was attached to his uncontested 1997 Notice. But Kelly's reliance on *Calixto* is misplaced. Rather than give preclusive weight to physicians' reports, *Calixto* recognized an "exception to the res judicata effect of an unprotested notice" that occurs when a notice-of-claim status directly contradicts the medical report upon which it is based, as the contradiction renders the notice void. *Id.* at 401, 616 P.2d at 77.

¶12 That case does not hold, however, that a medical report is entitled to the same preclusive effect as the notice-of-claim status or that the notice of claim necessarily adopts all findings in an attached medical report. At most, *Calixto* supports a determination that the 1997 Notice was valid inasmuch as it was consistent with Dr. Peate's report, *see id.*, a determination well short of giving the report preclusive authority.[2]

¶13 Furthermore, because the uncontested 1997 Notice was processed by Risk Management and not the Industrial Commission, no administrative record was created that reflects "determined facts of record." *Cornelson v. Indus. Comm'n*, 199 Ariz. 269, ¶¶ 22-23, 17 P.3d 114, 118 (App. 2001). Thus, Dr. Peate's report did not become part of the administrative record and is not entitled to preclusive effect. For all these reasons, the ALJ did not contradict the 1997 Notice by

[2]Thus, it is of no moment that Dr. Maxwell's opinion appeared to contradict some of the details of Dr. Peate's report supporting the 1997 Notice. Even so, Risk Management observes that in two July 1996 notes, Dr. Peate stated Kelly had "[p]ossible preexisting spondylolisthesis" and that Dr. Peate was "trying to determine if his spondylolisthesis was preexisting" but did not because relevant x-rays from an earlier injury had been destroyed.

considering and ultimately adopting Dr. Maxwell's opinion that Kelly's spondylolisthesis preexisted his 1996 industrial injury or that his industrial injury was a sprain or strain superimposed upon preexisting conditions.

1998 Award

¶14 Alternatively, Kelly argues the 1998 Award conclusively determined his industrial injury permanently aggravated his preexisting spondylolisthesis and this determination carries preclusive effect. But the sole issue in the 1998 Award was the degree to which Kelly suffered a loss in his earning capacity as a result of his industrial injury. With respect to the diagnosis underlying the 1998 Award, ALJ Israel adopted the opinion of Dr. Grimes who diagnosed Kelly with a "lumbar sprain and strain superimposed upon preexisting spondylolisthesis of L5 on S1."[3] Our analysis rests on whether the finding of permanent injury based on that diagnosis necessarily requires a conclusion that the "sprain and strain" worsened the underlying spondylolisthesis.

¶15 Relying on the principle that a compensable claim exists when an industrial injury aggravates a preexisting condition and so disables an employee, *Arellano v. Indus. Comm'n*, 25 Ariz. App. 598, 603, 545 P.2d 446, 451 (1976), Kelly argues Dr. Grimes's diagnosis recognized his superimposed sprain and strain constituted a "permanent aggravation" of his preexisting spondylolisthesis. But the 1998 Award only adopts the diagnosis of a *sprain and strain* that had been superimposed upon the preexisting spondylolisthesis, not that the sprain and strain permanently aggravated that condition.

[3]Conversely, Dr. Hassman opined that Kelly suffered from a "grade one L5-S1 spondylolisthesis, L5-S1 spondylosis *exacerbated by the industrial injury*, and symptoms of L5-S1 radiculopathy." (Emphasis added.) However, ALJ Israel rejected this diagnosis in favor of that by Dr. Grimes.

Nor has Kelly cited any authority demonstrating that "superimposed" necessarily means "permanently aggravated."[4]

¶16 Thus, even assuming the diagnosis was essential to the judgment, the only finding entitled to preclusive effect was that the "*sprain and strain*" injury was permanent. The diagnosis adopted in the 1998 Award does not state that the sprain and strain necessarily aggravated Kelly's underlying spondylolisthesis, nor that such aggravation was also permanent.[5] Accordingly, the ALJ was not precluded from considering whether the industrial injury caused or permanently aggravated Kelly's spondylolisthesis. Neither was the ALJ precluded from adopting Dr. Maxwell's expert opinion concerning these issues.

¶17 Relying on *Miller*, Kelly asserts ALJ Wohl erred by adopting Dr. Maxwell's opinion diagnosing him with preexisting, degenerative spondylolisthesis because that opinion directly contradicted Dr. Grimes's opinion adopted by ALJ Israel in the 1998 Award. In *Miller*, however, the opinions at issue disputed whether an employee had suffered a spinal or soft tissue injury—the issue litigation sought to resolve. 240 Ariz. 257, ¶¶ 13-18, 378 P.3d at 437-39. There, the second ALJ was precluded from adopting the opinion that the employee had only suffered a soft-tissue injury because that opinion directly contradicted one adopted in an earlier

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[4]"[S]uperimpose" means "[t]o lay (something) on the top (of another thing); to add an infection or complication to an existing infection or complication; to add to an existing difficulty." 5 J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder* S-385 (1999).

[5]Indeed, inasmuch as the 1998 Award is ambiguous as to the meaning of "superimposed," one plausible interpretation is that Kelly's preexisting spondylolisthesis elevated his risk of sprains and strains, even as a chronic condition, without those injuries having the reciprocal effect of aggravating his underlying spondylolisthesis. That is, his spondylolisthesis may have been a substantial factor, together with the struggle with the inmate, which together caused his sprain or strain.

award determining he had not suffered a soft-tissue injury, but a spinal injury. *Id.* ¶ 19. But no such contradiction exists here. Contrary to Kelly's assertion, the 1998 Award did not adopt the opinion that his industrial injury permanently aggravated his preexisting spondylolisthesis. Accordingly, ALJ Wohl was not precluded from considering and determining whether the industrial injury either caused or permanently aggravated his preexisting spondylolisthesis.[6]

Disposition

¶18 Because the 1997 Notice and 1998 Award were not entitled to preclusive effect with respect to whether Kelly's industrial injury either caused or permanently aggravated his spondylolisthesis, the ALJ acted within her authority when she reconsidered these issues. *See* A.R.S. § 23-951(B); *Miller*, 240 Ariz. 257, ¶ 8, 378 P.3d at 436. Thus, we cannot say the ALJ acted without or in excess of her power by determining that Kelly had not met his burden of proving he had suffered a new, additional or previously undisclosed condition causally related to his industrial injury. *See Polanco*, 214 Ariz. 489, ¶ 6, 154 P.3d at 393. We therefore affirm the award denying Kelly's petition to reopen.

[6]In response to Risk Management's assertion that Kelly did not suffer a "new, additional or previously undiscovered condition," Kelly argues he has suffered additional, objective impairment within the meaning of A.R.S. § 23-1061(H). However, because we determine that the ALJ did not err by adopting Dr. Maxwell's opinion that Kelly's spondylolisthesis was not causally related to his industrial injury, we need not address whether any deterioration of his spondylolisthesis constituted a new condition under A.R.S. § 23-1061(H).