

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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ANTONIO CHAVARRIA,  
*Petitioner Employee,*

*v.*

THE INDUSTRIAL COMMISSION OF ARIZONA,  
*Respondent,*

FLOWING WELLS SCHOOL DISTRICT,  
*Respondent Employer,*

ARIZONA SCHOOL ALLIANCE FOR WORKERS' COMPENSATION, INC.,  
*Respondent Insurer.*

No. 2 CA-IC 2017-0002  
Filed September 21, 2017

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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NOT FOR PUBLICATION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).

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Special Action - Industrial Commission  
ICA Claim No. 20122640047  
Insurer No. 2012000067A  
LuAnn Haley, Administrative Law Judge

**AWARD SET ASIDE**

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

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COUNSEL

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

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly<sup>1</sup> concurred.

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S T A R I N G, Presiding Judge:

¶1 Petitioner Antonio Chavarria seeks review of an Industrial Commission of Arizona (ICA) award and decision upon review finding his head injury to be medically stationary. Chavarria argues that because the issue of causation had been decided in a previous hearing, thus precluding any further litigation of the question, the administrative law judge (ALJ) erred in adopting the opinion of Leo Kahn, M.D., and terminating his active medical treatment. Because we agree that further litigation of the issue of

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<sup>1</sup>The Hon. Virginia C. Kelly, 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.

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

causation was precluded, we conclude the ALJ erred in adopting Kahn's opinion and set aside the award.

**Factual and Procedural Background**

¶2 We consider the evidence in the light most favorable to upholding the award. *Aguayo v. Indus. Comm'n*, 235 Ariz. 413, ¶ 2, 333 P.3d 31, 32 (App. 2014). In July 2012, Chavarria, who was employed by the Flowing Wells School District, suffered a concussion when he lost consciousness and fell while attempting to use the toilet at home,<sup>2</sup> after being exposed to work conditions that caused him to suffer dehydration and heat exhaustion. He filed a workers' compensation claim, which was denied by Flowing Wells's carrier, Arizona School Alliance for Workers' Compensation. Chavarria timely requested a hearing, at which he testified, as did his wife, his primary care physician, Norman Epstein, M.D., and the carrier's medical expert, Raymond Schumacher, M.D. In May 2014, ALJ Thomas A. Ireson adopted Epstein's opinion that Chavarria's work conditions "caused or contributed to the fainting episode and resultant injury," and awarded "[m]edical, surgical and hospital benefits . . . until such time as the condition is determined to be medically stationary."

¶3 Approximately one month later, the carrier closed Chavarria's claim based on an April 2013 Independent Medical Examination (IME). Chavarria timely protested the closure and ALJ Jacqueline Wohl received testimony from Chavarria, his wife, Epstein, and the carrier's second medical expert Gary Dilla, M.D. In September 2015, ALJ Wohl issued an award, also adopting Epstein's causation opinion, and finding Chavarria to be "not medically stable and stationary" and "that he should receive further active neurological treatment to evaluate and treat post-concussive syndrome." The carrier neither protested nor appealed ALJ Wohl's award, which became final. Chavarria continued to receive treatment for post-concussive syndrome from the neurologist who diagnosed him, Diana Benenati, M.D.

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<sup>2</sup>Chavarria also suffered abrasions, fractures of nasal bones and contusions on his head and face as a result of the fall.

# CHAVARRIA v. INDUS. COMM'N OF ARIZ.

## Decision of the Court

¶4 In May 2016, the carrier sent Chavarria to Dr. Marion Selz, a psychologist, for a neuropsychological evaluation, and in June it sent him to Kahn, a neurologist, for another IME. Based on Kahn's report, the carrier again closed the claim for active medical treatment. Chavarria timely protested the closure.

¶5 In 2016, ALJ LuAnn Haley heard testimony from Chavarria, his wife, Benenati, and Kahn. This time, in a November 2016 award, the ALJ adopted Kahn's opinion, finding Chavarria "stationary without impairment" as of June 2016, and allowing for supportive care only until the beginning of 2017. Chavarria timely requested administrative review, arguing the ALJ was precluded as a matter of law from relying on Kahn's opinion as it concerned post-concussive syndrome. After a review, the ALJ affirmed the award.

¶6 Chavarria timely filed a petition for special action. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951, and Ariz. R. P. Spec. Act. 10.

### Discussion

¶7 "In reviewing findings and awards of the ICA, we defer to the [ALJ's] factual findings, but review questions of law de novo." *Aguayo*, 235 Ariz. 413, ¶ 2, 333 P.3d at 32. "Unless the applicability of issue preclusion involves disputed questions of fact, its applicability is a question of law for this court to determine independently." *Id.* ¶ 17, quoting *Special Fund Div., Indus. Comm'n v. Tabor*, 201 Ariz. 89, ¶ 20, 32 P.3d 14, 17 (App. 2001).

¶8 The workers' compensation statutes provide for a progression of stages in the administration of a claim for compensation, see *Hardware Mut. Cas. Co. v. Indus. Comm'n*, 17 Ariz. App. 7, 9-10, 494 P.2d 1353, 1355-56 (1972), each of which is "resolved by a carrier's separate Notices of Claim Status, and if protested, by separate determinations by an ALJ." *Miller v. Indus. Comm'n*, 240 Ariz. 257, ¶ 7, 378 P.3d 434, 436 (App. 2016). Once any determination becomes final, "either by Notice of Claim Status or by ALJ decision," it is "entitled to preclusive effect." *Id.* ¶¶ 7-8.

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

¶9 “Issue preclusion bars relitigation of an issue if the issue was previously litigated, determined, and necessary to final judgment,” *Tabor*, 201 Ariz. 89, ¶ 20, 32 P.3d at 17, and may apply in successive claim stages having an issue of fact or law in common, *Miller*, 240 Ariz. 257, ¶ 8, 378 P.3d at 436. To determine whether preclusion applies, courts examine the issues raised and determined in previous hearings. *Id.* ¶ 10.

### 2015 Hearings and Award

¶10 During the 2015 hearings, Epstein testified he continued to treat Chavarria after the accident, noting his “[g]eneral good health” prior to the accident. Chavarria did not experience chronic headaches, moodiness, or depression prior to his injury. Following a February 2013 visit for an unrelated incident, Epstein concluded there had been serious, negative changes to Chavarria’s memory and cognitive abilities. Throughout the intervening time, Chavarria had complained of headaches and cognitive impairment. Epstein believed Chavarria was suffering from post-concussive syndrome.

¶11 Epstein referred Chavarria for a neuropsychological evaluation by Dr. Marisa Menchola, who diagnosed Chavarria with “Adjustment Disorder with Depressive Mood.” Although Menchola could not confirm any clinically significant cognitive deficits, her report did indicate “Chavarria’s difficulties in everyday functioning” were “likely associated with post-concussive symptoms, in particular his significant mood symptoms.”

¶12 In February 2015, Epstein referred Chavarria to Benenati, a neurologist.<sup>3</sup> Benenati diagnosed Chavarria with post-concussive syndrome. Epstein believed Chavarria had suffered a “major concussion,” noting “a lot of people, even with minor concussions, [have] long-term effects that are pretty serious.”

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<sup>3</sup>According to Epstein, post-concussive syndrome is something “more likely and more frequently seen by a neurologist and is probably something that would be better diagnosed by a neurologist than a neuropsychologist.”

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

¶13 Dilla performed an IME in December 2014, at the carrier's request. He noted Chavarria complained of headaches occurring three to four times a week, lasting anywhere from forty-five minutes to three hours, short-term memory and concentration difficulties, and balance deficit. Despite these complaints, Dilla concluded, more than two years after the incident, Chavarria had not suffered "any significant traumatic brain injury," but only contusions and a mild neck sprain, which had "resolved." According to Dilla, Chavarria "require[d] no additional diagnostic workup or treatment as related to [the] incident, and require[d] no supportive care treatment."

¶14 In the September 2015 award, ALJ Wohl found:

The medical experts in this case disagree about whether the applicant has post-concussive syndrome causally related to the industrial injury. Regarding the conflicting medical opinions on the issue, the opinion of Dr. Epstein is found to be more probably correct and well-founded. Dr. Epstein has the advantage of a long-term relationship with the applicant, spanning over 20 years, and was familiar with his personality and his functional ability prior to the industrial injury.

Additionally, Dr. Epstein and Dr. Menchola found symptoms of depression, contrary to the observations of Dr. Dilla, although Dr. Dilla did recommend a psychiatric evaluation. There is no evidence that the applicant had a history of depression prior to the industrial injury and credible evidence was presented regarding the applicant's change in personality following the industrial injury.

For the reasons stated above, it is found that the applicant is not medically

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

stable and stationary but that he should receive further active neurological treatment to evaluate and treat post-concussive syndrome, as well as a psychiatric evaluation and continued counseling for depressive symptoms and to determine the appropriate treatment.

Chavarria was awarded “[t]emporary medical, surgical and/or hospital benefits . . . until he [was] found to be medically stable and stationary including neurological treatment and mental health counseling.” The award went unchallenged and became final.

**2016 Hearings and Award**

¶15 In May 2016, the carrier referred Chavarria to Selz for an independent neuropsychological evaluation. Selz found “data suggestive of significant impairment and symptom validity,” believing Chavarria to be “genuinely distressed and [to] have genuine neuropsychological deficits.” However, Selz concluded “it makes no sense that a very mild injury, which had resolved cognitively almost 2 years ago, has now resulted in such severe cognitive deterioration almost 4 years after the event,” and she did “not believe that the neuropsychological claim [was] related to the injury.”

¶16 Kahn examined Chavarria in June 2016. In his report, Kahn recorded Chavarria’s complaints of daily headaches, lasting approximately forty-five to sixty minutes, difficulty concentrating and maintaining conversations, and balance deficits. Despite these complaints, Kahn concluded:

The reported persistence of Mr. Chavarria’s neurological symptomatology cannot be explained within the context of the 07/12/2012 industrial injury. Any head trauma sustained on that date is considered to be minor. Thus, one would have expected resolution of his symptomatology over at most a three to six [month] timeframe. The reported overall persistence of his clinical

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

symptomatology now almost four years following the industrial injury cannot be explained within the context of the injury sustained. However, a review of Dr. Selz's recent neuropsychological independent medical examination provides insight into the most likely etiology for Mr. Chavarria's reported persistent subjective symptomatology. . . .

From a neurological perspective as it relates to the 07/12/2012 industrial injury, Mr. Chavarria does not require any further active treatment or diagnostic studies. He is considered to be medically stationary without objective basis for any ratable permanent neurological impairment.

Although Kahn's report included an extensive summary of Chavarria's medical history since the accident, it made no mention of Benenati's March 2015 diagnosis of post-concussive syndrome.

¶17 Benenati testified that after her February 2015 diagnosis she continued to see Chavarria from July 2015 to October 2016, which was several months after Kahn examined him. At no point during that period did her diagnosis change: Chavarria continued to exhibit symptoms of post-concussive syndrome related to his industrial accident. Benenati disagreed with Kahn's assertion that the duration of Chavarria's symptomatology ruled out post-concussive syndrome. While acknowledging that most patients recover within three to six months, Benenati stated it was "not unheard of" for patients to have ongoing issues lasting years. Indeed, she opined that the duration of Chavarria's symptoms indicated he might never "get back to his baseline," though he could improve "given the appropriate treatment."

¶18 ALJ Haley gave greater credence to Kahn, writing, Dr. Kahn, provide[d] a well-reasoned opinion that despite the many subjective



CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

complaints made by the applicant there are no objective neurological findings that can be related to the July 12, 2012 fall when he struck his head. Also, Dr. Selz after conducting a comprehensive neuro psychological exam conclude[d] that applicant's increasing cognitive symptoms and continuing anxiety and depression cannot at this time be related to the injury.

Although she found Benenati's treatment of Chavarria to be "reasonable," she accepted "Kahn's opinion regarding stationary status of the applicant and [found] . . . Chavarria stationary without impairment as of June 6, 2016."

### **Preclusion**

¶19 On appeal, Chavarria argues the 2015 award, in which ALJ Wohl concluded he suffered from post-concussive syndrome with symptoms of headaches, depression, and balance deficit as a result of the July 2012 industrial injury, precluded ALJ Haley from adopting Kahn's opinion that such symptoms were unrelated to the injury. Respondents argue "[t]he issue here is not re-litigation of the causation of the initial injury, but a determination of whether the current symptoms of [Chavarria] are related to that injury." However, because Kahn was offering essentially the same previously rejected causation opinion as Dilla, we agree with Chavarria that the ALJ "should have . . . rejected [it] on preclusion grounds." *Miller*, 240 Ariz. 257, ¶ 19, 378 P.3d at 439.

¶20 In 2015, ALJ Wohl found Chavarria was "not medically stable and stationary but that he should receive further active neurological treatment to evaluate and treat post-concussive syndrome, as well as a psychiatric evaluation and continued counseling for depressive symptoms and to determine the appropriate treatment." In reaching her conclusion, she rejected Dilla's assessment that Chavarria did not suffer "any significant head injury" and that his "ongoing subjective complaints" were unrelated to the industrial injury. Instead, she found Epstein's opinion "to be more probably correct and well-founded." Epstein, who had a

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

lengthy history as Chavarria's primary care physician, believed Chavarria suffered a "major concussion" that resulted in his current post-concussive syndrome and its attending symptomatology.

¶21 Kahn offered essentially the same opinion as Dilla, opining Chavarria suffered only a "minor" head injury and thus his persistent "neurological symptomatology [could not] be explained within the context of [that] industrial injury." Accordingly, while Kahn acknowledged Chavarria's symptoms were ongoing, he concluded that the industrial injury was not the cause of those symptoms. But, "[t]he causal connection between [Chavarria's] conditions, symptoms, and findings and the industrial event had already been specifically and finally determined." *Miller*, 240 Ariz. 257, ¶ 26, 378 P.3d at 440. The only issue to be resolved in the 2016 hearing was whether Chavarria's conditions were now medically stationary. *See id.* "Although purporting to address that issue, [Kahn] instead opined . . . that the underlying pathology and medical conditions were not causally related to the industrial injury." *Id.*

¶22 Additionally, although Kahn stressed that he did not "find any objective evidence of any . . . neurological dysfunction," he acknowledged that post-concussive syndrome is a clinical diagnosis attended by a "constellation" of subjective symptoms. Indeed, as Benenati, also a neurologist, explained, "[s]ometimes post-concussive syndrome does not show up on any type of scan, CT or MRI scan." Furthermore, as Epstein explained at the 2015 hearing,

it turns out that with concussions, either multiple small concussions or a major concussion, which is more similar to what [Chavarria] had, with a loss of consciousness and a significant fall, that there can be a lot of subtle mental changes that are not easy to be quantified.

You can't see them on a CAT scan,  
you can't see them on an MRI. . . .

So you can't really tell by a CAT scan  
or MRI scan if someone has got post[-

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

]concussive syndrome. It's a clinical diagnosis. . . .

So we think that there's something that goes on in the brain that's not real easy to see or measure that causes changes over a long period of time, including months and years or maybe even decades later, as we have seen in some of the sports-related issues that have come up.

¶23 Accordingly, Kahn's causation opinion was precluded by the 2015 award and ALJ Haley erred by not giving ALJ Wohl's findings their required preclusive effect.

¶24 That is not to say, however, the carrier is forever precluded from closing Chavarria's claim. But, in order to do so in the face of ongoing symptoms, it will need to offer evidence that is more than speculative about the persistence of such symptoms since the industrial accident. *See Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 15, 275 P.3d 638, 643 (App. 2012) ("[W]hen a physician simply offers speculation that another cause might have been responsible for an injury, there is 'no credible medical evidence . . . upon which to base [an] award of no compensation.'"), quoting *Belshe v. Indus. Comm'n*, 98 Ariz. 297, 303-04, 404 P.2d 91, 96 (1965). "Equivocal or speculative medical testimony is insufficient to support an award or create a conflict in the evidence." *Id.* ¶ 10.

¶25 Here, the carrier presented only speculative evidence as to why Chavarria's symptoms have continued beyond their expected timeframe. Selz, who is not a medical doctor, concluded,

[I]t makes no sense that a very mild injury . . . has now resulted in such severe cognitive deterioration almost 4 years after the event that in numerous realms he is severely impaired. . . . My diagnoses include the *possibility* of some type of dementia, which can be assessed by retesting in about two years . . . .

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

(Emphasis added.) Kahn did not provide any more concrete explanation, stating,

The reported overall persistence of his clinical symptomatology now almost four years following the industrial injury cannot be explained within the context of the injury sustained. However, a review of Dr. Selz's recent neuropsychological independent medical examination provides insight into the *most likely* etiology for Mr. Chavarria's reported persistent subjective symptomatology.

(Emphasis added.)<sup>4</sup> Neither Selz nor Kahn committed to a particular opinion as to the cause of Chavarria's ongoing symptoms other than their belief that they were causally unrelated to the industrial accident.<sup>5</sup> *See id.* ("Medical testimony is equivocal . . . when the expert avoids committing to a particular opinion."). "A medical examiner's unwillingness to assent to a conclusion about medical causation, based exclusively on the speculative possibility of unknown causes for an injury, cannot be the basis for denying an otherwise compensable claim." *Id.* ¶ 20.

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<sup>4</sup>Importantly, both conclusions were based on the assumption that Chavarria's injury was minor, despite Epstein's belief that Chavarria suffered a major concussion, upon which the 2015 award was based.

<sup>5</sup>Immediately after observing that Selz "provides insight into the most likely etiology," Kahn "noted that quite often non-verifiable subjective somatic symptomatology is a manifestation of underlying psychological and other emotional issues." This is not a causation opinion. *See Hackworth*, 229 Ariz. 339, ¶ 9, 275 P.3d at 642 (proof of causation must meet reasonable degree of medical probability standard).

CHAVARRIA v. INDUS. COMM'N OF ARIZ.  
Decision of the Court

**Disposition**

¶26  
ALJ.

For the foregoing reasons, we set aside the award of the