IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PIMA COUNTY,
Petitioner Employer,

TRISTAR RISK MANAGEMENT,
Petitioner Insurer,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

CHRISINDA D. BALLEW,
Respondent Employee.

No. 2 CA-IC 2018-0014
Filed April 5, 2019

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NOT FOR PUBLICATION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. 20150540077
Insurer No. 15576237
LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Moeller Law Office, Tucson
By M. Ted Moeller
Counsel for Employer and Insurer

The Industrial Commission of Arizona, Phoenix
Gaetano Testini, Chief Legal Counsel
By Stacey Rogan, Assistant Chief Counsel
Counsel for Respondent

Tretschok, McNamara, Miller & Feldman P.C., Tucson
By Patrick R. McNamara
Counsel for Respondent Employee

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Judge:

¶1 In this statutory special action, petitioners Pima County and its workers' compensation insurer Tristar Risk Management (collectively, Tristar) challenge the administrative law judge's ("ALJ's") award granting respondent Chrisinda Ballew's request for reimbursement of certain medical expenses. Tristar contends the request was precluded because Ballew had made a similar request in 2016 but withdrew it before an ALJ made any determination. For the following reasons, we find the claim was not precluded and affirm the award.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming the ALJ's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2 (App. 2007). In February 2015, Ballew injured her ankle while working as a civil engineer for Pima County, and Tristar accepted the claim as compensable.

¶3 In September 2016, Ballew filed a request for a hearing, stating that her treating physician, Dr. Steck, had recommended additional treatments by Dr. Nakra but that Tristar was refusing to cover them. During a "telephonic informal conference," she withdrew that request in March 2017. That August she underwent surgery on her ankle.

¶4 In April 2018, Ballew filed another request for a hearing, contending that Tristar had "refused and/or neglected to reimburse [her]

for her out of pocket medical expenses," which included Dr. Nakra's treatments. Tristar argued that Ballew was barred from seeking reimbursement for Dr. Nakra's treatments under the doctrine of claim preclusion because she had withdrawn her previous request for a hearing. It contended claim preclusion applied because "all or nearly all of the treatment/benefits sought in her new request for hearing are the same as those sought in the September 29, 2016, request." In its award, however, the ALJ declined to find the claim precluded, stating there had been "no final decision on the merits regarding [Dr. Nakra's treatments] and the parties offered no specific stipulation on what was to be covered in March 2017 when [Ballew's September 2016] request was withdrawn." The ALJ's award directed Tristar to reimburse the costs of Dr. Nakra's treatments but denied Ballew's remaining requests for reimbursement.

¶5 Tristar sought review of that decision, and the ALJ affirmed it. Tristar then filed a petition for special action, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

Discussion

¶6 Tristar argues the ALJ erred in concluding that claim preclusion did not apply to Ballew's request for reimbursement of the cost of Dr. Nakra's treatments. "[T]he applicability of preclusion is a mixed question of fact and law." *A.J. Bayless v. Indus. Comm'n*, 179 Ariz. 434, 439 (App. 1993). We "apply a deferential standard of review to the determination of disputed facts supported by reasonable evidence, and apply an independent standard of review to the ultimate determination of whether these facts trigger preclusion." *Miller v. Indus. Comm'n*, 240 Ariz. 257, ¶ 9 (App. 2016); *see A.J. Bayless*, 179 Ariz. at 439.

¶7 "'Claim preclusion' occurs when a party has brought an action and a final, valid judgment is entered after adjudication or default." *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425 (App. 1993). It "bars relitigation of the same claim, i.e., preclusion of matters actually decided or that could have been decided after a timely protest." *Miller*, 240 Ariz. 257, ¶ 8.

¶8 As a preliminary matter, at the time Ballew filed her second request for a hearing, the ALJ had not yet entered a final award that would provide the basis for preclusion. Following Ballew's withdrawal of her September 2016 request for a hearing, the ALJ issued a "Notice of Cancellation and Award." It states that the scheduled hearing had been

cancelled and, under the heading titled "Award," that Ballew's "counsel [had] withdr[awn] the [A.R.S. § 23-1061(J)] request at a telephonic informal conference." The award does not make any findings related to Dr. Nakra's treatments or make any award to either party on that issue. Stated differently, it is not a decision on the merits. As such, this appears to have been an "award" in name only. *See* A.R.S. § 23-942(A) (ALJ must "determine the matter and make an award in accordance with [her] determination"). Consequently, the withdrawn notice is not a final judgment that would trigger the application of claim preclusion. *See Circle K*, 179 Ariz. at 425; *see also Matusik v. Ariz. Pub. Serv. Co.*, 141 Ariz. 1, 3 (App. 1984) (claim preclusion requires "final judgment on the merits" and common identity between the parties, their capacities, subject matter, and cause of action).

¶9 Even assuming the notice were a final judgment, however, we conclude the ALJ did not err in declining to apply claim preclusion. Although claim preclusion, unlike issue preclusion, does not require actual litigation, it only applies "when the policies justifying preclusion are furthered." *Circle K*, 179 Ariz. at 425 ("Issue preclusion requires actual litigation. Claim preclusion does not."). Those policies include "(1) finality in litigation; (2) the prevention of harassment; (3) efficiency in the use of the courts; and (4) enhancement of the prestige of the courts." *Id.* at 426. They must be balanced, however, against the remedial nature of the workers' compensation statutory scheme, which is meant "to assure and make certain a just and humane compensation law" and protect workers "from 'the burdensome, expensive and litigious remedies for injuries' that would otherwise govern their efforts to obtain compensation." *Id.* at 426-27 (quoting Ariz. Const. art. XVIII, § 8).

¶10 During the hearing on Ballew's April 2018 request, her counsel stated his "recollection was that . . . [Tristar] would agree to keep the case open and provide the . . . additional treatment, including the surgery." Tristar's counsel responded that its view had always been that Dr. Nakra's treatments were not "medically reasonable" and it had "never agreed to pay for these treatments." Rather, its position had been that Ballew required surgery, and, once she agreed to undergo that surgery, Ballew withdrew her request. The ALJ stated that its recollection was "that everybody agreed that the case should continue to be open" without any stipulations as to what was and was not covered. In its written award, the ALJ noted that "the parties offered no specific stipulation on what was to be covered" before Ballew withdrew her request.

¶11 Under these circumstances, it would be "plainly unfair" to consider the costs associated with Dr. Nakra's treatment precluded. *Circle K*, 179 Ariz. at 426. The record demonstrates there was a misunderstanding between the parties during their informal telephonic conference on the issue. Indeed, the fact that Ballew withdrew her request supports her claim that she believed Tristar would cover those expenses. On the record before us, it would make little sense for her to withdraw the request otherwise. Moreover, despite Tristar's insistence that it would never have agreed to cover those treatment costs, it also failed to submit any stipulation as to that issue to the ALJ at the time. Reasonable evidence supports the ALJ's findings that there was no stipulation or final decision on the merits related to Ballew's September 2016 request. *See Miller*, 240 Ariz. 257, ¶ 9. Consequently, claim preclusion does not apply. *See id.*

¶12 Further, none of the policies supporting preclusion is present here. *See Circle K*, 179 Ariz. at 426. Because there had been no decision on Ballew's request for reimbursement, finality was not at issue. *See id.* Tristar has not argued, nor is there evidence to support, that Ballew's actions have been for the purposes of harassment, and we fail to see how the efficiency or prestige of the courts would be enhanced by applying preclusion here. *See id.* To the extent it may have been more efficient for Ballew to request specific findings before withdrawing her request, that is outweighed by the remedial purpose of workers' compensation statutes and, under these facts, would unfairly deprive Ballew of her "day in court." *Id.* (quoting Allan D. Vestal, *Res Judicata/Preclusion*, 16 (1969)). Ultimately, to preclude Ballew's claim based solely on her withdrawn request for a hearing, in the absence of any record as to what the parties had discussed or what agreement was reached, would be an overly technical application of claim preclusion. *See id.* at 426, n.11 ("The rigid application of [claim and issue preclusion] must give way where the result would frustrate a legislative purpose of compensation for lost wages."); *see also Ferris v. Hawkins*, 135 Ariz. 329, 331 (App. 1983) (preclusion not appropriate "where 'there is some overriding consideration of fairness to a litigant, which the circumstances of the particular case would dictate'" (quoting *Di Orio v. City of Scottsdale*, 2 Ariz. App. 329, 332 (1965))).

¶13 Tristar contends that our supreme court in *Circle K* "never said that withdrawal of the request for hearing was a reason that claim preclusion could not apply." It thus appears to reason that a withdrawn request for hearing has preclusive effect unless the two circumstances discussed in *Circle K* exist: either the claim falls under A.R.S. §§ 23-1044(F)

and 23-1061(H),[1] or the claimant had "little financial incentive to litigate the issue" in the first instance. *Circle K*, 179 Ariz. at 427. We do not find this argument persuasive. Nothing in *Circle K* states, either directly or by implication, that claim preclusion in a workers' compensation case is limited to the two scenarios described above. Rather, claim preclusion is dependent upon the particular circumstances of each case, considering the claim presented and the manner in which it was decided, and balancing the policies of preclusion against the purpose of workers' compensation laws. *See id.* at 426-27; *see also Ferris*, 135 Ariz. at 331. Having considered those factors in this case, we agree with the ALJ that applying claim preclusion would not be appropriate.

¶14 Tristar nevertheless argues that preclusion is appropriate because Ballew "could have litigated the present issues at the time of her first request for hearing." However, based on Ballew's understanding—albeit a mistaken one—that Tristar was accepting her claim, she proceeded in the most efficient and cost-effective manner by withdrawing her request for a hearing. In other words, she lacked any financial incentive to further litigate the issue under those circumstances. *See Circle K*, 179 Ariz. at 426 (courts hesitant to apply preclusion when "party against whom preclusion is sought had no incentive to litigate"). Accordingly, the ALJ did not err by finding preclusion did not apply. *See Miller*, 240 Ariz. 257, ¶ 9; *see also A.J. Bayless*, 179 Ariz. at 439.

Disposition

¶15 For the foregoing reasons, we affirm the ALJ's award.

---

[1]Section 23-947(B), A.R.S., states that if a timely request for a hearing is not made, "the determination by the commission, insurance carrier or self-insuring employer is final and res judicata to all parties." A claim may be reopened, however, under the limited circumstances set forth in §§ 23-1044(F) and 23-1061(H). *See Circle K*, 179 Ariz. at 427.