

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

**FILED BY CLERK**  
**JAN 23 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

PIMA COUNTY, )  
)  
Petitioner Employer, )  
)  
PIMA COUNTY RISK )  
MANAGEMENT, )  
)  
Petitioner Insurer, )  
)  
v. )  
)  
THE INDUSTRIAL COMMISSION OF )  
ARIZONA, )  
)  
Respondent, )  
)  
BENJAMIN E. WHITE, )  
)  
Respondent Employee. )  
\_\_\_\_\_ )

2 CA-IC 2008-0003  
DEPARTMENT B

MEMORANDUM DECISION  
Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 89111-055820

Insurer No. 79-00319

Deborah P. Hansen, Administrative Law Judge

AWARD AFFIRMED

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V Á S Q U E Z, Judge.

¶1 In this statutory special action, petitioner employer Pima County and petitioner insurer Pima County Risk Management (collectively, “the County”) contend the administrative law judge (ALJ) erred in granting respondent employee Benjamin White’s petition to reopen his workers’ compensation claim. Specifically, the County asserts reopening of the claim was precluded by White’s failure to protest the previous denial of a petition to reopen seeking the same treatment he sought in the current petition. For the reasons that follow, we affirm.

### **Facts and Procedural Background**

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission’s findings and award. *Polanco v. Indus. Comm’n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In 1979, White suffered a compensable injury in the course and scope of his employment as a groundskeeper for Pima County Parks and Recreation. After he had received two surgeries on his right knee, his workers’ compensation claim was closed

with a permanent impairment in 1990. In January 2006, White filed a petition to reopen the claim, based on a medical report stating he had osteoarthritis of the right knee and required a total knee replacement. The following month, Pima County's insurance carrier denied the petition in a notice of claim status, which White did not protest.

¶3 In April 2007, White filed a second petition to reopen, based on a new medical report indicating his condition had deteriorated further and also recommending a total knee replacement. As before, the insurer issued a notice of claim status denying the petition. White timely requested a hearing. After holding hearings, the ALJ issued a decision reopening White's claim and awarding additional benefits. It affirmed its award on review, and this statutory special action followed.

#### **Standard of Review**

¶4 “We deferentially review the ALJ's factual findings but independently review [her] legal conclusions.” *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004). We will not reverse the ALJ's award if it is supported “by any reasonable theory of evidence.” *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 25, 2 P.3d 691, 699 (App. 2000).

#### **Discussion**

¶5 The County first argues that principles of claim preclusion prevented the ALJ from reopening White's claim because “all relevant facts to this petition to reopen existed at the time of the last petition to reopen, [and thus] the matter could have been previously litigated when the prior petition to reopen was denied.” A notice of claim status is final “as

to the merits of the carrier's determination when no protest follows within the statutory time requirements." *Phoenix Cotton Pickery v. Indus. Comm'n*, 120 Ariz. 137, 138-39, 584 P.2d 601, 602-03 (App. 1978). Thus, a claimant is precluded from reopening a claim in "an attempt to relitigate issues which were or could have been litigated" pursuant to an unprotested notice. *See Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985). However, under A.R.S. § 23-1061(H), a claim may be reopened on the basis of "a new, additional or previously undiscovered temporary or permanent condition." And, "[t]he law of Arizona [ha]s uncontrovertibly established that a showing of a change in physical condition, an aggravation of a pre-existing condition, and/or a worsening of a prior condition, are sufficient to show a new, additional or previously undiscovered condition." *Sneed v. Indus. Comm'n*, 124 Ariz. 357, 361, 604 P.2d 621, 625 (1979) (citations omitted).

¶6 Here, both White's treating physician, Dr. Housman, and the petitioner's medical expert, Dr. Grimes, testified that White's condition—which the parties do not dispute resulted from his compensable injury—had worsened significantly since the denial of the previous petition. Comparing a report prepared for that petition with his more recent examination of White in December 2006, Housman noted that the range of motion in White's knee had deteriorated from a full range between zero and approximately 135 degrees to a reduced range between zero and eighty-five degrees. Grimes's subsequent examination in November 2007 showed a further deterioration, to a range of between five and eighty degrees. Although the prior report noted that no swelling had been present in the knee and

also did not indicate the presence of crepitus, Housman observed both during the 2007 examination.<sup>1</sup>

¶7 Therefore, White presented sufficient evidence to support the ALJ's finding that his knee had "incurred crepitus, swelling and significant change in loss of range of motion" since his previous petition was denied. Indeed, to the extent there was no conflict in the medical testimony, the ALJ could not have found otherwise. *See Hopkins v. Indus. Comm'n*, 176 Ariz. 173, 177, 859 P.2d 796, 800 (App. 1993) (uncontroverted medical findings binding on Industrial Commission). Contrary to the County's assertion, none of this evidence "existed at the time of the last petition to reopen" in February 2006. The further evidence adduced in 2007 supported the existence of a new, additional, or previously undiscovered condition pursuant to § 23-1061(H). *See Sneed*, 124 Ariz. at 361, 604 P.2d at 625. Thus, the ALJ did not err in concluding White was entitled to have his claim reopened.

¶8 Relying primarily on *Stainless Specialty*, the County nonetheless contends claim preclusion necessarily bars reopening when the treatment sought is "the exact same surgery" recommended when the last petition to reopen was denied. However, *Stainless Specialty* itself provides that, "where there is evidence that the circumstances have changed

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<sup>1</sup>Furthermore, White testified in November 2007 that he had recently started using a cane and "ha[d] to hold onto things" for support as he moved around the house. Although the County describes White's testimony as "dubious" in light of his apparent statement at deposition that his knee had "been the way it was these days" at the time of the prior petition, the ALJ evidently found his prior statement referred to the "type" of his condition and not to its "degree." When more than one reasonable inference may be drawn from the evidence, an ALJ may choose either. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973).

since closing, because of a difference either in the claimant's physical condition or in the medical procedures necessary to treat that condition, reopening will be supported." 144 Ariz. at 19, 695 P.2d at 268. As noted above, the evidence supported the ALJ's finding that White's condition had changed since the denial of his previous petition to reopen. Thus, reopening White's claim was not precluded by the fact that he had also sought knee-replacement surgery in a previous petition.

**Disposition**

¶9 For the reasons stated above, we affirm. However, we deny White's request for an award of attorney fees pursuant to Rule 25, Ariz. R. Civ. App. P. Although we conclude the County's appeal lacks merit, we cannot say it is frivolous or undertaken solely for delay. *Asarco Inc. v. Indus. Comm'n*, 204 Ariz. 118, ¶ 27, 60 P.3d 258, 263 (App. 2003).

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge