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NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Bernard Higgins,
Plaintiff,
v.
XL Insurance America Incorporated,
Defendant.

No. CV-17-00582-PHX-DJH
ORDER

On November 18, 2016, Plaintiff Bernard Higgins (“Plaintiff”) filed a complaint against Defendant XL Insurance America Inc. (“Defendant”) alleging a breach of the implied duty of good faith and fair dealing (“bad faith”) for wrongful denial of his workers’ compensation claim in Arizona state court. (Doc. 1-1). Defendant removed the case to federal court on February 27, 2017. (Doc. 1). Now pending before the Court is Defendant’s Motion for Summary Judgment (Doc. 34). Plaintiff has filed a Response (Doc. 37) and Defendant has filed a Reply (Doc. 41).¹ Because the Court finds it lacks jurisdiction to hear Plaintiff’s bad faith claim, Defendant’s Motion will be granted.

I. Background

Unless otherwise noted, the following material facts are not in dispute. Some facts are drawn directly from the Administrative Record of Plaintiff’s worker’s compensation claim, portions of which both parties attach to their separate statements of fact, and to

¹ Defendant has requested oral argument as to this Motion. The Court will deny the request because the issues have been fully briefed and oral argument will not aid the Court’s decision. See Fed. R. Civ. P. 78(b) (court may decide motions without oral hearings); LRCiv. 7.2(f)(same).

1 which this Court takes judicial notice.

2 Plaintiff was driving a tractor trailer on September 10, 2014, when a similar truck
3 going the opposite direction side-swiped his vehicle, smashing Plaintiff's driver side
4 mirror. At the time, Plaintiff was an employee of Autozone. Plaintiff suffered no loss of
5 consciousness from the accident. He was treated at Wickenburg Community Hospital for
6 corneal abrasion and superficial wounds from pieces of glass; he did not require stitches
7 or antibiotics as a result of his injuries. Plaintiff filed a worker's compensation claim
8 with Autozone later that day by phone. Plaintiff's claim was accepted by Defendant, and
9 benefits were timely initiated and paid in accordance with the Arizona Workers'
10 Compensation Act ("AWCA"). Plaintiff was subsequently treated by U.S. Healthworks
11 and released from care.

12 At Defendant's request, on November 14, 2014, Plaintiff underwent an
13 Independent Medical Exam ("IME") with Dr. Atul Patel ("Dr. Patel") and Dr. Leo Kahn
14 ("Dr. Kahn"). The doctors concluded that the physical and neurological examinations of
15 Plaintiff did "not demonstrate any objective abnormalities" and that from a physical and
16 neurological perspective, they advised that Plaintiff could "return to full-time regular
17 duty work without restriction." The doctors believed, however, that "there may be a
18 significant underlying psychological component to [Plaintiff's] overall clinical course
19 and presentation today." They stated that, "[w]hether or not his current psychological
20 status is related to the September 10, 2014 industrial injury is out of the scope of these
21 examiners and should be addressed formally by a neuropsychologist." They concluded
22 that they did "not believe that [Plaintiff] should be allowed to return to work driving a
23 tractor trailer until he has undergone neuropsychological evaluation." Prior to the IME,
24 Plaintiff had not made a claim for a neuropsychological component of his claim, nor had
25 he sought medical care for a neuropsychological condition or requested help in obtaining
26 an appointment.

27 Thereafter, Defendant Filed a Notice of Claim Status on December 22, 2014
28 ("NOC Status") effectively closing the claim due to no permanent disability. (Plaintiff's

1 Controverting Statement of Facts and Additional Facts Deemed Material (“PCSOF”),
2 Doc. 38-3). That NOC Status stated, among other things, that (1) Plaintiff had been
3 released to work on November 19, 2014; (2) Plaintiff’s temporary compensation changed
4 and active medical treatment had been terminated on November 23, 2014 because
5 Plaintiff had been discharged; and (3) Plaintiff’s injury had resulted in no permanent
6 disability. (*Id.*) The NOC Status gave Plaintiff ninety (90) days to request a hearing with
7 the Industrial Commission of Arizona (“ICA”) disputing the NOC Status. (*Id.*) The
8 NOC Status advised that “IF NO SUCH APPLICATION IS RECEIVED WITHIN
9 THAT NINETY DAY PERIOD, THIS NOTICE IS FINAL.” (*Id.*) Plaintiff did not file a
10 request for a hearing within the stated time period. (*Id.*)

11 Over a year later, on December 29, 2015, Plaintiff filed a Request for Hearing
12 with the ICA under A.R.S. § 23-1061(J) (“J’ Request”). (PCSOF, Doc. 38-4). Therein,
13 Plaintiff sought to reopen the September 10, 2014 claim, and alleged that Defendant had
14 failed to pay outstanding compensation benefits and medical bills, and failed to authorize
15 neuropsychological testing and/or treatment. (*Id.*) On January 8, 2016, Defendant
16 responded to the “J” Request informing the ALJ that it had placed Plaintiff’s outstanding
17 medical bill in line for payment. (PCSOF, Doc. 38-5). It also stated that Plaintiff’s
18 September 14, 2014 NOC Status had “long since gone final” and that “[i]f he believes he
19 requires further treatment and/or evaluation for reasons attributable to his September 10,
20 2014 claim, then we believe his remedy is to file a petition to reopen.” (*Id.*) On January
21 11, 2016, Chief Administrative Law Judge (“ALJ”) Mosesso sent Plaintiff a letter
22 explaining to Plaintiff that the reopening process is different from a request under A.R.S.
23 § 23-1061(J). (PCSOF, Doc. 38-6). She accordingly attached a reopen form to his letter
24 and instructed Plaintiff to contact the Ombudsman’s Office. (*Id.*) The ALJ also sought a
25 response from Plaintiff regarding Defendant’s letter about his outstanding medical bills.
26 (*Id.*) In that regard, she asked Plaintiff to inform the Court within ten (10) business days
27 as to whether Defendant’s letter resolved the issues raised in his “J” Request, and if he
28 did not, the “J” Request would be “deemed resolved.” (*Id.*) Plaintiff did not respond to

1 ALJ Mosesso's inquiry. (PCSO, Doc. 38-7). On February 2, 2016, ALJ Mosesso
2 issued an award that stated: "On December 29, 2015, Applicant filed an A.R.S. § 23-
3 1061(J) request for investigation into the failure of the defendant carrier to pay
4 outstanding compensation benefits owed, to pay outstanding medical bills, and to
5 authorize neuropsychological testing and/or treatment...Applicant has not responded to
6 the undersigned inquiry from January 11, 2016. Therefore, this matter is deemed
7 resolved. IT IS ORDERED that no further action be taken on applicant's A.R.S. § 23-
8 1061(J) request. (*Id.*)

9 On February 16, 2016, Plaintiff filed a second Request for Hearing with the ICA
10 again protesting the December 22, 2014 NOC Status. (DSOF, Doc. 40-1, Ex. H; PSAF ¶
11 84). Therein, Plaintiff claimed he was entitled to continuing benefits and because "[t]he
12 carrier's notice of claim status is not supported by medical evidence and is void or
13 voidable" under *Roseberry v. Indus. Comm'n*, 546 P.2d 802 (Ariz. 1976). (PSCOF, Doc.
14 38-8).

15 On June 10, 2016, ALJ Radke sent the parties an interim letter² in which she
16 indicated that Plaintiff had demonstrated the NOC Status was void pursuant to *Roseberry*,
17 thus giving the IAC jurisdiction to hear Plaintiff's claim. (PSCOF, Doc. 38-11). The
18 ALJ indicated she would thus set a notice of hearing on Plaintiff's claim. (*Id.*)

19 On August 29, 2016, however, ALJ Radke issued a formal order that ultimately
20 dismissed Plaintiff's February 16, 2016 request for continuing benefits for lack of
21 jurisdiction. (PCSO, Doc. 38-13). ALJ Radke found that Plaintiff's claim for
22 continuing benefits was barred by "res judicata in light of Chief Judge Mosesso's
23 February 2, 2016 Award." (*Id.*) The ALJ found that although she "would have found
24 [Plaintiff's] *Roseberry* argument persuasive, finding that the IME could not provide a
25 viable basis for the Notice of Claim Status releasing [Plaintiff] to regular work,"
26 Plaintiff's continuing benefits claim, which included claims with "respect to

27 ² Plaintiff characterizes this letter as an "order" that contains "administrative finding[s]".
28 (Doc. 37 at 9). The Court disagrees with this characterization, but notes that even if it
could be characterized as such, the ALJ plainly reconsidered her "findings" in the two
subsequent formal orders issued on August 29, 2016 and September 27, 2016.

1 compensation benefits and further treatment” was precluded because Plaintiff “failed to
2 file a Request for Review of the [February 2, 2016] Award deeming the case resolved.
3 The [February 2, 2016] Award therefore became final.” (*Id.*) The ALJ thus found that
4 the relief requested in Plaintiff’s February 16, 2016 “J” request, including the request for
5 psychological testing and treatment, was untimely and could not be excused under
6 *Roseberry*. (*Id.*) Plaintiff appealed ALJ Radke’s August 29, 2016 decision by filing a
7 Request for Review on September 7, 2016. (DSOF, Doc. 40-1, Ex. L). That decision
8 was affirmed on September 27, 2016. (*Id.*)

9 Plaintiff also filed a Petition to Reopen the NOC Status on April 1, 2016, in which
10 he asked the ICA to “consolidate [the Petition to Reopen] with 2/16/16 request for
11 hearing.” (Defendant’s Statement of Facts in Support of its Motion for Summary
12 Judgment (“DSOF”) Doc. 40-1, Ex. I). Defendant denied Plaintiff’s Petition to Reopen
13 the NOC on April 22, 2016. (DSOF, Doc. 40-1, Ex. L). The Court scheduled a hearing
14 on the Petition to Reopen for November 7, 2016, but prior to that time, the parties
15 informed the court that the case had been settled. (DSOF, Doc. 40-1, Ex. M). Through
16 representation, on October 19, 2016, the parties filed a Petition for Approval of
17 Compromise and Settlement Agreement (the “Agreement”).³ (*Id.*) The Agreement was

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19 ³ In his Response, Plaintiff objects to the Court’s consideration of the ICA
20 Settlement in deciding Defendant’s motion, arguing that it is not relevant under Fed. R.
21 Evid. 408(a). Plaintiff contends that Defendant only seeks to use the ICA Settlement
22 Agreement to “limit the Plaintiff’s case by arguing that his claim is invalid based on the
23 settlement.” (Doc. 37 at 16). Defendant offers no specific rebuttal to this argument in its
24 Reply.

25 Rule 408 provides in relevant part that evidence of compromise and offers is not
26 admissible to prove liability for or invalidity of the claim or its amount. *See* Fed. R. Evid.
27 408(a). The 1972 advisory committee’s notes to those proposed rules state that “[w]hile
28 the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a
similar attitude must be taken with respect to completed compromises when offered
against a party thereto.” Evidence of a settlement agreement otherwise precluded by Rule
408, however, may be offered for a purpose *other* than to prove or disprove liability or
the validity of a claim or its amount. *See e.g., Johnson v. Hugo’s Skateway*, 974 F.2d
1408 (4th Cir. 1992) (finding consent judgment was admissible to prove motive or
intent). Although the Court finds it conceivable that Defendant is using the parties’
Settlement Agreement and subsequent consent decree to establish that this Court lacks
jurisdiction over the claim, and not to prove that Plaintiff’s claim is invalid, Defendant
did not argue as much, and this Court will not make such a presumption on its behalf.
The Court thus grants Plaintiff’s request to strike the ICA Settlement documents, and
references them here only for purposes of background.

1 approved by ALJ Radke on October 24, 2016. (*Id.*)

2 **II. Summary Judgment Standards**

3 Summary judgment is appropriate when: (1) the movant shows that there is no
4 genuine dispute as to any material fact; and (2) after viewing the evidence most favorably
5 to the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ.
6 P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Under this standard,
7 “[o]nly disputes over facts that might affect the outcome of the suit under governing
8 [substantive] law will properly preclude the entry of summary judgment.” *Anderson v.*
9 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A “genuine issue” of material fact arises
10 only “if the evidence is such that a reasonable jury could return a verdict for the non-
11 moving party.” *Id.*

12 Notwithstanding the summary judgment standards, the court must dismiss a case
13 over which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). Indeed, “[a]
14 federal court is presumed to lack jurisdiction...unless the contrary affirmatively appears.”
15 *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225
16 (9th Cir. 1989). When that jurisdiction is challenged, “the plaintiff bears the burden of
17 establishing the court’s subject matter jurisdiction.” *Soghomonian v. United States*, 82 F.
18 Supp. 2d 1134, 1140 (E.D. Cal. 1999).

19 **III. Discussion**

20 Plaintiff claims that Defendant, as Plaintiff’s workers compensation insurer,
21 breached its duty of good faith and fair dealing by refusing to properly evaluate and thus
22 effectively denying Plaintiff’s September 14, 2014 benefit claim without any reasonable
23 basis. Arizona law allows a workers compensation claimant to bring an action against his
24 employer’s workers compensation insurer for breach of the duty of good faith and fair
25 dealing, i.e., a “bad faith” claim. *Demetrulias v. Wal-Mart Stores Inc.*, 917 F. Supp. 2d
26 993, 1004 (D. Ariz. 2013) (citing *Mendoza v. McDonald’s Corp.*, 213 P.3d 288, 298
27 (Ariz. Ct. App. 2009)). “The duty of good faith arises because...implicit in the contract
28 and the relationship is the insurer’s obligation to play fairly with its insured.” *Id.*

1 Because the duty of good faith is non-delegable, Defendant may be liable for the
2 insurer's actions. See *Temple v. Hartford Ins. Co. of Midwest*, 40 F. Supp. 3d 1156, 1166
3 (D. Ariz. 2014).

4 A claim for bad faith “arises when the insurance company intentionally denies,
5 fails to process or pay a claim without a reasonable basis for such action.” *Noble v. Nat’l*
6 *Am. Life Ins. Co.*, 624 P.2d 866, 868 (Ariz. 1981). Although the IAC has exclusive
7 jurisdiction over workers’ compensation claims in Arizona, see Ariz. Const. art. 18, § 8;
8 A.R.S. §§ 23–901 *et seq.* – a workers’ compensation carrier can nonetheless be liable for
9 the common law tort of bad faith in a district court because such a tort is “separate and
10 not a direct or natural consequence of the compensable industrial injury.” *Merkins v.*
11 *Fed. Ins. Co.*, 349 P.3d 1111, 1113 (Ariz. Ct. App. 2015) (citing *Franks v. U.S. Fidelity*
12 *& Guaranty Co.*, 718 P.2d 193 (Ariz. Ct. App. 1985), *Boy v. Fremont Indem. Co.*, 742
13 P.2d 835, 839 (Ariz. Ct. App. 1987) and *Mendoza v. McDonald’s Corp.*, 213 P.3d 288,
14 298 (Ariz. Ct. App. 2009).

15 However, to bring a claim of bad faith denial of benefits against a carrier, an
16 aggrieved claimant must first obtain a “compensability determination from the [IAC].”
17 *Id.* at 1115. In *Merkins*, the court explained the basis for such a requirement is to ensure
18 that the IAC’s exclusive jurisdiction to determine entitlement to benefits and the amount
19 of benefits is not being circumvented. *Id.* There, the claimant filed a claim for bad faith
20 denial of benefits with the superior court instead of seeking review of the carrier’s
21 decision to file a notice of claim status terminating her claim. *Id.* The Court held that the
22 superior court lacked jurisdiction to hear the Plaintiff’s bad faith claim because the
23 Plaintiff had failed to exhaust her administrative remedies. *Id.* In so finding, the Court
24 stated:

25 Even if we assume the evidence would show that [the carrier] (through its
26 employees) acted in bad faith by denying [plaintiff’s] claim, the finder of
27 fact would have to make a compensability determination to find that [the
28 carrier] unreasonably terminated [plaintiff’s] benefits. [] Moreover, without
a compensability determination, the finder of fact could not award as
damages any unpaid policy benefits due from the industrial injury because

1 only the Industrial Commission can determine whether benefits are due and
2 order payment. [] As a result, to allow a plaintiff to seek damages based on
3 a denial of benefits from the carrier without pursuing benefits through the
4 workers' compensation system would be akin to ordering that the benefits
5 be paid for, thereby circumventing the Industrial Commission's exclusive
6 jurisdiction to decide the issue.

7 *Id.*

8 Relying on *Merkins*, Defendant argues that the Court lacks jurisdiction to decide
9 the compensability issue Plaintiff has alleged because he did not exhaust his
10 administrative remedies on this issue with the ICA. Specifically, Defendant argues,
11 "Plaintiff did not secure any ruling from ICA awarding any additional workers'
12 compensation benefits that were not previously paid." (Doc. 34 at 10). The Court agrees,
13 and finds the language from *Merkins* forecloses its authority to hear Plaintiff's bad faith
14 denial of benefits claim.

15 Here, Plaintiff's December 28, 2015 "J" Request specifically sought continuing
16 benefits based on the conduct underlying Plaintiff's bad faith claim, i.e., Defendant's
17 failure to authorize neuropsychological testing and/or treatment prior to closing his claim
18 on December 22, 2015. (PCSO, Doc. 38-4). Plaintiff's "J" Request stated in part, "To
19 date, I have not received any neuropsychological appointments or compensation to
20 continue my recovery...I am requesting that the workman's compensation case be
21 reopened and re-evaluated to showcase that there is still more treatment necessary for my
22 recovery..." (*Id.*) By the clear language of Plaintiff's Request for Hearing, the Court
23 finds the question of continuing benefits in the form of neuropsychological testing and/or
24 treatment was placed in issue by the Plaintiff. *Stephens v. Industrial Comm'n*, 559 P.2d
25 212, 214 (Ariz. Ct. App. 1977). When Defendant represented that payment was
26 forthcoming for Plaintiff's outstanding medical bills (which were also requested in that
27 "J" Request), the ALJ asked Plaintiff to respond within ten days as to whether
28 Defendant's response adequately resolved all the concerns in his "J" Request. (PCSO,
Doc. 38-6). Plaintiff did not respond to the ALJ's request. As he had told Plaintiff he
would if no request was received, the ALJ thus "deemed [the matter] resolved" and

1 ordered that no further action be taken on any of the matters in Plaintiff's "J" request.
2 (*Id.*) Plaintiff did not seek review of this order. *See* A.R.S. § 23-946 (providing that any
3 party dissatisfied with an ICA decision can appeal that decision to superior court within
4 thirty days). Plaintiff's claim to entitlement of additional neuropsychological testing
5 and/or treatment pursuant to Defendant's September 2014's acceptance of the original
6 claim therefore became final and adverse to Plaintiff on February 16, 2016.

7 The Court finds this conclusion is underscored by ALJ Radke's subsequent
8 August 29, 2016 decision finding that the court lacked jurisdiction to hear Plaintiff's
9 request for continuing benefit coverage for neuropsychological testing and/or treatment
10 due to the res judicata effect of ALJ Moresso's prior order on that issue (DSCOF, Doc.
11 38-13). And because the parties ultimately settled before Plaintiff's Petition to Reopen
12 went to hearing, there was of course no determination by the ICA there.

13 Plaintiff had an opportunity to seek review of ALJ Moresso's February 2, 2015
14 adverse award regarding Plaintiff's entitlement to neuropsychological testing and/or
15 treatment. He did not. Thus, there is no favorable determination from the IAC entitling
16 Plaintiff to continuing benefits in relation to neuropsychological testing and/or treatment.
17 A finder of fact here would have to make a compensability determination prior to
18 awarding any damages, a duty that is within the exclusive jurisdiction of the IAC.
19 *Merkins*, 349 P.3d at 1113. Thus, allowing Plaintiff's bad faith denial claim, which
20 undisputedly seeking damages stemming from Plaintiff's failure to provide benefits
21 covering neuropsychological testing and/or treatment, would be "circumventing the
22 Industrial Commission's exclusive jurisdiction to decide" whether Plaintiff was ever
23 entitled to those benefits. *Id.*

24 The damages alleged from Plaintiff's bad faith denial claim all stem from
25 Defendant's alleged failure to authorize neuropsychological testing and/or treatment. But
26 Plaintiff never sought review of the ALJ Award that adversely resolved the issue of
27 Plaintiff's entitlement to these continuing benefits. As such, under *Merkins*, this Court
28 lacks jurisdiction over Plaintiff's bad faith claim.

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Accordingly,

IT IS ORDERED granting Defendant's Motion for Summary Judgment (Doc. 34).

IT IS FURTHER ORDERED that the Clerk of Court should enter judgment accordingly.

Dated this 30th day of September, 2018.



Honorable Diane J. Humetewa
United States District Judge