

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

SEP 19 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CARLOS ALBERTO LOPEZ,)	
)	2 CA-IC 2013-0006
Petitioner Employee,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
THE INDUSTRIAL COMMISSION)	Rule 28, Rules of Civil
OF ARIZONA,)	Appellate Procedure
)	
Respondent,)	
)	
G HING FOOD SERVICE, INC.,)	
)	
Respondent Employer,)	
)	
SCF ARIZONA,)	
)	
Respondent Insurer.)	
)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20092380334

Insurer No. 0913713

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

Carlos Alberto Lopez

Tucson
In Propria Persona

The Industrial Commission of Arizona
By Andrew F. Wade

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M I L L E R, Judge.

¶1 In this statutory special action, petitioner Carlos Lopez contends the administrative law judge (ALJ) erred in dismissing his petition to reopen his workers' compensation claim for knee pain. The ALJ determined Lopez's claim was barred by the principle of issue preclusion. For the reasons given below, we affirm the award dismissing Lopez's petition to reopen.

Factual and Procedural Background

¶2 On review, we consider the evidence in the light most favorable to upholding the ALJ's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). On August 12, 2009, Lopez was injured while working as a delivery driver for G Hing Food Service, Inc. ("G Hing"). His truck rolled over, pinning him into the truck's cab by the steering wheel, and injuring his back, head, right hand, and right leg. G Hing's insurance carrier, SCF Arizona, accepted Lopez's claim for workers' compensation benefits. Lopez's doctor cleared him to return to work

on September 10, 2009. SCF closed Lopez's claim on November 7, 2009, with a finding of no permanent disability.

¶3 Lopez petitioned to reopen his claim in January 2012, claiming right leg pain and a limp. SCF denied the petition. Lopez requested a hearing, arguing he had a new additional or previously undiscovered knee condition. ALJ LuAnn Haley reviewed medical records and heard testimony from Lopez's treating physician and an independent medical expert.¹ Lopez's physician said Lopez had a tear in the cartilage or meniscus of his knee, and concluded the injury was new and had been caused by the industrial accident. The independent medical examiner opined the knee pain was the result of a preexisting degenerative hip condition that could not have been aggravated by the industrial accident. ALJ Haley accepted the independent medical examiner's opinion as "most probably correct and well founded," further concluding that Lopez did not have a new condition related to the 2009 industrial injury. Lopez did not protest ALJ Haley's decision and it became final. A.R.S. § 23-942(D) (award final when entered unless party files request for review).

¶4 In October 2012, Lopez filed a new petition to reopen, claiming increased knee and hip problems. SCF denied Lopez's petition, and he filed a request for hearing.

¹No hearing transcripts are included in the record on appeal. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) ("A party is responsible for making certain the record on appeal contains all the transcripts or other documents necessary for us to consider the issues raised on appeal."); Ariz. R. Civ. App. P. 11(b); *see also* Ariz. R. Spec. Actions 10(k) (Arizona Rules of Civil Appellate Procedure apply to special action review of industrial commission awards). When a party fails to include these necessary items, we assume they would support the court's findings and conclusions. *Baker*, 183 Ariz. at 73, 900 P.2d at 767.

G Hing and SCF moved to dismiss Lopez’s petition to reopen, arguing the claim was barred by res judicata and *Blickenstaff v. Indus. Comm’n*, 116 Ariz. 335, 339, 569 P.2d 277, 281 (App. 1977), which requires a petition to reopen be accompanied by a physician’s report containing “sufficient medical facts which, if true, would constitute a prima facie showing of entitlement to relief.” After reviewing the file and records, but without holding a hearing, ALJ Gary M. Israel dismissed the petition. He concluded that issue preclusion principles did not allow Lopez to relitigate the claim. Lopez filed a request for review, which was summarily denied. He then filed a timely petition for special action. We have jurisdiction to review ALJ Israel’s award pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A).

Discussion

¶5 We defer to the ALJ’s findings of fact, but independently review questions of law, including issue preclusion. *See Special Fund Div., Indus. Comm’n v. Tabor*, 201 Ariz. 89, ¶ 20, 32 P.3d 14, 17 (App. 2001); *Polanco v. Indus. Comm’n*, 214 Ariz. 489, ¶ 6, 154 P.3d 391, 393-94 (App. 2007). Issue preclusion forecloses a party from litigating an issue actually litigated in a prior proceeding that resulted in a final judgment. *Circle K Corp. v. Indus. Comm’n*, 179 Ariz. 422, 425, 880 P.2d 642, 645 (App. 1993). The party against whom the doctrine will be used must have had an opportunity to litigate the issue and must have actually litigated it. *Id.* Further, the issue must have been essential to the final judgment. *Id.*

¶6 The workers’ compensation statutes provide an exception to the general principles of claim and issue preclusion in industrial commission cases. *Stainless*

Specialty Mfg. Co. v. Indus. Comm'n, 144 Ariz. 12, 15, 695 P.2d 261, 264 (1985). Section 23-1061(H), A.R.S., allows claims to be reopened to address changed circumstances when an employee can prove a “new, additional or previously undiscovered temporary or permanent condition.” *Polanco*, 214 Ariz. 489, ¶ 6, 154 P.3d at 393. A new diagnosis may satisfy the requirements and allow reopening. *See Stainless*, 144 Ariz. at 19, 695 P.2d at 268. Reopening is not allowed, however, if the new diagnosis simply controverts previous evidence or if a doctor changes his mind as to a known condition. *Id.* at 19 & n.3.

¶7 Before denying Lopez’s first petition to reopen in August 2012, ALJ Haley heard testimony from Lopez, treating physician Dr. John Medlen, and Dr. Anthony Theiler, who performed an independent medical evaluation. Dr. Medlen recommended arthroscopic surgery for a tear of the cartilage or meniscus in Lopez’s right knee. According to ALJ Haley’s summary of evidence, Dr. Medlen also testified that he believed the knee condition was new and related to the work injury because Lopez had no knee pain before the accident. Dr. Medlen’s records did not include information about Lopez’s hip, but Dr. Medlen testified that Lopez had pre-existing degenerative changes in the right hip, and agreed that hip pathology may also cause referred pain in the knee. Dr. Medlen could not state the source of Lopez’s hip pain, testifying that he needed to review a hip x-ray before making recommendations.

¶8 Dr. Theiler examined Lopez twice, and reviewed pelvis and hip x-rays that showed osteoarthritis in the right hip. Dr. Theiler concluded in his report that the hip pathology was the primary, if not only, cause of the right knee pain. Further, Dr. Theiler

did not believe the osteoarthritis could have been aggravated by the accident because Lopez's records indicated he was asymptomatic for more than a month after the accident.

¶9 ALJ Haley found that where the doctors' opinions differed, Dr. Theiler's opinion was the most probably correct and well-founded. She stated she was persuaded by Dr. Theiler's review of Lopez's diagnostic studies, and thought it notable that Dr. Medlen did not review Lopez's hip x-rays or examine his hips. In denying the petition to reopen, ALJ Haley concluded that the industrial injury did not aggravate Lopez's pre-existing hip condition, and also did not cause the pain in his right knee.

¶10 When he filed his second petition to reopen in October 2012, Lopez supported the request with a letter from Dr. Medlen stating that Lopez had advanced arthritis of his hip, and may have damaged cartilage in his knee from the accident. Dr. Medlen's letter further stated that he "would also like to emphasize the fact that some of [Lopez's] knee symptoms are probably referred down the femur from the hip, which is commonly the case when one has advanced arthritis of the hip." As to whether the condition was new, Dr. Medlen concluded the "key in the whole equation is if he has no history of prior medical evaluation by physicians looking at either his hip or his knee, he probably has a more solid case, but if he has a history of problems with his knee prior to this and multiple doctor's visits concerning his right lower extremity . . . this will be considered pre-existing."

¶11 In his opening brief, Lopez argues that his knee injury was caused by the industrial accident, and implies that this is a new, additional, or previously undiscovered condition. We disagree.

¶12 Lopez is foreclosed from re-litigating the cause of his right knee pain due to the principle of issue preclusion. *See Circle K Corp.*, 179 Ariz. at 425-26, 880 P.2d at 645-46. Lopez had a full opportunity to litigate the cause of his knee pain before ALJ Haley, including testifying on his own behalf and calling on Dr. Medlen to serve as an expert witness. ALJ Haley's decision that the knee pain was not caused by the industrial accident was central to the decision not to reopen the claim. Further, ALJ Haley's decision was final at the time Lopez filed his next petition to reopen. A.R.S. § 23-942(D) (award final when entered unless party files request for review). The issue of causation of the knee pain is barred from re-litigation by issue preclusion. *See Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 24, 41 P.3d 640, 645 (App. 2002).

¶13 Further, Dr. Medlen's letter does not describe a new or previously undiscovered condition. As noted above, Lopez's knee pain was known at the time of ALJ Haley's award, and ALJ Haley concluded that it was caused by Lopez's hip condition. At best, Dr. Medlen's diagnosis is an attempt to controvert Dr. Theiler's previous diagnosis, which will not justify reopening. *Stainless*, 144 Ariz. at 19, 695 P.2d at 268. Further, even though Dr. Medlen's letter suggests a knee injury as the possible source of the knee pain, his diagnosis is equivocal, noting that existing arthritis in the hip may cause knee pain as well. ALJ Israel did not err in dismissing Lopez's petition to reopen. *See Lovitch*, 202 Ariz. 102, ¶¶ 22-24, 41 P.3d at 645 (clear diagnosis of irritant-induced vocal cord dysfunction not new or previously undiscovered where employee previously diagnosed with vocal cord spasm or dysfunction).

Disposition

¶14 We affirm the award.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge