

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ROSA HUERTA,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

POLYPORE, INC.,
Respondent Employer,

SCF ARIZONA,
Respondent Insurer.

No. 2 CA-IC 2013-0016
Filed May 9, 2014

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NOT FOR PUBLICATION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); Ariz. R. Civ. App. P. 28(c).

Special Action - Industrial Commission
ICA Claim No. 91226096284
Insurer No. 8109336
LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

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COUNSEL

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 In this statutory special action, petitioner Rosa Huerta challenges the administrative law judge's (ALJ) award modifying her medical maintenance benefits to terminate her psychological treatments. Huerta contends that the insurance carrier, SCF Arizona (SCF), was precluded from altering her benefits for supportive medical maintenance because they arose from a contract and the original notice of such benefits was involved in litigation that became final. Because the ALJ did not err, we affirm the award.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming 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 1981, Huerta filed a claim for workers' compensation benefits

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after part of a machine she was working on fell onto and injured her wrist. Her employer's insurance carrier, SCF, accepted the claim, which was closed in 1989. When it closed the case, SCF also issued a notice of supportive medical maintenance benefits, which included seventeen visits with a psychologist for one year. In 1991, the parties entered into a settlement agreement, which included a clause stating the previous notice of supportive care would remain "intact." In 1992 and 1996, SCF sent Huerta additional notices of supportive care, modifying the benefits in minor ways, unrelated to her psychologist's visits, to which Huerta did not object. Those notices both stated her benefits would be reviewed annually and discontinued if not used.

¶3 In August 2012, SCF issued another notice of supportive care providing, as relevant here, for six sessions with Huerta's psychologist in order to "terminat[e]... the psychotherapeutic relationship." Huerta requested a hearing pursuant to A.R.S. § 23-1061(J), alleging the August 2012 "supportive care award [was] inadequate." Over the course of two hearings, the ALJ heard testimony from both Huerta's treating psychologist, Dr. Denny Peck, and the psychologist hired by SCF to conduct an independent examination of Huerta, Dr. Joel Parker. The ALJ ultimately ordered that Huerta be afforded an additional two visits to terminate her relationship with Dr. Peck.

¶4 Huerta requested a review of the ALJ's decision, and the ALJ affirmed the award. We have jurisdiction over Huerta's petition for special action pursuant to A.R.S. §§ 23-951 and 12-120.21(A)(2). *See also* Ariz. R. P. Spec. Actions 10.

Discussion

¶5 Huerta first contends that because the 1989 supportive care notice was litigated and approved by the ALJ, SCF is precluded from altering those benefits "without some new, additional or previously undisclosed evidence." "We defer to the ALJ's factual determinations but review de novo whether issue preclusion applies." *Brown v. Indus. Comm'n*, 199 Ariz. 521, ¶ 10, 19 P.3d 1237, 1239 (App. 2001).

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¶6 Although the Arizona Workers' Compensation Act does not specifically authorize awards of supportive medical benefits,¹ "the propriety of granting such benefits has been recognized where a continuing need for such care is causally related to the industrial injury." *Capuano v. Indus. Comm'n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986). As in the present case, insurance carriers often use informal procedures to "voluntarily issu[e] notices of supportive care in lieu of commission awards." *Id.* at 227, 722 P.2d at 395. Such notices may be adjusted at any time and "may not be characterized as res judicata in the absence of a § 23-1061(J) hearing." *Id.* In this way, supportive care notices are distinguishable from notices of claim status, which, pursuant to statute, are final adjudications that may only be changed using formal reopening procedures. *Id.*; see also § 23-1061(H).

¶7 If, however, a particular issue concerning supportive care is "actually litigated, decided, and essential to a final judgment" by an ALJ, the insurance carrier is precluded from relitigating the issue unless it presents evidence of a change in the claimant's medical condition or available procedures. *Brown*, 199 Ariz. 521, ¶¶ 11, 14, 19 P.3d at 1240. Under those circumstances, it is not enough for the insurance carrier to show a mere "change in medical opinion" or evidence that is "not qualitatively different from evidence presented at a prior proceeding." *Id.* ¶ 14. Rather, the carrier must show "a change in physical condition or in medical procedures." *Id.*

¶8 Huerta argues that because the supportive care issue in her case was involved in "litigation that became final," *Brown* applies and SCF was precluded from altering her supportive care "without some new, additional, or previously undiscovered evidence." She appears to contend that because the settlement agreement, which included a provision related to supportive care, was approved by an ALJ following a hearing, it was actually

¹ The Act does mention supportive medical maintenance benefits in A.R.S. § 23-941.01(B), which provides that parties may enter into final settlements that waive any future entitlement to such benefits.

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litigated as described in *Brown*. But nothing in the record supports Huerta's contention that this issue was "actually litigated, decided, and essential to a final judgment." *Id.* ¶ 11.

¶9 Pursuant to the Industrial Commission's policy regarding settlement agreements, an ALJ must approve a proposed settlement agreement if "[a] bona fide dispute exists." ICA Policies and Procedures for Processing Compromise and Settlement Agreements (Sept. 24, 1987), reprinted in Ray J. Davis et al., *Arizona Workers' Compensation Handbook* app. C, at C-7 to C-9 (1992); see also *Holsum Bakery v. Indus. Comm'n*, 191 Ariz. 255, 256, 955 P.2d 11, 12 (App. 1997). Before the 1991 settlement agreement was approved by the ALJ, the parties had a hearing before the ALJ at which both sides admitted the only disputed issue was related to Huerta's limited earning capacity. Indeed, the approved settlement agreement indicates the only "legitimate dispute" related to Huerta's earning capacity. Similarly, the ALJ noted that issue was the only "bona fide dispute." At no point during these proceedings did the parties argue about Huerta's entitlement to supportive care, no evidence on the issue was presented, and the ALJ made no judgment regarding such benefits.

¶10 Thus, Huerta's entitlement to supportive care was never "actually litigated, decided, and essential to a final judgment," and it could not have a preclusive effect. See *Brown*, 199 Ariz. 521, ¶ 11, 19 P.3d at 1240. Rather, the notices were voluntarily issued by the insurance carrier to authorize medical maintenance benefits and could be adjusted at any time, subject to the claimant's objection pursuant to § 23-1061(J). See *Capuano*, 150 Ariz. at 227, 722 P.2d at 395. Accordingly, because *Brown* is inapplicable to Huerta's case, SCF was not precluded from arguing at that hearing that Huerta's previously authorized supportive care benefits should be adjusted. See *id.* ("[P]ayment of medical benefits does not preclude a succeeding determination [that] the claimant's condition is not causally related to the industrial injury.").

¶11 Huerta next argues that contract principles bar SCF's alteration of her supportive care because the language in the 1991 settlement agreement indicates the supportive care would continue indefinitely. Huerta, however, did not raise this argument before

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the ALJ, and “this Court generally will not consider on appeal issues not raised before the [Industrial Commission].” See *T.W.M. Custom Framing v. Indus. Comm’n*, 198 Ariz. 41, ¶ 4, 6 P.3d 745, 748 (App. 2000). That rule derives in part from “the requirement that a party must develop its factual record before the agency and give the ALJ the opportunity to correct any legal error.” *Id.*; see also *Teller v. Indus. Comm’n*, 179 Ariz. 367, 372, 879 P.2d 375, 380 (App. 1994) (“[T]he court assumes that an ALJ would have decided an issue correctly if the petitioner had presented it to the ALJ.”). Additionally, although an appellate court can determine de novo whether a settlement agreement clause is ambiguous, that “ambiguity is subject to a factual determination concerning the intent of the parties and is to be resolved conclusively by the trier of fact.” *Hartford v. Indus. Comm’n*, 178 Ariz. 106, 111, 870 P.2d 1202, 1207 (App. 1994). Because this argument was not raised below, neither party had the opportunity to develop the factual record by presenting relevant extrinsic evidence that would enable the ALJ to determine the parties’ intent and interpret the settlement agreement provision at issue, which in turn would allow us to review that conclusion. It is therefore inappropriate for us to address this issue for the first time on appeal.

¶12 Huerta additionally argues that, if *Brown* does not apply to her case, then the three unprotested notices of supportive care she received between 1989 and 1996 should be given “res judicata effect to protect her from a new medical opinion and a change in her supportive care of over 20 years.” Huerta reasons that *Capuano*, in which this court concluded that unprotested notices of supportive care have no res judicata effect, was wrongly decided and incorrectly interpreted the Workers’ Compensation Act. See *Capuano*, 150 Ariz. at 227, 722 P.2d at 395. Like her previous contention, Huerta also failed to attack *Capuano* before the ALJ, and we will not address that argument for the first time on appeal. See *T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 4, 6 P.3d at 748.

¶13 In a related argument, Huerta contends that the burden of proof for altering supportive care benefits should be placed on the party asserting a new position. As applied here, that would mean SCF had the burden of proof because it was seeking to alter Huerta’s

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previous supportive care benefits. Huerta states she is not aware of any cases delineating “the burden of proof in regard to supportive care awards,” and asks this court to provide some guidance on the issue. However, this court noted in *Capuano* that “the claimant ha[s] the burden of proving the continuing industrial effect upon the condition in order to be entitled to future [supportive care] benefits.” 150 Ariz. at 226, 722 P.2d at 394. That statement is consistent with the more general standard that “[c]laimants bear the burden of establishing all material elements of their claim, including causation and, in [Industrial Commission] cases, the necessary connection to a work-related injury.” *T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 12, 6 P.3d at 749-50. We also stated in *Capuano* that “a carrier’s voluntary payment of supportive care benefits does not bar its request for a later determination whether a claimant’s current condition is still causally related to the industrial injury.” 150 Ariz. at 227, 722 P.2d at 395. Thus, although a claimant is entitled to request a hearing pursuant to § 23-1061(J) when the carrier alters her supportive care benefits, at that hearing the burden is on the claimant to establish that she is still entitled to receive those benefits. Huerta has not demonstrated why we should deviate from the standard burden of proof in Industrial Commission cases, and we decline to do so.²

²Huerta contends that *T.W.M. Custom Framing*, cited by the ALJ for the appropriate burden of proof, is inapplicable because that case involved the issue of whether a man’s suicide was related to his work. But any factual or legal differences in the underlying workers’ compensation claim do not undermine the legal principles guiding the burden of proof applicable in all Industrial Commission cases. We have repeatedly stated, in cases other than *T.W.M. Custom Framing*, the claimant in an Industrial Commission case must prove all elements of her claim, including that her condition is both medically and legally causally related to her employment. See, e.g., *Hackworth v. Indus. Comm’n*, 229 Ariz. 339, ¶¶ 3-7, 9, 275 P.3d 638, 640-42 (App. 2012) (claimant did not establish neuroma was related to work conditions); *Keovorabouth v. Indus. Comm’n*, 222 Ariz. 378, ¶¶ 7-8, 18, 214 P.3d 1019, 1021-22, 1023-24 (App. 2009) (claimant did not establish accident “arose out of” employment); *Montgomery v. Indus. Comm’n*, 173 Ariz. 106, 108, 840 P.2d 282, 284 (App. 1992)

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¶14 Huerta also contends allowing insurance carriers to alter supportive care benefits without having to prove a change in the claimant's condition creates an "untenable situation" for claimants which allows carriers to "unilaterally" revoke those benefits and "escape[] liability for the ongoing supportive care." Again, Huerta did not raise this argument to the ALJ, and we will not consider it on appeal. *See T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 4, 6 P.3d at 748. Moreover, established procedures already provide protection against arbitrary or unsupported actions by a carrier. Carriers which process claims unfairly or in bad faith are subject to penalties by the Industrial Commission. A.R.S. § 23-930; *see also* Ariz. Admin. Code R20-5-163. If a claimant disagrees with the terms of a supportive care notice, he or she may request a hearing pursuant to § 23-1061(J), as Huerta has done here.

Disposition

¶15 For the foregoing reasons, we affirm the ALJ's award and decision upon review.

(same); *Special Fund Div./No Ins. Section v. Indus. Comm'n*, 172 Ariz. 319, 324, 836 P.2d 1029, 1034 (App. 1992) (claimant did not establish he was, in fact, an employee at time of injury).