

# RES JUDICATA AND REOPENING WORKERS' COMPENSATION CLAIMS IN ARIZONA

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The Arizona Constitution mandates the enactment of a Workmen's Compensation Law.<sup>1</sup> In 1925, the Arizona legislature enacted the Workmen's Compensation Act which, as amended,<sup>2</sup> is the basis of the current Arizona workers' compensation system.<sup>3</sup>

Under the Workmen's Compensation Act, an employee is awarded compensation for work related injuries without regard to fault or common law tort defenses.<sup>4</sup> Workers' compensation is intended to provide a streamlined and efficient system for handling the claims of injured employees.<sup>5</sup> The purpose of this system is to place the cost of employee death and injury on industry and to remove the burden of

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1. ARIZ. CONST. art. 18, § 8. See also R. DAVIS, ARIZONA WORKERS' COMPENSATION 1-4 (1980); Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ. ST. L.J. 1, 14, 18.

2. 1968 Ariz. Sess. Laws, 4th Spec. Sess., Ch. 6, at 998. These 1968 amendments reorganized the Industrial Commission and State Compensation Fund, ARIZ. REV. STAT. ANN. § 23-981-82 (Supp. 1971-80), and permitted more extensive administration by the insurance carrier. *Id.* § 23-1061(G); see *Ahearn v. Bailey*, 104 Ariz. 250, 255, 451 P.2d 30, 35 (1969); *Evertsen v. Industrial Comm'n*, 117 Ariz. 378, 381, 573 P.2d 69, 72 (Ct. App. 1977), *approved and adopted*, 117 Ariz. 342, 572 P.2d 804 (1977); Casenote, *Workmen's Compensation, Compromise of Claim*, 18 ARIZ. L. REV. 849, 850 (1976).

3. 1925 Ariz. Sess. Laws ch. 83, at 345; see *Adkins v. Industrial Comm'n*, 95 Ariz. 239, 243, 389 P.2d 118, 120 (1964). The Act was passed in conjunction with a constitutional amendment to article 18, § 8, intended to validate the Act. See *Bearden v. Industrial Comm'n*, 14 Ariz. App. 336, 341, 483 P.2d 568, 573 (1971); authorities cited in note 1 *supra*. The Act and Constitution are to be construed together. See *Red Rover Copper Co. v. Industrial Comm'n*, 58 Ariz. 203, 211, 118 P.2d 1102, 1105 (1941); *Bearden v. Industrial Comm'n*, 14 Ariz. App. 336, 341, 483 P.2d 568, 573 (1971); *Ream v. Wendt*, 2 Ariz. App. 497, 502, 410 P.2d 119, 124 (1966). For current provisions of the Arizona Workmen's Compensation Act, see ARIZ. REV. STAT. ANN. §§ 23-901 to 1091 (1971 & Supp. 1971-80).

4. *Ossic v. Verde Cent. Mines*, 46 Ariz. 176, 184-86, 49 P.2d 396, 400 (1935); A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 2.10 (1976); Note, *Arizona Pit Mines Safety Inspection: An Analysis of Legal Incentives*, 17 ARIZ. L. REV. 1024, 1030 nn.39-41 (1975). See also *Red Rover Copper Co. v. Industrial Comm'n*, 58 Ariz. 203, 210-11, 118 P.2d 1102, 1105 (1941).

5. *Fullen v. Industrial Comm'n*, 122 Ariz. 415, 419, 595 P.2d 657, 661 (1979) (remedial legislation will be liberally construed to provide a simpler, less formal, and more rapid procedure for processing claims); *Wood v. Industrial Comm'n*, 126 Ariz. 259, 261-62, 614 P.2d 340, 342-43 (Ct. App. 1980) (speedy, fair, and final adjudication); *Lawler v. Industrial Comm'n*, 24 Ariz. App. 282, 287, 537 P.2d 1340, 1345 (1975) (system to handle claims in "orderly and fair" manner); *Mokma v.*

these costs from society and the employee's family.<sup>6</sup>

In Arizona, a claim for workers' compensation is initially processed by the employer's insurance carrier,<sup>7</sup> which can make payments without an Industrial Commission award.<sup>8</sup> Any interested party<sup>9</sup> may request a hearing before an administrative law judge to object to the insurance carrier's decision.<sup>10</sup> After the hearing, the administrative law judge is empowered to enter an award.<sup>11</sup> The award is final unless a party requests review within thirty days.<sup>12</sup> Administrative review of the administrative law judge's award, if requested, is performed by the presiding administrative law judge and is based on the entire record.<sup>13</sup> The presiding administrative law judge's award is final if not appealed by writ of certiorari to the court of appeals.<sup>14</sup> A final

Industrial Comm'n, 9 Ariz. App. 88, 91, 449 P.2d 622, 625 (1969) (provide benefits by speedy, informal proceedings).

6. Holder v. Industrial Comm'n, 125 Ariz. 366, 368, 609 P.2d 1066, 1068 (Ct. App. 1980); Pottinger v. Industrial Comm'n, 22 Ariz. App. 389, 393, 527 P.2d 1232, 1236 (1975); Hannon v. Industrial Comm'n, 9 Ariz. App. 231, 232, 451 P.2d 44, 45 (1969); see Fullen v. Industrial Comm'n, 122 Ariz. 425, 429, 595 P.2d 657, 661 (1979) (protect beneficiaries and compensate valid claims); Inspiration Consol. Copper Co. v. Industrial Comm'n, 128 Ariz. 288, —, 625 P.2d 351, 353 (Ct. App. 1981) (basic policy of workers' compensation is to compensate the worker while he is disabled); Gordon v. Industrial Comm'n, 23 Ariz. App. 457, 460, 533 P.2d 1194, 1197 (1975) (compassionate purpose of aiding injured workers).

7. ARIZ. REV. STAT. ANN. § 23-1061(G) (Supp. 1971-80); see *Massie v. Industrial Comm'n*, 113 Ariz. 101, 104, 546 P.2d 1132, 1135 (1976); *Evertsen v. Industrial Comm'n*, 117 Ariz. 378, 381, 573 P.2d 69, 72 (Ct. App. 1977), *approved and adopted*, 117 Ariz. 342, 572 P.2d 804 (1977); *Nelson v. Industrial Comm'n*, 115 Ariz. 293, 295, 564 P.2d 1260, 1262 (Ct. App. 1977); *Casene*, *supra* note 2, at 850.

8. ARIZ. REV. STAT. ANN. § 23-1061(G) (Supp. 1971-80); see *Keeton v. Industrial Comm'n*, 27 Ariz. App. 302, 305, 554 P.2d 898, 901 (1976) (employer cannot modify or terminate commission award). See generally *King, Reorganization of the Industrial Commission*, 10 ARIZ. L. REV. 371, 378 (1968). The payments may be changed or terminated by means of a "notice of claim status." See ARIZ. REV. STAT. ANN. § 23-1061(F), (M) (Supp. 1971-80); text & notes 25-27, *infra*; Ariz. Compilation R. and Regs. 4-13-118 (1975); cf. ARIZ. REV. STAT. ANN. § 23-1047 (Supp. 1971-80) (an award for an unscheduled injury must be given by the commission, not the carrier); *Harbor Ins. Co. v. Industrial Comm'n*, 24 Ariz. App. 197, 200, 537 P.2d 34, 37 (1975) (commission award cannot be modified by insurer).

9. ARIZ. REV. STAT. ANN. § 23-901(9) (Supp. 1971-80) defines "interested party" to include the employer, the employee, and the carrier.

10. *Id.* § 23-941(A), (C); see *Sandoval v. Salt River Project*, 117 Ariz. 209, 214-15, 571 P.2d 706, 711-12 (Ct. App. 1977) (remedy is statutory, and claimant cannot sue for damages); 1980 Ariz. Sess. Laws, 2nd Reg. Sess. ch. 246 substituted "administrative law judge" for "hearing officer."

11. ARIZ. REV. STAT. ANN. § 23-942(A) (Supp. 1971-80).

12. *Id.* § 23-942(D).

13. *Id.* § 23-943(E); *Koval v. Industrial Comm'n*, 23 Ariz. App. 277, 279, 532 P.2d 549, 551 (1975) ("presiding" officer means the hearing officer who presided at the hearing, not the chief hearing officer); see *Chavez v. Industrial Comm'n*, 118 Ariz. 141, 146, 575 P.2d 340, 345 (Ct. App. 1977) (Jacobson, J., specially concurring) (since 1974, awards have been made by a single hearing officer without commission review); *Evertsen v. Industrial Comm'n*, 117 Ariz. 378, 381 n.3, 573 P.2d 69, 72 n.3 (Ct. App. 1977) (§ 23-943 transferred reviewing function from the commissioners to the presiding hearing officer); *William v. Industrial Comm'n*, 14 Ariz. App. 571, 572, 484 P.2d 664, 665 (1971) (the 1968 amendments gave the hearing officer greater responsibility).

14. ARIZ. REV. STAT. ANN. §§ 23-943(H), 951(A) (Supp. 1971-80). The proper place to file is division one of the court of appeals. *Id.* § 12-120.21 (Supp. 1980-81); see *Hall v. Industrial Comm'n*, 106 Ariz. 221, 223-24, 474 P.2d 812, 814-15 (1970) (fee must also be tendered within thirty days, and the proper place to file is division one). See also *Ross v. Industrial Comm'n*, 20

award is *res judicata*,<sup>15</sup> and compensation can only be modified by reopening the award based upon some specific statutory provision.<sup>16</sup>

This Note will consider the application of *res judicata* to awards for workers' compensation in light of the statutory right to reopen the award upon a change in the claimant's condition.<sup>17</sup> First, the doctrine of *res judicata* as it applies to workers' compensation awards will be considered. Next, the statutory provisions mitigating against the application of *res judicata* will be noted, with emphasis upon the right to reopen. Arizona case law interpreting the requirement of a new, additional, or previously undiscovered condition will then be analyzed in light of the policies underlying the workers' compensation system. Particular consideration will be given to two rules developed by the cases: first, that new evidence of the claimant's prior condition is insufficient to justify reopening the claim; and second, the related requirement that evidence justifying reopening must be comparative in nature. Finally, the implications of recent Arizona cases limiting these rules will be discussed.

## POLICY CONFLICTS IN WORKERS' COMPENSATION PROCEEDINGS

### *Res Judicata*

The doctrine of *res judicata* is a principle of judicial economy.<sup>18</sup> Consequently, *res judicata* bars relitigation of an issue which has al-

Ariz. App. 353, 354-55, 513 P.2d 143, 144-45 (1973) (the hearing officer's award cannot be appealed prior to administrative review).

15. See text & notes 18-35 *infra*.

16. See text & notes 51-56 *infra*. Reopening provisions vary from state to state. See, e.g., FLA. STAT. § 440.28 (1981) ("change in condition or . . . mistake in a determination of fact"); KY. REV. STAT. § 342.125 (Supp. 1980) (reopening for "change of conditions, mistake, fraud or newly discovered evidence"); N.C. GEN. STAT. § 97-47 (1979) (reopening for "change in condition"). See also A. LARSON, WORKMEN'S COMPENSATION (Desk ed. 1981) § 81.00. Some states with more "liberal" provisions allow reopening for "good cause," CAL. LABOR CODE § 5803 (West 1971); MINN. STAT. ANN. § 176.461 (West Supp. 1981), or when "justified." E.g., OHIO REV. CODE ANN. § 4123.52 (Page 1980); OR. REV. STAT. § 65.278(1) (1979); UTAH CODE ANN. § 35-1-78 (1953); see A. LARSON, *supra*; Subsequent Injury Fund v. Baker, 40 Md. App. 339, 345-48, 392 A.2d 94, 98-99 (1978).

Arizona law permits reopening for a "new, additional, or previously undiscovered temporary or permanent condition." ARIZ. REV. STAT. ANN. § 23-1061(H) (Supp. 1971-80). Originally the Arizona reopening provision was modeled on Washington law (WASH. REV. CODE § 51-28.040 (Supp. 1981) ("change in circumstances")). See 1925 Ariz. Sess. Laws ch. 83, § 80(c), at 411. The present language was adopted in the 1968 amendments. See 1968 Ariz. Sess. Laws, 4th Spec. Sess., ch. 6, § 49, at 1043.

17. ARIZ. REV. STAT. ANN. § 23-1061(H) (Supp. 1971-80).

18. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); accord, Sea Land Serv. v. Gaudet, 414 U.S. 573, 578 (1974); United States v. Mumford, 630 F.2d 1023, 1027 (4th Cir. 1980). A party should not be permitted to litigate the same matter twice. *Lauderdale v. Industrial Comm'n*, 60 Ariz. 443, 446-47, 139 P.2d 449, 450-51 (1943); *Weller v. Weller*, 14 Ariz. App. 42, 46, 480 P.2d 379, 383 (1971); *Di Orto v. City of Scottsdale*, 2 Ariz. App. 329, 332, 408 P.2d 849, 852 (1965). See generally 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1] (2nd ed. 1980). See also *School Dist. No. 1 v. Snowflake Union High Sch. Dist.*, 100 Ariz. 389, 391, 414 P.2d 985, 987 (1966) (public policy requires an end to litigation); *Garrett v. Holmes Tuttle Broadway Ford*, 5 Ariz. App. 388, 390, 427 P.2d 369, 371 (1967) (*res judicata* is essential to the efficacy of the judicial process).

ready been determined, or which could have been determined in a previous action between the parties involved in the current litigation.<sup>19</sup>

The *res judicata* doctrine is applied in workers' compensation proceedings.<sup>20</sup> For example, when an award has become final,<sup>21</sup> *res judicata* bars relitigation of the issues determined in proceedings initiated pursuant to that award.<sup>22</sup> *Res judicata* has also been held to bar the litigation of issues which could have been decided at the time of the prior award.<sup>23</sup> This result occurs because the award exhausts the Industrial Commission's jurisdiction.<sup>24</sup> In addition, a notice of claim sta-

19. *Vance v. Vance*, 124 Ariz. 1, 2, 601 P.2d 605, 606 (1979) (*res judicata* as to issues which were or would have been decided); *Hoff v. City of Mesa*, 86 Ariz. 259, 260, 344 P.2d 1013, 1014 (1959) (final judgment conclusive on every point raised by parties or suggested by record); *Industrial Park Corp. v. U.S.I.F. Palo Verde Corp.*, 26 Ariz. App. 204, 206, 547 P.2d 56, 56 (1976) (citing *Hoff*).

20. *Lauderdale v. Industrial Comm'n*, 60 Ariz. 443, 446-47, 139 P.2d 449, 450-51 (1963) (*res judicata* bars reopening); *Waller v. Industrial Comm'n*, 6 Ariz. App. 249, 251, 431 P.2d 689, 691 (1967) (causation was *res judicata*); A. LARSON, *supra* note 4, § 79.71, at 15-307; see *Nackley, The Continuing Jurisdiction of the Ohio Industrial Commission*, 4 OHIO N. L. REV. 727, 727 (1977).

21. ARIZ. REV. STAT. ANN. § 23-943(H) (Supp. 1971-80) provides that the parties have thirty days to appeal from a decision upon review of the presiding administrative law judge. See *id.* § 23-951(A); *Cowan v. Industrial Comm'n*, 18 Ariz. App. 155, 157, 500 P.2d 1143, 1145 (1972) (only mitigation of *res judicata* for final award under statutory language is reopening). The claimant can petition to reopen only after an award becomes final. *Murdock v. Industrial Comm'n*, 15 Ariz. App. 56, 59, 485 P.2d 1173, 1176 (1971). However, § 23-951(A) applies to intermediate awards and findings rendering them final and *res judicata*. *Massie v. Industrial Comm'n*, 113 Ariz. 101, 104, 546 P.2d 1132, 1135 (1976); *Talley v. Industrial Comm'n*, 105 Ariz. 162, 166, 461 P.2d 83, 87 (1969); *Ringgold v. Industrial Comm'n*, 21 Ariz. App. 273, 277, 518 P.2d 592, 596 (1974). An award finding the injury non-compensable cannot be reopened and is *res judicata*. *Vigil v. Industrial Comm'n*, 113 Ariz. 292, 293, 552 P.2d 453, 454 (1976); cf. *Verdugo v. Industrial Comm'n*, 14 Ariz. App. 79, 80-81, 480 P.2d 996, 997-98 (1971) (plaintiff is unable to seek compensation for an injury found uncompensable in a prior award).

22. *Inspiration Consol. Copper Co. v. Industrial Comm'n*, 128 Ariz. 288, —, 625 P.2d 351, 353 (Ct. App. 1981); *Modern Indus., Inc. v. Industrial Comm'n*, 125 Ariz. 283, 286, 609 P.2d 98, 101 (Ct. App. 1980); *Nunez v. Arizona Mining Co.*, 7 Ariz. App. 387, 389-90, 439 P.2d 834, 836-37 (1968); see, e.g., *Phelps Dodge v. Ulmer*, 65 Ariz. 180, 182, 177 P.2d 225, 226 (1947) (an industrial commission award is *res judicata* if not appealed and is full satisfaction for the injury as it existed at the time of the award); *London v. Industrial Comm'n*, 71 Ariz. 111, 115, 223 P.2d 929, 931-32 (1950) (the Industrial Commission performs a judicial function, and its judgments have dignity equal to those of the superior court; therefore, issues which were or could have been determined are *res judicata*.); *Zagar v. Industrial Comm'n*, 40 Ariz. 479, 485, 14 P.2d 472, 474 (1932) (the Industrial Commission acts in a judicial capacity, and its judgments are *res judicata* upon facts developed in the original hearing and award).

23. *London v. Industrial Comm'n*, 71 Ariz. 111, 115, 223 P.2d 929, 932 (1950); *Scroggins v. Industrial Comm'n*, 123 Ariz. 35, 36-37, 597 P.2d 188, 189-90 (Ct. App. 1979); *Magma Copper Co. v. Industrial Comm'n*, 115 Ariz. 551, 554, 566 P.2d 699, 702 (Ct. App. 1977) (award was *res judicata* that claimant had no mental or physical disability at the time of an award which considered only his physical injury, but could have considered his mental condition).

24. *Nevitt v. Industrial Comm'n*, 70 Ariz. 172, 175, 217 P.2d 1039, 1040 (1950); *Verdugo v. Industrial Comm'n*, 14 Ariz. App. 79, 81, 480 P.2d 996, 998 (1971); see *Russell v. Industrial Comm'n*, 104 Ariz. 548, 553, 456 P.2d 918, 923 (1969) (commission has jurisdiction to alter, amend, or rescind award only upon a subsequent change in physical condition); *Kleinsmith v. Industrial Comm'n*, 26 Ariz. App. 77, 78, 546 P.2d 346, 347 (no jurisdiction after notice of claim is final), *approved and adopted*, 113 Ariz. 189, 549 P.2d 161 (1976). But see *Parsons v. Bekins Freight*, 108 Ariz. 130, 132, 493 P.2d 913, 915 (1972) (commission can waive failure to file, retreating from position that commission has no jurisdiction); *International Metal Prod. Div. v. Industrial Comm'n*, 99 Ariz. 73, 78, 406 P.2d 838, 841 (1965) (commission can never ascertain whether an award is final, because it retains jurisdiction to alter, amend, or rescind); *State Compensation Fund v. McComb*, 16 Ariz. App. 303, 304, 492 P.2d 1241, 1242 (1972) (commission must retain continuing jurisdiction under the statutory scheme to reflect changed circumstances). Continuing

tus, issued by the employer's insurance carrier, has been given the same effect as an Industrial Commission award.<sup>25</sup> Consequently, failure to protest entitles the notice to finality<sup>26</sup> and gives it *res judicata* effect.<sup>27</sup>

While the above analysis appears straightforward, the court of appeals has observed that application of the *res judicata* doctrine to Industrial Commission awards is "not without problems."<sup>28</sup> One problem involves determining whether an award has become final.<sup>29</sup> This determination is important because, in the absence of a final award, the Industrial Commission can keep the claim open and is free to reverse itself in subsequent proceedings.<sup>30</sup>

jurisdiction is invoked by reopening under ARIZ. REV. STAT. ANN. § 23-1061(H) (Supp. 1971-80). See *Stout v. Industrial Comm'n*, 12 Ariz. App. 211, 215, 469 P.2d 103, 107 (1970); note 51 *infra*.

25. *Phoenix Cotton Pickery v. Industrial Comm'n*, 120 Ariz. 137, 138, 584 P.2d 601, 602 (Ct. App. 1978); *Saline v. Industrial Comm'n*, 16 Ariz. App. 204, 205, 492 P.2d 453, 454 (1972); see text & notes 26-27 *infra*.

26. ARIZ. REV. STAT. ANN. § 23-947(A) (Supp. 1971-80); see *Phoenix Cotton Pickery v. Industrial Comm'n*, 120 Ariz. 137, 138-39, 584 P.2d 601, 602-03 (Ct. App. 1978); *Nelson v. Industrial Comm'n*, 115 Ariz. 293, 295, 564 P.2d 1260, 1262 (Ct. App. 1977).

27. *Minghelli v. Industrial Comm'n*, \_\_\_ Ariz. \_\_\_, 630 P.2d 45, 48 (Ct. App. 1981); *Calixto v. Industrial Comm'n*, 126 Ariz. 400, 402, 616 P.2d 75, 77 (Ct. App. 1980); *Phoenix Cotton Pickery v. Industrial Comm'n*, 120 Ariz. 137, 138-39, 584 P.2d 601, 602-03 (Ct. App. 1978); cf. *Best v. Industrial Comm'n*, 14 Ariz. App. 221, 224, 482 P.2d 470, 473 (1971) (ambiguous notice did not bar reopening).

28. *State Compensation Fund v. McComb*, 16 Ariz. App. 303, 304, 492 P.2d 1241, 1242 (1972); see *Bell v. Industrial Comm'n*, 126 Ariz. 536, 539, 617 P.2d 44, 47 (Ct. App. 1980) (Jacobson, J., dissenting) (application of *res judicata* to Industrial Commission awards is "a troublesome area" in a "state of flux"); *Judd v. Industrial Comm'n*, 23 Ariz. App. 254, 259, 532 P.2d 196, 201 (1975) (recognizing prior decisions have not been "wholly correct" in applying *res judicata*).

29. See, e.g., *Sandoval v. Salt River Project*, 117 Ariz. 209, 213, 571 P.2d 706, 710 (Ct. App. 1977) (applying *res judicata*, but recognizing a lack of finality in certain circumstances); *Judd v. Industrial Comm'n*, 23 Ariz. App. 254, 254, 532 P.2d 196, 201 (1975) (supreme court decisions cast doubt upon the finality of workers compensation awards); *Taylor v. Industrial Comm'n*, 20 Ariz. App. 46, 50, 509 P.2d 1083, 1087 (1973) (recognizing that failure to protest a final award may not bar relief, given relaxation of *res judicata*); cf. *International Metal Prod. Div. v. Industrial Comm'n*, 99 Ariz. 73, 78, 406 P.2d 838, 841-42 (1965) (the commission cannot determine whether an award is final because it has continuing jurisdiction to alter, rescind, or amend the award upon a showing of changed circumstances or earning capacity).

Even if the award has become final, *res judicata* does not bar an action brought to correct stenographic error. *Industrial Indem. Co. v. Industrial Comm'n*, 27 Ariz. App. 296, 298, 554 P.2d 892, 894 (1976); *State Compensation Fund v. McComb*, 16 Ariz. App. 303, 304, 492 P.2d 1241, 1242 (1972); *Garcia v. Industrial Comm'n*, 13 Ariz. App. 128, 130, 474 P.2d 847, 849 (1970).

*Res judicata* may not bar an action to correct mutual mistake. *Herman v. Industrial Comm'n*, 100 Ariz. 312, 316 n.1, 414 P.2d 134, 137 n.1 (1966); *Martin v. Industrial Comm'n*, 63 Ariz. 273, 277-78, 161 P.2d 921, 923 (1945); *International Metals Prod. v. Industrial Comm'n*, 6 Ariz. App. 543, 544, 434 P.2d 659, 660 (1968). But see *Industrial Indem. Co. v. Industrial Comm'n*, 27 Ariz. App. 296, 297 n.1, 298, 554 P.2d 892, 893 n.1, 894 (1976) (commission has no jurisdiction to correct factual mistakes); *State Compensation Fund v. McComb*, 16 Ariz. App. 303, 304-05, 492 P.2d 1241, 1242-43 (1972) (refusing to follow *Martin* as inconsistent with later supreme court decision on *res judicata*).

Finally, an award that is fraudulently obtained is not *res judicata*. *Scott v. Wasielewski*, 89 Ariz. 29, 32, 357 P.2d 614, 616 (1960); *Hopper v. Industrial Comm'n*, 27 Ariz. App. 732, 735, 558 P.2d 927, 929 (1976); see *Sandoval v. Salt River Project*, 117 Ariz. 209, 213, 571 P.2d 706, 710 (Ct. App. 1977); 3 A. LARSON, *supra* note 4, § 81.51; cf. *Vidal v. Industrial Comm'n*, 3 Ariz. App. 529, 531, 416 P.2d 208, 212 (1966) (award is not *res judicata* where Industrial Commission improperly informed the plaintiff he needed medical evidence to obtain a hearing to protest the award).

30. *Boyd v. Industrial Comm'n*, 12 Ariz. App. 388, 389-90, 470 P.2d 708, 709-10 (1970); *Dennis v. Mountain States Tel. & Tel. Co.*, 11 Ariz. App. 7, 9, 461 P.2d 183, 185 (1969); see *Russell v. Industrial Comm'n*, 104 Ariz. 548, 552-53, 456 P.2d 918, 922-23 (1969) (motion to rehear opens an

One situation in which an award is denied finality involves a claimant's delay in questioning a notice of claim status. In this situation, the notice of claim status is deprived of *res judicata* effect due to lack of finality if (1) the claimant's delay in questioning the notice of claim status is not excessive; (2) the delay does not unfairly prejudice the other party; and (3) the facts "appear" to warrant relief.<sup>31</sup> The facts will appear to warrant relief when the claimant has an apparently meritorious reason for the delay in seeking a hearing.<sup>32</sup> In addition, an award terminating temporary disability benefits is not final if, at the time of the award, the claimant's condition has not become stationary.<sup>33</sup>

*Res judicata* is also avoided where an award is set aside by the courts.<sup>34</sup> In that case, a *de novo* hearing is required for the entire claim at which new evidence may be introduced on any issue.<sup>35</sup>

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award for full hearing on the merits before the commission); *Murdock v. Industrial Comm'n*, 15 Ariz. App. 56, 59, 485 P.2d 1173, 1176 (1971) (petition to reopen appropriate only if the award is final).

31. *Chavez v. Industrial Comm'n*, 111 Ariz. 364, 365-66, 529 P.2d 1181, 1182-83 (1974); *Parsons v. Bekins Freight*, 108 Ariz. 130, 132, 493 P.2d 913, 915 (1972); see *Janis v. Industrial Comm'n*, 111 Ariz. 362, 363, 529 P.2d 1179, 1180 (1974) (*Parsons* is "applicable to all situations where a claimant protests, seeks a review, rehearing, or reconsideration of any order or award"); *Town of El Mirage v. Industrial Comm'n*, 127 Ariz. 377, 381-82, 621 P.2d 286, 290-91 (Ct. App. 1980) (findings must be made indicating all three conditions are met). *But see Smith v. Industrial Comm'n*, 27 Ariz. App. 100, 102, 551 P.2d 90, 92 (1976) (court of appeals has no jurisdiction if writ of certiorari is received three days late, distinguishing cases on commission's right to waive late filing). The claimant is required, in fact, to take action to call the award into question. *Judd v. Industrial Comm'n*, 23 Ariz. App. 254, 258, 532 P.2d 196, 200 (1975); see *Verdugo v. Industrial Comm'n*, 14 Ariz. App. 79, 81, 480 P.2d 996, 998 (1971). See also Casenote, *Workmen's Compensation—A New Interpretation of the Time Limitation for Filing A Claim*, 17 ARIZ. L. REV. 929, 934-35 (1975).

32. *Keeler v. Industrial Comm'n*, 122 Ariz. 16, 18, 592 P.2d 1282, 1284 (Ct. App. 1979); *Citizens Sav. & Loan v. Industrial Comm'n*, 120 Ariz. 424, 425, 586 P.2d 985, 986 (Ct. App. 1978); *Kleinsmith v. Industrial Comm'n*, 26 Ariz. App. 77, 78-80, 546 P.2d 346, 347-49 (1976), *approved and adopted*, 113 Ariz. 189, 549 P.2d 161 (1976).

33. *Rosenberry v. Industrial Comm'n*, 113 Ariz. 66, 68, 546 P.2d 802, 804 (1976); *Godfrey v. Industrial Comm'n*, 124 Ariz. 153, 157, 602 P.2d 821, 825 (Ct. App. 1979); *Huffman v. Industrial Comm'n*, 22 Ariz. App. 401, 406, 527 P.2d 1244, 1249 (1975). A condition is stationary when no further medical treatment is prescribed to improve the condition. *Cleator v. Industrial Comm'n*, — Ariz. —, —, 629 P.2d 1015, 1017 (Ct. App. 1981); *Field v. Industrial Comm'n*, 128 Ariz. 425, —, 626 P.2d 155, 158 (Ct. App. 1981); *Sandoval v. Industrial Comm'n*, 114 Ariz. 132, 134-35, 559 P.2d 688, 690-91 (Ct. App. 1976). Once a claimant's condition becomes stationary, temporary disability benefits are precluded; however, the claimant may be entitled to permanent disability benefits. *Id.* at 134, 559 P.2d at 690; see ARIZ. REV. STAT. ANN. §§ 23-1047(A), 1044(F) (Supp. 1971-80).

34. *Rutledge v. Industrial Comm'n*, 108 Ariz. 61, 63, 492 P.2d 1168, 1170 (1972); see *Chavez v. Industrial Comm'n*, 118 Ariz. 141, 143-44, 575 P.2d 340, 342-43 (Ct. App. 1977) (law of the case does not apply in a trial *de novo*); *Vidal v. Industrial Comm'n*, 8 Ariz. App. 244, 247, 445 P.2d 446, 449 (1968) (award is not final). The court of appeals can only affirm or set aside the Industrial Commission's award. ARIZ. REV. STAT. ANN. § 23-951(D) (Supp. 1971-80); see *Glover v. Industrial Comm'n*, 23 Ariz. App. 187, 188-89, 531 P.2d 563, 564-65 (1975) (power to modify would be more efficient); *Cunningham v. Industrial Comm'n*, 16 Ariz. App. 443, 446, 494 P.2d 48, 51 (1972) (court cannot alter or amend an award); *Castellanos v. Industrial Comm'n*, 15 Ariz. App. 319, 322, 488 P.2d 675, 678 (1971) (court cannot reverse with directions).

35. *Rutledge v. Industrial Comm'n*, 108 Ariz. 61, 63, 492 P.2d 1168, 1170 (1972); *International Metal Prod., Inc. v. Industrial Comm'n*, 99 Ariz. 73, 77, 406 P.2d 838, 842 (1965); *Chavez v. Industrial Comm'n*, 118 Ariz. 141, 143, 575 P.2d 340, 342 (Ct. App. 1977); ARIZ. REV. STAT. ANN. § 23-951(B), (D) (Supp. 1971-80).

Once an award has become final, then, *res judicata* would appear to bar relitigation of the award initiated merely because the claimant discovers that his injury is worse than originally diagnosed. The remainder of this Note will consider whether this "apparent" rule reflects the policies and practices under the Arizona Workmen's Compensation Act.

### *The Policy Underpinning Res Judicata*

In general, *res judicata* is concerned with finality, not justice.<sup>36</sup> Consequently, the fact that an issue may have been determined incorrectly does not affect the application of the doctrine of *res judicata*.<sup>37</sup> As in all litigation, there must come a point at which workers' compensation proceedings are concluded.<sup>38</sup>

Additional considerations underly the application of *res judicata* in the workers' compensation setting. A principal purpose of the workers' compensation system is to expedite the payment of employee claims.<sup>39</sup> Although mistakes may be inevitable in adjudicating worker's compensation claims, in order to achieve efficient administration of the compensation system the awards cannot be indefinitely postponed.<sup>40</sup> Maintaining records indefinitely for purposes of future

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36. *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 445, 616 P.2d 902, 905 (Ct. App. 1980) (Jacobson, J., dissenting); Whalen, *Reopening of Awards Under the Longshoremen's & Harbor Workers Compensation Act: What is a Mistake in Determination of Fact?*, 23 INS. COUNCIL J. 229, 229 (1956); see *Nackley, supra* note 20, at 728 (the ends of fairness, reliance, and economy require a point at which the decision is final); RESTATEMENT (SECOND) OF JUDGMENTS 12-14 (Tent. Draft No. 7, 1980) (courts are not infallible, but must eventually be final even if decision is wrong).

37. *Fraternal Order of Police v. Superior Court*, 122 Ariz. 563, 565, 596 P.2d 701, 703 (1979); *Shattuck v. Shattuck*, 67 Ariz. 122, 130, 192 P.2d 222, 234 (1948); *State ex rel Lassen v. Self-Realization Fellowship Church*, 21 Ariz. App. 233, 235, 517 P.2d 1280, 1282 (1974); see *Nelson v. Industrial Comm'n*, 115 Ariz. 293, 295, 564 P.2d 1260, 1262 (Ct. App. 1977) (determination is final even if incorrect). Thus, it has long been the rule that a final award conclusively determines the rights of the parties even if the award is inadequate. See *Scott v. L. E. Dixon Co.*, 42 Ariz. 525, 529-30, 27 P.2d 1109, 1111 (1934).

38. *Lauderdale v. Industrial Comm'n*, 60 Ariz. 443, 446-47, 139 P.2d 449, 451 (1943); *Huffman v. Industrial Comm'n*, 22 Ariz. App. 401, 406, 527 P.2d 1244, 1249 (1974); *Keefe v. O.K. Precision Tool & Die Co.*, 566 S.W.2d 804, 807 (Ky. App. 1978).

39. See *Burkhart v. Argonaut Ins. Co.*, 239 Ga. 608, 609, 238 S.E.2d 400, 401 (1977) (system is intended to provide speedy dispositions of claims); *Amania v. City of Portland*, 394 A.2d 782, 784 (Me. 1978) (speedy, inexpensive, and final settlement is purpose of workers' compensation); cases cited in note 5 *supra*. An additional argument for *res judicata* is that it prevents overburdening the courts with claims which could have previously been decided. Hence, *res judicata* prohibits splitting a cause of action and, instead, requires all injuries arising out of a single accident to be raised in a single claim. *London v. Industrial Comm'n*, 71 Ariz. 111, 115, 223 P.2d 929, 932 (1950); *Magma Copper Co. v. Industrial Comm'n*, 115 Ariz. 551, 554, 566 P.2d 699, 702 (Ct. App. 1977); *Gose v. Monroe Auto Equip. Co.*, 409 Mich. 147, 162, 294 N.W.2d 165, 168 (1980). *But see State Compensation Fund v. McComb*, 16 Ariz. App. 303, 304, 492 P.2d 1241, 1242 (1972) (interim award is final despite "piecemeal approach"); *Nackley, supra* note 20, at 733 (claimant can split his claim in Ohio).

40. *Talley v. Industrial Comm'n*, 105 Ariz. 162, 166, 461 P.2d 83, 87 (1969); *Huffman v. Industrial Comm'n*, 22 Ariz. App. 401, 406, 527 P.2d 1244, 1249 (1974); *State Compensation Fund v. McComb*, 16 Ariz. App. 303, 305, 492 P.2d 1240, 1242 (1972).

litigation would pose a great administrative inconvenience.<sup>41</sup> Instead, compensation issues should be finally decided while memories are clear.<sup>42</sup> In addition, while the application of *res judicata* can inure to the benefit of both the claimant and the insurer,<sup>43</sup> *res judicata* is particularly essential for insurance companies which must be able to estimate their reserve requirements.<sup>44</sup>

Based on these considerations, a change of medical opinion has generally been held insufficient to justify reopening a claim in Arizona<sup>45</sup> or elsewhere.<sup>46</sup> This result is dictated by the general rule that the claimant is not entitled to relitigate those matters upon which he was free to introduce evidence in a prior proceeding, even if additional evidence is later available.<sup>47</sup>

41. *Talley v. Industrial Comm'n*, 105 Ariz. 162, 166, 461 P.2d 83, 87 (1969); *W. DODD, ADMINISTRATION OF WORKER'S COMPENSATION* 203 (1936); *A. LARSON, supra* note 16, § 81.10.

42. *Talley v. Industrial Comm'n*, 105 Ariz. 162, 166, 461 P.2d 83, 87 (1969); *A. LARSON, supra* note 16, § 81.10.

43. *Modern Indus., Inc. v. Industrial Comm'n*, 125 Ariz. 283, 286, 609 P.2d 98, 101 (Ct. App. 1980); *see Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 448, 616 P.2d 902, 908 (Ct. App. 1980) (Jacobson, J., dissenting). *Res judicata* may be applied to secure benefits to the claimant. *See, e.g., Ringgold v. Industrial Comm'n*, 21 Ariz. App. 273, 277, 518 P.2d 592, 596 (1974) (carrier cannot prove lack of causation after it was established in prior proceedings); *Pew v. Industrial Comm'n*, 20 Ariz. App. 113, 116, 510 P.2d 424, 427 (1973) (finding of permanent partial disability barred a subsequent finding of no disability).

44. *See Sandal v. Tallman Oil Co.*, 298 Minn. 264, 266, 214 N.W.2d 691, 692 (1974); *A. LARSON, supra* note 16, § 81.10; *W. DODD, supra* note 41, at 203.

45. *See cases cited in note 99 infra.*

46. *Nicky Blair's Restaurant v. Worker's Compensation Appeals Bd.*, 109 Cal. App. 3d 941, 958, 167 Cal. Rptr. 516, 526 (1980) (doctor's opinion based on previously available findings is not "good cause" justifying reopening); *Power v. Moretti Co.*, 120 So. 2d 443, 446 (Fla. 1960) (change of opinion by witness is not sufficient to justify reopening); *Indian Territory Illuminating Co. v. State Indus. Comm'n*, 185 Okla. 72, 74, 90 P.2d 398, 400 (1939) (a change in opinion relating to a prior condition will not justify reopening); *Gaddy v. C.J. Kern, Contractor*, 32 N.C. App. 671, 674, 233 S.E.2d 609, 611 (1977) (a change of condition must be actual, and not a mere change of opinion respecting a preexisting condition); *Shuller v. Talon, Div. of Textron*, 30 N.C. App. 570, 573, 577, 227 S.E.2d 627, 631 (1976) (change of opinion due to chronicity of symptoms is not a change in condition justifying reopening); *West v. J.P. Stevens Co.*, 12 N.C. App. 456, 460, 183 S.E.2d 876, 879 (1971) (a change in the doctor's prognosis for recovery is not an actual change in condition sufficient to reopen claim); *State ex rel. Oberlin v. Industrial Comm'n*, 114 Ohio App. 135, 138-40, 178 N.E.2d 250, 253 (1961) (additional evidence of claimant's physical condition is not grounds for modification); *J.A. Jones Constr. Co. v. Martin*, 198 Va. 370, 377, 94 S.E.2d 202, 207 (1956) (rejecting the liberal construction proposed by Professor Larson and holding that a mere change of opinion is not sufficient to show change of condition); *see Nackley, supra* note 20, at 733, 746-47 (prevailing Ohio rule is that the claimant cannot introduce evidence of facts previously presented and decided. Ohio courts properly require proof of new and changed conditions to modify a claim). *But see Kearns v. City of Torrington*, 119 Conn. 522, 529-31, 177 A. 725, 727-28 (1935) (recognizing that the claimant cannot try his case piecemeal, and that he had merely proven a mistake in diagnosis, but permitting reopening for newly discovered material evidence not discoverable at the first proceeding).

47. *Lauderdale v. Industrial Comm'n*, 60 Ariz. 443, 444-47, 139 P.2d 449, 450-51 (1943) (doctor failed to consider symptoms prior to award, but reopening was barred by *res judicata* and commission had no jurisdiction); *Waller v. Industrial Comm'n*, 6 Ariz. App. 249, 251, 431 P.2d 689, 691 (1967) (claimant was given every opportunity to present his doctor's medical testimony at the hearing denying recovery. Many of the same doctors testified in favor of reopening, but the prior award was *res judicata*); *see RESTATEMENT (SECOND) OF JUDGMENTS* § 61.1(a), Comments b, c (Tent. Draft No. 5, 1978) (new evidence of unproved claim does not avoid *res judicata*); *cf. Massie v. Industrial Comm'n*, 113 Ariz. 101, 104, 546 P.2d 1132, 1135 (1976) (*res judicata* does not apply if a hearing is requested and not provided); *International Metal Prod. Div. v. Industrial*

### Reopening the Claim

An early Arizona case, *Zager v. Industrial Commission*,<sup>48</sup> held that where the Industrial Commission reserves jurisdiction to alter, rescind, or amend its award for good cause, the award is final unless new disabilities flowing from the same injury are subsequently discovered.<sup>49</sup> Inquiry was limited to whether "new and undiscovered" disabilities, which were not considered in the original award, had arisen.<sup>50</sup>

Today, the potentially harsh effects of *res judicata* are mitigated by specific statutory provisions.<sup>51</sup> In particular, section 23-1061(H) of the Arizona Revised Statutes permits a claimant to reopen his award upon a showing of a new, additional, or previously undiscovered temporary or permanent condition.<sup>52</sup> The courts often speak of this standard as

Comm'n, 99 Ariz. 73, 77, 406 P.2d 838, 841 (1965) (claimant is entitled to present his case fully and freely at least once).

48. 40 Ariz. 479, 14 P.2d 472 (1932).

49. *Id.* at 485, 14 P.2d at 474. See also *Fred Harvey Co. v. Industrial Comm'n*, 41 Ariz. 64, 70, 15 P.2d 949, 951 (1932).

50. *Zager v. Industrial Comm'n*, 40 Ariz. at 485, 14 P.2d at 474; accord, *Harambasic v. Barrett & Hilp & Macco Corp.*, 58 Ariz. 319, 323, 119 P.2d 932, 933-34 (1941); see *Phelps Dodge Corp. v. Ulmer*, 65 Ariz. 180, 183, 177 P.2d 225, 227 (1947) (new and additional disability not known at prior award). This is still the rule. See *Standard Brands Paint Co. v. Industrial Comm'n*, 26 Ariz. App. 365, 367, 548 P.2d 1177, 1179 (1976); cases cited in note 72 *infra*.

51. See ARIZ. REV. STAT. ANN. §§ 23-1044(F) (Supp. 1971-80); *id.* § 23-1061(H).

Section 1044(F) provides for a redetermination of the claimant's lost earning capacity upon a showing of (1) a change in physical condition arising out of the injury and affecting earning capacity; (2) a reduction of earning capacity arising out of the injury; or (3) an increase in earning capacity. This section mitigates the effect of *res judicata*. *Modern Indus., Inc. v. Industrial Comm'n*, 125 Ariz. 283, 286, 609 P.2d 98, 101 (Ct. App. 1980). This section, however, applies only to awards of unscheduled permanent, partial disability resulting in loss of earning capacity. See ARIZ. REV. STAT. ANN. § 23-1044(C) (Supp. 1971-80); *Modern Indus., Inc. v. Industrial Comm'n*, 125 Ariz. 283, 286, 609 P.2d 98, 101 (Ct. App. 1980); R. DAVIS, *supra* note 1, at 225. *But see* *Inspiration Consol. Copper Co. v. Industrial Comm'n*, 128 Ariz. 288, \_\_\_, 625 P.2d 351, 353 (Ct. App. 1981) (permanent total disability subject to rearrangement under § 1044(F)(3)). Section 1044(F) is a codification of prior case law, see *State Compensation Fund v. McComb*, 16 Ariz. App. 303, 304 n.1, 492 P.2d 1241, 1242 n.1 (1972), and may apply in the absence of proof of a change in physical condition. *Hunt v. Industrial Comm'n*, 107 Ariz. 569, 570-71, 490 P.2d 575, 576-77 (1971) (claimant need only show the relationship between his loss of earning capacity and the prior injury); *Arizona Sand & Rock v. Industrial Comm'n*, 123 Ariz. 448, 451, 600 P.2d 752, 755 (Ct. App. 1979); cf. *Vega v. Industrial Comm'n*, 15 Ariz. App. 534, 536, 489 P.2d 1236, 1238 (1971) (atrophy of leg not shown to have affected earning capacity). Jurisdiction under this section might not be properly invoked unless the claimant files a petition to reopen under § 1061(H). *Modern Indus., Inc. v. Industrial Comm'n*, 125 Ariz. 283, 286-87, 609 P.2d 98, 101-02 (Ct. App. 1980). *But see* *Inspiration Consol. Copper Co. v. Industrial Comm'n*, 128 Ariz. 288, \_\_\_, 625 P.2d 351, 353 (Ct. App. 1981) ("triggering mechanism" is § 1044(F)).

Section 23-1061(H) provides for reopening upon the basis of a "new, additional, or previously undiscovered temporary or permanent condition." This section also mitigates the effect of *res judicata*. *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 444, 616 P.2d 902, 904 (1980); *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 224, 589 P.2d 466, 467 (Ct. App. 1978); *State Compensation Fund v. Bunch*, 23 Ariz. App. 173, 175, 531 P.2d 549, 551 (1975). Section 1961(H) is also a codification of prior case law. *Stout v. Industrial Comm'n*, 12 Ariz. App. 211, 214, 469 P.2d 103, 106 (1970); cf. *London v. Industrial Comm'n*, 71 Ariz. 111, 116, 223 P.2d 929, 932 (1950) (burden is on claimant to establish new, additional, and previously undiscovered disability arising out of prior accident); *Elliot v. Industrial Comm'n*, 4 Ariz. App. 181, 182, 418 P.2d 611, 612 (1966) (change in physical condition arising out of injury and reducing earning capacity).

52. ARIZ. REV. STAT. ANN. § 23-1061(H) (Supp. 1971-80); cf. RESTATEMENT (SECOND) OF JUDGMENTS § 61, Comment f (Tent. Draft No. 5, 1978) (subsequent "material operative facts"

requiring a showing of a change in physical condition.<sup>53</sup> In accord with the prior case law,<sup>54</sup> a change in physical condition now gives the Industrial Commission statutory jurisdiction to reopen the claim.<sup>55</sup> Thus, section 1061(H) is an attempt to substitute specific statutory language authorizing the invocation of Industrial Commission jurisdiction in post award situations such as the supreme court recognized in *Zager*.<sup>56</sup>

Where the claimant's medical experts testify that the claimant's condition is the same at the time of the petition to reopen as it was prior to the award, reopening is properly denied.<sup>57</sup> On the other hand, if subsequent to the award the claimant begins suffering disabling pain, this infirmity is deemed compensable physical disability representing a change of physical condition occurring after the award, and reopening is justified.<sup>58</sup> Aggravation of the claimant's condition also justifies reopening his claim<sup>59</sup> unless the aggravation is the result of a new injury.<sup>60</sup>

This right to reopen exists in addition to the right to a rehearing,<sup>61</sup>

may be the basis of a cause of action); *id.* § 121 (Tent. Draft No. 6, 1979) (modification of judgment for changed condition).

A demonstration of any one of the three statutory requirements (new, additional, or previously undiscovered) is sufficient. *Crocker v. Industrial Comm'n*, 124 Ariz. 566, 568, 606 P.2d 417, 419 (1980); *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 444, 616 P.2d 902, 904 (Ct. App. 1980).

53. *See Sneed v. Industrial Comm'n*, 124 Ariz. 357, 360, 361, 604 P.2d 621, 624, 625 (1979); *Russell v. Industrial Comm'n*, 104 Ariz. 548, 553, 456 P.2d 918, 923 (1969); *State Compensation Fund v. Bunch*, 23 Ariz. App. 173, 175, 531 P.2d 549, 551 (1975).

54. *See, e.g., Davila v. Industrial Comm'n*, 98 Ariz. 258, 261-62, 403 P.2d 812, 814-15 (1965); *Black v. Industrial Comm'n*, 89 Ariz. 273, 361 P.2d 402, 403 (1961); text & note 49 *supra*.

55. *Aetna Ins. Co. v. Industrial Comm'n*, 115 Ariz. 110, 112, 113, 563 P.2d 909, 911, 912 (Ct. App. 1977); *State Compensation Fund v. Bunch*, 23 Ariz. App. 173, 175, 531 P.2d 549, 551 (1975); *see text & note 53 supra*. Section 1061(H) has been described as "the stepping stone to invoking jurisdiction." *Stout v. Industrial Comm'n*, 12 Ariz. App. 211, 215, 469 P.2d 103, 107 (1970).

56. *See Stout v. Industrial Comm'n*, 12 Ariz. App. 211, 215, 469 P.2d 103, 107 (1970).

57. *Magma Copper Co. v. Industrial Comm'n*, 115 Ariz. 551, 504, 566 P.2d 699, 702 (Ct. App. 1977); *Balbuze v. Industrial Comm'n*, 20 Ariz. App. 410, 411, 513 P.2d 948, 949 (1973); *Whitley v. Industrial Comm'n*, 19 Ariz. App. 519, 520-21, 508 P.2d 778, 779-80 (1973); *accord, Bell v. Industrial Comm'n*, 126 Ariz. 536, 538, 617 P.2d 44, 46 (1980); *cf. Phoenix Cotton Pickery v. Industrial Comm'n*, 120 Ariz. 137, 139, 584 P.2d 601, 603 (Ct. App. 1978) (plaintiff failed to prove a change in physical condition since denial of his first petition to reopen).

58. *Arizona Sand & Rock v. Industrial Comm'n*, 123 Ariz. 448, 452, 600 P.2d 752, 756 (Ct. App. 1979). *But cf. U.S. Fidelity & Guar. Co. v. Industrial Comm'n*, 117 Ariz. 480, 481-82, 573 P.2d 880, 881-82 (Ct. App. 1977) (increased pain does not justify reopening absent loss of earning capacity).

59. *Culver v. Industrial Comm'n*, 23 Ariz. App. 540, 543, 534 P.2d 754, 757 (1975); *Lockhart v. Industrial Comm'n*, 15 Ariz. App. 209, 210, 487 P.2d 430, 431 (1971); 3 A. LARSON, *supra* note 1, § 81.31.

60. *Lumbermen's Mut. Cas. Co. v. Industrial Comm'n*, 118 Ariz. 92, 93-94, 574 P.2d 1311, 1312-13 (Ct. App. 1977); *Sequeiros v. Industrial Comm'n*, 20 Ariz. App. 104, 109, 510 P.2d 415, 420 (1973); *Lockhart v. Industrial Comm'n*, 15 Ariz. App. 209, 211, 487 P.2d 430, 432 (1971). The claimant should file both a new claim and a petition to reopen if causation is in doubt. *See Cotton v. Industrial Comm'n*, 26 Ariz. App. 58, 61, 546 P.2d 35, 38 (1976); ARIZ. REV. STAT. ANN. § 23-1061(L) (Supp. 1971-80). *See also Howard F. Foley Co. v. Industrial Comm'n*, 120 Ariz. 325, 327, 585 P.2d 1237, 1239 (Ct. App. 1978).

61. *McKnight v. Industrial Comm'n*, 9 Ariz. App. 97, 98, 449 P.2d 631, 632 (1969); *Soto v. City of Tucson*, 8 Ariz. App. 199, 203, 445 P.2d 82, 86 (1968).

and can be invoked only by compliance with statutory requirements.<sup>62</sup> Accordingly, the petition to reopen<sup>63</sup> must demonstrate a change in the claimant's condition as required by section 1061(H).<sup>64</sup> In addition, the causal relationship between the prior injury and the new, additional, or previously undiscovered condition must be shown.<sup>65</sup> The claimant has the burden of proof as to each element in the petition,<sup>66</sup> and he must establish those elements by the preponderance of the evidence.<sup>67</sup> To meet this burden, the claimant may be required to provide expert medical testimony, especially on the causation issue.<sup>68</sup> Where the medical testimony conflicts, the appellate court will be bound by the Industrial Commission's resolution of the conflict.<sup>69</sup>

62. See *Russell v. Industrial Comm'n*, 104 Ariz. 548, 553, 456 P.2d 918, 923 (1969); *State Compensation Fund v. Bunch*, 23 Ariz. App. 173, 176, 531 P.2d 549, 552 (1975); *Brewer v. Industrial Comm'n*, 16 Ariz. App. 318, 319, 492 P.2d 1256, 1257 (1972); *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681, 682 (Ky. 1976); *Diamond v. State Compensation Comm'n*, 148 W. Va. 26, 31, 132 S.E.2d 743, 746 (1963).

In recognition of the significance of Section 1061(H), it has been held that an Industrial Commission award is res judicata subject "only" to the right to reopen under this section. *Moore v. Industrial Comm'n*, 12 Ariz. App. 325, 327-28, 470 P.2d 473, 475-76 (1970).

63. ARIZ. REV. STAT. ANN. § 23-1061(H) (Supp. 1971-80) requires the claimant to file a petition to reopen. See *Fullen v. Industrial Comm'n*, 122 Ariz. 425, 427-28, 595 P.2d 657, 659-60 (Ct. App. 1979). A petition to reopen under § 23-1061(H) also invokes jurisdiction under ARIZ. REV. STAT. ANN. § 23-1044(F) (Supp. 1971-80). See *Modern Indus., Inc. v. Industrial Comm'n*, 125 Ariz. 283, 286, 609 P.2d 98, 101 (Ct. App. 1980). *But cf. Inspiration Consol. Copper Co. v. Industrial Comm'n*, 128 Ariz. —, —, 625 P.2d 351, 353 (Ct. App. 1981) (reopening under § 1061(H) differs procedurally and substantively from reopening under § 1044(F)). *Broadus v. Industrial Comm'n*, 18 Ariz. App. 429, 434, 503 P.2d 387, 392 (1972) (distinguishes a petition to reopen for a new, additional, or previously undiscovered condition from a request for change in compensation).

Use of the Industrial Commission's form is not required; a letter from the claimant's attorney followed by a letter from his doctor has been held to be sufficient. *Fullen v. Industrial Comm'n*, 122 Ariz. 425, 429, 595 P.2d 657, 661 (Ct. App. 1979).

64. *Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1979); *Cotton v. Industrial Comm'n*, 26 Ariz. App. 58, 60, 546 P.2d 35, 37 (1976); *Arizona State Welfare Dep't v. Industrial Comm'n*, 25 Ariz. App. 6, 8, 540 P.2d 737, 739 (1975).

65. *Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1980); *Miller v. Industrial Comm'n*, 114 Ariz. 449, 450, 561 P.2d 773, 774 (Ct. App. 1977); *Terrell v. Industrial Comm'n*, 24 Ariz. App. 389, 392, 539 P.2d 193, 196 (1975).

66. *Crocker v. Industrial Comm'n*, 124 Ariz. 566, 568, 606 P.2d 417, 419 (1980); *Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1979); *Standard Brands Paint Co. v. Industrial Comm'n*, 26 Ariz. App. 365, 367, 548 P.2d 1177, 1179 (1976).

67. *Crocker v. Industrial Comm'n*, 124 Ariz. 566, 568, 606 P.2d 417, 419 (1980); *Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1979); *Theoharidi v. Industrial Comm'n*, 8 Ariz. App. 364, 365, 446 P.2d 470, 471 (1968).

68. See, e.g., *Blickenstaff v. Industrial Comm'n*, 116 Ariz. 335, 339, 569 P.2d 277, 281 (Ct. App. 1977); *Miller v. Industrial Comm'n*, 114 Ariz. 449, 450, 561 P.2d 773, 774 (Ct. App. 1977); *Cotten v. Industrial Comm'n*, 26 Ariz. App. 58, 60-61, 546 P.2d 35, 37-38 (1976). If a medical report is required, claimant has a reasonable time to file a doctor's statement. *Salt River Project v. Industrial Comm'n*, 128 Ariz. 511, —, 627 P.2d 692, 697 (1981); *Fullen v. Industrial Comm'n*, 122 Ariz. 425, 429, 595 P.2d 657, 661 (Ct. App. 1979); see *Davis v. Industrial Comm'n*, 26 Ariz. App. 355, 358, 548 P.2d 849, 852 (1976). Additional medical reports, however, are not required to terminate a claim. See *Minghelli v. Industrial Comm'n*, 128 Ariz. —, —, 630 P.2d 45, 48 (Ct. App. 1981); *Parkway Mfg. v. Industrial Comm'n*, 128 Ariz. —, —, 626 P.2d 612, 615 (Ct. App. 1981).

69. *Perry v. Industrial Comm'n*, 112 Ariz. 397, 398-99, 542 P.2d 1096, 1097-98 (1975); *Bergstresser v. Industrial Comm'n*, 118 Ariz. 155, 157, 575 P.2d 354, 356 (1978); *Phelps Dodge Corp. v. Industrial Comm'n*, 121 Ariz. 75, 77, 588 P.2d 368, 370 (Ct. App. 1973). The commission findings will be sustained if supported by any reasonable evidence. *Perry v. Industrial Comm'n*, 112 Ariz. 397, 398-99, 542 P.2d 1096, 1097-98 (1975); *Talley v. Industrial Comm'n*, 105 Ariz. 162, 165, 461

Unless the statutory grounds for reopening are met, an award is res judicata and cannot be reviewed on a petition to reopen.<sup>70</sup> Even if the petition to reopen is granted, neither party can relitigate original issues such as the occurrence of an injury, the causation of the injury, and the degree of disability at the time of the initial award.<sup>71</sup> Inquiry is limited to the existence of a new and additional disability unknown and not considered in the original award.<sup>72</sup>

### *The Policy Behind the Right to Reopen*

The policies behind res judicata and reopening appear to create a fundamental conflict.<sup>73</sup> While the doctrine of res judicata recognizes the importance of finality, the statutory right to petition to reopen recognizes the importance of compensating claims.

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P.2d 83, 86 (1969); *Valdon v. Industrial Comm'n*, 103 Ariz. 547, 550, 447 P.2d 239, 242 (1968); *cf.* *Estate of Bedwill*, 104 Ariz. 443, 444, 454 P.2d 985, 986 (1969) (commission findings are given the same weight as a trial judge or jury's findings.)

At one time a claim could be conditionally reopened to verify the presence of a new, additional, or previously undiscovered condition. *See Johnson v. Industrial Comm'n*, 107 Ariz. 338, 341, 487 P.2d 759, 762 (1971); *O'Donnell v. Industrial Comm'n*, 23 Ariz. App. 367, 370, 533 P.2d 675, 678 (1975); *Broadus v. Industrial Comm'n*, 18 Ariz. App. 429, 435, 503 P.2d 387, 393 (1972). It has since been held, however, that the statute requires a showing of a changed condition and that the claimant cannot reopen for exploratory surgery. Instead, the Industrial Commission must resolve any conflict in the medical testimony. *Phelps Dodge Corp. v. Industrial Comm'n*, 121 Ariz. 75, 77, 588 P.2d 368, 370 (Ct. App. 1978); *Colorado River Inn v. Industrial Comm'n*, 116 Ariz. 27, 31, 567 P.2d 343, 347 (Ct. App. 1977); *Martin v. Industrial Comm'n*, 20 Ariz. App. 376, 378, 513 P.2d 383, 385 (1973).

Thus, the hearing officer must assume that the facts established at the prior award are accurate unless a subsequent change in physical condition is shown. *Arizona Sand & Rock v. Industrial Comm'n*, 123 Ariz. 448, 451-52, 600 P.2d 752, 755-56 (1979); *see Hughes Aircraft Co. v. Industrial Comm'n*, 90 Ariz. 154, 156-57, 367 P.2d 206, 207-08 (1961); *cf.* text & note 92 *infra*.

70. *See* text & note 62 *supra*.

71. 3 A. LARSON, *supra* note 4, § 81.32, at 510; *see, e.g., State Compensation Fund v. Bunch*, 25 Ariz. App. 552, 553, 545 P.2d 63, 64 (1976) (nature of award as scheduled); *Govan v. Industrial Comm'n*, 23 Ariz. App. 261, 263-64, 532 P.2d 533, 535-36 (1975) (causation); *Balbuze v. Industrial Comm'n*, 20 Ariz. App. 410, 411, 513 P.2d 948, 949 (1973) (nature of disability as temporary).

72. *Davila v. Industrial Comm'n*, 98 Ariz. 258, 261-62, 403 P.2d 812, 814-15 (1965); *Capital Foundry v. Industrial Comm'n*, 27 Ariz. App. 79, 82, 551 P.2d 69, 72 (1976). "The issue is sharply restricted to . . . the improvement or worsening of the injury on which the original award was based." 3 A. LARSON, *supra* note 4, § 81.32, at 509. *See Gardner, Workers Compensation Contested Cases Under the IAPA*, 27 DRAKE L. REV. 59, 61 (1978).

73. Res judicata is necessary to achieve the policy of an efficient compensation system. *See* note 5 *supra*. Reopening is necessary to achieve the underlying policy of the entire workers' compensation system—to shift the burden of injury from the employee to the industry. *See* note 75 *infra*. In resolving the conflict between these two policies, the issue is whether the needs of the system the legislature has created justify impeding the attainment of the purposes for which that system was created. While this may pose a rhetorical question in a legislative context, the resolution is less clear in a judicial context.

The proposition that this policy conflict is fundamental is supported by the fact that the conflict arises outside of Arizona as well. *See, e.g., Keefe v. O.K. Precision Tool & Die Co.*, 566 S.W.2d 804, 806 (Ky. App. 1978) (recognizing basic legal conflict between reopening and res judicata); *Gose v. Monroe Auto Equip. Co.*, 409 Mich. 147, 176, 294 N.W.2d 165, 175 (1980) (Williams, J., concurring and dissenting) ("the policy favoring finality is not always consistent with the purpose behind worker's compensation. . ."); *Nackley, supra* note 20, at 727-28 (Ohio law); *Note, Workmen's Compensation—Reopening in Tennessee*, 7 MEMPHIS ST. U. L. REV. 261, 262 (1977) (Tennessee law). *See also* A. LARSON, *supra* note 16, § 81.10 (legislative objectives require unlimited jurisdiction to reopen, but this creates administrative problems).

The Workers' Compensation statutes are consistently given a liberal interpretation so as to achieve their purpose of compensating valid claims.<sup>74</sup> The underlying policy is that the worker should receive all the benefits to which he is entitled, and the employer should bear the burden of injury.<sup>75</sup>

To achieve this policy, the courts recognize that accurate diagnosis is not always possible<sup>76</sup> and that an employee should not have the duty to know the nature of an injury that is not reasonably ascertainable by the medical profession.<sup>77</sup> Therefore, the Arizona Supreme Court has adopted a policy of waiving the failure to file a claim when the claimant cannot by reasonable diligence obtain the facts justifying the claim.<sup>78</sup> Application of the same policy would also mitigate the effect of *res judicata* upon the right to reopen the claim.<sup>79</sup>

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74. Fullen v. Industrial Comm'n, 122 Ariz. 425, 429, 595 P.2d 657, 661 (1979); Beasley v. Industrial Comm'n, 108 Ariz. 391, 393, 499 P.2d 106, 108 (1972); Pascucci v. Industrial Comm'n, 126 Ariz. 442, 444, 616 P.2d 902, 904 (Ct. App. 1980); see *In re Trull*, 21 Ariz. App. 511, 513-14, 520 P.2d 1188, 1190-91 (1974) (remedial compensation statute is interpreted liberally so as to achieve justice by deciding matters on their merits).

Compensation, however, should be provided only for valid claims, and while the injured employee has an interest in increasing his compensation if the disability increases, the insurance carrier and employer also have a legitimate interest in reducing the compensation if disability diminishes. Zager v. Industrial Comm'n, 40 Ariz. 479, 487-88, 14 P.2d 472, 475 (1932); Sims v. Industrial Comm'n, 10 Ariz. App. 574, 578, 460 P.2d 1003, 1007 (1969), *amended*, 11 Ariz. App. 385, 464 P.2d 972 (1970); W. DODD, *supra* note 41, at 203. This is the policy behind continuing jurisdiction. Zager v. Industrial Comm'n, 40 Ariz. at 487-88, 14 P.2d at 475. The carrier's interest cannot be overlooked since benefits paid almost certainly cannot be recouped. Talley v. Industrial Comm'n, 105 Ariz. 162, 166, 461 P.2d 83, 87 (1969).

75. See Holder v. Industrial Comm'n, 125 Ariz. 366, 368, 609 P.2d 1066, 1068 (Ct. App. 1980); Pottinger v. Industrial Comm'n, 22 Ariz. App. 389, 393, 527 P.2d 1232, 1236 (1975); Parise v. Industrial Comm'n, 16 Ariz. App. 77, 79, 492 P.2d 426-428 (1972); authorities cited in note 6 *supra*.

Courts are reported to engage in blatant result oriented decisionmaking under the pretext of adhering to the policy behind workers' compensation. Note, *supra* note 73, at 265 (courts ingeniously defeat *res judicata* in particular cases); Casenote, *Worker's Compensation*, 900 CAP. U.L. Rev. 835, 840 (1980) (noting that the claimant has a decided advantage); cf. Lugar v. Industrial Comm'n, 9 Ariz. App. 44, 49, 449 P.2d 61, 66 (1969) (previously undiagnosed organic basis for claimant's symptoms was admissible on rehearing, despite "picayune procedural tactics designed to frustrate the plaintiff's claim").

76. Zager v. Industrial Comm'n, 40 Ariz. 479, 486-87, 14 P.2d 472, 474-75 (1932); Pascucci v. Industrial Comm'n, 126 Ariz. 442, 444, 616 P.2d 902, 904 (Ct. App. 1979); Mollerup Van Lines v. Adams, 16 Utah 2d 235, 238, 398 P.2d 882, 883 (1965); see Nackley, *supra* note 20, at 741 (a condition previously impossible to document may be capable of objective measurement as medical science advances); Note *supra* note 5, at 199 (doctors cannot accurately forecast how long disability will last); Note, *supra* note 73, at 262 (law must accommodate the uncertainties of medical diagnosis).

77. Employers' Mut. Liability Ins. Co. v. Industrial Comm'n, 24 Ariz. App. 427, 430, 539 P.2d 541, 543 (1975); see English v. Industrial Comm'n, 73 Ariz. 86, 90, 237 P.2d 815, 818 (1951).

78. Hughes v. Industrial Comm'n, 81 Ariz. 264, 266, 304 P.2d 1066, 1067 (1956); English v. Industrial Comm'n, 73 Ariz. 86, 91, 237 P.2d 815, 818 (1951); Bird v. Industrial Comm'n, 14 Ariz. App. 322, 323, 483 P.2d 63, 64 (1971).

79. See Employer's Mut. Liability Ins. Co. v. Industrial Comm'n, 24 Ariz. App. 427, 430, 539 P.2d 541, 543 (1975) (the employee need not know the nature of his disability or its relation to employment before it is medically ascertainable for purposes of making a timely original claim); Judd v. Industrial Comm'n, 23 Ariz. App. 254, 257, 532 P.2d 196, 199 (1975); Taylor v. Industrial Comm'n, 20 Ariz. App. 46, 50, 509 P.2d 1083, 1087 (1973); text & note 31 *supra*. See also Chavez v. Industrial Comm'n, 111 Ariz. 364, 365, 529 P.2d 1181, 1182 (1974) (that claimant's protest was 46 days later is the least important factor in applying *Parsons*).

The reopening provision serves the goal of compensating as many claims as possible by permitting the hearing officer to make his best estimate of disability while recognizing that, because future disability is unpredictable, the hearing officer should not be forever bound by his decision.<sup>80</sup> Several jurisdictions have suggested they would permit reopening for a mistaken diagnosis.<sup>81</sup> Professor Larson suggests that, given the imperfect state of medical science, the right to reopen for a mistake in diagnosis should be preserved.<sup>82</sup> The basis for this proposition is that diagnosis, no matter how skillfully performed, may overlook a compensable condition.<sup>83</sup> Thus, to achieve the policy of liberal compensation, the legislature (and courts) have seen fit to mitigate the application of *res judicata*. This, as noted above,<sup>84</sup> creates potential administrative problems. Courts are therefore compelled to balance the needs of the statutory workers' compensation system with the social policy behind workers' compensation legislation.<sup>85</sup>

### BALANCING THE CONFLICTING POLICIES

#### *The Verdugo Rationale—An Attempted Reconciliation*

In *Verdugo v. Industrial Commission*,<sup>86</sup> the Arizona Court of Appeals considered whether a claimant could reopen a workers' compensation award.<sup>87</sup> The claimant had been involved in an accident in 1963.<sup>88</sup> In 1964 the Industrial Commission determined that no physical

80. *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 445, 616 P.2d 902, 905 (Ct. App. 1979); A. LARSON, *supra* note 4, § 81.30, at 496-97; *see, e.g.*, *Arnold v. Industrial Comm'n*, 18 Ariz. App. 470, 472, 503 P.2d 408, 410 (1972); *Clark v. Industrial Comm'n*, 18 Ariz. App. 384, 385, 502 P.2d 185, 186 (1972); *Spacone v. Industrial Comm'n*, 14 Ariz. App. 351, 352-53, 483 P.2d 583, 584-85 (1971).

81. *See Sager v. Royce Kershaw Co., Inc.*, 359 So.2d 398, 401 (Ala. App. 1978) (settlement without knowledge of a disc injury requiring surgery set aside for mutual mistake of fact); *Solo v. Chrysler Corp.*, 408 Mich. 345, 354-55, 292 N.W.2d 438, 441-42 (1980) (equitable relief, beyond statutory authority, permitted rescission of an agreement to redeem a claim on grounds of mutual mistake. The court relied on 3 A. LARSON, *supra* note 4, § 81.52, at 545-46, despite the absence of a broad reopening statute); *Stimburis v. Leviton Mfg. Co.*, 5 N.Y.2d 360, 367, 157 N.E.2d 621, 624, 637, 184 N.Y.S.2d 632, 637 (1959) (doctor's admission of wrong diagnosis in failure to determine total disability resulted in reopening for medical error); A. LARSON, *supra* note 4, § 81.52, at 543; *cf. Mattson v. Abate*, 279 Minn. 287, 292-93, 156 N.W.2d 738, 741-42 (1968) (consent decree set aside for mistake of *existing*, not future, fact); *Corby v. Mathews*, 541 S.W.2d 789, 793-94 (Tenn. 1976) (same). *Contra*, *Miller v. Hartford Accident & Indem. Co.*, 86 Ga. App. 503, 505-06, 71 S.E.2d 782, 783 (1952) (discovery of fracture not located in prior examination was insufficient to overcome the bar of *res judicata* as to prior award); *Pizzuti v. Minjac Toy Supermarket*, 61 App. Div. 2d 1066, 1066, 403 N.Y.S.2d 149, 150 (1978) (reopening denied where doctor testified work "could have" caused claimant's heart attack, despite prior testimony to the contrary).

82. 3 A. LARSON, *supra* note 4, § 81.52, at 545.

83. *Id.*

84. *See text & notes 40-44 supra.*

85. *See Note, supra* note 73, at 262 (any resolution of the problem requires consideration of the social policy behind workers' compensation as well as the need for finality in administrative proceedings).

86. 8 Ariz. App. 492, 447 P.2d 584 (1968).

87. *Id.*

88. *Id.*

disability had resulted from the accident.<sup>89</sup> In 1965 the claimant filed a petition to reopen his claim.<sup>90</sup> Applying the accepted doctrine of res judicata to the claimant's prior Industrial Commission award, the court held that the 1964 award was binding on both the claimant and the Industrial Commission.<sup>91</sup> The court, however, stated that the prior finding compelled the assumption that the claimant either had no disability in 1964, or that any disability existing at that time was undiscovered.<sup>92</sup> Therefore, current medical testimony indicating that the claimant was no longer able to perform his regular work was considered sufficient to establish a change of condition subsequent to the 1964 award.<sup>93</sup> Consequently, the claimant was entitled to reopen his claim.<sup>94</sup>

The fallacy in the logic of *Verdugo* is that res judicata does not apply because the prior award was accurate, but in spite of the award's inaccuracy.<sup>95</sup> Under *Verdugo*, the claimant is permitted to relitigate the issues determined in the original award by merely showing that there is contrary medical opinion. This procedure, while providing a theory favorable to the claimant seeking reopening, completely abrogates res judicata as applied to Industrial Commission awards.<sup>96</sup> In recognition of this, two rules have been applied to limit the rationale expressed in the *Verdugo* opinion: (1) New evidence of the claimant's prior condition will not justify reopening claim; and (2) in order to justify reopening the claim, the proffered evidence must be comparative in nature.

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89. *Id.* at 492-93, 447 P.2d at 584-85.

90. *Id.* at 493, 447 P.2d at 585.

91. *Id.*

92. *Id.* at 493-94, 447 P.2d at 585-86; *accord*, *Mokma v. Industrial Comm'n*, 9 Ariz. App. 88, 90-91, 449 P.2d 622, 624-25 (1969) (a final award finding no disability establishes the claimant's first step in proving a new, additional, or previously undiscovered disability—the commission having already ruled there was no disability on the date of the award. To prove a previously undiscovered condition, the claimant need only go forward with new evidence proving disability at a later date.)

93. 8 Ariz. App. at 493-94, 447 P.2d at 585-86.

94. *Id.* at 494, 447 P.2d at 586. Subsequent case law has rejected this analysis. *See Garrote v. Industrial Comm'n*, 121 Ariz. 223, 225, 589 P.2d 466, 468 (Ct. App. 1978); *Aetna Ins. Co. v. Industrial Comm'n*, 115 Ariz. 110, 112, 563 P.2d 909, 911 (Ct. App. 1977); *State Compensation Fund v. Industrial Comm'n*, 113 Ariz. 65, 66, 546 P.2d 801, 802 (1976).

95. See text & note 37 *supra*.

96. *Taylor v. Indus. Comm'n*, 20 Ariz. App. 46, 49, 509 P.2d 1083, 1086 (1973); *see Aetna Ins. Co. v. Industrial Comm'n*, 115 Ariz. 110, 112, 563 P.2d 909, 911 (Ct. App. 1977); *Whitley v. Industrial Comm'n*, 19 Ariz. App. 519, 520-21, 508 P.2d 778, 779-80 (1973).

If the claimant is permitted to reopen based upon medical testimony that the original award was wrong, finality would not exist for workers' compensation awards. *Young v. Harris*, 467 S.W.2d 588, 590 (Ky. 1970); *accord*, *Darnall v. Ziffrin Truck Lines*, 484 S.W.2d 868, 870 (Ky. App. 1972). *See also Gose v. Monroe Auto Equip. Co.*, 409 Mich. 147, 162, 294 N.W.2d 165, 168 (1980) ("the remedial character of the legislation . . . would scarcely be enhanced by a construction which would authorize piecemeal compensation for an injury.") *But see id.* at 189-90, 216, 294 N.W.2d at 181, 193-94 (Levin, J., dissenting) (because piecemeal compensation is inherent in workers' compensation, the desire for finality is not a controlling consideration).

*New Evidence in a Petition to Reopen*

Evidence of a previously undiscovered condition (such as cartilage remaining after surgery to remove it) justifies reopening a claim under section 1061(H).<sup>97</sup> The manifestation of new symptoms causally related to a prior injury has also been held to be sufficient evidence of a previously undiscovered or newly manifested condition to come within the reopening statute.<sup>98</sup> Evidence of a new condition, however, must be distinguished from new evidence of a pre-existing condition considered at the prior award.

Where the medical expert's testimony is no more than additional evidence of a diagnosis presented at the original hearing and considered by the hearing officer in entering the prior award (which is *res judicata*), reopening is not justified.<sup>99</sup> The *Verdugo* court apparently did not recognize this distinction. The evidence offered by the plaintiff in *Verdugo* may have merely been new evidence of the condition considered at the prior award.<sup>100</sup> If the claimant was given a full opportunity to present his evidence at the original award, the doctrine of *res judicata* bars relitigation of these issues.<sup>101</sup> In addition, *res judicata* has been applied to workers' compensation awards even when the subsequently proffered evidence relating to a pre-existing condition was unavailable at the time of the original award.<sup>102</sup>

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97. See *O'Donnell v. Industrial Comm'n*, 23 Ariz. App. 367, 370, 533 P.2d 675, 678 (1975).

98. *Sequeiros v. Industrial Comm'n*, 20 Ariz. App. 104, 109, 510 P.2d 415, 420 (1973); cf. *Moore v. Industrial Comm'n*, 12 Ariz. App. 325, 328, 470 P.2d 473, 476 (1970) (award was *res judicata* regarding a pre-existing disability, not discovered until after the petition to reopen, once the commission resolved the conflict in the evidence against the claimant).

99. *State Compensation Fund v. Bunch*, 23 Ariz. App. 173, 176, 531 P.2d 549, 552 (1975) (testimony as to the extent of the claimant's prior known back injury did not justify reopening); *Govan v. Industrial Comm'n*, 23 Ariz. App. 261, 263, 532 P.2d 533, 535 (1975) (doctor's opinion regarding causation of claimant's mental condition was considered and rejected in prior proceedings, and his present diagnosis, based on a review of the same medical records, is merely new evidence and does not justify reopening); *Standard Brands Paint Co. v. Industrial Comm'n*, 26 Ariz. App. 365, 367, 548 P.2d 1177, 1179 (1976) (the hearing officer's finding that claimant had spondylolysis was *res judicata*, and after additional tests, the doctor's testimony reasserting a position rejected by the hearing officer was merely additional evidence of a known condition. Therefore reopening was denied).

100. See cases cited in note 99 *supra*. At least three Arizona Supreme Court cases prior to the *Verdugo* decision barred reopening based upon additional evidence. *Davila v. Industrial Comm'n*, 98 Ariz. 258, 260-61, 403 P.2d 812, 814-15 (1965) (medical evidence already considered by the Industrial Commission is insufficient to reopen); *Bishop v. Industrial Comm'n*, 94 Ariz. 65, 67, 381 P.2d 598, 600 (1963) (medical testimony based on the same findings available prior to the award but differing from the conclusions drawn by the doctors who testified at the award is merely new evidence of a previously known condition and does not justify reopening); *Black v. Industrial Comm'n*, 89 Ariz. 273, 275-76, 361 P.2d 402, 403 (1961) (even though test results upon which doctor testified were unavailable at the original hearing, the claimant was denied reopening on the grounds that the doctor's testimony constituted, at most, newly discovered evidence, and not evidence of an undiscovered disability).

101. See text & note 42 *supra*.

102. *Black v. Industrial Comm'n*, 89 Ariz. 273, 274, 361 P.2d 402, 402-03 (1961) (even though test results upon which doctor testified were unavailable at the original hearing, the claimant was

### *Comparative Evidence in a Petition to Reopen*

Generally, reopening requires the claimant to demonstrate that his current condition is different or more aggravated than his condition existing at the time of the original hearing.<sup>103</sup> Alternatively, a claimant may demonstrate that his current condition was unknown and not considered at the time of the original award.<sup>104</sup> The purpose of reopening, however, is to compensate the claimant for a change in his condition; and, for that reason, comparative evidence has been required in order to demonstrate a change in condition.<sup>105</sup> The claimant's present condition must be compared with his actual condition at the time of the award.<sup>106</sup>

The logic of *Verdugo* would seem to permit the claimant to reopen his claim simply upon a demonstration that his current condition differs from the condition found to exist in the award, rather than comparing the claimant's actual condition at the time of the award. This approach would result in a complete abrogation of *res judicata*.<sup>107</sup> Under *Verdugo*, a mistaken diagnosis or an erroneous resolution of conflicting medical testimony would subject the award to reopening upon subsequent proof that the award was in error. This could occur even if the condition subsequently proven to exist had been considered and

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denied reopening on the grounds that the doctor's testimony constituted, at most, newly discovered evidence, and not evidence of an undiscovered disability).

ARIZ. R. Crv. P. 60(c) provides, *inter alia*, relief from a final judgment for newly discovered evidence which could not have been discovered by due diligence prior to the judgment. Although this rule is applied in almost all other areas of the law, *Kleinsmith v. Industrial Comm'n*, 26 Ariz. App. 77, 82, 546 P.2d 346, 351 (Nelson, J., dissenting), *approved and adopted*, 113 Ariz. 189, 549 P.2d 161 (1976); *In re Trull*, 21 Ariz. App. 571, 573-74, 520 P.2d 1188, 1190-91 (1974), Rule 60(c) is not applicable to Industrial Commission awards. *Chavez v. Industrial Comm'n*, 21 Ariz. App. 501, 503, 570 P.2d 1178, 1180 (1974); *Whitley v. Industrial Comm'n*, 19 Ariz. App. 519, 521, 508 P.2d 778, 780 (1973); *United States Fidelity and Guar. Co. v. Industrial Comm'n*, 19 Ariz. App. 410, 411, 507 P.2d 1022, 1023 (1973). *But cf.* *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 444, 616 P.2d 902, 904 (1980) (statutory provisions to correct prior omissions and update judgments of Industrial Commission have no parallel in the civil law). North Carolina has reached the same result by holding that a subsequent medical exam by the same doctor is not newly discovered evidence. Otherwise, efforts to prove error in the doctor's estimate of disability would make compensation proceedings interminable. *Grupe v. Thomasville Furniture, Inc.*, 28 N.C. App. 119, 121, 220 S.E.2d 201, 202 (1976). *But see* *Hughes v. Denny's Restaurant*, 328 So.2d 830, 837-38 (Fla. 1976) (*res judicata* does not apply where new techniques lead to discovery of a different injury within two years).

103. *Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359-61, 604 P.2d 621, 623-25 (1980); *Black v. Industrial Comm'n*, 89 Ariz. 273, 276, 361 P.2d 402, 403 (1961).

104. *Standard Brands Paint Co. v. Industrial Comm'n*, 26 Ariz. App. 365, 367, 548 P.2d 1177, 1179 (1976); *see note 23 supra*.

105. *See, e.g., Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1980); *Scroggins v. Industrial Comm'n*, 123 Ariz. 35, 37, 597 P.2d 188, 190 (Ct. App. 1979); *Phelps Dodge Corp. v. Industrial Comm'n*, 121 Ariz. 75, 77, 588 P.2d 368, 370 (Ct. App. 1978). *See also* *Blickensstaff v. Industrial Comm'n*, 116 Ariz. 335, 339, 569 P.2d 277, 281 (Ct. App. 1977) (assessing the advisability of reopening involves a comparative process).

106. *Aetna Ins. Co. v. Industrial Comm'n*, 115 Ariz. 110, 112, 563 P.2d 909, 911 (Ct. App. 1977); *Arizona State Welfare Dep't v. Industrial Comm'n*, 25 Ariz. App. 6, 8-9, 540 P.2d 737, 739-40 (1975); *see 3 A. LARSON, supra note 4, § 81.33*.

107. *See text & note 96 supra*.

rejected in the prior award. To prevent the abrogation of *res judicata*, the rationale of *Verdugo* was eventually repudiated.

### *Aetna—The Repudiation of Verdugo*

In the leading case of *Aetna Insurance Company v. Industrial Commission*,<sup>108</sup> the court of appeals refused to follow *Verdugo*.<sup>109</sup> In *Aetna*, the Industrial Commission initially determined that the claimant was not disabled.<sup>110</sup> The claimant's doctor, however, subsequently testified that continued treatment had disclosed a permanent disability.<sup>111</sup> Based on this testimony the Industrial Commission reopened the claim.<sup>112</sup>

The court of appeals held that reopening was barred by *res judicata* because the claimant's present condition (symptomized by continuous low back pain) was not new, additional, or previously undiscovered.<sup>113</sup> The court based its conclusion upon the premise that in order to reopen, a claimant must show a comparative change in physical condition since the original award.<sup>114</sup> The doctor, however, did not testify to such a change in physical condition.<sup>115</sup> Rather, the doctor testified to the existence of his medical opinion that the claimant had a permanent disability.<sup>116</sup> Consequently, the only new, additional, or previously undiscovered element in this case was the doctor's *opinion* that the condition was permanent (as shown by the passage of time).<sup>117</sup>

In addition, the doctor's testimony implied that the original award should have found at least temporary disability.<sup>118</sup> Because the claimant was aware of the doctor's opinion at the original award hearing, the resulting award finding no disability (temporary or permanent) was *res judicata*.<sup>119</sup> At most, the doctor's testimony was newly discovered evidence, which is insufficient to reopen a final award.<sup>120</sup> The award al-

108. 115 Ariz. 110, 563 P.2d 909 (Ct. App. 1977).

109. *Id.* at 112, 563 P.2d at 911.

110. *Id.* at 111-12, 563 P.2d at 910-11.

111. *Id.* at 112, 563 P.2d at 911.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 112-13, 563 P.2d at 911-12; *see text & note 105 supra; cf. Salt River Project v. Industrial Comm'n*, 126 Ariz. 196, 200-01, 613 P.2d 860, 864-65 (Ct. App. 1980) (parties stipulated that doctor would testify that claimant had no herniated disc at the time of the prior award; therefore, testimony that a herniated disc was confirmed by surgery subsequent to the award was comparative.)

116. 115 Ariz. at 111-12, 563 P.2d at 910-11.

117. *Id.* at 112, 563 P.2d at 911.

118. *Id.*

119. *Id.* at 112-13, 563 P.2d at 911-12; *cf. Taylor v. Industrial Comm'n*, 20 Ariz. App. 46, 50, 509 P.2d 1083, 1087 (1973) (claimant may not have known her condition was permanent at the time of the prior award).

120. 115 Ariz. at 113, 563 P.2d at 912; *see text & note 99 supra; cf. Scroggins v. Industrial Comm'n*, 123 Ariz. 35, 597 P.2d 188 (Ct. App. 1979). Scroggins' condition would have been

lowing reopening was, accordingly, set aside.<sup>121</sup>

Under *Aetna*, proof that conflicting medical evidence was erroneously resolved (new evidence of a previously known condition) is insufficient to avoid the bar of *res judicata*.<sup>122</sup> The claimant is also required to show a comparative change in condition.<sup>123</sup> These two rules attempt to achieve a more appropriate balance between the policies behind *res judicata* and reopening worker's compensation awards than was possible under *Verdugo*. A changed or undiscovered condition will not be inferred merely from failure of the hearing officer to award the appropriate compensation, but requires proof of a previously undiscovered condition.<sup>124</sup>

## RECENT OPINIONS ALLOWING REOPENING

### *Reopening for New or Additional Conditions*

In general, a claimant is entitled to reopen his claim when he provides objective evidence of a new or additional injury, such as surgical confirmation of a herniated disc<sup>125</sup> or measurable atrophy of muscles.<sup>126</sup> The court of appeals has also required the claimant to prove that the new or additional condition arose after the original award by comparing the claimant's current condition to his condition at the time of the original award.<sup>127</sup>

known, but he did not seek treatment for neck and shoulder pain; therefore, he did not request a hearing. *Id.* at 37, 597 P.2d at 190. Evidence regarding these symptoms neither indicated a new condition nor provided any comparison to his prior condition, resulting in denial of reopening. *Id.*

121. 115 Ariz. at 113, 563 P.2d at 912.

122. Thus, Arizona appeared to have joined those jurisdictions barring reopening for a mere change in the doctor's opinion. See note 46 *supra*.

123. See *Smitty's Super Valu, Inc. v. Industrial Comm'n*, 126 Ariz. 367, 369-70, 616 P.2d 42, 44-45 (1980) (comparative evidence of a change in condition required to avoid the bar of *res judicata*); *Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1980) (requiring comparative evidence of a new, additional, or changed condition); *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 226, 589 P.2d 466, 469 (Ct. App. 1978) (Wren, J., dissenting) (expressing concern with problems resulting if comparative evidence is not required).

124. *But see* text & note 133 *infra*.

125. *Salt River Project v. Industrial Comm'n*, 126 Ariz. 196, 200-01, 613 P.2d 860, 864-65 (Ct. App. 1980) ("obviously" new); see *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 445, 616 P.2d 902, 905 (Ct. App. 1980); *Cotton v. Industrial Comm'n*, 26 Ariz. App. 58, 60-61, 546 P.2d 35, 37-38 (1976) (reopening not barred by *res judicata* where medical and surgical procedures were performed after the award showing discogenic disease, but claimant did not sustain the burden of proof); 3 A. LARSON, *supra* note 4, at § 81.33; *cf.* *Bell v. Industrial Comm'n*, 126 Ariz. 536, 541, 617 P.2d 44, 49 (Ct. App. 1980) (Jacobson, J., dissenting) (distinguishing cases involving verifying physical evidence from mere change of opinion).

126. *Sneed v. Industrial Comm'n*, 124 Ariz. 357, 358, 361-62, 604 P.2d 621, 624, 625-26 (1980) (atrophy in calf and thigh); *Hughes Aircraft Co. v. Industrial Comm'n*, 120 Ariz. 335, 338, 585 P.2d 1247, 1250 (Ct. App. 1978) (marked atrophy of *gluteus maximus* and left calf).

127. *Magma Copper Co. v. Industrial Comm'n*, 115 Ariz. 551, 555, 566 P.2d 699, 702 (Ct. App. 1977); see *Salt River Project v. Industrial Comm'n*, 126 Ariz. 196, 200-01, 613 P.2d 860, 864-65 (Ct. App. 1980); *Hughes Aircraft Co. v. Industrial Comm'n*, 120 Ariz. 335, 337-38, 585 P.2d 1247, 1249-50 (Ct. App. 1978); *cf.* *Capital Foundry v. Industrial Comm'n*, 27 Ariz. App. 79, 551 P.2d 69 (1976). The *Capital Foundry* court held that where mental condition was not at issue in the prior

The Arizona Supreme Court recognized the need for comparative evidence to prove the claimant has a new or additional condition in *Sneed v. Industrial Commission*.<sup>128</sup> In *Sneed*, a comparison of the medical expert's reports showed that what the expert described as a "continuation" of the claimant's condition was a change in condition causally related to the prior injury.<sup>129</sup> The court held that proof of a change, aggravation, or worsening of the claimant's condition, which is causally related to a prior injury, is sufficient to justify reopening.<sup>130</sup> *Sneed's* condition was not present, expected, contemplated, or considered at the prior award.<sup>131</sup> It was thus a new and additional condition adequate to reopen the claim.<sup>132</sup>

### *Reopening for Previously Undiscovered Conditions*

While the rules applied in *Aetna* and adopted in *Sneed* have been adequate to deal with the cases concerning new and additional conditions, the courts have been unable to apply these rules with equal effectiveness in cases involving a previously undiscovered condition. In *Crocker v. Industrial Commission*,<sup>133</sup> for example, the Arizona Supreme Court held that the comparative evidence requirement did not apply to a petition to reopen for a previously undiscovered condition.<sup>134</sup> Crocker was injured in a work related auto accident.<sup>135</sup> At the time Crocker's award was closed, he was unable to discover any organic basis for his pain.<sup>136</sup> Despite the continuing pain, Crocker was denied permanent disability.<sup>137</sup> Three years later Crocker's doctor diagnosed deep venous thrombosis and causalgia syndrome, constituting an organic basis for

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award, it could be inferred that the mental condition was not known. *Id.* at 82, 557 P.2d at 72. Consequently, only a conclusive finding regarding the claimant's mental condition at the time of the prior award would require comparative testimony. *Id.* at 81, 551 P.2d at 71. The court appears to have relied on the alternative ground that the appearance of a factor new in kind (in this case, a neurotic condition superimposed on physical symptoms) will satisfy the comparative evidence requirement. *Id.* at 81-82, 551 P.2d at 71-72; see *Smitty's Super Valu, Inc. v. Industrial Comm'n*, 126 Ariz. 367, 369-70, 616 P.2d 42, 44-45 (1980).

128. 124 Ariz. 357, 604 P.2d 621 (1980).

129. *Id.* at 361, 604 P.2d at 625.

130. *Id.*; cf. *State Compensation Fund v. Industrial Comm'n*, 113 Ariz. 65, 66, 546 P.2d 801, 802 (1976). In *State Compensation Fund*, the claimant developed severe pain after the award which prevented him from working. *Id.* The Arizona Supreme Court authorized reopening the award for a new and additional disability. *Id.* The court of appeals, however, had held that the evidence was not comparative and that it merely conflicted with the evidence upon which the res judicata award was founded. 23 Ariz. App. 505, 507, 534 P.2d 436, 438 (Ct. App. 1975). (the supreme court did not address these issues.)

131. 124 Ariz. at 361-62, 604 P.2d at 625-26.

132. *Id.*

133. 124 Ariz. 566, 606 P.2d 417 (1980).

134. *Id.* at 568, 606 P.2d at 419; see *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 224-25, 589 P.2d 466, 467-68 (Ct. App. 1978).

135. 124 Ariz. at 567, 606 P.2d at 418.

136. *Id.*

137. *Id.*

his pain.<sup>138</sup> The court held that a finding that the claimant suffers from a previously undiscovered condition is not foreclosed by the prior existence of the symptoms (pain) where the underlying condition causing the pain is never diagnosed.<sup>139</sup> *Aetna* applies only when the claimant allows the claim to be closed after the diagnosis.<sup>140</sup> Therefore, Crocker was entitled to reopen his claim based upon his doctor's subsequent diagnosis.<sup>141</sup>

The *Crocker* decision was a clear retreat from the requirements of *Aetna*, and the door was opened to challenging, under the reopening statute, findings and awards based on new diagnoses. As a result, the courts have been faced with the unenviable task of determining when a new diagnosis is merely new evidence<sup>142</sup> and when it constitutes a discovery of a previously undiscovered disability. In *Pascucci v. Industrial Commission*,<sup>143</sup> a claimant suffering from lower back pain petitioned to reopen his claim based upon surgical evidence of a herniated disc.<sup>144</sup> Claimant's doctors testified that they had been unable to diagnose the herniated disc at the preceding hearing.<sup>145</sup> The court of appeals treated the herniated disc as either a new condition or a previously undiscovered condition.<sup>146</sup> Because the "true cause" of Pascucci's back problem was unknown at the time of the prior award, and was later diagnosed, he was permitted to reopen his claim.<sup>147</sup> Thus, while recog-

138. *Id.*

139. *Id.*, at 568-69, 606 P.2d at 419-20. *But see* *Smitty's Super Valu, Inc. v. Industrial Comm'n*, 126 Ariz. 377, 616 P.2d 52 (Ct. App. 1979), *vacated*, 126 Ariz. 367, 616 P.2d 42 (1980). In *Smitty's*, the court of appeals held that a lack of change in the claimant's symptoms (pain) indicated that his condition was not undiscovered. 126 Ariz. at 378, 616 P.2d at 53. In addition, the court held that the failure to show that any condition developed subsequent to the prior award meant that the claimant's evidence was merely a new diagnosis of the condition which would not justify reopening. *Id.* The court of appeals opinion, however, was vacated. 126 Ariz. 367, 616 P.2d 42 (1980). The supreme court did not reach the question whether the condition was previously undiscovered. *Id.* at 369, 616 P.2d at 44. Although the court asserted that, under the doctrine of *res judicata*, the lack of comparative evidence would bar reopening, the notice of claim status was not *res judicata* in this case because the claimant's condition was not stationary. *Id.* at 369-70, 616 P.2d at 44-45; *see text & note 33 supra*. Alternatively, because the claimant's symptoms had changed, there was an additional condition that was new in kind. Therefore, comparative evidence was not required. 126 Ariz. at 369-70, 616 P.2d at 44-45; *see text & note 127 supra*.

140. *Crocker v. Industrial Comm'n*, 124 Ariz. at 569, 606 P.2d at 420; *see Garrote v. Industrial Comm'n*, 121 Ariz. 223, 225, 589 P.2d 466, 468 (Ct. App. 1978); *Aetna* also applies where the claimant's petition to reopen is based upon a new or additional disability. *See Sneed v. Industrial Comm'n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1979).

141. 124 Ariz. at 569, 606 P.2d at 420.

142. *See text & note 99 supra*.

143. 126 Ariz. 442, 616 P.2d 902 (Ct. App. 1980).

144. *Id.* at 443, 616 P.2d at 903; *cf. text & note 125 supra*.

145. 126 Ariz. at 445, 616 P.2d at 905.

146. *Id.*

147. *Id.* (The Arizona Supreme Court has granted review in this case.)

Justice Jacobson, in dissent, would have distinguished *Crocker* on the grounds that Pascucci's herniated disc was at issue in the first hearing, but had been misdiagnosed, while in *Crocker* there had been no diagnosis at all. *Id.* at 447, 616 P.2d at 907 (Jacobson, J., dissenting). A change of the doctor's opinion as to the correct diagnosis has been held inadequate to reopen the claim. *See text & note 99 supra*.

nizing that the doctrine of *res judicata* bars reopening a claim merely on the basis of new evidence, the court of appeals held that the doctrine of *res judicata* is mitigated when a claimant petitions to reopen a claim upon discovery of a previously misdiagnosed condition.<sup>148</sup>

The Arizona Supreme Court recently agreed, in *Salt River Project v. Industrial Commission*,<sup>149</sup> that where a claimant's condition is not definitely known at the time of the original award, diagnosis of the true cause of a disability justifies reopening under the "previously undiscovered" clause of section 23-1061(H).<sup>150</sup> Although the claimant's symptoms in *Salt River Project* suggested a degenerative disc, the medical tests conducted prior to the award did not support this diagnosis.<sup>151</sup> After the award was closed (with no permanent disability), worsening pain led to additional testing in which a soft degenerative disc was discovered.<sup>152</sup> After the disc was surgically removed,<sup>153</sup> the court of appeals held that reopening was barred by *res judicata*.<sup>154</sup> The supreme court reversed, holding that reopening was proper on the grounds that a firm diagnosis of claimant's true condition did not occur until after the award hearing.<sup>155</sup>

In its most recent decision, *Bell v. Industrial Commission*,<sup>156</sup> the court of appeals has turned to a concept labeled "evolution" of opinion as distinguished from a mere change of opinion.<sup>157</sup> After being shot in the head, officer Bell suffered from psychiatric symptoms and temporary blackouts which were initially diagnosed as a post-traumatic brain syndrome.<sup>158</sup> After the award was closed, the blackouts recurred, whereupon Bell's condition was tentatively diagnosed as a psychomotor seizure disorder.<sup>159</sup> Lack of positive evidence of the causation of

148. 126 Ariz. at 445, 616 P.2d at 905; *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 225, 589 P.2d 466, 468 (Ct. App. 1978); see *Bell v. Industrial Comm'n*, 126 Ariz. 536, 539, 617 P.2d 44, 47 (Ct. App. 1980).

149. \_\_\_ Ariz. \_\_\_, 627 P.2d 692 (1981).

150. *Id.*, at \_\_\_, 627 P.2d at 695; accord *Bell v. Industrial Comm'n*, 126 Ariz. 536, 539, 617 P.2d 44, 47 (Ct. App. 1980); *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 445, 616 P.2d 902, 905 (Ct. App. 1980).

151. \_\_\_ Ariz. at \_\_\_, 627 P.2d at 694, 695. Thus, as in *Pascucci v. Industrial Comm'n*, there was no accurate prior diagnosis of the claimant's condition. 126 Ariz. 442, 443, 445, 616 P.2d 902, 903, 905 (Ct. App. 1980); see note 174 *infra*. This fact distinguishes *Salt River Project* from *Bell v. Industrial Comm'n*, 126 Ariz. 536, 537, 538-39, 617 P.2d 44, 45, 46-47 (Ct. App. 1980) (tentative diagnosis resulting in treatment for psychomotor seizure disorder).

152. \_\_\_ Ariz. at \_\_\_, 627 P.2d at 694.

153. *Id.* This factor gives rise to an additional distinction between the instant case and *Bell v. Industrial Comm'n*. See 126 Ariz. 223, 228, 617 P.2d 44, 49 (Ct. App. 1980) (Jacobson, J., dissenting); text & note 125 *supra*.

154. \_\_\_ Ariz. at \_\_\_, 627 P.2d at 693.

155. *Id.* at \_\_\_, 627 P.2d at 694-95; see note 150 *supra*.

156. 126 Ariz. 536, 617 P.2d 44 (Ct. App. 1980).

157. *Id.* at 539, 617 P.2d at 47.

158. *Id.* at 537, 617 P.2d at 45.

159. *Id.*

the disorder, however, barred Bell's first petition to reopen.<sup>160</sup> Finally, seven years after the accident, and two to three years after the tentative diagnosis, other doctors were able to ascribe the unchanged symptoms to the prior brain injury and definitely diagnose a psychomotor seizure disorder.<sup>161</sup>

Although a previous petition to reopen based on a tentative diagnosis of the same condition had been denied, it was not until the second petition to reopen that a definite diagnosis and causal relationship were established.<sup>162</sup> Holding that these events represented not a change of opinion, but an evolution of opinion from tentative to definite, the court allowed Bell to reopen his claim.<sup>163</sup>

Justice Jacobson dissented on the ground that the petition was barred by *res judicata*.<sup>164</sup> The claimant suffered from the same condition throughout and had undergone no diagnostic tests since the previous hearing.<sup>165</sup> It is also clear that there had been several previous diagnoses, one of which was correct.<sup>166</sup> In this case, the condition was

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160. *Id.*

161. *Id.* at 538, 617 P.2d at 46; *cf.* *Messer v. Drees*, 382 S.W.2d 209 (Ky. 1964). In *Messer*, the claimant's doctors had detected psychological complications, but had not diagnosed their cause or severity. *Id.* at 212. The symptoms required for diagnosis were not manifest until after the hearing. *Id.* The court permitted reopening, holding that "the important question is whether the man got the relief to which the law entitled him, based on the truth as we are now able to ascertain it." *Id.* at 213. Kentucky law, however, provides the claimant a broader scope of relief than Arizona law. *Compare* *Keefe v. O.K. Precision Tool & Die Co.*, 566 S.W.2d 804, 806 (Ky. App. 1978) (claimant can reopen in Kentucky for change of condition on grounds set forth in rule 60) with *Chavez v. Industrial Comm'n*, 21 Ariz. App. 501, 503, 520 P.2d 1178, 1180 (1974) (rule 60(c) is not applicable to workers' compensation awards in Arizona). See also *Shuler v. Talon, Div. of Textron*, 30 N.C. App. 570, 573, 577, 227 S.E.2d 627, 629, 631 (1976) (change of opinion due to chronicity of symptoms is not a "change in condition" justifying reopening).

162. 126 Ariz. at 538, 617 P.2d at 46.

163. *Id.* at 539, 617 P.2d at 47; *cf.* *Hughes v. Denny's Restaurant*, 328 So.2d 830, 838 (Fla. 1976) (modification is so inherently a part of workers' compensation that *res judicata* is not applicable to an injury discovered by a new diagnostic technique; but to prevent interminable litigation, modification is limited to two years after the original testimony); *Young v. Varney*, 469 S.W.2d 344, 345 (Ky. App. 1971) (doctor who previously found no occupational disability now finds silicosis. Court held this showed change in condition). *Turner Elkhorn Mining Co. v. O'Bryan*, 414 S.W.2d 410, 412-13 (Ky. App. 1967) (allowing recovery for disease developing progressively over a long period of time, but not medically demonstrable at the time of the award, by treating subsequent development as an actual change of condition). *But see* *Young v. Charles F. Trivette Coal Co.*, 459 S.W.2d 776, 778 (Ky. App. 1970) (fact claimant was worse off than believed at the time of settlement will not allow reopening and relitigation where the condition was accurately diagnosed from the beginning); *Edwards v. John Smith & Sons*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 270 S.E.2d 569, 570 (1980) (delayed discovery of psychological basis or cause of symptoms and disability is not a "change in condition").

164. 126 Ariz. at 539, 617 P.2d at 47 (Jacobsen, J., dissenting).

The recent decisions dealing with the right to reopen for a previously undiscovered condition have arguably abrogated the doctrine of *res judicata* by permitting reopening any time the prior award is erroneous as evidenced by subsequent medical testimony. See *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 447-48, 616 P.2d 902, 907-08 (Ct. App. 1980) (Jacobson, J., dissenting); *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 226, 589 P.2d 466, 469 (Ct. App. 1978) (Wren, J., dissenting); *cf.* text & note 96 *supra*.

165. 126 Ariz. at 540, 617 P.2d at 48 (Jacobson, J., dissenting).

166. *Id.*

not previously undiscovered, merely previously unproven.<sup>167</sup> The only new factor, according to Justice Jacobson, was the testimony concerning causation, and, as new evidence of a known condition, it did not justify reopening.<sup>168</sup>

### *Analysis of the Cases Construing "Previously Undiscovered"*

Several Arizona Court of Appeals cases have construed "previously undiscovered", as used in section 1061(H), in terms of a change in the claimant's symptoms.<sup>169</sup> Justice Jacobson, in dissenting to reopening for a new diagnosis, has repeatedly emphasized the absence of additional tests or findings.<sup>170</sup> The Arizona Supreme Court, however, has not adopted a test based on the claimant's symptoms<sup>171</sup> or the presence of new tests or findings,<sup>172</sup> and has focused instead on the diagnosis itself.<sup>173</sup> Under the supreme court construction of the "previously undiscovered" provision, even symptoms which should have led to an accurate diagnosis will not bar reopening if no accurate diagnosis was in fact made.<sup>174</sup>

It is important to remember that in treating a previously undiag-

167. *Id.* at 540-41, 617 P.2d at 48-49.

168. *Id.* at 540, 617 P.2d at 48; see note 147 *supra*.

169. See, e.g., *Smitty's Super Valu, Inc. v. Industrial Comm'n*, 126 Ariz. 377, 378, 616 P.2d 52, 53 (Ct. App. 1979), *vacated*, 126 Ariz. 367, 616 P.2d 42 (1980); *Scroggins v. Industrial Comm'n*, 123 Ariz. 35, 37, 597 P.2d 188, 190 (Ct. App. 1979); *Aetna v. Industrial Comm'n*, 115 Ariz. 110, 112, 563 P.2d 909, 911 (Ct. App. 1977).

170. *Bell v. Industrial Comm'n*, 126 Ariz. 536, 540, 617 P.2d 44, 48 (Ct. App. 1980) (Jacobson, J., dissenting); *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 445-46, 606 P.2d 902, 905-06 (Ct. App. 1980) (Jacobson, J., dissenting). There is substantial authority for this view. See *Davila v. Industrial Comm'n*, 98 Ariz. 258, 260-61, 403 P.2d 812, 814-15 (1965); *Bishop v. Industrial Comm'n*, 94 Ariz. 65, 67, 381 P.2d 598, 600 (1963); *Govan v. Industrial Comm'n*, 23 Ariz. App. 261, 263, 532 P.2d 533, 535 (1975). *But cf.* *Standard Brands Paint Co. v. Industrial Comm'n*, 26 Ariz. App. 365, 367, 548 P.2d 1177, 1179 (1976) (no reopening for findings constituting new evidence of prior diagnosis). See also *Nicky Blair's Restaurant v. Workers Compensation Appeals Bd.*, 109 Cal. App. 3d 941, 958, 167 Cal. Rptr. 516, 526 (1980).

171. *Crocker v. Industrial Comm'n*, 124 Ariz. 566, 568, 606 P.2d 417, 419 (1980). *But see* *Lauderdale v. Industrial Comm'n*, 60 Ariz. 443, 444, 139 P.2d 449, 450 (1943).

172. *But see* *Davila v. Industrial Comm'n*, 98 Ariz. 258, 260-61, 403 P.2d 812, 814-15 (1965); *Bishop v. Industrial Comm'n*, 94 Ariz. 65, 67, 381 P.2d 598, 600 (1963).

173. *Salt River Project v. Industrial Comm'n*, — Ariz. —, —, 627 P.2d 692, 694-95 (1981); *Smitty's Super Valu, Inc. v. Industrial Comm'n*, 126 Ariz. 367, 369-70, 616 P.2d 42, 44-45 (1980); *Crocker v. Industrial Comm'n*, 124 Ariz. 566, 568-69, 606 P.2d 417, 419-20 (1980); see *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 447, 616 P.2d 902, 907 (Ct. App. 1980) (Jacobson, J., dissenting).

174. See *Salt River Project v. Industrial Comm'n*, — Ariz. —, —, 627 P.2d 692, 695 (1981); *Fidelity & Guar. Ins. Co. v. Industrial Comm'n*, — Ariz. —, —, 631 P.2d 124, 127, 128-29 (1981) (permitting reopening where doctors did not diagnose condition even though "they should have suggested it"); *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 225, 589 P.2d 466, 468 (Ct. App. 1978) (claimant must justify ignorance of any evidence of injury existing at the prior award); *Taylor v. Industrial Comm'n*, 20 Ariz. App. 46, 50, 509 P.2d 1083, 1087 (1973) (not *res judicata* if claimant did not know and could not have known by reasonable diligence of his injury). *Garrote* and *Taylor* apparently no longer reflect the Arizona rule because mere suggestion of the injury is not sufficient to raise the bar of *res judicata* in reopening proceedings. See *Salt River Project v. Industrial Comm'n*, — Ariz. —, —, 627 P.2d 692, 695 (1981); *Bell v. Industrial Comm'n*, 126 Ariz. 536, 539, 617 P.2d 44, 47 (Ct. App. 1980).

nosed condition as a previously undiscovered condition for purposes of the reopening statute, the courts are engaging in statutory construction.<sup>175</sup> While diagnosis of the cause of symptoms does not indicate a change in condition,<sup>176</sup> the new diagnosis would seem to indicate that the condition (but not the symptoms) was previously undiscovered<sup>177</sup> and, therefore, within the statutory provision.

The liberal interpretation given to the plaintiff's right to reopen by the courts can readily be justified by reference to the liberal compensatory policies underlying the workers' compensation system.<sup>178</sup> The Arizona Supreme Court has already recognized the preeminence of these policies in mitigating the effects of *res judicata* where protest is untimely.<sup>179</sup> A claimant should not be penalized merely because of the inability to obtain a proper medical diagnosis. Therefore, the Arizona courts are correct in treating the term "previously undiscovered" as equivalent to "previously undiagnosed."<sup>180</sup>

While the claimant is statutorily entitled to reopen upon a showing of a previously undiscovered condition, there is no authority for permitting reopening, as in *Bell*, for previously undiscovered causation.<sup>181</sup> The causation of the claimant's injury has often been held to be *res judicata*.<sup>182</sup> In addition, Arizona cases have long recognized that the administrative law judge must resolve the conflict in medical testimony on the issue of causation, and that the administrative law judge's resolution is ordinarily binding on the court.<sup>183</sup> Therefore, when the hearing officer is presented with evidence of a correct diagnosis so that the condition is not undiscovered, the resolution of the causation question, in the absence of proof of a new or additional condition, should be *res judicata*.

175. See *Crocker v. Industrial Comm'n*, 124 Ariz. 566, 568-69, 606 P.2d 417, 419-20 (1980); *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 447, 616 P.2d 902, 907 (Ct. App. 1980) (Jacobson, J., dissenting); *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 224-25, 589 P.2d 466, 467-68 (Ct. App. 1978).

176. *Edwards v. John Smith & Sons*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 270 S.E.2d 569, 570 (1980); see *Aetna Ins. Co. v. Industrial Comm'n*, 115 Ariz. 110, 112-13, 563 P.2d 909, 911-12 (Ct. App. 1977). *But see* *Young v. Varney*, 469 S.W.2d 344 (Ky. App. 1971).

177. See authorities cited in note 175 *supra*.

178. *Messer v. Drees*, 382 S.W.2d 209, 212-13 (Ky. 1964) ("bearing in mind that compensation laws are fundamentally for the benefit of the injured worker, a just claim must not fall victim to rules of order unless it is clearly necessary to prevent chaos"); see text & notes 74-75 *supra*.

179. See text & notes 30-32, 76-79 *supra*.

180. *Crocker v. Industrial Comm'n*, 124 Ariz. 566, 568, 606 P.2d 417, 419 (1980); *Pascucci v. Industrial Comm'n*, 126 Ariz. 442, 447, 616 P.2d 902, 907 (Ct. App. 1980) (Jacobson, J., dissenting); *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 225, 589 P.2d 466, 468 (Ct. App. 1978).

181. See text & notes 166-67 *supra*.

182. See *Ringgold v. Industrial Comm'n*, 21 Ariz. App. 273, 277, 518 P.2d 592, 596 (1974); text & note 71 *supra*.

183. *Johnson v. Industrial Comm'n*, 107 Ariz. 338, 342, 487 P.2d 759, 763 (1971); *Ossendorf v. Industrial Comm'n*, 15 Ariz. App. 445, 446-47, 489 P.2d 292, 293-94 (1971); *Frizzell v. Industrial Comm'n*, 6 Ariz. App. 293, 295, 432 P.2d 152, 154 (1967); cases cited in note 69 *supra*.

Because the purpose of the reopening statute is to mitigate against the effects of *res judicata*,<sup>184</sup> judicial construction of the statutory provision regarding previously undiscovered conditions could be expected to limit the application of *res judicata*. The issue of discovery of a condition, to which the reopening statute is addressed, however, is distinguishable from the issue of proof of a condition's causal relationship to employment. Extension of the statutory language to problems of proof should be precluded by the long line of Arizona cases holding that new evidence does not satisfy the requirement of the reopening statute.<sup>185</sup> The *Bell* decision, therefore, constitutes an abrogation of the doctrine of *res judicata* that is not justified by statute, case law, or public policy.

### CONCLUSION

*Res judicata* is applied to workers' compensation awards in order to avoid the administrative difficulties that would accompany a lack of finality. The application of the doctrine of *res judicata*, however, is mitigated by specific statutory provisions. These statutes are liberally construed to insure that an injured claimant receives adequate compensation.

Section 23-1061(H) permits reopening of an award where the claimant can demonstrate a "new, additional, or previously undiscovered condition."<sup>186</sup> In order to reopen a claim based upon a new or additional condition, the claimant must demonstrate that his present condition differs from his actual condition at the time of the award. New evidence of a previously unproven disability will not justify reopening. The recent Arizona cases construing the "previously undiscovered" provision, however, indicate that (1) If the claimant's condition has not yet been diagnosed, the claim can be reopened when it is diagnosed; (2) if it has been misdiagnosed, the claim can be reopened when it is correctly diagnosed; and (3) if it has been correctly diagnosed, but the causal link to the claimant's industrial injury cannot be established, the claim can be reopened when proof of causation is available. The difficulty in resolving particular cases can be traced, to a large extent, not to disagreement over the general principle to be applied, but disagreement as to the particular facts of the case.<sup>187</sup> This difficulty will probably continue since the Arizona Supreme Court has

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184. See text & note 59 *supra*.

185. See notes 99-100, 168 *supra*.

186. ARIZ. REV. STAT. ANN. § 23-1061(H) (Supp. 1971-80).

187. See *Smitty's Super Valu, Inc. v. Industrial Comm'n*, 126 Ariz. 337, 378, 616 P.2d 52, 53 (Ct. App. 1979), *vacated*, 126 Ariz. 367, 616 P.2d 42 (1980); *Garrote v. Industrial Comm'n*, 121 Ariz. 223, 225, 589 P.2d 466, 468 (Ct. App. 1978) (Wren, J., dissenting); *Gosek v. Garmer & Stiles Co.*, 158 N.W.2d 731, 737 (Iowa 1968) (LeGrand, J., dissenting).

made the factual question of the presence of a prior diagnosis determinative of the claimant's right to reopen for a previously undiscovered condition.

Where the condition is misdiagnosed or impossible to diagnose, the test applied by the Arizona courts (permitting reopening when the "true cause" is discovered) achieves an appropriate balance between the need for res judicata in the existing system and the claimant's right to compensation. Where the claimant's condition is diagnosed, however, and he is denied recovery, the claimant should not be entitled to reopen without presenting comparative evidence indicating a new or additional condition.<sup>188</sup>

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188. *Contra*, Bell v. Industrial Comm'n, 126 Ariz. 536, 539, 617 P.2d 44, 47 (Ct. App. 1980).

