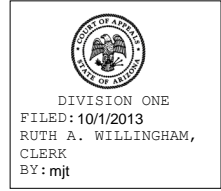


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ERASMO GARCIA,	)	No. 1 CA-IC 12-0063
	)	
Petitioner,	)	DEPARTMENT D
	)	
v.	)	<b>MEMORANDUM DECISION</b>
	)	(Not for Publication -
THE INDUSTRIAL COMMISSION OF	)	Rule 28, Arizona Rules of
ARIZONA,	)	Civil Appellate Procedure)
	)	
Respondent,	)	
	)	
SELLERS AND SONS INC.,	)	
	)	
	)	
Respondent Employer,	)	
	)	
SCF WESTERN INSURANCE COMPANY,	)	
	)	
Respondent Carrier.	)	
_____	)	

Special Action - Industrial Commission

ICA Claim No. 20111-960359

Carrier Claim No. 11W01256

The Honorable James B. Long, Administrative Law Judge

**AFFIRMED**

Erasmus Garcia  
Petitioner *In Propria Persona*

Mesa

Andrew Wade, Chief Counsel  
The Industrial Commission of Arizona  
Attorneys for Respondent

Phoenix

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**B R O W N**, Judge

¶1 Erasmo Garcia challenges an award of the Industrial Commission of Arizona ("ICA") finding (1) he was not entitled to continuing benefits and (2) the scope of his work-related injury did not include an alleged injury to his right shoulder. For the following reasons, we affirm.

**BACKGROUND**

¶2 On July 5, 2011, Garcia was working as a driver for Sellers and Sons, Inc. While parked on the edge of a street at a construction site, a ground plate beneath the left rear wheels of the truck collapsed. After the truck fell into the ground, Garcia was able to get out on his own. The following morning, Garcia received medical attention for the incident at Concentra Medical Centers. Garcia claimed he was suffering from pain in his right knee, left knee, right shoulder, neck, rib, and hip. After Garcia described his symptoms, an x-ray and MRI were taken of his right knee, but did not display any broken bones. The treating physician at Concentra prescribed some medication and told Garcia there was nothing else wrong with him.

¶3 On July 18, 2011, Garcia was referred to Dr. Kassman, who concluded that Garcia had a torn muscle and needed surgery

on his right knee, which was completed on August 18. On October 17, Garcia returned for a follow-up visit for his knee surgery, but his primary complaint during this examination involved right shoulder pain. An MRI scan of the right shoulder was performed at Surgical Specialty Hospital of Arizona on October 31. Dr. Kassman concluded from the MRI that it did not show any rotator cuff tear. Kassman's final recommendation to SCF was that "[a]ccording to the AMA guides to rating of permanent impairment . . . . [Garcia's] [f]inal impairment rating is 2% to the right lower extremity." Dr. Kassman found "no basis for impairment to the right shoulder or upper extremity."

¶4 Garcia's ICA claim was filed on July 14, 2011 and was accepted by the defendant insurance carrier, SCF Western Insurance Company ("SCF"). On December 1, 2011, SCF issued a notice of claim status terminating active care and temporary compensation benefits effective November 14, 2011, with a permanent disability. On that same date, SCF also issued a notice of permanent disability benefits, awarding Garcia a 2% functional loss of his right lower extremity.

¶5 Garcia timely protested SCF's determination, and three hearings were conducted over a four-month period in 2012 before an administrative law judge ("ALJ"). The issues at the hearing focused on whether continuing benefits were proper for the

injuries Garcia sustained on July 5, 2011 and the extent of permanent disability of Garcia's right knee.

¶16 Scott Stratmann, a licensed chiropractor, testified that Garcia had sustained a right shoulder injury to his rotator cuff as a result of the accident on July 5, 2011. Dr. Stratmann reached this opinion based on the fact that Garcia had no right shoulder complaints prior to the accident, the shoulder pain began close to the time of injury, and an MRI displayed a torn rotator cuff. Therefore, Dr. Stratmann concluded that Garcia's condition needed treatment by an orthopedic surgeon.

¶17 Anthony Theiler, a board certified orthopedic surgeon, performed an independent medical examination of Garcia on February 21, 2012, and authored a report from this date. In conjunction with his physical examination, he reviewed relevant medical records and diagnostic studies. He opined that the rotator cuff pathology revealed on diagnostic studies was degenerative (age related) in nature and not a result of the industrial accident. Further, Dr. Theiler opined that Garcia's condition, relative to the industrial injury, was stationary with 2% impairment to his right lower extremity, with no work restrictions and no need for supportive medical maintenance benefits. Finally, he opined that he did not relate Garcia's other subjective complaints to the industrial injury.

¶18 The ALJ resolved the medical conflict by accepting the opinions of Dr. Theiler over those of Dr. Stratmann as being "more probably correct and well founded." Garcia requested review, and the ALJ affirmed its prior decision. Garcia timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(2), 23-951(A) and Arizona Rule of Procedure for Special Actions 10.

#### DISCUSSION

¶19 As an initial matter, Garcia's opening brief fails to identify or discuss any specific legal grounds or arguments for vacating the ALJ's decision; nor does his brief include citations to the record, which could constitute abandonment and waiver of his claim. See ARCAP 13(a)(6) (requiring the appellant's brief to contain arguments that include "citations to the authorities, statutes and parts of the record relied on"). In our discretion, we decide this appeal on its merits based on our own review of the record. See *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (recognizing that courts prefer to decide each case upon its merits rather than dismissing on procedural grounds). We construe Garcia's vague opening brief as a general challenge to the sufficiency of the evidence.

¶10 When reviewing a workers' compensation award, we view the evidence in the light most favorable to sustaining the ALJ's

decision and will not set it aside if reasonably supported by the evidence. *Delgado v. Indus. Comm'n*, 183 Ariz. 129, 131, 901 P.2d 1159, 1161 (App. 1994). Garcia bears the burden of proving that his shoulder injury is compensable. *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977). To justify receiving continuing benefits, Garcia must establish that it is more likely than not that his shoulder injury is not medically stationary, or, if the condition is stationary, that he has sustained a permanent impairment. See *Timmons v. Indus. Comm'n*, 83 Ariz. 74, 79, 316 P.2d 935, 938 (1957). Further, Garcia must also show that the current medical condition, whether stationary or not, was caused by the industrial incident. *Spears v. Indus. Comm'n*, 20 Ariz. App. 406, 407, 513 P.2d 695, 696 (1973). Finally, this showing must be established by expert medical testimony. See *McNeely v. Indus. Comm'n*, 108 Ariz. 453, 455, 501 P.2d 555, 557 (1972).

¶11 The record in this case supports the ALJ's implicit determination that Garcia's shoulder injury was not caused by the water truck incident.<sup>1</sup> The ALJ considered the evidence

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<sup>1</sup> Based on our review of the record and our understanding of the opening brief, Garcia is not directly challenging the ALJ's finding of permanent 2% impairment to the right knee; instead, he asserts he has continuing medical injuries *other than* his knee injury that should be covered (i.e., his right shoulder). In any event, Dr. Theiler's opinion that Garcia had 2% impairment of the right knee was based on the American Medical Association Guides to the Evaluation of Permanent Impairment

presented and resolved the conflict in the expert testimony in favor of Dr. Theiler, explaining that Dr. Theiler's testimony was "more probably correct and well founded." See *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975) (explaining it is the ALJ's duty to "resolve all conflicts in the evidence"). Dr. Theiler's ultimate opinion of Garcia's medical conditions was based on a comprehensive review of Garcia's past medical records, the events relating to Garcia's injuries, and a physical examination of Garcia. Thus, we conclude that the ALJ's decision is supported by substantial evidence in the record. See *Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979) (explaining an ALJ's resolution of a conflict in expert opinion "will not be disturbed unless it is wholly unreasonable").

¶12 Garcia, who was 60 years old at the time of his work-related knee injury, vaguely asserts that the ALJ improperly ruled against Garcia based on his age, presumably because the ALJ referenced Dr. Theiler's testimony about the origin of a partially torn rotator cuff. But nothing in the record supports Garcia's suggestion that age was an inappropriate factor in evaluating his claimed injuries. Dr. Theiler merely noted, as part of the independent medical evaluation, that Garcia was a

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(6th ed. 2009). This determination mirrored the opinion of Garcia's original treating physician, Dr. Kassman. Thus, the record supports the ALJ's finding of 2% impairment.

"60-year-old male truck driver" at the time of the industrial accident. At the subsequent hearing, Dr. Theiler opined that "the partial tear noted on the MRI arthogram was most likely degenerative in nature" and that consistent with Garcia's age, he has "age-related changes in his AC joint, and I suspect an age-related partial thickness rotator cuff tear."

**CONCLUSION**

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

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
ANDREW W. GOULD, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
DONN KESSLER, Judge