DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HENDERSON BEGAY, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, KINETICS INTEL, Respondent Employer, ARGONAUT INSURANCE COMPANY, Respondent Carrier.	No. 1 CA-IC 09-0038 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action--Industrial Commission

ICA CLAIM NO. 20010-920628

CARRIER CLAIM NO. 73-123669

Robert F. Retzer, Administrative Law Judge

AWARD AFFIRMED

Henderson Begay
In propria persona

Chandler

The Industrial Commission of Arizona Phoenix
By Andrew F. Wade, Chief Counsel
Attorney for Respondent

Steven C. Lester, P.C. Phoenix
By Steven C. Lester
Attorneys for Respondent Employer/Carrier

J O H N S E N, Judge

¶1 This is a special action review of a Decision Upon Hearing and Findings and Award Denying Reopening ("Decision") by an Administrative Law Judge ("ALJ") of a worker's compensation claim. Henderson Begay argues his claim should have been reopened because his current neck pain and headaches are attributable to a new, additional or previously undiscovered condition caused by his industrial injury. For the following reasons, we affirm the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995) and Rule 10 of the Arizona Rules of Procedure for Special Actions. On review of a decision by the Industrial Commission of Arizona ("ICA"), "we defer to the ALJ's factual findings but review questions of law *de novo*." *Sun Valley Masonry, Inc. v. Indus. Comm'n*, 216 Ariz. 462, 463-64, ¶ 2, 167 P.3d 719, 720-21 (App. 2007). Additionally, we view the

evidence in the light most favorable to sustaining the award, *id.* at 464, ¶ 2, 167 P.3d at 721, and we will not set aside the award unless it is unsupported by any reasonable theory of the evidence, *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987).

FACTUAL AND PROCEDURAL HISTORY

A. The Original Injury.

¶3 On March 20, 2001, Begay was at work when a section of pipe broke free and hit him in the face, knocking him unconscious. The blow caused Begay to fall from a seven-foot-high platform and strike his head on a concrete floor. He was diagnosed with an avulsion fracture of a vertebra in his neck, which occurs when a ligament under stress pulls off a piece of the bone to which it is attached.

¶4 After the accident, Begay experienced head and neck pain and depression. He was treated with approximately six months of physical therapy, medication and injections. Begay received disability compensation and medical benefits from the time of the accident through October 27, 2001. On May 16, 2003, an ALJ issued a Decision Upon Hearing finding that Begay's medical condition became stationary as of October 27, 2001, with no permanent impairment, and awarded him the benefits he had already received. Begay did not seek review of the decision.

B. Petition to Reopen.

¶5 Begay petitioned to have his claim reopened on April 18, 2008. The petition was denied and Begay requested a hearing, at which testimony was taken from Begay; Lonnie Harding, a physician's assistant; and Zorn Maric, an orthopaedic surgeon.

¶6 Begay testified his headaches and neck pain had worsened since 2001. He stated that while the pain was intermittent in 2001, it was now constant, giving him "difficulties with just regular day to day operations just living." Begay added that his depression, too, had worsened since 2001.

¶7 Harding, a physician's assistant who had treated Begay in 2008, testified that Begay had complained of elbow pain and chronic neck pain and that Begay's magnetic resonance imaging ("MRI") results showed "small vessel eschemic changes" and "an asymmetric disc bulge with moderate to severe left-sided neural foraminal narrowing . . . ." Because he was unfamiliar with Begay's March 2001 injury, however, Harding was unable to determine whether the pain or MRI results were attributable to the industrial accident. Maric testified he found "[r]eally no significant change" between Begay's 2001 MRI results and the results of a 2008 MRI. He noted that a "left-sided disc slash

osteophyte –- basically [a] bony spur" looked smaller in the 2008 image but that it "[c]ould be just a difference with the imaging technique." Maric concluded that he found no "new, additional or previously undiscovered conditions causally related to [the March 20, 2001] incident." In addition to hearing testimony, the ALJ stated that before ruling, he would review the medical records Begay submitted.

¶8 In his Decision, the ALJ denied Begay's petition, finding that Begay "failed to carry his burden of proving by a reasonable preponderance of the evidence, that he has a new, additional or previously undiscovered condition causally related to [the] March 20, 2001 industrial injury . . . ." Upon request, the ALJ reviewed the Decision, but again denied reopening, concluding the original Decision was supported by the evidence. Begay appeals these decisions.

DISCUSSION

¶9 In order to reopen a worker's compensation claim, the claimant must show that the original industrial injury has caused a "new, additional or previously undiscovered" condition. *See* A.R.S. § 23-1061(H) (Supp. 2009); *Sun Valley*, 216 Ariz. at 464-65, ¶ 11, 167 P.3d at 721-22. The claimant bears the burden of presenting evidence sufficient to support reopening the claim. *Id.* at 465, ¶ 11, 167 P.3d at 722. If a causal

connection between the original injury and the condition "is not readily apparent, it must be established by expert medical testimony." *Id.* Finally, "[a] claim shall not be reopened because of increased subjective pain if the pain is not accompanied by a change in objective physical findings." A.R.S. § 23-1061(H).

¶10 Our review of the record shows that the ALJ correctly determined that Begay failed to meet his burden of proving the existence of a "new, additional or previously undiscovered" condition related to his industrial injury. Though Begay testified to increased pain, no witness testified to a "change in objective physical findings." *See* A.R.S. § 23-1061(H) (increased subjective pain insufficient to reopen claim absent "change in objective physical findings"). To the contrary, Maric testified that after examining Begay and viewing Begay's records, he failed to find any significant change in Begay's condition since his claim was closed. Even assuming the medical records Begay submitted to the ALJ showed the existence of a "new, additional or previously undiscovered" condition, Begay presented no expert medical testimony demonstrating a causal connection to his industrial injury. *See Sun Valley*, 216 Ariz. at 465, ¶ 11, 167 P.3d at 722. Begay's only medical witness, Harding, was unfamiliar with the original injury and therefore

was unable to opine as to whether Begay's current condition reflected any change or was attributable to the industrial injury. As a result, viewing the evidence in the light most favorable to sustaining the award, we conclude the ALJ correctly decided that Begay failed to meet his burden and did not err in denying the petition to reopen.[1]

¶11 Begay also contends that the May 16, 2003 Decision Upon Hearing finding his condition medically stationary was wrongly decided. "Issue preclusion bars relitigation of an issue if the issue was previously litigated, determined, and necessary to final judgment." *Special Fund Div. v. Tabor*, 201 Ariz. 89, 92, ¶ 20, 32 P.3d 14, 17 (App. 2001). Unless disputed issues of fact exist as to its applicability, issue preclusion is an issue of law. *Id.* The issue of whether Begay's condition was medically stationary was litigated in his 2003 hearing and was decided against him, and Begay did not appeal the award. Therefore, Begay is precluded from relitigating the findings of

[1] Begay submitted with his opening brief additional evidence he contends shows the existence of a "new, additional or previously undiscovered" condition. On appeal, however, we review only the evidence that was before the ALJ, and do not consider new evidence. *See Epstein v. Indus. Comm'n*, 154 Ariz. 189, 195, 741 P.2d 322, 328 (App. 1987). Review of administrative awards is restricted to the record. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 15, 41 P.3d 640, 643 (App. 2002).

the 2003 Decision Upon Review. *See Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 107, ¶ 23, 41 P.3d 640, 645 (App. 2002).

¶12 Finally, Begay argues on appeal that the ALJ improperly excluded physicians who could have testified on his behalf. The record does not show that the ALJ excluded any physicians from testifying. To procure a subpoena for a medical expert witness, a claimant must file a written request with the ALJ at least 20 days before the first scheduled hearing. Ariz. Admin. Code section R20-5-141(A)(2); *see also Fidelity & Guar. Ins. Co. v. Indus. Comm'n*, 129 Ariz. 342, 346, 631 P.2d 124, 128 (App. 1981) ("In order to assure the presence of a medical witness for testimony, a party desiring the issuance of a subpoena must make the request for a subpoena in writing to the administrative law judge . . . .").

¶13 Begay submitted to the ALJ a letter listing "the names of witnesses that I would like to testify on my behalf." The letter listed four medical professionals, one of whom was said to be a registered nurse practitioner, and two of whom were said to be medical doctors. No designation was listed for the third individual. Harding was not on the list, and Begay did not request the ALJ to issue a subpoena to any of the four individuals. At the first hearing date, the ALJ asked Begay for the name of a doctor that could testify that Begay had a new or

previously undiscovered condition. Begay named Harding and Craig Fujii, a nurse practitioner who had treated Begay, but stated that Fujii had left the Indian Health Service, where he had treated Begay, and that he did not know how to contact him. The ALJ told Begay he would set an additional hearing date for Harding's testimony. During a lengthy discussion between Begay and the ALJ regarding what medical witnesses Begay could provide, he repeatedly named only Harding and Fujii. At no point during the proceedings did Begay mention the additional witnesses appearing on his list or ask that they be subpoenaed to testify on his behalf.

¶14 Arguments not raised before the ALJ generally are waived on appeal. *See T.W.M. Custom Framing v. Indus. Comm'n*, 198 Ariz. 41, 44, ¶ 4, 6 P.3d 745, 748 (App. 2000); *Kessen v. Stewart*, 195 Ariz. 488, 493, ¶ 19, 990 P.2d 689, 694 (App. 1999). Though Begay submitted a list of witnesses to the ALJ, he mentioned only Harding and Fujii in response to the ALJ's queries regarding his medical witnesses, and at no point during the hearing or in his request for review did he mention the additional witnesses or complain that they did not testify. Therefore, because the issue of additional witnesses was not raised before the ALJ, it is waived on appeal. *T.W.M. Custom Framing*, 198 Ariz. at 44, ¶ 4, 6 P.3d at 748.

CONCLUSION

¶15 Because the record supports the ALJ's decision, we affirm.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Presiding Judge

/s/
JON W. THOMPSON, Judge