DIVISION ONE
FILED: 02/07/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NEGASH BALCHA, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, SHUTTLEPORT FUTURO TRANSPORTATION, Respondent Employer, SCF ARIZONA, Respondent Carrier.	)	No. 1 CA-IC 11-0030 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action--Industrial Commission

ICA Claim No. 20080-110209

Carrier Claim No.0745775

The Honorable Margaret A. Fraser, Administrative Law Judge

AFFIRMED

Negash Balcha
Appellant

Peoria

Andrew F. Wade, Chief Counsel
Industrial Commission of Arizona Phoenix

James B. Stabler, Chief Counsel State Compensation Fund Phoenix
By Philip D. Garrow, Deputy Chief Counsel
Attorneys for Respondent Employer and Respondent Carrier

O R O Z C O, Judge

¶1 Petitioner seeks special action review of an Industrial Commission of Arizona (ICA) Decision upon Review affirming the ICA's Decision upon Hearing and Findings and Award (Decision upon Hearing). Appellant argues he was denied due process and equal protection because he was not appointed a translator for the proceedings and was deprived of the opportunity to cross-examine a witness. He also appears to argue that the Decision upon Hearing was not supported by the evidence. For the reasons set forth herein, we affirm the Decision upon Review.

PROCEDURAL AND FACTUAL HISTORY

¶2 On December 19, 2007, Petitioner was injured while working for Respondent Employer ShuttlePort Futuro Transportation. Respondent Carrier SCF Arizona (SCF) accepted Petitioner's workers' compensation claim, and Petitioner underwent treatment for his injury. SCF subsequently closed Petitioner's claim effective July 10, 2008, after medical reports found his condition to be medically stationary with no permanent disability.

¶3 On September 20, 2009, Petitioner filed a petition to reopen his claim, which SCF denied on October 19, 2009. Petitioner then filed a request for hearing with the ICA to review his petition to reopen. The ICA proceeding took place over the course of two days of hearings, with another hearing scheduled for a third day.

¶4 During the first hearing, on October 26, 2010, Petitioner testified about his condition and the medical treatment he received from Evan L., M.D. (Dr. L.). At the second hearing, on January 19, 2011, Dr. L. testified as Petitioner's medical expert witness that he treated Petitioner for an injury, which he originally understood to be the result of an automobile accident. He testified that he was initially unaware that Petitioner suffered an injury from an industrial accident and noted some confusion and disparity in Petitioner's claims about the cause of the injury. As a result, although Dr. L. testified that Petitioner suffered various injuries, he stated that he had "no basis to say that [the injury for which he treated Petitioner] is related to his work comp injury at all."

¶5 The third hearing was scheduled for January 25, 2011, at which David B., M.D. (Dr. B.) was to testify. Dr. B. was SCF's medical expert and authored an Independent Medical Examiner's report, which SCF entered into evidence. In the

report, Dr. B expressed the opinion that Petitioner's condition was the result of an age-related degenerative disease that was not causally related to Petitioner's industrial injury. At the conclusion of the January 19 hearing, SCF moved to waive Dr. B.'s testimony at the third hearing scheduled for January 25, unless Petitioner wanted to cross-examine Dr. B. Petitioner did not object to the motion or indicate he intended to cross-examine Dr. B., and the Administrative Law Judge (ALJ) granted the motion and cancelled the January 25 hearing, noting that Petitioner had not filed a request for a subpoena to cross-examine Dr. B.

¶6 On February 11, 2011, the ALJ issued the Decision upon Hearing, in which she found that Petitioner had not met his burden of proof to have his claim reopened because he had not shown a new, additional, or previously undiscovered condition causally related to his industrial injury. After Petitioner filed a request for review, the ALJ issued the Decision upon Review, which affirmed the Decision upon Hearing.

¶7 Petitioner filed a timely petition for special action review. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.2 (2003) and 23-951.A (1995) and Rule 10 of the Arizona Rules of Procedure for Special Actions.

DISCUSSION

¶8 We note initially that Petitioner's opening brief does not comply with Rule 13(a) of the Arizona Rules of Civil Appellate Procedure (ARCAP). *See* Ariz. R.P. Spec. Act. 10 (k). Most importantly, the brief contains virtually no legal argument or citation to legal authority. *See* ARCAP 13(a)(6) (appellant's brief shall contain arguments "with citations to the authorities, statutes and parts of the record relied on"). *See also, e.g.*, *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491 n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellate courts will not consider bald assertions offered without elaboration or citation to legal authority).

¶9 Although Petitioner is a non-lawyer representing himself, he is held to the same standards as a qualified attorney. *See, e.g.*, *Old Pueblo Plastic Surgery, P.C v. Fields,* 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985). Nevertheless, because we prefer to decide cases on the merits, in the exercise of our discretion, we will attempt to discern and address the substance of Petitioner's arguments. *See Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966).

¶10 However, to the extent Petitioner's argument is essentially a request for this court to re-weigh the evidence it is not an appropriate argument on appeal. *See, e.g.*, *Johnson-Manley Lumber v. Indus. Comm'n,* 159 Ariz. 10, 13, 764 P.2d 745,

748 (App. 1988) (it is the duty of the ALJ to weigh the evidence, and appellate courts will not reject the ALJ's factual determinations unless they are wholly unreasonable); *Hurd v. Hurd*, 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009) ("Our duty on review does not include re-weighing conflicting evidence or redetermining the preponderance of the evidence.").

Due Process and Equal Protection

¶11 Although the ICA is an administrative agency, "due process requires that all parties appearing before it receive a fair and impartial decision." *Evertsen v. Indus. Comm'n*, 117 Ariz. 378, 383, 573 P.2d 69, 74 (App. 1977) (citations omitted). When a party challenges state action on grounds of substantive due process, courts "engage in a 'substantive review' of the compatibility of the questioned law with the Constitution." *State v. Watson*, 198 Ariz. 48, 51, ¶ 6, 6 P.3d 752, 755 (App. 2000). In contrast, "procedural due process requires an adequate opportunity to fully present factual and legal claims." *Avila v. Indus. Comm'n*, 219 Ariz. 56, 58 n.2, ¶ 7, 193 P.3d 310, 312 n.2 (App. 2008) (citation omitted).

¶12 Petitioner first claims he was denied due process and equal protection because he was not provided a translator at the hearing. For purposes of this decision, we assume without deciding that Petitioner's due process or equal protection

rights would entitle him to a translator if he was unable to speak or understand English at the hearing.[1]

¶13 Petitioner's argument, however, is not supported by the record. His contention that he was incapable of adequately presenting his case in English is contradicted by his demonstrated ability to effectively participate in the hearing, in which he was able to engage in dialogue with the ALJ, question a witness and testify. Furthermore, Petitioner failed to request an interpreter or otherwise indicate that he was unable to understand English. Importantly, he failed to designate that he needed an interpreter on the form in which he requested a hearing. The form includes a section specifically addressing whether an applicant requires an interpreter.

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[1] Under Arizona law, it is unclear whether non-English-speaking claimants are entitled to a translator during workers' compensation hearings before the ICA. Although the constitutional rights to due process and equal protection do require that a criminal defendant be provided a translator for criminal proceedings, *see, e.g.*, *State v. Natividad,* 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974), there is no applicable case law in Arizona regarding whether claimants before the ICA are entitled to the same rights and protections.

Other courts have reached inconsistent results about whether to recognize a due process or equal protection right to an interpreter in the context of civil economic proceedings. *Compare, e.g., Kustura v. Dep't of Labor and Indus.*, 175 P.3d 1117, 1130-34 (Wash. App. 2008) (refusing to recognize a due process or equal protection right to a translator in workers' compensation hearings), *with Bethleham Area Sch. Dist. v. Zhou*, 976 A.2d 1284, 1286 (Pa. Commw. 2009) (the constitutionally protected rights afforded by due process apply to administrative proceedings and include, in certain circumstances, the right to assistance from an interpreter).

Petitioner left this space blank. Accordingly, we find that the ALJ did not abuse her discretion by not *sua sponte* appointing an interpreter, and Petitioner was not denied due process or equal protection for this reason.

¶14 Petitioner next claims he was deprived of due process when he was denied the opportunity to cross-examine SCF's medical expert, Dr. B., because the ALJ cancelled the hearing at which Dr. B. was to testify. Petitioner claims that because SCF entered into evidence a medical report authored by Dr. B., he should have been allowed the opportunity to cross-examine the witness.

¶15 In hearings before the ICA, parties may enter medical reports into evidence. Ariz. Admin. Code (A.A.C.) R20-5-155. "As part of the statutory mandate of 'substantial justice,' however, Arizona courts have carefully guarded a party's right to cross-examine the author of any document that the ALJ considers as substantive evidence." *Coulter v. Indus. Comm'n*, 198 Ariz. 384, 387, ¶ 13, 10 P.3d 642, 645 (App. 2000). Accordingly, a claimant is entitled to cross-examine the author of a medical report entered into evidence by the respondent. *Scheytt v. Indus. Comm'n*, 134 Ariz. 25, 28, 653 P.2d 375, 378 (App. 1982).

¶16 Nevertheless, under the ICA's rules, a party "seeking to cross-examine the author of any medical or non-medical report

filed into evidence shall request a subpoena under [A.A.C.] R20-5-141."[2] A.A.C. R20-5-155.G. The right to cross-examine the author of a medical report can be waived if the party wishing to cross-examine the witness fails to request a subpoena. A.A.C. R20-5-155.H ("If a party fails to timely request a subpoena under this Section and R20-5-141, the party waives the right to cross-examine the author of any medical or non-medical report filed into evidence . . . ."); *A.J. Bayless Markets, Inc. v. Indus. Comm'n*, 134 Ariz. 243, 245-46, 655 P.2d 363, 365-66 (App. 1982).

¶17 In this case, SCF requested a subpoena for Dr. B.'s testimony on June 18, 2010 and entered Dr. B.'s medical report into evidence on December 20, 2010. Dr. B.'s testimony was scheduled to be taken at a hearing on January 25, 2011. During the January 19 hearing, however, SCF moved on the record to waive the testimony unless Petitioner wanted to cross-examine Dr. B. Petitioner did not object to the motion to waive the testimony, and the ALJ granted the motion, noting that

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[2] A.A.C. R20-5-141.A.2 provides:

> A party may request a presiding administrative law judge to issue a subpoena to compel the appearance of an expert medical witness by filing a written request with the presiding administrative law judge at least 20 days before the date of the first scheduled hearing.

Petitioner had not previously requested a subpoena to compel Dr. B.'s appearance.[3]

¶18 If Petitioner desired to exercise his right to cross-examine Dr. B., he had a duty to notify the ALJ and request a subpoena 20 days before the hearing. A.A.C. R20-5-141.A.2, R20-5-155.G. In order to comply with A.A.C. R20-5-141.A.2 and R20-5-155.G, Petitioner should have requested a subpoena by January 5, 2011. Petitioner neither requested a subpoena to cross-examine Dr. B. by the January 5 deadline nor made that request orally at the January 19 hearing. Also, he did not object to SCF's motion to waive Dr. B.'s testimony. Thus, Petitioner waived his right to cross-examine Dr. B. by failing to request a subpoena or notify the ALJ of his desire to assert the right. A.A.C. R20-5-155.H; *A.J. Bayless Markets*, 134 Ariz. at 245, 655 P.2d at 365 ("A party may not idly stand by, wait for the administrative law judge's decision and then complain that it has been denied its right to cross-examination.").

The Decision was supported by the evidence

¶19 Finally, Petitioner contends that the Decision upon Hearing was not supported by the evidence and the medical

[3] Petitioner appears to also argue that he wanted to examine Dr. L. at the January 25 hearing. Dr. L. testified at the January 19 hearing, however, and was not scheduled to appear at the January 25 hearing. Thus, Petitioner would not have been able to examine Dr. L. at the January 25 hearing in any event. Furthermore, Petitioner did in fact examine Dr. L., his own witness, at the January 19 hearing.

reports and testimony were inaccurate. As the claimant seeking to reopen his claim, Petitioner had "the burden of showing a new, additional, or previously undiscovered temporary or permanent condition causally related to the industrial injury." *Hopkins v. Indus. Comm'n*, 176 Ariz. 173, 176, 859 P.2d 796, 799 (App. 1993); *see also* A.R.S. § 23-1061.H (2011).[4] Unless the causal relationship was clearly apparent to a layman, Petitioner had the burden of establishing the relationship through expert medical testimony. *Makinson v. Indus. Comm'n*, 134 Ariz. 246, 248, 655 P.2d 366, 368 (App. 1982).

¶20 When reviewing ICA decisions, we defer to the ALJ's factual findings but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). The ALJ determines the credibility of witnesses, *Royal Globe Ins. Co. v. Indus. Comm'n,* 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973), and resolves conflicts in the evidence. *Johnson-Manley Lumber,* 159 Ariz. at 13, 764 P.2d at 748. We consider the evidence in the light most favorable to upholding the ALJ's decision and will not disturb the decision unless it is wholly unreasonable. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

[4] We cite the current version of the applicable statute when no revisions material to this decision have since occurred.

¶21 Here, in support of his petition to reopen his claim, Petitioner presented medical expert testimony from Dr. L. However, Dr. L. was unable to express any opinion as to whether any injury for which he treated Petitioner was causally related to the industrial accident. In addition, Dr. B. expressly opined that Petitioner's injury was not causally related to the industrial accident. Given this evidence, the ALJ found that Petitioner had not met his burden of establishing a causal relation between a new, additional, or previously undiscovered condition and the industrial injury. This finding is clearly supported by the record, and we will not disturb it.

CONCLUSION

¶22 For the reasons set forth above, we affirm the ICA's Decision upon Review.

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PATRICIA A. OROZCO, Judge

CONCURRING:

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DIANE M. JOHNSEN, Presiding Judge

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MICHAEL J. BROWN, Judge