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.

FILED BY CLERK
NOV -9 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSEPH R. TAYLOR, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DOLLAR GENERAL MISSION RDG, Respondent Employer, NEW HAMPSHIRE INSURANCE CO./ AVIZENT, Respondent Insurer.	2 CA-IC 2011-0006 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20100900411

Insurer No. WC020342242

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

Goering, Roberts, Rubin, Brogna,
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E C K E R S T R O M, Presiding Judge.

¶1 In this statutory special action, petitioner employee Joseph Taylor challenges the ruling of the administrative law judge (ALJ) finding his leg injury was not compensable. Taylor raises several arguments on review to this court. Principally, he challenges the medical testimony that his peroneal nerve injury was not caused by his employment, and he maintains the unexplained-injury and positional-risk doctrines should have created the presumption that his injury was compensable. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 On review, we consider the evidence in the light most favorable to upholding the award, *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 16, 41 P.3d 640, 643 (App. 2002), and we deferentially review all factual findings made by the ALJ. *PFS v. Indus. Comm'n*, 191 Ariz. 274, 277, 955 P.2d 30, 33 (App. 1997).

¶3 On March 25, 2010, Taylor fell backwards at work while moving a freight container across the floor. Some cases of oil and gallon-bottles of cleaning products fell

on him during the accident, "hitting [him] along the sides of [his] body." Meanwhile, Taylor's back and shoulders collided with another freight container.

¶4 He continued working that day but subsequently sought medical treatment for neck and back pain, along with several other symptoms. He did not report that anything had struck the area around his knee during the accident, nor did he complain of any pain there. His claim was accepted for benefits in April 2010. Over a month later, Taylor's treating neurosurgeon, Dr. Timothy Putty, diagnosed him with a blockage of the right peroneal nerve, among other conditions. After being denied compensation for the surgery to treat the nerve injury, Taylor filed a request for a hearing pursuant to A.R.S §§ 23-941 and 23-1061(J).

¶5 At the hearing, the medical experts agreed that Taylor had a right peroneal nerve blockage, but their opinions differed as to its cause. Both Dr. Putty and Dr. Marjorie Eskay-Auerbach, a board-certified orthopedic physician, acknowledged that Taylor's condition could have been caused either by chronic pressure, as from crossing one's legs while sitting, or by trauma to the area from a direct blow. Dr. Putty testified he believed the condition was related to the accident at work, but Dr. Eskay-Auerbach believed the condition more likely had been caused by something such as leg crossing, which she described as "[t]he most common cause" of the injury.

¶6 The ALJ found there was a conflict in the medical testimony but credited the opinion of Dr. Eskay-Auerbach as being more likely correct, given the absence of any medical reports or testimony about trauma to the right knee area. This decision was

affirmed after Taylor filed a request for review. We have jurisdiction to review the ALJ's ruling pursuant to A.R.S. § 23-951 and Rule 10, Ariz. R. P. Spec. Actions.

Discussion

Expert Testimony

¶7 Taylor first maintains "[t]he ALJ erred in adopting the testimony of Dr. Eskay-Auerbach." We disagree. "To prove compensability, the claimant must establish all the elements of his claim," including that he has "suffered an injury and that the injury was causally related to his employment." *W. Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 527, 647 P.2d 657, 658 (App. 1982). "The burden is on the claimant . . . to show by a preponderance of the evidence al[l] the elements of his claim, and the carrier does not have to disprove it." *Lawler v. Indus. Comm'n*, 24 Ariz. App. 282, 284, 537 P.2d 1340, 1342 (1975). The ALJ resolves any conflict in medical testimony. *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985). We will not disturb the ALJ's resolution "unless it is wholly unreasonable." *Id.*

¶8 Here, both medical experts acknowledged Taylor's peroneal nerve injury could have been caused by at least two mechanisms, one of which was not related to his employment. Although Dr. Putty opined the injury likely was caused by trauma to the knee area, he also recognized that Taylor gave no "history of any trauma to the area . . . as a result of his fall at work" and he never indicated "that anything [had] struck him" there. Taylor's own testimony at the hearing likewise failed to mention any trauma to the knee area that could account for the peroneal nerve injury. In light of this history, Dr. Eskay-Auerbach concluded "something other than th[e] traumatic episode" at work

caused the injury, and she estimated the "more likely" cause was something such as leg crossing. The ALJ accepted this opinion, in part, because she "was persuaded by [Taylor]'s description of the injury at [the] hearing[,] which did not include any mention of a blow to the right knee or fibular head."

¶9 Although it is possible that Taylor failed to observe or accurately describe what happened during his accident at work, the ALJ essentially found that he had accurately reported the accident, and no trauma to the knee area—and thus no peroneal nerve injury—occurred at that time. To the extent this was a factual finding, it is supported by the record and will not be disturbed. *See Karber/Interstate Air v. Indus. Comm'n*, 180 Ariz. 411, 416, 885 P.2d 99, 104 (App. 1994). We conclude there was a legally sufficient conflict in the evidence regarding the cause of Taylor's nerve injury. *See Rosarita Mexican Foods v. Indus. Comm'n*, 199 Ariz. 532, ¶ 10, 19 P.3d 1248, 1251 (App. 2001). And because the ALJ's resolution of that conflict is a reasonable one, we are bound to accept it. *See Stainless Specialty Mfg. Co.*, 144 Ariz. at 19, 695 P.2d at 268.

¶10 Taylor nonetheless contends Dr. Eskay-Auerbach's testimony about causation was "equivocal" and thus "incapable of supporting a valid award." We reject this argument. Medical testimony is equivocal when it is subject to more than one interpretation or when the expert avoids committing herself to a particular opinion. *Rosarita Mexican Foods*, 199 Ariz. 532, ¶ 13, 19 P.3d at 1252. Testimony is not equivocal when medical experts state they are uncertain about the exact cause of an injury but nevertheless offer opposing opinions on causation. *See, e.g., Harbor Ins. Co. v. Indus. Comm'n*, 25 Ariz. App. 610, 612-13, 545 P.2d 458, 460-61 (1976).

¶11 Here, Dr. Eskay-Auerbach unequivocally testified that something other than Taylor's work accident was more likely the cause of the injury to his peroneal nerve. She did not avoid committing herself to this position, nor did she retreat from or contradict it. *See State Compensation Fund v. Indus. Comm'n*, 24 Ariz. App. 31, 36, 535 P.2d 623, 628 (1975). Her conclusion that Taylor's injury was unlikely to have been caused by the accident at work was, contrary to Taylor's suggestion, consistent with her more general testimony that this type of injury may have either traumatic or non-traumatic causes. The ALJ therefore was entitled to consider Dr. Eskay-Auerbach's opinion and weigh its value in light of the circumstances of the case. *See id.* at 37, 535 P.2d at 629. Moreover, "[i]t must be remembered that the burden of proof is on the applicant to show affirmatively all the material elements necessary to sustain an award, and that it is unnecessary for the Commission to disprove an asserted claim." *Helmericks v. AiResearch Mfg. Co. of Ariz.*, 88 Ariz. 413, 416, 357 P.2d 152, 154 (1960).

¶12 Taylor also maintains Dr. Eskay-Auerbach's testimony was "legally insufficient and foundationally deficient." Specifically, he alleges Dr. Eskay-Auerbach possessed incomplete medical records, "selectively edited" those she did receive, failed to examine him for the condition at issue, and lacked "critical information" regarding his condition before the accident and after his corrective surgery, information which he claims "she had indicated in her supplemental report . . . would cause her to change her opinion." Although Taylor has cited numerous legal authorities in this section of his opening brief, he has failed to develop these arguments and provide supporting record citations for them as required by Rule 13(a)(6), Ariz. R. Civ. App. P. Consequently, he

has waived the issues on appeal. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (failure to develop argument in accordance with rules of appellate procedure waives issue); *Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P.3d 101, 108 n.5 (App. 2006) (same).

¶13 Furthermore, even if these arguments were not waived, we would still uphold the award. A petitioner in a special action, like an appellant, carries the burden of showing error entitling him to relief. *See Guirey, Srnka & Arnold, Architects v. City of Phx.*, 9 Ariz. App. 70, 71, 449 P.2d 306, 307 (1969). Taylor has not persuaded this court that knowledge of his extensive medical records preceding the accident and following his surgery was a foundational prerequisite to forming an opinion as to the likely cause of his peroneal nerve injury. Nor has he convinced us that Dr. Eskay-Auerbach's opinion, which was based on her training, experience, and examination of Taylor, together with Taylor's own reports of the work accident, was "legally insufficient." In sum, he has not shown an error in the ALJ's causation determination that would entitle him to relief.

Evidentiary Presumptions

¶14 Taylor next argues the positional-risk or unexplained-injury doctrines should have applied here to create the presumption that his peroneal nerve injury was compensable. We disagree.

¶15 The unexplained-injury doctrine, which this court first recognized in *Hypl v. Industrial Commission*, 210 Ariz. 381, ¶ 20, 111 P.3d 423, 429 (App. 2005), creates a presumption that an injury arises out of and in the course of employment when the claimant shows the injury occurred within the time and space limits of employment but

the injury itself has rendered the claimant unable to testify about how it happened. In effect, *Hypl* extended the unexplained-death presumption to cases involving nonfatal injuries that function as the equivalent of death insofar as they destroy the claimant's ability to tell the story of the injury, such as a skull fracture that results in a coma and amnesia. *Id.* ¶¶ 3, 13-14, 17, 21. Here, there is no evidence Taylor's injuries impaired his consciousness, memory, or ability to communicate. In addition, Taylor failed to demonstrate by a preponderance of the evidence that his peroneal nerve injury occurred at work. *See id.* ¶ 20. Thus, the doctrine does not apply.

¶16 The positional-risk doctrine articulated in *Circle K Store No. 1131 v. Industrial Commission*, 165 Ariz. 91, 796 P.2d 893 (1990), is likewise inapplicable. That doctrine concerns legal rather than medical causation. Legal causation focuses on whether "the accident arose out of and in the course of employment," whereas medical causation focuses on whether "the industrial accident caused the injury." *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 8, 90 P.3d 211, 213-14 (App. 2004), *aff'd*, 211 Ariz. 67, 117 P.3d 786 (2005). Normally, a claimant's proof of legal causation requires a showing that the injury resulted from "a necessary risk of the . . . employment, or a necessary risk or danger inherent in the nature of that employment." *Grammatico*, 211 Ariz. 67, ¶ 19, 117 P.3d at 790. In *Circle K*, where "[t]he parties stipulated that no medical testimony was necessary to establish that the fall caused claimant's injuries," 165 Ariz. at 92, 796 P.2d at 894, our supreme court held a claimant is entitled to a presumption that an injury from an unexplained fall "arose out of . . . employment" if the fall occurred "in the course of" employment, thus making "neutral" injuries compensable and relieving claimants of

any burden of showing the fall was caused by a distinctly work-related risk. *Id.* at 94, 95-96 & 95 n.6, 796 P.2d at 896, 897-98 & 898 n.6.

¶17 Here, Taylor did not establish his fall at work caused his peroneal nerve injury. Furthermore, the cause of Taylor's fall was not "unexplained" or "neutral," as in *Circle K*, *id.* at 96, 796 P.2d at 898; it was undisputedly employment related. The ALJ accepted Taylor's account that he fell at work while moving a freight container due to an uncovered drain in the floor. Medical causation, rather than legal causation, was disputed in this case. The positional-risk doctrine, therefore, does not apply here.

Procedural Arguments

¶18 Taylor raises a pair of additional procedural arguments. Specifically, he claims that in light of the "unexpected testimony by Dr. Eskay-Auerbach," the ALJ either should have considered the post-hearing evidence he submitted or allowed another hearing to address it. Taylor cites R20-5-156, Ariz. Admin. Code, to support this contention. That rule allows a continuance of a hearing when a party makes a request "at the conclusion of a hearing" and specifies both the evidence he or she wishes to present and the reason it could not have been produced earlier. Ariz. Admin. Code R20-5-156(B)(1), (3). Here, in the absence of a timely request to continue the hearing, the ALJ lacked authority to receive evidence after the hearing, which had terminated without any objection from Taylor.

¶19 Taylor also argues the ALJ erred in failing to make findings regarding the compensability "of his low back condition, headaches and dizziness." Taylor's request for a hearing specified its purpose was to address his peroneal nerve surgery, *see* Ariz.

Admin. Code R20-5-135(B)(2); the ALJ confirmed this was the scope of the hearing at its outset; and she expressly found upon review that "the parties agreed . . . the issue litigated was to be the causal connection of the peroneal nerve condition to the industrial injury." Nevertheless, Taylor argues the parties' presentation of evidence on the other issues demonstrated an agreement to litigate them.[1]

¶20 In support of his argument, Taylor cites *Industrial Indemnity Co. v. Industrial Commission*, 162 Ariz. 503, 508, 784 P.2d 709, 714 (App. 1989), and *Arellano v. Industrial Commission*, 25 Ariz. App. 598, 599-600, 545 P.2d 446, 447-48 (1976). Yet these cases merely illustrate that an ALJ's ruling on other issues relating to a claim may, at times, be permitted. We agree with respondents that simply presenting evidence does not require an ALJ to rule on issues potentially presented by the evidence. *Cf. Magma Copper Co. v. Indus. Comm'n*, 139 Ariz. 38, 46-47, 676 P.2d 1096, 1104-05 (1983) ("We do not believe that the admission of evidence relevant to an issue which has been expressly raised can be taken as raising a different issue which has been impliedly excluded by an express limitation of the issues to be heard. Something more definite is required."). Accordingly, we decline Taylor's invitation to reverse the ALJ's award based on its refusal to rule upon issues not squarely before it.

[1]Taylor also claims he "made clear" his intention to litigate other issues at an informal conference on October 15, 2010, but he has provided no record citation supporting this claim in compliance with Rule 13(a)(6), Ariz. R. Civ. App. P. We therefore disregard it.

Disposition

¶21 For the foregoing reasons, the award is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge