

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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KENNETH HENDERSON, *Plaintiff/Appellant*,

*v.*

SNOW CARPIO & WEEKLEY PLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0222  
FILED 1-25-2018

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Appeal from the Superior Court in Maricopa County  
No. LC2016-000473-001  
The Honorable Patricia A. Starr, Judge

**AFFIRMED**

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COUNSEL

Kenneth Henderson, Phoenix  
*Plaintiff/Appellant*

Snow, Carpio & Weekley, PLLC, Phoenix  
By Brian A. Weekley  
*Counsel for Defendant/Appellee Snow Carpio & Weekley*

Broening Oberg Woods & Wilson, PC, Phoenix  
By Jerry T. Collen, Kevin R. Myer  
*Counsel for Defendant/Appellee Kirk A. Barberich*

**MEMORANDUM DECISION**

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Paul J. McMurdie joined.

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**CAMPBELL**, Judge:

¶1 Plaintiff/Appellant Kenneth Henderson appeals the superior court's order dismissing his complaint for lack of subject matter jurisdiction. For the following reasons, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 In July 2016, Henderson filed a request for a hearing with the Industrial Commission of Arizona ("ICA"), claiming his employer and its insurance carrier had failed to pay him full benefits for an injury he suffered while on the job.<sup>1</sup> On August 15, 2016, Henderson filed a notice with the ICA that he had retained the law firm Snow, Carpio & Weekley, PLLC to represent him with respect to his claim. Sixteen days later, on August 31, 2016, Weekley sent a letter to the ICA withdrawing as Henderson's counsel. The administrative law judge ("ALJ") allowed the withdrawal over Henderson's objection, and, on October 26, 2016, denied Henderson's motion for review of the order allowing withdrawal.

¶3 On December 5, 2016, Henderson filed a superior court action seeking judicial review of the ALJ's October 26, 2016 order. He named as defendants Snow, Carpio & Weekley, PLC and Kirk A. Barberich, an attorney who represented Henderson's employer and insurance carrier in the ICA proceedings. The superior court dismissed the action for lack of subject matter jurisdiction and awarded Barberich attorney fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-349.

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<sup>1</sup> Although this court typically confines its review to the record before the superior court, *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990), the parties all refer to the Industrial Commission proceedings, and appellant did not object to appellee Kirk A. Barberich's inclusion of the documents filed with the Industrial Commission in his appendix. We refer to those records only for purposes of the factual background.

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¶4 Henderson timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶5 Henderson challenges the superior court’s dismissal of his request for judicial review and its award of attorney fees to Barberich.

I. Jurisdiction

¶6 Subject matter jurisdiction is the court’s power to hear and determine a controversy—a question of law that we review de novo along with issues of statutory interpretation and application. *Buehler v. Retzer ex rel. Indus. Comm’n*, 227 Ariz. 520, 521, ¶ 4 (App. 2011).

¶7 Henderson’s request for judicial review of the ALJ’s October 26, 2016 ruling alleged the superior court had jurisdiction pursuant to A.R.S. § 12-904(A), which directs a party appealing a final administrative decision to file his or her notice of appeal with the superior court. *See Johnson v. Ariz. Registrar of Contractors*, 242 Ariz. 409, 412, ¶ 8 (App. 2017). However, the Arizona statutory scheme governing judicial review of an administrative decision (“JRADA”), A.R.S. §§ 12-901 to -914, does not apply “if the act creating or conferring power on an agency or a separate act provides for judicial review of the agency decisions and prescribes a definite procedure for the review.” A.R.S. § 12-902(A)(1). Because the statutes granting the ICA authority over workers’ compensation matters establish the procedure a party must follow to obtain review of a final ICA decision, *see* A.R.S. §§ 23-943(H), -951, JRADA did not apply to Henderson’s case. A.R.S. § 12-902(A)(1).<sup>2</sup> Accordingly, the superior court lacked jurisdiction over Henderson’s complaint.<sup>3</sup>

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<sup>2</sup> Section 23-946(A) does allow a person dissatisfied with an ICA order to commence an action in the superior court within 30 days to ask the court to set aside, vacate, or amend the order. This provision does not apply in this case, however, as Henderson was attempting to challenge a procedural ruling relative to the processing of his compensation claim, which is excluded from the definition of “order” in Title 23. *See Buehler*, 227 Ariz. at 521-23, ¶¶ 7-15.

<sup>3</sup> Because we determine the superior court did not have subject matter jurisdiction, we do not address Henderson’s argument that he timely filed his complaint under A.R.S. § 12-904(A) or that the superior

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¶8 Further, we reject Henderson’s argument that the superior court erred by refusing to allow him to amend his complaint. Although Henderson waived that argument by failing to request leave to amend in the superior court, *Dube v. Likins*, 216 Ariz. 406, 420-21, ¶ 53 (App. 2007), the court was not required to permit him to amend his complaint because any attempted amendment could not have cured the jurisdiction defect, *Id.* at 415, ¶ 25; *Wigglesworth v. Mauldin*, 195 Ariz. 432, 439, ¶ 27 (App. 1999).

## II. Attorney Fees

¶9 Finally, Henderson challenges the superior court’s award of attorney fees to Barberich on the basis that the request was untimely.<sup>4</sup> This court reviews de novo the interpretation and application of the Arizona Rules of Civil Procedure. *Stafford v. Burns*, 241 Ariz. 474, 483, ¶ 35 (App. 2017).

¶10 Henderson filed his original Appeal for Judicial Review on December 5, 2016. Barberich moved to dismiss for lack of jurisdiction on January 6, 2017. Henderson opposed the motion to dismiss, but also filed a Complaint for Judicial Review of Administrative Decision on January 19, 2017. Barberich then filed a second motion to dismiss the January 19, 2017 complaint, asserting the same jurisdictional defect as the first motion to dismiss and requesting an award of attorney fees pursuant to A.R.S. § 12-349. The superior court ruled that its decision to grant the first motion to dismiss rendered the second motion to dismiss moot, but allowed Barberich to file an application for attorney fees based on his request in the second motion. Henderson did not oppose Barberich’s application, and the court awarded him \$527 of the \$1,768 he requested in attorney fees.

¶11 Arizona Rule of Civil Procedure 54(g) requires a party to make a claim for attorney fees in the pleadings “or in a Rule 12 motion filed before the movant’s responsive pleading.” *See also Balestrieri v. Balestrieri*,

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court had an obligation pursuant to Arizona Rule of Civil Procedure 60(a) to investigate whether he timely filed his complaint.

<sup>4</sup> Henderson also states, without argument, that there was no underlying legal basis for the award. This court will not consider issues not developed on appeal. *Jones v. Burk*, 164 Ariz. 595, 597 (App. 1990) (“Issues not clearly raised and argued in a party’s appellate brief constitute waiver of error on review.”); *Phelps Dodge Corp. v. Ariz. Elec. Power Coop., Inc.*, 207 Ariz. 95, 122, ¶ 117 (App. 2004) (refusing to consider argument stated in appellate brief heading, but not further developed).

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232 Ariz. 25, 27, ¶ 8 (App. 2013). Barberich timely filed his request for attorney fees in his second motion to dismiss, which was a Rule 12 motion, Ariz. R. Civ. P. 12, filed before his responsive pleading. We therefore reject Henderson's argument that Barberich's fee request was improper because he did not file a pleading as Arizona Rule of Civil Procedure 7(a) defines that term. Henderson had notice of Barberich's request and an opportunity to respond to the application for fees. We find no error.

**CONCLUSION**

¶12 For the foregoing reasons, we affirm. We will award costs to appellants upon their compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA