IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/11/2010
PHILIP G. URRY, CLERK
BY: GH

ERIC S. VALERO, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, SPROUTS FARMERS MARKETS LLC*,**, Respondent Employer, SCF ARIZONA*, TRAVELERS PROPERTY CASUALTY CO. OF AMERICA**, Respondent Carrier.	)	1 CA-IC 09-0034 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim Nos. 20073-060406*, 20080-390177**

Carrier Nos. 0571493*, 127 CB CCV1591J**

Administrative Law Judge J. Matthew Powell

AFFIRMED

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In Propria Persona

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P O R T L E Y, Judge

¶1 Eric S. Valero ("Claimant") seeks special action review of an Industrial Commission of Arizona (the "Commission") consolidated decision upon hearing and findings and award for noncompensable claims, and the decision upon review. For the following reasons, we affirm the decisions.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶2 Claimant, a meat clerk formerly employed by Sprouts Farmers Markets, alleged that his "back was injured" on August 5, 2005, when a stack of meat boxes fell.[1] He filed a workers' compensation claim on October 24, 2007 (the "2005 claim"). Respondent SCF Arizona (the "2005 Carrier") issued a notice of claim status in January 2008, and denied the claim.

¶3 Claimant filed a second workers' compensation claim on February 1, 2008, and alleged that he "slipped and fell" and reinjured his back while working on July 16, 2007 (the "2007

[1] Claimant later testified that the accident occurred on September 5, 2005.

claim"). Respondent Travelers Property Casualty Company of America (the "2007 Carrier") issued a notice of claim status in February 2008, and denied the 2007 claim.

¶4 After Claimant protested the Carriers' notices, the claims were consolidated, and there was a formal hearing. On March 6, 2009, an Administrative Law Judge ("ALJ") found that Claimant "did not file his . . . 2005 injury claim within the time allowed by A.R.S. § 23-1061(A)," and he "did not forthwith report either the . . . 2005 injury or the . . . 2007 injury as required by A.R.S. § 23-908." He therefore deemed both claims "noncompensable" and denied Claimant benefits. The ALJ subsequently affirmed the decision on April 20, 2009.

¶5 Claimant timely filed this special action. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(B) (2003), 23-951(A) (1995), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶6 Initially, Claimant's opening brief does not comply with Arizona Rule of Civil Appellate Procedure 13(a). *See* Ariz. R.P. Spec. Act. 10(k) (stating that the Arizona Rules of Civil Appellate Procedure apply to special action review of Commission awards). The opening brief contains no table of citations, standard of review, question(s) for review, references to the record, statement of facts, and is devoid of any legal argument.

¶7 Claimant's failures could justify our summary refusal to consider his petition. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, 299, ¶ 28, 18 P.3d 85, 93 (App. 2000) ("[Appellant's] bald assertion is offered without elaboration or citation to any . . . legal authority. We will not consider it."); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 93, ¶ 50, 977 P.2d 807, 815 (App. 1998) ("This assertion is wholly without supporting argument or citation of authority, and accordingly we reject it."); *Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983) (holding that pro se litigants are "held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributed to a qualified member of the bar"). However, we prefer to resolve cases on their merits, *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984), and will review the Commission's decision.

¶8 In reviewing findings and awards of the Commission, we defer to an 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). We consider the evidence in a light most favorable to upholding the award, and "will affirm [the] Commission['s] decision if it is reasonably supported by the evidence." *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

¶9 Generally, we review only issues raised before the Commission as part of the hearing process or in the request for review. *Kessen v. Stewart*, 195 Ariz. 488, 493, ¶ 19, 990 P.2d 689, 694 (App. 1999). Here, the only issues raised and relied upon by the ALJ were whether the 2005 claim was filed within the one-year limitations period of A.R.S. § 23-1061(A) (Supp. 2009), and whether both the 2005 and 2007 accidents were "forthwith" reported to Sprouts as required by A.R.S. § 23-908(E) (Supp. 2009).[2] In his opening brief, however, Claimant concedes that he failed to file his 2005 claim within the one-year limitations period.[3] He contends, however, that the Commission's decision on

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[2] The relevant statutory provisions have not been amended after the date of Claimant's alleged injuries. Thus, we cite to the current versions of the statutes.

[3] The concession reflects a conclusion by the ALJ that is fully supported by the evidence. A workers' compensation claim must be filed by the employee "within one year after the injury occurred or the right thereto accrued." A.R.S. § 23-1061(A). The limitations period begins to run "when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that [he] has sustained a compensable injury." *Id.* In the decision upon hearing and findings and award, the ALJ "concluded that [Claimant] knew or should have know[n] of any injury that might have occurred as a result of the . . . 2005 incident soon after it happened" and "[a]t a minimum, he knew or should have know[n] and was already seeking medical care for symptoms he attributed to the alleged incident more than one year before he filed his claim on October 31, 2007." The ALJ also concluded that "[n]one of the recognized exceptions to A.R.S. § 23-1061(A) . . . are present in this instance."

The findings are reasonably supported by the evidence. Claimant's medical history indicates that he was examined as early as March 2006, and by September 2006, he had been evaluated by several physicians and a neurologist.

the 2007 claim was "unjust." We therefore review the factual findings and legal conclusions of the ALJ and determine whether the denial of Claimant's 2007 claim was legally proper and reasonably supported by the evidence.[4]

¶10 An employee who suffers an accident "shall forthwith report the accident and the injury resulting therefrom to the employer." A.R.S. § 23-908(E). If an employee fails to comply with this requirement, then "no compensation shall be paid for the injury claimed to have resulted from the accident." A.R.S. § 23-908(F). Here, the ALJ found that Claimant "did not notify [his] employer of the alleged incident of July 16, 2007 until February of 2008," and "concluded that [Claimant] failed to report [the 2007 injury][5] in a timely manner as required by A.R.S. § 23-908." The conclusions are legally proper and reasonably supported by the evidence.

Specifically, in August 2006, Claimant "underwent radiographs of the lumbosacral spine" that "showed an irregular anterior superior aspect of the L5 consistent with fracture," and on September 1, 2006, the neurologist, Dr. Dale Schultz, assessed Claimant with "right rotator cuff tear or impingement, possible L5 lumbar fracture, and migraine headaches." Based upon this evidence, the ALJ did not err in denying the 2005 claim.

[4] To the extent that Claimant might have raised alternative arguments in his appeal, they are waived for his failure to present them in his brief. *See Meiners v. Indus. Comm'n*, 213 Ariz. 536, 538 n.2, ¶ 8, 145 P.3d 633, 635 n.2 (App. 2006).

[5] The ALJ also concluded that Claimant failed to forthwith report his 2005 accident and injury. Because Claimant does not appear to challenge the denial of his 2005 claim, and because it was not timely filed with the Commission, we decline to review the ALJ's conclusion.

¶11 Although Claimant testified that his manager Adam Losurdo and other co-workers witnessed his fall, and that he reported his fall to store manager Gary Haarklau, the ALJ found that Claimant was "not a reliable witness or historian" due to inconsistencies in his testimony. *See Adams v. Indus. Comm'n*, 147 Ariz. 418, 421, 710 P.2d 1073, 1076 (App. 1985) (stating that "the administrative law judge's assessment of the credibility of witnesses is generally binding upon the reviewing court"). The ALJ therefore concluded that "[a]ll conflict in the evidence as to whether and when [Claimant] reported the alleged work injuries to his managers and other employer representatives [would be] resolved against [him] and in favor of the other testifying witnesses."

¶12 Mr. Losurdo was the meat manager on duty the day Claimant was allegedly injured in 2007. He testified that, although Claimant told him that he had fallen, Claimant "didn't want to report it" and "said he would be fine." Wanda Thompson, the safety manager for Sprouts at the time of the alleged 2007 injury, testified that Sprouts did not learn of the 2007 injury claim until February 5, 2008. Finally, Gary Haarklau, the Sprouts store manager at the time, testified that Claimant never reported a July 16, 2007 slip and fall injury, that no other person reported such an injury on his behalf, but, if someone had reported an incident, he would have filled out a report.

Given the evidence, the ALJ's findings are reasonably supported and we defer to them.

¶13 Although Claimant failed to "forthwith" report his 2007 accident and injury, the Commission may excuse a late report if a claimant proves that the delay was in no way prejudicial to the employer. *See Pac. Fruit Express v. Indus. Comm'n*, 153 Ariz. 210, 215, 735 P.2d 820, 825 (1987). This burden may be met by showing "that the claimant's injury was not aggravated by the employer's inability to provide early diagnosis and treatment, and, further, by showing that the employer was not hampered in making his investigation and preparing his case." *Id.* at 216, 735 P.2d at 826 (quoting *Magma Copper v. Indus. Comm'n*, 139 Ariz. 38, 43-44, 676 P.2d 1096, 1101-02 (1983)).

¶14 Here, the ALJ found that Claimant's "lengthy delay[] in reporting the alleged injur[y] to his employer was prejudicial to both the employer and the insurance carrier because it precluded them from taking reasonable steps [to] investigate and to mitigate or limit any injury by monitoring the medical care and changing or limiting applicant's work activities." The findings are reasonably supported by the evidence. Therefore, the Commission did not err in finding the 2007 claim "noncompensable."

CONCLUSION

¶15 For the foregoing reasons, we affirm the Commission's consolidated decision upon hearing and findings and award for noncompensable claims, and the decision upon review.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Judge

/s/
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MARGARET H. DOWNIE, Judge