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

DIVISION ONE
FILED: 06/24/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GREGORY D. FRANKLIN, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, MAGELLAN HEALTH SERVICES, Respondent Employer, TRAVELERS PROPERTY CASUALTY CO. OF AMERICA, Respondent Carrier.	1 CA-IC 09-0096 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20082-420258

Carrier Claim No. 127CBCCV5173T

Honorable J. Matthew Powell, Administrative Law Judge

AFFIRMED

Gregory D. Franklin — Phoenix
Petitioner *In Propria Persona*

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

Steven C. Lester PC Phoenix
By Steven C. Lester
Attorney for Respondent Employer and Carrier

B R O W N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review finding that respondent employee Gregory Franklin ("Claimant") did not sustain a compensable injury. For the following reasons, we affirm.

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 Arizona Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the factual findings of the administrative law judge ("ALJ") 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 ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). In addition, we will not reverse the ALJ's award unless it is "unsupportable by any

reasonable theory of the evidence[.]" *Wal-Mart v. Indus. Comm'n*, 183 Ariz. 145, 147, 901 P.2d 1175, 1177 (App. 1995).

BACKGROUND

¶3 Claimant was employed as a case manager for Magellan Health Services ("Magellan") starting in January 2008. On July 18, 2008, he was "written up" for failing to perform the essential functions of his position and he was given warnings regarding insubordination. He was placed on daily monitoring and directed to complete a minimum level of production. On July 29, 2008, Claimant notified a Magellan human resources employee that "typing [was] a barrier" for him and he needed an ergonomic evaluation. Following a visit with a physician on July 30, 2008, Claimant requested that he be relieved of daily monitoring and provided a note from the physician that suggested a limitation of his typing to two hours per day. An ergonomic evaluation of Claimant's office was conducted on July 31, 2008, resulting in some modifications to Claimant's keyboard, monitor, chair, and mouse. On August 7, 2008, Claimant met with a supervisor to discuss possible accommodations, and Claimant informed the supervisor he was not making a request for an accommodation under the Americans with Disabilities Act. Claimant was terminated as a Magellan employee on August 21, 2008. On August 25, 2008, Claimant filed a worker's report of

injury with the ICA, claiming that in July 2008 he experienced a work-related injury, which he described as "tendonitis/tendonopathy" and tender biceps. He reported that the injury was caused by his use of a keyboard, as management had mandated "extensive typing."

¶4 Following denial of his claim, Claimant filed a request for a hearing. Claimant testified that in July 2008 he began feeling pain in his neck, shoulders, arms, and back while performing his typing duties. Two physicians, Dr. Green, who specializes in pain management and physical rehabilitation, and Dr. Shapiro, an orthopedic surgeon, disagreed as to whether Claimant's employment with Magellan caused or contributed to his claimed injury. Based on the evidence presented, the ALJ found that Claimant did not sustain a compensable injury and thus was not entitled to benefits. The ALJ noted that Claimant was "not a reliable witness and historian," and concluded that Claimant's "work activities (including typing and any movement of office furniture) did not cause or contribute to the neck, shoulder, back and upper-extremity complaints for which [he] is now receiving medical treatment." He further concluded that Dr. Shapiro's medical conclusions were more probably correct than those of Dr. Green. The award was affirmed on administrative review and Claimant filed this special action.

DISCUSSION

¶5 As an initial matter, Claimant's opening brief fails to identify or discuss any specific legal grounds or arguments for vacating the ALJ's decision; and his brief does not include citations to the record, which could constitute abandonment and waiver of his claim.[1] ARCAP 13(a)(6) (requiring the appellant's brief to contain arguments that include "citations to the authorities, statutes and parts of the record relied on"); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim."). In our discretion, we decide this appeal on its merits based on our own review of the record. *See Adams v. Valley Nat. Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (recognizing that courts prefer to decide each case upon its merits rather than dismissing on procedural grounds). Additionally, we construe Claimant's opening brief as a general challenge of the sufficiency of the evidence presented to the ALJ.

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[1] In Claimant's reply brief, he raises the following additional issues: (1) whether the administrative law judge curtailed his ability to change doctors, which impeded him from introducing additional medical evidence at the hearing; and (2) whether respondent employer's employee provided false information to respondent carrier. Because these arguments were not raised in his opening brief, we do not address them. *See Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007).

¶6 Claimant had the burden of establishing: (1) the existence of an accident arising out of and in the course of employment; (2) that the accident caused injury to petitioner; and (3) the injury resulted from conditions of the employment. *Dunlap v. Indus. Comm'n*, 90 Ariz. 3, 6, 363 P.2d 600, 602 (1961). If the cause of the injury is not readily apparent, petitioner must establish the causal relationship between the industrial accident and the injury through expert medical testimony. *T.W.M. Custom Framing v. Indus. Comm'n*, 198 Ariz. 41, 45, ¶ 12, 6 P.3d 745, 749 (App. 2000). Here, the ALJ found that Claimant failed to carry his burden of proving that he sustained an injury as a result of working for Magellan. We find that the evidence supports the ALJ's decision.

¶7 Dr. Green testified that he had conducted an initial consult with Claimant in January 2009, at which time he ordered an MRI. Based on a patient questionnaire Claimant completed at the time of the initial visit, Claimant's symptoms began in January 2008. Dr. Green first testified that the MRI showed a "disk bulge and pinched nerve," but later clarified that the MRI showed "minimal findings with no evidence of nerve root impingement or even abutment." He ultimately diagnosed Claimant with cervical radiculitis and cervical disk degeneration, and he opined that sitting and typing for hours could exacerbate

Claimant's neck injury. Dr. Green conceded, however, that he was unaware of the type of industrial injury for which the hearing was being held, and he was also unaware of what Claimant's job entailed in June and July of 2008.

¶8 Dr. Shapiro examined Claimant in April 2009. During the examination, Claimant complained of neck soreness and soreness across the trapezi, but he did not complain of any problems involving his wrists or numbness in his arms. Dr. Shapiro also reviewed a variety of medical records from various doctors Claimant had visited in the past, as well as the results from Claimant's MRIs and electro-diagnostic studies. Dr. Shapiro opined that Claimant's first MRI was normal for someone of his age, and that there was nothing to indicate Claimant had suffered a discal injury in July 2008. He also stated that a second MRI, from June 2009, was also normal and, within a reasonable degree of medical probability, he believed the MRI did not suggest that Claimant had suffered any type of neck injury as a result of typing. Dr. Shapiro noted that the results of Claimant's EMG nerve conduction studies were also normal. In reviewing Claimant's past medical records, Dr. Shapiro stated that the first time neck or shoulder pain was noted was in December 2008. Dr. Shapiro testified that it would be "extremely uncommon" and "not within reasonable medical

probability" for Claimant's neck pain to be related to work activities if Claimant had stopped working in August 2008, and the neck pain did not appear until December 2008. Dr. Shapiro opined that he could not find "anything" to indicate Claimant suffered any type of injury as a result of typing activities.

¶9 After weighing the evidence, the ALJ was persuaded that the testimony of Dr. Shapiro was "more probably correct" than that of Dr. Green. It is the responsibility of the ALJ to resolve such conflicts and we will uphold the ALJ's resolution when it is reasonably supported by the evidence. *See Fry's Food Stores v. Indus. Comm'n of Ariz.*, 161 Ariz. 119, 121, 776 P.2d 797, 799 (1989); *see also Lazarin v. Indus. Comm'n of Ariz.*, 135 Ariz. 369, 373, 661 P.2d 219, 223 (App. 1983) (citation omitted). On this record, we conclude that reasonable evidence exists to support the ALJ's resolution of conflicting evidence and his ultimate finding that Claimant's injury was not caused or contributed to by his work activities.

CONCLUSION

¶10 For the foregoing reasons, we affirm the ALJ's findings and award for a non-compensable claim.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Judge

/s/
_____
SHELDON H. WEISBERG, Judge