

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 11/29/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

WILLIAM A. SMITH,) No. 1 CA-IC 10-0060
)
Petitioner,) DEPARTMENT B
)
v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules
ARIZONA,) of Civil Appellate
) Procedure)
Respondent,)
)
B & G ELECTRIC,)
)
Respondent Employer,)
)
SCF ARIZONA,)
)
Respondent Carrier.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20032-320201** and 20083-170075*

Carrier Claim No. 0327348** and 0827392*

Administrative Law Judge Karen Gianas Calderon

AWARD AFFIRMED

William A. Smith,
Petitioner Employee
In *Propria Persona*

Phoenix

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

Phoenix

James B. Stabler, Chief Counsel
and Kenna L. Finch
SCF of Arizona
for Respondent Employer and Carrier

Phoenix

D O W N I E, Judge

¶1 William A. Smith appeals the Industrial Commission's ("Commission") denial of his petitions to reopen a 2003 claim and to keep open a 2008 claim. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In August 2003, Smith sustained chest, hip, and back injuries when he was shocked by a live wire and fell ten feet onto a concrete floor ("2003 accident"). State Compensation Fund ("SCF") accepted his work-related injury claim ("2003 claim"). In January 2005, an Independent Medical Examination ("IME") determined that Smith was capable of returning to his usual and customary employment without restriction and that he had "0%" impairment as a result of the 2003 accident. The report also opined that any treatment Smith might require in the future would be "causally related to his preexisting degenerative spinal condition rather than the industrial injury of 08/05/03." A Notice of Claim Status informed Smith that his

claim would be closed without permanent disability, effective February 2, 2005.

¶13 On October 7, 2008, Smith stepped in a hole at work and felt "immediate intense" low back pain ("2008 accident"). SCF accepted his work-related injury claim, and Smith received treatment for right leg stiffness and back pain ("2008 claim"). In July 2009, an IME determined Smith was medically stable, without permanent disability, and required no further medical care related to the 2008 accident. An IME report stated that Smith did not incur any new injury from the 2008 accident, but experienced "a continuation of his chronic painful condition, which has waxed and waned in the past." Smith did not return to work and applied for social security disability. When Smith received the Notice of Claim Status closing the 2008 claim without permanent disability, he requested a hearing.

¶14 In July 2009, Smith filed a petition to reopen the 2003 claim, but his petition was denied pending an IME. The ensuing IME report stated that Smith did not have "any objective residual findings or conditions related to the 08/05/03 industrial injury." Smith's petition to reopen was denied, and he requested a hearing.

¶15 A consolidated hearing was held on Smith's hearing requests. Smith testified his medical issues began with the 2003 accident and were aggravated by the 2008 accident.

Dr. Phillips, Smith's designated medical witness for both petitions, testified he could not offer an opinion about the 2008 injury because he did not treat Smith for those injuries. The doctor also testified there was no "new condition" that would support reopening the 2003 claim.

¶16 The Administrative Law Judge ("ALJ") ruled that Smith failed to prove "a new, additional or previously undiscovered condition" related to the 2003 claim or that the 2008 claim should remain open. Smith requested review of the ALJ's decision and an extension of the hearing to provide additional evidence. His written request also raised new issues not presented during the hearing. Respondents filed a response, asking the ALJ to reject any "comments" not presented at the hearing and to affirm the earlier decision. The ALJ reviewed the record and memoranda, adopted Respondents' response, and affirmed the prior decision.

¶17 Smith timely requested statutory special action review. Ariz. Rev. Stat. ("A.R.S.") § 23-951(A). We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(2).

DISCUSSION

¶18 In his opening brief, Smith poses nine questions, some of which he answers in narrative fashion. Some of these issues were not raised below, which prevents us from considering them

on appeal. See *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) ("It is settled that an appellate court cannot consider issues and theories not presented to the court below."). We are also limited in our review by Smith's failure to develop his legal arguments or cite to the record in support of his claims.¹ See ARCAP 13(a)(6), (b)(1) (requiring a party to present significant arguments, set forth a position on the issues raised, and include citations to relevant authorities, statutes, and record); *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) (appellate courts "will not consider argument posited without authority"); *Higgins v. Higgins*, 194 Ariz. 266, 270, ¶ 12, 981 P.2d 134, 138 (App. 1999) (holding a *pro per* litigant to the same standard as an attorney).

¶19 To the extent Smith challenges the ALJ's findings of fact and legal conclusions, we find no error. "We will affirm a Commission decision if it is reasonably supported by the evidence after reviewing the evidence in a light most favorable to sustaining the award." *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). "We deferentially

¹ For example, Smith implies he was "limited" to one physician's testimony, when the Respondent was allowed two medical witnesses. The record, however, demonstrates that Smith chose to "just go[] with" Dr. Phillips' opinion. Respondent's two witnesses were each tied to an individual claim (2003 or 2008).

review the ALJ's factual findings but independently review . . . legal conclusions." *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, 12, ¶ 6, 90 P.3d 211, 213 (App. 2004).

I. Reopening of the 2003 Claim

¶10 The burden is on the worker to prove entitlement to reopen a claim "by showing a new, additional, or previously undiscovered condition and a causal relationship between that new condition and the prior industrial injury." *Lovitch*, 202 Ariz. at 105-06, ¶ 17, 41 P.3d at 643-44. "A change of condition may be shown by a change in the claimant's causally related physical condition." *Id.* at 106, 41 P.3d at 644.

¶11 As an initial matter, we note that Smith did not challenge the 2005 IME report that determined he was medically stable, without any permanent disability, and able to return to work. Those conclusions are therefore binding. *See Church of Jesus Christ of Latter Day Saints v. Indus. Comm'n*, 150 Ariz. 495, 498 n.2, 724 P.2d 581, 584 n.2 (App. 1986) (claimant can avoid the effect of a Notice of Claim Status by filing a request for hearing).

¶12 Dr. Phillips supported Smith's request to reopen the 2003 claim because Smith continued to "suffer from . . . chronic back pain." Dr. Phillips described Smith's continuing back pain, which radiated into his leg, as the only remaining symptom connected to the 2003 injury. However, a claim cannot be

reopened based on an employee's "increased subjective pain if the pain is not accompanied by a change in objective physical findings." A.R.S. § 23-1061(H); see also *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491, ¶ 6, 154 P.3d 391, 393 (App. 2007).

¶13 Although medical testing revealed changes in Smith's spine from 2003 to 2009, the IME related those changes to "the natural history of age-related progressive lumbar spondylosis . . . not specifically related to the 8/5/03 injury."² Dr. Phillips testified the testing showed "a little bit of increased prominence" of a disc bulge that was apparent in 2003 and "some worsening" at a higher disc level. He concluded there were "certainly probably some changes" in Smith's spine, but conceded the extent was "uncertain." Dr. Phillips did not contest the IME finding that the changes were age-related or testify that they were related to the 2003 injury. Additionally, Dr. Phillips testified he was unaware of any "new condition" that arose "[o]ver the years" he treated Smith or from the medical tests he conducted.

¶14 Smith questioned Dr. Phillips about his diabetes, depression, and elbow injury, but Smith's questioning was vague, and Dr. Phillips never linked those conditions to the 2003

² The IME physician studied the actual films, while Dr. Phillips reviewed the radiologist's "interpretation" of the films.

accident.³ See *Makinson v. Indus. Comm'n*, 134 Ariz. 246, 248, 655 P.2d 366, 368 (App. 1982) (when the causal connection between the condition and the industrial injury is not readily apparent, it must be established by expert medical testimony). Although Dr. Phillips testified Smith's elbow disfigurement was "[m]ost likely" caused by the 2003 accident, the unchallenged 2005 IME report stated that it resulted from a "long standing" physical condition that was "unrelated to [Smith's] industrial injury." See *Ariz. Pub. Serv. Co. v. Indus. Comm'n*, 133 Ariz. 358, 362, 651 P.2d 886, 890 (App. 1982) ("If no request for hearing is filed, the notice of claim status issued . . . is considered to be final and to have res judicata effect.") (disapproved on other grounds by *Marriott Corp. v. Indus. Comm'n*, 156 Ariz. 78, 81, 750 P.2d 21, 24 (1988)).

II. 2008 Claim

¶15 The burden is on the worker to show by a preponderance of the evidence that his condition is not stationary. *Lawler v. Indus. Comm'n*, 24 Ariz. App. 282, 284, 537 P.2d 1340, 1342

³ The examination relating to depression was:

Q. Okay. . . . Is this normal for someone to suffer injuries and can't work due to the depression?

A. Yes, depression is very commonly seen with anybody that has a chronic pain issue.

The examination also brought out that Smith's diabetes "wasn't addressed until . . . 2008," but Dr. Phillips testified the condition was "not related to [Smith's] back pain other than the fact of the potential in weight gain because of inactivity."

(1975). We will sustain the Commission's findings if they are reasonably supported by the evidence. *Spears v. Indus. Comm'n*, 20 Ariz. App. 406, 407, 513 P.2d 695, 696 (1973).

¶16 Dr. Phillips testified he was not involved in Smith's care related to the 2008 accident. He further stated that Smith never told him about that accident. Indeed, Smith specifically "denied any recent injury or trauma" when he saw Dr. Phillips for back pain ten days after the 2008 incident. Dr. Phillips stated he had no opinion about the 2008 claim and left that topic to doctors who had treated Smith.

¶17 During the hearing, Smith neither offered additional evidence regarding the 2008 claim nor requested additional time to gather evidence. See A.A.C. R20-5-156(A) (ALJ has discretion to continue hearing if "a party shows good cause"); *Wood v. Indus. Comm'n*, 126 Ariz. 259, 261-62, 614 P.2d 340, 342-43 (App. 1980) (a hearing may be continued if a party requests continuance at the "[close] of the hearing" and details the evidence to be produced, the witnesses who will produce it, and the reason the evidence and witnesses were not produced at the hearing).

CONCLUSION

¶18 Smith failed to establish a new, additional, or previously undiscovered condition related to the 2003 accident

