DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOSEPH A GARNICA, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CITY OF PEORIA, Respondent Employer, SCF ARIZONA, Respondent Carrier.	)	No. 1 CA-IC 11-0038 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action—Industrial Commission

ICA CLAIM NO. 20032-2720215

CARRIER CLAIM NO. 0335149

The Honorable James B. Long, Administrative Law Judge

AFFIRMED

Ber & Associates PLLC — Phoenix
By Hershel Ber
Attorney for Petitioner

Andrew F. Wade, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

James B. Stabler, Chief Counsel Phoenix
State Compensation Fund
By Brandyn L. Stewart
Attorney for Respondents Employer and Carrier

T I M M E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") decision upon review denying Joseph A. Garnica's petition to reopen his claim. Garnica argues the administrative law judge ("ALJ") abused his discretion by not subpoenaing a requested witness. For the following reasons, we disagree and therefore affirm.

BACKGROUND

¶2 Garnica sustained a compensable injury ("original injury") to his left lower extremity while working for the City of Peoria on September 19, 2003. Three months later, respondent SCF Arizona ("SCF") closed his claim for active medical treatment without permanent disability.

¶3 Garnica filed a petition to reopen his claim in 2004, which SCF denied. He did not protest the denial of the petition. In 2005, Garnica again petitioned to reopen his claim, which SCF once again denied without protest by Garnica. He filed a third petition to reopen in May 2010, claiming he had pain related to the original injury. After SCF denied the petition, Garnica filed a hearing request. The ALJ scheduled a hearing and informed Garnica he must provide medical testimony

to support his alleged new condition[1] arising from the 2003 injury and, in order for a doctor to testify, he must file all subpoena requests at least twenty days before the first hearing.

¶4 Garnica filed a timely request for subpoenas to be issued to his treating physician, S.D. Steen Johnsen, as well as three of Garnica's co-workers. In a response letter, the ALJ explained the co-workers would not be subpoenaed as they could not offer medical testimony on which the case hinged.

¶5 At the beginning of the first hearing on September 21, 2010, Garnica stated he had seen other doctors and a physical therapist, and asked the ALJ to subpoena them to testify. After the ALJ responded that not all doctors seen by a claimant are needed to testify typically, Garnica replied he had seen Dr. Laureen Cota the previous week, and she would be willing to testify that the new condition was related to the original injury. The ALJ concluded by saying he would address what doctors are needed to appear after Garnica testified.

¶6 At the end of the day, the ALJ discussed the issue with Garnica and determined that Dr. Johnsen, a specialist in foot and ankle surgery, had provided the most treatment for Garnica's current condition, the doctor had reviewed Garnica's

[1] To reopen a claim for benefits, a claimant must show a new, additional, or previously undiscovered condition or disability, a causal relationship between that condition and the industrial injury, and a change in condition since the last award. Ariz. Rev. Stat. ("A.R.S.") § 23-1061(H) (Supp. 2010).

medical records, and Garnica had requested him to testify. The ALJ then explained he only needed one physician to testify in support of the petition and concluded Dr. Johnsen would be that physician. Garnica said he would prefer all his doctors testify, but acknowledged Dr. Johnsen was the "main one."

¶7 Dr. Johnsen testified on October 7, the second day of the hearing, that Garnica's claim should be reopened because his new condition is "contiguous" to the original injury. He further testified, however, the new condition "could be" related to his original injury. He stated this connection was based on Garnica's statements to him about continued pain since 2003. On cross-examination, Dr. Johnsen noted it was possible the current condition could be based on a newer injury.

¶8 The employer/carrier elicited testimony on the third day of the hearing, October 18, from Dr. William Leonetti, a board certified physician in foot and ankle surgery who had examined Garnica. Dr. Leonetti testified the MRI records demonstrated there was "no question" Garnica had suffered a second injury unrelated to the original injury sometime between July 2004 and May 2009. He noted that two of Garnica's MRIs, one from July 2004 and a second from October 2007, were completely negative with no inflammation, but a third MRI from June 2009 showed "significant soft tissue, ligamentous, and tendinous pathology," suggesting a second injury.

¶9 Recognizing the medical opinions differed, the ALJ resolved the conflict by accepting the opinion of Dr. Leonetti as more probably correct. The ALJ therefore found that Garnica had not proven he had suffered a new condition stemming from the original injury and denied the petition to reopen. Garnica filed a timely request for review, and the ALJ affirmed the previous decision. Garnica then filed this timely petition for special action.

DISCUSSION

¶10 Garnica argues the ALJ erred by refusing to issue a subpoena for Dr. Cota.[2] The ICA "has wide discretion to . . . control the witnesses who appear before it." *Artis v. Indus. Comm'n*, 164 Ariz. 452, 453, 793 P.2d 1119, 1120 (App. 1990). Thus, we review the ALJ's refusal to issue the subpoena for an abuse of discretion. *K Mart Corp. v. Indus. Comm'n*, 139 Ariz. 536, 539, 679 P.2d 559, 562 (App. 1984).

¶11 A party seeking to compel the appearance of a medical expert witness at a hearing must file a written request for a subpoena at least twenty days before the first scheduled hearing. Ariz. Admin. Code ("A.A.C.") R20-5-141(A)(2). The ALJ

[2] Garnica also contends the ALJ erred by failing to subpoena "other witnesses." Because Garnica fails to develop this argument, he has waived it, and we do not consider it further. *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 304, ¶ 19 n.7, 197 P.3d 758, 765 n.7 (App. 2008) (arguments not developed on appeal are deemed waived).

must issue the subpoena if the anticipated testimony is "material and necessary."[3] A.A.C. R20-5-141(A)(4). Garnica argues the ALJ erred by denying his subpoena request because Dr. Cota's anticipated testimony was material and necessary, as demonstrated by the ALJ's ultimate finding that Garnica's current condition is not causally related to the original injury. As a result, Garnica claims the ALJ denied him the fundamental right to present witnesses and frustrated the ends of justice. We disagree for two reasons.

¶12 First, the ALJ was required to grant the subpoena for a necessary and material witness only if Garnica timely requested it, which he did not do. A.A.C. R20-5-141(A)(2), (4). Garnica's request was untimely because he did not make it in writing at least twenty days before the first day of the hearing; he orally requested it on the first day of the hearing. *Id*.

¶13 Second, putting aside the timeliness of the request, the ALJ did not err by implicitly deciding Dr. Cota's testimony was not necessary because the subject matter of her anticipated expert opinion was addressed by Dr. Johnsen. In compliance with

[3] The ALJ may decline to issue a subpoena for a witness whose testimony is material and necessary if the party failed to file a timely response to the ALJ's request for a written description of the witness's anticipated testimony and the party does not show good cause for failing to timely comply with the ALJ's request. A.A.C. R20-5-141(A)(4). The ALJ did not make such a request in this case, so this exception is not applicable.

A.R.S. § 23-1061(H), Garnica attached to his petition to reopen Dr. Johnsen's report to demonstrate that Garnica suffered from a new, additional or previously undiscovered condition related to the original injury. This document reflected Dr. Johnsen's opinion that Garnica's new condition "is contiguous with his previous surgery and previous injury and that his case should be reopened because of this." Dr. Johnsen reiterated that opinion at the hearing, although he also stated the new condition "could be" related to the original injury. Although Garnica wanted to call all his physicians to testify, when the ALJ limited him to one physician, he agreed Dr. Johnsen was the "main one" to testify in support of the petition.

¶14 The ALJ was charged with authority to conduct the hearing "in any manner that will achieve substantial justice." A.R.S. § 23-941(F) (1995). Garnica was not deprived of substantial justice because he was able to elicit opinion testimony from Dr. Johnsen about the causal relationship between his new condition and the original injury. Additional testimony from Dr. Cota on the same subject would have been cumulative and therefore unnecessary. *See* Ariz. R. Evid. 403 (authorizing exclusion of cumulative evidence); Ariz. R. Civ. P. 26(b)(4)(D) (providing each side is presumptively entitled to one expert per issue); *see also W. Water Works v. Indus. Comm'n*, 213 Ariz. 521, 524, ¶ 14, 144 P.3d 535, 538 (App. 2006) (noting that although

the rules of evidence and civil procedure are inapplicable to industrial commission hearings, they provide guidance). Thus, this situation is markedly different from the one in *K Mart*, in which this court held the ALJ deprived an employer of its fundamental right to present witnesses by refusing to subpoena the employer's only medical expert witness who could counter the claimant's position that an industrial injury caused her psychiatric condition. 139 Ariz. at 538-39, 679 P.2d at 561-62.

¶15 In summary, the ALJ did not abuse his discretion by refusing to subpoena Dr. Cota to appear and give additional expert testimony on the issue of medical causation. Garnica's right to present witnesses was not frustrated but reasonably limited. The ALJ ensured substantial justice by hearing expert testimony from both Dr. Johnsen and Dr. Leonetti and then resolving the conflict between their opinions.

CONCLUSION

¶16 For the foregoing reasons, we affirm.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Patricia K. Norris, Presiding Judge

/s/
Margaret H. Downie, Judge