

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DAVID RAMIREZ,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

PHELPS DODGE,
Respondent Employer,

AIG INSURANCE COMPANY OF PUERTO RICO,
Respondent Insurer.

No. 2 CA-IC 2020-0005
Filed March 24, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Act. 10(k).*

Special Action – Industrial Commission
ICA Claim No. 95286-805550
Insurer No. 444-00263
Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

David Ramirez, Thatcher
In Propria Persona

RAMIREZ v. INDUS. COMM'N OF ARIZ.
Decision of the Court

The Industrial Commission of Arizona, Phoenix
By Gaetano Testini
Counsel for Respondent

Lundmark, Barberich, La Mont & Slavin P.C., Phoenix
By Javier A. Puig
Counsel for Respondent Employer and Insurer

MEMORANDUM DECISION

Presiding Judge Espinosa authored the decision of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

ESPINOSA, Presiding Judge:

¶1 In this statutory special action, David Ramirez challenges the award of the administrative law judge (ALJ) granting relief in part and denying relief in part. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We review the evidence in the light most favorable to upholding the Industrial Commission's award.¹ *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2 (App. 2007). Ramirez sustained an industrial injury in 1995 that was accepted by the respondent insurer. In 2018, after his claim was reopened, Ramirez filed two petitions regarding injury to his temporomandibular joint (TMJ) and hearing loss, both of which the respondent insurer denied. Ramirez sought physical therapy for his TMJ twice weekly, but the insurer would only agree to four weeks of physical

¹ The parties have not provided a statement of facts "with appropriate references to the record," as required by Rule 13 of the Arizona Rules of Civil Appellate Procedure, although the respondent employer and insurer's answering brief asserts that "the relevant facts were accurately outlined" in the ALJ's decision and "accept[s] those as true and correct." We draw the facts from our own review of the record. *See Sholes v. Fernando*, 228 Ariz. 455, n.2 (App. 2011).

therapy, once per week, and then to reevaluate Ramirez's condition. Ramirez filed requests for hearing in early 2019.

¶3 Dr. Ronald Quintia, Ramirez's oral and maxillofacial surgeon, testified he had been treating Ramirez since 1995 and prescribed "one to two sessions . . . weekly" of physical therapy for one year, opining that physical therapy reduces Ramirez's pain level and is preferable to the expense of "surgery and hospitalization to replace his joints." The respondent insurer's medical expert testified he believed using a jaw "stretching" appliance twice per week and physical therapy would enable Ramirez to eat but was not a long-term solution to his TMJ condition, which would require surgery. He further stated physical therapy once per week for a year would be reasonable but that the treatment plan should be reevaluated in several weeks to determine whether Ramirez would need more physical therapy. The ALJ adopted Quintia's testimony as being "most probably correct and well-founded" and therefore granted Ramirez his requested relief with regard to his TMJ condition, entitling him to "weekly physical therapy and any other care recommended by Dr. Quintia."

¶4 As to Ramirez's hearing loss claim, Dr. Treasure Scheib, an audiologist, testified that Ramirez had hearing loss in both ears but "there's no way . . . to identify the cause of [his] hearing loss" because she had tested his ears for the first time in 2018 and had no baseline for comparison. Dr. Leon Zeitzer, an otolaryngologist who had evaluated Ramirez in 2019, also testified there was no medical record of his hearing before 2018 and he was therefore unable to say to a reasonable medical probability that Ramirez's current hearing loss was related to the 1995 industrial accident. The ALJ concluded that Ramirez had failed to establish a causal relationship between his hearing loss and the industrial accident and denied his request for relief as to that claim. The ALJ's decision on both claims was affirmed on review. Ramirez initiated this statutory special action, over which we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-948.

Discussion

¶5 Our review is limited to "determining whether or not the commission acted without or in excess of its power" and whether the findings of fact support the ALJ's decision. A.R.S. § 23-951(B). Ramirez's complaint on review centers around the manner in which the hearing proceeded. He contends he "was not allowed to object" during the questioning of Dr. Quintia because while opposing counsel was cross-

examining Quintia, the ALJ “gestured with his finger in front of his mouth for [Ramirez] to remain quiet.” And because he was not permitted to object to the opposing attorney’s repeated questions about whether Ramirez needed one or two physical therapy sessions per week, he asserts he was not “able to defend [him]self.”

¶6 During a hearing on a claim, the ALJ “is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct the hearing in any manner that will achieve substantial justice.” A.R.S. § 23-941(F); *see also Lugar v. Indus. Comm’n*, 9 Ariz. App. 44, 49 (1968) (procedure before Industrial Commission should be simplified). Ramirez has not demonstrated the ALJ’s conduct during the hearing failed to achieve substantial justice. Although the ALJ gestured that he not interrupt the opposing attorney’s questioning of Dr. Quintia, Ramirez was immediately afterwards invited to ask follow-up questions on redirect if desired. He declined that opportunity.

¶7 Additionally, we cannot say Ramirez was prejudiced by the manner in which the hearing was conducted. The ALJ adopted Dr. Quintia’s testimony as the most “correct and well-founded.” Ramirez, however, contends counsel repeatedly asked Quintia the same question until he conceded that one physical therapy session per week was sufficient. But Quintia maintained his prescription for physical therapy for “once *or* two times a week” (emphasis added) and thus made no concession based on the opposing attorney’s questions. Moreover, the ALJ ultimately granted the relief Ramirez requested. Specifically, the ALJ determined Ramirez was entitled to “weekly physical therapy and any other care recommended by Dr. Quintia.” Accordingly, we conclude the evidence supported the decision and the ALJ did not act in excess of his power.² *See* § 23-951(B).

¶8 In his petition for special action, which he titled “Notice of Appeal,” Ramirez challenged the denial of his hearing loss claim, arguing “[t]here are transcripts, and notes notated in the 90’s of me complaining of hearing issues” that were submitted to the ALJ. Because Ramirez did not

²To the extent Ramirez complains of not receiving the ALJ’s award of benefits, we note that the Industrial Commission, not this court, is the proper venue for enforcing benefits. *See* A.R.S. § 23-1061(J) (“The commission shall investigate and review any claim in which it appears to the commission that the claimant has not been granted the benefits to which such claimant is entitled.”).

RAMIREZ v. INDUS. COMM'N OF ARIZ.
Decision of the Court

raise any argument in his opening brief related to this issue, we conclude it is waived. *See* Ariz. R. Civ. App. P. 13(a)(7) (requiring contentions for each issue presented for review to be in opening brief); Ariz. R. P. Spec. Act. 10(k) (Arizona Rules of Civil Appellate Procedure apply to this court's review of Industrial Commission awards); *Polanco*, 214 Ariz. 489, n.2 (failure to develop and support issues on appeal waives those issues). Nevertheless, even were we to consider the contention presented in Ramirez's detailed "Notice of Appeal" as sufficient, we would still affirm the ALJ's decision because Ramirez did not meaningfully develop that argument with supporting authority for his propositions.³ *See* Ariz. R. Civ. App. P. 13(a)(7); *Polanco*, 214 Ariz. 489, n.2.

¶9 Moreover, Ramirez essentially asks us to reweigh the evidence and come to a contrary conclusion than the ALJ, who determined that Ramirez had "failed to establish a causal relationship of hearing loss to the 1995 industrial accident." *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975) (appellate court does not "weigh the evidence, but considers it in the light most favorable to sustaining the award of the Commission"). That determination is well grounded in the evidence presented. *See Payne v. Indus. Comm'n*, 136 Ariz. 105, 108 (1983) (medical condition must be established to a reasonable degree of medical probability); *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 16 (App. 2002) (affirming ALJ's award "if it is reasonably supported by the evidence").

Disposition

¶10 For the foregoing reasons, the ALJ's award granting relief in part and denying relief in part is affirmed.

³Unrepresented petitioners appearing in propria persona 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." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441 (App. 1983). While courts, particularly ALJs, may afford some discretionary latitude, *see Huff v. Indus. Comm'n*, 18 Ariz. App. 436, 439 (1972), a pro se litigant "is entitled to no more consideration than if he had been represented by counsel," *Copper State Bank*, 139 Ariz. at 441.