

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

COREY PORTIS,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

KROGER,
Respondent Employer,

KROGER COMPANY,
Respondent Insurer.

No. 2 CA-IC 2021-0006
Filed January 21, 2022

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NOT FOR PUBLICATION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 Nos. 20192670856 and 20192630079
Insurer No. 30193032738-0001
Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Corey Portis, Tucson
In Propria Persona

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

Quintairos, Prieto, Wood & Boyer P.A., Scottsdale
By Terence N. Cushing and Rita J. Bustos
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 In this statutory special action, petitioner Corey Portis challenges the administrative law judge's (ALJ) award, finding he did not sustain compensable injuries. Portis argues the ALJ violated his constitutional rights because he did not personally attend or present evidence at one of the hearings before the ALJ after he was not notified of the hearing date. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the ALJ's award and in doing so, defer to its factual findings. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2 (App. 2012). In September 2019, Portis filed claims for injuries to his left knee and shoulder that had occurred while working as an assistant grocery manager for Kroger. After Kroger's insurer denied his claims, Portis retained counsel, challenged the denial, and requested a hearing with the Industrial Commission (Commission). After conducting two evidentiary hearings, the ALJ found Portis had not established that his injuries were compensable. Portis's counsel subsequently withdrew from the case, and Portis sought review of the ALJ's award. The ALJ affirmed his award, and Portis filed a petition for special action from that decision, over which we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-948, and Rule 10, Ariz. R. P. Spec. Act.

Discussion

¶3 As an initial matter, Portis's opening brief does not substantially comply with Rule 13(a), Ariz. R. Civ. App. P., as he does not develop or support his arguments with citations to legal authorities, *see* Rule 13(a)(7)(A), includes only sparse references to the record¹ and omits the applicable standard of review for each contention, *see* Rule 13(a)(7)(B), and has omitted the required "table of citations," Rule 13(a)(2). We hold self-represented litigants "to the same standards as attorneys," *Flynn v. Campbell*, 243 Ariz. 76, ¶ 24 (2017), and when a party fails to develop its arguments with proper citations to legal authority, we consider such arguments waived, *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2 (App. 2007). Nevertheless, because Kroger has not objected in its answering brief to these deficiencies, *see Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, n.2 (App. 2011), and because we prefer to resolve cases on the merits, *see Adams v. Valley Nat. Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984), in the exercise of our discretion, we address the merits of his claims.

¶4 Portis argues he was denied the opportunity to be present and submit evidence during the testimony of Kroger's medical expert, presented at a second hearing, because he was not notified of the hearing date. Our review is "limited to determining whether or not the [ALJ] acted without or in excess of [his] power" and whether any findings of fact support the award. A.R.S. § 23-951(B). While we defer to the ALJ's factual findings, we review questions of law de novo. *SCF Gen. Ins. Co. v. Indus. Comm'n*, 236 Ariz. 545, ¶ 2 (App. 2015).

¶5 In a Commission proceeding, parties are entitled to notice and an opportunity to be heard, *Iphaar v. Indus. Comm'n*, 171 Ariz. 423, 426 (App. 1992), and have "a fundamental right to present evidence to support or defend" their claims, *Horan v. Indus. Comm'n*, 167 Ariz. 322, 326 (App. 1991). A party, personally or through counsel, can waive the right to cross-examine witnesses by choosing not to attend, or simply failing to attend, the hearing. *Cash v. Indus. Comm'n*, 27 Ariz. App. 526, 530 (1976) ("Although the opportunity [to cross-examine witnesses] cannot be restricted by the Commission the right can be waived by the party.").

¹For example, Portis states in his opening brief that he has research from "numerous world-renowned orthopedic institutions," which he wanted admitted. But he does not provide any argument relating to this research, including what it is and how it relates to his case.

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¶6 Portis and his expert both testified at the first hearing before the ALJ in July 2020. At the beginning of that hearing, when the ALJ asked Portis's counsel if she wished to have him excused from attending the second telephonic hearing at which Kroger's expert would testify, counsel responded, "[y]es, please." The ALJ then addressed Portis directly and informed him that he would not be called for the second hearing and that represented claimants are usually excused from future hearings unless there is a reason for them to provide additional testimony. At the end of the hearing, the ALJ again clarified at the request of Portis's counsel that Portis was excused from attending future hearings. At no time during the first hearing did Portis mention that he needed to attend the second hearing or otherwise object to being excused. *See Hughes Aircraft Co. v. Indus. Comm'n*, 125 Ariz. 1, 3-4 (App. 1979) (issue not raised or objection not made before Commission is abandoned on appeal).

¶7 Portis did not attend the second hearing in January 2021. His counsel did attend the hearing, but chose not to cross-examine Kroger's expert.² *See Wyatt v. Wehmuller*, 167 Ariz. 281, 284 (1991) ("[A]n attorney, by virtue of the attorney-client relationship, has implied authority to perform acts incident or necessary to the purpose for which he was retained, including the day-to-day tactical decisions involved in the litigation process."). Because Portis was voluntarily excused from attending the hearing and, through his counsel, had the opportunity to cross-examine Kroger's expert and introduce evidence, he cannot claim the hearing process lacked substantial justice. A.R.S. § 23-941(F) ("[T]he [ALJ] . . . may conduct the hearing in any manner that will achieve substantial justice.").

¶8 Portis also contends the ALJ should have allowed him to introduce additional evidence into the record when he requested review of the ALJ's decision. The ALJ correctly rejected his request, noting he could only consider evidence that was in the record at the close of the hearings. A.R.S. § 23-943(E); *Sw. Nurseries v. Indus. Comm'n*, 133 Ariz. 171, 174 (App. 1982) ("[T]he fact-finding process in workmen's compensation proceedings ends at the conclusion of the last scheduled hearing.").

²Although Portis suggests that had he attended the hearing he could have cross-examined the expert personally, he is mistaken. *See Lincoln v. Lincoln*, 155 Ariz. 272, 274 (App. 1987) ("A person who is represented by counsel in litigation has no right to personally conduct any aspect of the litigation except through counsel.").

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¶9 The record supports the ALJ's decision on review affirming the award. Portis's expert and Kroger's expert offered differing medical opinions on the causal relationship of his injuries to his work. But the ALJ is responsible for resolving all conflicts in the evidence and determining credibility, and we will not disturb the ALJ's conclusion unless "it is wholly unreasonable." *Henderson-Jones v. Indus. Comm'n*, 233 Ariz. 188, ¶ 9 (App. 2013). Here, because the record supports the ALJ's determination that Kroger's expert was "most probably correct and well-founded," the ALJ's award is appropriate.

Disposition

¶10 For the foregoing reasons, we affirm the ALJ's award.