IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARK L. WITTEN,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

AMPHITHEATER UNIFIED SCHOOL DISTRICT NO. 10,
Respondent Employer,

THE ARIZONA SCHOOL ALLIANCE FOR WORKERS COMPENSATION,
Respondent Insurer.

No. 2 CA-IC 2022-0001
Filed June 29, 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NOT FOR PUBLICATION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 No. 20191000103
Insurer No. 2017004564A
Marceline Lavelle, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Mark L. Witten, Tucson
In Propria Persona

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

Wright Welker & Pauole PLC, Phoenix
By Linnette Flanigan and Shannon Lindner
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 In this statutory special action, petitioner Mark Witten challenges the Industrial Commission of Arizona's (ICA) decision finding his workers' compensation claim non-compensable. He primarily contends the administrative law judge (ALJ) failed to properly weigh the evidence. For the following reasons, we affirm the award.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining ICA's award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2 (App. 2007). In February 2016, a storm caused damage at a middle school where Witten was a teacher. Witten's classroom sustained some damage, although it was not one of the classrooms primarily affected. The school district took action to remediate the damage in the affected classrooms—including removing moisture and damaged surfaces, repairing the roof, and testing for mold contamination. No dangerous levels of mold were detected in Witten's classroom.

¶3 Witten resigned in September 2017. In October 2017, he sent a notice of claim to the school district offering to settle for $1,000,000 and alleging he suffered from "permanent hearing loss, chronic fatigue syndrome, excessive weight loss, inability to concentrate, loss of appetite, altered sleep patterns, joint pain, overall lethargy, and memory loss" as a result of the school district's failure to properly remediate mold contamination following the storm. In April 2018, Witten sued the school district, but the court granted the school district's motion for summary judgment.

¶4 In April 2019, Witten filed a workers' compensation claim with ICA, alleging that in April 2018 he had been diagnosed with glaucoma, which he attributed to mold exposure from his classroom. The district[1] denied the claim and moved to dismiss twice. First, it asserted Witten's failure to file the claim within one year after he sustained the alleged injury deprived ICA of jurisdiction over the claim; second, it contended Witten had waived his right to workers' compensation by filing the civil action.

¶5 After multiple hearings, the ALJ found Witten's claim was non-compensable. The ALJ concluded the claim was barred for Witten's failure to file within a year, but nevertheless analyzed the evidence without regard to the jurisdictional defense and found Witten had failed to meet his burden of proof.[2] Witten requested review, and the ALJ affirmed the decision upon review. Witten then petitioned this court for review, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

Discussion

¶6 As we understand Witten's arguments, he asserts the ALJ erred by improperly weighing the evidence and deprived him of the opportunity to prove his claim by denying his request for testimony from two witnesses. The district first responds that Witten's opening brief fails

[1]We refer to the respondent employer and its insurer as "the district" throughout this decision.

[2]The ALJ noted that hearings went forward despite the allegation that Witten had failed to file within one year to allow him the opportunity to present evidence on this issue.

to comply with our rules of civil appellate procedure, and thus any issues raised should be waived on review. We agree.

¶7 Witten's brief fails to sufficiently develop his arguments, does not identify any standard of review, and apart from a brief jurisdictional statement, contains no citations to any legal authority.[3] *See* Ariz. R. Civ. App. P. 13(a)(7) (opening brief must contain argument with supporting reasons for each contention, applicable standard of review, and citations of supporting legal authority); Ariz. R. P. Spec. Act. 10(k) (except as otherwise provided, rules of civil appellate procedure apply to review of ICA award). Although Witten represents himself, we hold him to the same standard as an attorney. *See Flynn v. Campbell*, 243 Ariz. 76, ¶ 24 (2017); *Homecraft Corp. v. Fimbres*, 119 Ariz. 299, 301 (App. 1978) (self-represented litigant held to same familiarity with rules and procedure as attorney). Accordingly, we conclude his claims are waived. *See Polanco*, 214 Ariz. 489, n.2 (undeveloped, unsupported argument waived on review).

¶8 Even were we to conclude Witten had not waived review, we agree with the district that his arguments fail on their merits. Our review is "limited to determining whether or not [ICA] acted without or in excess of its power" and whether any findings of fact support the award. § 23-951(B). It is the privilege of the ALJ, not this court, to resolve conflicts in the evidence and draw any warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217 (1968). We will not disturb the ALJ's conclusions unless wholly unreasonable. *Id.*

¶9 The ALJ first concluded Witten's claim was time-barred. But even assuming, without deciding, that the ALJ was incorrect in finding his claim was time-barred, Witten's arguments on review are unavailing. To prevail on his claim for compensation, Witten had to prove that his glaucoma arose "out of and in the course of his employment." A.R.S. § 23-1021. Witten contends the ALJ erred because she disregarded his testimony and citations to medical literature, while crediting testimony from the district's medical witnesses, whom he asserts were incompetent.

¶10 But we do not reweigh evidence or testimony on review and this is particularly true of conflicts in medical evidence. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975). Here, Drs. Rose and Schumacher testified that they could not, to a reasonable degree of probability, relate Witten's

[3]Witten's original opening brief was rejected for failure to comply with the procedural rules.

glaucoma to mold exposure.[4] Witten's physician, Dr. Morris, testified generally to Witten's eye complaints and his treatment of Witten's eye symptoms and chronic conjunctivitis with an anti-fungal medication, but did not mention glaucoma.[5] The ALJ concluded that "[t]o the extent that resolution of conflicts in the evidence is necessary," conflicts in the evidence were resolved "in favor of the opinions of Dr. Schumacher."

¶11 Witten argues the ALJ should have considered his testimony as expert medical testimony, and should have credited his testimony regarding medical literature that the glaucoma was caused by mold exposure over the other expert medical witness testimony. But the ALJ weighed the evidence in the record, *see Malinski*, 103 Ariz. at 216, and there was sufficient evidence to support the finding that Witten had not met his burden of proving his glaucoma arose out of and in the course of his employment. Accordingly, we do not disturb the decision on review. *See id.* at 217.

¶12 To the extent Witten contends the ALJ erred in precluding two of his requested expert medical witnesses from testifying, we cannot conclude there was an abuse of discretion. *See Artis v. Indus. Comm'n*, 164 Ariz. 452, 453 (App. 1990) (ALJ has wide discretion to regulate witnesses who appear). Arizona Administrative Code R20-5-141 requires a party to submit a subpoena request for an expert medical witness twenty days before the first scheduled hearing. The first scheduled hearing was October 23, 2019.[6] But despite the ALJ advising Witten of the October 2019 deadline to request expert medical witnesses, and permitting him two extra weeks after a rescheduled March 2, 2020 initial hearing to request witnesses, Witten did not request medical witnesses until July 19 and July 22, 2021.[7]

---

[4]Dr. Rose did a medical examination of Witten, and Dr. Schumacher performed a review of Witten's medical records.

[5]Dr. Rose found no evidence of a fungal infection of the eye, and Dr. Schumacher testified that if there was a fungal infection treated in 2021 it would not plausibly have a causal relationship to an alleged mold exposure in 2017.

[6]This hearing was not recorded due to a technological failure. The ALJ rescheduled the hearing beginning on March 2, 2020.

[7]Witten asserted the delay in requesting these witnesses was because he did not learn he had skin cancer, which he attributed to mold exposure, until June 2021. But the district points out that in a February 2020 letter to

Due to his delay, and the ALJ's broad discretion, we cannot say there was an abuse of discretion. *See id.*; *Artis*, 164 Ariz. at 453.

Disposition

¶13 For the foregoing reasons, we affirm the award.

---

the ALJ, Witten stated he underwent surgery to remove skin cancer lesions in February 2018, which he attributed to mold exposure. Moreover, as observed by the ALJ, Witten's claim was specifically for glaucoma.