

**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.

**FILED BY CLERK**  
**MAY 26 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JAMES ROBERTSON (DECEASED), by	)	2 CA-IC 2009-0002
MARSHA ROBERTSON, widow,	)	DEPARTMENT A
	)	
Petitioner Employee,	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
v.	)	Rule 28, Rules of Civil
	)	Appellate Procedure
THE INDUSTRIAL COMMISSION OF	)	
ARIZONA,	)	
	)	
Respondent,	)	
	)	
CIRCLE JMR CORPORATION,	)	
	)	
Respondent Employer,	)	
	)	
SCF ARIZONA,	)	
	)	
Respondent Insurer.	)	
_____	)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20081650381

Insurer No. 0809920

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

---

Dee-Dee Samet, P.C.  
By Dee-Dee Samet

Tucson  
Attorney for Petitioner Employee

The Industrial Commission of Arizona  
By Andrew F. Wade

Phoenix  
Attorney for Respondent

SCF Arizona  
By James B. Stabler and Jeffrey L. Patten

Tucson  
Attorneys for Respondents  
Employer and Insurer

---

H O W A R D, Presiding Judge.

¶1 Petitioner Marsha Robertson, the widow of employee James Robertson, petitions this court to review the decision of the Administrative Law Judge (ALJ), based on Rule 20-5-124(B), Arizona Administrative Code, affirming the dismissal of Robertson’s request for a hearing on the denial of her survivor’s claim for workers’ compensation benefits by respondent insurer SCF Arizona. Because Robertson has waived any argument concerning the applicability of the rule, and because based on the rule the ALJ did not err, we affirm.

¶2 The relevant facts are not disputed. Marsha Robertson and her husband, James Robertson, owned Circle R Plumbing as an unincorporated business. In 2002, James signed a rejection of the provisions of the Workers’ Compensation Act (“the Act”), A.R.S. §§ 23-901 through 23-1091, as an employee of Circle R Plumbing. *See also* A.R.S. § 23-1022 (providing benefits sought under the Act constitute exclusive remedy). That same year,

Circle R Plumbing was incorporated and became Circle JMR Corporation. James worked for the corporation as president. He did not sign another rejection of the Act after the company incorporated.

¶3 In 2008, James was killed in an airplane accident. The accident occurred within the course and scope of James' employment with Circle JMR Corporation. Marsha Robertson filed a claim for benefits with SCF, the workers' compensation insurer for Circle JMR, and SCF denied the claim. Robertson requested a hearing on SCF's decision pursuant to A.R.S. § 23-941. The ALJ conducted a hearing at which Robertson testified that, as secretary for Circle JMR Corporation, she had received annual policy endorsements that contained notice of her husband's rejection of the Act. She further testified that when Circle R Plumbing incorporated to become Circle JMR Corporation, only the form of the business changed, not the type of work done by the business.

¶4 After the hearing, the ALJ relied on R20-5-124(B) and concluded that James' rejection of the Act in 2002 was valid as a rejection of the Act in 2008 for Circle JMR Corporation. Accordingly, the ALJ dismissed Robertson's request. Robertson sought review of that decision pursuant to A.R.S. § 23-943, and the ALJ subsequently affirmed her decision. Robertson now seeks special action review pursuant to A.R.S. § 23-951(A) and Rule 10, Ariz. R. P. Spec. Actions.

¶5 The sole issue before this court is whether the ALJ was correct in concluding that James' rejection of the Act in 2002 as an employee of Circle R Plumbing was a valid

rejection in 2008 as an employee of Circle JMR Corporation. Because this is a legal conclusion, we apply our independent judgment on review. *See Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 10, 2 P.3d 691, 695 (App. 2000).

¶6 Section 23-906(A), A.R.S., provides that employees may reject the provisions of the workers' compensation statutes and retain the right to sue their employer. The election to reject must be submitted in writing to the employer before any injury is sustained. § 23-906(B), (C). An employee's rejection of the Act bars the employee's widow from collecting survivor benefits. *See Coyner v. Indus. Comm'n*, 77 Ariz. 210, 214, 269 P.2d 712, 714 (1954).

¶7 Section 23-921(B), A.R.S., authorizes the Industrial Commission of Arizona (ICA) to "make and declare all rules and regulations which are reasonably required in the performance of its duties." The ICA rules are contained within the Arizona Administrative Code. Rule R20-5-124(B) of the Code provides: "If an employee is continuously employed and the employer changes workers' compensation insurance carriers, or *form of doing business*, the prior rejection is valid and remains in full force and effect." (Emphasis added.)

¶8 Here, the ALJ expressly relied on R20-5-124(B) in rendering her decision denying Robertson's request and again in her decision on review. But in Robertson's memoranda to the ALJ and in Robertson's opening brief to this court, she does not acknowledge or challenge the applicability or validity of R20-5-124(B). Respondent insurer SCF does address the issue in its answering brief and argues the rule is dispositive in this

case. In her reply brief, Robertson argues, for the first time, that R20-5-124(B) conflicts with § 23-906 and she essentially asks this court to invalidate the rule. But she fails to cite any applicable authority with respect to how this court determines when an administrative rule conflicts with a statute or in what circumstances any such conflict renders the rule void.

¶9 Arguments not raised before the ALJ are generally waived. *See T.W.M. Custom Framing v. Indus. Comm’n*, 198 Ariz. 41, ¶ 4, 6 P.3d 745, 748 (App. 2000). Likewise, arguments not clearly raised in the opening brief on appeal are usually deemed waived. *See Meiners v. Indus. Comm’n*, 213 Ariz. 536, n.2, 145 P.3d 633, 635 n.2 (App. 2006) (policy of waiver prevents courts from “deciding cases with no research assistance or analytical input from the parties”), quoting *Childress Buick Co. v. O’Connell*, 198 Ariz. 454, ¶ 29, 11 P.3d 413, 418 (App. 2000). In light of Robertson’s failure to timely or adequately challenge the ALJ’s express conclusion regarding the applicability of R20-5-124(B), the issue is waived.<sup>1</sup> We therefore apply R20-5-124(B) to this case.

¶10 The parties do not dispute that when Circle R Plumbing became Circle JMR Corporation, only the form of doing business changed. Thus, under R20-5-124(B), James’

---

<sup>1</sup>Alternatively, Robertson suggests in her reply brief we should interpret the language in R20-5-124(B) regarding changing the “form of doing business” to mean changing the activity of the business, such as from “selling fruit to washing cars.” This argument is also waived for failure to timely raise it. *See T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 4, 6 P.3d at 748; *Meiners*, 213 Ariz. 536, n.2, 145 P.3d at 635 n.2. In addition, the plain meaning of the phrase “form of doing business” refers to the business’s type of ownership, not its business activities. *See Black’s Law Dictionary* 211 (8th ed. 2004) (defining “business enterprises” as the “field of law dealing with various forms of business, such as corporations, limited-liability companies, and partnerships.”) (emphasis added).

written notice of rejection of the Act filed in 2002 was valid as to Circle JMR Corporation in 2008. Additionally, as the ALJ noted, because the employee in *Hacker v. Indus. Comm'n*, 157 Ariz. 391, 392, 758 P.2d 662, 663 (App. 1988), had not executed any rejection of the Act, that case does not require or suggest a different result as Robertson contends. We therefore affirm the ALJ's decision on review.

---

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

---

JOHN PELANDER, Chief Judge

---

PHILIP G. ESPINOSA, Judge