

**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

AUG 26 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOHN M. PASHAIN,)	
)	2 CA-IC 2010-0006
Petitioner Employee,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
THE INDUSTRIAL COMMISSION)	Rule 28, Rules of Civil
OF ARIZONA,)	Appellate Procedure
)	
Respondent,)	
)	
PIMA COUNTY,)	
)	
Respondent Employer,)	
)	
PINNACLE RISK MANAGEMENT)	
SERVICES,)	
)	
Respondent Insurer.)	
)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20003540303

Insurer No. WCPWC20001281LE

Thomas A. Ireson, Administrative Law Judge

AWARD AFFIRMED

John M. Pashain

Ft. Collins, Colorado
In Propria Persona

The Industrial Commission of Arizona
By Andrew F. Wade

Phoenix
Attorney for Respondent

Goering, Roberts, Rubin, Brogna, Enos
& Treadwell-Rubin, P.C.
By Pamela Treadwell-Rubin
and Elizabeth L. Warner

Tucson
Attorneys for Respondents
Employer and Insurer

B R A M M E R, Presiding Judge.

¶1 In this statutory special action, petitioner John Pashain challenges an Industrial Commission award of disability benefits of \$132 per month for his reduced earning capacity caused by his work-related, unscheduled, permanent, partial disability. He asserts the Administrative Law Judge (ALJ) erred by considering the supplemental report of a labor-market consultant that the respondent, Pima County (the County), had filed after the disclosure deadline and by finding employment as a police dispatcher was suitable for and available to him. We affirm the award.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). While employed as a deputy sheriff for the County, Pashain was injured in an automobile accident on December 8, 2000, sustaining injuries to his neck, back, right shoulder, and right knee. After he received treatment, his claim was closed in 2002 without a finding of permanent impairment. In 2004, however, his claim was reopened due to continuing pain in his right shoulder. The Industrial Commission

issued an award on June 3, 2009, finding Pashain had sustained a 30.24% loss of earning capacity and awarding him monthly payments of \$399.15.

¶3 The County filed a request for hearing, asserting Pashain had not sustained the loss of earning capacity described in the June 3 award. After a hearing, the ALJ awarded Pashain a monthly benefit of \$132 based on a finding that work as a police dispatcher was both suitable and available. Pashain then filed a request for review, accompanied by various documents he asserted demonstrated the police dispatcher position was not suitable given his typing skills and the work restrictions caused by his physical limitations. Finding Pashain's supporting documents untimely filed, the ALJ declined to consider them and affirmed his decision. This statutory special action followed.

Discussion

¶4 Pashain's opening brief does not comply in any substantial way with Rule 13(a), Ariz. R. Civ. App. P. It contains no table of citations, standard of review, or citations to either the record or pertinent legal authority. Pashain's failure to comply with Rule 13(a) would justify our summary refusal to consider his petition. *See In re \$26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (“[Appellant's] bald assertion is offered without elaboration or citation to any . . . legal authority. We will not consider it.”); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (“This assertion is wholly without supporting argument or citation of authority, and accordingly[,] we reject it.”); *see also* Ariz. R. P. Spec. Actions 10(k) (Arizona Rules of Civil Appellate Procedure generally apply to special action

review of industrial commission awards). In addition, despite Pashain's pro se status, he is held to the same standards as an attorney in proceedings before this court. *See Old Pueblo Plastic Surgery, P.C. v. Fields*, 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985). Nonetheless, because we prefer to resolve cases on their merits, *Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966), and because the County has provided us useful assistance in its answering brief, we will attempt to discern and address the substance of Pashain's petition.

¶5 The burden of demonstrating a loss of earning capacity is on Pashain, *see Avila v. Indus. Comm'n*, 219 Ariz. 56, ¶ 13, 193 P.3d 310, 313 (App. 2008), and a loss of earning capacity may be determined through analysis of job opportunities reasonably available to him, consistent with his "physical capabilities, education, and training," and comparing the wages for those opportunities to his previous earnings, *id.* ¶¶ 14-15. "We deferentially review the ALJ's factual findings but independently review his legal conclusions."¹ *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004), *aff'd* 211 Ariz. 67, 117 P.3d 786 (2005). The ALJ determines the credibility of witnesses, *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973), and resolves conflicts in the evidence. *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). "When more than one

¹The County mistakenly suggests we lack jurisdiction to review the ALJ's factual findings. Our jurisdiction of this statutory special action is beyond question, although our review of the ALJ's factual findings is deferential. *See* A.R.S. §§ 12-120.21(A)(2), 23-951(A); Ariz. R. P. Spec. Actions 10.

inference may be drawn, the [ALJ] may choose either, and we will not reject that choice unless it is wholly unreasonable.” *Id.*

¶6 On November 20, 2009, ten days before the hearing, the County submitted a supplemental report prepared by its labor-market consultant. Pashain argues the ALJ erred in considering the report because it was disclosed “after the disclosure date.” The rules of procedure for the Industrial Commission require a party to submit any nonmedical reports to the ALJ at least fifteen days before the first scheduled hearing. Ariz. Admin. Code R20-5-155(B). An ALJ may permit a later filing, however, “[u]pon a showing of good cause.” Ariz. Admin. Code R20-5-155(E).

¶7 On November 12, 2009, the County had filed a request for “an additional extension of time to file lay records and lay witness subpoena requests . . . due to the fact that [its] labor market expert [wa]s in the process of reviewing additional medical records that were just received . . . in response to [the County’s] subpoena for said records.”² Although the ALJ did not rule explicitly on the County’s extension request, it implicitly granted the request by permitting the County not only to submit the supplemental report but also to rely on it at the hearing.

¶8 Pashain does not appear to suggest the ALJ erred by implicitly finding the County had demonstrated good cause. He argues only that he was prejudiced by the late

²Pashain suggests the ALJ should not have considered the late disclosure because the County had requested the extension to file “medical records,” not an additional labor-market report. But Pashain misconstrues the County’s extension request, which states the County sought the extension to file an addendum report by its labor-market consultant due to its recent receipt of subpoenaed medical records.

disclosure of the supplemental report because he had “no realistic time to research the change of information provided.” But Pashain neither filed a response to the County’s request for an extension nor objected to the supplemental report or its use during the hearing. We do not consider arguments raised for the first time on review and therefore do not address this contention further. *See Kessen v. Stewart*, 195 Ariz. 488, ¶ 19, 990 P.2d 689, 694 (App. 1999); *Stephens v. Indus. Comm’n*, 114 Ariz. 92, 94, 559 P.2d 212, 214 (App. 1977) (“This court will not consider on review an issue not raised before the Industrial Commission where the petitioner has had an opportunity to do so.”).

¶9 Pashain next argues the various employment positions the labor-market expert had recommended as both suitable for and available to him were inconsistent with the work restrictions identified in an independent medical evaluation—specifically that he work no more than six to eight hours per day. But Pashain identifies no evidence in the record supporting this argument. He instead refers to documents presented to the ALJ for the first time with his request for review. The ALJ declined to consider those documents when deciding Pashain’s request for review, finding they had not been filed timely. Although a party may, “at the conclusion of a hearing” request that the hearing be continued “to introduce additional evidence,” Pashain did not do so. Ariz. Admin. Code R20-5-156(B). And, although he appears to assert that the late filing of the supporting documents was attributable to the County’s late disclosure of the supplemental report, as we noted above, Pashain did not object to either the County’s extension request or the report. Thus, to the extent Pashain argues the ALJ erred in declining to consider the materials he submitted for the first time with his request for

review, we reject that argument. The labor-market expert testified the positions she had opined were suitable for and available to Pashain were consistent with his work restrictions, and he has provided no reason for us to question the ALJ's reliance on that testimony. *See Grammatico*, 208 Ariz. 10, ¶ 6, 90 P.3d at 213 (we “deferentially review” ALJ's findings).

¶10 The County's consultant further testified that one of the proposed positions identified in her report—a public safety dispatcher—should be withdrawn from consideration because it required a typing speed competency of forty-five words per minute and Pashain was concerned he could not meet that requirement. Pashain asserts the police dispatcher position the ALJ found appropriate also required the same typing speed and the ALJ therefore erred in finding it to be suitable employment. But, according to the consultant's report, that dispatcher position required a typing speed of only thirty words per minute. The report also stated that even a “hunt and peck” typist like Pashain would be able to meet that requirement, particularly given his level of education and experience with computers.³ Thus, the evidence supports the ALJ's conclusion that the identified dispatcher position was suitable employment for Pashain. The only evidence Pashain cites in support of his claim that the position required a faster typing speed than the report indicated and therefore was unsuitable for him, are the

³At the hearing, Pashain sought to admit evidence of a typing test he had taken demonstrating his typing speed, but the ALJ precluded that evidence, and Pashain does not argue the ALJ erred by doing so.

documents he submitted after the ALJ had issued his decision. As we have explained, the ALJ did not err in declining to consider those documents.

Disposition

¶11 For the reasons stated, we affirm the award.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge