

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
NOV 25 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JONATHAN A. BALLESTEROS,)	
)	
Petitioner Employee,)	2 CA-IC 2009-0011
)	DEPARTMENT B
)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
THE INDUSTRIAL COMMISSION)	Appellate Procedure
OF ARIZONA,)	
)	
Respondent,)	
)	
RAYTHEON SYSTEMS COMPANY,)	
LLC,)	
)	
Respondent Employer,)	
)	
LIBERTY MUTUAL FIRE)	
INSURANCE COMPANY,)	
)	
Respondent Insurer.)	
)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20040-0060695

Insurer No. WC648-353954

Thomas A. Ireson, Administrative Law Judge

AWARD AFFIRMED

Jonathan Ballesteros

Tucson
In Propria Persona

The Industrial Commission of Arizona
By Andrew F. Wade

Phoenix
Attorney for Respondent

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By M. Ted Moeller

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Employer and Respondent Insurer

B R A M M E R, Judge.

¶1 In this statutory special action, petitioner Jonathan Ballesteros contends the administrative law judge (ALJ) erred in denying his motion to reopen his claim for benefits. The ALJ determined Ballesteros had failed to present a new, additional, or previously undiscovered disability or condition causally related to the industrial injury he sustained while employed at respondent Raytheon Systems Co. Finding no error, we affirm the award.

Factual and Procedural Background

¶2 “On review of an Industrial Commission award, we must view the evidence in the light most favorable to sustaining the Industrial Commission’s findings and award.” *Roberts v. Indus. Comm’n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). On November 18, 2003, Ballesteros was injured while working for Raytheon when the plate on a copy machine he was fixing pinched his dominant left hand. He filed an application for benefits with the Industrial Commission on December 9, 2003. Later that month he

saw Dr. Karen Haas, reporting pain, weakness, and tingling in his left hand and fingers. Haas recommended that Ballesteros limit his activities and begin occupational therapy. When his pain did not improve, Ballesteros saw Dr. Douglas Wegner in June 2004. By then, Ballesteros's pain had migrated from the dorsal central area, or center of his wrist, to the ulnar side of his wrist, the side closest to his little finger. In July 2005, Wegner performed wrist surgery on Ballesteros's triangular fibrocartilage complex (TFCC), a structure localized to the ulnar side of the wrist.

¶3 Liberty Mutual Fire Insurance Co., Raytheon's insurance carrier, accepted Ballesteros's claim for benefits on August 2, 2005. Thereafter, Ballesteros continued to suffer "diffuse" wrist pain, which Wegner diagnosed as arising from the thickening of his extensor carpi ulnaris tendon (ECU), also a structure localized to the ulnar side of the wrist. In January 2007, Wegner performed a second wrist surgery on Ballesteros's ECU to address this condition. In May 2007, Wegner determined Ballesteros was at "maximum medical improvement," meaning there was no further treatment that could be provided Ballesteros that would bring him relief. Wegner diagnosed Ballesteros with "permanent partial impairment of 8 percent of his left upper extremity," "correspond[ing] to a 5 percent whole person permanent partial impairment." In June 2007, Liberty Mutual closed Ballesteros's claim, noting his injury had resulted in permanent impairment.

¶4 Ballesteros continued to complain to Wegner of ulnar-side wrist pain following both his surgeries and after the closure of his claim. He also complained of

dorsal-central wrist pain, similar to that he had initially experienced following his accident years earlier. In May 2008, Wegner diagnosed further degeneration or tearing of Ballesteros's TFCC, and advised Ballesteros to undergo a third surgery, a repeat arthroscopy and TFCC debridement. In June 2008, Ballesteros filed a petition to reopen his claim based on a new, additional, or previously undiscovered disability or condition. Liberty Mutual denied his petition on July 8, 2008 and Ballesteros requested a hearing before the Industrial Commission, which the ALJ scheduled to begin October 28, 2008.

¶5 On October 7, 2008, Ballesteros saw Dr. John Hayden for an independent medical evaluation, complaining of dorsal-central wrist pain. He also complained of pain in the dorsal radial area, the thumb side of his wrist. Hayden could not determine the cause of Ballesteros's pain nor could he relate it to the industrial injury without further testing. Following further testing, on November 7, 2008, Hayden reiterated that he could not account for Ballesteros's pain nor causally relate the pain to his industrial accident. Hayden further opined that Ballesteros "[wa]s not in need of any further active medical care"

¶6 Ballesteros, Wegner, and Hayden testified at the three-day hearing before the ALJ. Finding "there does not appear to be a material conflict in medical opinion that there have been no objective changes shown on diagnostic testing or physical examination since the last closure of the claim," the ALJ entered an award denying Ballesteros's petition to reopen. Ballesteros filed a request for review, and the ALJ affirmed the award. This special action followed.

Discussion

¶7 Ballesteros’s petition does not comply with Rule 13(a), Ariz. R. Civ. App. P, or Rule 7(e) and (i), Ariz. R. P. Spec. Actions. It contains no table of contents or table of citations. His statement of the case, statement of facts, statement of the issues and argument do not contain the required material. His brief contains no citations to the record or to any pertinent authority. He does not articulate a standard of review for the issues he raises. Ballesteros’s failure to comply with Rule 13(a) and Rule 7 would justify our summary refusal to consider his statutory special action 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.”); *Allen v. Chon-Lopez*, 214 Ariz. 361, n.1, 153 P.3d 382, 384 n.1 (App. 2007) (statement of facts disregarded for failure to comply with Rule 7(e)); *see also* Ariz. R. P. Spec. Actions 10(k) (Arizona Rules of Civil Appellate Procedure apply to special action review of industrial commission awards). Even though Ballesteros is appearing in propria persona, he is held to the same standards as a qualified attorney. *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 Raytheon has provided us useful guidance in its response, we will attempt to discern and address the substance of Ballesteros's petition.

¶8 Section 23-1061(H), A.R.S., provides that an employee may file a petition to reopen a claim for new benefits “upon the basis of a new, additional or previously undiscovered temporary or permanent condition” However, “[a] claim shall not be reopened because of increased subjective pain if the change is not accompanied by a change in objective physical findings.” *Id.* It is the claimant's burden to demonstrate to the ALJ the existence of a new, additional, or previously undiscovered temporary or permanent condition. *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 16, 695 P.2d 261, 265 (1985); *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, ¶ 17, 41 P.3d 640, 643-44 (App. 2002). The claimant must also establish there is a causal connection between the new or additional condition and the industrial injury. *Stainless Specialty*, 144 Ariz. at 19, 695 P.2d at 268; *see also* § 23-1061(H). “Unless a causal connection is clearly apparent to a lay person, the relationship must be established by expert medical testimony.” *Stainless Specialty*, 144 Ariz. at 19, 695 P.2d at 268. “Where there is a conflict in expert testimony, it is the responsibility of the [ALJ] to resolve it,” and “[w]e will not disturb the resolution of the [ALJ] unless it is wholly unreasonable.” *Id.* “If there is any substantial evidence to support the [ALJ's] factual findings, we must affirm his determination.” *Gomez v. Indus. Comm'n*, 148 Ariz. 575, 576, 716 P.2d 32, 33 (App. 1985); *see also Roberts v. Indus. Comm'n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989) (“We will not set aside the award if it is based upon any reasonable interpretation of the

evidence. However, an award will not be upheld if it is not based on competent or substantial evidence.”) (citation omitted).

¶9 At the hearing before the ALJ, Hayden testified that the third surgery Wegner recommended would be performed on Ballesteros’s TFCC, a structure localized to the ulnar side of the wrist, “not anywhere near” the dorsal central area where Ballesteros currently was experiencing pain. Hayden opined that Wegner’s recommended TFCC surgery would not alleviate Ballesteros’s current dorsal central pain. Although Ballesteros had experienced dorsal-central wrist pain immediately following his industrial accident, Hayden testified he could not causally relate Ballesteros’s current pain to the industrial accident. Ballesteros had not experienced dorsal-central wrist pain for over three years and Hayden could not determine any reason for its reoccurrence. Wegner had testified that Ballesteros’s dorsal-radial wrist pain was not the pain for which he had treated Ballesteros, nor was it the pain for which he had recommended the third surgery. In light of this testimony, we can readily conclude substantial evidence supports the ALJ’s award denying Ballesteros’s petition to reopen. Ballesteros has failed to demonstrate the existence of a new, additional, or previously undiscovered temporary or permanent condition causally related to his industrial accident.

Disposition

¶10 For the foregoing reasons, we affirm the ALJ's award denying Ballesteros's petition to reopen.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge