

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

GUILLERMO MENA-MEDINA, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

RUSSO AND STEELE, LLC., *Respondent Employer,*

TRAVELERS INDEMNITY COMPANY, *Respondent Carrier.*

No. 1 CA-IC 16-0013
FILED 11-8-2016

Special Action – Industrial Commission
ICA Claim No. 20143-390064
Carrier Claim No. 127-CB-EYC5153-J
J. Matthew Powell, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Guillermo Mena-Medina, Phoenix
Petitioner Employee

The Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent

Hoffman Kelley Lopez LLP, Scottsdale
By Carolanne D. McCaskill, Kevin E. Karges
Counsel for Respondents Employer and Carrier

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge *Pro Tempore* Edward W. Bassett¹ joined.

T H O M P S O N, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision. An Administrative Law Judge (ALJ) affirmed the decision by Travelers Indemnity Company (the industrial employer's insurance carrier or the insurance carrier) closing Guillermo Mena-Medina's (Petitioner) benefits claim with a 1% permanent impairment to the right hand effective July 8, 2015 and an award of scheduled permanent disability benefits. Because we find the ALJ's decision is supported by reasonable and substantial evidence, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Petitioner sustained a compensable injury to his right hand arising out of and in the course of his work for Russo and Steele, LLC (the industrial employer) in October 2014. He filed a claim for workers' compensation benefits. The claim was accepted by the industrial employer's insurance carrier.

¶3 In March 2015, Petitioner's treating hand physician and surgeon, Paul Zidel, M.D., (Dr. Zidel), who provided Petitioner's hand therapy and performed his X-rays, determined that Petitioner's hand injury was stationary, that no active medical care was warranted, and that he could resume full-duty work. The insurance carrier initially terminated Petitioner's benefits based on Dr. Zidel's report. The insurance carrier rescinded the termination in April after Petitioner claimed Dr. Zidel discharged him without asking how his right hand was feeling or if he could work with it. However, the insurance carrier again suspended

¹ The Honorable Edward W. Bassett, Judge of the Arizona Superior Court, has been authorized to sit in this matter pursuant to Article 6, Section 3 of the Arizona Constitution.

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Petitioner's medical benefits effective May 18, 2015, asserting that Petitioner "[r]efused to submit to or obstructed a medical examination."

¶4 In June 2015, Paul M. Guidera, M.D., (Dr. Guidera) performed an independent medical examination (IME) on Petitioner, concluding he should be awarded a permanent impairment rating of 1% of his right dominant hand (the equivalent of 6% impairment of the right small finger). Dr. Guidera additionally noted that there was no indication of a need for supportive care. Based on the information in Dr. Zidel's report and Dr. Guidera's IME, the insurance carrier closed Petitioner's claim for benefits effective July 8, 2015.

¶5 Petitioner timely requested a hearing before an ALJ protesting the closure of his claim and his impairment rating. The ALJ held hearings on the matter in October and December of 2015. During the December hearing, Petitioner testified he disagreed with Dr. Guidera's impairment rating and questioned why his hand was still hurting. Counsel for the industrial employer and insurance carrier (collectively Respondents) drew attention to the fact that Petitioner had not submitted any medical evidence to support his contention of persistent pain or of a greater permanent impairment.

¶6 Albeit not disclosing a receipt date, Petitioner acknowledges he received a letter by mail informing him that his claim would be closed if he failed to submit any medical evidence regarding his hand injury. On February 10, 2016, the ALJ issued a decision finding that Petitioner had not met his burden of proof because he failed to provide the requested evidence. The ALJ cited the doctors' reports and concluded that the insurance carrier correctly closed Petitioner's claim. The ALJ further ordered an award for scheduled permanent disability.

¶7 Petitioner timely requested the ALJ review his decision, arguing the decision was unfair and stating that he was going to see a doctor on March 1, 2016. After a visit to Dr. Zidel on March 1, Petitioner submitted to the court a letter from the doctor that same day, stating: "Guillermo Mena Medina was seen in my clinic on 3/1/2016 who is s/p open fracture of right hand 2014 with new pain tendonitis. He will be treated conservatively with therapy and will be reevaluated in one month . . ."

¶8 Respondents responded to Petitioner's request for review, arguing the February 10 decision was reasonably supported by the evidence, and that Respondents would be prejudiced if the ALJ were to

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accept further evidence from Petitioner without allowing them to cross-examine Petitioner or otherwise respond to the evidence. On March 10, 2016, the ALJ entered a decision upon review affirming the February 10 findings and award.

¶9 Petitioner timely appealed to this court. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(2) (2016), 23-951(A) (2016), and Arizona Rules of Procedure for Special Actions 10.

DISCUSSION

¶10 We affirm the ALJ's conclusion that Petitioner failed to meet his burden to provide the requisite evidence of a greater permanent impairment or a need for continuing active medical care beyond July 8, 2015.

¶11 In reviewing the ICA's awards and findings, we consider the evidence in the light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). We defer to the ALJ's factual findings and review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We will affirm the ALJ's award if it is supported by substantial and reasonable evidence. *See Hopper v. Indus. Comm'n*, 27 Ariz. App. 732, 735, 558 P.2d 927, 930 (1976).

¶12 As an applicant for workers' compensation benefits, Petitioner had the burden of proving all elements of his claim, including "the existence of an industrially-related permanent impairment." *Simpson v. Indus. Comm'n*, 189 Ariz. 340, 346, 942 P.2d 1172, 1178 (App. 1997) (citing *Brooks v. Indus. Comm'n*, 24 Ariz. App. 395, 399, 539 P.2d 199, 203 (1975)). Petitioner's burden to prove his case is not diminished because he is not represented by counsel. *See, e.g., Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 16, 17 P.3d 790, 793 (App. 2000) (stating that a party who conducts a case without an attorney is held to the same standards expected of an attorney).

¶13 Petitioner disagreed with Dr. Zidel's conclusions that his injury was stationary and thus further active medical care was unnecessary, and Dr. Guidera's 1% impairment rating because he allegedly continued to experience pain. However, "[s]ubjective pain does not fall under Arizona's definition of an injury," and thus cannot alone support a claim. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 494, ¶ 12, 154 P.3d 391, 396 (App. 2007). "[S]ubjective pain must be directly related to the degree of impairment resulting from an objective physical change." *Id.* (citation omitted). "The

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[ICA] may disregard self-serving testimony of an interested witness” that is not “corroborated by other credible evidence or disinterested testimony.” *Adams v. Indus. Comm’n*, 113 Ariz. 294, 296, 552 P.2d 764, 766 (1976) (internal quotation and citations omitted).

¶14 Thus, to prevail on his protest of the insurance carrier’s decision to close his benefits and the impairment rating, Petitioner was *required to provide evidence* of either a need for continuing active medical treatment *related to the industrial incident* or the existence of a greater permanent impairment resulting from the industrial incident. He failed to do either prior to the ALJ’s February 10 findings and award. Nor does the record indicate Petitioner requested additional time or a hearing continuance to present additional evidence regarding his injury at the conclusion of the last scheduled ICA hearing in December 2015.²

¶15 Due to Petitioner’s failure to present alternative or additional medical evidence, the ALJ based his decision on the medical reports from Dr. Zidel and Dr. Guidera that Respondents produced at the hearing. These reports constitute substantial evidence that reasonably supports the ALJ’s February 10 findings and award. *See Crystal Bottled Waters v. Indus. Comm’n*, 174 Ariz. 184, 185, 847 P.2d 1131, 1132 (App. 1993) (noting that if no conflict exists in medical testimony, the ALJ is bound to accept it).

¶16 We cannot decipher from the language in the decision upon review whether the ALJ actually considered the March 1 letter in reviewing the February 10 decision. If the ALJ did consider the March 1 letter, the ALJ could have reasonably concluded that the March 1 letter alone would not have sufficed to show a need for active medical treatment or a greater or permanent impairment directly stemming from the subject industrial incident. *See, e.g., Cassey v. Indus. Comm’n*, 152 Ariz. 280, 283, 731 P.2d 645, 648 (App. 1987) (concluding that disabling pain constitutes a permanent impairment if a claimant meets his or her burden of proof to show both the causal relationship between the industrial incident and the disabling pain and a resulting inability to return to his or her former work). Additionally, the ALJ could have reasonably concluded that permitting Petitioner to present the note of his March 1 visit to Dr. Zidel, without Respondents cross-examining Petitioner or otherwise responding to this evidence, would

² *See* Ariz. Admin. Code R20-5-156(A) (“A party may request a continuance of a scheduled hearing. If a party shows good cause, a presiding administrative law judge may grant a request that a hearing be continued.”).

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prejudice the Respondents. Under these circumstances, we cannot conclude that the ALJ had no reasonable basis to affirm the February 10 findings and award. The letter did not provide any new evidence to support a change in the ALJ's decision.

CONCLUSION

¶17 Because the evidence in the record supports the ALJ's findings, award, and decision upon review, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA