IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LAWRENCE E. HAND, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

R and M REFUSE, *Respondent Employer*.

No. 1 CA-IC 13-0005
FILED 12-26-2013

Special Action Industrial Commission
ICA Claim No. 20111-250304 Carrier Claim No. 1102330
The Honorable J. Matthew Powell, Administrative Law Judge

AWARD SET ASIDE

COUNSEL

Lawrence E. Hand, Vernon

Petitioner In Propria Persona

The Industrial Commission of Arizona, Phoenix
By Andrew Wade

Counsel for Respondent

SCF Arizona, Phoenix
By Mark A. Kendall

Counsel for Respondent Employer / Carruer

MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Kent E. Cattani joined.

G E M M I L L, Judge:

¶1 Lawrence E. Hand seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review affirming a credit against Hand's temporary partial compensation based on a finding that suitable alternative work was available during the relevant time period. For the following reasons, we set aside the award.

FACTS AND PROCEDURAL HISTORY

¶2 Hand was employed as a garbage truck route driver for Respondent Eriksen Enterprises, d.b.a. R&M Refuse ("R&M"). The job required a commercial driver's license. On April 20, 2011, Hand suffered a work-related injury when the third, fourth, and fifth fingers of his right hand were crushed in a hydraulic compactor on the truck. Hand underwent several surgeries to repair the middle finger, which sustained the most severe damage, culminating in its amputation.

¶3 Hand was unable to work for several months after his injury while undergoing treatment. He expressed willingness to proceed with the amputation in part because he wished to cease taking pain medication and return to work. On November 1, 2011, Hand's attending physician indicated Hand was still not able to fully resume work and that he could not lift or exert any force with his right hand. Two days later, the doctor

reported that Hand was able to drive, but the doctor did not clarify whether that included commercial driving.

¶4 After learning Hand had been cleared to drive, R&M owner Mike Eriksen sent a letter dated November 10, 2011, offering Hand a "temporary" job assignment, to begin November 15, that consisted of the same driving duties Hand performed before the injury. Hand testified that, after receiving the letter, he informed Eriksen that he could not legally return to commercial driving until he had his Department of Transportation medical card re-evaluated and cleared, but he offered to do any available non-driving work. Eriksen testified, in contrast, that Hand left him a voicemail stating, with no explanation, that Hand would not break the law, and that Hand did not further contact Eriksen about the job offer.

¶5 Eriksen further testified that sometime in mid-October, before he sent the letter to Hand offering the "temporary" driving job, Eriksen had verbally offered Hand a temporary, non-driving job training a new driver on Hand's routes, which Hand declined. This job would have lasted "two or three weeks" and would have been completed by November 15. Eriksen maintained that, because he wrote the letter offering Hand his old job during the same period of time as his verbal training job offer, it was implied that the alternative work was still available even after Hand declined the training job. Eriksen also stated that additional non-driving work was available, but Eriksen never mentioned other available work to Hand after Hand refused the training job. Hand testified that he did not recall Eriksen verbally offering him an alternative job in October.

¶6 On November 13, 2012, the ICA Administrative Law Judge ("ALJ") awarded Hand an 18% permanent impairment to the right upper extremity and supportive medical care that included a cosmetic prosthetic finger and a Digi sleeve (anti-vibration glove). The ALJ also found that alternative work as a non-driving trainer, consistent with Hand's work restrictions, was available to Hand effective November 18, 2011, and for that reason, the ALJ awarded a credit against Hand's temporary partial compensation benefits from that date through the end of his partial compensation claim on January 24, 2012, thereby considerably reducing the benefits for that period.

¶7 Hand timely requested review of the "portion of the [Hearing Decision that] addresses the issue of temporary compensation

benefits due." On January 3, 2013, the ALJ affirmed the decision. The ALJ held that the written offer implicitly recognized that R&M still needed someone to learn and drive Hand's route. The ALJ further stated that he found credible Eriksen's testimony that Eriksen had additional non-driving work available but saw no point discussing it with Hand after Hand rejected the initial temporary training job. The ALJ deemed Hand's contrary testimony not credible.

¶8 Hand timely appealed the Decision Upon Review to this court. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") section 23-951(A) and Arizona Rule of Procedure for Special Actions 10.

SCOPE OF OUR REVIEW

¶9 In reviewing ICA decisions, this court is limited to those issues previously raised as part of the hearing process or in a Request for Review. *Obersteiner v. Indus. Comm'n of Ariz.*, 161 Ariz. 547, 549, 779 P.2d 1286, 1288 (App. 1989). When an issue raised on appeal was not presented in the Request for Review before the ICA, this court will consider the issue only if it is "extant in the record," such as an objection to evidence; "fundamental on review," such as a question about the sufficiency of evidence to support the decision; or of "a general public nature, affecting the interests of the state at large." *Id.*; *Ruth v. Indus. Comm'n*, 107 Ariz. 572, 574, 490 P.2d 828, 830 (1971). Hand raises several issues on appeal, but we review only his argument that a credit should not have been applied against his temporary compensation.

¶10 Contrary to Hand's contentions, he did not raise claims about his permanent impairment schedule and the functional prosthetic in his Request for Review of the Hearing Decision. Hand specifically requested review of "that portion of the [hearing decision that] addresses the issue of temporary compensation benefits due." The decision clearly differentiated between "temporary compensation benefits," which covered the credit against compensation; "supportive medical benefits," which included the Digi sleeve and prosthetic; and the 18% scheduled permanent impairment. Because he limited his Request for Review to temporary compensation benefits, Hand did not exhaust his administrative remedies for the other two issues – a prerequisite for judicial review. *See Obersteiner*, 161 Ariz. at 549, 779 P.2d at 1288 (stating rule precluding appellate review of claims not raised below "stems from the requirement that an aggrieved party must exhaust his administrative remedies before seeking judicial relief").

¶11 The scheduled nature of Hand's permanent benefits and the award of a prosthetic are not extant in the record in the manner of objections to evidence, fundamental on review, or of a general public nature. While the issues may have been addressed elsewhere in the proceedings, their omission from the Request for Review precludes Hand from raising them before this court. Even though Hand adequately raised the issue of the credit against his temporary compensation benefits, the ALJ made his determination based on a finding of available alternative work and declined to decide whether Hand was legally permitted to commercially drive during the period in question. Therefore, we limit our review to whether the ALJ could have reasonably found that alternative work was available to Hand to support a credit against his benefits.

ANALYSIS

¶12 We will affirm an ICA decision that is "reasonably supported by the evidence after reviewing the evidence in a light most favorable to sustaining the award." *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). We "deferentially review factual findings of the ALJ." *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003).

¶13 The ALJ determined that alternative work was available to Hand between November 18, 2011 and January 24, 2012, based on a finding that the training job Eriksen allegedly offered in October was implicitly still available at the time of Eriksen's November 10 letter that offered Hand essentially the same driving job he previously held. Specifically, the ALJ found Eriksen's testimony more credible than Hand's on the question of whether the training job was offered in October and found that the written offer implied the alternative job was still available.

¶14 The ALJ is the sole judge of witness credibility. *Holding v. Indus. Comm'n of Ariz.*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). Likewise, the ALJ must draw warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). "[W]here more than one inference may be drawn, the [ALJ] is at liberty to choose either, and this court will not disturb its conclusion unless it is wholly unreasonable." *Id.* We will set aside an award, however, if an ALJ's conclusions are based on an error of law or are otherwise unsupported by the record. *See Kwietkauski v. Indus. Comm'n of Ariz.*, 231 Ariz. 168, 170, ¶ 9, 291 P.3d 365,

367 (App. 2012) (noting that the Court of Appeals "independently reviews" an ALJ's legal conclusions); *Glodo v. Indus. Comm'n of Ariz.*, 191 Ariz. 259, 261, 955 P.2d 15, 17 (App. 1997) (observing that an award "will be set aside if not supported by the evidence").

¶15 Here, the facts and the law do not support the ALJ's conclusion that the only logical inference from the written November offer was that non-driving work was available, even after November 15, 2012. The ALJ found that "implicit in the written offer to [Hand] for the driving job [was] the recognition . . . that the employer still needed someone at that time to learn and do [Hand's] route." The ALJ inferred that Eriksen's offer to give Hand his old job meant that the job was not filled the previous month and also that the alternative job — the training job — would also still be available to Hand (assuming he could not legally return to commercial driving). Because the November written offer of a driving position implied that alternative non-driving work as a trainer was still available, the ALJ's inference was permissible. The credit against Hand's benefits, however, required the ALJ to further conclude that Hand should have known both that there was alternative work available to him temporarily and that alternative work was available for several weeks thereafter. We find this latter conclusion to be too speculative and therefore legally unsupported on this record.

¶16 Benefit credits are essentially applied to penalize claimants for not engaging in gainful employment available to them. It is inappropriate to penalize a claimant for not accepting a job he did not know was available, particularly if the claimant has previously expressed interest in returning to work. *See Phelps Dodge Corp. v. Indus. Comm'n*, 114 Ariz. 252, 254, 560 P.2d 436, 438 (App. 1977) (finding that a claimant made a satisfactory effort to secure employment when he inquired of his employer about the availability of light work); *R.L. Owensby v. Riegel Textile Corp.*, 123 S.E.2d 147, 149 (Ga. Ct. App. 1961) (affirming credit against benefits for period when claimant's employer made light work available, "claimant *had knowledge* that this work was available to him," and claimant did not accept work offered (emphasis added)).

¶17 Although the ALJ inferred from the November 10 letter that an alternative job was available, the appropriate inquiry is whether Hand was unreasonable in not making the same inference and not reaching the same understanding (that alternative, non-driving work was available). Furthermore, the credit was applied for a period of more than nine weeks after the start date of the written job offer. Even if Hand should have

inferred that the training job was still available, such an inference does not establish that he also should have known, without being told, that work was available beyond the two- or three-week assignment. We note that the ALJ did not apply a credit against Hand for the period in October when, based on Eriksen's testimony, an alternative job had been communicated to Hand. Beyond that, the fact that Hand initially turned down the training job did not preclude him from accepting alternative work in the future. *See, e.g., Bierman v. Indus. Comm'n*, 2 Ariz. App. 548, 551, 410 P.2d 666, 669 (1966) (holding award should be reevaluated after petitioner showed change of heart about refusing light work offered).

¶18 We conclude that the ALJ erred by expecting Hand to make the same inference that the ALJ made about the continued availability of the non-driving, training work previously offered. A potential contradictory inference from the November 10 written offer of the driving position is that the employer was trying to coax Hand into resuming his prior driving job, without the need for alternative, non-driving work. Although Hand perhaps should have followed up on the written job offer more thoroughly, it is not reasonable to penalize him for not accepting alternative work when, based on the record, he may not have known that alternative work was available. To the extent that the ALJ's decision was based on inferring Hand's knowledge of the availability of alternative work that was not clearly communicated to him, we find it unsupported by the evidence.

CONCLUSION

¶19 Because the award is not fully supported by the facts and law, we set the award aside.