

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

KELLY S. LEVY,
Petitioner,

v.

THE INDUSTRIAL COMMISSION
OF ARIZONA,
Respondent,

PERFORMANCE RADIATOR PACIFIC,
Respondent Employer,

TOKIO MARINE MANAGEMENT,
Respondent Carrier.

No. 1 CA-IC 16-0032
FILED 2-28-2017

Special Action - Industrial Commission
ICA No. 20151-800220
INSCA No. WC0000103077
The Honorable Deborah A. Nye, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Kelly S. Levy, Phoenix
Petitioner

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

Lundmark, Barberich, LaMont & Slavin, PC, Phoenix
By Kirk A. Barberich
Counsel for Respondent Employer/Carrier

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Margaret H. Downie joined.

B E E N E, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (“ICA”) award concerning a compensable injury. The claimant, Kelly S. Levy, argues the administrative law judge (“ALJ”) erred by miscalculating his temporary disability benefits (“TPD”) and by finding that Levy obstructed his independent medical examination (“IME”). For the reasons that follow, we affirm the ICA’s award.

FACTS AND PROCEDURAL BACKGROUND

¶2 Levy worked for Performance Radiator Pacific (“PRP”) as an industrial account manager, a sales job that required him to drive 100 to 300 miles per day and occasionally lift heavy equipment. On June 11, 2015, Levy injured his right arm and shoulder moving a radiator for a PRP customer. Following his injury, Levy was placed on light duty, which limited him to making phone calls to customers from his home. Levy made a timely claim for workers’ compensation, which was accepted by PRP’s insurance carrier, Tokio Marine Management, Inc., on June 25, 2015. Levy was granted medical benefits and later diagnosed with a right shoulder subscapularis tear, bicep tendon dislocation, and a superior labral tear. Levy’s injuries required surgery, which was performed on August 27, 2015.

¶3 In accordance with PRP policy, Levy was drug tested at the earliest possible date following his industrial injury, and on June 26, 2015, he was fired after testing positive for marijuana. Levy was not granted temporary disability benefits between his firing on June 26, 2015 and his August 27, 2015 surgery. On September 25, 2015, Levy was retroactively granted benefits from the date of his surgery onward.

LEVY v. PERFORMANCE/TOKIO
Decision of the Court

¶4 Levy’s benefits continued through November 11, 2015, when PRP unilaterally suspended them, citing Arizona Revised Statutes (“A.R.S.”) section 23-1026(C) (2017),¹ after Levy purportedly obstructed an IME on November 9, 2015. According to the evidence, Levy was confrontational during a scheduled IME with Dr. Amit Sahasrabudhe. Levy refused to answer basic questions about his medical condition, refused to remove his shoulder brace and refused to remove his sunglasses. Dr. Sahasrabudhe testified that Levy was passive aggressive and asked questions that intimidated his medical assistant. Dr. Sahasrabudhe felt that he could not complete an appropriate examination of Levy.

¶5 Levy filed a “Complaint of Bad Faith,” claiming he had not obstructed the IME and requesting that his benefits be reinstated. After hearing testimony of Dr. Sahasrabudhe, Levy and PRP’s human resources manager, the ALJ issued a decision upholding the suspension of Levy’s benefits and finding that he had obstructed the IME. The ALJ further determined that Levy’s average monthly wage prior to the accident was \$3,548.03 and that he was entitled to temporary disability benefits of \$506.34 between June 26, 2015 and August 27, 2015. Levy objected to the decision, which the ALJ affirmed on review. Levy’s Petition for Special Action timely followed.

¶6 This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2017), 23-951 (2017) and Rule 10 of the Arizona Rules of Procedure for Special Actions.

DISCUSSION

¶7 In reviewing an ICA award, 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 (App. 2003). The ALJ has discretion to resolve any conflicts in the evidence, *Perry v. Indus. Comm’n*, 112 Ariz. 397, 398 (1975), and is the sole judge of witness credibility. *Henderson-Jones v. Indus. Comm’n*, 233 Ariz. 188, 191, ¶ 9 (App. 2013). As long as the ALJ’s findings are not unreasonable, this Court will not disturb them. *Hackworth v. Indus. Comm’n*, 229 Ariz. 339, 343, ¶ 9 (App. 2012).

I. The ALJ Properly Calculated Levy’s TPD

¶8 Levy argues that the ALJ undervalued the TPD he was entitled to between June 26, 2015 and August 27, 2015. Levy claims the ALJ

¹ Absent material revision after the relevant date, we cite a statute’s current version.

LEVY v. PERFORMANCE/TOKIO
Decision of the Court

incorrectly determined that his average monthly wage was \$3,548.03 before the industrial accident, and the ALJ generally erred in her grant of \$506.34 TPD. Levy's arguments are unfounded in fact or law.

¶9 In October 2015, the ICA set Levy's average monthly wage at \$3,548.03. Levy protested the calculation, but withdrew his objection at the hearing. We will not consider argument on an issue that a party has waived, and affirm the ALJ's average monthly wage determination. See generally *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (errors not raised in the trial court cannot be raised on appeal).

¶10 Levy argues, without support, that the ALJ erred in calculating his TPD. TPD is, by statute, calculated as 66 and 2/3 percent of the difference between an employee's average wage earned prior to his or her injury, and the employee's earning capacity post-injury. A.R.S. § 23-1044(A) (2017). Here, Levy's pre-injury salary was agreed to by the parties. The ALJ then determined Levy's post-injury earning capacity was his base salary, exclusive of sales commissions. PRP's human resource manager testified that Levy would have continued to receive his base salary had he not been fired for failure to abide by PRP's drug policy, and the ALJ determined the manager's testimony to be credible. The ALJ then used Levy's base salary as his earning capacity to calculate TPD. The ALJ's determination of post-accident earning capacity is supported by the record, and the ALJ properly applied the law in calculating Levy's TPD.

II. There is Sufficient Evidence to Find Levy Obstructed an IME

¶11 Levy also argues that there was insufficient evidence to show he obstructed the IME.

¶12 An employer may suspend benefits "[i]f the employee refuses to submit to the medical examination or obstructs the examination." A.R.S. § 23-1026(C) (2017). While an employer may unilaterally exercise this rule, benefits may not be suspended absent a "wrongful act" by the employee. *Kwietkauskis v. Indus. Comm'n*, 231 Ariz. 168, 171, ¶ 12 (App. 2012); *Edmunds v. Indus. Comm'n*, 126 Ariz. 486, 487 (App. 1980). The employee must "volitionally" refuse to attend or obstruct the IME. *Edmunds*, 126 Ariz. at 488. We affirm an ICA decision if it 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 (App. 2002).

¶13 Levy argues that the ALJ failed to properly consider or admit evidence, including medical records from his past injuries, testimony from

LEVY v. PERFORMANCE/TOKIO
Decision of the Court

his treating physicians, and various legal proceedings against the parties and others. But the evidence Levy cites is irrelevant to the ALJ's obstruction finding. The issue for the ALJ was whether Levy obstructed the November 2015 IME, not his conduct in any other medical examination or procedure.

¶14 The record shows that Levy actively obstructed Dr. Sahasrabudhe from completing the IME. Levy refused to provide his medical history, did not fill out a pain diagram, would not answer questions about the causation of his injury, refused to remove his arm sling, and intimidated Dr. Sahasrabudhe's medical assistant. Levy tried to justify his behavior, but the ALJ did not find his testimony to be credible, and agreed with Dr. Sahasrabudhe's depiction of the IME. The ALJ is solely responsible for determining the credibility of the witnesses, and there is sufficient evidence to support the ALJ's decision that Levy's wrongful obstruction prevented Dr. Sahasrabudhe from completing the IME.

CONCLUSION

¶15 For the reasons stated above, we affirm the award of the ICA.



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