

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

CITY OF PHOENIX, *Petitioner Employer,*

YORK RISK SERVICE GROUP, *Petitioner Carrier*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

ROBERT SAUCEDA, *Respondent Employee.*

No. 1 CA-IC 16-0043

FILED 6-6-2017

Special Action - Industrial Commission

ICA Claim No. 20091-970001

Carrier Claim No. 2009, 28089

Paula R. Eaton, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Jardine, Baker, Hickman & Houston, PLLC, Phoenix

By K. Casey Kurth

Counsel for Petitioners Employer and Carrier

Industrial Commission of Arizona, Phoenix

By Jason M. Porter

Counsel for Respondent

Taylor & Associates, PLLC, Phoenix
By Thomas C. Whitley, Nicholas C. Whitley
Counsel for Respondent Employee

MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Chief Judge Michael J. Brown and Judge Patricia A. Orozco¹ joined.

P O R T L E Y, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona (“ICA”) award and decision upon review granting a petition for rearrangement and awarding the respondent employee (“claimant”) permanent total disability benefits. One issue is presented: whether the administrative law judge’s (“ALJ’s”) award finding the claimant permanently and totally disabled is supported by the evidence of record. Because we find that the record contains sufficient evidence to support the ALJ’s award granting rearrangement, we affirm the award.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(2), 23-951(A), and Arizona Rules of Procedure for Special Actions 10.² In reviewing findings and awards of the ICA, we defer to the ALJ’s factual findings, but review questions of law de novo. *Young v. Indus. Comm’n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ’s award. *Lovitch v. Indus. Comm’n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

¹ The Honorable Maurice Portley and Honorable Patricia A. Orozco, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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BACKGROUND

¶3 The claimant, a police officer, sustained injuries during an altercation with a suspect on January 23, 2009, while working for the self-insured petitioner employer, City of Phoenix (“Phoenix”). He filed a workers’ compensation claim, which was accepted for benefits. The claimant received medical treatment, including surgery, and was then released to perform light duty work for Phoenix.

¶4 Following an independent medical examination (“IME”), the claimant’s claim was closed with an unscheduled permanent partial impairment and supportive medical care benefits. The ICA then entered its administrative award for a 13% permanent impairment and no loss of earning capacity (“LEC”), based on claimant’s return to light duty work with Phoenix.³ The claimant testified that his industrial-related injuries deteriorated over time, and it became more difficult for him to perform his police work. He applied for and obtained a medical/disability retirement from Phoenix in May 2015.

¶5 The claimant filed a petition for rearrangement of compensation asserting that following his retirement, he had sustained an LEC. The ICA entered an administrative determination denying the petition for rearrangement, and the claimant timely requested an ICA hearing.⁴ The ALJ heard testimony from the claimant, one of his treating physicians, Anthony Lee, M.D., and two labor market experts, Richard A. Prestwood and Lisa A. Clapp.

¶6 The ALJ entered an award granting rearrangement and finding that the claimant had sustained a total LEC. Phoenix timely requested administrative review, but the ALJ summarily affirmed the award. Phoenix next brought this special action.

³ The ICA makes the initial determination of whether a permanent impairment has resulted in an LEC. *See* A.R.S. § 23-1047(A). If the ICA’s award is protested, it is rendered null and has no value in the subsequent LEC proceedings. *LeDuc v. Indus. Comm’n*, 116 Ariz. 95, 98 (App. 1977).

⁴ The ICA makes the initial determinations as to whether rearrangement is appropriate. *See* A.R.S. § 23-1044(F), -1047(A).

DISCUSSION

¶7 Phoenix argues that the ALJ erred by granting rearrangement and awarding a total LEC, because there was no medical evidence to establish that the claimant was unable to continue performing light duty work. The party seeking rearrangement has the burden of proof. *See Pima Cnty. Bd. of Supervisors v. Indus. Comm'n*, 149 Ariz. 38, 45 (App. 1986). A reduction in earning capacity is measured by comparing the facts determined by the prior final findings and award with those existing at the time the petition for rearrangement is filed. *Gallegos v. Indus. Comm'n*, 144 Ariz. 1, 5-6 (1985).

¶8 In this case, the claimant had the burden of proving that his earning capacity decreased between the February 5, 2014 LEC award and his April 24, 2015 petition for rearrangement. The claimant testified that his residual industrial injuries include permanent paralysis of his left diaphragm, damage to his esophagus, and digestive issues. These injuries cause daily pain and discomfort including (1) shortness of breath, (2) difficulty breathing, and (3) gastrointestinal distress which necessitates frequent bathroom breaks, up to several times per hour some days. These conditions caused the claimant to miss time from work and made it difficult for him to keep up with his workload. He testified that his job gradually became harder for him to manage physically and that his health was deteriorating, so he retired.

¶9 The claimant receives supportive medical care from Dr. Bremner, a cardiothoracic surgeon, Dr. Sue, a pulmonologist, and Dr. Lee, a pain management physician. Dr. Lee testified that he has treated the claimant since 2010 for abdominal pain, chest wall pain, and thoracic pain, which arose out of injuries sustained in the industrial injury and the surgery necessary to treat those injuries. Dr. Lee completed a work status report of the claimant's work restrictions related to his January 23, 2009 industrial injury. It was Dr. Lee's opinion that the claimant could perform full-time, light work within those restrictions. Although the work status report does not mention the claimant's gastrointestinal issues, Dr. Lee testified that he was aware of those issues and that he was "not sure with the GI issues what restrictions he has."

¶10 Mr. Prestwood testified that he considered the physical limitations provided by Drs. Schaller and Lee for his opinion. He stated that assuming the ALJ found the claimant's testimony regarding his residual injuries credible, the claimant is unemployable due to the unpredictable nature of his symptoms. Ms. Clapp testified that she relied

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on Dr. Lee's work status report for her opinion. Based on his restrictions, it was her opinion that the claimant can perform full-time light duty work as a dispatcher or a security guard with no LEC.

¶11 In an LEC proceeding, the medical expert's role is to identify the claimant's anatomical or functional impairments. *See, e.g., Adkins v. Indus. Comm'n*, 95 Ariz. 239, 243 (1964). The labor market expert's role is to receive medical input from the treating physician regarding the claimant's physical capabilities and to match them to requirements of specific jobs in the open labor market. *See Tucson Steel Div. v. Indus. Comm'n*, 154 Ariz. 550, 556 (App. 1987). In that regard, while

. . . the employment expert may bring to the trier of fact his expertise in this area (which makes his opinion admissible) this type of evidence is not so completely outside the understanding of the average layman, that a contrary conclusion cannot be reached. As with most expert opinions, the trier of fact is entitled to consider it, but give it only the weight to which he deems it is entitled.

LeDuc v. Indus. Comm'n, 116 Ariz. 95, 98 (App. 1977).

¶12 The ALJ is the sole judge of witness credibility. *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551 (App. 1984). It is his duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 216 (1968). In doing so, an ALJ is not bound to accept or reject an expert's entire opinion, but instead, is free to combine portions of the expert testimony in a reasonable manner. *Fry's Food Stores v. Indus. Comm'n*, 161 Ariz. 119, 123 (1989).

¶13 In this case, the ALJ specifically found the claimant credible and adopted his testimony regarding the effect his gastrointestinal problems had on his ability to work. Although Dr. Lee testified that the claimant was capable of full-time light work, he conceded that he did not know what restrictions the claimant had related to his gastrointestinal issues. Mr. Prestwood testified that assuming the claimant's testimony regarding the severity of his gastrointestinal problems was found credible, he was unemployable in the open labor market.

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¶14 Based on the ALJ's credibility determination and resolution of the evidentiary conflicts, there is reasonable evidence to support the finding that the claimant's earning capacity decreased between the February 5, 2014 LEC award and the April 24, 2015 petition for rearrangement, and that he is currently unemployable.

CONCLUSION

¶15 For all the foregoing reasons, we affirm the award.



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