

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JORGE ANDRADE, *Petitioner,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

JBS HOLDINGS, *Respondent Employer,*

ZURICH AMERICAN INSURANCE COMPANY, *Respondent Carrier.*

No. 1 CA-IC 18-0020
FILED 12-27-2018

Appeal from the Industrial Commission of Arizona
ICA Claim No. 20153-6300024
Carrier Claim No. 3015458749320001
The Honorable Layna Taylor, Administrative Law Judge

AFFIRMED

COUNSEL

Snow, Carpio & Weekley, PLC, Phoenix
By Erica Rose Gonzalez-Melendez
Counsel for Petitioner

The Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent Industrial Commission of Arizona

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Michael J. Brown joined.

M O R S E, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") decision awarding petitioner employee Jorge Andrade permanent disability benefits at a 50% rate rather than the 75% he requested. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Andrade worked for JBS Holdings ("JBS"), a slaughterhouse, as a forklift driver. As part of his work obligations, Andrade pushed and pulled "pallets" and "combos" that weighed between 60 and 200 pounds with a forklift. On November 10, 2015, Andrade's forklift broke down, so he attempted to operate a pallet jack instead. When Andrade went to retrieve the pallet jack, a safety bar fell and struck his left ankle, fracturing it. Andrade filed a claim for workers' compensation benefits, which was accepted. He was surgically treated for the fracture, and his temporary benefits were terminated, effective February 2016, without permanent impairment.

¶3 In August 2016, Andrade successfully reopened his claim and underwent additional surgery to remove hardware from his ankle. In December 2016, Andrade saw Dr. Graves, an orthopedic surgeon, because he still felt pain and discomfort in his ankle. Dr. Graves ordered a magnetic resonance imaging test and noted that although Andrade may need surgery in the future, nothing further needed to be done to his ankle at that time. Dr. Graves discharged Andrade in January 2017, with a 10% impairment rating, and recommended that he continue to work as a forklift driver with almost no restrictions. Andrade subsequently received a 10% disability award at the 50% rate, pursuant to Arizona Revised Statutes ("A.R.S.") section 23-1044(B).

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¶4 In Spring 2017, Andrade aggravated the 2015 ankle injury and was treated again by Dr. Graves. Dr. Graves permitted Andrade to return to his position as a forklift driver, but recommended supportive care with the following new work restrictions:

[His] restrictions include minimal lifting, pushing or pulling over 15 pounds. He should use an ankle brace or a hightop work boot at all times. He should restrict ladder climbing, squatting, or prolonged walking or standing. . . . He may work with these restrictions driving a forklift.

¶5 On June 5, 2017, Andrade filed a Request for Hearing, and argued that his disability award should have been paid at the 75% rate pursuant to A.R.S. § 23-1044(B)(21). That statute generally provides for compensation paid at a rate of 50% of average monthly wages for "the partial loss of use of a . . . foot or leg," increasing to a 75% rate "if the employee is unable to return to the work the employee was performing at the time the employee was injured." *Id.*

¶6 An administrative law judge ("ALJ") held a two-day hearing in September and November 2017. Andrade and Dr. Graves testified at the hearing. Andrade contended that his disability award should have been paid at the 75% rate rather than the 50% rate because he can no longer perform the same work as a forklift driver that he performed before the date of his industrial injury. Dr. Graves, however, testified that he could return to his job as a forklift driver and, with modifications, still perform the tasks he did prior to his industrial injury.

¶7 On November 29, 2017, the ALJ decided that Andrade's permanent disability should be compensated at the 50% rate, as he could continue to work his date-of-injury job driving a forklift. On January 22, 2018, the ICA affirmed the decision and award.

¶8 Andrade timely requested special action relief.

¶9 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶10 "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 of Ariz.*, 162 Ariz. 108, 110 (1989). We deferentially review the ALJ's factual findings but review de novo the ALJ's legal conclusions. *Gamez v. Indus. Comm'n of Ariz.*, 213 Ariz. 314, 315, ¶ 9 (App. 2006).

¶11 Andrade argues the ALJ erred by improperly awarding his scheduled disability be paid at the 50% rate rather than the 75% rate. He asserts that although he can return to his "occupation" as a forklift driver, he cannot return to his date-of-injury "work," pursuant to A.R.S. § 23-1044(B)(21), and therefore compensation should be calculated based on 75% of his average monthly wage.

¶12 It is the ALJ's duty to "resolve all conflicts in the evidence, and draw warranted inferences." *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217 (1968). When more than one inference may be drawn, the ALJ is at liberty to choose either, and we will not disturb that conclusion unless it is wholly unreasonable. *Id.* We will further presume the ALJ considered all relevant evidence in the absence of a reason in the record to conclude otherwise. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975).

¶13 In this case, the sole issue in dispute is whether Andrade's permanent impairment should be paid at the 50% rate or the 75% rate. "If the injury is not readily apparent to a layman, the existence of a condition can be established only by expert medical testimony." *Kaibab Indus. v. Indus. Comm'n of Ariz.*, 196 Ariz. 601, 608, ¶ 22 (App. 2000). At the hearing, Dr. Graves testified that, based on his evaluation of Andrade and Andrade's statements about his ability to return to work, he released Andrade to return to his date-of-injury work, and gave him restrictions under supportive care. *See supra* ¶ 4. Dr. Graves opined that Andrade could continue to work as a forklift driver with the permanent work restrictions in place, so long as Andrade takes care of his ankle. Dr. Graves also testified that Andrade told him that he wanted to return to JBS as a forklift driver, and that Andrade believed he could do so without climbing ladders or doing heavy lifting or pushing.

¶14 Andrade had the burden of proving his claim by a preponderance of the evidence. *See In re Bedwell's Estate*, 104 Ariz. 443, 444 (1969); *see also Malinski*, 103 Ariz. at 216 ("The petitioner has the burden to show affirmatively that he is entitled to compensation, and the [ICA] is not

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required to disprove such claim."). At the hearing, Andrade testified that he could not perform the same work that he once did before the date of his industrial injury. However, he also testified that he is still working full-time as a forklift driver – even earning more now than he did when he was initially injured – and the "only difference" in his current work, compared to before his injury, is "[he's] not helping out, doing the things that [he] used to do before." More specifically, he stated that he is not allowed to go places "where there's a lot of fat," where he has to walk "five or seven blocks," and he is not able to "collaborate and help out" his colleagues like he once did before his injury. He further testified that he had to "manually" push and pull pallets and combos that weighed over 15 pounds prior to his industrial injury, but now he is restricted from pushing, pulling, or lifting anything above 15 pounds. He therefore contends that because he cannot perform some of the work he once did as a forklift driver prior to his industrial injury, he should be compensated at the 75% rate.

¶15 This Court will not disturb the ALJ's conclusion unless it cannot be supported by any reasonable theory of the evidence. *Phelps v. Indus. Comm'n of Ariz.*, 155 Ariz. 501, 506 (1987); *see also Malinski*, 103 Ariz. at 217 (noting that the ALJ is the trier of fact and "unless its conclusion is arbitrary and cannot be supported on any reasonable theory of the evidence, we are bound thereby"). Here, the record demonstrates reasonable evidence to support the ALJ's decision that Andrade's permanent disability should be compensated at the 50% rate, as he can continue to work in his date-of-injury job driving a forklift. Andrade has made no showing that the tasks he listed in his testimony are necessary parts of his job description or that JBS will require him to perform such work as a forklift driver. To the contrary, despite Andrade's claim that he is limited in the tasks that he can perform, Andrade's continued work as a forklift driver for JBS provides sufficient evidence to support the ALJ's decision. *See Shaffer v. Ariz. State Liquor Bd.*, 197 Ariz. 405, 409, ¶ 20 (App. 2000) ("Even if the record supports inconsistent conclusions, neither we nor the superior court may substitute our judgment for that of the ALJ because conflicting evidence can still be 'substantial.'" (citation omitted)); *see also Malinski*, 103 Ariz. at 216 ("The findings of [t]he [ICA] will not be disturbed when the evidence is conflicting, and there is substantial evidence to support the findings.").

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CONCLUSION

¶16

For the foregoing reasons, we affirm the award.



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