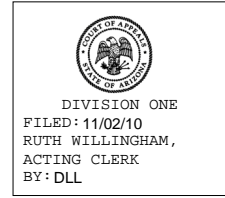


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



CITY OF MESA,) No. 1 CA-IC 10-0004
)
Petitioner Employer,) DEPARTMENT C
)
CITY OF MESA,) **MEMORANDUM DECISION**
)
Petitioner Carrier,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
JOYCE A. BYLER,)
)
Respondent Employee.)
)

Special Action - Industrial Commission

ICA Claim No. 0000F-136246

Carrier Claim No. 000001424

Administrative Law Judge Paula R. Eaton

AWARD AFFIRMED

Jardine, Baker, Hickman & Houston Phoenix
By K. Casey Kurth
Attorneys for Petitioners Employer and Carrier

Andrew Wade, Chief Counsel Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

O R O Z C O, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review for a total loss of earning capacity (LEC). Two issues are presented on appeal:

(1) whether the administrative law judge (ALJ) erroneously failed to review and compare the surveillance video with the hearing testimony; and

(2) whether the ALJ's award is legally insufficient for this court's review under *Post v. Industrial Commission*, 160 Ariz. 4, 770 P.2d 308 (1989).

Because we find the ALJ's award sufficient for our review and to be supported by the evidence of record, we affirm.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.2. (2003), 23-951.A. (1995), and Arizona Rule of Procedure for Special Actions 10. 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, 63 P.3d 298, 301 (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, 41 P.3d 640, 643 (App. 2002).

PROCEDURAL AND FACTUAL HISTORY

¶13 On May 30, 1986, the respondent employee (claimant) was employed by the self-insured petitioner employer, City of Mesa (Mesa), when she was involved in an industrially related motor vehicle accident. She filed a workers' compensation claim, which was accepted for benefits. In 1996, the claimant's claim was closed with an unscheduled permanent partial impairment, no LEC, and supportive care benefits. In 2008, the claimant filed a petition for rearrangement of the 1996 closure. The ICA issued an award denying the claimant's petition for rearrangement, and she timely requested a hearing.

¶14 Three ICA hearings were held for testimony from the claimant, her treating physician, her labor market expert, an independent medical examiner, and Mesa's labor market expert. Following the hearings, the ALJ entered an award granting rearrangement and finding that the claimant had sustained a total LEC. Mesa timely requested administrative review, and the ALJ summarily affirmed her award. Mesa next brought this appeal.

DISCUSSION

¶15 Mesa first argues that the ALJ failed to consider the surveillance video and compare it with the hearing testimony. Initially, we recognize that the ALJ may conduct a hearing in any manner that will achieve substantial justice and "is not bound by common law or statutory rules of evidence or by technical or formal

rules of procedure." A.R.S. § 23-941.F. (1995). But every party to an ICA hearing should have an opportunity to fully develop the evidence relevant to the hearing both by cross-examination of witnesses and by presenting evidence of his own. *Pauley v. Indus. Comm'n*, 10 Ariz. App. 315, 317, 458 P.2d 519, 521 (1969).

¶16 It is well established that the trier-of-fact determines the weight of surveillance evidence. See, e.g., 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 127.10, at 127-45 to -47 (2010). As the reviewing court, we are bound to assume that the ALJ does her duty "honestly and conscientiously," basing her findings on an unbiased review of the evidence as it appears in the record. *King v. Alabam's Freight Co.*, 40 Ariz. 363, 376, 12 P.2d 294, 298 (1932).

¶17 In this case, Mesa obtained a surveillance video of the claimant, which it provided to its independent medical examiner, Mary E. Merkel, M.D. Dr. Merkel reviewed the surveillance video and commented in detail with regard to the activities that the claimant was seen performing. The claimant's treating physician, Steve Fanto, M.D., also was asked about the surveillance video:

Q. [By Mr. Palmer] There is some surveillance taken on multiple days. I think the longest was 29 minutes, but most of them were only a couple of minutes. I was only able to see one of the videos. The other one didn't work for me. But the one I saw showed her, she's at her home in the morning in a housecoat, she bends down to pick up a newspaper in the driveway. I spoke to Mr. Kurth this morning and he kind of remembers the videos that he saw shows her maybe at Wal-Mart bending down for some extended period of time, I don't know how long,

doing something, and then maybe there's some boxes that she's removing from the trunk of her car. Again, I don't know how long of a period of time that is. I mean, are those activities - let's assume she did those activities. Is that contrary to your opinion, does that affect your opinion in any way assuming she did those activities?

A. [Dr. Fanto] No.

Q. Why not?

A. Again, patients will occasionally have activities that they will do that may elicit pain out of necessity in living, but on no sustained basis or repeated basis do we expect to observe her doing those.¹

¶8 The ALJ noted on the record at the ICA hearing that the video surveillance was part of the ICA's record. In addition, she heard testimony from Dr. Merkel and Dr. Fanto regarding the surveillance evidence and she received Dr. Merkel's report on the surveillance in evidence. In her award, the ALJ stated:

Having considered the evidence, file and all related matters, the undersigned now enters her Findings and Award as follows:

* * * *

7. Upon a review of the totality of the evidence, it is found that the applicant is credible. Accordingly, any conflicts in the evidence are resolved in favor of the applicant.

8. I find the testimony and opinions of Dr. Fanto to be more probably correct and well founded. Based upon the testimony of the applicant and of

¹ Dr. Fanto was unaware of Dr. Merkel's opinions at the time he gave his testimony because Mesa failed to file Dr. Merkel's report in a timely manner.

Dr. Fanto, I find that the applicant has sustained a total loss of earning capacity as a result of her industrial injury which would result in a monthly entitlement of Eight Hundred and Eighty Three and 38/100 (\$883.38) per month from and after October 23, 2008.

Based upon the applicable legal principles, we believe that the ALJ adequately considered the video surveillance evidence in the context of the hearing testimony.

¶9 Mesa next argues that the ALJ's award contains legally insufficient findings with respect to the statutory test for rearrangement. In *Post v. Industrial Commission*, 160 Ariz. 4, 770 P.2d 308, the Arizona Supreme Court reassessed the specificity necessary for a legally sufficient award. The Court concluded that the award should specify the basis for the ultimate disposition and the evidence supporting that basis. *Post*, 160 Ariz. at 7, 770 P.2d at 311. The court stated that this does not mean that a "lack of findings on a particular issue . . . invalidate[s] an award per se" *Id.* But if the appellate court must speculate about the basis for the award or assume a factfinder role, then the award must be set aside because it is "so lacking in specificity" that we cannot review it. *Id.* at 9, 770 P.2d at 313.

¶10 But an ALJ is not required to make a specific finding on every issue, as long as he resolves the ultimate issues in the case. See *Cavco Indus. v. Indus. Comm'n*, 129 Ariz. 429, 435, 631 P.2d 1087, 1093 (1981). Further, some findings are implicit in an award. *Pearce Dev. v. Indus. Comm'n*, 147 Ariz. 582, 583, 712 P.2d

429, 430 (1985).

¶11 Rearrangement is governed by A.R.S. § 23-1044 (Supp. 2009) which provides in pertinent part:

F. For the purposes of subsection C of this section, the commission, in accordance with the provisions of § 23-1047 when the physical condition of the injured employee becomes stationary, shall determine the amount which represents the reduced monthly earning capacity and upon such determination make an award of compensation which shall be subject to change in any of the following events:

1. Upon a showing of a change in the physical condition of the employee subsequent to such findings and award arising out of the injury resulting in the reduction or increase of the employee's earning capacity.

A change in condition is measured by comparing the facts determined by the final findings and award with those existing at the time of the rearrangement petition. *Gallegos v. Indus. Comm'n*, 144 Ariz. 1, 5-6, 695 P.2d 250, 254-55 (1985).

¶12 In this case, the claimant's claim was closed in April 1996, with an unscheduled permanent partial impairment and no LEC. Dr. Fanto, her treating physician, testified that the claimant's industrially-related condition gradually has worsened since that time and she is no longer capable of working. Relying on Dr. Fanto's testimony, Richard A. Prestwood, the claimant's labor market consultant, testified that the claimant has a total LEC which entitles her to receive \$883.38 per month.

¶13 The ALJ summarized the medical testimony of Drs. Fanto and Merkel and recognized the corresponding labor market testimony

from Mr. Prestwood and Mr. Kelman. She adopted the testimony of Dr. Fanto and Mr. Prestwood. We believe that this evidence satisfies the A.R.S. § 23-1044.F.1. test for rearrangement and that the Award contains legally sufficient findings.

¶14 For all of the foregoing reasons, the award is affirmed.

PATRICIA A. OROZCO, Judge

CONCURRING:

MAURICE PORTLEY, Presiding Judge

MARGARET H. DOWNIE, Judge