DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRY'S FOOD STORES OF ARIZONA, INC., Petitioner Employer, SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, BARBARA PRITCHARD, Respondent Employee.	No. 1 CA-IC 11-0025 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 99270-000308

Carrier Claim No. WCFRY19992658

Administrative Law Judge Michael A. Mosesso

AWARD SET ASIDE IN PART

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S W A N N, Judge

¶1 This is a special action review of the Industrial Commission of Arizona's award and decision upon review for an unscheduled permanent partial disability. The Employer argues that the administrative law judge erred in (1) adopting the testimony of one expert over another concerning the Claimant's capacity to work, and (2) by basing Claimant's loss of earning capacity on an averaged rollback wage rather than her actual wage. Because it is within the purview of the administrative law judge to determine the credibility and weight of testimony, we find no error in his adoption of one expert's testimony over another. We further hold that Claimant is not presently entitled to an award for loss of earning capacity for the hours she is presently capable of working because she has suffered no present economic injury as a consequence of her work-related injury. We set aside that portion of the award.

FACTS AND PROCEDURAL HISTORY

¶2 On August 31, 1999, Barbara Pritchard ("Claimant") injured her lower back while working for Fry's Food Stores of Arizona ("Fry's"). At the time of the injury, Claimant had a preexisting back injury for which she had undergone surgery and

made a full recovery; the 1999 work-related injury required three additional back surgeries in April 2002, March 2007 and April 2009. Her worker's compensation claim was closed for benefits on March 16, 2010, with an unscheduled permanent partial impairment. The Industrial Commission of Arizona ("ICA") then entered its findings and award for a 25% unscheduled permanent partial impairment, an 18.39% reduction in earning capacity, and $196.37 per month in disability benefits.

¶3 Both Claimant and Fry's timely protested the ICA's award. Claimant, two coworkers, two medical experts, and two labor market experts gave testimony at scheduled hearings. Following the hearings, the administrative law judge ("ALJ") entered an award for an unscheduled permanent partial disability. Fry's timely requested administrative review, and the ALJ supplemented and affirmed the award.

¶4 Fry's timely appeals. We have jurisdiction under A.R.S. §§ 12-120.21(A)(2) and 23-951(A) and Ariz. R.P. Spec. Act. 10.

STANDARD OF REVIEW

¶5 In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law and statutory interpretation de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003) (citation

omitted); *Univ. Roofers v. Indus. Comm'n*, 187 Ariz. 620, 622, 931 P.2d 1130, 1132 (App. 1996) (citation omitted). 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) (citation omitted).

DISCUSSION

I. THE ALJ'S ADOPTION OF DR. PATEL'S TESTIMONY WAS NOT WHOLLY UNREASONABLE.

¶6 Dr. Merkel, Claimant's treating physician, testified that Claimant was capable of working 40 hours per week. Dr. Patel conducted an independent medical examination ("IME") and testified that Claimant was capable of working only 24.5 hours per week. Fry's argues that it was "wholly unreasonable" for the ALJ to adopt Dr. Patel's testimony over that of Dr. Merkel, who saw Claimant multiple times, or Dr. McLean, who was a spine surgeon.[1]

¶7 When expert medical testimony conflicts, it is the ALJ's duty to resolve the conflicts and draw all warranted inferences. *Perry*, 112 Ariz. at 398, 542 P.2d at 1097. When the ALJ is considering conflicting evidence, it should include

[1] Although Dr. McLean did not testify at the ICA hearings, his reports were in evidence. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975) (reviewing court presumes ALJ reviews all relevant evidence, both testamentary and documentary, in reaching his award).

in its consideration: "whether or not the testimony is speculative, . . . the diagnostic method used, qualifications and backgrounds of the expert witnesses and their experience in diagnosing the type of injury incurred." *Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988). Additionally, an ALJ is not required to give greater weight to the testimony of a treating physician. *Walter v. Indus. Comm'n*, 134 Ariz. 597, 599, 658 P.2d 250, 252 (App. 1982).

¶8 Dr. Patel, board certified in physical medicine and rehabilitation with a specialty in pain medicine, performed an IME of Claimant on July 14, 2010, and issued a report based on this examination. He received a history from Claimant of her industrial injury and all four back surgeries, reviewed the available medical records, and performed a physical examination. He described Claimant as a credible patient who provided a reliable history. On cross-examination regarding a change in his recommendation as to Claimant's work-schedule limitations, Dr. Patel explained that after his IME, he received and reviewed additional medical records -- including a report from Dr. McLean, with more thorough information on Claimant's prior back surgeries, and one from Dr. Theodore, with a diagnosis of intractable pain and *cauda equina* syndrome -- which formed the basis for his change of opinion.

¶9 There is nothing in the record to indicate that the court inappropriately credited Dr. Patel's testimony where it conflicted with the other doctors; we therefore cannot conclude that the ALJ erred in crediting the testimony of Dr. Patel over that of Drs. Merkel and McLean.

II. CLAIMANT HAS NO PRESENT ENTITLEMENT TO A WAGE ADJUSTMENT FOR LOSS OF EARNING CAPACITY IN HER CURRENT EMPLOYMENT.

¶10 Fry's also argues that the ALJ incorrectly applied a $7.595/hour rollback wage[2] to calculate Claimant's present entitlement.[3] To the extent that Fry's argument asserts that Claimant is not immediately entitled to an award that reflects loss of hourly earning capacity for the 24.5 hours per week that she *can* work, we agree.

¶11 The purpose of Worker's Compensation is to compensate injured employees for lost earning capacity. *See Special Fund Div. v. Indus. Comm'n*, 91 Ariz. 149, 152, ¶ 8, 953 P.2d 541, 544 (1998) (citation omitted). When an injured worker returns to work following the industrial injury, a rebuttable presumption arises that the worker suffered no loss of earning capacity if

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[2] Neither party disputes that Claimant's rollback wage of $10.72/hour in her current employment is properly calculated.

[3] We do not reach the issue whether the $7.595/hour calculation itself was correctly performed because Claimant is not now entitled to an hourly differential for lost earning capacity. This decision does not preclude either party from readdressing the propriety of the ALJ's determination if the Claimant later petitions for rearrangement under A.R.S. § 23-1044(F).

the worker returns under normal working conditions. *See Maness v. Indus. Comm'n*, 102 Ariz. 557, 559, 434 P.2d 643, 645 (1967); *Midland-Ross Corp. v. Indus. Comm'n*, 107 Ariz. 311, 313, 486 P.2d 793, 795 (1971). The worker may rebut this presumption by demonstrating that the post-injury employment is sheltered, a result of employer sympathy, would result in further injury, or is "make-work." *See Alsbrooks v. Indus. Comm'n*, 126 Ariz. 469, 471, 616 P.2d 929, 931 (App. 1980) (citations omitted); *Midland-Ross Corp.*, 107 Ariz. at 314, 486 P.2d at 796.

¶12 This is not a case in which an injured worker was terminated because of her injury, nor of an injured worker who is unable to obtain suitable work -- Fry's continues to employ Claimant and the greeter position is suitable work, whether done for Fry's or another employer. Additionally, there is no evidence that the greeter position at Fry's is the result of sympathy nor that it is "sheltered" employment or "make-work" -- the greeter position was not created to accommodate Claimant, it is available to any Fry's employee who requests it at a rate of pay commensurate to the employee's position before becoming a greeter and greeter positions are available in the open labor market.

¶13 The ALJ's task was to accurately determine the "amount which represents the reduced monthly earning capacity" resulting

from Claimant's permanent partial disability. *See* A.R.S. §§ 23-1044(F), (D). To calculate reduced monthly earning capacity, the ALJ must consider a variety of factors, including previous disability, the injured worker's occupational history, the nature and extent of the disability, the type of work the injured employee is able to perform following the injury, the worker's age, and "*any wages received for work performed subsequent to the injury*." A.R.S. § 23-1044(D) (emphasis added).

¶14 The case law interpreting the worker's compensation statutes uniformly establishes that the measure of an award is "the *loss* of earnings caused by the injury." *Hoffman v. Brophy*, 61 Ariz. 307, 314-15, 149 P.2d 160, 163 (1944) (emphasis added). A.R.S. § 23-1044(D) specifically commands the ALJ to consider "wages received for work performed" after the injury as a factor in determining reduced earning capacity. In circumstances such as those presented here, when an injured employee returns to work at or above the pre-injury rate-of-pay and can work up to a certain number of hours, the employee experiences no loss for the hours worked. Here, Claimant has no loss as to the 24.5 hours per week Dr. Patel testified (and the ALJ determined) she was capable of working, so long as her continued employment at Fry's is paid at or above the pre-injury wage. As to the 15.5

hours she cannot work, she is entitled to the statutorily prescribed award.

¶15 In *Maness*, our supreme court held that a worker who had returned to work, who was able to do the work satisfactorily and who was being paid a higher monthly wage than before the injury could not reasonably claim his earning capacity was diminished. 102 Ariz. at 558-59, 434 P.2d at 644-45. The *Maness* court further noted that should future circumstances result in a decrease in the worker's earning capacity, he could seek to reopen his case. *Id.* at 559, 434 P.2d at 645. This case is nearly on all fours with *Maness*, and we find that reasoning persuasive on these facts.

¶16 Claimant attempts to distinguish *Maness* by asserting that "to continue to earn $14 an hour as a greeter, she must continue working [at Fry's]; otherwise, she will earn a greatly reduced wage in the competitive labor market." It may be true that Claimant's hourly wage as a greeter is higher at Fry's than it would be in the open market. But Claimant nonetheless implicitly concedes that her hourly reduction in earnings is potential, not actual. As long as she continues at Fry's, the "greatly reduced wage in the competitive labor market" remains a mere possibility. To the extent that her wage at Fry's is

artificially high, we perceive nothing in the law that requires it to be further inflated.

¶17 Because she has not suffered a loss in *hourly* earning capacity, Claimant is presently entitled only to an award that reflects the differential in the hours she can work as a result of the work-related injury (40 hours - 24.5 hours = 15.5 hours), not the differential in hourly pay were she no longer working at Fry's. Should her employment circumstances change such that she is no longer receiving the hourly rate of pay that Fry's now offers, she may be entitled to seek rearrangement to address the difference. A.R.S. § 23-1044(F).

¶18 The result Claimant seeks regarding the portion of the award reflecting a loss of hourly earning capacity would represent a windfall for her because she has yet to suffer the loss. Were we to hold otherwise, employers who continued to employ injured workers and accommodated their injuries would be incentivized to terminate those employees or reduce their wages -- neither of which would serve the purpose of protecting injured workers.

¶19 We therefore remand for a recalculation of the award under the appropriate statutory framework so that it compensates Claimant only for her lost hours, not the potential for lost hourly wages.

CONCLUSION

¶20 For the reasons discussed above, we set aside the award in part and remand for proceedings consistent with this opinion.

/s/
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PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge