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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SHERYL D. STUTZMAN, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, TUCSON UNIFIED SCHOOL DISTRICT, Respondent Employer, TRISTAR RISK MANAGEMENT, Respondent Insurer.	2 CA-IC 2010-0012 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20072560324

Insurer No. 07198219

Thomas A. Ireson, Administrative Law Judge

AWARD AFFIRMED

Dee-Dee Samet, P.C.
By Dee-Dee Samet — Tucson
Attorneys for Petitioner Employee

The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
Attorney for Respondent

Zingg Law Office, PLLC
By Jo Fox Zingg — Tucson
Attorneys for Respondent
Employer and Insurer

B R A M M E R, Judge.

¶1 In this statutory special action, petitioner Sheryl Stutzman challenges the Administrative Law Judge's (ALJ) decision upon review reversing his previous award and finding Stutzman was not entitled to unscheduled permanent partial disability benefits because he had not established a loss in earning capacity. Because the award is supported by substantial evidence, we affirm.

Factual and Procedural Background

¶2 "[W]e must view the evidence in the light most favorable to sustaining the Industrial Commission's findings and award." *Roberts v. Indus. Comm'n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). On September 5, 2007, Stutzman was injured while working as a math teacher for the Tucson Unified School District when a projector screen fell onto his neck at the base of his skull. Stutzman filed an application for benefits, which Tristar Risk Management, the school district's insurer, accepted in September 2007 and closed in September 2008 finding no permanent disability. Stutzman challenged his claim status, and in September 2009 the Industrial Commission

found Stutzman had sustained a three percent functional disability as a result of the injury, which did not reduce his earning capacity. Stutzman filed a request for hearing.

¶3 At the hearing, Stutzman reported he had persistent headaches and difficulty concentrating. He acknowledged he had continued to work as a teacher without missing a day from the date of his injury through May 2008, when he took regular retirement at the end of the school year.[1] He testified he had experienced difficulty concentrating while teaching, mainly due to his medications. He also noted the size of his last two classes had been reduced by removal of disruptive students so the classes would be "easier to maintain."

¶4 Dr. Randall Prust, Stutzman's treating specialist, diagnosed him with bilateral occipital neuralgia. Prust treated Stutzman through medication and the use of cervical steroid epidural injections. He acknowledged Stutzman "may have" problems like difficulty concentrating and "might have to leave work." Although Prust suggested some work restrictions could be necessary, he could not say whether Stutzman would have a problem being able to teach children.

[1]Stutzman argues the ALJ's decision incorrectly suggested he had acquired eighty "points" toward retirement. After discussing possible reasons Stutzman continued to work for eight months after the injury, including the possibility he desired to earn points toward retirement, the ALJ stated that "for whatever reason . . . [Stutzman] was able to continue working and continue his involvement in extra-curricular activities without missing a day." The statement Stutzman challenges clearly was not material to the decision, and we do not address the argument further.

¶5 Dr. Marjorie Eskay-Auerbach, another physician who evaluated Stutzman, also testified at the hearing. She opined that he was capable of returning to work as a teacher without any work restrictions.

¶6 Two labor market experts provided testimony regarding job availability given Stutzman's injury. Both provided multiple scenarios based on the varying restrictions suggested by the medical experts. Ruth Van Vleet testified that, based on Stutzman's self-reporting, he would be totally disabled. If he merely required less stress or concentration she stated he could work as a security guard, but should not return to work as a teacher because she did not believe he could maintain a classroom. Rebecca Lollich performed a labor market survey and found Stutzman would be able to return to his position as a teacher with the lesser restrictions, and likely could do so even with Prust's suggested restrictions.

¶7 In July 2010, the ALJ issued his decision awarding Stutzman $400.10 per month for unscheduled permanent partial disability. Tristar and the school district requested a review of the decision, and in September 2010 the ALJ issued a decision upon review reversing his previous decision and determining Stutzman was not entitled to unscheduled permanent partial disability benefits.

¶8 The ALJ determined that, because Stutzman had continued to work as a teacher for eight months after the injury, there was a presumption his earning capacity was commensurate with his earnings during that period, and Stutzman "ha[d] not overcome the presumption." The ALJ found the evidence "d[id] not support pain levels at the severity and consistency described by [Stutzman] and used by Dr. Prust as a

foundation for his opinions," and adopted Eskay-Auerbach's restrictions or a more limited interpretation of Prust's restrictions. The ALJ also adopted the opinions of Lollich regarding the availability of date-of-injury employment, finding such jobs were "reasonably available and would result in no loss in earning capacity." He found awarding unscheduled permanent partial disability benefits inappropriate because Stutzman had not established a loss in earning capacity.

¶9 This special action followed. We have jurisdiction pursuant to A.R.S. § 23-951.

Discussion

¶10 Our review is limited to "determining whether or not the commission acted without or in excess of its power" and whether the findings of fact support the ALJ's decision upon review. § 23-951(B). "[W]e defer to the ALJ's factual findings but review questions of law de novo." *Hahn v. Indus. Comm'n*, 227 Ariz. 72, ¶ 5, 252 P.3d 1036, 1038 (App. 2011).

¶11 Stutzman argues the ALJ "misapplied the law" and "in essence made the presumption of an ability to continue to earn the same amount a conclusive presumption rather than a rebuttable presumption." "Evidence of a claimant's post-injury earnings raises a presumption of post-injury earning capacity." *Proudfoot v. Indus. Comm'n*, 193 Ariz. 139, 140, 971 P.2d 186, 187 (App. 1998). The claimant may rebut the presumption by showing the source of income is "an unreliable indicator of his earning capacity" because the job was created out of sympathy, is temporary, or would be "deleterious to the claimant's health" if continued. *Id.* "[D]iscerning the quantum of evidence needed to

burst a particular presumption bubble can be problematic," but, in general, presumptions shift only the burden of producing contrary evidence—not of persuading the factfinder of the non-existence of the presumed fact. *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, ¶¶ 49-50, 65 P.3d 956, 970-71 (App. 2003). The ALJ accurately summarized the law pertaining to the rebuttable presumption of post-injury earnings. He noted "it is the claimant's burden to rebut a post-injury earnings presumption with evidence that the income is not a reliable indicator of earning capacity," and cited *Proudfoot* as providing examples of how to rebut the presumption.

¶12 Stutzman does not contend his post-injury job was created out of sympathy or was temporary, instead suggesting teaching was deleterious to his health. *See Proudfoot*, 193 Ariz. at 140, 971 P.2d at 187. He argues he rebutted the presumption because Prust diagnosed him with occipital neuralgia and testified to the "reasonable medical probability of the problems [Stutzman] would have in doing the work of a teacher." He also argues his burden was met by evidence that his class size had been reduced.

¶13 However, the ALJ found the evidence did not establish Stutzman's work as a teacher was "intolerable" or might be "deleterious to his health" and that Stutzman had not explained adequately "why he was able to perform competently for eight months after the injury and is unable to do so now." He found the evidence "d[id] not support pain levels at the severity and consistency described by [Stutzman] and used by Dr. Prust as a foundation for his opinions," noting Stutzman's perfect work attendance and involvement

in extra-curricular activities after the injury. These findings are reasonably supported by evidence presented at the hearing.

¶14 Prust acknowledged headaches are a subjective symptom he could not verify, and his opinion regarding work restrictions therefore was based on Stutzman's self-reported symptoms. He acknowledged Stutzman "may have" problems like difficulty concentrating and "might have to leave work," but did not say Stutzman would have a problem teaching children nor testified Stutzman was unable to continue working as a teacher.

¶15 Inconsistencies noted by the medical experts apparently caused the ALJ to doubt Stutzman's veracity in making self-reports about his symptoms. Prust testified that Stutzman had not suffered any side effects or problems with his medications, and that he was "surprised" at the level of pain Stutzman had reported in a log he had created for the hearing because Prust "thought that [Stutzman] had better control over his pain." Eskay-Auerbach testified that Stutzman's activities after the injury—which included coaching soccer, being involved in student council, golfing, and house and yard work—were not those that someone with disabling headaches would be able to pursue. She also noted Stutzman's reported headache history and response to treatment was unusual, which raised questions about his veracity in describing his limitations. She opined Stutzman required no work restrictions and could return to work as a teacher. Therefore, the evidence supported the ALJ's rejection of Stutzman's testimony regarding his pain levels. *See Mustard v. Indus. Comm'n*, 164 Ariz. 320, 321, 792 P.2d 783, 784 (App. 1990) (ALJ

sole judge of witness credibility; may reject testimony if self-contradictory, inconsistent with other evidence, or impeached).

¶16 Stutzman argues this case is similar to *Midland-Ross Corp. v. Indus. Comm'n*, 107 Ariz. 311, 486 P.2d 793 (1971), in which the claimant returned to work at his former wage after sustaining a back injury and undergoing surgery. He experienced "almost constant pain," and his physician testified the job was "unsuitable and improper in view of the operation." *Id.* at 312-13, 486 P.2d at 794-95. The court concluded "[t]he presumption must retire in the face of positive evidence," and noted that the evidence was "more than adequate to prove that a continuance in the employee's job was both painful and might involve further injury." *Id.* at 313-14, 486 P.2d at 795-96. This case is distinguishable. Prust did not advise that Stutzman stop teaching, and the potential problems Prust did identify were based on testimony the ALJ rejected as incredible based on inconsistencies with other evidence. *See Mustard*, 164 Ariz. at 321, 792 P.2d at 784. Here, reasonable evidence supported the ALJ's determination that Stutzman had not provided sufficient evidence that his post-injury teaching job was "an unreliable indicator of his earning capacity." *See Proudfoot*, 193 Ariz. at 140, 971 P.2d at 187.

¶17 Moreover, even if Stutzman successfully had rebutted the post-injury earnings presumption by presenting contrary evidence, he would have been required to satisfy his burden of proving a loss of earning capacity.[2] *See Golonka*, 204 Ariz. 575,

[2]Stutzman argues that upon rebutting the presumption, the burden of proof shifts to the employer. However, successfully rebutting the presumption that post-injury earnings reflect one's earning capacity is not the same as carrying one's burden of proving a loss of earning capacity. Instead, the presumption will be ignored as if it never

¶ 48, 65 P.3d at 970 (once presumption destroyed, existence or non-existence of presumed fact determined as if presumption had never existed). The claimant bears the burden of proving a loss of earning capacity, which he may do by making a good faith effort to obtain employment or by presenting testimony from a labor market expert regarding his earning capacity. *Avila v. Indus. Comm'n*, 219 Ariz. 56, ¶¶ 13-14, 193 P.3d 310, 313 (App. 2008). The ALJ found Stutzman was "clearly not conducting an active good faith search for employment," a finding Stutzman does not dispute. Based on the ALJ's findings regarding Stutzman's work restrictions and job availability, the testimony Stutzman presented regarding his earning capacity did not satisfy his burden.[3]

¶18 As discussed above, the ALJ made a finding supported by reasonable evidence that Stutzman did not require post-injury job restrictions that would prevent him from working as a teacher. Additionally, the ALJ adopted Lollich's opinion that Stutzman could return to his date-of-injury employment because such jobs were "reasonably available." "Where there is a conflict in expert testimony, it is the responsibility of the [ALJ] to resolve it," and "[w]e will not disturb the resolution of the [ALJ] unless it is wholly unreasonable." *Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 19, 695 P.2d 261, 268 (1985). Stutzman argues that "[t]here was no evidence presented . . . that [he] would be allowed to continue to work with [his]

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had existed. *See Golonka*, 204 Ariz. 575, ¶ 48, 65 P.3d at 970. Nonetheless, the factfinder "may still draw reasonable inferences from the facts originally giving rise to the presumption," *id.* ¶ 52, and therefore the ALJ could consider Stutzman's post-injury work as some evidence of his earning capacity.

[3]We will affirm an award upon review if it is correct for any reason. *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 10, 2 P.3d 691, 695 (App. 2000).

restrictions." However, Lollich explicitly considered potential restrictions when providing the results of her labor market survey in separate scenarios based on the level of those restrictions. And, also as discussed above, the ALJ found Stutzman had no work restrictions that would prevent him from teaching. The ALJ did not err in finding, based on this record, that teaching jobs were reasonably available to Stutzman.

¶19 In light of the evidence in the record, we conclude substantial evidence supports the ALJ's finding that Stutzman failed to establish a loss in earning capacity, and that he is not entitled to unscheduled permanent partial disability benefits. *See Roberts*, 162 Ariz. at 110, 781 P.2d at 588 (we will not set aside Industrial Commission award if based upon any reasonable interpretation of the evidence).

Disposition

¶20 For the foregoing reasons, we affirm the award.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge