DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WILLIAM RICHARDSON, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CITY OF MESA, Respondent Employer, CITY OF MESA, Respondent Carrier.	No. 1 CA-IC 12-0016 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 0000P117776

Carrier Claim No. 000004382

Administrative Law Judge J. Matthew Powell

AWARD AFFIRMED

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K E S S L E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for permanent disability benefits. Three issues are presented on appeal, specifically whether the administrative law judge ("ALJ")

> (1) erroneously failed to consider the petitioner employee's ("claimant's") testimony regarding his industrially related symptoms and functional limitations;
>
> (2) accurately summarized the claimant's ability to perform "basic physical work activities" despite his residual symptoms and functional limitations; and
>
> (3) erred by concluding that the job of customer service representative was both suitable for and reasonably available to the claimant.

The record and the award demonstrate that the ALJ considered all of the testimony presented to him, including that of the claimant, and that the evidence supports the ALJ's findings regarding the claimant's ability to work. Further, the accepted medical and labor market evidence supports the ALJ's finding that the claimant can perform the job of customer service representative. For these reasons, 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) (2003), 23-951(A) (2012), and Arizona Rule of Procedure for Special Actions 10. Our review is limited. 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

¶3 The self-insured respondent employer, City of Mesa ("Mesa"), employed the claimant as a police officer on October 10, 1986, when he was involved in a motor vehicle accident while on duty. The claimant sustained injuries to his low back and both knees, all of which required surgery. He filed a workers' compensation claim, which was accepted for benefits. Over the years, the claimant's claim was opened and closed a number of times for additional treatment of ongoing lumbar and knee issues.

¶4 In April 2010, Mesa obtained independent medical examinations of the claimant's knees and low back. Based on these reports, it issued a notice of claim status reclosing the claim on July 20, 2010, with an unscheduled permanent partial impairment. The ICA then issued its findings and award for a nine percent permanent impairment, resulting in a 31.46 percent loss of earning capacity, and benefits in the amount of $229.24 per month. The claimant timely protested the ICA's award and requested a hearing.

¶5 The ALJ held four hearings and heard testimony from the claimant, two physicians, and two labor market experts. He adopted the testimony of Mesa's independent medical examiner and labor market expert and awarded the claimant permanent disability benefits in accordance with their opinions. The claimant timely requested administrative review, but the ALJ summarily affirmed his award. The claimant next brought this appeal.

DISCUSSION

¶6 The claimant first argues that the ALJ's award is legally insufficient because he failed to make an express credibility finding or to explain why he "did not consider [the claimant's] testimony." The Arizona Supreme Court reassessed the specificity necessary for a legally sufficient award in *Post*

v. Indus. Comm'n, 160 Ariz. 4, 770 P.2d 308 (1988). 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 went on to state 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 7, 9, 770 P.2d at 311, 313.

¶7 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. *See Pearce Dev. v. Indus. Comm'n*, 147 Ariz. 582, 583, 712 P.2d 429, 430 (1985).

¶8 In this case, the ultimate issue was the claimant's earning capacity in light of his residual industrial impairments. Initially, we recognize that in the award, the ALJ stated he had "considered the evidence, file and all related matters" and that he summarized the claimant's testimony. On review, this court presumes that the ALJ considered all relevant evidence. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542

P.2d 1096, 1097 (1975).

¶9 The claimant argues that if the ALJ rejected his testimony as to his physical limitations, he needed to make an express credibility finding. We agree that a specific credibility finding is necessary when credibility is a material issue. *Villaneuva v. Indus. Comm'n*, 148 Ariz. 285, 287-88, 714 P.2d 455, 457-58 (App. 1985). Further, in the absence of a specific finding, this Court will not imply a rejection of credibility. *See Joplin v. Indus. Comm'n*, 175 Ariz. 524, 528, 858 P.2d 669, 673 (App. 1993).

¶10 In this case, we do not find that a specific credibility finding as to the claimant was necessary. Establishing a claimant's residual earning capacity requires medical and labor market evidence. *Avila v. Indus. Comm'n*, 219 Ariz. 56, 60, ¶ 15, 193 P.3d 310, 314 (App. 2008) ("The labor market expert's role [in determining residual earning capacity] is to receive medical input from the treating physician regarding the claimant's physical capabilities and to match them to the requirements of specific jobs in the open labor market."). Here, the ALJ heard testimony from two doctors and two labor market experts, all of whom had heard and/or read the claimant's testimony and used it to form the foundation for their opinions.

¶11 In establishing residual earning capacity, "[t]he object is to determine as near as possible whether in a competitive labor market the subject in his injured condition can probably sell his services and for how much." *Davis v. Indus. Comm'n*, 82 Ariz. 173, 175, 309 P.2d 793, 795 (1957). Ordinarily, the injured worker has the burden of proof and must meet it with evidence of inability to perform the job at which he was injured or to earn a comparable wage through other suitable and available work. *Zimmerman v. Indus. Comm'n*, 137 Ariz. 578, 580, 672 P.2d 922, 924 (1983).

¶12 The claimant can meet this burden by presenting evidence of his inability to return to date-of-injury employment and by making a good faith effort to obtain other suitable employment or by presenting testimony from a labor market expert to establish residual earning capacity. *See D'Amico v. Indus. Comm'n*, 149 Ariz. 264, 266, 717 P.2d 943, 945 (App. 1986). If there is testimony that these efforts were made and were unsuccessful, the burden of going forward with contrary evidence shifts to the employer and carrier. *Zimmerman*, 137 Ariz. at 580, 672 P.2d at 924.

¶13 Here the evidence established that Mesa medically retired the claimant as a result of the residual impairment from his industrial injury. For that reason, he could not return to

his date-of-injury employment. Instead, the clamant presented testimony from a labor market expert, Nathan Dean. Mr. Dean relied on the physical limitations provided by the claimant's treating physician, Dennis Armstrong, M.D., for his opinion that the claimant was unable to return to any work.

¶14 The ALJ rejected Mr. Dean's testimony and adopted the opinions of Duane D. Pitt, M.D., Mesa's independent medical examiner, and labor market expert, Rebecca Lollich. As the trier of fact, it is the ALJ's duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). For that reason, it is necessary to determine whether Dr. Pitt's and Ms. Lollich's testimony is legally sufficient to support the award.

¶15 The claimant argues that Dr. Pitt's testimony is foundationally insufficient and cannot support the award. This Court has recognized that "medical testimony can be so weakened by proof of an inaccurate factual background, that [it] cannot be said to constitute substantial evidence" to support an award. *Desert Insulations, Inc., v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982) (citation and internal quotation marks omitted).

> Many factors enter into a resolution of conflicting evidence, including whether or

> not the testimony is speculative, consideration of the diagnostic method used, qualifications in 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).

¶16 Medical opinions must be based on findings of medical fact. *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). These findings may come from the claimant's history, medical records, diagnostic tests, and examinations. *See id.* Further, this Court has recognized that an ALJ is not required to give greater weight to the testimony of the treating physician. *Walter v. Indus. Comm'n*, 134 Ariz. 597, 599, 658 P.2d 250, 252 (App. 1982).

¶17 Dr. Pitt is a board certified orthopedic surgeon and a fellowship trained spine surgeon. He examined the claimant on April 16, 2010, reviewed his medical records and imaging studies, and authored a report. Due to his concern that the claimant might have a pseudoarthrosis at the site of his L5-S1 spinal fusion, Dr. Pitt requested additional diagnostic studies, which he reported on May 24, 2010, in an addendum report.

¶18 Dr. Pitt's reports demonstrate that he was aware of the claimant's injury, surgeries, rehabilitation, ongoing pain, and the necessary adjustments to his daily activities to control

that pain. He also recorded that these adjustments included a daily exercise program combining swimming and light weight lifting, as well as limitations on standing, walking, and sitting and frequent changes in position. This information is found both in the doctor's testimony and his reports. We find that Dr. Pitt had a legally sufficient foundation for his medical opinion and nothing more was required.

¶19 The claimant last argues that the ALJ erred by finding the customer service representative position was suitable for and reasonably available to him. We note that the majority of the claimant's argument is addressed to the suitability of this type of work. In order to establish residual earning capacity, there must be evidence of job opportunities which are (1) suitable, i.e., which the claimant would reasonably be expected to perform considering his physical capabilities, education, and training; and (2) reasonably available. *Germany v. Indus. Comm'n*, 20 Ariz. App. 576, 580, 514 P.2d 747, 751 (1973). In determining a claimant's residual earning capacity, the ALJ must consider "any previous disability, the occupational history of the injured employee, the nature and extent of the physical disability, the type of work the injured employee is able to perform subsequent to the injury, any wages received for work

performed subsequent to the injury and the age of the employee at the time of injury." *See* A.R.S. § 23-1044(D) (Supp. 2012).

¶20 In this case, the ALJ adopted the labor market testimony of Ms. Lollich. She testified that in preparation for her labor market report, she reviewed and considered "voluminous file materials and documents." This included medical records and reports and education and employment records. Because Ms. Lollich considered the claimant "as a whole" in assessing his earning capacity, she also was present throughout his deposition so that she could ascertain how he related in a professional setting, how he presented himself, his appearance, and his physical attributes.

¶21 Ms. Lollich relied on the physical limitations provided by Dr. Pitt for the claimant's back and Dr. Bailie for his knees. These limitations focused her labor market research on "sedentary to light seated positions." She testified that she also had personal experience working as a human resources manager for a 500 person call center. Ms. Lollich based her recommendation of customer service representative on her personal knowledge and the claimant's attributes: personal presentation, police work background for communication skills, long tenure employment, articulate, and a proficient writer.

¶22 With regard to the physical setting for this position, Ms. Lollich testified that the work stations for these jobs were pretty similar: a "cubicle with a divider, . . . so the voices don't . . . carry[,] . . . a computer[,] . . . a keyboard, mouse, phone, with an earpiece[,]" although some "are going wireless," and "an adjustable chair."[1] In her experience and opinion, the claimant would be able to get up and down, and move around the cubicle.

¶23 This court has recognized that

> [T]he 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, 567 P.2d 1224, 1227 (App. 1977). In this case, the ALJ found Ms. Lollich's labor market testimony persuasive. Based on our review of her testimony, we find it to be legally sufficient to establish the

[1] Ms. Lollich also testified that these positions would each begin with a training period.

suitability and reasonable availability of customer service work.

¶24 For all of the foregoing reasons, we affirm the ALJ's award.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
ANDREW W. GOULD, Judge