IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CR&R, INC., *Petitioner Employer*,

XL SPECIALTY INSURANCE COMPANY, *Petitioner Carrier*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent*,

JOSE VARGAS, *Respondent Employee*.

No. 1 CA-IC 17-0009
FILED 12-12-2017

Special Action - Industrial Commission

ICA Claim No. 20140-570357
Ins. Claim No. 6164-141-832848
Deborah Nye, Administrative Law Judge *Retired*

AWARD AFFIRMED

COUNSEL

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Counsel for Petitioners Employer and Carrier

Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent

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By Robert E. Wisniewski
Counsel for Respondent Employee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review granting Jose Vargas unscheduled permanent partial disability benefits resulting from a shoulder injury he suffered while working as a garbage truck driver. Carrier XL Specialty Insurance Company ("XL") challenges the award for a loss of earning capacity ("LEC") and monthly disability benefits. Because the record reasonably supports the award, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In February 2014, Vargas injured his right shoulder when he fell backwards and caught himself on his outstretched arm while working as a garbage truck driver for CR&R, Inc. ("CR&R"). He filed a workers' compensation claim, which was accepted for benefits.

¶3 Vargas received conservative medical treatment, followed by surgical treatment from orthopedic surgeon Rodney Henderson, M.D. He underwent two surgeries: first, to repair his torn rotator cuff, and second, to address adhesive capsulitis that developed after the rotator cuff repair. Following physical therapy, Vargas's right shoulder became medically stationary with an unscheduled permanent partial impairment and permanent work restrictions that included "no repetitive overhead or over-shoulder work with the right upper extremity and a weightlifting restriction of 15 lb overhead lifting."

¶4 After his discharge from medical care, Vargas returned to light work at CR&R. Several weeks later, he attempted to perform his regular work as a garbage truck driver, which required him to stretch his right arm out in front of him a total of 600–800 times each day to push and pull the levers used to lift, dump, and lower each garbage bin. After an

hour and a half, his right arm began to hurt and became weak, and he was unable to continue.

¶5 After Vargas's condition became medically stationary, the ICA entered an award for an unscheduled permanent partial disability with a 19.46% LEC and disability benefits of $396.39 per month. Both Vargas and XL timely protested the ICA award, and an administrative law judge ("ALJ") held evidentiary hearings at which Vargas, his supervisor, Dr. Henderson, and independent medical examiner Anthony Theiler, M.D. testified. The ALJ thereafter entered an award for a 28.77% LEC and disability benefits of $586.07 per month. XL timely requested administrative review, and the ALJ summarily affirmed. XL brought this appeal.

DISCUSSION

¶6 XL argues that the ALJ erred by finding that Vargas sustained a LEC as a result of the industrial injury, asserting that Vargas could have returned to his date-of-injury employment. In reviewing a workers' compensation award, we defer to the ALJ's factual findings, but review questions of law de novo. *See Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14 (App. 2003). We consider the evidence in the light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

¶7 A claimant has the burden of proving a LEC. *See, e.g.*, *Zimmerman v. Indus. Comm'n*, 137 Ariz. 578, 580 (1983). The claimant must establish an inability to return to date-of-injury employment and must either make a good faith effort to obtain other suitable employment or present testimony from a labor market expert to establish his residual earning capacity. *See D'Amico v. Indus. Comm'n*, 149 Ariz. 264, 266 (App. 1986).

¶8 XL first argues that the LEC award was improper because Vargas failed to establish an inability to return to his date-of-injury employment or make a good faith effort to obtain other suitable employment. But Vargas testified that his date-of-injury employment as a garbage truck driver required him to use his right arm above shoulder level and caused his mild residual shoulder pain to increase to a level 8 or 9 on a scale of 1 to 10. Further, Dr. Henderson testified that the prescribed work restrictions precluded Vargas from using his right arm above shoulder level, and Vargas explained that actions above shoulder level were necessary to perform his date-of-injury employment. Although Vargas did

not search for other suitable employment, he did present testimony from labor market expert Gretchen Bakkenson to establish his residual earning capacity. *See id.* No more was required to meet his burden of proof.

¶9 XL next argues that Vargas failed to mitigate his damages by accepting suitable and reasonably available employment at CR&R. *See Hoffman v. Brophy*, 61 Ariz. 307, 314 (1944) (holding that the claimant has a duty to mitigate damages by minimizing loss of earnings). To establish residual earning capacity, there must be evidence of job opportunities that are (1) suitable, i.e., a job the claimant would reasonably be expected to perform considering his physical capabilities, education, and training; and (2) reasonably available. *See, e.g.*, *Germany v. Indus. Comm'n*, 20 Ariz. App. 576, 580 (App. 1973). In this case, XL offered Vargas only his date-of-injury employment as a garbage truck driver, and this position was not suitable for Vargas based on the residual effect of his industrial injury and his permanent work restrictions.

¶10 XL next argues that the ALJ erred by failing to make a finding regarding the suitability of the driver position if the truck were equipped with an armrest. But XL did not raise this issue in its request for review before the ALJ. *See, e.g.*, *Spielman v. Indus. Comm'n*, 163 Ariz. 493, 496 (App. 1989) (noting that a request for additional findings on administrative review is a prerequisite for judicial review of the sufficiency of the findings). And in any event, Vargas credibly testified that even in a truck with an armrest, he would have to stretch his arm forward and lift it above shoulder level to operate the levers that allowed him to lift, dump, and lower a garbage bin, motions that would cause increased pain.

¶11 XL next argues that there was uncontroverted medical testimony that Vargas could return to his date-of-injury employment. But Dr. Henderson testified that Vargas could not perform repetitive work above shoulder level, and Dr. Theiler testified that Vargas could not perform any prolonged or repetitive overhead work. For this reason, the medical testimony was not uncontroverted, and the ALJ reasonably resolved the conflict in favor of Dr. Henderson's view that Vargas could not perform repetitive work above shoulder level. *See Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217 (1968).

¶12 XL last argues that the ALJ made inconsistent findings. The award included a finding reflecting that Vargas could attempt the driving job in the future:

> There is an argument that this pain may have been caused even if [Vargas's] arm was below a ninety degree angle. A reasonable approach to this problem might have been to attempt the job again at a later time to see whether that one short attempt was representative of the situation, or to ask for some accommodation if it continues to be a problem. One does wonder whether attempting the job for one hour was sufficient to determine applicant's work capacity, and the undersigned would encourage the employee and the employer to work together to accommodate the applicant *if he wishes to attempt his driving job again to increase his earnings*. In the meantime however the undersigned concludes that the driving work as attempted (without the armrest) is not suitable for applicant's restrictions, and that applicant has proven he has sustained a loss of earnings.

(Emphasis added.) The ALJ's comments appear to have been intended to provide the parties with guidance for the future, and they do not alter the ALJ's resolution of the issue of suitability based on the record presented. *Cf.* Ariz. Rev. Stat. § 23-1044(F)(3) (providing for a petition for rearrangement of permanent disability benefits upon a showing of an increase in the claimant's earning capacity). We will not disturb the ALJ's conclusion unless it is not supported by any reasonable theory of the evidence, *see Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506 (1987), and here, the award has a reasonable basis given the ALJ's credibility determinations and resolution of evidentiary conflicts.

CONCLUSION

¶13 The award is affirmed.

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