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

DIVISION ONE
FILED: 01/25/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FERRELLGAS, Petitioner Employer, ACE AMERICAN INSURANCE COMPANY/GALLAGHER BASSETT, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, ROBERT D. GALLUP, Respondent Employee,	No. 1 CA-IC 10-0022 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim No. 20080-940248

Carrier Claim No. 000877-009824WC-01

Administrative Law Judge J. Matthew Powell

AWARD AFFIRMED

Jardine, Baker, Hickman & Houston, PLLC — Phoenix
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H A L L, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review for an unscheduled permanent impairment. The petitioner employer, Ferrellgas, raises one issue on appeal: whether a service-connected rating from the Department of Veterans Affairs (VA) automatically unschedules an otherwise scheduled industrial injury. We hold that a service-connected rating does not automatically unschedule an otherwise scheduled injury; however, because the evidence of record reasonably supports the ALJ's award in this case, 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 Rules 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

¶3 On March 19, 2008, the respondent employee (claimant) worked for Ferrellgas as a delivery driver/service technician delivering propane gas. The claimant testified that while performing his job duties that day, he blacked out driving. When he regained consciousness, he was pinned beneath his overturned truck. He stated that the truck had rolled several times, and he had been ejected from the cab. He filed a workers’ compensation claim, which was accepted for benefits. The claimant received extensive medical and surgical treatment for his injuries.

¶4 On September 3, 2008, Douglas W. Kelly, M.D., performed an independent medical examination (IME) of the claimant. Dr. Kelly reported that the claimant had a significant past medical history:

> He reports an injury while in the military service in 1978. It was a lifting injury. He eventually was discharged and had a 40% impairment rating from the VA for his back. His diagnosis at the VA when he was treated in Spokane, Washington was for scoliosis. He states that he received pain medications from the VA; Hydrocodone 10mg. He continued to take these pain medications for a period of approximately three years. He was usually taking the pain medication at night. He reports that he stopped the pain medication in

> January of 2008. He was on a roller-coaster where the pain would go up and down. He wasn't to take it during the day because of his work activities. Other treatment through the VA other than the pain medication including the VA in Show Low was the trial of the use of a TENS unit which was unsuccessful in treating his back pain. He also reports the continued use of the Hydrocodone medication. He believes that the VA has x-rays of his back as well as MRI and the only diagnosis he recalls is the scoliosis. His back pain would usually hurt worse at night and it did hurt during the day as well.
>
> He was experiencing back pain prior to the industrial accident. He simply feels that the intensity of the back pain has worsened since his accident. He can't explain why he had no back pain for the first several months. He believes it's either because of the pain medication or he was not up ambulatory at that time.
>
> The pain in his lower back is in the same area in the midline. This is the same area that it was prior to the accident and since 1978.
>
> He also explains that he had a diagnosis of sciatica with the VA in Spokane. The sciatic pain was severe in his right leg, experiencing a tingling sensation in his anterior thigh as well as radiating down his right leg. He believes that the worst episode of sciatica on the right was in 2006. He had no recurrence of the sciatic pain again until the recent accident.

¶5 Based on this IME, the petitioner carrier, Ace American Insurance Company (Ace), issued a notice of claim status (NCS) "limiting liability to right lower extremity and denying low back." The claimant timely protested this notice. Subsequently, Ace closed the claimant's claim with a 15% scheduled permanent partial impairment of the right lower extremity. The claimant also timely protested the closure. He

asserted that assuming arguendo his medical condition was stationary, he had an unscheduled permanent impairment pursuant to A.R.S § 23-1044(C) (Supp. 2010).

¶6 Six ICA hearings were held for testimony from the claimant, his wife, Ferrellgas's manager, four physicians, and two labor market experts. Following the hearings, the ALJ entered an award for an unscheduled permanent partial impairment. With regard to the claimant's VA rating, he found:

> 13. It is concluded that in light of applicant's pre-existing, service connected permanent impairment, applicant's permanent impairment should be deemed unscheduled rather than scheduled. The situation here is essentially indistinguishable from the circumstances addressed by the Arizona Supreme Court in *Alsbrooks v. Industrial Commission,* 118 Ariz. 480, 578 P.2d 159 (1978).

Ace timely requested administrative review, but the ALJ summarily affirmed his Award. Ace next brought this appeal.

DISCUSSION

¶7 On appeal, Ace argues that the ALJ erred by automatically unscheduling the claimant's industrial injury based on his 40% rating from the VA. It argues that the ALJ should have looked to *PFS v. Industrial Commission,* 191 Ariz. 274, 955 P.2d 30 (1997), as instructive, instead of applying *Alsbrooks*. Relying on *Alsbrooks*, as did the ALJ, we conclude that claimant presented evidence that his pre-existing impairment resulted in an earning capacity disability.

¶8 An impairment is compensated as an unscheduled disability if a claimant has a "previous disability" under A.R.S. § 23-1044(E). *See, e.g., Alsbrooks*, 118 Ariz. at 482-84, 578 P.2d at 161-63. In *Alsbrooks*, the Arizona Supreme Court stated that a pre-existing impairment is a "previous disability" under subsection (E) only if "*there is some evidence, no matter how slight, that it is also an earning capacity disability*." *Id.* at 483, 578 P.2d at 162 (emphasis added). This earning capacity disability, however, "refers to injuries which result in impairment of earning power generally,"[1] and the required disability "may be minimal." *Id.* at 484, 578 P.2d at 163. Without mentioning any evidence other than the impairment rating itself, the supreme court concluded that "[i]t is unreasonable to find that, as to a man engaged in industrial labor, a 40% permanent physical disability does not result in a disability for work." *Id.*

[1] The authority cited for this proposition is *Savich v. Industrial Commission*, 39 Ariz. 266, 5 P.2d 779 (1931). This case involved a minor whose industrial injuries disabled him from returning to his date-of-injury employment but did not totally disable him from all gainful employment. The supreme court rejected the worker's claim for total disability compensation by stating that the "'word' disability . . . does not mean disablement to perform the particular work petitioner was doing at the time of his injury, but refers to injuries which result in impairment of earning power generally." *Id.* at 266, 5 P.2d at 780.

¶9 The supreme court next interpreted and applied *Alsbrooks* in *Borsh v. Industrial Commission*, 127 Ariz. 303, 620 P.2d 218 (1980). In that case, when the claimant voluntarily retired from the military, previously asymptomatic degenerative joint disease was discovered. *Id.* at 304, 620 P.2d at 219. The disease affected the claimant's ankles, knees, and back and was rated a 30% disability. *Id.* After retiring, the claimant applied to work for the post office. *Id.* at 305, 620 P.2d at 220. While this application was pending, he found work as a security guard and as a janitor, but he quit these jobs because the work aggravated the symptoms of the joint disease. *Id.* The claimant then found work as a carpenter's helper earning the most he had earned as a civilian. *Id.* While performing this work, he suffered a knee injury. *Id.* After this injury, the post office rejected the claimant's application because of his joint disease. *Id.*

¶10 Based on this evidence, the ALJ concluded that the claimant had failed to prove that the pre-existing impairment from joint disease was an earning capacity disability. *Id.* at 304-05, 620 P.2d at 219-20. The supreme court set aside this award. The court concluded that the claimant was entitled to a rebuttable presumption of disability even though his joint disease would have been unscheduled if it had been industrially

related.[2] *Id.* at 306, 620 P.2d at 221. The court then found that the claimant's loss of two jobs was evidence of an earning capacity disability. *Id.* at 307, 620 P.2d at 222.

¶11 The supreme court last interpreted *Alsbrooks* in *Pullins v. Industrial Commission,* 132 Ariz. 292, 645 P.2d 807 (1982). In that case, the claimant was blind in one eye, but he nevertheless was able to work as a union carpenter without loss of earnings or employment opportunities. *Id.* at 293, 645 P.2d at 808. He then suffered an industrial injury to the other eye resulting in severe impairment of vision. *Id.*

¶12 Relying on the claimant's employment history, the ALJ found that the pre-existing impairment was not an earning capacity disability at the time of the industrial injury. *Id.* at 293-95, 645 P.2d at 808-10. The supreme court again set aside the award, concluding that some pre-existing impairments are of such a magnitude that they must be conclusively presumed to cause an earning capacity disability.

> There are certain disabilities, such as the loss of an arm or leg, that no matter how well the worker has adapted to the disability, are so severe that they must be considered an earning capacity disability, regardless of whether they are industrial or non-

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[2] This presumption has been found to be rebutted by evidence that before the industrial injury, the claimant had no difficulty securing or retaining employment for which he was otherwise qualified. *See Camacho v. Indus. Comm'n*, 20 Ariz.App. 225, 226-27, 511 P.2d 668, 669-70 (1973).

> industrial in origin. The loss of an eye has to be one of these disabilities.

Id. at 295, 645 P.2d at 810 (citation omitted).

¶13 Based on the foregoing authority, we believe that the ALJ correctly applied *Alsbrooks* to the claimant's pre-existing service-related disability. The evidence in this case established that following his honorable discharge from the military, the claimant mainly worked driving trucks. The claimant testified that he worked full-time as a truck driver despite his pre-existing back problems, but stated that his employer was aware of his VA rating and his pre-existing back condition, because he could not be "on call" to drive at night. His back condition fluctuated and sometimes required him to use pain medication and/or muscle relaxants, which precluded him from driving. The claimant testified that he only used these narcotic medications at night so that he would be able to drive during the day.

¶14 The claimant's labor market expert, Richard A. Prestwood, testified that at the time of the claimant's industrial injury he had two service-connected disabilities: a 20% rating for his right knee and a 40% rating for his low back, for a combined rating of 70%. Mr. Prestwood testified that anyone with a 70% or more service-connected rating is considered to be 100% disabled by the VA and is compensated at that rate.

¶15 Because we find that the evidence from the claimant regarding his inability to drive at night and Mr. Prestwood's testimony provide "some evidence, no matter how slight" of an earning capacity disability at the time of the industrial injury, we affirm the ALJ's award.

/s/
PHILIP HALL, Presiding Judge

CONCURRING:

/s/
JON W. THOMPSON, Judge

/s/
LAWRENCE F. WINTHROP, Judge