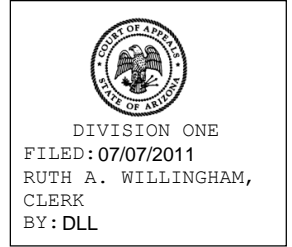


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITY OF MESA,) No. 1 CA-IC 10-0055
)
Petitioner Employer,) DEPARTMENT E
)
CITY OF MESA,) **MEMORANDUM DECISION**
)
Petitioner Carrier,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
LEEROY TRYON,)
)
Respondent Employee,)
)

Special Action - Industrial Commission

ICA Claim No. 20073-510042

Carrier Claim No. WC2007012898

Administrative Law Judge Michael A. Mosesso

AWARD AFFIRMED

Klein, Lundmark, Barberich & LaMont, P.C. Phoenix
By R. Todd Lundmark
Eric W. Slavin
Attorneys for Petitioners Employer and Carrier

Andrew Wade, Chief Counsel Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

B R O D M A N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review granting a petition for rearrangement and awarding the respondent employee ("claimant") unscheduled permanent partial disability benefits. The appeal presents a single issue: whether the administrative law judge ("ALJ") erroneously granted rearrangement pursuant to Arizona Revised Statutes ("A.R.S.") section 23-1044(F)(2) (Supp. 2010). We conclude that the record contains sufficient evidence to support the ALJ's finding of changed circumstances supporting rearrangement and thus affirm the award.

I. JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to A.R.S. §§ 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).

II. PROCEDURAL AND FACTUAL HISTORY

¶3 The claimant sustained an industrial low back injury on December 5, 2007, while working as a firefighter for the self-insured petitioner employer, City of Mesa ("Mesa"). He filed a workers' compensation claim, which was accepted for benefits. The claimant received conservative medical treatment from James Maxwell, M.D., who found the claimant's condition permanent and stationary on June 11, 2008, with an eight percent permanent impairment. Based on Dr. Maxwell's report, Mesa issued a notice of claim status finding the claimant stationary with an unscheduled permanent impairment. As a result of his back injury, Mesa medically retired the claimant.

¶4 The ICA next entered its findings and award for an unscheduled permanent partial disability with no loss of earning capacity ("LEC"). The basis stated for the award was:

Insurance carrier submitted a loss of earning capacity recommendation authored by Gecko¹ indicating of the employers surveyed the reported wages on average would be \$14.42 per hour or \$2,501.01 per month. Currently, applicant would be able to obtain employment that currently exceeds his previously established average

¹ The August 13, 2008 Loss of Earning Capacity Recommendation was authored by Rebecca Lollich and was filed with the ALJ on March 1, 2010.

monthly wage.² Therefore, it is respectfully recommended that applicant not be awarded any monthly earning ability based on employers contacted for the vocational directives of dialysis technician, medical assistant, phlebotomist and cardiac monitor assistant.

Per information contained in the file the position of a medical assistant would have paid \$14.42 per hour.

$\$14.42 \times 40 \times 4.333 = \$2,499.27$

Medical limitations would not preclude applicant [from] performing the duties of a medical assistant or comparable work earning an average monthly sum equal to or in excess of established average monthly wage thereby sustaining no loss of earning capacity.

The claimant did not protest the ICA's award, and it became final.

¶15 Approximately one year after the ICA's no LEC award, the claimant filed a petition for rearrangement. At the rearrangement hearing, he testified that at the time the ICA entered its no LEC award, he had been looking for the type of positions recommended by Ms. Lollich, but he had been unable to find that type of work. He stated that he did not protest the ICA's award because he "believed it was just a matter of time before . . . [he] found one of those positions." In fact, the only job the claimant found was as a part-time employee in the liquor department at Fry's Food Stores. Due to his inability to find a better paying job, claimant eventually filed the petition

² February 22, 2008 Notice of Average Monthly Wage setting claimant's wage at the statutory maximum of \$2,400.00 per month.

for rearrangement accompanied by Richard Prestwood's labor market report.

¶16 The ICA issued administrative findings and award denying rearrangement, and the claimant timely requested an ICA hearing. Two ICA hearings were held for testimony from the claimant and two labor market experts, Mr. Prestwood and Ms. Lollich.

¶17 Mr. Prestwood performed an earning capacity evaluation for the claimant. In doing so, he reviewed the claimant's medical records, the ICA records and reports, and interviewed the claimant. He explained that the best measure of the claimant's earning capacity was his job at Fry's. Based on the Fry's employment, Mr. Prestwood testified that the claimant was entitled to a loss of earning capacity award in the amount of \$924.40 per month based on part-time employment or \$528.79 per month based on full-time employment.

¶18 Mr. Prestwood also commented on Ms. Lollich's initial August 13, 2008 and supplemental March 3, 2010 labor market reports. He testified that the claimant lacked the appropriate education, certification, and experience for any of the positions listed and that none of them were appropriate. Furthermore, he stated that the jobs Ms. Lollich recommended at the time of the petition for rearrangement were largely

unchanged from the jobs that she had recommended at the time of the ICA's initial no LEC award. Finally, he testified that these recommendations caused the ICA's November 10, 2008 no LEC award to be incorrect.

¶19 Ms. Lollich testified in accordance with her August 13, 2008 and March 3, 2010 labor market reports that the positions identified in those reports were both suitable for and reasonably available to the claimant. The fact that claimant had not found work in any of the listed positions did not change her opinion.

¶10 At the conclusion of the hearings, the ALJ entered an award granting rearrangement. Mesa timely requested administrative review, and the ALJ supplemented and affirmed the Award. Mesa next brought this appeal.

III. DISCUSSION

¶11 Mesa argues that the ALJ erroneously granted the claimant's petition for rearrangement. Rearrangement is governed by A.R.S. § 23-1044, which provides in pertinent part:

F. For the purposes of subsection C of this section, the commission, in accordance with the provisions of § 23-1047 when the physical condition of the injured employee becomes stationary, shall determine the amount which represents the reduced monthly earning capacity and upon such determination make an award of compensation which shall be subject to change in any of the following events:

. . . .

2. Upon a showing of a reduction in the earning capacity of the employee arising out of such injury where there is no change in the employee's physical condition, subsequent to the findings and award.

This subsection permits rearrangement when there is a reduction in earning capacity causally related to the industrial injury that results from "some external change in circumstances occurring after the commission issued its final award." *Gallegos v. Indus. Comm'n*, 144 Ariz. 1, 2, 695 P.2d 250, 251 (1985).

¶12 The party seeking rearrangement has the burden of proof. See *Pima Cnty. Bd. of Supervisors v. Indus. Comm'n*, 149 Ariz. 38, 44, 716 P.2d 407, 413 (1986) (whichever party petitions for rearrangement has burden of proof). A reduction in earning capacity is "measured by comparing the facts determined by the [prior] final findings and award with those existing at the time" of the petition for rearrangement is filed. *Gallegos*, 144 Ariz. at 5, 695 P.2d at 254.

¶13 In this case, Mesa argues there is no change in circumstances to support rearrangement because the claimant was earning the same wage at the time the prior no LEC award became final as he was when he filed his petition for rearrangement. Since the facts are unchanged, Mesa asserts that the claimant had to protest the no LEC award before it became final and that

now he is precluded from doing so. *But cf. Stainless Specialty Mfg. Co. v. Indus. Comm'n*, 144 Ariz. 12, 18, 695 P.2d 261, 267 (1985) (rearrangement by definition is a statutory exception to finality). We disagree and find support for the ALJ's award in *Gallegos*.

¶14 In *Gallegos*, the claimant sustained an industrial back injury while employed as a laborer earning \$4.15 per hour. 144 Ariz. at 2, 695 P.2d at 251. After being released to return to work, financial need caused him to accept work as a furniture mover earning \$8 per hour. After six weeks as a furniture mover, he had to quit because the work was too strenuous. *Id.* The ICA subsequently entered a findings and award for a fifteen percent permanent partial impairment and no LEC based on the claimant's earnings as a furniture mover. *Id.* At the time the ICA entered the award, the claimant was no longer moving furniture but was working at a family dry cleaning business earning minimum wage. *Id.* He did not protest the ICA award, and despite being factually erroneous, the award became final and res judicata. *Id.*

¶15 Thereafter, the claimant filed a petition for rearrangement based on his actual minimum wage reemployment earnings. *Id.* at 3, 695 P.2d at 252. The Arizona Supreme Court held that, despite being erroneous, the ICA's findings and award

for no LEC was final and established the comparison point for the claimant's petition for rearrangement. *Id.* at 4, 695 P.2d at 253. For that reason, the court found that the claimant's minimum wage earnings at the time he filed the petition for rearrangement satisfied the A.R.S. § 23-1044(F)(2) requirement of changed circumstances. *Id.* at 5-6, 695 P.2d at 254-55.

¶16 In this case, the prior final findings and award found that the claimant could work full time as a medical assistant and earn \$14.42 per hour. At the time he filed the petition for rearrangement, the claimant had been unable to obtain that type of position and was working as a grocery clerk earning \$8.30 per hour. *See Maness v. Indus. Comm'n*, 102 Ariz. 557, 559, 434 P.2d 643, 645 (1967) (evidence of post-injury earnings raises a presumption of post-injury earning capacity). Claimant's labor market expert also testified that this represented the best measure of the claimant's current earning capacity. These facts are consistent with the holding in *Gallegos*.

¶17 Although Mesa's labor market expert disagreed with the claimant's allegation, 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). Here, the ALJ resolved the conflict between the labor market experts in favor of the claimant. Mr. Prestwood's

testimony established that the claimant's earning capacity at the time he filed the petition for rearrangement was \$8.30 per hour. Because that is substantially less than the \$14.42 per hour found by the prior final findings and award, the ALJ properly found a change in circumstances under A.R.S. § 23-1044(F)(2) and rearrangement under *Gallegos* was appropriate. For all of the foregoing reasons, we affirm the award.

/s/

ROGER E. BRODMAN, Judge*

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge

* Pursuant to Article VI, Section 3 of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Roger E. Brodman, Judge of the Maricopa County Superior Court, to sit in this matter.