

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



DIVISION ONE
FILED: 12/13/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

ELDON J. THOMAS,) No. 1 CA-IC 11-0012
)
Petitioner,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules of
ARIZONA,) Civil Appellate Procedure)
)
Respondent,)
)
CSK AUTO CORP.*,**,)
)
Respondent Employer,)
)
ZURICH AMERICAN INSURANCE CO.*,)
ROYAL & SUNALLIANCE, AKA)
ARROWPOINT CAPITAL**,)
)
Respondent Carrier.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20051-470336**, 20073-540128*

Carrier Claim No. 208 0178173*, 77501691800**

Administrative Law Judge Michael A. Mosesso

AWARD AFFIRMED

Eldon J. Thomas
Petitioner/Appellant *In Propria Persona*

Glendale

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B R O W N, Judge

¶1 Eldon J. Thomas seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for permanent partial disability benefits. As best we can tell, Thomas asserts that the administrative law judge ("ALJ") erred in determining the amount of Thomas's loss of earning capacity relating to his 2002 work injury. Because we conclude the ALJ's decision is reasonably supported by the evidence, we affirm.

BACKGROUND

¶2 Thomas injured his right arm in 2002 while working for Respondent CSK Auto Corporation ("CSK"). Thomas received benefits, and the Respondent Carrier Royal & Sun Alliance ("Royal") closed his claim with an unscheduled permanent impairment in November 2009. The ICA issued its findings and award for unscheduled permanent partial disability on April 27, 2010. Thomas protested the closing and requested a hearing.

¶13 In 2007, Thomas injured his left shoulder while still working for CSK. Thomas again received benefits, and the Respondent Carrier Zurich American Insurance Company ("Zurich") closed the claim with an unscheduled impairment in January 2010. Thomas protested the closing and requested a hearing.

¶14 The ALJ consolidated the requests and held hearings on August 19, 2010 and October 15, 2010. As pertinent here, the ALJ found that Thomas could work twenty-five hours per week as a pizza delivery driver earning \$5.25 per hour, resulting in a loss of earning capacity of \$124.02 per month in permanent benefits for the 2002 injury. Upon request for review, the ALJ affirmed his prior ruling and Thomas filed a timely petition for special action.¹ We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (2003) and Arizona Rule of Procedure for Special Actions 10.

¹ Although Thomas names the respective insurance carriers for both the 2002 and 2007 injuries in the caption of his special action, he only addresses arguments relating to the 2002 injury. We therefore focus our analysis to the 2002 claim. We note, however, that the issue decided by the ALJ regarding the 2007 claim was whether Thomas's condition was medically stationary and whether he suffered a permanent disability. As all parties agreed to accept the report of Thomas's treating physician stating that Thomas's condition was stationary and he suffered a 4% permanent disability, the ALJ's decision as to the 2007 claim was not in error.

DISCUSSION

¶15 In reviewing ICA decisions, 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 the light most favorable to upholding the ALJ's decision. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

¶16 As an initial matter, Thomas's opening brief fails to identify or discuss any specific legal grounds or arguments for vacating the ALJ's decision; nor does his brief include citations to the record, which could constitute abandonment and waiver of his claim. See ARCAP 13(a)(6) (requiring the appellant's brief to contain arguments that include "citations to the authorities, statutes and parts of the record relied on"); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim."). In our discretion, we decide this appeal on its merits based on our own review of the record. See *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (recognizing that courts prefer to decide each case upon its merits rather than dismissing on procedural grounds). We construe Thomas's vague opening brief as a challenge to the ALJ's finding regarding loss of earning capacity benefits for the 2002 injury.

¶17 Thomas first suggests that the average monthly wage of \$797.46, which was determined by the ICA and relied upon by the ALJ in determining Thomas's loss in earning capacity relating to his 2002 injury, was too low. We disagree.

¶18 The ICA issued a notice of average wage calculation on February 18, 2010, establishing Thomas's average monthly wage as \$797.46. The notice provided that this calculation would become final unless Thomas submitted a written request for a hearing within ninety days. See A.R.S. § 23-947(A) (Supp. 2011).² It was undisputed during the ALJ hearing that Thomas failed to submit a written request challenging this calculation. We therefore conclude the average monthly wage calculation is final and may not be challenged on appeal. See A.R.S. § 23-947(B) ("Failure to file with the commission within the required time by a party means that the determination by the commission . . . is final and res judicata to all parties."); *Houston v. Indus. Comm'n*, 19 Ariz. App. 255, 256, 506 P.2d 646, 647 (1973) (holding average monthly wage determination became final when employee failed to timely request a hearing to review it).

¶19 Thomas also questions the credibility of a labor market expert's report on the basis of several factual discrepancies, including Thomas's age, his date of hire, and the

² We cite the current statute when there have been no material changes.

location of his injury. Because it is the duty of the ALJ to resolve any conflicts in evidence, we defer to the ALJ's factual findings if they are substantiated by competent evidence. *Preuss v. Indus. Comm'n*, 15 Ariz. App. 515, 516-17, 489 P.2d 1217, 1218-19 (1971). The ALJ's decision relied in part on Lisa Clapp's amended report dated August 20, 2010, which noted Thomas's correct age, but still contained incorrect statements of his date of hire and the precise location of his injury. However, neither Thomas's original hire date nor whether the 2002 injury involved his right arm or shoulder were relevant to the determination of his loss of earning capacity, and Thomas pointed out these discrepancies during his testimony at the hearing.

¶10 Additionally, Thomas suggests that he should have been awarded a higher amount for loss of earning capacity. The relevant issues in determining a loss of earning capacity are whether in a competitive labor market the injured worker can probably sell his services and for how much. *Macias v. Indus. Comm'n*, 139 Ariz. 182, 183, 677 P.2d 1290, 1291 (1984). This assessment considers the worker's medical impairment, age, employment restrictions, and prior work history. See A.R.S. § 23-1044(D) (Supp. 2011). The focus is on the suitability and availability of employment. *Zimmerman v. Indus. Comm'n*, 137 Ariz. 578, 582, 672 P.2d 922, 926 (1983).

¶11 The ALJ determined Thomas had made a good effort to obtain work and that Clapp's loss in earning capacity analysis was credible and persuasive. Accordingly, the ALJ determined Thomas could work twenty-five hours a week as a pizza delivery driver, earning a rollback wage of \$5.25 per hour and resulting in an earning capacity of \$571.96 per month. Subtracting this amount from Thomas's pre-injury average monthly wage as determined by the ICA of \$797.46, and multiplying the result by the statutory factor of 55%,³ the ALJ determined Thomas had established by a reasonable preponderance of the evidence that he was entitled to receive \$124.02 per month in permanent partial disability benefits from the 2002 accident. We conclude that the ALJ's decision is supported by the record.

¶12 Clapp testified that she used the physical function limitations identified by Thomas's treating physician, Dr. Rockowitz,⁴ in identifying two appropriate job categories. Clapp stated that she considered pizza delivery driver and unarmed security guard positions to be both suitable and available for Thomas in light of his medical limitations, age, education, and

³ See A.R.S. § 23-1044(C).

⁴ The medical analysis was undisputed; all parties agreed to rely on medical reports from Rockowitz that established Thomas suffered a 10% permanent impairment of his right upper extremity and imposed restrictions on lifting and repetitive activities involving that arm.

prior work history as well as the availability of local job openings in both fields. Thomas testified that he had recently sought employment with several auto-parts stores and that he could work under the medical limitations outlined by Rockowitz. He also stated that he could work as a pizza delivery driver, but disagreed with the compensation amounts testified to by Clapp. Accordingly, the evidence is undisputed that Thomas is capable of working under certain medical limitations. Although Thomas disagrees with the amount of the loss of earning capacity award, he does not direct us to any evidence supporting a higher amount. In any event, it is the role of the ALJ to resolve conflicts in the evidence. See *Preuss*, 15 Ariz. App. at 516-17, 489 P.2d at 1218-19.

CONCLUSION

¶13 For the forgoing reasons, we affirm the ALJ's award and decision upon review.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

PATRICIA A. OROZCO, Judge