

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: 12/15/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVEN E BAKER,) No. 1 CA-IC 11-0020
)
Petitioner Employee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
THE INDUSTRIAL COMMISSION OF ARIZONA,) (Not for Publication -
) Rule 28, Arizona Rules
Respondent,) of Civil Appellate
) Procedure)
CITY OF TEMPE,)
)
Respondent Employer,)
)
PINNACLE RISK MANAGEMENT,)
)
Respondent Carrier.)

Special Action - Industrial Commission
ICA Claim No. 20081-690532
Carrier Claim No. WCTEM2008584659

Administrative Law Judge Karen G. Calderon

AWARD AFFIRMED

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B A R K E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") findings and award establishing credits against the petitioner employee's ("Claimant's") 2010 unscheduled disability benefits award for vocational rehabilitation bonuses paid in three prior industrial injury claims. Two issues are presented on appeal:

(1) whether the administrative law judge ("ALJ") erroneously interpreted Arizona Revised Statutes ("A.R.S.") section 23-1065(B)(1) (Supp. 2011), when she found that the vocational rehabilitation bonuses constituted credits against Claimant's May 12, 2010, unscheduled permanent disability benefits award; and

(2) whether vocational rehabilitation bonuses paid pursuant to A.R.S. § 23-1065(B)(1) constitute previous disabilities under A.R.S. § 23-1044(E) (Supp. 2011) for purposes of calculating Claimant's permanent disability benefits.

Because we find that the ALJ correctly concluded that vocational rehabilitation bonuses constitute credits against Claimant's unscheduled permanent disability benefits award, we affirm.

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 Rule of Procedure for Special Actions 10 (2003). 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). Questions of

statutory interpretation are reviewed *de novo*. *Universal Roofers v. Indus. Comm'n*, 187 Ariz. 620, 622, 931 P.2d 1130, 1132 (App. 1996).

Procedural and Factual History

¶3 Claimant worked as a fire fighter for twenty-eight years prior to retiring in August 2008. During his employment, Claimant sustained a number of industrial injuries:

1. November 26, 1991 injury to the right major arm, closed with a scheduled five percent impairment, and scheduled disability benefits of \$3150.¹
2. August 10, 1996 injury to the right knee, closed with an eleven percent permanent impairment to the right lower extremity, no loss of earning capacity, and a vocational rehabilitation bonus² of \$5775.
3. September 23, 2004 injury to the left knee, closed with a ten percent permanent impairment to the left lower extremity, no loss of earning capacity, and a vocational rehabilitation bonus of \$6000.
4. January 6, 2008 injury to the right shoulder, closed with no loss of earning capacity.
5. March 9, 2008 injury to the right biceps tendon, closed with a five percent permanent impairment to the right upper extremity, no loss of earning capacity, and a vocational rehabilitation bonus of \$4500.
6. June 7, 2008 injury to the low back, closed with a five percent unscheduled permanent partial impairment and stipulated disability benefits of \$588.07 per month.

¹ Scheduled disability benefits are calculated based on fifty-five percent of the claimant's average monthly wage, multiplied by a percentage of the total number of statutorily-determined months that represent a complete loss of use of the member. See A.R.S. § 23-1044(B).

² Benefits paid to the claimant when a second scheduled injury is unscheduled by operation of law and there is no loss of earning capacity. See A.R.S. § 23-1065(B)(1).

¶14 The ICA claimed credits against Claimant's 2010 award of unscheduled permanent disability benefits for the vocational rehabilitation bonuses that he had received in conjunction with three prior industrial injuries. Claimant timely protested, and an ICA hearing was scheduled. The hearing was cancelled, however, when the parties stipulated that the only issue involved statutory interpretation, which could be addressed in legal memoranda. The parties filed legal memoranda, and the ALJ adopted the respondent employer's, City of Tempe's ("Tempe's"), arguments.³ Claimant timely requested administrative review, and the ALJ summarily affirmed the award. Claimant next brought this appeal.

Discussion

¶15 Claimant first argues the ALJ erred by allowing Tempe to take credits against his unscheduled permanent disability benefits for the vocational rehabilitation bonuses he received following his August 10, 1996, September 23, 2004, and March 9, 2008, industrial injuries. Claimant asserts this error is based on the ALJ's erroneous interpretation of the statutory language in A.R.S. § 23-1065(B)(1):

B. In claims involving an employee who has a preexisting industrially-related permanent physical impairment of the type specified in § 23-1044,

³ See, e.g., *Hester v. Indus. Comm'n*, 178 Ariz. 587, 589-90, 875 P.2d 820, 822-23 (App. 1993) (stating that ALJ may incorporate by reference a party's legal memorandum).

subsection B and who thereafter suffers an additional permanent physical impairment of the type specified in such subsection, the claim involving the subsequent impairment is eligible for reimbursement, as provided by subsection D of this section, according to the following:

1. The employer in whose employ the subsequent impairment occurred or its insurance carrier is solely responsible for all temporary disability compensation to which the employee is entitled and for an amount equal to the permanent disability compensation provided by § 23-1044, subsection B for the subsequent impairment. If the employee is determined to have sustained no loss of earning capacity after the medically stationary date, the employer or carrier shall pay him as a vocational rehabilitation bonus the amount calculated under this paragraph as a lump sum, *which shall be a credit against any permanent compensation benefits awarded in any subsequent proceeding.* The amount of the vocational rehabilitation bonus for which the employer or carrier is responsible under this paragraph shall be calculated solely on physical, medically rated permanent impairment and not on occupational or other factors.

(Emphasis added.) Claimant submits that the emphasized language refers only to subsequent proceedings⁴ on the same industrial injury claim for which the vocational rehabilitation bonus was paid and not to "permanent compensation benefits" awarded on any other industrial injury claim.

¶16 "We interpret a statute so as to give effect to legislative intent, looking to the language of the statute as 'the most reliable indicator of legislative intent.'" *de la Cruz v.*

⁴ In workers' compensation claims, there are two statutory exceptions to finality: reopening, A.R.S. § 23-1061(H), and rearrangement, A.R.S. § 23-1044(F). See *Epstein's Custom Carpentry v. Indus. Comm'n*, 155 Ariz. 284, 287, 746 P.2d 25, 28 (App. 1987).

State, 192 Ariz. 122, 124, ¶ 6, 961 P.2d 1070, 1072 (App. 1998) (quoting *Alaface v. Nat'l Inv. Co.*, 181 Ariz. 586, 592, 892 P.2d 1375, 1381 (App. 1994)) (citation omitted). "To determine legislative intent, the words of the statute should be given their ordinary meanings." *Bird v. State ex rel. Corbin*, 170 Ariz. 20, 23, 821 P.2d 287, 290 (App. 1991). Statutory interpretation is unnecessary when language is plain and unambiguous and conveys a clear and definite meaning. *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).

¶17 When a compensable industrial injury results in a permanent impairment, an award of permanent disability benefits is made depending upon the character of the impairment as either "scheduled" or "unscheduled." See A.R.S. § 23-1044(B), (C). Scheduled injuries listed in A.R.S. § 23-1044(B) are conclusively presumed to adversely affect a claimant's earning capacity and are compensated based on a statutory formula. *Ronquillo v. Indus. Comm'n*, 107 Ariz. 542, 544, 490 P.2d 423, 425 (1971). Impairments not contained in A.R.S. § 23-1044(B) are considered to be unscheduled and are compensated only upon demonstrating an actual loss of earning capacity. See A.R.S. § 23-1044(C); *Valle v. Farmers Inv. Co.*, 175 Ariz. 441, 443, 857 P.2d 1259, 1297 (1992).

¶18 Arizona courts have long recognized that when a claimant has multiple impairments, those impairments may result in a greater total disability than the sum of the individual disabilities. See,

e.g., *Ossic v. Verde Cent. Mines*, 46 Ariz. 176, 188, 49 P.2d 396, 401 (1935); *Adams Insulation Co. v. Indus. Comm'n*, 163 Ariz. 555, 558, 789 P.2d 1056, 1059 (1990). For that reason, when a claimant sustains a second scheduled industrial injury, the entire injury is conclusively presumed to be unscheduled. See *Ronquillo*, 107 Ariz. at 544, 490 P.2d at 425; *Valle*, 175 Ariz. at 443, 857 P.2d at 1297.

¶9 Before 1986, a second scheduled injury that was unscheduled by operation of law and resulted in no loss of earning capacity was not entitled to an award of permanent disability benefits. *Dutra v. Indus. Comm'n*, 135 Ariz. 59, 61, 695 P.2d 18, 20 (1983). But in 1986, the legislature amended A.R.S. § 23-1065(B) and created a new benefit, the vocational rehabilitation bonus. See 1986 Ariz. Sess. Laws, ch. 415, § 1, ¶ 3. After that, a claimant who sustained a second scheduled injury, but had no loss of earning capacity, received the statutory scheduled benefit for the second injury as a vocational rehabilitation bonus. A.R.S. § 23-1065(B)(1).

¶10 Pursuant to this statutory authority, Claimant received three vocational rehabilitation bonuses for his 1996, 2004, and 2008 scheduled industrial injuries. After each of the scheduled injuries, Claimant had returned to his regular work as a fire fighter with no loss of earning capacity; so instead, he received vocational rehabilitation bonuses. As a result of his industrial low back injury sustained in 2008, Claimant was found to have a

five percent unscheduled permanent partial impairment, and he received unscheduled permanent disability benefits. The ICA then applied credits against the unscheduled "permanent compensation benefits" for each of the vocational rehabilitation bonuses Claimant received from Tempe.

¶11 Tempe argues that it is entitled to redeem these credits against Claimant's unscheduled disability benefits award by virtue of the express statutory language in A.R.S. § 23-1065(B)(1). Claimant responds that his unscheduled disability benefits award is based solely on the unscheduled five percent permanent impairment he received for a herniated disc under the *AMA Guides to the Evaluation of Permanent Impairment*. He submits that the back injury claim was rated without reference to his prior scheduled industrial injuries and those prior injuries should not impact the amount of his unscheduled benefits.

¶12 Determining a claimant's entitlement to disability benefits is a two-step process: first there is a determination of permanent impairment, and second there is a determination of disability benefits. *Tucson Steel v. Indus. Comm'n*, 154 Ariz. 550, 554, 744 P.2d 462, 466 (App. 1987). Typically, a labor market expert receives medical input from the treating physician regarding the claimant's impairment rating and physical capabilities, and then he matches them to requirements of specific jobs in the open

labor market to determine the claimant's residual earning capacity.
Id. at 556, 744 P.2d at 468.

¶13 In determining a claimant's residual earning capacity, the ALJ also 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." A.R.S. § 23-1044(D) (emphasis added). For these reasons, we disagree that Claimant's unscheduled permanent disability benefits award was based solely on his unscheduled five percent permanent impairment.

¶14 Claimant next argues that the vocational rehabilitation bonuses cannot be considered credits under A.R.S. § 23-1044(E) because, for purposes of that statute, a prior disability is an earning capacity disability, and after each scheduled injury, Claimant returned to his regular work. We agree that "disability" as used in A.R.S. § 23-1044(E) means an earning capacity disability, but we recognize that scheduled industrial injuries are conclusively presumed to adversely affect a claimant's earning capacity. *See Special Fund Div. v. Ariz. Dept. of Transp.*, 198 Ariz. 224, 227 n.4, ¶ 13, 8 P.3d 412, 415 n.4 (App. 2000).

¶15 In *Special Fund Division*, this court considered A.R.S. § 23-1044(E) for purposes of apportioning the responsibility for

the claimant's permanent disability benefits among several industrial injuries, both scheduled and unscheduled:

The procedure of § 23-1044(E) determines what portion of the entire earning capacity disability is the responsibility of the current employer. The unscheduling of the injuries and the determination of the "entire disability" ensure that the cumulative effect of all injuries on the claimant's earning capacity is properly considered. The deduction of prior disabilities prevents any double recovery and limits the responsibility of the current employer to that disability caused by the current injury.⁵

198 Ariz. at 228, ¶ 18, 8 P.3d at 416. The method utilized in *Special Fund Division* provides guidance for this case. For that reason, we find that the ALJ correctly valued the credit for each vocational rehabilitation bonus utilizing *Roth* and then appropriately deducted the combined total credit from the claimant's monthly unscheduled permanent disability benefits.

⁵ We recognized that the prior injury payments "needed to be apportioned over Claimant's life expectancy by the method described in *R.G. Roth Constr. Co. v. Industrial Comm'n*, 126 Ariz. 147, 150, 613 P.2d 307, 310 (App. 1980)." *Special Fund*, 198 Ariz. at 226 n.2, 8 P.3d at 414 n.2. *Roth* credits are calculated in this manner because permanent disability benefits are paid over a claimant's entire lifetime. In this case, after applying *Roth*, the combined credit deducted from Claimant's monthly unscheduled permanent disability benefits would be \$55.09 for all three vocational rehabilitation bonuses that he received.

Conclusion

¶16 For the foregoing reasons, we affirm.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Presiding Judge

/s/

PATRICK IRVINE, Judge