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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CARLETON J. FULLER, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, EAGLE EXPRESS LINES, INC., Respondent Employer, LIBERTY MUTUAL INSURANCE GROUP, Respondent Insurer.	2 CA-IC 2012-0004 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20060030479

Insurer No. WC197-556895

LuAnn Haley, Administrative Law Judge

AWARD SET ASIDE

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E C K E R S T R O M, Presiding Judge.

¶1 In this statutory special action, petitioner employee Carleton Fuller challenges the decision of the administrative law judge (ALJ) awarding him $951.81 per month in loss of earning capacity benefits. For the following reasons, we set aside the award.

¶2 Fuller injured his neck and right shoulder in May 2005 while working as a truck driver for respondent employer Eagle Express. In April 2011, the Industrial Commission issued its findings and award for total permanent disability, awarding him $1,600.08 per month based on a complete loss of earning capacity. Eagle Express and the respondent insurer Liberty Mutual Insurance Group (collectively "Eagle Express") filed a request for hearing on the ground that Fuller "has a greater earning capacity than determined by the Industrial Commission award." After a hearing, the ALJ determined that Fuller could find part-time work at an entry-level service job and therefore reduced the award to "$951.81 per month in loss of earning capacity benefits." The ALJ affirmed the award in its decision upon review. Fuller filed this special action, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951.

¶3 When reviewing an Industrial Commission award, we view the evidence in the light most favorable to upholding the award. *Roberts v. Indus. Comm'n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). We will not set aside an award that is based on a reasonable interpretation of the evidence. *Id.* We will, however, set aside an award that is "not based upon competent or substantial evidence." *Id.*

Reasonably Available Jobs

¶4 Fuller argues "[t]he Defendants have the burden of proof that there are reasonably and suitably available jobs that the Applicant can do given his industrially-related work restrictions, and they have failed to meet that burden." Based on the testimony of several physicians and a physical therapist about Fuller's work restrictions, the ALJ found that he could lift no more than twenty pounds and that his workday should not exceed six hours, excluding commuting time. The ALJ further found that Fuller would be able to commute from his home in Patagonia to Tucson "as long as he takes a break." In sum, the ALJ concluded that "Fuller is able to perform light work up to thirty hours per week." And, based on the testimony and reports of two labor market consultants, the ALJ found that an "entry level service job[]" in Tucson "at a maximum of thirty hours a week," would be "suitable and available for [Fuller]." Accordingly, his loss of earning capacity was determined on that basis.

¶5 When determining the future earning capacity of an injured worker, "[t]he object is to determine as near as possible whether in a competitive labor market the subject in his injured condition can probably sell his services and for how much." *Davis v. Indus. Comm'n*, 82 Ariz. 173, 175, 309 P.2d 793, 795 (1957). In general, "an injured

worker bears the initial burden of proof on the issue of lost earning capacity," and he or she can meet this burden by offering "any relevant evidence tending to show that termination from employment, or inability to obtain suitable work, is wholly or partially due to the industrial injury or its resulting limitations." *Ariz. Dep't of Pub. Safety v. Indus. Comm'n*, 176 Ariz. 318, 322, 861 P.2d 603, 607 (1993); *see* A.R.S. § 23-1044(G). Once the worker meets this burden of proof, the employer or insurer must show "the availability of suitable employment and/or the lack of a causal relationship between the claimed loss of earning capacity and the injury." *Ariz. Dep't of Pub. Safety*, 176 Ariz. at 322, 861 P.2d at 607; *see* § 23-1044(G).

¶6 Eagle Express argues Fuller never satisfied his initial burden of proving he made an active, good-faith effort to find work within the relevant labor market and points to evidence showing a lack of effort on his part. First, we note that Fuller testified that he had searched for employment in several smaller communities near his home in Patagonia and had been unsuccessful. And, his labor market consultant testified that he had unsuccessfully applied for several jobs in Tucson. Testimony about a claimant's job-seeking efforts can alone be sufficient to shift the burden of proof to the insurer or employer. *See, e.g., Roberts*, 162 Ariz. at 109-10, 781 P.2d at 587-88 (claimant's testimony he inquired about four jobs found by labor market consultant sufficient to satisfy initial burden); *Arden-Mayfair v. Indus. Comm'n*, 158 Ariz. 580, 583, 764 P.2d 341, 344 (App. 1988) (sufficient evidence to shift burden when employee testified he had applied for jobs and had been unsuccessful in finding anything but part-time employment); *cf. Phelps Dodge Corp. v. Indus. Comm'n*, 114 Ariz. 252, 254, 256, 560

P.2d 436, 438, 440 (App. 1977) (medical evidence and testimony by claimant that he inquired about availability of light work from labor department head sufficient to establish "satisfactory effort to secure employment" and shift burden to employer or insurer).

¶7 Second, even were we to conclude Fuller had not shown "an unsuccessful good faith effort to obtain suitable employment," that is only one of the ways a worker can meet his or her initial burden of proof on lost earning capacity. *Ariz. Dep't of Pub. Safety*, 176 Ariz. at 322, 861 P.2d at 607; *accord Franco v. Indus. Comm'n*, 130 Ariz. 37, 39, 633 P.2d 446, 448 (App. 1981). An injured worker can also meet his or her burden by showing "the type of work that can be performed despite the industrial injury, and the amount to be earned in such employment," or "membership in the 'odd-lot' category (able to provide such limited services that no stable labor market exists)." *Ariz. Dep't of Pub. Safety*, 176 Ariz. at 322, 861 P.2d at 607.

¶8 Here, Fuller also presented the expert opinions of a medical doctor and a labor market consultant in order to show the type of work he could perform, the amount to be earned from that employment, and to try to prove that no stable labor market exists for his services.[1] Using the least severe medical restrictions provided by Eagle Express's physician, Fuller's labor market expert, Staci Schonbrun, testified he could perform an entry-level, service-type, minimum-wage job. As to the availability of employment,

[1]There was no dispute that Fuller could not return to his time-of-injury job as a truck driver.

Schonbrun testified she was "not able to identify" suitable work in the communities surrounding Patagonia but that "in theory" such a job might be found in Tucson.[2]

¶9 Thus, the burden shifted to Eagle Express to show reasonably available work that is suitable for Fuller to perform. *See id.* "If the carrier presents evidence that there is employment reasonably available which the claimant could reasonably be expected to perform, considering his physical capabilities, education and training, . . . the carrier has met its burden of showing an earning capacity." *Germany v. Indus. Comm'n*, 20 Ariz. App. 576, 580, 514 P.2d 747, 751 (1973). Our supreme court has made clear that specific evidence must be presented on several factors in order for an insurer or employer to show an employee has residual earning capacity based on "reasonably available" employment.

> [The] determination of the injured worker's ability to sell his services in a competitive, open market requires specific evidence—not abstractions or assumptions—regarding the number of positions available, the competition for those positions, the regularity and permanency of the positions, and, "possibly most importantly," the likelihood of the prospective employer giving the injured applicant as much consideration as those who are not handicapped or who have not experienced industrial injury.

[2]Fuller argues this court should find that he is an "odd-lot" employee and therefore should be classified as "totally disabled." But proving that one is an "odd-lot" employee only makes a prima facie case of total loss of earning capacity. *See Ariz. Dep't of Pub. Safety*, 176 Ariz. at 322, 861 P.2d at 607; *Emp'rs Mut. Liab. Ins. Co. v. Indus. Comm'n*, 25 Ariz. App. 117, 120, 541 P.2d 580, 583 (1975). The employer or insurer still has the opportunity to present evidence of reasonably available employment. *Emp'rs Mut. Liab. Ins. Co.*, 25 Ariz. App. at 120, 541 P.2d at 583. Because we have concluded Eagle Express did not present sufficient evidence of such employment here, we need not decide whether Fuller satisfied his initial burden of proof by showing he was an odd-lot employee or by other means.

Zimmerman v. Indus. Comm'n, 137 Ariz. 578, 584, 672 P.2d 922, 928 (1983), *quoting Dye v. Indus. Comm'n*, 23 Ariz. App. 68, 72, 530 P.2d 914, 918 (1975) (Jacobson, P.J., specially concurring); *accord Roberts*, 162 Ariz. at 110-11, 781 P.2d at 588-89; *Roach v. Indus. Comm'n*, 137 Ariz. 510, 512, 514-15, 672 P.2d 175, 177, 179-80 (1983); *Dean v. Indus. Comm'n*, 113 Ariz. 285, 287, 551 P.2d 554, 556 (1976).

¶10 Eagle Express presented the testimony and report of labor market consultant Diane Nayhouse about the reasonable availability of jobs that Fuller could perform. Her report set forth five jobs in Tucson that she opined Fuller would be qualified for and that paid higher than the minimum wage. However, the ALJ did not find any of those jobs to be suitable and available. Rather, the ALJ found that an "entry level service job[] . . . at a maximum of thirty hours a week" would be "suitable and available for [Fuller]." In that vein, Nayhouse testified generally that Fuller would be employable as a parking lot attendant, warehouse clerk, routing clerk, or in the fast food industry. She testified that parking lot attendant jobs were "commonly available" and "routinely open" in Tucson. But she had no evidence of the number of openings or applicants for parking lot attendants or any of the other types of minimum-wage jobs enumerated. Schonbrun stated that a parking lot attendant job might work for Fuller but that there was currently no availability in Tucson. No evidence was presented about how Fuller's disability would affect his opportunity to be hired at any specific position.

¶11 Arizona courts have not hesitated to set aside awards when specific evidence has not been presented on the relevant factors. *See, e.g.*, *Roberts*, 162 Ariz. at

112, 781 P.2d at 590 (award set aside when no evidence presented about number of applicants for jobs or employers' willingness to hire someone with disability); *Macias v. Indus. Comm'n*, 139 Ariz. 182, 184, 677 P.2d 1290, 1292 (1984) (setting aside award when "no evidence tend[ed] to show that petitioner could reasonably be expected to compete for and secure employment as a home companion for twenty hours per week"); *Zimmerman*, 137 Ariz. at 584, 672 P.2d at 928 (setting aside award when no evidence potential employer "would or could consider an applicant with claimant's serious limitations on a competitive basis with other claimants not so limited"); *Roach*, 137 Ariz. at 515, 672 P.2d at 180 (setting aside award based on "abstract and non-specific" evidence of suitability and availability of potential jobs); *Dean*, 113 Ariz. at 287, 551 P.2d at 556 (setting aside award when no evidence showing either competition for available position or "likelihood that employers will hire someone with a previous disability although he is now fully qualified to perform the work"); *Arden-Mayfair*, 158 Ariz. at 584, 764 P.2d at 345 (award based on incompetent evidence when no showing employee "would have had an equal opportunity to be hired in competition with others").

¶12 Based on the complete absence of evidence on any of the factors set forth in *Zimmerman* as to the minimum-wage work the ALJ found suitable for Fuller to perform, there was no basis for the ALJ to conclude that "there is a reasonable probability that [Fuller] can find suitable employment on a regular basis." 137 Ariz. at 584, 672 P.2d at 928 (emphasis omitted). Accordingly, the award is set aside.

Relevant Labor Market

¶13 We address the following issue because it might recur in a subsequent proceeding. Fuller argues the ALJ misapplied *Kelly Services v. Industrial Commission*, 210 Ariz. 16, 106 P.3d 1031 (App. 2005), to find that Tucson is within his relevant labor market. "A reasonably available job is one in sufficient supply within the competitive labor market of claimant's residence as to offer the claimant a reasonable prospect of securing such work." *W.F. Dunn, Sr. & Son v. Indus. Comm'n*, 160 Ariz. 343, 348, 773 P.2d 241, 246 (App. 1989). The court in *Kelly* held that the appropriate inquiry for determining the relevant labor market is "whether a reasonable person *in the claimant's situation* would probably seek employment there." 210 Ariz. 16, ¶ 15, 106 P.3d at 1035 (emphasis added).

¶14 The only circumstance the ALJ relied upon in finding Tucson was the relevant labor market under *Kelly* was that "Fuller drove to Tucson for employment prior to his injury." She did not expressly take into account Fuller's "ability . . . to make the commute based on his physical condition" or any other relevant circumstances. *Id.* In *Kelly*, we set aside an award due to the ALJ incorrectly assuming, as a matter of law, that the claimant's labor market could not be expanded outside the town in which he resided. *Id.* ¶¶ 13-14. We emphasized there that "a proper determination of the relevant geographical labor market in a given case is a factual inquiry dependent on a variety of factors." *Id.* ¶ 1. Here, to the extent the ALJ found as a matter of law that Tucson would have to be included because Fuller had worked there before his injury and therefore failed

to consider all relevant factors in the totality of circumstances, we would find error in her determination that Tucson was included in the relevant labor market.

Travel Expenses

¶15 Finally, Fuller argues the ALJ erred in finding his travel expenses to Tucson do not affect his residual earning capacity under *Ihle v. Industrial Commission*, 14 Ariz. App. 463, 484 P.2d 232 (1971). But we agree with the ALJ's application of *Ihle* to this case. In general, the determination of earning capacity involves a comparison of post-injury earning capacity to pre-injury earnings. *See id.* at 465, 484 P.2d at 234. And in *Ihle*, the injured worker had to expand his geographical labor market after his injury. *Id.* at 464, 484 P.2d at 233. Thus, his travel expenses were an additional post-injury reduction in his earning capacity attributable to the injury. *Id.* at 465, 484 P.2d at 234. Here, Fuller had already paid for travel expenses to drive sixty miles to Tucson each day for work before his injury. Accordingly, a comparison of his earnings then and his post-injury earning capacity with jobs approximately sixty miles away would not include mileage reimbursement for the distance.[3]

¶16 As stated above, the award is set aside. *See Cunningham v. Indus. Comm'n*, 16 Ariz. App. 443, 446, 494 P.2d 48, 51 (1972); *see also Kennecott Copper*

[3]We need not address whether he would be entitled to a reduction in earning capacity if a job found to be reasonably suitable was in excess of sixty miles from his home. We simply note the express holding of *Ihle* that if "a disabled workman voluntarily expands his employment efforts to an area *distant from the place of his preinjury . . . employment*, . . . the Commission can and should consider the attendant work-connected travel expenses in determining his post-injury earning capacity." *Id.* at 465, 484 P.2d at 234 (emphasis added).

Corp. v. Indus. Comm'n, 62 Ariz. 516, 521-22, 528, 158 P.2d 887, 889, 892 (1945) (reviewing court can only set aside award and must assume on rehearing due consideration will be given to facts).

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge