IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

VIOLA A. BONILLAS,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

PIMA COUNTY,
Respondent Employer,

TRISTAR RISK MANAGEMENT,
Respondent Insurer.

No. 2 CA-IC 2016-0001
Filed March 29, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Actions 10(k).

Special Action–Industrial Commission
ICA Claim Nos. 91162068870 and 94098505657 (Consolidated)
Insurer Nos. 90004579 and 94CS00217
Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Tretschok, McNamara & Miller, P.C., Tucson
By Patrick R. McNamara and Blair A. Feldman
Counsel for Petitioner Employee

The Industrial Commission of Arizona, Phoenix
By Jason M. Porter
Counsel for Respondent

M. Ted Moeller
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Miller and Judge Espinosa concurred.

S T A R I N G, Presiding Judge:

¶1 In this statutory special action, Viola Bonillas petitions for review of the administrative law judge's (ALJ) consolidated decision upon hearing of the Industrial Commission (the "Commission") relating to her claim of lost earning capacity as a result of a 1991 work-related injury, and denial of her petition for rearrangement relating to a 1994 injury. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We "must view the evidence in the light most favorable to sustaining the [ALJ's] findings and award." *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). Viola Bonillas sustained work-related injuries to her right elbow and shoulder in 1991 and lower back in 1994, both while employed by

respondent Pima County.[1] She filed claims for workers' compensation benefits for both accidents, which respondent insurer Tristar Risk Management accepted. In 2007, the Commission concluded Bonillas had no loss of earning capacity from her 1994 low-back injury. In June 2014, the Commission awarded Bonillas permanent total disability compensation of $1,155.32 per month for her 1991 injuries. Tristar protested the award and filed a request for hearing. In July 2014, Bonillas filed a petition for rearrangement of the 2007 decision and requested consolidation of that petition with Tristar's protest of the June 2014 award.

¶3 Following a number of hearings, the ALJ found Bonillas had a 51.5 percent loss of earning capacity because of the 1991 injury, but none from the 1994 injury. He found she was capable of working full-time in a sedentary position requiring the use of one hand with occasional assistance from the injured arm. The ALJ concluded there was no conflict in the evidence of Bonillas's physical impairments, and he resolved the conflict in the psychiatric evidence by adopting the opinions of Tristar's expert as "most probably correct and well-founded," finding Bonillas was not psychiatrically restricted from working. Based on labor market expert testimony, the ALJ found Bonillas could work as a PBX operator, a job that involves wearing a headset and pushing buttons to transfer incoming telephone calls, usually from the shelter of a private cubicle or alcove. He further found full-time employment as a PBX operator was reasonably available, and awarded Bonillas permanent partial disability compensation of $490.77 per month.[2]

¶4 Bonillas requested review, and the ALJ affirmed its award. This statutory special action followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

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[1] Bonillas also suffered a psychological injury in connection with her 1991 injury, specifically depression related to her physical impairment, pain, and loss of independence.

[2] Compensation for partial disability is governed by A.R.S. § 23-1044.

Discussion

¶5 Bonillas argues the ALJ erred by failing to shift to Tristar the burden of proving the availability of employment that would be suitable in light of her permanent impairments. She contends Tristar failed to sustain its burden. We will affirm an ALJ's factual findings unless they are not substantiated by competent evidence. *Preuss v. Indus. Comm'n*, 15 Ariz. App. 515, 516-17, 489 P.2d 1217, 1218-19 (1971). We review questions of law de novo. *Hahn v. Indus. Comm'n*, 227 Ariz. 72, ¶ 5, 252 P.3d 1036, 1038 (App. 2011).

¶6 Ordinarily, the claimant has the burden of establishing all elements of a claim for workers' compensation benefits by a preponderance of evidence. *Edmiston v. Indus. Comm'n*, 92 Ariz. 179, 182, 375 P.2d 377, 379 (1962); *Helmericks v. AiResearch Mfg. Co. of Ariz.*, 88 Ariz. 413, 416, 357 P.2d 152, 154 (1960). A claimant who suffers permanent partial disability for work from injuries not enumerated in A.R.S. § 23-1044(B) is entitled to payment of fifty-five percent of the difference between her average monthly earnings prior to disability and her reduced monthly earning capacity. § 23-1044(C). Reduced monthly earning capacity is determined based on considerations that include the claimant's previous disabilities, complete occupational history, age and current physical disability, and "the type of work the injured employee is able to perform after the injury." § 23-1044(D). A claimant can meet her burden to establish lost earning capacity by demonstrating "inability to perform the job at which [she] was injured and to get other work which [she] can perform in light of [her] physical impairments." *Zimmerman v. Indus. Comm'n*, 137 Ariz. 578, 580, 672 P.2d 922, 924 (1983). If the claimant demonstrates "reasonable efforts to secure suitable employment . . . , the burden shifts to the opposing party to show the availability of such employment." *Dean v. Indus. Comm'n*, 113 Ariz. 285, 287, 551 P.2d 554, 556 (1976).[3]

[3] The claimant's burden to demonstrate efforts to seek employment is described differently among cases, but all embody a concept of reasonableness. *See Employers Mut. Liab. Ins. Co. of Wis. v. Indus. Comm'n*, 25 Ariz. App. 117, 119, 541 P.2d 580, 582 (1975) ("reasonable effort"); *Davis v. Indus. Comm'n*, 16 Ariz. App. 535, 538, 494 P.2d 735, 738 (1972) ("conscientious effort"); *Meadows v. Indus.*

¶7 As noted, Bonillas argues the burden shifted to Tristar. Tristar, however, contends Bonillas waived her burden-shifting argument by failing to raise it before the Commission. *See Stephens v. Indus. Comm'n*, 114 Ariz. 92, 94, 559 P.2d 212, 214 (App. 1977) (appellate court will not consider issues petitioner failed to raise before Industrial Commission).[4] The rule of waiver stems "from the requirement that administrative remedies be exhausted before court relief is sought," as well as the assumption an administrative agency will decide a matter correctly if given the chance. *Id.* Bonillas asserts she raised the issue below, in a November 2014 letter to the ALJ in which she asserted that Tristar had the burden of proof because it had protested the 2014 award. But that three-sentence enclosure letter contained neither any citation to authority for deviating from the general burden of proof, *see Helmericks*, 88 Ariz. at 416, 357 P.2d at 154, nor any hint of the assertion that the basis for shifting the burden was Bonillas's presentation of evidence demonstrating reasonable yet unsuccessful efforts to seek employment.[5] Bonillas thus failed to raise the burden-shifting issue with any degree of specificity that would

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Comm'n, 12 Ariz. App. 114, 119, 467 P.2d 954, 959 (1970) ("satisfactory effort"). As such, the determination of whether a claimant has met the burden is within the ALJ's discretion. *Cf. Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 384, 762 P.2d 1334, 1338 (App. 1988) ("Because the determination of what is reasonable varies with the circumstances, we believe this determination falls within the exercise of the trial court's sound discretion.").

[4]*See also Word v. Indus. Comm'n*, 175 Ariz. 474, 476-77, 857 P.2d 1328, 1330-31 (App. 1993) (objection to improper amendment of caption preserved only as to limited extent made below); *Releford v. Indus. Comm'n*, 120 Ariz. 75, 77-78, 584 P.2d 56, 58-59 (App. 1978) (error waived unless raised below, asserted in request for review, or extant in record); *Larson v. Indus. Comm'n*, 114 Ariz. 155, 158, 559 P.2d 1070, 1073 (App. 1976) (omission of argument from request for review precludes review on appeal).

[5] The assertion read as follows: "Our position is that the defendants have the burden of proof in this matter since it is their protest of this award." Bonillas made no mention of the burden of proof in her request for review.

have permitted the ALJ to address it. As was the case in *Stephens*, Bonillas simply "never raised" the argument below; we conclude the argument has been waived. *See Stephens*, 114 Ariz. at 94, 559 P.2d at 214.

¶8 Moreover, even if we conclude Bonillas adequately preserved the burden-shifting issue, the evidence in the record is sufficient to support the ALJ's findings. *See id.* at 95, 559 P.2d at 215 (sufficiency of evidence to support decision "fundamental" for purposes of administrative and appellate review). To the extent we can review this issue, Bonillas has a high burden; we will reverse only if there is no "competent evidence" to support a conclusion that she did not make a reasonable effort to seek appropriate employment. *See Preuss*, 15 Ariz. App. at 516-17, 489 P.2d at 1218-19. She has not met that burden here.

¶9 We disagree with Bonillas's assertion before this court that Tristar did not dispute that she had made a reasonable effort to obtain alternate employment. Bonillas worked for Pima County for twenty years following her 1991 injury. She claimed she could not perform her most recent job not because her physical condition had changed, but because her supervisor had increased her physical job duties.[6] Further, her departure from her county job coincided with a shoulder surgery that reportedly had caused her pain to decrease. And both labor experts agreed Bonillas's physical limitations would not preclude her from returning to administrative or other light office work on at least a part-time basis.

¶10 Bonillas's subsequent job-search efforts, however, were limited to inquiring or attempting to apply for work as a PBX operator only once with each of the three employers Tristar's labor expert had surveyed. She testified she had made no other efforts to seek employment after she stopped working for Pima County.[7]

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[6]"Post-injury earnings create a presumption of earning capacity commensurate with them." *Davis v. Indus. Comm'n*, 16 Ariz. App. 535, 538, 494 P.2d 735, 738 (1972).

[7] At the October 2014 hearing, Bonillas testified on cross-examination that she had not worked since leaving the county. When

¶11 Notably, the ALJ found that the three PBX jobs the labor experts discussed were "representative of many PBX operator jobs . . . that are suitable for" Bonillas. This finding is substantiated by the testimony and report of Tristar's labor expert, which indicated multiple openings annually at each of the three employers she surveyed.[8] The ALJ not making a finding that Bonillas made a reasonable effort to seek employment can be sustained based on her failure to inquire more than once with each of the three employers surveyed. We need not fault Tristar's lack of evidence establishing precisely how many additional employers offered PBX positions or other light office work suitable for Bonillas, when Bonillas herself made no effort to seek out any other positions.[9]

¶12 Further, Bonillas has not argued that the testimony of the labor experts was not competent or that it provided no support for the ALJ's findings. To the extent she challenges Tristar's evidence, she asserts it was insufficient to meet a burden Tristar could have had only if Bonillas had met her own burden to establish reasonable efforts to seek employment. Assuming Bonillas's attack on the sufficiency of Tristar's evidence is even applicable to the question of whether she met her own burden, Bonillas essentially asks us to reweigh the evidence and "substitute [our] judgment for that of the Commission," which we will not do. *Id.* at 517, 489 P.2d at 1219.

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asked, "[a]nd you haven't made any efforts to find another job, correct," Bonillas answered, "No, I haven't."

[8]Bonillas's expert agreed with the job availability figures at the time of the report, but testified that her inquiries indicated availability had decreased since that time.

[9]In contrast to Bonillas's efforts, the claimant in *Dean* was "unanimously refused employment" by "numerous companies" before obtaining work at a reduced salary. *Dean*, 113 Ariz. at 286-87, 551 P.2d at 555-56. In another example, a claimant's failure to apply for more than one position was sufficient where he "reasonably believe[d] that he was . . . totally disabled from returning to work." *Employers Mut. Liab. Ins. Co. of Wis. v. Indus. Comm'n*, 25 Ariz. App. 117, 120, 541 P.2d 580, 583 (1975).

¶13 As noted above, Bonillas failed to seek out any administrative office work or to seek a position as a PBX operator from more than three employers, and she never asserted below that the burden of proof should shift to Tristar because of her job-seeking efforts. On this record, the ALJ did not err by not finding Bonillas had made "reasonable efforts" to obtain alternate employment. There was thus no basis to shift the burden to Tristar to prove job availability. *See Dean*, 113 Ariz. at 287, 551 P.2d at 556. The ALJ's ultimate finding that Bonillas was employable and thus suffered only a partial loss of earning capacity was substantiated by competent evidence, and was not error. *See Preuss*, 15 Ariz. App. at 516-17, 489 P.2d at 1218-19.

Disposition

¶14 For the foregoing reasons, we affirm the ALJ's award.