IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

KEITH D. SIMMONS,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

J.R. MCDADE COMPANY, INC.,
Respondent Employer,

COPPERPOINT AMERICAN INSURANCE COMPANY,
Respondent Insurer.

No. 2 CA-IC 2019-0003
Filed February 7, 2020

Special Action – Industrial Commission
ICA Claim No. 20153000460
Insurer No. 15A01002
LuAnn Haley, Administrative Law Judge

AWARD SET ASIDE

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OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 We must decide in this statutory special action whether the administrative law judge (ALJ) erred by awarding scheduled as opposed to unscheduled benefits to petitioner employee, Keith Simmons, for his permanent industrial injury.[1] Because we find the ALJ applied an incorrect legal standard and issued an award that is not reasonably supported by the evidence, we set that award aside.

Factual and Procedural Background

¶2 Simmons sustained an industrial injury to his dominant right wrist in October 2015 while working as a vinyl flooring installer for respondent employer, J.R. McDade Company. The facts regarding the injury are not disputed. Simmons's claim for benefits was accepted by respondent insurer, CopperPoint American Insurance Company. After nearly two years of medical treatment, Simmons's treating physician

[1] "Arizona's workers' compensation law divides permanent disabilities into two broad categories: those identified and compensated under a fixed schedule ('scheduled' disabilities), and those compensated according to actual loss of earning capacity ('unscheduled' disabilities)." *Young v. Indus. Comm'n*, 204 Ariz. 267, n.1 (App. 2003); *see also* A.R.S. § 23-1044(B), (C).

determined Simmons had reached maximum medical improvement, rating the permanent impairment to his right upper extremity at five percent.

¶3 The insurer closed the claim with a scheduled disability and notified Simmons that he was entitled to permanent disability benefits, which it calculated using his treating physician's five-percent impairment rating. Simmons protested, arguing that although his wrist injury was scheduled, the "injury should be unscheduled because of his prior disabilities." The employer disagreed, contending the claim was properly closed with a scheduled disability. A hearing was held over four days, during which the ALJ heard testimony from Simmons and the medical and labor market experts called by both parties.

¶4 As the award notes, Simmons testified at the hearing that his diabetic peripheral neuropathy[2] "caused pain and numbness into his feet," resulting in "difficulty walking long distances or loading and unloading items on the job." Medical records predating Simmons's industrial injury corroborated this testimony. In November 2013, Simmons's physician recorded that his "[l]eg pain due to peripheral neuropathy [was] worsening," his "feet [were] numb, painful, sometimes burning, sometimes ice cold," he felt "as if he [were] walking on broken bones," and "[s]ome days, he cannot walk." In March 2014, Simmons's physician again recorded that he complained of "[p]ain and numbness of the feet," and this condition was "getting worse" by the time of his appointment in October 2014. Due to this persistent "[b]ilateral pain and numbness of feet," the physician ordered a test that revealed the worsening of Simmons's peripheral neuropathy.

¶5 Respondent employer's medical expert reviewed these medical records and agreed that, before his industrial injury, Simmons was suffering from "peripheral neuropathy involving primarily the lower extremities," which had been documented as causing pain and numbness in his feet and worsened between April 2010 and October 2014. At the hearing, he testified that Simmons's symptoms—"numb and painful feet," "feel[ing] like you're walking on broken bones," and "difficulty with walking"—were all consistent with peripheral neuropathy.

[2]It is undisputed that Simmons was suffering from diabetes and peripheral neuropathy at the time of his industrial accident. He had been diagnosed with both diseases in 2010, and medical examinations had documented a worsening of his neuropathy by October 2014.

¶6 In January 2019, the ALJ issued an award confirming the five-percent scheduled disability based on her conclusion that Simmons had failed to carry his burden of establishing a pre-existing earning capacity disability capable of converting his scheduled wrist injury into an unscheduled disability. Simmons requested review, and the ALJ affirmed her prior determinations, finding "no reason" in either the case law or the hearing transcripts to alter the award. This timely special action followed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951, and Rule 10, Ariz. R. P. Spec. Act.

Standard of Review

¶7 "This court deferentially reviews factual findings of the ALJ, but independently reviews any legal conclusions." *Young v. Indus. Comm'n*, 204 Ariz. 267, ¶ 14 (App. 2003). In so doing, we liberally construe Arizona's Workers' Compensation Act, so as to effectuate its remedial purpose. *Borsh v. Indus. Comm'n*, 127 Ariz. 303, 306 (1980) (act "must be construed liberally to effectuate the humanitarian reasons for which the statute was enacted").

What Constitutes an "Earning Capacity Disability"?

¶8 Simmons challenges the ALJ's determination that he "did not have an earning capacity disability on October 14, 2015," the date of his industrial injury. In particular, Simmons contends the ALJ "used the wrong legal standard to analyze whether Simmons's previous disability resulted in a loss of earning power" at the time of his injury. We agree.

¶9 In order for a scheduled disability to be converted into an unscheduled one, the injured worker must have been suffering from "a previous disability" at the time of the injury. A.R.S. § 23-1044(E). In this context, "disability" is a term of art that means a pre-existing "earning capacity disability." *Adams Insulation Co. v. Indus. Comm'n*, 163 Ariz. 555, 559 (1990) (quoting *Alsbrooks v. Indus. Comm'n*, 118 Ariz. 480, 484 (1978)).

¶10 In *Alsbrooks*, our supreme court held that the word "disability" as used in the Workers' Compensation Act "does not mean disablement to perform the particular work petitioner was doing at the time of his injury, but refers to injuries which result in impairment of earning power generally." 118 Ariz. at 484 (quoting *Savich v. Indus. Comm'n*, 39 Ariz. 266, 270 (1931)). In other words, "[i]t applies to earning power and not to inability to do a certain class of work." *Id.* The court reiterated this reading in *Borsh*, concluding that it is error to consider "only one aspect of [an individual's] job history." 127 Ariz. at 307 (quoting *Savich*, 39 Ariz. at 270). The determining factor is whether an employee was suffering from a

"potential earning capacity" disability, not an "actual earning capacity" disability. *Id.* (quoting *Sutton v. Indus. Comm'n*, 16 Ariz. App. 334, 336 (1972)); *see also PFS v. Indus. Comm'n*, 191 Ariz. 274, 277 (App. 1997) ("The requisite loss of earning capacity need only be minimal and need only constitute a general impairment of earning power, not a specific inability to perform one's former work.").

¶11 Despite this guidance from our supreme court, in this case as in *Borsh*, the ALJ focused too narrowly on "only one aspect of petitioner's job history," rather than his complete job history. 127 Ariz. at 307. In particular, the ALJ framed "the issue" as whether Simmons's pre-existing impairments "restricted his ability to work as a vinyl floor installer" at the time of the injury in October 2015. This narrow focus is contrary to settled jurisprudence, including the very decisions cited in the ALJ's award.

¶12 Respondents contend these opinions are inapplicable to Simmons's case because they involved presumptions that do not apply here (an issue we discuss separately below). But what constitutes an "earning capacity disability" under the statute does not change from one category of cases to another, and our supreme court's guidance about the meaning of that legal term is binding on this court whether or not a particular presumption applies. *See Borsh*, 127 Ariz. at 305 ("loss of earning capacity" always required to convert scheduled disability into unscheduled one, and presumptions impact only burden of proof, not legal meaning of "earning capacity disability" that must be shown); *Alsbrooks*, 118 Ariz. at 484 (defining "earning capacity disability" as "impairment of earning power generally," without reference to presumptions discussed earlier in opinion (quoting *Savich*, 39 Ariz. at 270)).

Was the Award Reasonably Supported by the Evidence?

¶13 "Our duty on review is to determine whether the Commission's award is supported by reasonable evidence." *Borsh*, 127 Ariz. at 306. Although we defer to the ALJ's factual findings, we cannot do so if the ALJ applied an incorrect legal standard in assessing the facts before her. *See Young*, 204 Ariz. 267, ¶ 14; *see also Borsh*, 127 Ariz. at 306-07 (if "award was based and proceeds upon an erroneous and improper theory," correction appropriate despite deference to factfinder (quoting *Hoffman v. Brophy*, 61 Ariz. 307, 312 (1944))). Here, the ALJ's overly narrow definition of a qualifying "earning capacity disability" led her to issue an award that is not reasonably supported by the evidence.

¶14 The law is clear that "the effect upon the workman's earning capacity may be minimal" and still qualify as an earning capacity disability. *Adams Insulation*, 163 Ariz. at 559 (quoting *Alsbrooks*, 118 Ariz. at 484). The standard is "some evidence, no matter how slight," that the pre-existing disability impacted the worker's earning capacity. *Alsbrooks*, 118 Ariz. at 483. This is a low bar, and the only sort of pre-existing condition that does not clear it is "a disability or physical impairment having *no effect* upon the claimant's ability to work." *Id.* at 482 (emphasis added); *see also Yount v. Indus. Comm'n*, 20 Ariz. App. 527, 529-30 (1973) (prior impairment may be disregarded "if the evidence showed that the previous disability had *no effect* on earning capacity at the time of the subsequent injury" or "*no* evidence of loss of earning capacity was shown" (emphasis added)); *Leon v. Indus. Comm'n*, 10 Ariz. App. 470, 471 (1969) (no earning capacity disability when "prior physical problem had *no effect* upon the earning capacity enjoyed by the employee at the time of the industrial injury" (emphasis added)). The evidence in this case does not reasonably support a finding of "no effect" from Simmons's pre-existing conditions.

¶15 Arizona courts have repeatedly explained that there are some disabilities, such as the complete loss of a leg or an eye, for which "[i]t cannot be said that there is not some impairment, even though minimal, of petitioner's earning capacity." *Pullins v. Indus. Comm'n*, 132 Ariz. 292, 295 (1982). Although it may not rise to the same level of impairment, pain and numbness in the feet that is severe enough to cause a periodic inability to walk is the sort of disability which, even when the employee "has adapted . . . to the point that he has been able to function adequately and even competitively, he still has lost a physical function of such enormity that it detracts from the body's total efficiency in ordinary employment, as well as the ordinary pursuits of life." *Id.* (discussing loss of an eye).

¶16 The record also contains evidence of specific ways Simmons's symptoms from his diabetes and peripheral neuropathy affected his earning capacity before the October 2015 injury. For example, it is undisputed that Simmons missed three months of work due to a diabetes-related toe infection in late 2013. His employer was aware of that missed time, and both labor market experts testified that such an extended absence could have an impact on normal employment.

¶17 Simmons further testified that, when he was released to return to work in early 2014, after the toe infection, his physician directed him to stop working about three times a day to take his shoes off and check

his feet, and to limit walking.[3] His labor market expert testified that these limitations were significant and required Simmons to find a non-traditional job that accommodated such requirements, including by allowing him to "work when he could," go home early if necessary, and "work the sixth day in order to get the job done"—accommodations that would not normally be available in an "eight to five Monday through Friday work schedule."

¶18 Finally, Simmons testified that, although he generally accepted work when it was offered, he was sometimes forced to turn down jobs if they required too much walking or time on his feet. Respondent employer's labor market expert conceded that, at his deposition, Simmons had "even mentioned a specific subdivision where he had to turn down a job." Given that Simmons took jobs week-by-week as they became available and was paid by the job rather than on a salary, any choice to turn down work due to his physical limitations necessarily impacted his earning capacity at least to some extent.

¶19 It may be true, as the ALJ found, that Simmons "rarely turned down a job." But the evidence in the record does not reasonably support a determination that Simmons "was performing his daily manual labor with *no* disabling effects from his pre-existing condition up to the time of the accident." *Lee Moor Contracting Co. v. Indus. Comm'n*, 61 Ariz. 52, 57 (1943) (emphasis added). Rather than a pre-existing condition that was "dormant and not disabling at the time of the accident," Simmons's painful feet and difficulty walking due to diabetic peripheral neuropathy were "a pre-existing disability that [was] added to by a second disability." *Id.* Those limitations were "an existing disability at the time of the injury . . . that affect[ed] his earning power." *Id.* at 58.

¶20 Respondents cite many cases they contend are analogous. But more than one involved prior Industrial Commission decisions where "no loss of earning capacity" from the prior injury or condition had already been conclusively established. *Modern Indus., Inc. v. Indus. Comm'n*, 125 Ariz. 283, 285-86 (App. 1980) (finding "prior unaltered award finding no loss of earning capacity attributable to the [earlier] injury" entitled to *res*

[3]The ALJ was therefore incorrect that Simmons "had no restrictions stemming from the diabetes before the work event in 2015." Regardless, our supreme court has illustrated that a lack of work restrictions from doctors is not dispositive. *Borsh*, 127 Ariz. at 304-05, 307 (finding clear impact on ability to work, despite lack of work limitations at time of diagnosis).

judicata effect); *Elmer Shelton Concrete Contractor, Inc. v. Indus. Comm'n*, 123 Ariz. 200, 201 (App. 1979) (undisputed that "employee incurred no loss of earning capacity as a result of the first injury," as determined by prior unchallenged industrial commission decision). Such cases are obviously distinguishable, as Simmons's pain and numbness in his lower extremities and related difficulty walking have never been the subject of a separate award or stipulation.[4]

¶21 Nor is this a case like *Lewis v. Indus. Comm'n*, 126 Ariz. 266, 270 (App. 1980)—stressed both in the ALJ's award and respondents' answering brief—in which "no arthritic pain was 'bothering' petitioner at the time of the injury" and the only change to his work occurred "eleven years prior to the industrial incident." *Accord Kovacs v. Indus. Comm'n*, 132 Ariz. 173, 176 (App. 1982) ("no evidence that he had any back problems whatsoever at that time" and no testimony "as to any pain, any limitation of movement or any medically imposed (or even self-imposed) lifting limitations which have or would affect his earning capacity 'at the time of the subsequent injury'"). Here, the opposite was true: the evidence, including medical records, indicated that Simmons's pain, numbness, and difficulty walking were worsening in the year before his industrial injury and required him to work a non-traditional schedule during his year-long tenure with respondent employer precisely because his condition continued to "bother" him.

¶22 In addition, to reach the conclusion that Simmons was suffering no earning capacity disability at the time of his industrial injury, the ALJ focused on a year of Simmons's employment, his most recent, that did not fairly represent his entire work history. In particular, the ALJ emphasized that Simmons "did well financially in the year before the injury," which Simmons testified "was his best year ever financially." But, as we have explained, "actual earnings are not the same as earning capacity," and "[t]here are a number of reasons why an employee who receives the same or higher wages after an injury than he earned before the injury may nevertheless have suffered a loss of earning capacity." *County of Maricopa v. Indus. Comm'n*, 145 Ariz. 14, 19 (App. 1985).

[4] Those cases are perhaps analogous regarding Simmons's 1995 carpal tunnel injury because, in order to receive a set payment, he entered into a stipulation that he did not suffer any loss of earning capacity as a result of the injury. But we do not address that injury or its impact here.

¶23 Here, Simmons had only worked for respondent employer for one year prior to his industrial accident, a job which finally provided "continuity of work" and accommodated his worsening physical impairments. As his labor market expert explained, after "a number of bad years," Simmons "finally had continuous work." This arose, at least in part, from his ability to work a non-traditional schedule that allowed him to "work around his limitations." For these reasons, Simmons did better financially in 2015 than he had done from 2009 through 2012 when he did scattered odd jobs, or in 2013 and 2014, when he was not able to work for multiple months due to his diabetes-related toe infection.

¶24 Even respondent employer's labor market expert testified that Simmons "seems to be the type of gentleman that works very hard despite the complicated medical picture." As we have previously observed, the "policies and purposes of our Workmen's Compensation Act" are undermined if a worker is penalized for "perseverance and fortitude in attempting to cope with and overcome his disabilities, and in making himself a productive member of society." *Yount*, 20 Ariz. App. at 530.

Was Simmons Entitled to a Rebuttable Presumption?

¶25 The burden of showing a loss of earning capacity is on the worker seeking to convert the scheduled disability into an unscheduled one. *Adams Insulation*, 163 Ariz. at 559 (quoting *Alsbrooks*, 118 Ariz. at 484). However, there are certain instances in which "the workman may be entitled to a legal presumption which meets his burden of proof on the issue of lost earning capacity." *Asbestos Eng'g & Supply Co. v. Indus. Comm'n*, 131 Ariz. 558, 560 (App. 1982).

¶26 One such scenario is when the worker suffers from a pre-existing condition which, although not industrially related, would have been a scheduled disability were it industrially related. *Id.* In those circumstances, "there is a rebuttable presumption that the prior impairment had an effect on the earning capacity of the workman at the time of the second injury," *id.*, which "shift[s] the burden of proof to the employer and carrier," *id.* at 561.

¶27 It is only when such a presumption does not apply that a claimant must prove an "actual loss of earning capacity at the time of the second injury as a result of the prior disability" in order to convert the second scheduled disability into an unscheduled one. *Adams Insulation*, 163 Ariz. at 558; *see also Wyckoff v. Indus. Comm'n*, 169 Ariz. 430, 434 (App. 1991) ("The supreme court has created several presumptions of disability," and it

is only when "these presumptions are inapplicable" that "the claimant must prove that the pre-existing impairment caused an earning capacity disability when the subsequent injury occurred."); *Asbestos Eng'g*, 131 Ariz. at 561 (only when injured employee "cannot shift the burden of proof to the employer and carrier" under this or another presumption must he "prove[] that the pre-existing condition in fact resulted in a loss of earning capacity at the time of the subsequent industrial injury").

¶28 Here, the ALJ determined that "Simmons must establish an actual earning capacity disability" in order to convert his scheduled disability into an unscheduled one, emphasizing the "applicant's burden to establish an earning capacity disability." Under longstanding case law, these statements imply a finding that none of the presumptions created by our supreme court applied in Simmons's case to shift the burden of proof.

¶29 But nothing in the award demonstrates that the ALJ grappled with this threshold issue; nowhere does the award discuss whether Simmons had established that, at the time of his industrial injury in October 2015, he suffered from a pre-existing condition that would have been a scheduled disability had it been industrially related, entitling him to a rebuttable presumption of an earning capacity disability.[5] Although the issue was not raised by the parties,[6] we note it here in the event another

[5]The record before us suggests that it is—at minimum—plausible that, due to a pre-existing impairment to his "lower extremities" impacting his ability to walk, Simmons was entitled to a rebuttable presumption that "[met] his burden of proof on the issue of lost earning capacity," *Asbestos Eng'g*, 131 Ariz. at 560, which would have "shift[ed] the burden of proof to the employer," *id.* at 561. *See* § 23-1044(B)(21) ("partial loss of use of a . . . foot or leg" is scheduled injury); *Borsh*, 127 Ariz. at 304-06 ("hearing officer was in error in not giving the petitioner the benefit of the rebuttable presumption" that his pre-existing degenerative joint disease and resulting knee pain from prolonged standing affected his earning capacity, and "this presumption does not disappear because the condition also affects the back").

[6]The parties agree that this issue was not litigated below. However, counsel for respondents has argued for a remand so that the issue may be addressed in the first instance by the ALJ, not for affirmance on the ground that Simmons forfeited the argument by failing to raise it below. Although we are not authorized to order a remand of an Industrial Commission award, *see Garcia v. Indus. Comm'n*, 26 Ariz. App. 313, 315 (1976) (under § 23-951(D), appellate court may only affirm ALJ's award or set it aside

hearing is held before the ALJ.[7] *See Glover v. Indus. Comm'n*, 23 Ariz. App. 187, 188 (1975) (when award set aside, parties entitled to de novo hearing).

Disposition

¶30 For the foregoing reasons, we set aside the award and the decision upon review.

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entirely), such would be appropriate to permit the ALJ to address the availability of the presumption as a threshold question for determining who bore the burden of proof. *See Stine v. Indus. Comm'n*, 20 Ariz. App. 465, 467 (1973) (setting aside award when "presumption was not considered" by ALJ, who therefore failed to make factual determination of whether presumption had been rebutted); *Sutton*, 16 Ariz. App. at 335-36 (all parties assumed wrong burden of proof, but "award must be set aside" when ALJ did not address presumption issue and whether it had been overcome).

[7]In other cases, we have determined that a petitioner's pre-existing condition would have been scheduled if industrially related and therefore should have given rise to the rebuttable presumption of earning capacity disability, even when that question had not previously been litigated before the ALJ. *E.g.*, *Stine*, 20 Ariz. App. at 466 (prior loss of four fingers on left hand); *Sutton*, 16 Ariz. App. at 334-35 (pre-existing sixty-percent hearing loss, for which military was providing compensation). But Simmons's pre-existing condition—pain and numbness in his feet and periodic difficulty walking caused by diabetic peripheral neuropathy—is arguably less clearly included in the list of scheduled injuries provided in § 23-1044(B) than finger loss (§ 23-1044(B)(1)–(7)) and hearing loss (§ 23-1044(B)(18)–(19)). We therefore agree with respondents that the question of whether Simmons's condition would have been scheduled if industrially related, thus giving rise to the rebuttable presumption, should be litigated before the ALJ rather than this court.