

SPECIAL FUND REIMBURSEMENT

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NOTICE TO WORKERS' COMPENSATION INSURANCE CARRIERS,
SELF-INSURED EMPLOYERS, THIRD-PARTY ADMINISTRATORS
AND WORKERS' COMPENSATION ATTORNEYS.

Effective August 29, 1994, in all cases in which reimbursement is requested from the Special Fund pursuant to the provisions of A.R.S. §23-1065(B) and in which it is demonstrated that the applicant is entitled to compensation for a loss in earning capacity and is, additionally, unable to return to his/her date of injury employment due to the subject industrial injury, the Industrial Commission of Arizona Claims Division will be calculating the total amount of permanent benefits for which the employer or carrier is solely responsible to pay based upon 75% of the applicant's average monthly wage. For those cases in which the subject industrial injury does not contribute to the inability of the applicant to return to his/her date of injury employment but the applicant is, nevertheless, entitled to receive compensation for a loss in earning capacity, the amount for which the employer or carrier is solely responsible to pay will be calculated based upon 50% of the applicant's average monthly wage.

The position of the Industrial Commission is based upon the statutory language of A.R.S. §23-1065(B) and §23-1044(B). The Industrial Commission's interpretation of the language of these respective statutes has been upheld by the Arizona Court of Appeals in a memorandum decision issued earlier this year (copy attached). While the Industrial Commission recognizes that this memorandum decision has no precedential value, the decision, nevertheless, confirms the Industrial Commission's position in this matter.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
MAY 3 1994
COURT OF APPEALS
DIVISION TWO

SPECIAL FUND DIVISION,

Petitioner,

v.

THE INDUSTRIAL COMMISSION OF
ARIZONA,

Respondent,

SANDRA A. CHURCHWELL,

Respondent Employee,

ARIZONA DEPARTMENT OF ECONOMIC
SECURITY, DIVISION OF DEVELOPMENTAL
DISABILITIES,

Respondent Employer,

STATE COMPENSATION FUND,

Respondent Insurance Carrier.

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DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28(a)(2), Civil
Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 91066-026406

Gary M. Israel, Administrative Law Judge

AWARD SET ASIDE

Special Fund Division
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Phoenix
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The Industrial Commission of Arizona
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Attorney for Respondent

State Compensation Fund
By James F. Crane

Tucson

Attorney for Respondents Employer and Carrier

D R U K E, Chief Judge.

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solely on physical/medical permanent impairment without regard to occupational or other factors, i.e. the 50% calculation in A.R.S. Section 23-1044 (B)(21). A.R.S. Section 23-1065 (B)(2) then states, in pertinent part:

"If the commission determines that the employee is entitled to compensation for loss of earning capacity. . . , the total amount of permanent benefits for which the employer or carrier is solely responsible under paragraph 1 of the subsection, shall be expended first . . . (emphasis added)."

The emphasized portion leads the undersigned to conclude that the 50% calculation should be utilized in this situation so that the calculations in the Findings and Award are correct and need not be disturbed.

The Special Fund requested special action review, arguing that the ALJ's finding on the calculation of payments was incorrect. We agree and set aside the award.

Section 23-1065(B), designed to ensure the hiring of the physically impaired, provides that when an employee's industrial injury is unscheduled due to a preexisting, industrially related, permanent impairment, the carrier may seek reimbursement from the Special Fund for a portion of any permanent disability benefits awarded. Subsections (B)(1) and (2) provide:

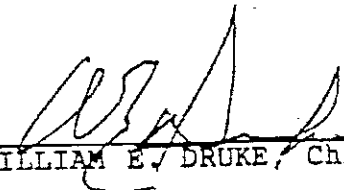
1. The employer in whose employ the subsequent impairment occurred or its insurance carrier is solely responsible for all temporary disability compensation to which the employee is entitled and for an amount equal to the permanent disability compensation provided by § 23-1044, subsection B for the subsequent 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

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member The effect on a worker's ability to return to his occupation at the time of the injury shall not be considered in establishing the percentage of loss under this section, except that if the employee is unable to return to the work he was performing at the time he was injured due to the partial loss of use, compensation pursuant to this section shall be calculated based on seventy-five per cent of the average monthly wage.


(Emphasis added.) A.R.S. §§ 23-1065(B)(1) and -1044(21), read in conjunction, provide that in a successive injury case when the employee is unable to return to his or her occupation at the time of injury and has suffered a loss in earning capacity, compensation is to be based on 75 percent of the average monthly wage, not 50 percent as the ALJ found.

The award of August 25, 1993, therefore, is set aside.


WILLIAM E. DRUKE, Chief Judge

CONCURRING:


PHILIP G. ESPINOSA, Presiding Judge


JAMES D. HATHAWAY, Judge

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