INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-669-708

IN THE MATTER OF THE CLAIM OF

AUDREY A. WHEELER,

Claimant,

v.

FINAL ORDER

ARCHDIOCESE OF DENVER MANAGEMENT CORP.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Harr (ALJ) dated August 30, 2010, that ordered the insurer to pay the claimant permanent total disability (PTD) benefits at the maximum compensation rate at the time the claimant reached maximum medical improvement (MMI). We modify the order to reflect that the insurer is to pay PTD benefits at the maximum compensation rate in effect at the time of the industrial injury on November 17, 2005 and otherwise affirm the order.

The claimant suffered a catastrophic industrial injury on November 17, 2005. The claimant reached MMI as of September 24, 2009. The insurer filed a Final Admission of Liability admitting that the claimant was entitled to PTD benefits. At the time of her injury, the claimant was working for the employer on a part-time basis, where her admitted average weekly wage (AWW) was $74.40.

The ALJ found that the claimant has proven by a preponderance of the evidence that the maximum AWW in effect at the time of her permanent disability represented a more fair approximation of her loss of earning capacity. The Director of the Division of Workers' Compensation had determined that the maximum compensation rate, effective July 1, 2009, is $807.24, based upon weekly earning of $1,210.86 or a yearly salary of $62,964.72. The ALJ determined that the claimant's AWW was $1,210.86, which would entitle the claimant to the maximum compensation rate of $807.24 in effect at the time she reached MMI. The ALJ ordered the insurer to pay the claimant PTD benefits at the rate of $807.24 per week ongoing for life. The respondents bring this appeal.

I.

The respondents first contend that the ALJ erred in determining the claimant's AWW based upon testimony of an expert retained by the claimant. The expert testified that it was vocationally probable that the claimant would eventually secure employment within the arts professional career cluster where she could expect to earn an average mean wage of $986.30 per week. The ALJ concluded that the maximum AWW in effect on the date of MMI of $1,210.86 reasonably and more fairly approximated the claimant's wage loss due to her injury rather than the claimant's actual earnings at the time of the accident. The respondents argue that § 8-42-102(2) C.R.S. requires that the claimant's AWW to be calculated on the income she was receiving "at the time of the injury."

Section 8-42-102(2)(d), C.R.S, sets forth the method for calculating the AWW. The overall purpose of the statutory scheme is to calculate "a fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The ALJ is afforded discretionary authority in calculating the wage. We may not interfere with the ALJ's calculation of the AWW unless an abuse of discretion is shown. *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). An ALJ only abuses his discretion where the order "exceeds the bounds of reason," such as where it is unsupported by the record or is contrary to law. *Rosenberg v. Board of Education of School District # 1*, 710 P.2d 1095 (Colo. 1985).

The respondents argue that although the ALJ relied on *Avalanche Industries, Inc. v. Clark* 198 P.3d 589 (Colo. 2008) he misinterpreted the case. The respondents urge that under *Avalanche* and other published cases, the ALJ's discretion to use future earnings to calculate AWW is restricted to "actual earnings" made by the claimant after the date of the injury. The respondents argue that here there was no evidence of the claimant's actual earnings after the injury or of any contractual right to increases in wages after the injury. Therefore, according to the respondents, the ALJ erred in his determination of the claimant's AWW.

We note that in *Avalanche Industries, Inc. v. Clark* 198 P.3d 589 (Colo. 2008) the court affirmed an ALJ's exercise of discretion to calculate a claimant's AWW based on earnings at a subsequent employer. The court held that § 8-42-102(2), as the "default provision," of the statute requires the AWW to be calculated "upon the monthly, weekly, daily, hourly, or other remuneration" received by the injured worker "at the time of the injury." However, the *Avalanche* court further held that the default provision is expressly subordinated or made subject to the discretionary exception found in § 8-42-102(3). The *Avalanche* court determined that although the default provision is tied to the injured worker's AWW at the time of the injury, the discretionary exception is not so limited. The discretionary exception in subsection (3) provides:

> Where the foregoing methods [set forth in subsection (2)] of computing the average weekly wage of the employee ... will not fairly compute the average weekly wage, the division [of workers' compensation], in each particular case, may compute the average weekly wage in such other manner and by such method as will, in the opinion of the director [of the division of workers' compensation] based on the facts presented, fairly determine such employee's average weekly wage.

We acknowledge that in one part of the *Avalanche* decision the court noted that its holding was that the ALJ can base an AWW on a salary that a claimant was actually earning when forced to stop working. However, we do not read the decision in *Avalanche* as restricting the ALJ's discretion to "actual earnings" made by the claimant after the date of the injury. As the *Avalanche* court emphasized an ALJ's decision on AWW is reviewed for an abuse of discretion, and is reversed only where it exceeds the bounds of reason and was unsupported by applicable law.

Here, the ALJ specifically relied on the discretionary exception found in § 8-42-102(3). In determining the claimant's AWW, the ALJ credited the opinion of a vocational expert. The ALJ made the following findings of fact. It was vocationally probable that the claimant would eventually secure employment within the arts professional career cluster and that earnings for this group ranged from $38,610 to $59,090. The claimant's catastrophic industrial injury profoundly impaired her earning capacity while she was in the developmental stage of her career before she had matured as a wage earner. The admitted AWW was based upon the claimant's part-time earnings in jobs that were preparatory to fully realizing her earning potential.

We are not persuaded that the ALJ's determination is not supported by applicable law. The parties have not referred us to, nor are we aware of any cases directly involving use of a vocational expert in order to establish AWW based upon an estimate of the claimant's vocationally probable future employment. However, in *Drywall Products v. Constuble* 832 P.2d 957 (Colo. App. 1991), the court generally accepted the principle that a claimant's AWW could be calculated based upon anticipated earnings rather than past earnings. In *Drywall* the claimant had been paid on an hourly basis but shortly before the injury he was paid on a piecework basis. The court affirmed the ALJ's determination based on the claimant's anticipated AWW using the piecework wage.

Further, in *Pizza Hut v. Industrial Claim Appeals Office.* 18 P.3d 867 (Colo. App. 2001), it was held that the ALJ did not abuse his discretion by awarding medical impairment benefits to the claimant based upon the higher weekly wage claimant was earning at time of MMI. The court rejected the employer's contention that the ALJ abused his discretion in failing to award medical impairment benefits based upon

claimant's AWW at the time of the injury, rather than his higher weekly wage at the time of MMI. In *Pizza Hut* the claimant was injured delivering pizza working part-time for the employer. The claimant, who had been attending nursing school, shortly after the accident obtained full-time employment with a hospital. The court found that the potential impact that the claimant's impairment may have on his future nursing career represented a reasonable and appropriate circumstance to be considered by the ALJ in assessing the fairness of the calculation of AWW.

We acknowledge that in *Pizza Hut, Drywall,* and *Avalanche* the claimants had actually earned the higher AWW that their benefits were eventually based upon. In contrast here the claimant presented evidence from an expert demonstrating the vocational probability that she would have, but for the industrial accident, eventually secured employment within the arts profession at a much higher AWW than what she earned from her employer at the time of the accident.

Nevertheless in our opinion the principles set forth in *Pizza Hut, Drywall Products* and *Avalanche* granting the ALJs broad discretion in computation of AWW apply here. Thus, although the record contains evidence that could have supported the calculation of claimant's AWW based on her earnings at the time of the injury, we are satisfied that the ALJ acted within the scope of his discretion in determining that the higher wage based upon the vocational probability that the claimant would eventually secure employment within the arts professional more fairly compensated the claimant for her future loss of earnings then her actual wage at the time of the accident. Given the unusual circumstances in this case, we hold that the ALJ did not abuse his discretion. *See Romero V. Albany Medical Center, Hosp.*, 184 A.D.2d 971, 585 N.Y.S.2d 586 (1992) (not error to consider claimant's potential earnings as a physician rather than her part-time earnings as a nursing aide. The claimant was enrolled in a course of study which likely would have led to medical school and a subsequent medical practice); *Rubalcava v. Workers' Comp. App. Bd.*, 220 Cal. App. 901, 269 Cal. Rptr, 656(1990) (awarded maximum disability rate to cheese grinder who was a student with a definite career goal in commerce, and there was evidence that his long term earnings would have increased); *Sellers v. Pinedale Residential Ctr.* 350 S.C. 183, 564 S.E.2d 694(Ct. App. 2002) (sixteen year old high school student with part-time income was rendered paraplegic and entitled to have AWW calculated based on a fair assessment of the earnings he would have enjoyed had he never been injured. His AWW now not limited to that which reflected his part-time, minimum wage work as a student); *see also* 5 A. Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 93.01(1)(e), at 93-10 to 93-11 (judging fairness of applying AWW test based on claimant's own annual earnings by whether it will "produce an honest approximation of claimant's probable future earning capacity"), §93.02D(2)(d), at 93-37 to 93-38 (extending part-time wage connection of young people into future to compute earnings) (2010).

We are not unmindful that use of estimated future potential earning to base the important determination of AWW upon might easily slip into mere speculation. Nor are we unaware that insurers base premiums in part upon wage information supplied by the employer of actual amounts paid to the workers rather than income that the workers might some day enjoy. Nevertheless we cannot say that in the peculiar circumstances presented here that the ALJ, by the mere use of estimated future potential earning to base the important determination of AWW, abused his broad discretion.

II.

We now turn to the respondents' contention that substantial evidence does not support the ALJ's AWW determination. The respondents argue that the ALJ relied upon the mere assumptions of the expert that the claimant may have pursued further education which may have led to a career in the arts and media career cluster. Respondents argue that these assumptions are nothing more than conjecture.

Because the issue of AWW is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). In particular, we note that the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

Here, the ALJ made the following relevant findings of fact. The claimant's expert's testimony involving his assessment of loss of earning capacity was persuasive. The claimant had sustained a severe and profound functional impairment as a result of the injury. The claimant was injured just four months past her birthday, which meant she was no longer a minor. As a minor the claimant would have been entitled to the maximum compensation rate. Prior to her injury the claimant was laying a foundation for a career in the arts and media industry. In high school the claimant emphasized video production, art and photography. The claimant worked in an honors program and completed a degree from a community college. In addition the claimant took courses in art at the University of Northern Colorado. The claimant had obtained materials from the Vancouver Film School and was takings steps to apply for admission. The claimant had outlined a clear path in her vocational development, targeting a career in the area of motion picture arts and sciences. The claimant's expert identified five occupational groups the claimant may have entered following her education and training. The average of the mean wage figures was $51,288. The respondents do not challenge any of these specific facts, but contend that as a whole they constitute only conjecture and speculation.

We acknowledge that an ALJ cannot base an award on speculation or conjecture, or on evidence not in the record. *Upchurch v. Industrial Comm'n* 703 P.2d 628 (Colo. App. 1985). Certainly the ALJ's findings must be based on probabilities, not possibilities, and he should not guess or speculate about the amount of AWW. *See Letts v. Iwig,* 153 Colo. 20, 384 P.2d 726 (1963); Colorado Civil Jury Instructions 3:4. However, here there is abundant evidence of the cause and existence of the claimant's wage loss and diminished earning capacity. Therefore, difficulty or uncertainty in determining the precise amount of the claimant's wage loss cannot prevent the ALJ from deciding the issue of AWW and he must use his best judgment based on the evidence. *See Donahue v. Pikes Peak Auto*. Co., 150 Colo. 281, 372 P.2d 443 (1962); Colorado Civil Jury Instructions 5:5. The proper test for determining the sufficiency of the evidence for calculating the AWW is whether there is a reasonable basis in the evidence from which the ALJ may compute the AWW. *See Accutool Precision Mach., Inc. v. Denver Metal Finishing*, 680 P.2d 861, 864 (Colo. App. 1984).

In our opinion, the testimony of the claimant's expert, which the ALJ credited, constitutes substantial evidence to support the ALJ's finding of AWW. See *Iler v. Industrial Claim Appeals Office* 207 P.3d 945 (Colo.App.2009)(circumstantial evidence may be used in establishing AWW). Under these circumstances, the ALJ's pertinent findings are not based upon mere speculation or conjecture. *Compare Gilliatt v. Industrial Commission,* 680 P.2d 1310 (Colo. App. 1983) (record devoid of evidence that industrial injury limited claimant to minimum wage jobs). Given the ALJ's broad discretionary authority in calculating AWW and the overall purpose of the statutory scheme to calculate a fair approximation of the claimant's wage loss and diminished earning capacity we cannot say that as a matter of law the ALJ abused his discretion. *Campbell v. IBM Corp., supra.*

III.

The respondents next contend that the ALJ erred in awarding the AWW based upon the maximum available at the time the claimant reached MMI instead of at the time of her injury. We agree.

The Workers' Compensation Act (Act) establishes a formula for calculating workers' compensation benefits that proceeds in two steps. *See Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777 (Colo. 2010). The employee's average weekly wage serves as the basis for computing disability benefits. Section 8-42-102, C.R.S. After the employee's AWW is determined, the statutory limit on workers compensation benefits must be applied and then the rate of the claimant's benefits is calculated. The TTD rate is the lesser of either sixty-six and two-thirds percent of the employee's AWW or ninety-one percent of the state's average weekly wage ("State AWW"). Section 8-42-105 (awards

for TTD benefits); § 8-47-106 (statute governing State AWW). In *Benchmark* the supreme court, citing *Pubanz v. State of Colorado,* W.C. No. 3070168 (September 9, 1997), noted that the director of the Division of Workers' Compensation determined the state AWW on a yearly basis using the most recent figures about statewide average weekly earnings under § 8-47-106 and assumed, without deciding, that the ALJ uses the state AWW in effect at the claimant's "time of injury."

In our view a claimant is limited to the maximum rate in effect at the date of injury. This is consistent with our understanding of *Benchmark/Elite, Inc. v. Simpson* supra. *See Simpson v. Benchmark/Elite,* W.C. No. 4-467-097 (August 8, 2007), *rev'd, Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009); *Bennett v. City of Colorado Spring*, W.C. No. 4-295-688 (October 1, 2008), *rev'd, Bennett v. Industrial Claim Appeals Office*, No. 08CA2179 (Colo. App. Aug. 13, 2009) (not selected for official publication); *see also Bobbett v. Kmart*, W. C. No. 4-309-712 (October 12, 2005); *Pubanz v. State of Colorado*, W.C. No. 3070168 (September 9, 1997).

Further, this result is consistent with *Bellendir v. Kezer* 648 P.2d 645 (Colo. 1982). In *Bellendi*r the court, in interpreting § 8-46-133, the predecessor to the present § 8-47-106, while acknowledging that the benefit ceiling continues to be raised over the years, held that the benefit level continues to be determined by the employee's actual weekly wage at the "time of the accident." We note that *Bellendir*, as in the present case, involved a claimant who had been awarded PTD benefits. The *Bellendir* court upheld the constitutionally of the Workers' Compensation Act against a challenge that it failed to provide for an increase in his award commensurate with benefits available to claimants injured in subsequent years. Therefore, in our opinion the ALJ's order must be modified to reflect that the insurer is to pay the claimant PTD benefits at the maximum compensation rate in effect at the time of the industrial injury on November 17, 2005.

IT IS THEREFORE ORDERED that the ALJ's order dated August 30, 2010 is modified to order the insurer to pay the claimant PTD benefits at the maximum compensation rate in effect at the time of the industrial injury on November 17, 2005. We otherwise affirm the order.

INDUSTRIAL CLAIM APPEALS PANEL

John D. Baird

Thomas Schrant

NOTICE

This Order is final unless an action to modify or vacate this Order is commenced in the Colorado Court of Appeals, by filing a petition for review with the Court, within twenty (20) days after the date this Order is mailed, pursuant to § 8-43-301(10) and § 8-43-307, C.R.S. The appealing party must serve a copy of the petition upon all other parties, including the Industrial Claim Appeals Office, which may be served by mail at 633 17th Street, Suite 600, Denver CO 80202.

Colorado Court of Appeals
101 West Colfax Avenue, Suite 800
Denver, Co 80202

Copies of this order were mailed to the parties at the addresses shown below on

12/21/2010 by RP .

AUDREY A WHEELER, 5841 MEADOW CREEK LANE, LOVELAND, CO, 80538 (Claimant)
ARCHDIOCESE OF DENVER MANAGEMENT CORP, Attn: BARBARA BUCHANAN, 1300 S STEELE STREET, DENVER, CO, 80210 (Employer)
PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING, ESQ., 7501 E LOWRY BLVD, DENVER, CO, 80230 (Insurer)
LAW OFFICE OF ROBERT A. GARCIN, Attn: ROBERT A. GARCIN, ESQ., 150 EAST 29TH STREET, SUITE A, LOVELAND, CO, 80538 (For Claimant)
RITSEMA & LYON - FORT COLLINS, Attn: RONDA K. CORDOVA, ESQ., 2629 REDWING ROAD, SUITE 330, FORT COLLINS, CO, 80526 (For Respondents)