DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

OSBORN ELEMENTARY SCHOOL DISTRICT, Petitioner Employer, ARIZONA SCHOOL ALLIANCE, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, TERRY CARRILLO, Respondent Employee.	1 CA-IC 09-0048 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

ICA Claim No. 20080-240487

Carrier Claim No. 2008013370

Paula R. Eaton, Administrative Law Judge

AFFIRMED

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The Industrial Commission of Arizona
Attorney for Respondent

S W A N N, Judge

¶1 This special action presents the question whether the compensation benefits of a teacher's aide employed by a school district from August until May should be computed by averaging her yearly compensation on a 10-month basis or a 12-month basis. For the reasons that follow, we conclude that the administrative law judge ("ALJ") properly computed the award on a 10-month basis. Accordingly, we affirm.

Jurisdiction and Standard of Review

¶2 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003) and 23-951(A) (1995), and Ariz. R.P. Spec. Act. 10. In reviewing findings and awards of the Industrial Commission of Arizona ("ICA"), we defer to the ALJ's factual findings but review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We review questions of statutory interpretation *de novo*. *Universal Roofers v. Indus. Comm'n*, 187 Ariz. 620, 622, 931 P.2d 1130, 1132 (App. 1996).

Factual and Procedural History

¶3 On January 8, 2008, Terry Carrillo was injured when she lifted a heavy child during the course of her employment as a

teacher's aide. Thereafter she initiated a claim for workers' compensation. On September 4, 2008, the ICA issued its Average Monthly Wage Calculation, determining that Carrillo's average monthly wage was $1,721.55. On September 30, 2008, Osborn Elementary School District and Arizona School Alliance (collectively "Petitioners") filed a request for a hearing, asserting that because Carrillo was a seasonal employee, the average monthly wage as approved by the ICA was incorrect.

¶4 A hearing was held on January 26, 2009. Because Carrillo did not attend the hearing, a transcript of her deposition testimony was received into evidence.[1] During her deposition, Carrillo testified that she worked for the Osborn School District ("OSD") from March 15, 2004, until March 25, 2008, as a life skills assistant, which is a teacher's aide for a preschool special needs classroom. She did not have a second job during her employment with the school district. At the time of her injury, the district paid her $8.45 per hour and she was employed 40 hours per week. Although she signed up to work during the summer months, because of the competitive selection process, she was never chosen to work during these months. Instead she was employed from January until May and then August

[1] Deposition testimony is admissible in an ICA case where a deponent is deceased or by agreement of the parties. A.A.C. R20-5-142(G)(1), (2). Citing to A.R.S. § 23-941(F), the ALJ admitted Carrillo's deposition testimony because she failed to appear at the hearing and object to its admission.

through December. While some district employees choose to have their pay disbursed evenly throughout a 12-month period, Carrillo elected to receive her wages only during the 10 months that she worked.

¶5 At the hearing, Thomas Mitchell, a labor market expert, testified with respect to the prevailing season for Arizona teachers, teachers' aides and other school district employees. He surveyed school districts throughout Arizona and determined that only 11 schools are open for the summer session. He distinguished between a school operating under a standard school year and an alternative school. The former specifically hires its staff under a summer contract if it elects to operate during that period. With respect to the latter, however, both its period of operation and its employment contracts extend for the entire 12-month period. Mr. Mitchell testified that there are no alternative schools within OSD, and whether a particular school within OSD operated during the summer varied on a yearly basis. He also testified that Carrillo was an hourly employee, rather than a contract employee.[2]

¶6 Robert Tindall, Director of Human Resources for OSD, also testified at the hearing. According to his records, Carrillo began working for the district in 1998 in the preschool

[2] Teachers, however, receive an employment contract.

after-school program. She worked in that capacity until May of 2002; and then from July 1, 2002, until August 2, 2002, she worked as a summer clerk. For the next two years she worked for Head Start and was not an employee of the district. She returned to work for OSD in March 2004 as a life skills assistant. Longview Elementary School, where Carrillo was employed full time, operated from August until May. Mr. Tindall testified that generally OSD designated one school to remain operational during the summer months.[3]

¶7 After the hearing, the ALJ concluded that Carrillo was not a seasonal employee, and ordered her compensation benefits to be based on an average monthly wage of $1,703.96. Petitioners timely appeal.[4]

Discussion

¶8 The basis for computing an employee's compensation is provided in A.R.S. § 23-1041 (Supp. 2009). Under the Arizona Workers' Compensation Act, benefits are paid to the injured

[3] The district employed 11 life skills assistants during the summer of 2008; Carrillo was not one of them. She was free to work for other employers during the summer months.

[4] We note that although we extended the time for Carrillo to file an answering brief, she did not do so. But we are not required to accept her failure to file an answering brief as a confession of error, and we decline to do so on this record. *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). This decision, therefore, was determined on the basis of the record and Petitioners' opening brief.

employee based on her average monthly wage at the time of the injury. A.R.S. § 23-1041(A). The term "monthly wage," as defined in A.R.S. § 23-1041(G), is "the average wage paid during and over the month in which the employee is killed or injured."

¶9 To establish an average monthly wage, the ICA considers actual wages earned, rather than those that are merely speculative. *See Morse v. Indus. Comm'n*, 213 Ariz. 575, 579, ¶¶ 15-16, 146 P.3d 76, 80 (App. 2006). "Wages earned during the thirty days preceding an industrial injury are the presumptive average monthly wage, but the ALJ has broad discretion to use an expanded wage base when the presumptive base does not realistically reflect earning capacity." *Id.* at 577, ¶ 8, 146 P.3d at 78. An expanded wage base may be used when the employment is seasonal in nature.[5] *Id.*

¶10 Petitioners argue that the ALJ erred when she computed Carrillo's monthly wages on a 10-month basis, rather than a 12-month basis, and ordered her compensation benefits to be based on an average monthly wage of $1,703.96. They contend that the

[5] "Seasonal employment refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year. It does not include such occupations as may be carried on throughout the entire year." *Pettis v. Indus. Comm'n*, 91 Ariz. 298, 302, 372 P.2d 72, 75 (1962).

ALJ's reliance on *Powell v. Indus. Comm'n*, 104 Ariz. 257, 451 P.2d 37 (1969), is misplaced.[6] We disagree.

¶11 In *Powell*, our supreme court examined whether the average monthly wage of a teacher contracted to work from August to June should be computed on a 9-month basis or a 12-month basis. *Id.* at 258, 451 P.2d at 38. The ICA computed her average wage on a 12-month basis. *Id.* This court reversed the award, holding that because the petitioner was contracted to work during the 9-month academic calendar, her average monthly wage should have been determined on a 9-month basis. *Id.* Our supreme court affirmed. *Id.* at 263, 451 P.2d at 43.

¶12 The Arizona Supreme Court noted in *Powell* that "[p]rotection to workmen and their dependents is limited to injuries by accident arising out of and in the course of employment." *Id.* (quoting *Cavness v. Indus. Comm'n*, 74 Ariz. 27, 30, 243 P.2d 459, 462 (1952)). Because "[t]he circumstances must be such that the activity engaged in, at the time of the accident, is an incident of employment," the petitioner could not recover industrial insurance during the three months that she did not work for the district. *Id.* (quoting *City of Phoenix v. Indus. Comm'n*, 104 Ariz. 120, 123, 449 P.2d 291, 294 (1969), *disapproved of on other grounds by Pauley v. Indus. Comm'n*, 109

[6] We cite to the Arizona Supreme Court opinion, but note that the ALJ's findings and award relied on our court's decision in *Powell v. Indus. Comm'n*, 7 Ariz. App. 518, 441 P.2d 553 (1968).

Ariz. 298, 508 P.2d 1160 (1973)). But "to evaluate the reasonable, fair and equitable earning capacity of workmen, both for the purposes of assessment of premium and for the payment of compensation benefits," the ICA must employ the "same measure of value . . . as it related to the collection of premium and to payment of compensation benefits." *Id.* at 262-63, 451 P.2d at 42-43 (quoting *Gene Autry Prods. v. Indus. Comm'n*, 67 Ariz. 290, 299, 195 P.2d 143, 149 (1948)).

¶13 Because the ICA fixes rates of an employer's premiums based on the duration of an employee's contract, the *Powell* court reasoned that it was inequitable to compute the teacher's compensation benefits on a 12-month basis, rather than on a 9-month basis:

> In *Pettis v. Industrial Commission*, *supra*, we held it was not proper to include the 2-month period during which time the petitioner did not work due to the shutdown of his employer. In the instant case, it would be equally unfair to make such inclusion for a period of time not covered in the contract by calling it seasonal employment. Certainly, as pointed out by petitioner and which was supported by the evidence, there is school work in the summer. A few schools are operated in the summer, as well as other work which a teacher might secure. If injured in this other work, the employer would be the one who would be paying the compensation for that period of time. Respondent points out the latitude of the schools in the employment of teachers. We agree that a school could make a contract for twelve months employment. However, this was not done in the instant case and the Industrial Commission is under a duty of providing workmen's compensation rates on the basis of contracts made by the school district, which in the instant case was for approximately a 9-month period.

Id. at 263, 451 P.2d at 43.

¶14 Just as the district in *Powell* elected not to extend a 12-month contract to the petitioner, OSD did not select Carrillo to fill one of the few life skills assistant positions available during the summer months. Carrillo was free to seek employment outside of the district during the summer. And as the *Powell* court noted, her summer employer would be responsible for paying compensation for any injuries incurred during that period. Alternatively, if Carrillo were unemployed during that period, she could incur no compensable injuries. OSD was not responsible for securing workers' compensation insurance to cover Carrillo during the months she did not work. Under the reasoning of *Powell*, therefore, it would be anomalous to reduce Carrillo's monthly wage by dividing it by the period for which she was not employed. Accordingly, we conclude that the ALJ's computation of Carrillo's compensation benefits on a 10-month basis most reasonably reflects her true average monthly wage.

Conclusion

¶15 For the aforementioned reasons, we affirm.

/s/
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PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge