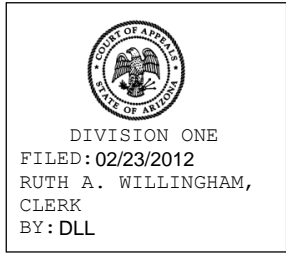


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



RAYMOND BEJAR,) 1 CA-IC 11-0029
)
Petitioner,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF ARIZONA,) Rule 28, Arizona Rules
) of Civil Appellate
Respondent,) Procedure)
)
DATS TRUCKING,)
)
Respondent Employer,)
)
ADVANTAGE/PINNACLE RISK MANAGEMENT)
SERVICES,)
)
Respondent Carrier.)

Special Action - Industrial Commission

ICA CLAIM NO. 20080-630634

CARRIER CLAIM NO. 2008561644

Administrative Law Judge Karen G. Calderon

AWARD AFFIRMED

Joel F. Friedman, PLLC Phoenix
By Joel F. Friedman
Attorney for Petitioner Employee

Andrew F. Wade, Chief Counsel Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

W I N T H R O P, Chief Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review setting an average monthly wage. Petitioner Bejar ("Claimant") argues that the Administrative Law Judge ("ALJ") did not apply the correct legal standard when calculating his average monthly wage. Claimant also argues that even if the ALJ applied the correct standard, she abused her discretion in calculating his average monthly wage. Because the evidence reasonably supported the average monthly wage calculation and it is in accordance with applicable law, we affirm the award.

I. JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (West 2012),¹ 23-951(A), and Rule 10, Arizona Rules of Procedure for Special Actions. In reviewing findings and awards of the 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 consider the evidence in the light most favorable

¹ We cite the current version of the applicable statutes where no revisions material to the decision have since occurred.

to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

II. PROCEDURAL AND FACTUAL HISTORY

¶13 Claimant was employed by respondent employer, DATS Trucking ("DATS"), as a forklift operator. In April 2006, Claimant was working at DATS when he was crushed between two forklifts and sustained abdominal and knee injuries. Claimant underwent abdominal surgery and left knee surgery. After rehabilitation, Claimant returned to light-duty office work at DATS. The parties stipulated that Claimant's average monthly wage for the 2006 injury was \$2,339.91 per month.

¶14 In February 2008, Claimant sustained a second injury while working at DATS. Claimant filed a workers' compensation claim, which was accepted for benefits. The ICA then entered its notice of average monthly wage in the amount of \$1,383.04 for the new injury.² Claimant asserted that he had a higher average monthly wage and timely requested a hearing. Claimant and DATS' terminal manager, Rick Bushman, testified at the hearing.

¶15 Following the hearing, the ALJ increased Claimant's average monthly wage to \$1,401.55. The ALJ found:

² The ICA determines and issues the notice of average monthly wage. See A.R.S. § 23-1061(F). Prior to issuing the notice of average monthly wage, the ICA receives a recommended average monthly-wage calculation from the insurance carrier. The ICA then independently determines the average monthly wage and issues the notice. See, e.g., *Borquez v. Indus. Comm'n*, 171 Ariz. 396, 398, 831 P.2d 395, 397 (App. 1991).

The payroll records show six paychecks prior to the 2008 date of injury, December 8, 2007 through February 16, 2008. Each paycheck is for a two week period of time. The hours for the paychecks vary from a low of 34.15 hours (17.07 hours per week, \$998.51 wage) to a high of 66.68 hours (33.34 hours per week, \$1,950.24 wage), the two weeks immediately before the injury. The average of all the hours in the period of time from December 2007 to February 2008 is 23.96 hours per week, \$1,401.55 wage.

I accept Mr. Bushman's testimony. I do not accept [Claimant's] argument that the 2008 wage should be the same as the 2006 wage. I find the use of an expanded wage base is appropriate since the number of hours [Claimant] worked per week varied. Using the wages from December 2007 through February 2008, [Claimant's] average monthly wage is set at \$1,401.55.

The ALJ summarily affirmed the award on administrative review, and Claimant brought this special action.

III. DISCUSSION

¶16 Claimant and DATS agree that it was appropriate for the ALJ to use an expanded wage base to determine Claimant's average monthly wage. Claimant argues, however, that the ALJ applied the wrong legal standard in determining the expanded wage base. Claimant also argues that any time he lost from work due to his work-related injuries should have been omitted from the average monthly-wage calculation. We disagree.

¶17 Claimant testified that DATS originally hired him in September 2005 to be a forklift operator. He stated that he would have continued to do that work if he had not been injured in April 2006. After he was released to work following the 2006 injury,

Claimant could only perform light-duty office work. DATS continued to pay Claimant the same hourly rate to perform light-duty office work as it had paid him to be a forklift operator. Claimant testified that although he was paid the same, he earned less money performing light-duty work because there were fewer light-duty hours available. Claimant alleges that the ALJ erred by using Claimant's part-time hours to calculate his average monthly wage.

¶18 Bushman testified that Claimant was scheduled to work eight hours per day and that light-duty work was available to Claimant on a full-time basis. The work included performing driver check-ins, scanning freight bills, and shredding paper. Bushman stated that other employees had performed these job duties, but the duties were combined into a single job for Claimant after his 2006 injury.³ Bushman further testified that if Claimant worked fewer hours, it was by choice because he allowed Claimant to leave work whenever he wanted. Bushman testified that Claimant occasionally stated he was leaving work because he was in pain, but more often, Claimant left because he grew impatient with periods of inactivity.

¶19 The ALJ is the sole judge of witness credibility. *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574

³ Claimant relies on *County of Maricopa v. Indus. Comm'n*, 145 Ariz. 14, 19, 699 P.2d 389, 394 (App. 1985), to argue that "made work" cannot be used to establish a claimant's earning capacity. The issue here, however, is the average monthly wage calculation, not post-injury earning capacity. See *Hardware Mut. Cas. Co. v. Indus. Comm'n*, 17 Ariz. App. 7, 9-10, 494 P.2d 1353, 1355-56 (1972) (entitlement to permanent disability benefits does not arise until after a claimant's medical condition becomes stationary).

(App. 1984). It is his or her duty to resolve all conflicts in the evidence and to draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). On appeal, this court will not disturb an ALJ's award unless it cannot be supported by any reasonable theory of the evidence. *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987).

¶10 The ALJ in this case explicitly resolved any conflicts in the evidence in favor of Bushman's testimony. Bushman's testimony and the payroll records for December 2007 through February 2008 constituted reasonable evidence supporting the ALJ's average monthly-wage determination. Accordingly, we find no error.⁴

¶11 We also find no support for Claimant's argument that any time he lost from work due to pain from his work-related injuries should have been omitted from the average monthly-wage calculation. Although Claimant is correct that time lost from work for reasons beyond a claimant's control should be omitted from average monthly wage calculation, Claimant did not offer any medical evidence to support his contention that he lost work due to pain from work-related injuries. The ALJ adopted Bushman's explanation that Claimant chose to work part-time because he did not want to sit

⁴ We recognize Claimant's concern that this decision may adversely impact his ability to establish an accurate loss of earning capacity when his 2006 industrial injury becomes stationary. As we noted earlier, this decision only addresses the average monthly wage for the 2008 injury. Further, as noted by the Arizona Supreme Court, with multiple injury claims, the appropriate method to close the cases is in the order the injuries occurred. See *Gates v. Indus. Comm'n*, 118 Ariz. 521, 524, 578 P.2d 602, 605 (1978).

idle while awaiting tasks to perform. Accordingly, we find no error.

IV. CONCLUSION

¶12 For the foregoing reasons, we affirm the award.

/s/
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
DONN KESSLER, Judge