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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/17/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CITY OF MESA, Petitioner Employer,) No. 1 CA-IC 11-0058
)
CITY OF MESA, Petitioner Carrier) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF,) Rule 28, Arizona Rules
ARIZONA,) of Civil Appellate
) Procedure)
Respondent,)
)
ARTHUR MILLS,)
)
Respondent Employee.)
_____)

Special Action - Industrial Commission

ICA Claim No. 99071-435474

Carrier Claim No. 990980401

The Honorable Robert F. Retzer, Administrative Law Judge

AWARD AFFIRMED

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K E S S L E R, Judge

¶1 Petitioner City of Mesa ("Mesa") seeks special action review of an Industrial Commission of Arizona ("ICA") decision awarding Respondent Employee Arthur Mills ("Mills") unscheduled permanent disability benefits. Mesa argues the administrative law judge ("ALJ") erroneously excluded from the post-injury earning capacity calculation housing and utility benefits paid by Mills's employer. For the following reasons, we affirm the award.

FACTUAL AND PROCEDURAL HISTORY

I. Mills's injury and relevant procedural history

¶2 From 1991 until 2001, Mills was employed as a Mesa police officer. In 2001 he retired due to a cervical-spine injury he suffered while on duty in 1999.

¶3 Mills filed a workers' compensation claim with the ICA protesting a notice that terminated benefits, which closed the claim effective November 2001. The ICA found Mills had a three-percent permanent disability and awarded him unscheduled permanent partial disability benefits of \$427.61. Mesa protested the award, but the parties later stipulated to a monthly award of \$350. Mesa would begin paying the stipulated

amount after a credit of about \$40,460 in Mesa's favor was extinguished.

¶4 In 2006, Mills reopened his ICA claim and subsequently underwent surgery. The ICA closed his claim in 2010, finding in relevant part a ten percent scheduled permanent impairment and a 53.05 percent loss of earning capacity and awarding him \$612.74 per month in benefits. The award was based on Mills's salary as a camp manager, his job since January 2007.

¶5 Mesa protested the award and requested a hearing. After three days of hearings, the ALJ affirmed the award. Mesa filed a request for review, arguing that the ALJ erred in excluding from Mills's camp salary the value of the use of a cabin and utilities paid for by the camp. Upon review the ALJ affirmed his decision. Mesa timely appealed.

II. Mills's residences

¶6 In January 2007, Mills began full-time employment as manager of a camp outside Prescott and lived in the camp cabin while at work. From that time in 2007 until 2009, Mills retained a residence at his daughter's home in Gilbert, where she provided a room in which he could stay rent-free.

¶7 In 2009, his daughter bought a parcel of land with two houses on it in Gilbert, and Mills moved into the home not occupied by his daughter. He did not pay any rent to her, but

he paid \$10,000 to his daughter for the down payment on the property and another \$10,000 in renovations. Mills called this house his permanent residence and the Prescott cabin his place of employment.

¶8 As camp manager, Mills was required to be on call twenty-four hours a day, seven days a week while the camp was in session, which was year-round. Thus, in the busy months between April and August, Mills stayed at the camp almost every night. One month in the fall of 2010, which was a very busy month, Mills stayed at the cabin approximately 20 nights of the month, with the other ten days spent at his daughter's home in Gilbert. He stayed at the cabin more nights than he stayed anywhere else.

¶9 Per his employment contract, Mills was entitled to receive \$13,500 salary and a \$1000 IRA contribution. The contract also allowed Mills free meals at the camp, which his wife, working as an assistant camp manager and camp cook, made for the campers, but he never ate more than half of the camp meals served.

¶10 The employment contract did not refer to the 100-year-old cabin and did not specify whether use of the cabin was part of Mills's compensation. Mills said that regardless of whether he used the cabin, his compensation remained the same.

¶11 The cabin, used as the camp office, was a two bedroom, two bathroom, 1600 square foot old mining structure. It had running water, electricity, and was supplied by gas, all paid by the camp. Mills had to furnish the cabin with beds and other furniture.

¶12 Mills did not retain control over the cabin. The cabin was used to house other employees when there were not enough beds in the camp. The cabin was also the camp office, and people freely came in and used the telephone, fax machine, and computer, or came in because they were lost.

¶13 If something prevented Mills from staying at the camp, he would either commute from Gilbert, stay with a friend, or stay in a hotel in Prescott. If he had to drive from Gilbert, it would have been a two-hour commute. Mills viewed the cabin as a tool to help him fulfill his obligation under the employment contract to be accessible to the camp and to allow him to rest when his neck pain became too severe to bear.

III. Hearing testimony

¶14 The ALJ heard testimony from Mills, his surgeon, and labor-market consultants. The ALJ also received into evidence Mills's employment contract with the camp.

¶15 Mills's labor-market consultant, Gretchen Bakkenson ("Bakkenson"), testified in part that the cabin and utilities had no monetary value because Mills retained a primary

residence in Gilbert and he needed to use the cabin to fulfill his job duties. In her report, she additionally relied on the fact that the employment contract did not include the cabin as compensation. Bakkenson testified that Mills was functionally required to live near the camp to respond to the needs of campers, and Mills would not have lived in Prescott but for his job at the camp. Bakkenson noted that had Mills been required to commute to and from Prescott to Gilbert, the cost of commuting would have been subtracted from Mills's salary because it would have been considered reimbursement for employment-related expenditures Mills would not have incurred but for his job. See *Moorehead v. Indus. Comm'n*, 17 Ariz. App. 96, 99, 495 P.2d 866, 869 (1972) (holding "'wages' [do] not include amounts paid to the employee to reimburse him for employment-related expenditures of a nature which would not be incurred but for his employment"). This deduction would have resulted in a lower salary and increased benefit payment.

¶16 Mesa's labor-market consultant, Rebecca Lollich ("Lollich"), testified the cabin and utilities were valued at \$432.86 because if Mills had not lived at the camp, he would have had commuting expenses or would have had to pay for other housing in Prescott. Thus, deducting the value of the cabin and utilities, she testified that Mills should have received only \$374.89 per month in benefits.

¶17 Lollich believed that the cabin was included as a benefit in Mills's employment contract and that he was required to live at the camp. She also believed that the camp provided the cabin as part of Mills's compensation as camp manager. Lollich admitted that she did not know the cabin was indeed a cabin, nor that the cabin was 100 years old, and she also thought Mills enjoyed exclusive use of the cabin. Lollich did not review Mills's earlier hearing testimony.

¶18 Lollich compared the cabin to three other properties of comparable size within the Prescott city limits. She estimated the cost of utilities and rent, added Mills's monthly earning ability, and determined what Mills should have been awarded had the value of the cabin and utilities been included in the calculation. Lollich arbitrarily halved the estimated price of the cabin, as compared to the other three properties, due to the cabin's run-down features. She chose an arbitrary percentage because she was unsure how much less the cabin would rent for than the three other properties. She did not ascertain the other properties' actual rent.

¶19 After summarizing the testimony, the ALJ found Mills's camp manager position "to be most representative of [his] earning capacity," and found his earning capacity to be his 2009 camp-manager salary, not including the value of the cabin and utilities. Mesa's request for review of the decision

challenged only the ALJ's omission of the use of the cabin and utilities from his calculation of earning capacity. The ALJ found his earlier decision supported by the evidence and affirmed.

¶20 Mesa timely appealed. This Court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (2012), and Rule 10 of the Arizona Rules of Procedure for Special Actions.

STANDARD OF REVIEW

¶21 In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review *de novo* questions of law. *Young v. Indus. Comm'n of Ariz.*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in the light most favorable to sustaining the award. *Lovitch v. Indus. Comm'n of Ariz.*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). We will uphold the ALJ's decision if there is reasonable evidence to support it and will not reweigh the evidence upon review. *Jaramillo v. Indus. Comm'n of Ariz.*, 203 Ariz. 594, 596, ¶ 6, 58 P.3d 970, 972 (App. 2002).

DISCUSSION

¶22 Mesa argues: (1) The ALJ's failure to make findings of fact and conclusions of law regarding how he calculated Mills's disability award makes it impossible for this Court to review that award; and (2) The cabin and utilities provided to

Mills "are items of value which constitute real economic gain and therefore, must be included when calculating his post-injury earning capacity." The dispositive question is whether the cabin and utilities were intended to be part of Mills's compensation package for his employment with the camp. We find that they were not included as part of Mills's compensation and thus, the ALJ correctly excluded the value of those benefits from his calculation of Mills's earning capacity.

¶23 We first address whether the record is sufficient to review the ALJ's award. "[L]ack of findings on material issues does not invalidate an award per se." *Cavco Indus. v. Indus. Comm'n of Ariz.*, 129 Ariz. 429, 435, 631 P.2d 1087, 1093 (1981). We will vacate the award if we are "unable to determine whether the basis of the hearing officer's conclusion was legally sound." *Id.* "A specific finding [is] unnecessary as to how the ultimate finding was reached since it can be determined from an examination of the record." *Id.*

¶24 Here, the ALJ set forth a summary of the testimony and law he found relevant, and the basis of his decision is easily discernible from the record. The ALJ found ample evidence, including Mills's and Bakkenson's testimony as well as the contract, more convincing in proving that the cabin and utilities should not be considered as part of his salary. That

the ALJ did not set forth how he reached that decision does not require reversal.

¶25 Second, the ALJ properly excluded the value of the cabin and utilities from his calculation of Mills's salary.¹ The term "wages" has been defined as "payments or benefits conferred upon an employee in return for his labor and services[;] [these benefits] are includable in computing the average monthly wage, even though these payments or benefits do not on their face purport to be 'wages'." *Moorehead*, 17 Ariz. App. at 99, 495 P.2d at 869. The emphasis is on calculating what an employee actually earned for his labors, including "anything of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee." *Lazarus v. Indus. Comm'n of Ariz.*, 190 Ariz. 301, 303, 947 P.2d 875, 877 (App. 1997) (citation and internal quotation marks omitted).

¶26 Wages do "not include amounts paid to the employee to reimburse him for employment-related expenditures of a nature which would not be incurred but for his employment" because "[s]uch payments are simply not intended as compensation for services rendered." *Moorehead*, 17 Ariz. App. at 99, 495 P.2d at 869. One important consideration in determining whether a

¹ Mesa has not asked us to review the ALJ's determination in regards to Mills's IRA contribution or the value of the free meals he received.

benefit should be included in wages is whether the extra benefits provided by the employer would cease to exist if the employee's employment ceased. *Id.*

¶27 Here, the record supports the conclusion that the cabin and utilities should not be considered part of Mills's compensation. Mills testified that his duties as camp manager required him to be "on call 24 hours a day, 7 days a week." Thus, his employer essentially required Mills to live at or near the camp. Mills testified that he chose not to rent a place near the camp because it would have cost money he did not want to spend. He also testified that although he was required to stay at or near the camp, his need for a permanent residence in Gilbert was not eliminated. If Mills was not employed with the camp, his need for housing in Prescott would cease, and he would continue to live in his residence in Gilbert. The cabin provided by his employer was a benefit which he would not have incurred but for his employment, and therefore, any value attached to that benefit should be excluded from his wages. See *id.* (holding wages do not include amounts paid by employer for expenses that would cease with the cessation of employment).

¶28 Furthermore, the employment contract was silent with regard to the cabin provided to Mills. Mills testified that he understood that the cabin was not part of his compensation and

that his compensation would remain the same regardless of whether or not he used the cabin. Mesa did not present any testimony from the camp to controvert Mills's belief. Thus, the record supports the ALJ's decision to exclude from the salary calculation the value of the cabin and utilities that the camp provided.

CONCLUSION

¶29 For the foregoing reasons, we affirm the ALJ's award.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge