

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARIA O. MIRANDA, *Petitioner Employer,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

HILDA M. ALVARENGA DE PEREZ, *Respondent Employee,*

SPECIAL FUND DIVISION/NO INSURANCE SECTION, *Respondent
Party in Interest*

No. 1 CA-IC 18-0025
FILED 12-27-2018

Special Action – Industrial Commission
ICA Claim No. 20140-710391
The Honorable Paula R. Eaton, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Arizona Injury Law Group, PLLC, Phoenix
By Weston S. Montrose
Counsel for Petitioner Employer

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Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent

Snow & Carpio, PLC, Phoenix
By Erica González-Meléndez
Counsel for Respondent Employee

Special Fund Division/No Insurance Section,¹ Phoenix
By Scott J. Cooley
Counsel for Respondent Party in Interest

MEMORANDUM DECISION

Presiding Judge James P. Beene delivered the decision of the Court, in which Judge Michael J. Brown and Judge James B. Morse Jr. joined.

B E E N E, 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. This Court has jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10(a). Only one issue is presented on appeal: whether the administrative law judge (“ALJ”) erroneously calculated the respondent employee’s (“claimant’s”) average monthly wage. Because the evidence of record and the case law reasonably support the ALJ’s calculation, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The claimant was working for the petitioner employer, Maria O. Miranda (“Miranda”), as a house cleaner when she fell off a ladder and fractured her left wrist. She filed a workers’ compensation claim, which was denied for benefits, litigated at the ICA, and eventually found compensable. Following Miranda’s appeal to this Court, we affirmed the

¹ On July 6, 2018, the Special Fund filed a notice “that it does not intend to file an answering brief in this matter.”

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ALJ's award. The ICA then entered its notice of average monthly wage,² and Miranda timely requested an ICA hearing. The ALJ held one hearing for testimony from both the claimant and Miranda.

¶3 The claimant testified that she came to the United States from El Salvador in December 2013. She first obtained work at GCA Services, a cleaning company, four hours a day. She stopped working at GCA after she began cleaning with Miranda. The claimant worked for Miranda a total of six days before her injury.³ Initially, the claimant worked two days followed by a gap of time, and then she worked another four days. Each time the claimant worked with Miranda, there were two other house cleaners working with them and they worked ten- to twelve-hour days.

¶4 Miranda paid the claimant in cash – \$160 for two days and then \$240 for four other days. The claimant did not receive anything in writing from Miranda, and she did not know how frequently she could expect to work or how much she would be paid. Although Miranda had told the claimant she would give her more work, she never called again after the injury. Following surgery and rehabilitation, the claimant obtained a new cleaning job and worked steadily at M & E Green Cleaning Solutions.

¶5 Miranda testified that, at the time of the claimant's injury, she did not have a cleaning business. She stated that she cleaned houses by herself or with one other person. Miranda testified that she worked five days a week and had regular customers that she cleaned for on a regular basis. She stated that when she had extra work, she hired a helper. Miranda testified that, in a normal month, she only used a helper for three to four days per week. During the time the claimant cleaned with her, Miranda

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. See, e.g., 9/1/16 Recommended Average Monthly Wage Calculation of 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 (App. 1991).

³ Although Miranda testified that the claimant only worked five days, the ALJ found the claimant's testimony more credible. See *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551 (App. 1984) (the ALJ is "the sole judge of witness credibility").

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had a lot of work and also employed two other house cleaners, Yadira and Edy. Miranda stated that Edy worked with her three days a week for three weeks in January 2014. She paid all the house cleaners in cash, \$60-65 a day. Miranda testified that her business was unpredictable, and she never promised the claimant work of five days a week.

¶6 Following the hearing, the parties filed a post-hearing legal memorandum, and the ALJ entered an award setting the average monthly wage at \$1,408.23 (“Award”). Miranda requested administrative review, but the ALJ summarily affirmed the award. Miranda next brought this appeal.

DISCUSSION

¶7 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 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ’s award. *Lovitch v. Indus. Comm’n*, 202 Ariz. 102, 105, ¶ 16 (App. 2002).

¶8 On appeal, Miranda argues that the ALJ erroneously calculated the claimant’s average monthly wage. Wages earned during the thirty days preceding an industrial injury are the presumptive average monthly wage. See A.R.S. § 23-1041(G). But if the injured employee has not been continuously employed for thirty days prior to injury,

the average monthly wage shall be such amount as, having regard to the previous wage of the injured employee or of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, reasonably represents the *monthly earning capacity* of the injured employee in the employment in which the injured employee is working at the time of the accident.

A.R.S. § 23-1041(B) (emphasis added).

¶9 Thus, a claimant employed less than thirty days at time of her injury must be compensated based on her monthly earning capacity at time of injury. See, e.g., *Miller v. Indus. Comm’n*, 113 Ariz. 52, 54 (1976). In determining a claimant’s earning capacity, the test is whether the work is steadily available and “not whether [the claimant] intended to work steadily in the industry.” *Id.*

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¶10 In *Pena v. Indus. Comm'n*, 140 Ariz. 510 (App. 1984), this Court discussed various average monthly wage computations for employees who had been employed less than thirty consecutive days on the date of injury. In *Pena*, the deceased employee had worked for a dairy intermittently over a two-year period. At the time of his death, he was performing regular, full-time employment at the dairy. But during his final employment, he had worked for less than thirty consecutive days. The ALJ calculated the deceased's average monthly wage by determining the deceased's total earnings for all periods of employment during the two-year period and dividing that number by the total number of days the deceased had worked at the dairy. He then multiplied that figure by the number of days in a month.

¶11 On appeal, this Court found that the ALJ had used an erroneous computation and set aside the award. We discussed three average monthly wage formulas the ALJ could choose to apply on remand: (1) determination based on mathematical extrapolation; (2) determination based on the wages of similar employees doing similar work in the locality; or (3) determination based on the total wages earned by the claimant while working for the employer in the same job as long as "the expanded wage base reasonably reflect [the claimant's] monthly earning capacity at the time of the [injury]." *Pena*, 140 Ariz. at 515.

¶12 In this case, the ALJ cited *Pena* and found:

the evidence in this matter establishes that the applicant was earning \$65 per day working for the defendant employer. The evidence further establishes that there was work available to the applicant earning \$65 a day as a house cleaner. I find, therefore, that the applicant's average monthly wage should be set at \$1,408.23. ($\$65 \times 5 \times 4.333$).

She based the claimant's monthly earning capacity on the actual earnings of similarly situated employees, a method recognized both by A.R.S. § 23-1041(B) and *Pena*.

¶13 Miranda testified that she had regular clients and cleaned houses five days a week, which indicated that house cleaning provided steady employment. When Miranda hired additional house cleaners, she paid them \$60-65 a day. Although the claimant's work for Miranda was sporadic at the time of her injury, Miranda had promised her additional work and there was no evidence that the claimant intended to work less

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than full time. We find that this evidence satisfies the statutory directive to look to the wages of employees of a similar class, working in similar employment, in the same locality to establish the injured employee's monthly earning capacity.

¶14 In reaching this conclusion, we recognize that due to the claimant's brief period of pre-injury employment, it is not possible to set her average monthly wage based solely on her earnings. Instead, we must follow the statutory directive and set her average monthly wage based on her monthly earning capacity. This Court previously held that a loss of earnings is not synonymous with a loss of earning capacity, and we recognized that "the purpose of workmen's compensation is to reimburse injured workers for loss of earning capacity, not loss of earnings." *Franco v. Indus. Comm'n*, 130 Ariz. 37, 40 (App. 1981).

CONCLUSION

¶15 For the foregoing reasons, we affirm the ICA award and the decision upon review setting an average monthly wage.



AMY M. WOOD • Clerk of the Court
FILED: AA