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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

ANTONIO S. HERNANDEZ, *Petitioner Employee,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

LEXMAR DISTRICT, *Respondent Employer,*

CALIFORNIA INSURANCE COMPANY, *Respondent Carrier.*

No. 1 CA-IC 18-0072

FILED 10-17-2019

Special Action – Industrial Commission

ICA Claim No. 20172-280341

Carrier Claim No. 132570

The Honorable Rachel C. Morgan, Administrative Law Judge

AFFIRMED

COUNSEL

Snow Carpio & Weekley PLC, Phoenix

By Chad T. Snow

Counsel for Petitioner Employee

Industrial Commission of Arizona, Phoenix

By Gaetano J. Testini

Counsel for Respondent

Lundmark Barberich La Mont & Slavin PC, Phoenix

By Lisa M. La Mont

Counsel for Respondent Employer/Carrier

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge David D. Weinzwieg and Judge Peter B. Swann joined.

H O W E, Judge:

¶1 Antonio Hernandez appeals an Award and Decision Upon Review issued by the Industrial Commission of Arizona (“ICA”) setting his Average Monthly Wage (“AMW”). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Hernandez worked as a truck driver for Lexmar District for 11 years before his injury. He was based in Phoenix and his work consisted of driving back and forth between Arizona and California, sometimes staying in California overnight. On June 2, 2017, Hernandez was cleaning out his truck cab when he slipped and fell, injuring his back, his shoulder, his knee, and his hand. California Insurance Company (“Carrier”) accepted the claim and calculated Hernandez’s AMW as reported on ICA Form 108. The Carrier’s Form 108 declared Hernandez’s actual earnings for the 30 days before the injury to be \$3,970.00. But rather than use the 30-day amount as the wage base for calculating the AMW, the Carrier used an expanded wage base. Using an average daily wage determined by taking the wages Hernandez earned in the year before the injury and then dividing that number by 364 to account for the days in the period, the Carrier multiplied that average daily wage by 30.416 to arrive at an AMW of \$3,698.89. Hernandez contended that his actual monthly wage was \$4,100.59. The ICA adopted the \$3,698.89 amount in a Notice of Average Monthly Wage issued August 22, 2017, and Hernandez requested a hearing.¹ See A.R.S. § 23-1061(F) (ICA shall make an independent determination of AMW).

¶3 At the hearing, Hernandez testified, in relevant part, that he typically drove five to six days per week, that he was paid per round trip, and that he had earned more wages in prior months. He also testified that

¹ Hernandez protested another decision of the Carrier that was also addressed at the hearing. Because that part of the decision has not been appealed, we do not address it here.

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in December 2016 he did not work the entire month because of his child's health issues. Hernandez's supervisor testified that Hernandez was typically paid \$150 per round trip with a per diem for overnight trips. He testified that the amount Hernandez earned varied from week to week depending on how many legal hours he could drive. Based on the testimony of Hernandez and the supervisor, the administrative law judge ("ALJ") found that an expansion of the wage base was appropriate because Hernandez's earnings varied "in any given month." Thus, the ALJ affirmed the Carrier's use of an expanded wage base consisting of the prior years' wages to calculate Hernandez's AMW. In a post-hearing request for review, Hernandez argued that use of an expanded wage base was not proper under Arizona case law. In the alternative, he argued that December 2016 should be excluded from the days used for the expanded-wage-base calculation because he could not work that month due to circumstances outside his control. The ALJ implicitly rejected this argument by affirming on review her adoption of the Carrier's AMW calculation.

DISCUSSION

¶4 Under Arizona's worker's compensation law, an injured worker is entitled to disability benefits determined by using the worker's AMW at the time of injury. A.R.S. § 23-1041(A). "[M]onthly wage" is "the average wage paid during and over the month in which the employee is . . . injured." A.R.S. § 23-1041(G). Based on this language, Arizona courts have construed A.R.S. § 23-1041 as establishing a presumptive 30-day wage period for determining AMW. *Elco Veterinary Supply v. Indus. Comm'n*, 137 Ariz. 46, 47-48 (App. 1983) ("[W]ages earned during the 30 days preceding the injury are the presumptive average monthly wage[.]"). However, when the evidence shows that the presumptive wage base does not realistically reflect the injured worker's earning capacity, an administrative law judge has broad discretion to use a wage base greater than one month, an "expanded wage base." *Id.*; *Davis v. Indus. Comm'n*, 134 Ariz. 293, 296 (App. 1982). An expanded wage base is proper in cases involving, but not limited to, seasonal employment, intermittent employment, and inflated wages received the month before the injury. *See Davis*, 134 Ariz. at 296 (listing cases).

¶5 Hernandez argues that the ALJ abused her discretion by using an expanded wage base rather than the 30-day presumptive wage base. The ALJ found that, because Hernandez's earnings varied from month to month, an expanded wage base was appropriate. Hernandez argues this was error because his employment was neither seasonal nor intermittent. But this argument overlooks that the reasons for expanding a

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wage base are not limited to seasonal employment, intermittent employment, or inflated wages shortly before the injury. *Id.*; *Elco Veterinary Supply*, 137 Ariz. at 48; *Sw. Rest. Sys. v. Indus. Comm'n*, 170 Ariz. 433, 435 (App. 1991). Any such limitation would go against the goal of the Act – “to determine a realistic pre-injury wage base which can serve as a standard of comparison with the post-injury earning capacity of the injured worker; the emphasis in setting a worker’s average monthly wage is on what the employee has actually earned for his labors.” *Senor T’s Rest. v. Indus. Comm’n*, 131 Ariz. 360, 363 (1982). As long as the evidence justifies using a wage base greater than one month, the ALJ has discretion to do so. *Davis*, 134 Ariz. at 296. Here, the ALJ did not abuse her discretion by using an expanded wage base because the uncontested evidence showed that Hernandez’s wages varied from month to month.

¶6 Hernandez argues that even if an expanded wage base is appropriate, the month of December 2016 should be excluded from consideration because he was unable to work for reasons outside his control. He relies on *Pettis v. Indus. Comm’n*, which recognized that the expanded wage base should not include periods that a worker was not able to work due to factors outside the worker’s control. 91 Ariz. 298, 303 (1962). But he did not show that he was unable to work that entire month for reasons outside his control. He testified that he missed work that month due to his child’s health issues. Although his decision was completely understandable under the circumstances, his decision was still voluntary and not outside his control. His case is not like the injured worker in *Pettis*, who could not work for the period in question because his employer had shut down the business. *Id.* The record supports the ALJ’s decision.

¶7 Finally, Hernandez argues that the ALJ should not have relied on Form 108 because the numbers and calculations reflected were not substantiated by primary documentation. This argument was not raised to the ALJ, either at the hearing or upon request for administrative review. Therefore, his argument is waived, and we do not address it. *See Larson v. Indus. Comm’n*, 114 Ariz. 155, 158 (App. 1976) (“We will not consider on review an issue not raised before the Industrial Commission where the petitioner has had an opportunity to do so.”).

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CONCLUSION

¶8

For the foregoing reasons, we affirm.



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