IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SUSAN SOVA, *Petitioner Employee*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

SANTA BARBARA CATERING, *Respondent Employer*,

OHIO SECURITY INSURANCE COMPANY, *Respondent Carrier*.

No. 1 CA-IC 18-0083
FILED 9-19-2019

Special Action - Industrial Commission

ICA Claim No. 20153-280431
Carrier Claim No. WC22-247699
Colleen Marmor, Administrative Law Judge

AFFIRMED

COUNSEL

Arizona Injury Law Group PLLC, Phoenix
By Weston S. Montrose
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. LaMont, Danielle S. Vukonich
Counsel for Respondents Employer and Carrier

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge David D. Weinzweig joined.

M O R S E, Judge:

¶1 Petitioner Employee Susan Sova brings this statutory special action to review an award issued by the Industrial Commission of Arizona ("ICA"). Sova argues that the Administrative Law Judge ("ALJ") erred in calculating her Average Monthly Wage ("AMW"). Concluding that the ALJ followed the law and did not abuse her discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Sova moved from Michigan to Arizona in April 2015, leaving a full-time job as a registered nurse. As a matter of personal interest, Sova had obtained a pastry chef diploma in 2006 but had not worked in that field. When she settled in Arizona, she began looking for a full-time job either as a nurse or as a pastry chef. She responded to an ad for a pastry chef assistant with Respondent Employer Santa Barbara Catering ("SBC") and had a "working interview" in late August 2015 with Executive Chef Rebekah McIntyre. Sova claimed that McIntyre informed her that a pastry assistant's hours fluctuate depending on the season and the number of events booked, but asked if Sova would be willing to work extra hours as a server, if and when necessary, up to seven days a week. McIntyre denied making these statements, however, and said she informed Sova that her hours would primarily fluctuate depending on her skill-level. Sova was hired for $10 per hour.

¶3 On November 10, 2015, Sova injured her back when she picked up and carried a large, heavy mixing bowl. She tried to return to work after a few days, but could not. Sova had worked for three months before she was injured, but never worked more than 18 hours in any one week.

¶4 Sova filed a worker's compensation claim and it was accepted by Respondent Carrier Ohio Security Insurance Company. On November 16, 2018, the ICA issued an award finding an unscheduled permanent partial disability, no loss of earning capacity, and an AMW of $594.63. The AMW was calculated by taking the entire wage Sova had earned between August 25, 2015, and November 10, 2015, dividing it by the number of days in that period to arrive at an average daily amount, and then multiplying that number by a factor to get an average monthly amount. Sova timely requested a hearing to challenge the AMW calculation.

¶5 The ALJ conducted a hearing and heard testimony from Sova and McIntyre. Sova testified that she intended to work full-time and expected to pick up extra hours during peak season, though she admitted that she was not promised 40 hours per week. McIntyre testified that Sova's hours would have depended on the time of year, the weather, business demands, and her experience level. McIntyre also testified that there is typically very little to no business during the hot summer months.

¶6 Sova argued that the ICA erred because she was hired to work full-time and should not have been penalized by the seasonal nature of work. She asserted that after her injury, the workload would have picked up and she would have worked many more hours. She primarily argued that she should be treated as a full-time worker for purposes of the AMW calculation. Sova also argued that, even if she was considered a less than full-time worker, the method of calculation used by the ICA was flawed because it deflated her hours by not accounting for the seasonal nature of the work.[1]

¶7 The ALJ found that Sova was not a full-time worker but determined that the ICA calculation did not adequately account for the variability of work hours involved. As such, the ALJ increased Sova's wage base by excluding two pay periods in which Sova worked significantly fewer hours due to back fatigue in one period and industrial injury in the other. This decreased the base period from 72 days to 56 days, but increased the average daily wage, and, in turn, increased the AMW from $594.63 to $714.17.

[1] Additionally, Sova urged the ALJ to use the wages of other SBC employees with similar job duties to establish her AMW. The ALJ rejected that argument and Sova has not claimed error concerning that ruling on appeal.

¶8 Sova requested a review of the decision and the ALJ affirmed the decision upon review. Sova then appealed through this statutory special action.

¶9 This court has jurisdiction under Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) and 23-951(A), and Arizona Rule of Procedure for Special Actions 10. In reviewing awards issued by the ICA, "[w]e defer to the ALJ's factual findings unless no reasonable evidence supports them and view the evidence in the light most favorable to upholding the award." *Danial v. Indus. Comm'n*, 246 Ariz. 81, 83, ¶ 11 (App. 2019). We review issues of law de novo. *Gurtler v. Indus. Comm'n*, 237 Ariz. 537, 539 (App. 2015).

DISCUSSION

¶10 Under Arizona's worker's compensation law, injured workers are entitled to disability benefits based on their average monthly wages at the time of injury. A.R.S. § 23-1041(A). "Monthly 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 to provide for a presumptive 30-day wage period to determine AMW. *Kennecott Copper Corp. v. Indus. Comm'n,* 61 Ariz. 382, 384 (1944); *Elco Veterinary Supply v. Indus. Comm'n*, 137 Ariz. 46, 47–48 (App.) (noting that "wages earned during the 30 days preceding the injury are the presumptive average monthly wage"), *approved,* 137 Ariz. 45 (1983). The burden of proving AMW is on the worker. *Morris v. Indus. Comm'n*, 81 Ariz. 68, 74 (1956).

¶11 The primary purpose of the Arizona Worker's Compensation Act (A.R.S. §§ 23-901 to 23-1105) is "to compensate an employee for wages he would have earned without his injury, and, thereby, prevent him from becoming a public charge during his disability." *Lowry v. Indus. Comm'n,* 195 Ariz. 398, 400 (1999). Thus, the presumptive wage may be modified in favor of an "expanded wage base" that better reflects the realities of the employee's earning capacity. *Wozniak v. Indus. Comm'n*, 238 Ariz. 270, 274 ¶ 11 (App. 2015). An ALJ has discretion to base a claimant's average monthly wage upon what he might have earned rather than upon his actual earnings. *Floyd Hartshorn Plastering Co. v. Indus. Comm'n*, 16 Ariz. App. 498, 505 (1972). In *Floyd Hartshorn Plastering*, we noted it might be appropriate to use a non-presumptive base in "situations where, even though the claimant has been continuously employed for the preceding thirty days, his employment has been intermittent or affected by seasonal factors." *Id.*

¶12 Sova makes three arguments: (1) she should not be penalized by the seasonal nature of work; (2) she should be treated as a full-time employee for purposes of the AMW calculation; and (3) even if she was considered less than a full-time worker, the method of calculation used by the ICA was flawed. The ALJ rejected Sova's first two arguments but accepted the third. Because Sova's first two arguments are both discretionary, we must affirm unless reasonable evidence does not support the ALJ's determination. *Id*.

¶13 The evidence supports the ALJ's rejection of Sova's arguments regarding the seasonal nature of her work and status as a full-time worker. While Sova wanted to work full-time, the evidence that she could have done so is too speculative to treat her as a full-time employee. McIntyre testified that Sova's lack of experience would likely have limited her hours during the peak season. Because Sova was new as a pastry chef assistant, she did not have the experience needed to do many of the higher-level tasks required in the kitchen. Without a more developed skill set, according to McIntyre, her utility was limited and would limit the number of hours she would be needed for work. So, even though the business would have picked up and been busier in the months after the injury, it is unwarranted speculation that Sova would have worked more hours, much less full-time, continuously during the busy season.[2] *See Lowry*, 195 Ariz. at 401 ("Our interpretation of the statute permits the administrative law judge to calculate the wage base from numbers easily obtained, involving no extrapolation or speculation about unearned wages.").

¶14 Sova argues that the ALJ ignored evidence that (1) SBC had "more kitchen worker hours during the winter"; (2) SBC had full-time kitchen workers; and (3) Sova had not worked long enough to establish how many hours she could work at the job. The record does not support her argument. As noted above, the ALJ expanded the wage base in consideration of the variability of the hours that Sova likely would have worked. Also, McIntyre testified that none of the kitchen workers who were paid by the hour were full-time employees because the business typically shut down in the hot months of June, July, and August. That testimony supports the ALJ's conclusion that Sova was not a full-time employee and that she was not likely to work full-time hours consistently in the future. Thus, contrary to Sova's argument, the record shows that the

[2] Indeed, even Sova did not consider herself to be a full-time worker. In her Loss of Earning Capacity Questionnaire, she noted "24-32" when asked how many hours per week she worked.

ALJ considered the three factors noted. Viewed in the light most favorable to upholding the award, there is reasonable evidence to support the ALJ's decision.

¶15 Sova also argues that she should have been treated as a full-time employee because the pastry assistant position is "inherently" full-time. While McIntyre agreed that there were full-time pastry assistant positions in the general industry and that full-time hours were typically available to pastry assistants in the SBC kitchen during the winter months, she denied that this applied to Sova because of her lack of experience compared to other more-experienced SBC workers. Again, we must defer because reasonable evidence supports the ALJ's decision.

¶16 Sova's reliance on our decision in *Sw. Rest. Sys. v. Indus. Comm'n*, 170 Ariz. 433 (App. 1991) is misplaced. There, we contrasted objective limitations to continuous full-time employment, with a worker's self-imposed restriction of hours and found that consideration of the self-imposed restriction when determining an expanded wage base is not allowed by the statute. *Id*. at 436 (citing *Miller v. Indus. Comm'n*, 113 Ariz. 5, 54 (1976)). The Supreme Court's decision in *Miller*, in fact, supports the ALJ's determination in this case. In *Miller*, the Court interpreted A.R.S. § 23-1041 in the context of a university student who was injured during a summer job. In declaring that actual earnings are sufficient and proper to use for purposes of calculating an AMW, the Court stated, "[E]arning capacity is not to be determined by whether [the worker] intended to work steadily in the industry in which he is employed. The test is whether the employment, not the worker, is intermittent or erratic." 113 Ariz. at 54. Here, the ALJ found that even though Sova wanted to work full-time, full-time employment was not available for a worker with her training and experience. Because reasonable evidence supports that decision, we cannot substitute our judgment for that of the ALJ. *United Metro v. Indus. Comm'n*, 117 Ariz. 47, 49 (App. 1977).

¶17 Finally, the evidence supports the ALJ's decision about how to calculate Sova's AMW. The ALJ reasonably concluded that the wages earned for the 30 days before Sova's injury did not truly reflect her earning capacity. But rather than speculate about how many hours Sova might have earned, the ALJ used the wages Sova actually earned in other periods to expand the wage base. There was no abuse of discretion. *See Lowry*, 195 Ariz. at 401.

CONCLUSION

¶18 Sova failed to show that she should be treated as a full-time employee, and reasonable evidence supports the ALJ's determination of her AMW by use of a partially-expanded wage base. We find no abuse of discretion and affirm the award.

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