

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

FILED BY CLERK

JUL 11 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

ALEGRIA HAYES,	)	2 CA-IC 2012-0012
	)	DEPARTMENT A
Petitioner Employee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
THE INDUSTRIAL COMMISSION OF	)	Appellate Procedure
ARIZONA,	)	
	)	
Respondent,	)	
	)	
GABRIEL COUSENS, M.D.,	)	
	)	
Respondent Employer,	)	
	)	
THE HARTFORD,	)	
	)	
Respondent Insurer.	)	
_____	)	

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20102-360067

Insurer No. YKX88239C

Jacqueline Wohl, Administrative Law Judge

AWARD AFFIRMED

The Hansen Firm, PLLC  
By Deborah P. Hansen

Tucson  
Attorneys for Petitioner Employee

The Industrial Commission of Arizona  
By Andrew F. Wade

Phoenix  
Attorney for Respondent

Klein, Doherty, Lundmark, Barberich & La Mont, P.C.  
By Eric W. Slavin

Tucson  
Attorneys for Respondents  
Employer and Insurer

---

H O W A R D, Chief Judge.

¶1 In this statutory special action, petitioner Alegria Hayes challenges the Administrative Law Judge's (ALJ) denial of her request for a hearing as to her Notice of Average Monthly Wage (AMW). Because the ALJ did not err, we affirm.

### **Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's (IC's) findings. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In August 2010, Hayes was injured in a workplace accident and filed a claim for worker's compensation. In her filing, Hayes listed her address as "28 Old Hwy Lane," which was her residential address, rather than her mailing address. The IC mistakenly transcribed that address as "2801 Highway Lane." When the IC initially mailed Hayes's notice of AMW, it sent the notice to the incorrect residential address, and the notice was returned as undeliverable. This notice was dated October 6, 2010, and included the following language:

If you do not agree with this NOTICE and wish a hearing on the matter, your written request for hearing must be received

at either office of the [IC] listed below within NINETY (90) DAYS after the date of mailing of this NOTICE . . . IF NO SUCH REQUEST FOR HEARING IS RECEIVED WITHIN THAT NINETY DAY PERIOD, THIS NOTICE IS FINAL.

¶3 On February 2, 2011, the IC remailed the notice to the correct address. The second notice was still dated October 6, 2010, but also included a “Certificate of Service” stating that the notice was being “remailed” and that it had been sent on “2/2/11.” Hayes testified that when she received the second notice of AMW in February or March 2011, she thought the wage calculation was incorrect, but she also believed that, because the notice was dated October 6, 2010, and stated that it was not appealable after ninety days, she could not do anything.

¶4 At some unspecified time after receiving the February notice of AMW, Hayes called Connie Owens, her case manager with the insurance carrier, “because [Hayes] received a check that didn’t make sense to [her].” Hayes was told that the amount was a miscalculation and not to worry about it.

¶5 Although Hayes did not receive the AMW until February or March 2011, she did receive other documents relating to her claim before then. She began receiving checks in September 2010. Also, on September 27, 2010, the insurance carrier mailed a “Notice of Claim Status” to Hayes at the correct mailing address. This notice included a check for \$689.94, explained that the amount was based on an attached average monthly wage calculation, and stated that the calculation was “subject to final determination by the Industrial Commission of Arizona within [thirty] days.” It also stated that it could be

appealed by contacting the IC. Although Hayes testified that she did not receive this notice, the ALJ found that her testimony on that point was not credible.

¶6 On March 8, 2012, more than one year after receiving the February AMW, Hayes filed a request for hearing. The ALJ dismissed the request as untimely, finding that based on the September 27, 2010 Notice of Claim Status, Hayes “knew or should have known of the Notice of Average Monthly Wage during the [ninety] day filing period.” The ALJ also found Hayes had not been reasonably diligent in her efforts to ensure her compensation was correct when she received compensation checks for seventeen months before taking any action to protest the determination.

¶7 Hayes filed a motion for review, and upon review, the ALJ affirmed the previous decision. This petition for special action followed. We have jurisdiction pursuant to A.R.S. § 23-951 and A.R.S. § 12-120.21(A)(2).

#### **Excuse for Late Filing**

¶8 Hayes first asserts the ALJ should have excused her late filing pursuant to A.R.S. § 23-947(B)(1). We defer to the factual findings made by the ALJ and will overturn them only if they are entirely unsupported by evidence, but we review the ALJ’s legal conclusions de novo. *See Young v. Indus. Comm’n*, 204 Ariz. 267, ¶ 14, 63 P.3d 298, 301 (App. 2003). The petitioner bears the burden of demonstrating the ALJ erred. *Bergstresser v. Indus. Comm’n*, 118 Ariz. 155, 157, 575 P.2d 354, 356 (App. 1978).

¶9 Under A.R.S. § 23-1061(F), the IC must send a notice of the AMW and the basis for the calculation to the claimant. Under A.R.S. § 23-947(A), if the claimant

wishes to dispute the AMW, the claimant must request a hearing within ninety days after the notice is sent. That period does not begin to run until the notice is sent to the claimant's "last known and correct address." *Jaramillo v. Indus. Comm'n*, 203 Ariz. 594, ¶ 9, 58 P.3d 970, 972 (App. 2002). If the claimant does not file a request for a hearing within ninety days, the AMW "is final and res judicata to all parties." § 23-947(B).

¶10 However, § 23-947(B)(1) allows the IC or any court to excuse a late filing if the recipient of the notice justifiably relies "on a representation by the commission, employer or carrier" and exercises "reasonably diligent efforts to verify the representation." Additionally, under § 23-947(C), a late filing shall not be excused "if the person to whom the notice is sent . . . knew, or, with the exercise of reasonable care and diligence, should have know of the fact of the notice at any time during the filing period." Thus, a person seeking an exception to the general rule has an unconditional duty of reasonable diligence, which we have held includes an attempt to verify the accuracy of the notice. *See Chavis v. Indus. Comm'n*, 180 Ariz. 424, 428, 885 P.2d 112, 116 (App. 1994); *Borquez v. Indus. Comm'n*, 171 Ariz. 396, 399, 831 P.2d 395, 398 (App. 1991).

¶11 Although the IC originally sent the notice of AMW to the wrong address, the error was corrected and the IC remailed the notice to the correct address. The ninety-day period did not begin to run until the IC sent the notice to the correct address on February 2, 2011. *Jaramillo*, 203 Ariz. 594, ¶ 9, 58 P.3d at 972. But Hayes did not file her request for a hearing until March 8, 2012, over a year later, and well outside the

ninety-day period. However, she did call Connie Owens, her case manager at the insurance company, at some point between receiving the notice and filing her request for hearing. Without discussing the AMW, Owens told Hayes the amount of a check she had received was a miscalculation and not to worry about it.

¶12 Hayes claims her late filing should be excused because she reasonably relied on the IC's representation in the notice of AMW that the determination was already final when she received it. But § 23-947(B)(1) requires that a claimant make "reasonably diligent efforts to verify the representation," and the ALJ found Hayes made no attempt to verify the date listed on the AMW or the period for appeal. *See Chavis*, 180 Ariz. at 428, 885 P.2d at 116 (claimant had duty to inquire whether average monthly wage determination included overtime). The record supports that finding. Based on that finding, the ALJ could conclude Hayes made no reasonably diligent effort to verify the representation contained in the notice she received. A reasonable person, upon not receiving a notice with an October date until February of the following year, would at least have contacted the IC or the carrier to verify that the date was correct or to clarify the period during which she could request a hearing.

¶13 Additionally, the September 27, 2010 Notice of Claim Status informed Hayes of the carrier's calculation of the AMW, that it would be reviewed by the IC within thirty days, and that she could appeal by contacting the IC. Hayes never contacted the IC to inform them she had not received this document. Although Hayes claims she did not receive this notice, the ALJ found that claim not to be credible. The record

supports that finding. She received all other correspondence and compensation checks sent to her at the address of the notice, including the check that was enclosed with the September 27 Notice she claims not to have received. On these facts, the ALJ could reasonably conclude that Hayes knew or should have known of the AMW during the ninety-day filing period, and therefore § 23-947(C) precluded relief from the AMW calculation.

¶14 Alternatively, Hayes argues she reasonably relied on the representation by Owens from the insurance company that the amount of her check was a miscalculation, and that she therefore meets the requirements of § 23-947(B)(1). But, as stated above, § 23-947(B)(1) requires that a claimant make “reasonably diligent efforts to verify the representation.” During her phone call with Owens, Hayes did not ask any questions about the notice of AMW or the time period for appeal, instead stating only that “[she] received a check that didn’t make sense to [her]” and asking how the carrier had calculated the amount of the check. Hayes made no attempt to contact the IC. Instead, she received and deposited checks with the allegedly incorrect amount for seventeen months before attempting to bring a challenge. The ALJ could reasonably conclude, as she did, that this did not constitute “reasonably diligent efforts to verify the representation.” § 23-947(B)(1).

¶15 Hayes also argues that her late filing should be excused under § 23-947(B)(3), which allows the IC or any court to excuse a late filing if “[t]he person to whom the notice is sent shows by clear and convincing evidence that the notice was not

received.” But Hayes testified that she did receive the remailed notice of AMW in February or March 2011. Therefore her late filing cannot be excused under this subsection. Accordingly, the ALJ did not err in finding Hayes’s request for hearing was untimely.

### **Due Process**

¶16 Hayes next argues the notice she received did not satisfy the constitutional requirements of due process, relying solely on *Iphaar v. Indus. Comm’n*, 171 Ariz. 423, 426-27, 831 P.2d 422, 425-26 (App. 1992).

¶17 In *Iphaar* we stated “[t]he type of notice that due process requires is that which is reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.” *Id.* at 426, 831 P.2d at 425. In that case, the claimant was able to establish by clear and convincing evidence that he had never received any notice of the IC’s decision in his case and his right to request a hearing, and the court found that the denial of his request for a hearing based on his failure to timely file therefore violated his right to due process. *Id.*

¶18 Here, Hayes testified that she did receive the notice of AMW in February or March 2011, the ALJ found she had received the September 27 notice of claim status, and so she received the notice the court in *Iphaar* found lacking. And Hayes has not cited any authority for the proposition that due process requires specific notice of the appeal period. The notice she received advised her of the pendent action—the



determination of her monthly wage—and afforded her an opportunity to be heard, and that is all that due process requires. *Id.* Hayes’s right to due process was not violated.

### **Res Judicata**

¶19 Hayes also claims that, because the notice she received was ambiguous and misleading, it cannot be given res judicata effect, citing *Best v. Indus. Comm’n*, 14 Ariz. App. 221, 224, 482 P.2d 470, 473 (1971), and *Bernard v. Indus. Comm’n*, 24 Ariz. App. 136, 139, 536 P.2d 705, 708 (1975). In *Best* and *Bernard*, the notices involved were facially contradictory—the claimants in those cases were informed that their claims were being terminated and also that their claims were accepted. *Best*, 14 Ariz. App. at 223, 482 P.2d at 472; *Bernard*, 24 Ariz. App. at 137-38, 536 P.2d at 706-07. Because the notices contained such contradictory information, they essentially gave the claimants no notice at all. *Best*, 14 Ariz. App. at 223, 482 P.2d at 472; *Bernard*, 24 Ariz. App. at 137-38, 536 P.2d at 706-07. Hayes’s notice had no such facial incongruity. It gave her effective notice of the status of her claim and what she could do to appeal the determination, was not ambiguous, and therefore could be given res judicata effect.

### **Equal Protection**

¶20 Hayes last argues that her rights to Equal Protection were somehow violated by the ALJ’s denial of her request for a hearing. Because she did not present this argument to the ALJ, we do not consider it. See *T.W.M. Custom Framing v. Indus. Comm’n*, 198 Ariz. 41, ¶ 4, 6 P.3d 745, 748 (App. 2000) (“this [c]ourt generally will not consider on appeal issues not raised before the IC”).

## Conclusion

¶21 For the foregoing reasons, we affirm the decision of the ALJ.

*/s/ Joseph W. Howard*

---

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

*/s/ Garye L. Vásquez*

---

GARYE L. VÁSQUEZ, Presiding Judge

*/s/ Michael Miller*

---

MICHAEL MILLER, Judge