IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARK PERKINS,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

MARICOPA UNIFIED SCHOOL DISTRICT 20,
Respondent Employer,

THE ARIZONA SCHOOL ALLIANCE FOR WORKERS COMPENSATION,
Respondent Insurer.

No. 2 CA-IC 2021-0003
Filed May 3, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Act. 10(k).

Special Action – Industrial Commission
ICA Claim No. 20192740717
Insurer No. 2019000989A
Michelle Bodi, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Mark Perkins, Tucson
In Propria Persona

The Industrial Commission of Arizona, Phoenix
By Gaetano Testini, Chief Legal Counsel
Counsel for Respondent

Wright Welker & Pauole PLC, Phoenix
By Linnette Flanigan and Shannon Lindner
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

S T A R I N G, Vice Chief Judge:

¶1 In this statutory special action, Mark Perkins challenges the Industrial Commission's workers' compensation award, primarily arguing the administrative law judge (ALJ) erred in calculating his average monthly wage (AMW). For the following reasons, we affirm the award.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the ALJ's award and, in doing so, defer to the ALJ's factual findings. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2 (App. 2012). In September 2019, Perkins filed a workers' compensation claim alleging he had sustained back and leg injuries while working as a security guard for the Maricopa Unified School District. Perkins asserted his symptoms might have been related to the increased number of fights he was required to stop, as well as an incident in which a guest pushed past him while trying to reenter the high school football stadium. He listed September 6, 12, and 13 as possible dates of injury.

¶3 In March 2020, the Industrial Commission issued a notice setting Perkins's AMW at $3,771.89 based on his actual earnings from July 19, 2019, through September 5, 2019. Perkins requested a hearing, stating he believed his AMW was "set too low." Before the hearing, the parties submitted to the ALJ their positions regarding establishment of Perkins's AMW. The school district and its insurance carrier asserted that because Perkins's wages in the thirty days prior to his injury were "artificially

inflated" based on overtime work he had performed as a security guard at football games, his AMW should be calculated using his wages from the year before the date of injury to "take[] into account his fluctuating hours" and an increase in his hourly pay rate. However, Perkins claimed that, based on his compensation for all work performed for the school district in different capacities throughout the school year and summer months, as well as the "9 month contract" under which he was employed, he was entitled to the maximum rate allowable.

¶4 At the hearing, the payroll coordinator for the school district testified Perkins was employed as a security guard pursuant to a work agreement that was based on a "nine-month work calendar." Perkins testified that he typically worked approximately forty hours per week during school hours and was paid based upon the hours he actually worked. Evidence showed he had received a pay raise for the 2019-2020 school year. Perkins further testified that he "sometimes" had signed up to work overtime as a security guard at extracurricular events and that, approximately three to four years prior, he had begun working as a painter for the school district during the summer at a lower hourly rate than the one he earned as a security guard. He also explained that, "for the most part," he could decide "how much or how little" he worked during the summer months. The work agreement did not govern this additional work.

¶5 In its "Decision Upon Hearing and Findings and Award Setting Average Monthly Wage," the ALJ found that Perkins "worked year-round for the school district and therefore . . . the Work Agreement governed only *some* of [his] earnings." Accordingly, she concluded it was "appropriate to consider [Perkins]'s earnings over the calendar year prior to his industrial injury, so that the AMW calculation considers all work [he] performed for the school district and his raise for the 2019-20 school year," and set his AMW at $3,226.83. Upon review, the ALJ affirmed her decision regarding calculation of Perkins's AMW. Perkins subsequently initiated this statutory special action. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

Discussion

¶6 Perkins argues the ALJ made several errors during the hearing and in setting his AMW, including permitting defense counsel to make an "improper motion to change" his date of injury, "encouraging/leading defense counsel to change [a] lay witness to [an] employer representative," failing "to properly consider the key testimony of [a] lay witness," failing to consider applicable case law, and ultimately

calculating his AMW on a twelve-month basis instead of a nine-month basis. Further, he contends the ALJ erred "by omitting to rule on underpayment of benefits, or back-pay in the award," and "by not ordering defense counsel to forward [him] a copy of the deposition that counsel entered into evidence when she questioned [him] about statements in the deposition."

¶7 Our review is "limited to determining whether or not the [ALJ] acted without or in excess of [her] power" and whether any findings of fact support the award. A.R.S. § 23-951(B). The ALJ is responsible for resolving all conflicts in the evidence and determining credibility, *Henderson-Jones v. Indus. Comm'n*, 233 Ariz. 188, ¶ 9 (App. 2013), and we will "uphold an ALJ's factual findings if they are reasonably supported by the evidence," *Munoz v. Indus. Comm'n*, 234 Ariz. 145, ¶ 9 (App. 2014). We review questions of law de novo. *SCF Gen. Ins. Co. v. Indus. Comm'n*, 236 Ariz. 545, ¶ 2 (App. 2015).

¶8 As an initial matter, Perkins fails to meaningfully develop and cite pertinent legal authority in support of several of his arguments. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) ("An 'argument' . . . must contain . . . [a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies."); Ariz. R. P. Spec. Act. 10(k) (except as otherwise provided, Arizona Rules of Civil Appellate Procedure apply to review of Industrial Commission awards). These arguments—that the ALJ "acted biased . . . as a result of changing . . . [a] la[y] witness to employee representative" and that he was "underpaid bi-weekly and monthly benefits" because his AMW did not account for living expenses, spousal maintenance, groceries, mortgage payments, and inflation—are therefore waived.[1] *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2 (App. 2007) (failure to develop and support arguments on appeal waives review of those issues). Although Perkins's argument that the ALJ improperly averaged his earnings by 365 days rather than 189 days is similarly undeveloped, in

[1]Although appearing in propria persona, Perkins is "held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributed to a qualified member of the bar," and he "is entitled to no more consideration than if he had been represented by counsel." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441 (App. 1983).

the exercise of our discretion, we nevertheless address the merits of this claim. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984).

¶9 Arizona's workers' compensation law provides that injured workers are entitled to benefits based on their AMW at the time of injury. A.R.S. § 23-1041(A). The term "monthly wage," as defined in § 23-1041(G), is "the average wage paid during and over the month in which the employee is . . . injured." Although "[w]ages earned during the thirty days preceding an industrial injury are the presumptive average monthly wage," an ALJ "has broad discretion to use an expanded wage base when the presumptive base does not realistically reflect earning capacity." *Morse v. Indus. Comm'n*, 213 Ariz. 575, ¶ 8 (App. 2006). "Justifications for using an expanded wage base include intermittent employment, seasonal employment, or unrepresentative wages during the month before the injury." *Id.*

¶10 Because the "goal of the [Workers' Compensation] Act is 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). The burden of proving AMW is on the worker, *Morris v. Indus. Comm'n*, 81 Ariz. 68, 74 (1956), and an "ALJ has discretion to choose the appropriate formula for calculating the average monthly wage" so that it most closely represents the injured worker's monthly earning capacity, *Munoz*, 234 Ariz. 145, ¶ 9 (quoting *Morse*, 213 Ariz. 575, ¶ 9). "[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." *Miller v. Indus. Comm'n*, 113 Ariz. 52, 54 (1976); *see also Sw. Rest. Sys. v. Indus. Comm'n*, 170 Ariz. 433, 436 (App. 1991) ("objective characteristics of . . . employment are dispositive" under *Miller*); *Stanton v. Indus. Comm'n*, 116 Ariz. 1, 2-3 (1977) (applying *Miller* standard without regard to applicability of § 23-1041(B)).

¶11 Perkins does not challenge the ALJ's use of an expanded wage base. Rather, Perkins's argument, as we understand it, is that because he "did not have work available to [him] 365 days in 2019" and "only worked 3 extra days in May 2019, outside of contract," the ALJ erred in averaging his income by 365 days instead of 189 days—the number of days set out in his work agreement. Supporting his argument, Perkins asserts that contrary to the ALJ's conclusion, *Powell v. Industrial Commission*, 104 Ariz. 257 (1969), "should be admissible and strongly considered" with regard to

calculation of his AMW.[2] In *Powell*, our supreme court concluded the AMW of a teacher who had been injured within the scope of her nine-month employment contract was properly calculated by dividing the amount of the contract by nine months rather than twelve months. *Id.* at 258, 261, 263. In reaching this conclusion, the court considered the teacher's ability to work for another employer during the summer months and the fact that the other employer would have been obliged to provide compensation if she had been injured while working for it. *Id.* at 263. *Powell* is inapplicable to the facts of Perkins's case.

¶12 *Powell* involved an employment contract for a nine-month term under § 23-1041(C),[3] which provides, in relevant part:

> If the employee is working under a contract by which the employee is guaranteed an amount per diem or per month, notwithstanding the contract price for such labor, the employee . . . shall be entitled to receive compensation on the basis only of the guaranteed wage as set out in the contract of employment, whether paid on a per diem or monthly basis . . . .

104 Ariz. at 261, 263. Perkins was not employed by the school district under such a contract. Instead, he was employed pursuant to a "Notice of Indefinite Term Appointment," which provided that Perkins was an "at will" employee to be paid at an hourly rate. Testimony at the hearing indicated Perkins's "work agreement" for his security guard position differed from a teacher's contract in that "[t]eacher contracts are based on salarie[s] from a beginning date to an end date," while "[w]ork agreements are based on an hourly rate for the work calendar that was offered for the[] position," with pay "adjusted based upon the number of hours . . . actually work[ed]." In analogizing his work agreement to the employment contract in *Powell*, Perkins contends his agreement "along with the school year

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[2]Perkins appears to make a similar assertion regarding *Bell v. Industrial Commission*, 236 Ariz. 478 (2015), but fails to set forth any discernible legal argument demonstrating *Bell*'s applicability to the facts of this case. *See* Ariz. R. Civ. App. P. 13(a)(7)(A); *Polanco*, 214 Ariz. 489, n.2.

[3]This subsection has since been amended with minor stylistic changes. *See* 2007 Ariz. Sess. Laws, ch. 271, § 1.

combined together create a beginning and end date," thereby "plac[ing] greater emphasis on the 9 month 189-day (hourly) work Agreement." But this argument fails to consider the fact that the school district employed Perkins as a painter during the summer.

¶13 Relying on *Pettis v. Industrial Commission*, 91 Ariz. 298 (1962), Perkins asserts that because the payroll coordinator testified he had worked as a painter on three days in May 2019 but had not done "any painting after May 30th, 2019," the summer months preceding his injury should be excluded when calculating his AMW. In *Pettis*, our supreme court recognized that an expanded wage base should not include periods when a worker is unable to work due to factors outside the worker's control. *See id.* at 303 (AMW calculation should have excluded period during which employee could not work due to employer shutdown). But Perkins does not point to any evidence in the record establishing he was unable to work during the summer for reasons outside of his control. Indeed, he testified he "had summer work available" to him and "could decide how much or how little" he worked. *See Miller*, 113 Ariz. at 54.

¶14 The ALJ's decision to use an expanded wage base of 365 days is reasonably supported by the evidence. *See Munoz*, 234 Ariz. 145, ¶ 9. Consideration of the full 365 days before the date of injury provided a true reflection of Perkins's earning capacity because it took into account his wages from all work performed for the school district during that year, including his additional work as a security guard and summer work as a painter, as well as the pay raise he received for the 2019-2020 school year. Indeed, Perkins requested that the ALJ include his income for his work as a painter in her calculation of his AMW "based on [his] continuous ability to work over the summer months." As such, Perkins's related argument that the award "falls short of the Bureau of Labor Statistics . . . Employment Cost Index" because it was not "based on setting [his] AMW at the maximum allowable amount under" § 23-1041(E) and A.A.C. R20-5-165 also fails.

¶15 Additionally, Perkins claims the ALJ erred in considering defense counsel's "motion . . . to change [his] date of injury . . . from September 13, 2019 to September 6, 2019" "without reviewing all relevant evidence."[4] However, as the respondents point out in their answering brief,

[4]In support of his argument, Perkins cites Rules 7.1 and 26, Ariz. R. Civ. P. These rules are inapplicable in workers' compensation cases. *See* A.R.S. § 23-921(B) ("The commission may make and declare all rules and regulations which are reasonably required in the performance of its duties,

no such motion was made. Moreover, the record shows that at the hearing, both parties agreed to use September 6, 2019, as the date of injury, and Perkins concedes as much in his opening brief. *See* A.A.C. R20-5-152(B) ("A stipulation is binding upon the parties unless a presiding administrative law judge or the Commission grants the parties permission to withdraw the stipulation."). The evidence supports this stipulation.

¶16 To the extent Perkins argues defense counsel improperly referred to his deposition testimony during the hearing, any such argument is waived because he did not object to this reference. *See Arellano v. Indus. Comm'n*, 25 Ariz. App. 598, 599 (1976). Further, Perkins's argument that the ALJ erred in failing to order defense counsel to provide him with a copy of his deposition following this reference is not supported by the authority cited in his opening brief. Perkins cites A.A.C. R20-5-109 for the proposition that "[i]f a party or an administrative law judge considers a document contained in a Commission claims file, including a transcript of a prior proceeding, necessary or appropriate for hearing purposes, the administrative law judge shall receive a copy of the document into evidence if the document is otherwise admissible."[5] However, he concedes that "there was no evidence of a deposition in the claims file." Perkins's argument fails.

Disposition

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

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including but not limited to rules of practice and procedure in connection with hearing and review proceedings."); *Transcon. Bus Sys., Inc. v. Indus. Comm'n*, 71 Ariz. 209, 210, 211 (1950) (parties to workers' compensation matters "are not bound by the superior court rules of procedure but rather by the rules of procedure adopted by the Commission").

[5]Again, Perkins cites Rule 26, Ariz. R. Civ. P., in support of his argument. As noted, this rule is inapplicable in workers' compensation cases. *See* § 23-921(B); *Transcon. Bus Sys.*, 71 Ariz. at 210, 211.