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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEBORAH PHOENIX, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, PRECISION SHOOTING EQUIPMENT, INC., Respondent Employer, SCF ARIZONA, Respondent Insurer.	2 CA-IC 2010-0007 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION – INDUSTRIAL COMMISSION

ICA Claim No. 20081780360

Insurer No. 0815789

Deborah P. Hansen, Administrative Law Judge

AWARD AFFIRMED

Deborah Phoenix — Tucson
In Propria Persona

The Industrial Commission of Arizona
By Andrew F. Wade — Phoenix
Attorney for Respondent

SCF Arizona
By James B. Stabler and Veronique Pardee — Tucson
Attorneys for Respondents
Employer and Insurer

E C K E R S T R O M, Judge.

¶1 In this statutory special action, petitioner employee Deborah Phoenix challenges the ruling of the administrative law judge (ALJ) denying her request for a hearing to contest the amount of her workers' compensation award. The ALJ concluded she lacked jurisdiction to hold a hearing on Phoenix's claim because Phoenix's request was untimely. Phoenix raises several arguments on review to this court. Principally, she maintains that her delayed filing should be excused or, in the alternative, that the notice she received regarding the amount of her award should be found void due to the industrial commission's failure to make an independent determination of her average monthly wage. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 Phoenix suffered an industrial accident to her thumb in June 2008 and filed an application for compensation. At the time of her injury, she was employed by the respondent employer Precision Shooting Equipment, Inc. On July 3, the respondent insurer SCF Arizona sent a notice of claim status accepting Phoenix's claim along with a separate form calculating her average monthly wage as $506.43. The industrial

commission issued a notice of average monthly wage several weeks later, on July 22, 2008, in which it, too, determined her average monthly wage to be $506.43. The notice stated, in part:

> 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 Industrial Commission listed below within ninety (90) days after the date of mailing of this notice pursuant to A.R.S. [§§] 23-941 and 23-947. If no such request for hearing is received within that ninety day period, this notice is final.

SCF's notice contained similar language.

¶3 Over a year later, on September 25, 2009, Phoenix filed a request for a hearing. She filed another request for a hearing on October 29, 2009, clarifying that she wished to dispute the average monthly wage figures on which her permanent disability benefits were based. SCF argued that because the average monthly wage notice had not been challenged in a timely manner, the ALJ lacked jurisdiction to consider the issue.

¶4 The ALJ set a hearing in December 2009 to address the threshold issue of its jurisdiction. Phoenix admitted at the hearing that she had received the commission's notice of average monthly wage in July 2008. She also testified she had not read the entire notice. But she believed she had diligently pursued the issue because she had made a telephone call to SCF in July 2008 in an unsuccessful attempt to adjust her average monthly wage upward. Phoenix further testified that when she called the industrial commission in November 2009, she was informed by the official who had signed the notice of average monthly wage, Shirley Box, that Box "did not complete any independent calculation."

¶5 The ALJ found Phoenix's late filing was not excusable under § 23-947(B). The ALJ therefore concluded she lacked jurisdiction to consider the average monthly wage determination and denied Phoenix's request for a hearing. This decision was affirmed after Phoenix filed a summary request for administrative review. We have jurisdiction to review the ALJ's ruling pursuant to A.R.S. § 23-951 and Rule 10, Ariz. R. P. Spec. Actions.

Discussion

¶6 "We deferentially review the ALJ's factual findings but independently review [her] legal conclusions." *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004). Because an ALJ essentially exercises judicial functions, we review an ALJ's jurisdiction in the same manner as we would review the jurisdiction of a court. *See Kasalica v. Indus. Comm'n*, 65 Ariz. 28, 30-31, 173 P.2d 636, 638 (1946) (concluding same jurisdictional principles apply to industrial commission as to courts). Jurisdiction is ultimately a question of law that we review de novo, but when a judge's or hearing officer's factual findings affect her jurisdiction, we will defer to those factual determinations so long as they are supported by the record and are not intertwined with the merits of the case. *See Mitchell v. Gamble*, 207 Ariz. 364, ¶ 6, 86 P.3d 944, 947 (App. 2004); *Swichtenberg v. Brimer*, 171 Ariz. 77, 82, 828 P.2d 1218, 1223 (App. 1991); *see also Asarco Inc. v. Indus. Comm'n*, 204 Ariz. 118, ¶ 7, 60 P.3d 258, 260 (App. 2003) ("In the absence of a factual dispute, we review a challenge to the finality of a Commission notice de novo.").

Excusable Delay

¶7 An employee's average monthly wage is calculated pursuant to A.R.S. § 23-1041 and serves as the basis for computing the employee's compensation for an industrial injury. Under A.R.S. § 23-1061(F), an employee must be notified of the average monthly wage determinations made both by her employer's insurer and by the industrial commission. If the employee wishes to challenge those determinations, she must do so by filing a timely request for a hearing or by demonstrating a legally sufficient reason for her failure to file a timely request. *See Town of El Mirage v. Indus. Comm'n*, 127 Ariz. 377, 381, 621 P.2d 286, 290 (App. 1980). Section 23-947(A) specifies, in relevant part, that the deadline for requesting a hearing is ninety days after notice is sent pursuant to § 23-1061(F). A tardy request may be excused under the limited circumstances set forth in A.R.S. § 23-947(B), such as when

> [t]he person to whom the notice is sent does not request a hearing because of justifiable reliance on a representation by the commission, employer or carrier. . . . "[J]ustifiable reliance" means that the person to whom the notice is sent has made reasonably diligent efforts to verify the representation, regardless of whether the representation is made pursuant to statutory or other legal authority.

§ 23-947(B)(1). If an employee's failure to file a request within this timeframe is not excused, "the determination by the commission . . . [or] insurance carrier . . . is final and res judicata to all parties." § 23-947(B). The industrial commission then lacks jurisdiction to consider the claim any further. *See Roman v. Ariz. Dep't of Econ. Sec.*, 130 Ariz. 581, 583-84, 637 P.2d 1084, 1086-87 (App. 1981).

¶8 Phoenix contends she demonstrated justifiable reliance because she "was totally unaware of the laws and statutes that regulate the [workers' compensation] system" and she had made an effort to correct the average monthly wage through her telephone call to SCF. The thrust of her argument appears to be that her employer, SCF, and the industrial commission had statutory duties to inform her about the workers' compensation process, to compile accurate information regarding her claim, and to correctly calculate the amount of compensation she was owed. Due to their collective failure to execute their duties, she contends she was denied the information necessary to navigate through this process, and she was therefore justified in believing "the amount must be correct" and "resign[ing] [her]self to the fact."

¶9 We agree with the ALJ that Phoenix's failure to timely request a hearing to challenge the average monthly wage determination was not excused under § 23-947(B). Section 23-947(C) specifies that a late filing will not be excused based on justifiable reliance "if the person to whom the notice is sent . . . knew or, with the exercise of reasonable care and diligence, should have known of the fact of the notice at any time during the filing period." Here, Phoenix admitted she had received the commission's notice, she had failed to read it in its entirety, and she had not requested a hearing "because [she] was naïve." The commission's notice correctly advised her of her rights and the consequences of inaction. And although Phoenix testified her conversation with an SCF employee led her to conclude the average monthly wage figure "was already established and could not have been changed," she never alleged that SCF had provided her erroneous or misleading information. Thus, Phoenix's untimely filing was not the

result of any representation by SCF or the commission, *see* § 23-947(B)(1), but rather her own lack of knowledge, arising from her neglect in failing to read the entire notice and her failure to understand the legal significance of the notice.

¶10 A claimant's unfamiliarity with the relevant laws and rules does not excuse her untimely filing or justify her reliance on other parties' average monthly wage calculations. *See, e.g.*, *Borquez v. Indus. Comm'n*, 171 Ariz. 396, 397, 398, 831 P.2d 395, 396, 397 (App. 1991) (holding untimely filing not excused for claimant with ninth-grade education who did not know how average monthly wage calculated); *see also In re Marriage of Williams*, 219 Ariz. 546, ¶ 13, 200 P.3d 1043, 1046 (App. 2008) ("Parties who choose to represent themselves 'are entitled to no more consideration than if they had been represented by counsel' and are held to the same standards as attorneys with respect to 'familiarity with required procedures and . . . notice of statutes and local rules.'"), *quoting Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963).[1] Accordingly, the ALJ's determination that the late filing was not excused is supported both by the law and the record, and we have no statutory basis to disturb it.

Independent Determination

¶11 Phoenix next argues the industrial commission did not complete an independent wage calculation as required by A.R.S. § 23-1061(F), making the notice of

[1]Citing *Holler v. Industrial Commission*, 140 Ariz. 142, 146, 680 P.2d 1203, 1207 (1984), to support her argument that her reliance on the commission was justified, Phoenix overlooks the fact that the legislature amended § 23-947(B)(1) after *Holler* was decided and "expressly repudiated the interpretation of justifiable reliance adopted by the supreme court in its . . . *Holler* opinion." *Borquez*, 171 Ariz. at 398, 831 P.2d at 397; *see* 1987 Ariz. Sess. Laws 3d Spec. Sess., ch. 2, § 4.

average monthly wage null and void pursuant to *Mills v. Industrial Commission*, 23 Ariz. App. 28, 30, 530 P.2d 385, 387 (1975). In *Mills*, this court suggested that an average monthly wage determination could be challenged after the statutory deadline if "the Commission rubberstamped the carrier's calculations" rather than "ma[king] an independent determination as required by law." *Id.* at 31, 530 P.2d at 388.[2] Ultimately, the *Mills* court found the commission's determination was independent based on a memorandum in the commission's file indicating it had called the insurer and verified the past employment status of the claimant. *Id.*

¶12 The holding of *Mills* was soon limited by *Stemkowsi v. Industrial Commission*, 27 Ariz. App. 457, 458-59, 556 P.2d 11, 12-13 (1976). There, we clarified that the industrial commission need not generate any documents beyond the signed notice of average monthly wage in order to establish that it has performed its duty to make an independent determination. *Id.* We further held that "[i]n order to contest the correctness or appropriateness of the methods used by the Commission in arriving at its average monthly wage determination, a party must timely file a request for hearing, or alternatively, present reasons which would justify an untimely filing of such request." *Id.*

¶13 Here, there is no dispute that the notice of average monthly wage was signed by an authorized representative of the commission and purported to represent

[2]*Mills* used the term "rubberstamp[ing]" in its colloquial sense, meaning the commission could not adopt an insurer's average monthly wage determination without conducting its own analysis. 23 Ariz. App. at 31, 530 P.2d at 388. Officials of the commission may literally use a rubber stamp to put their signatures on the commission's official documents. *See Benites v. Indus. Comm'n*, 105 Ariz. 517, 520, 467 P.2d 911, 914 (1970).

Phoenix's "Average Monthly Wage as independently determined by the Industrial Commission . . . ." It was therefore facially valid, not void. And because Phoenix's challenge to the commission's independent determination was untimely and unexcused, the issue of its propriety was not properly before the ALJ.

Additional Arguments

¶14 Phoenix's additional arguments attacking the ALJ's decision may be disposed of more briefly. Specifically, she claims (1) the notice of average monthly wage was void pursuant to *Roseberry v. Industrial Commission*, 113 Ariz. 66, 546 P.2d 802 (1976), because the notice is wholly unsupported by the record, *see Asarco Inc. v. Indus. Comm'n*, 204 Ariz. 118, ¶ 18, 60 P.3d 258, 261-62 (App. 2003); (2) "[t]he ALJ erred in stating that the industrial commission's erroneous notice of average monthly wage was based on inaccurate information"; (3) the "[r]equest for [h]earing filed 9/25/2009 is timely" because it was filed within ninety days from the July 2009 notice of permanent disability benefits; and (4) she is not precluded from belatedly challenging the average monthly wage determination because she did not have a financial incentive to do so earlier, *see Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 426-27, 880 P.2d 642, 646-47 (App. 1993).

¶15 Without deciding whether these enumerated arguments were properly preserved below or developed in this court, we note, first, that the commission was in possession of and entitled to rely upon the information provided by SCF when computing Phoenix's average monthly wage. *See Borquez v. Indus. Comm'n*, 171 Ariz. 396, 398-99, 831 P.2d 395, 397-98 (App. 1991); *Harris v. Indus. Comm'n*, 24 Ariz. App. 319, 321,

538 P.2d 406, 408 (1975); *Mills v. Indus. Comm'n*, 23 Ariz. App. 28, 31, 530 P.2d 385, 388 (1975). Second, Phoenix acknowledges this information was accurate; she merely contends her average monthly wage should have been based solely on the wages she had earned the month she was injured. The ALJ's statement regarding the accuracy of the information, therefore, is irrelevant. Third, because Phoenix's challenge concerned the average monthly wage determination made by SCF and the commission, her request for a hearing was time-barred despite the fact that it was made within ninety days of her permanent disability notice. *See Mills*, 23 Ariz. App. at 29, 31, 530 P.2d at 386, 388 (finding hearing request untimely as to average monthly wage determination even though request timely filed as to notice of permanent disability). Fourth, Phoenix admits that she had believed the average monthly wage determination was low and that she had attempted to correct the problem with SCF. She therefore had a financial incentive to timely request a hearing. She simply did not attempt to resolve the problem using the proper statutory procedures.

Disposition

¶16 For the foregoing reasons, we affirm the ALJ's decision denying Phoenix's untimely request for a hearing on the issue of her average monthly wage.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge