

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ANTHONY J. RODRIGUEZ,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

TRUEBLUE, INC.,
Respondent Employer,

ESIS/ ACE USA (AZ),
Respondent Insurer.

No. 2 CA-IC 2015-0010
Filed March 10, 2016

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NOT FOR PUBLICATION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. Actions 10(k).*

Special Action - Industrial Commission
ICA Claim No. 20132980009
Insurer No. 59844982726592812
Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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COUNSEL

Anthony J. Rodriguez, Texas City, Texas
In Propria Persona

The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent

Lundmark, Barberich, LaMont & Slavin, P.C., Tucson
By Eric W. Slavin
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this statutory special action, Anthony Rodriguez challenges an award for workers' compensation benefits, claiming the administrative law judge (ALJ) erred in calculating his average monthly wage. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the ALJ's award. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2, 275 P.3d 638, 640 (App. 2012). In October 2013, Rodriguez, whose "home base" was in Illinois, suffered a spinal-cord injury while working for TrueBlue, Inc., an employment agency that had placed him with Bombardier in Tucson as an aircraft maintenance technician.¹ Rodriguez's claim for workers' compensation benefits

¹ PlaneTechs, which is listed on Rodriguez's employment paperwork, is a division of TrueBlue that specifically works with the aircraft industry.

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was accepted and, in January 2014, the Industrial Commission established Rodriguez's average monthly wage as \$2,788.54, based on his \$15 hourly pay. Later that year, TrueBlue and its insurer, ESIS/ACE USA, determined that Rodriguez's injury resulted in a permanent disability entitling him to supportive-care benefits for life.

¶3 In January 2015, Rodriguez filed a request for a hearing, arguing the average monthly wage failed to include his \$480 weekly per diem allowance.² At the hearing, in support of his argument, Rodriguez relied on A.R.S. § 23-1041(C) and also asserted that similar employees not working under a contract like his earned considerably more than \$15 per hour. In its decision, the ALJ concluded Rodriguez's "average monthly wage was appropriately established at \$2,788.54." The ALJ reasoned that Rodriguez's \$480 weekly per diem should not be included because it "was designed to cover [his] additional living expenses to maintain a temporary second residence in Tucson while he worked here." The ALJ also determined that § 23-1041(C) does not apply because it "covers a different scenario where there is a contracted wage that can be supplemented with performance bonuses."

¶4 Rodriguez filed a request for review and attached copies of his 2012 and 2013 earning statements to show that his average monthly wage should be higher. The ALJ affirmed his prior decision. This petition for special action followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Actions.

²Although Rodriguez did not timely file his request for a hearing, *see* A.R.S. § 23-947(A), TrueBlue declined to raise the affirmative defense because of the severity of Rodriguez's injury. *See Stange Co. v. Indus. Comm'n*, 120 Ariz. 241, 243-44, 585 P.2d 261, 263-64 (App. 1978) (failure to raise untimely filing results in waiver).

Discussion

¶5 Rodriguez maintains the “award is wrong” because “[t]he average monthly wage was not properly established.”³ We review the ALJ’s factual findings for an abuse of discretion. *United Metro v. Indus. Comm’n*, 117 Ariz. 47, 49, 570 P.2d 818, 820 (App. 1977). However, we review the ALJ’s legal conclusions de novo. *Hahn v. Indus. Comm’n*, 227 Ariz. 72, ¶ 5, 252 P.3d 1036, 1038 (App. 2011).

¶6 Workers’ compensation benefits are based on “the employee’s average monthly wage at the time of injury.” § 23-1041(A). But “not every payment made to an employee constitutes wages for purposes of computing the injured employee’s average monthly wage.” *Ins. Co. of N. Am. v. Indus. Comm’n*, 116 Ariz. 21, 24, 567 P.2d 337, 340 (App. 1977). “Wages” generally means “compensation for services rendered.” *Moorehead v. Indus. Comm’n*, 17 Ariz. App. 96, 99, 495 P.2d 866, 869 (1972). The claimant bears the burden of establishing the average monthly wage. *Zapien v. Indus. Comm’n*, 12 Ariz. App. 334, 336, 470 P.2d 482, 484 (1970).

¶7 Rodriguez contends the ALJ erred in excluding his \$480 weekly per diem from his average monthly wage. As he did below, Rodriguez relies on § 23-1041(C) and seems to suggest the per diem must be included because his \$15 hourly wage was “less than wages paid for similar work not under contract.”

³Rodriguez’s opening brief does not contain citations to the record or authority to support his argument. *See* Ariz. R. Civ. App. P. 13(a); *see also* Ariz. R. P. Spec. Actions 10(k) (Arizona Rules of Civil Appellate Procedure apply to review of Industrial Commission awards). Thus, we could deem Rodriguez’s argument waived. *See Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007). However, because we prefer to resolve cases on their merits, we address his argument. *See Adams v. Valley Nat’l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984).

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¶8 Section 23-1041(C) provides as follows:

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, but in no event shall the basis be less than the wages paid to employees for similar work not under contract.

However, Rodriguez's reliance on § 23-1041(C) is misplaced because the "per diem" discussed therein must constitute "wages." See *Barron v. Ambort*, 64 Ariz. 209, 214, 167 P.2d 925, 927-28 (1946) (purpose of § 23-1041(C) is "to provide a definite measure of wages for a contract worker"); see, e.g., *Fletcher v. Indus. Comm'n*, 120 Ariz. 571, 575-76, 587 P.2d 757, 761-62 (App. 1978) (discussing application of § 23-1041(C) in context of guaranteed pay and bonus earnings); see also *Lazarus v. Indus. Comm'n*, 190 Ariz. 301, 303, 947 P.2d 875, 877 (App. 1997) (discussing "wages" under § 23-1041 generally).

¶9 "[W]ages' do not include amounts paid to the employee to reimburse him for employment-related expenditures of a nature which would not be incurred but for his employment." *Moorehead*, 17 Ariz. App. at 99, 495 P.2d at 869. For example, in *Moorehead*, this court affirmed the exclusion of the claimant's travel allowance from his average monthly wage because "there was no residual financial gain to [the claimant]." 17 Ariz. App. at 100, 495 P.2d at 870. In other words, an employee must receive "'real economic gain'" from an amount received for it to be considered part of his or her average monthly wage. *Lazarus*, 190 Ariz. at 303, 947 P.2d at 877, quoting *Harvey Auto Supply, Inc. v. Indus. Comm'n*, 25 Ariz. App. 274, 276, 542 P.2d 1154, 1156 (1975).

¶10 Here, the record supports the ALJ's finding that the \$480 weekly per diem was for Rodriguez's living expenses in Tucson

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and not compensation for services. *See Moorehead*, 17 Ariz. App. at 99, 495 P.2d at 869. As part of his employment, Rodriguez signed a “Certification of Per Diem Substantiation Requirements,” in which he agreed that the per diem was “solely to reimburse [him] for lodging, meal, and incidental expenses” incurred “in connection with the performance of services as a contract worker . . . while temporarily away from . . . [his] principal residence.” The document also explained that the “per diem allowance is not a wage.” At the hearing, Rodriguez testified that his “home base” was in Illinois and that, while working for Bombardier, he maintained his primary residence there and rented a house in Tucson.

¶11 Similar to *Moorehead*, 17 Ariz. App. at 100, 495 P.2d at 870, the parties contracted for TrueBlue to pay Rodriguez a per diem allowance to maintain a second house in Tucson while working for Bombardier. Rodriguez testified that the amount of that allowance was approximately equal to the amount of actual living expenses he incurred in Tucson. Thus, the per diem allowance provided no real economic gain to Rodriguez. *See Lazarus*, 190 Ariz. at 303, 947 P.2d at 877; *cf. Kerr v. Indus. Comm'n*, 23 Ariz. App. 106, 108, 530 P.2d 1139, 1141 (1975) (per diem allowance paid regardless of actual travel and which the employee could use for any purpose considered “a . . . form of compensation”). The ALJ therefore did not err in excluding Rodriguez’s \$480 weekly per diem from his average monthly wage.⁴ *See Hahn*, 227 Ariz. 72, ¶ 5, 252 P.3d at 1038; *United Metro*, 117 Ariz. at 49, 570 P.2d at 820.

¶12 Rodriguez also contends the ALJ erred in failing to consider his 2012 and 2013 earning statements when calculating his average monthly wage. However, the ALJ refused to consider these statements because Rodriguez did not provide them until his request for review. We cannot say the ALJ erred in doing so. *See*

⁴Rodriguez asserts that his \$480 weekly per diem “was not consistently paid” and asks us to order that the arrearage amount be paid. However, as the ALJ noted, that is not the issue here, where Rodriguez requested a hearing on his average monthly wage. *See* A.R.S. § 23-941(A) (party may request hearing concerning workers’ compensation claim).

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A.R.S. § 23-943(E) (review by ALJ based upon record); *Epstein v. Indus. Comm'n*, 154 Ariz. 189, 195, 741 P.2d 322, 328 (App. 1987) (review of award limited to record in existence at conclusion of last hearing).

Disposition

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