

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000814-WC

J. C. MALONE ASSOCIATES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-77082

RAMON SANFORD; THOMAS A. NANNEY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

EMBERTON, JUDGE: The primary issue in this appeal is whether the determination as to the average weekly wage of appellee, Ramon Sanford, conforms to the criteria for establishing average weekly wage set out in Kentucky Revised Statutes (KRS) 342.140. The Workers' Compensation Board affirmed the decision of the Administrative Law Judge that because Sanford had been on the job only a half day prior to his injury, the most accurate indication of his wage is the average earned by other employees performing similar service for the employer. Finding no error in the

Board's application of KRS 342.140(1)(f) to the facts presented by this appeal, we affirm.

The facts are not in dispute. At the time Sanford was hired by Malone Associates as a press machine operator, it was agreed he would receive a guaranteed base wage of \$8.13 per hour, plus additional per hour wages based on the output generated from his particular machine. Evidence was presented to the ALJ indicating that the typical hourly wage under this piece rate system for employees doing the same job as appellee was between \$10 and \$12 per hour. A sales analysis report setting out the earnings of other similarly situated employees at the plant calculated the median per hour wage for such workers to be \$11.03 per hour for a forty-hour work week. Malone Associates argued to the ALJ that although Sanford had the potential to make that amount of money, that wage was not guaranteed and thus Sanford's wage must be based on the guaranteed minimum of \$8.13. The ALJ disagreed stating, that because of his brief work tenure, Sanford was unable to establish a specific earning history in the job and that the guaranteed base pay did not accurately reflect what Sanford would have earned had he been able to continue working.

In its appeal to the Board, Malone Associates argued that because Sanford's base pay of \$8.13 was readily ascertainable and fixed, the ALJ should not have been permitted to speculate as to what his earnings would have been under the piece rate system. The Board reasoned, however, that because both parties agreed that Sanford's actual hourly wage was to be based on a combination of his base pay plus his output pay, both

components had to be considered in arriving at his average weekly wage. We are in complete agreement with the Board's analysis.

KRS 342.140(1)(f) provides for this very situation:

The average weekly wage of the injured employee shall be determined as follows:

(1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:

. . . .

(f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating the compensation shall be taken to the usual wage for similar services where the services are rendered by paid employees. (Emphasis added).

Because there is no way to determine the output pay component of Sanford's wage as he only worked one-half day, the ALJ correctly determined that his hourly wage was not ascertainable. Resort to subsection (1)(f) of the statute was not only appropriate; it was required. The evidence in this case clearly established the median hourly wage for employees doing the same work as Sanford, and thus the ALJ was not forced to employ "mere speculation" in arriving at Sanford's average weekly wage for purposes of the statute. The base pay plus output formula was more than an "expectation;" it was the agreed upon method of calculating Sanford's hourly wage. The Board correctly emphasized that the ALJ had to consider both components in arriving at Sanford's average weekly wage.

Malone Associates also complains of the calculation of the number of weeks Sanford is to receive permanent disability

benefits. Because it appears from the record that this matter was not presented to the Board for review, we will not consider it for the first time in this appeal.¹

The opinion of the Workers' Compensation Board is affirmed.

¹ Lost Mountain Mining v. Fields, Ky. App., 918 S.W.2d 232 (1996).

ALL CONCUR.

BRIEF FOR APPELLANT:

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SANFORD:

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