

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000389-WC

AFFORDABLE ALUMINUM, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
WC-98-70185

JAMES HOWARD COULTER;  
HON. J. LANDON OVERFIELD,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
REVERSING AND REINSTATING  
\* \* \* \* \*

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

BARBER, JUDGE: Appellant, Affordable Aluminum, Inc.

("Affordable"), seeks review of the Workers' Compensation Board's decision, reversing the ALJ's average weekly wage calculation, and remanding. For the reasons set forth below, we reverse the Board and reinstate the ALJ's decision.

The Appellee, James Howard Coulter ("Coulter"), injured his ankle on August 6, 1998, while installing siding for Affordable. The parties stipulated that Coulter was an independent contractor and there was workers' compensation

coverage on the date of injury. At the time of the injury, Coulter had worked for Affordable for less than 13 weeks.

Affordable contends that the Board erroneously interpreted and applied KRS 342.120, thereby miscalculating the average weekly wage. Coulter advises this appeal is Affordable's "fourth bite at the apple," his wage having been determined sufficient for maximum benefits at the arbitrator level, upon de novo review by the ALJ and upon appeal to the Board.

Prior to working for Affordable, Coulter had worked for Jason Maxwell. Maxwell was a subcontractor doing siding work for Affordable in the Bowling Green area following a hail storm. Subcontractors were paid \$65.00 per square of siding -- \$50.00 for installation of new siding and \$15.00 for removal of damaged siding. Coulter worked for Maxwell on a 40-60 split. Coulter worked for Maxwell for a couple of weeks. Thereafter, Coulter subcontracted directly with Affordable through one of its owners, Greg Tucker. Coulter put together a crew and worked for Affordable for 3 weeks before he was injured.

The ALJ found that:

Plaintiff presented evidence that he had paid a [helper] . . . named Jerry Field [sic] \$493.00 for the week ending July 31, 1998, and \$325.00 for the week ending August 6, 1998. This total of \$818.00 was paid to Mr. Fields out of the payments made to Plaintiff by Defendant Employer. This figure . . . is not in dispute. Plaintiff also agreed with wage records filed by Defendant Employer that he had been paid a total of \$3,748.02, and after the payment to Fields, was left with \$2,940.02 for the work he did as a subcontractor for the Defendant-Employer. This appears to have been payment for the period from July 17, 1998 through August 7, 1998. From the totality of the evidence,

however, it appears that \$535.97 of this, for the week ending July 17, 1998, was Plaintiff's portion of the amount paid to Jason Maxwell.

Plaintiff testified that prior to working for the Defendant Employer as a subcontractor he had done siding work in the Glasgow/Bowling Green area. He did this work by himself and apparently much of what he earned was in cash.

Defendant Employer deposed Greg Tucker . . . . [H]e agreed that subcontractors were paid \$65.00 per square for removal of damaged siding and installation of new siding. He also agreed that Plaintiff had been paid \$460.62 for the week ending August 7, 1998, \$1,760.40 for the week ending July 31, 1998 and \$1,001.03 for the week ending July 24, 1998. Plaintiff was paid \$535.97 for the week ending July 17, 1998, but that was paid to Plaintiff by Mr. Maxwell after Maxwell had received payment from Defendant Employer. However, the figure does not coincide with 40% of the amount paid to Maxwell. Introduced as exhibits to Mr. Tucker's deposition were . . . checks payable to Plaintiff from Defendant Employer . . . as follows:

July 27, 1998	-	\$1,001.03
August 03, 1998	-	\$1,000.00
August 03, 1998	-	\$ 760.40
August 10, 1998	-	\$ 460.62

. . . .

[At hearing], Plaintiff was . . . [asked if] he had gone to work for Defendant Employer in April [1998] and . . . [he responded] that he believed he hauled away some shingles . . . for which he was paid cash.

. . . .

Plaintiff testified that for the four 13 weeks periods [sic] immediately preceding his August 6, 1998 injury, siding work would have been available in the Bowling Green/Glasgow area but not in the quantity that resulted from the hail storm which caused the damage Defendant Employer was repairing. He testified that in the four quarters

immediately preceding the injury he had been working for a contractor doing siding work for which he was paid \$40.00 a square and was doing 20 to 25 squares per week. Plaintiff testified that was merely putting siding on and was not taking it off . . . . This [sic] gist of Plaintiff's testimony was that he would have earned this type of money had he been employed as a siding installer for the full 13 week calendar weeks immediately preceding the injury. There is no evidence in the record to contradict this.

The ALJ concluded that Coulter's average weekly wage on August 6, 1998 was \$800.31:

Plaintiff, as a siding contractor in the Glasgow/Bowling Green area, was capable of earning \$800.00 per week for the ten weeks prior to the time he became a subcontractor for Defendant Employer. This is based on Plaintiff's testimony which is un rebutted. I also have based it on the three weekly periods during which Plaintiff received checks in the amount of \$3,222.05 . . . from Defendant Employer and deducted from that \$818.00 which Plaintiff paid to Mr. Fields . . . . This would give Plaintiff a grand total for the 13 week period immediately preceding his injury of \$10,404.05 for an average weekly wage of \$800.31. Doubtless Defendant Employer will argue that Plaintiff was not earning \$800.00 for the two week period during which he worked with Mr. Maxwell and that he had paid another employee \$50.00. Plaintiff's testimony is credible that the other employee was given \$50.00 only as a parting gift and there is no sum certain in the evidence . . . as to what Plaintiff earned while he was working with Mr. Maxwell. For the amount of evidence at hand for the determination of this most complicated issue, this is the best I can do.

Affordable appealed to the Board contending that the ALJ erred in calculating the wage. On January 24, 2001, the Board rendered a unanimous opinion reversing and remanding:

It is well established that the goal of KRS 342.140(1)(d) and (e) governing the calculation of the average weekly wage of a

claimant employed for fewer than 13 weeks is to obtain a realistic reflection of the workers' earning capacity. Huff v. Smith Trucking, Ky., 6 S.W.3d 819 (1999). The computation of the average weekly wage for individuals such as Coulter who are employed for fewer than 13 weeks must take into consideration the unique facts and circumstances of each individual case. C & D Bulldozing v. Brock, Ky., 820 S.W.2d 482 (1991). KRS 342.140(1)(d) and (3) [sic] specifically stated [sic] as follows:

The average weekly wage of the injured employee at the time of the injury or last injurious exposure 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:

\* \* \*

(d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury.

(e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. (Emphasis added.) [By the Board.]

The Board held that the ALJ was correct in determining that KRS 342.140(1)(e) is the statutory provision that controls the

calculation of Coulter's average weekly wage; however, the Board disagreed with the manner in which the ALJ applied the statute. The Board believed that the ALJ had erroneously included Coulter's personal earnings *before* he became a subcontractor with Affordable. The Board explained that KRS 342.140(1)(e) required the ALJ to calculate Coulter's earnings by extrapolating the amount he would have earned, *had he been employed by Affordable for the full 13 weeks immediately preceding his injury*. The Board noted that it was undisputed that Affordable paid subcontractors, such as Coulter, \$65.00 per square. The Board stated:

[W]e believe the ALJ was vested with the authority to project those earnings based upon the actual earnings by Coulter for the three weeks he was employed by the petitioner, especially given the "unique facts which are present in this case." Huff v. Smith Trucking, Ky., 6 S.W.3d at 822. We therefore believe that the ALJ should have simply averaged Coulter's earnings for the weeks ending July 24, 1998; July 31, 1998; and August 7, 1998, inferring that said average, less labor paid by Coulter to Fields, would properly represent his average earning capacity for each week for the full 13 weeks prior to his date of injury. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985) and Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1997).

Ironically, Affordable prevailed in its attempt to reverse the ALJ's decision only to have the Board propose a slightly higher average weekly wage figure upon remand. Affordable now attempts to persuade us that the Board erred.

Affordable contends that Coulter did not work at all or - failed to offer proof of earnings - during some of the ten

weeks before he started working for Affordable. KRS 342.140(1)(e) does not require a showing that a claimant actually worked, or intended to work, in the thirteen weeks preceding the injury. Central Ky. Steel v. Wise, Ky., 19 S.W.3d 657 (2000). Affordable also argues that earnings Coulter would have made before the injury as an independent contractor cannot be included in his average weekly wage under Hale v. Bell Aluminum, Ky., 986 S.W.2d 152 (1998), on the theory that such earnings would be from "non-covered" employment. Despite some superficial factual similarities, Hale deals with a different issue of law and does not control.

Hale, a siding installer, subcontracted with Bell Aluminum to provide labor at \$52.00 a square. Hale maintained workers' compensation coverage for himself through Bell Aluminum via a paycheck deduction. Bell Aluminum was aware that Hale had his own siding business, Stephan & Son. Hale did not carry workers' compensation coverage on Stephan & Son. Hale worked on his own jobs in between those for which he was hired by Bell Aluminum.

Hale was injured working for Bell Aluminum. At issue was his average weekly wage. KRS 342.140(5) provides that "when the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his wages from all the employers shall be considered as if earned from the employer liable for compensation." The court held that Hale's earnings from his own business, Stephan & Son, were not from "covered employment";

thus, they could not be considered concurrent wages. The case *sub judice* does not involve concurrent wages. KRS 342.140(5) is not at issue here.

We agree with the Board that the ALJ was correct in determining that KRS 342.140(1)(e) is the applicable statutory provision for calculating Coulter's average weekly wage; however, we believe that the Board erred by misconstruing the ALJ's calculation. We do *not* agree that the ALJ included Coulter's actual personal earnings *before* he started working as a subcontractor for Affordable. Before Affordable, Coulter had worked for Jason Maxwell. The ALJ *did not* include Coulter's personal earnings with Maxwell:

Plaintiff's average weekly wage on August 6, 1998, was \$800.31 . . . . Doubtless Defendant Employer will argue that Plaintiff was not earning \$800.00 for the two week period during which he worked with Mr. Maxwell . . . [however]there is no sum certain in the evidence for a determination as to what Plaintiff earned while he was working with Mr. Maxwell.

The ALJ based his wage calculation on the three weeks immediately preceding the injury that Coulter actually worked for Affordable, evidence concerning the availability of work and what a siding installer could have earned in the area for the ten weeks before that:

In making this finding I have determined that Plaintiff, as a siding contractor in the Glasgow/Bowling Green area, was capable of earning \$800.00 per week for the ten weeks prior to the time he became a subcontractor for the Defendant Employer. **This is based on Plaintiff's testimony which is unrebutted.** (Emphasis added.)



In Huff v. Smith Trucking, supra at 822-23, the Supreme Court discussed the application of the statute and the sufficiency of wage evidence:

**KRS 342.140(1)(e) applies to injuries sustained after fewer than 13 weeks' employment.** It utilizes the averaging method set forth in KRS 342.140(1)(d) and attempts to estimate what the worker's average weekly wage would have been over a typical 13-week period in the employment by referring to the actual wages of workers performing similar work when work was available . . . the goal of KRS 342.140(d) and (e) is to obtain a realistic estimation of what the injured worker would be expected to earn in a normal period of employment . . . .

. . . .

[T]he computation of average weekly wage pursuant to KRS 342.140(1)(e) must take into consideration the unique facts and circumstances of each case . . . .

In view of the unique facts which are present in this case, **we conclude that the Board properly construed KRS 342.140(1)(e) as authorizing a consideration of evidence concerning the wages earned by timber cutters who worked for other employers in the area where claimant lived and concerning the availability of such work. We are persuaded that claimant's uncontradicted testimony sufficiently demonstrated that timber cutting work was available at \$75.00 per day in the area in which he resided.** (Emphasis added.)

Here, Coulter's injury was sustained after fewer than 13 weeks of work for Affordable. Workers' compensation coverage was stipulated. The ALJ properly considered evidence concerning the wages of siding installers for other employers in the area where Coulter lived and the availability of such work. We are persuaded that Coulter's unrebutted testimony sufficiently

demonstrated that siding work was available at \$40 per square, 20-25 squares a week, in the area in which he resided for the period in question. The ALJ's determination of the average weekly wage is based upon the correct statutory provision and has a substantial evidentiary foundation. The Board erred in reversing the ALJ's decision.

Accordingly, we reverse the decision of the Workers' Compensation Board and reinstate the opinion and award of the ALJ.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas A. U'sellis  
Louisville, Kentucky

BRIEF FOR APPELLEE, JAMES  
HOWARD COULTER:

Thomas W. Davis  
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