RENDERED: NOVEMBER 2, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001082-WC

AMERICAN NURSING CARE, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00209

DENEILYA UPTON;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, VANMETER, AND WINE, JUDGES.

DIXON, JUDGE: American Nursing Care, Inc. ("ANC"), seeks review of an April 27, 2007, decision of the Workers' Compensation Board remanding an Administrative Law Judge's (ALJ) award on the issue of Deneilya Upton's average weekly wage ("AWW"). We affirm.

Upton, age 36, is a high school graduate, and she attended one and one-half years of college. She also received vocational training as a certified nurse's aide. Upton was hired by ANC in December 2003, as a home health aide. Shortly thereafter, Upton was injured on January 12, 2004, when she slipped on ice and fell outside of a patient's home. She was treated the following day for low back pain and returned to work at ANC on light duty. Upton's last date of employment with ANC was in November 2004.

Following a hearing on Upton's claim for benefits, the ALJ issued an opinion and award assessing a 10% impairment. The ALJ made the following finding regarding Upton's AWW:

> 10. The parties were unable to stipulate to an average weekly wage. KRS 342.140(1) which provides that an employee working less than 13 calendar weeks immediately preceding an injury shall have his/her wages by taking the wages had the employee been so employed by the employer the full 13 week[s] immediately preceding the injury when work was available to other employees in a similar occupation. While [Upton] testified that she earned $8.00 per hour for a 45 hour week, the wage records filed by [Upton] indicate that [Upton] worked eight hours the week ending December 26, 16.25 hours the week ending January 2, 17.3 hours the week ending January 9, and 43.5 hours the week ending January 16. Adding those hours, it appears [Upton] worked 85.05 hours over the prior four week period and dividing those hours by 4 yields an average of 21.26 hours per week. As [Upton] testified to earning $8.00 per hour, that number shall be multiplied by the wage figure and the [ALJ] finds that [Upton's] average weekly wage was $170.08 per week.

The ALJ denied Upton's subsequent petition for reconsideration; thereafter, Upton appealed to the Board, contending the calculation of her AWW was erroneous.

In a well-reasoned opinion, the Board stated:

> After having carefully considered the ALJ's calculation of Upton's average weekly wage and applicable statutory and case law, we are convinced the ALJ's decision does not follow the mandates of KRS 342.140(1)(e)[,] at least not without further explanation. The ALJ merely added the total wages earned by Upton over the four week period she was employed by [ANC] and divided by four without providing any explanation why this would be a representative wage. This is not a calculation pursuant to KRS 342.140(1)(e).

The Board remanded the claim to the ALJ for further factual findings on the issue of AWW. ANC filed this petition for review.

ANC argues that the ALJ's calculation of Upton's AWW was supported by substantial evidence and that the Board erred by remanding the issue for further findings. Normally, this Court gives deference to the Board's decision and only intervenes when the Board's action constitutes a flagrant error resulting in gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). However, this case involves a question of statutory interpretation. Consequently, because statutory interpretation is a matter of law, we owe no deference to the findings of the Board, and our review is *de novo*. *Newberg v. Thomas Industries*, 852 S.W.2d 339, 340 (Ky.App. 1993).

KRS 342.140 states in pertinent part:

> 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.

At the hearing, conflicting evidence was presented regarding the availability of work at ANC. Additionally, Upton testified that her scheduled hours were out of the ordinary during the four weeks preceding her injury. The evidence showed that ANC paid Upton weekly, and the pay period was Friday through Thursday. On Upton's first day of employment with ANC, she attended an eight-hour training session on the final day of the pay period. Then, during the two weeks encompassing the Christmas and New Year's holidays, Upton's elderly patient did not need full-time care because family members were visiting. Finally, Upton worked 43.5 hours during her fourth week of employment.

Our Supreme Court has stated:

> 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. As was recognized in [*C & D Bulldozing Co. v.*] *Brock*, [820 S.W.2d 482 (Ky. 1991),] 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.

Huff v. Smith Trucking, 6 S.W.3d 819, 821 (Ky. 1999).

In the case at bar, the ALJ calculated Upton's AWW by averaging the hours she worked in the four weeks preceding her injury. Although the ALJ cited the proper statute in his findings, we are unable to reconcile the statutory formula with the ALJ's calculation. Likewise, in reaching his conclusion, the ALJ did not address Upton's contention that her first three weeks of work prior to her injury were not representative of a "normal" period of employment. Based upon our review, it appears the ALJ failed to "take into consideration the unique facts and circumstances" presented by this case. *Id*. at 822. Consequently, we agree with the Board that this matter must be remanded to the ALJ for further findings on the issue of Upton's AWW pursuant to KRS 342.140(1)(e) and relevant case law.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David D. Black
DINSMORE & SHOHL LLP
Cincinnati, Ohio

BRIEF FOR APPELLEE

John W. Hardin
STUART & HARDIN, PLC
Versailles, Kentucky