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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000127-WC

UNINSURED EMPLOYERS' FUND — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00705

CHAD REED; JERRY WALLACE,
D/B/A WALLACE ROOFING AND HI
DRI ROOFING; HON. RICHARD M.
JOINER, ADMINISTRATIVE LAW
JUDGE; HON. THOMAS J. POLITES,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: The Appellant, Commonwealth of Kentucky, Uninsured Employers' Fund (hereinafter "UEF"), appeals the December 26, 2012, opinion of

the Kentucky Workers' Compensation Board (hereinafter "Board") affirming the June 7, 2012, opinion and award of the Administrative Law Judge (hereinafter "ALJ"), awarding workers' compensation benefits to Appellee Chad Reed. At issue on appeal is whether or not the ALJ erred in calculating Reed's average weekly wage (hereinafter "AWW"). Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Reed testified below by deposition on October 19, 2009, and at the hearing held on March 22, 2012. Reed was born on January 4, 1977, and completed high school. His work history includes work as a welder, laborer, maintenance worker, and roofer. At the time of his work injury in this matter, Reed was working for Wallace Roofing as a roofer. He was injured on June 1, 2009, his first day in which he was actually performing work for Wallace. Reed had been employed by Wallace Roofing for approximately one week prior to the injury, but did not begin working until the date of the injury due to poor weather conditions. Reed was originally hired as a laborer but after Wallace discovered that he had roofing experience he was switched to that line of work. At the time of Reed's injury Wallace Roofing and its owner, Jerry Wallace, were uninsured.

In his Form 101, Reed indicated that he injured his "right ankle knee" and lower back while working for Wallace on June 1, 2009, at which time he was in the process of laying shingles, and fell through the roof of the home on which he was working, resulting in his body sinking through the roof up to his waist. Reed initially sustained bruising and swelling to his right knee and asserts that he began

to experience severe lower back pain later that evening. After being seen at the emergency room, Reed was treated by Dr. Rex Arendall, a neurosurgeon practicing in Nashville, Tennessee, and by Dr. Claude Saint-Jacques.

On his Form 101, Reed indicated that as a roofer he earned a weekly wage of $10.00 per hour. Reed testified that prior to his employment with Wallace, he worked as a welder for approximately one year and a half, during which time he earned $12.00 per hour. Reed testified that he was laid off in January 2009. During the course of the final hearing below, Reed testified as follows concerning his rate of pay:

> **Q**: Let me ask you a little bit about your rate of pay there with Mr. Wallace. What was your rate of pay supposed to be?
> **A**: As a laborer, it was ten dollars an hour; but when he found out I could roof, it was supposed to be twelve dollars an hour.
> **Q**: How did they find out you could roof?
> **A**: Because the guy that I was working with, Terry Turner, I told him I could.
> **Q**: And who is Terry Turner?
> **A**: He was the foreman.
> **Q**: Okay.
> **A**: Because me and him was roofing that day and the other ones was [sic] the laborers.
> **Q**: Had you done roofing work before?
> **A**: Yes, sir.
> **Q**: So you told Mr. Turner you had experience as a roofer?
> **A**: Yes, sir.
> **Q**: And he said what about your rate of pay?
> **A**: He said my rate of pay would go up if I'm a roofer instead of a laborer.
> **Q**: Go up to what?
> **A**: Twelve dollars an hour.

Q: Did he say anything about how much work you could expect like in a week's time?
A: He said as much as I can as long as it don't – not bad weather.
Q: How many employees did Wallace Roofing have on the job that day, do you know?
A: Five – four, four.
Q: And were they all roofers or some roofers and some laborers?
A: Three were laborers, and me and Terry were two roofers.
Q: Okay. Was that the first day of that particular job?
A: Yes, sir.
Q: Do you know whether or not Wallace Roofing had been working prior to that day?
A: Yes, sir, the week before that. Not the week I started, but the week – two weeks before, they did.
Q: And what were they doing before that?
A: Roofing. I don't know exactly the location.
Q: Did Mr. Wallace have a job somewhere else other than the place where you were hurt? Was that the only job he had?
A: At the time, yeah.
Q: Okay.
A: But I know he did more jobs after, but I just don't know exactly where.

Reed also testified that he could not return to the type of work he was performing at the time he was injured because "I could not bend over or bend my knee or nothing at all or stand on my feet a long period of time at all."

The UEF voluntarily paid temporary total disability (hereinafter "TTD") at the minimum rate through mid-July 2011 as well as all medical benefits related to Reed's injury. Below, Reed asserted an average weekly wage of $480.00 while the UEF suggested an average weekly wage of $30.77. Following the hearing below, the ALJ found that pursuant to Kentucky Revised Statutes

(KRS) 342.130 Reed's average weekly wage was $360.00. In so finding, the ALJ stated that:

> The plaintiff suggests an average weekly wage of $480. This is based on a $12 per hour rate regularly working 40 hours per week. I do not believe that Mr. Reed worked that regularly or would have worked that regularly if he had been employed for 13 weeks prior to his injury. The Uninsured Employers' Fund suggests an average weekly wage of $30.77. This is based on earnings of $400 for 13 weeks, assuming that he had worked a full week prior to the injury. I believe that his wage would be greater than that 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. The problem is that there is very little evidence as to where the wage should be placed between the two extremes. I note that Mr. Reed's work with Mr. Wallace was delayed by approximately a week because of rain. He would not have worked 40 hours for the full 13 weeks prior to the injury. I believe that there would be likely to have been some rain to occur in the weeks before that sufficient to keep him from working full time during that 13 week period. I believe that $360 is a good approximation of what Mr. Reed would be likely to have earned had he
>
> been employed during the full 13 week period. I find the average weekly wage to be $360, producing a TTD rate of $240.00.

Opinion and Award of Administrative Law Judge, June 7, 2012, p. 15.

The UEF filed a petition for reconsideration, which was denied by the ALJ in an order entered on July 27, 2012. The UEF then appealed to the Board, asserting that Reed failed to adequately prove an average weekly wage. Specifically, the UEF argued that Reed's AWW should have been determined pursuant to KRS 342.140(1)(e) since he had not worked a full thirteen weeks, and

that there was no evidence as to "when work was available to other employees in a similar situation," or that Reed "was available to work in the prior thirteen weeks 'when work was available,'" both of which are requirements of KRS 342.140(1)(e). The Workers' Compensation Board entered an opinion on December 26, 2012, affirming the findings of the ALJ. It is from that opinion that the UEF now appeals to this Court.

Prior to reviewing the arguments of the parties, we note that pursuant to KRS 342.285, the ALJ is the finder of fact and has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418, 419 (Ky. 1985). It is within the discretion of the ALJ to determine whom and what to believe, and to reject any testimony, and to believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). Indeed, pursuant to KRS 342.285, the decision of an ALJ is conclusive and binding as to all questions of fact, and the Board shall not substitute its judgment for that of the ALJ as to the weight of the evidence on questions of fact. Finally, we note that the function of this Court on review is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). We review this matter with this standard in mind.

On appeal the UEF makes one argument, namely, that Reed failed to satisfy his affirmative burden to prove an average weekly wage. The UEF argues that there is no evidence that Reed would have worked for the employer for 40 hours a week for the full 40 weeks prior to the injury, but for the weather. In response, Reed argues that the UEF is making a factual argument as to his AWW and that the ALJ, as the trier of fact, made a decision which was supported by substantial evidence and should be affirmed.

In addressing the arguments of the parties on this issue, we note that determination of the AWW is controlled by KRS 342.140, particularly, in this instance, KRS 342.140(1)(e), because Reed was clearly employed for less than 13 calendar weeks immediately preceding the injury at issue. That provision provides, in pertinent part:

> The average weekly wage of the injured employee at the time of 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:
>
> (a) The wages were fixed by the week, the amount so fixed shall be the average weekly wage;
>
> (b) The wages were fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve (12) and divided by fifty-two (52);

(c) The wages were fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two (52);

(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 or her 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 or she would have earned had he or she 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; and

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

(2) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury.

Upon review of the record, the arguments of the parties, and the applicable law, we are in agreement with the Board below that substantial evidence

exists in the record to support the decision of the ALJ. While it is certainly true that the evidence concerning Reed's AWW is minimal, it is also true that neither Wallace nor the UEF provided evidence which refuted Reed's testimony that he was earning $10.00 per hour in cash at the time he was injured, or to refute his testimony regarding his earnings. Indeed, neither the UEF nor Wallace provided any type of AWW certification or documentation to indicate what Reed's rate of pay would have been. Accordingly, we turn to a review of the evidence that was submitted below.

The testimony, as reviewed by this Court, indicates that Reed was hired by Wallace approximately one week prior to his injury and had last been laid off from his previous employment in January 2009, several months before. Accordingly, Reed was available to work for the full 13-week period prior to his injury. Further, Reed testified that when he was hired by Wallace, he was informed that as a laborer he would receive $10.00 per hour, the amount which was in fact indicated on his Form 101.

Reed further testified that, though he had been promised $10.00 per hour, when he arrived on the job the foreman advised him that if he performed roofing work instead he would be paid $12.00 per hour. It is undisputed that this was the type of work that Reed was performing at the time of his injury. Further, the testimony provided by Reed below indicates that the foreman, Mr. Turner, advised Reed that he could expect to work as much as he wanted, provided the weather was good, and that Wallace Roofing had been working on jobs two weeks

prior to Reed's injury. Reed also testified as to his knowledge that Wallace Roofing continued to perform roofing work after his injury. Reed also testified that a coworker at Wallace Roofing, Lee Holcomb, had been working steadily as a laborer for Wallace Roofing for six months prior to Reed's injury.

We are in agreement with the Board that the purpose of the various methods of calculating AWW as set forth in KRS 342.140 is to obtain a realistic reflection of a claimant's earning capacity at the time of injury. *See Huff v. Smith Trucking*, 6 S.W.3d 819 (Ky. 1999). Certainly, this computation must take into consideration the unique facts and circumstances of each individual case. *C & D Bulldozing v. Brock*, 820 S.W.2d 482 (Ky. 1991). KRS 342.285(1) permits an ALJ to pick and choose from the testimony of witnesses and to draw reasonable inferences from the record. *Sub judice*, the ALJ relied on Reed's testimony in finding an AWW of $360.00 pursuant to KRS 342.140(1)(e), and he was within his discretion to do so. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the December 26, 2012, opinion of the Kentucky Workers' Compensation Board affirming the June 7, 2012, opinion and award of the Administrative Law Judge, Hon. Richard M. Joiner.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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