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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001547-WC

MARINAS INTERNATIONAL — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-18-00266

CHARLES BECKWITH; HONORABLE R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, LAMBERT, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: Marinas International has petitioned this Court for review of the opinion of the Workers' Compensation Board (the Board) affirming the portion of the Administrative Law Judge's (ALJ) opinion, order, and award related to

injured worker Charles Beckwith's average weekly wage (AWW) pursuant to Kentucky Revised Statutes (KRS) 342.140. We affirm.

Beckwith began working for Marinas as a rental boat mechanic in 2003, and he last worked there in September 2017. He had been injured on July 13, 2017, while he was working on a generator. A hatch lid weighing 150 pounds fell and hit his head, resulting in injuries to his head, neck, and back. Beckwith filed an application for resolution of injury claim in February 2018, and Marinas denied the claim as a disputed issue remained regarding the amount of compensation he was owed. Because this appeal concerns only the issue of AWW, we shall confine our review of the record to that issue.

Beckwith testified by deposition. He earned $11.25 per hour and worked 40 hours per week, plus overtime, working on rental houseboats. A typical day would entail checking the oil levels and other parts of the boats and repairing anything that was broken. The following exchange took place:

> Q: Is this seasonal work or is this full time, year around?
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> A: When I first was hired in, I was hired in full time. But somebody else – Dudley Webb owned it then. And then once he sold it to this other company, then I started getting like less and less and they put me down to seasonal.
>
> Q: Do you recall when you became seasonal?
>
> A: No, I don't.

> Q: Was that within the last year or much earlier?
>
> A: Oh, no. It was like – I don't know exactly. I really don't.
>
> Q: Okay. So you would work for a season. Would you draw unemployment when you were off?
>
> A: Yes.
>
> Q: Do you recall if you would have drawn unemployment during, I guess, the winter months of 2016 leading up to probably the spring of 2017? Does that sound about right?
>
> A: Yes.

Beckwith later testified about another employee, Gary Bradshaw, who was with him when he was injured. Beckwith described him as a full-time employee, not seasonal.

The ALJ held a hearing on February 26, 2019, and kept the record open for 14 days to permit the filing of proof regarding Beckwith's AWW. At the hearing, Beckwith testified about months he worked for Marinas. He would usually work from April to late November or early December. He worked 40 hours per week as well as overtime, and he earned $11.25 per hour. After the hearing, Marinas filed wage records that it argued in its brief established a seasonal AWW of $252.36. In his brief, Beckwith argued that his AWW should not be calculated like that of a seasonal employee because the work was capable of being

done on a year-round basis, not only on a seasonal basis. Therefore, he claimed, his AWW should be at least $450.00 per week.

On April 29, 2019, the ALJ entered an opinion, order, and award in which he addressed the contested issues. The ALJ concluded that Beckwith was entitled to both temporary total disability and permanent partial disability benefits based upon a 22% impairment rating, enhanced by various multipliers. Regarding his AWW, the ALJ was persuaded by Beckwith's argument and stated:

> Although, the plaintiff only worked part of the year the type of work he was performing as a mechanic could certainly be performed throughout the year. His services only happened to be needed by the employer during certain parts of the year. The ALJ is persuaded the work the plaintiff was performing was capable of being performed year round and therefore his AWW will not be calculated as a seasonal employee.

The ALJ concluded that Beckwith's AWW was $450.00 per week and awarded him benefits in the amount of $258.00 per week for 425 weeks.

Marinas filed a petition for reconsideration related to the ALJ's calculation of Beckwith's AWW. It argued that the ALJ's fact-finding was insufficient as to Beckwith's type of employment and that the ALJ erred in its explanation of the rationale for concluding that he was not a seasonal employee. Marinas relied upon Beckwith's deposition testimony that his work was seasonal and that he received unemployment benefits during off seasons. The ALJ denied

the petition in an order entered May 20, 2019. The ALJ considered Beckwith's testimony in reaching the following conclusions:

> This testimony would indicate the employer did have full-time employees year round and obviously did not close during the months the Plaintiff was laid off. After reviewing the testimony, the ALJ remains persuaded the Plaintiff was not a seasonal employee since the type of work he was doing could be performed year round and was not related to the seasons but to the amount of business. The employer had full-time employees and, in fact, the Plaintiff had been full-time when originally hired.
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> In response to the Defendant's request for certain specifications in numerical Paragraph 5 of the Petition, the ALJ would respond: (1) according to the Plaintiff's testimony he worked from April or before until November or December; (2) the evidence is not clear how many years he had been on a specific schedule but he had initially been hired fulltime; (3) it appears the Plaintiff did seek unemployment benefits each year that he was eligible for same; (4) yes, it would appear Plaintiff was rehired or at least returned to work each year; and (5) the ALJ cannot determine from the evidence the belief of the Plaintiff and, in any event, whether the Plaintiff was "seasonal" in a legal context is for the ALJ to determine from the facts.

Marinas appealed these rulings to the Board, which entered an opinion affirming on September 20, 2019, holding that substantial evidence supported the ALJ's determination that Beckwith was not a seasonal employee. The Board stated:

> Here, the evidence presented regarding the issue of seasonal employment is sparse. However, substantial

> evidence supports the ALJ's determination that Beckwith was not a seasonal employee. The ALJ was persuaded Beckwith was not a seasonal employee because the type of work he was doing could be performed year round. In fact, Marinas was open year round. The need for Beckwith's services was not related to the seasons but rather to the amount of business. Although Marinas notes the number of rentals decreased in colder months, this fact is not necessarily proof that maintenance work could not be, or would not be, performed in slower months. Beckwith testified he initially performed maintenance work for Marinas on a year round basis. Bradshaw continued as a full time employee who also performed maintenance work, and was doing so on the same boat at the time of Beckwith's injury. The ALJ could reasonably conclude maintenance work is performed at Marinas on a year round basis. The maintenance work cannot be considered "exclusively seasonal" or work that "cannot be carried on throughout the year" if Beckwith performed the work year round in the past and some other employee now performs the work during the months Beckwith is laid off.

This petition for review now follows.

This Court's role in reviewing workers' compensation actions is set forth in *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992), in which the Supreme Court directed that our function is to correct a decision of the Board only where we perceive that "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Id*. at 687-88.

The Supreme Court later addressed this standard in *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001), explaining:

> KRS 342.285(2) provides that when reviewing the decision of an ALJ, the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. *See American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission*, Ky., 379 S.W.2d 450, 457 (1964). Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, Ky., 474 S.W.2d 367 (1971). Although a party may note evidence which would have supported a different conclusion than that which the ALJ reached, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis*, *supra*, at 643.

And in *Special Fund v. Francis*, 708 S.W.2d at 643, the Supreme Court instructed:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the

> evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

In the present case, Beckwith was successful in establishing the amount of his AWW. Therefore, we must determine whether substantial evidence supports the ALJ's decision.

The ALJ has the authority to assess the credibility of witnesses and the persuasive weight of the evidence, KRS 342.285, and the ALJ, not the Board, is empowered "to determine the quality, character, and substance of evidence." *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). The ALJ is also free to reject testimony, *id.*, and "to believe part of the evidence and disbelieve other parts of the evidence[.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). For these reasons, the Board "shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact[.]" KRS 342.285(2); *see also FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007).

KRS 342.140 sets forth the methods to calculate an injured worker's AWW and provides, in relevant part, 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:

(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.
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> (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.

"An injured worker has the burden to prove every element of a claim for income benefits, including the applicable average weekly wage." *Commonwealth, Uninsured Employers' Fund v. Rogers*, 396 S.W.3d 292, 295 (Ky. 2012) (footnote omitted).

Marinas relies upon the decision of the former Court of Appeals in *Department of Parks v. Kinslow*, 481 S.W.2d 686 (Ky. 1972), to argue that Beckwith was a seasonal employee. Kinslow worked in the areas of general maintenance and garbage pickup for Barren River State Park, which cut back its services between October and April every year. He had been classified as a seasonal employee by the superintendent of the park. *Id*. at 687. While the employer argued that he was seasonal and should have his AWW calculated under KRS 342.140(2), Kinslow argued that the statute referred to occupations that are

exclusively seasonal and are not able to be carried on through the year as opposed to seasonal workers. *Id*. at 687-88.

> The statute does not define seasonal occupation and case law on the subject is fragmentary and inconclusive. In Damm v. Schreier Contracting Co., 235 App.Div. 478, 257 N.Y.S. 705 (1932), the court held that a highway construction laborer was engaged in seasonal work since the work was not carried on during winter months. In Hogan v. Onondaga County, 221 App.Div. 636, 225 N.Y.S. 57 (1927), however, where the county, in carrying on highway construction work, utilized the winter months to manufacture road materials and to repair machinery and equipment, the court held the county was not engaged in a seasonal occupation, although its main work was carried on during summer months.
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> . . . .
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> [T]he broad definition of seasonal occupation as given by the Pennsylvania court [in Froehly v. T. M. Harton Co., 291 Pa. 157, 159, 139 A. 727, 728 (1927),] is fraught with the danger of extending the meaning of seasonal occupation so far that it becomes meaningless. A classic example of a seasonal occupation is that of fruit picking in California. Yet, under the tenor of the Froehly case, since fruit picking is being carried on somewhere in the United States every day throughout the year, the migrant worker is not engaged in a seasonal occupation. We cannot accept this broad analysis. The very existence of the Barren River State Park depends on the patronage of tourists during the period from late spring to early fall. In the popular sense, this is seasonal. It would not be surprising to see posted in front of various facilities of the park the words, 'Closed for the Season.' Everyone would know what that would mean.

Kinslow, 481 S.W.2d at 688. The Court affirmed the ruling that Kinslow's occupation was seasonal.

Beckwith, on the other hand, relies upon the Supreme Court of Kentucky's opinion in *Travelers Insurance Company v. Duvall*, 884 S.W.2d 665 (Ky. 1994), in support of his argument that he was not a seasonal employee:

> The employer has filed a cross-appeal challenging the conclusion reached by the ALJ and affirmed by the Board and Court of Appeals, that claimant was not a seasonal employee. Regardless of the analysis conveyed by the Board, and disputed by the employer, we believe the ALJ's conclusion was supported by substantial evidence and comports with the law. He stated that:
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> > . . . it is undisputed that the plaintiff continued working for West Kentucky Paving and/or Emerine Construction Company through January 11, 1990. During the winter months, he was working in the shop, assisting with maintenance work on the equipment. It is further established that the paving business is a business which can be affected by weather, even in the summer, since paving cannot proceed when it is raining. It is further admitted that during the winter months, maintenance work continues and that the company would fill potholes in roads with cold mix. Finally, the plaintiff testified that while working for another paving company, prior to beginning work with West Kentucky Paving that they worked year-round.
>
> We believe the ALJ focused upon the proper facts to determine if this occupation was "exclusively seasonal." See KRS 342.140(2). We stress that what an

> ALJ will find determinative must, by necessity, vary from case to case because each situation involves unique circumstances. Therefore, the fact that in this case work was actually performed year-round should not be overshadowed by the fact that paving is dictated by the weather. Likewise, we do not find it necessarily incongruous that in *Department of Parks v. Kinslow*, Ky., 481 S.W.2d 686 (1972), the Court focused upon the truly seasonal work of a maintenance employee for the Barren River State Park classified as such, and the conclusion reached in *May v. Drew Shows*, Ky.App., 576 S.W.2d 524 (1979), that employment as a roustabout for a traveling carnival was not seasonal simply because the carnival, as is customary, left the state of Kentucky to perform elsewhere during the winter months. We believe the final result in each of these cases, including the one at bar, exemplifies how to sift through the irrelevant details and focus upon what makes an occupation, on a case-by-case basis, actually and exclusively seasonal.

Duvall, 884 S.W.2d at 667.

We are persuaded by Beckwith's argument that the ALJ and the Board properly focused on whether the work Beckwith did for Marinas was capable of being done year-round or only on a purely seasonal basis. "In the context of whether or not a job is seasonal, for calculating an average weekly wage for workers' compensation purposes, the test is not what the worker intended, but what the job itself entails." *Roland v. Kentucky Retirement Systems*, 52 S.W.3d 579, 584 (Ky. App. 2000) (citing *May*, 576 S.W.2d at 526). Beckwith's work as a mechanic was certainly capable of being performed throughout the year as opposed to only seasonally. As the Board observed, the need for Beckwith's services was

not related to the season but to the amount of business Marinas had. While houseboat rentals went down in months when it was colder, this did not mean that maintenance work could not be performed during these months. Beckwith had originally been hired on a full-time basis to perform this work, and there is proof in the record that there was another employee who did this work who worked on a full-time basis. That Beckwith described himself as a seasonal employee is not determinative legally in the context of KRS 342.140. Therefore, we hold that there is substantial evidence to support the ALJ's finding that Beckwith was not a seasonal employee and that the Board did not misconstrue the controlling statute or precedents, or commit any error in assessing the evidence.

For the foregoing reasons, the opinion of the Workers' Compensation Board affirming the ALJ's opinion, order, and award is affirmed.

ALL CONCUR.

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