IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-12-06 EMA Grant D.C.

2005-SC-1007-WC

DOLPHIN POOLS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0868-WC
WORKERS' COMPENSATION NOS. 02-67983 & 03-02334

MARK MEADOWS;
TIPTON TEMPORARY SERVICE;
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.140(2) provides a method for calculating the average weekly wage of a worker engaged in an occupation that is "exclusively seasonal and therefore cannot be carried on throughout the year." An Administrative Law Judge (ALJ) determined that the claimant was not a seasonal employee and calculated his average weekly wage under KRS 342.140(1)(d). The Workers' Compensation Board and the Court of Appeals affirmed. Convinced that the decision was reasonable under the evidence, we affirm.

The claimant began working for the defendant-employer in May, 2002, as a swimming pool installer. He earned $9.00 per hour, worked 40 hours per week, and earned a total of $360.00 per week. The claimant injured his back on September 27,

2002, and later filed an application for workers' compensation benefits. He testified that he contacted his employer upon the termination of temporary total disability benefits after Christmas in 2002. He was informed that the company's financial status was uncertain at that time and advised to find other employment until the spring.

The employer asserted that the claimant was a "seasonal" worker whose average weekly wage should be determined under KRS 342.140(2). On that basis, it proposed dividing his actual earnings in calendar year 2002 by 50 weeks. This yielded an average weekly wage of $174.77 for the purpose of calculating the income benefit.

The claimant acknowledged that he took the job with the expectation that he would work continuously until January, when the temperatures were usually in the 20's, but he also testified that the work could be performed throughout the year. His experience in a previous employment with Hampco Pools was that although workers were usually laid off in January and February, when the temperature was below freezing, they worked on days when it was warmer. Although there had been times when there was no work at all, he had usually worked at least one day per week for Hampco and had anticipated the same pattern with the defendant-employer.

After summarizing the evidence, the ALJ noted that the claimant was not hired until May, 2002. The record contained no information regarding the wages of similar employees or the defendant-employer's normal practice during the winter months. Testimony from the claimant established that his previous employer operated year-round, albeit sporadically in January and February. Therefore, the ALJ was not convinced that the availability of only sporadic work during those months was a sufficient reason to consider swimming pool installation and maintenance to be "exclusively seasonal" work. Noting the "unique factors in this case," the ALJ found

them to be more like those in The Travelers Insurance Company v. Duvall, 884 S.W.2d 665 (Ky. 1994), than in DESA International, Inc. v. Barlow, 59 S.W.3d 872 (Ky. 2001). On that basis, the ALJ concluded that KRS 342.140(1)(d) provided the method more likely to give a realistic estimate of the claimant's earning capacity. The average weekly wage under KRS 342.140(1)(d) was $360.00.

In a petition for reconsideration, the employer asserted that the ALJ erred in stating that there was no information concerning its practice with regard to year-round work. It pointed to the claimant's testimony that he thought the company shut down for a couple of months in the winter. The ALJ overruled the petition, however, noting that nothing contradicted the claimant's testimony that pool work can be performed year-round when the weather permits. He had ceased working before the onset of cold weather, and there was no "real testimony regarding Dolphin's employment practices for other employees."

Appealing, the employer asserts that DESA International, Inc. v. Barlow, supra, controls the present facts. Focusing on the claimant's testimony that he did not expect to work when temperatures were in the 20's and that he thought the company shut down for a couple of months in the winter, the employer argues that he did not expect to work all year. On that basis, it maintains that he was a seasonal employee as a matter of law.

KRS 342.140 provides, in pertinent 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 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.
(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.

The burden was on the claimant to prove every element of his claim, including his average weekly wage. This is not a case like DESA International, Inc. v. Barlow,

supra, in which over a number of years' employment, Ms. Barlow worked for a period of about 40 weeks annually. In the present case, the claimant produced substantial evidence that the type of work he performed was done year-round, albeit sporadically in cold weather. Therefore, the burden shifted to the employer to overcome the claimant's evidence by going forward with more convincing evidence that the company's practice was different. It failed to do so. Under the circumstances, the ALJ determined reasonably that that KRS 342.140(1)(d) provided a more realistic estimate of the claimant's earning capacity in the employment than KRS 342.140(2).

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Graves, McAnulty, Roach, Scott, and Wintersheimer, JJ., concur. Minton, J., not sitting.

COUNSEL FOR DOLPHIN POOLS:

James R. Carpenter
Baker, Kriz, Jenkins & Prewitt, PSC
PNC Bank Plaza, Suite 710
200 West Vine Street
Lexington, KY 40507

COUNSEL FOR MARK MEADOWS:

McKinnley Morgan
Morgan, Madden, Brashear & Collins
921 South Main Street
London, KY 40741