IN THE COMMONWEALTH COURT OF PENNSYLVANIA

T. Bruce Campbell Construction, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Rosa), Respondent	:	No. 1064 C.D. 2012 Submitted: November 21, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 24, 2013

T. Bruce Campbell Construction (Employer) challenges the order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) to grant the review petition of Julio Rosa (Claimant), to deny the review petition of Employer, and ordered Employer to pay Claimant benefits based on an average weekly wage of $3,003.84.

Claimant worked as a union crane operator with the Operating Engineers Local 66 (Union) based in Youngstown, Ohio. He had no fixed employer and received work assignments of limited duration throughout the year for various employers that contract with the Union. In the fifty-two weeks prior to his January 9, 2008, work-related injury, Claimant earned $34,204.59 for all worked performed through the Union for multiple employers.

In December 2007, the International Metals Reclamation Company, Inc. (Inmetco) contracted with Employer to undertake certain repairs at Inmetco's facility in Ellwood City, Pennsylvania. The repair work was called a "shut down" job whereby the facility would be closed when Employer performed its work. The work was scheduled to begin on January 2, 2008, and to be completed by January 14, 2008.

Employer hired Claimant from the Union to work as a night-time crane operator on this project. Claimant was expected to work twelve hours per day, seven days per week for the period of January 3, 2008, to January 15, 2008. His hourly rate was $26.82 for the first eight hours worked per day Monday through Friday. He earned time-and one-half, $40.23 per hour, for the remaining four hours worked on Monday through Friday and for all twelve hours worked on Saturday. Claimant earned double time, $53.64 per hour for all twelve hours worked on Sunday. He expected to earn $3,003.84 per week [($26.82/hour x 40 hours) + ($40.23/hour x 32 hours) + ($53.64/hour x 12 hours).

Work at the Inmetco facility commenced on January 3, 2008, and ended on January 18, 2008. On January 9, 2008, Claimant sustained a work-related right shoulder dislocation. Employer issued a notice of compensation payable which listed Claimant's average weekly wage as $1,072.80 and his temporary total disability rate as $715.13 per week. On February 12, 2008, Claimant's counsel wrote a letter to Employer's insurer which stated that Claimant's average weekly wage and temporary total disability rate were incorrectly calculated. In response Employer issued a corrected notice of

compensation payable which listed Claimant's average weekly wage as $2,252.88 and his weekly temporary total disability rate as $807.00.

On December 31, 2009, Employer petitioned to review compensation benefits and alleged that Claimant's average weekly wage on the corrected notice of compensation payable was incorrect.

On June 21, 2010, Claimant cross-petitioned to review compensation benefits and alleged that his average weekly wage on the corrected notice of compensation payable was incorrect.[1]

Before the WCJ, the parties stipulated to the facts. Employer argued that it was improper to calculate Claimant's average weekly wage based on the high earnings he received for the short time he worked because there was no expectation that he would work for Employer after the completion of the job and that the amount he earned in the limited time he worked for Employer would project to annual earnings of over $150,000 per year, while Claimant had only earned $34,204.59 in the previous year. Employer asserted that Claimant's average weekly wage was $799.50 with a weekly temporary total disability rate of $553.00.

Claimant argued that pursuant to the plain language of Section

[1] The WCJ consolidated the two petitions.

309(d.2) of the Workers' Compensation Act (Act)[2] Claimant was entitled to an average weekly wage of $3,003.84 with a weekly temporary total disability rate of $807.00.

The WCJ granted Claimant's review petition and denied Employer's. The WCJ set Claimant's average weekly wage at $3,003.84 and his weekly temporary total disability rate at $807.00:

> Counsel for the claimant has argued that ABB C-E Services, Inc. & Gallagher Bassett Services, Inc. v. W.C.A.B. (Rushing), No. 24 C.D. 2008 . . . is persuasive, in that it is virtually identical to the matter hereunder review. Counsel for the employer has correctly indicated that this case cannot be cited as binding authority, and this contention is certainly accepted. However, it is indeed persuasive, and supports the calculation of the average weekly wage as undertaken by claimant's counsel. Additionally, this calculation is consistent with the various paragraphs of the Stipulation of Facts, as reviewed above.
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> Counsel for the employer has argued, utilizing a strict interpretation of Section 309(d.2), that the claimant's proposed average weekly wage of $3,003.84 would result, in this case, in the claimant having projected earnings in excess of $150,000 a year. This constitutes almost five times his actual earnings for the 52 weeks prior to his work injury. As such, counsel indicates that these projected annual earnings would be the result of having sustained an injury on a job which was intended to last – at most – 13 days, and with insurance premiums calculated based on payroll, an inequity would result when contrasting earnings with insurance premiums. While counsel's contention is certainly meritorious, the

[2] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §582(d.2). This section was added by the Act of June 24, 1996, P.L. 350.

> holding in ABB C-E Services, Inc. suggests otherwise, with the apparent result that the insurer bears such risks when an employer enters into these types of hourly employment agreements.
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> Given the considerations reviewed above, the same support a determination granting the claimant's requested relief, and it will be for an appellate forum to determine the applicability of ABB C-E Services, Inc. in the matter under review.

WCJ's Decision, December 16, 2010, Finding of Fact No. 1 at 10; Reproduced Record (R.R.) at 23a.

Employer appealed to the Board which affirmed:

> After careful review of the record, we determine the Judge did not err in concluding that Claimant's AWW [Average Weekly Wage] was $3,003.84. To determine a claimant's AWW [Average Weekly Wage], one must first determine what section of 309 of the Act is applicable. . . . The stipulated facts show that Claimant worked less than a complete period of thirteen calendar weeks for Defendant [Employer], and did not have a fixed weekly, monthly, or yearly wage. Therefore, Claimant falls under Section 309(d.2) of the Act, which states that his AWW [Average Weekly Wage] shall be determined by his hourly wage, multiplied by the number of hours he was expected to work under the terms of his employment. . . . The stipulated facts state that Claimant was expected to work 12 hours per day, 7 days per week. During that period his hourly wage was $26.82 per hour for 40 hours, $40.23 per hour overtime for 32 hours, and $53.64 per hour double time for 12 hours. Therefore, pursuant to Section 309(d.2) of the Act, Claimant's AWW [Average Weekly Wage] was $3,003.84 per week. Consequently, the Judge did not err in determining the same.
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> Nevertheless, Defendant [Employer] argues that although Claimant's AWW [Average Weekly Wage] is correctly

calculated according to Section 309(d.2) of the Act, that the circumstances of Claimant's temporary employment warrant an exception to that calculation. Defendant [Employer] specifically argues that because Claimant's wages while working . . . were significantly higher than he had previously made in the past year working for other employers, that his AWW [Average Weekly Wage] should be based upon his previous years' wages, as that more reflects the economic reality of his situation. Defendant [Employer] cites to Hannaberry HVAC v. WCAB (Snyder, Jr.), 834 A.2d 524 (Pa. 2003), which held that Section 309(d) of the Act does not control in circumstances where it would lead to a grossly and demonstrably inaccurate measure of a claimant's AWW [Average Weekly Wage]. However, Hannaberry is distinguishable, as it only addressed the specific circumstance of a claimant whose part-time earnings were diluting his benefits after he sustained a work injury after becoming a full-time employee with significantly higher wages. Hannaberry did not deal with Section 309(d.2) of the Act, temporary employment, or basing an AWW on employment with different employers, and thus, the circumstances in Hannaberry do not apply in the instant case.

. . . .

Nevertheless, the unreported Commonwealth Court case ABB C-E Services, Inc. & Gallagher Bassett Services, Inc. v. WCAB (Rushing), No. 24 C.D. 2008 (Pa. Cmwlth. 2008), does present similar facts to the instant case. . . . . While Rushing is not binding, it persuasively applies to the instant case, as both claimants were union employees who were injured on temporary jobs that paid significantly higher wages than their previous employment in the past year. While Defendant [Employer] argues Claimant's AWW [Average Weekly Wage] should be calculated using his previous year's wages, those wages, just as in Rushing, were from different employers and can not [sic] be used to calculate Claimant's AWW [Average Weekly Wage] in regards to Defendant [Employer]. . . . In addition, the fact the previous year's wages were significantly lower than Claimant's current AWW [Average Weekly Wage] does

> not negate the use of Section 309(d.2). (Citation omitted).

Board Opinion, May 18, 2012, at 6-9.

Employer contends that the Board erred when it affirmed the calculation of Claimant's average weekly wage based on an unusual, temporary, two-week spike in wages which did not accurately reflect either the economic reality of Claimant's prior earnings or fairly ascertain his projected future earnings. Employer asserts that where Claimant stipulated that after his brief temporary job ended he expected no future employment or wages from Employer, it was error to calculate his average weekly wage pursuant to a statutory method based on a projection of future earnings.[3]

Section 309 of the Act, 77 P.S. §582, provides the methods for calculating a claimant's average weekly wage. Section 309(a) of the Act, 77 P.S. §582(a), provides that if a claimant's wages are fixed by the week, the amount so fixed shall be the claimant's average weekly wage. Section 309(b) of the Act, 77 P.S. §582(b), provides that if a claimant's wages are fixed by the month, the average weekly wage shall be the monthly wage multiplied by twelve and divided by fifty-two. Section 309(c) of the Act, 77 P.S. §582(c), provides that if a

[3] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

claimant's wages are fixed by the year, the claimant's average weekly wage shall be the yearly wage divided by fifty-two.[4]

The Board affirmed the WCJ's utilization of Section 309(d.2).[5] Claimant clearly worked less than a complete period of thirteen calendar weeks and did not have fixed weekly wages. Employer argues that the application of Section 309(d.2) to the facts of this case results in a calculation of Claimant's average weekly wage of $3,003.84 per week which would mean that Claimant's

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[4] The parties agree that Section 309(d) and (d.1), 77 P.S. §582(d), and (d.1), do not apply:

> (d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a), (b) or (c), the average weekly wage shall be calculated by dividing by thirteen the total wages earned in the employ of the employer in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury and by averaging the total amounts earned during these three periods.
>
> (d.1) If the employe has not been employed by the employer for at least three consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury, the average weekly wage shall be calculated by dividing by thirteen the total wages earned in the employ of the employer for any completed period of thirteen calendar weeks immediately preceding the injury and by averaging the total amounts earned during such periods.

Section 309(d.1) was added ty the Act of June 24, 1996, P.L. 350.

[5] Section 309(d.2), 77 P.S. §582(d.2), provides:

> If the employe has worked less than a complete period of thirteen calendar weeks and does not have fixed weekly wages, the average weekly wage shall be the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment.

annual wage would exceed $150,000 per year. Employer further argues that this result does not reflect the actual circumstances here as Claimant was only hired to work for Employer for slightly less than a two week period, Claimant concedes that he had no expectation of further employment with Employer, and Claimant only earned approximately $34,000 from all employers obtained through the Union in the previous calendar year.

The WCJ relied on ABB C-E Services, Inc. and Gallagher Bassett Services v. Workers' Compensation Appeal Board (Rushing), (Pa. Cmwlth. No. 24 C.D. 2008, filed August 5, 2008), *petition for allowance of appeal denied*, 600 Pa. 503, 968 A.2d 226 (2009). Initially, this Court notes that ABB was an unpublished opinion of this Court. Commonwealth Court's Internal Operating Procedures, 210 Pa.Code §69.414, provides:

> An unreported opinion of this court may be cited and relied upon when it is relevant under the doctrine of law of the case, res judicata or collateral estoppel. Parties may also cite an unreported panel decision of this court issued after January 15, 2008, for its persuasive value, but not as binding precedent. A single-judge opinion of this court, even if reported, shall be cited only for its persuasive value, not as a binding precedent.

ABB was issued on August 5, 2008, which is after January 14, 2008. Therefore, even though it was an unpublished opinion, it may be cited for its persuasive value.

In ABB, Madison Rushing (Rushing) suffered injuries on May 28, 1999, when he fell from scaffolding while working for ABB C-E Services, Inc.

(ABB) at a power plant as a boilermaker/welder. Rushing, along with other workers, was laid off at the end of the work day on May 28, 1999. Rushing was expected to work for ABB six days per week, ten hours per day, with an hourly rate of $24.30 and an overtime rate of $36.45. Rushing worked eleven days for ABB and completed one sixty hour work week. Rushing was totally disabled from May 28, 1999, to January 31, 2000. Rushing, who lived in Georgia, received jobs through union halls in various states. Rushing petitioned for total disability benefits. The WCJ approved a joint stipulation that identified Rushing's work injury as a herniated nucleus pulposus of C5-6 and pituitary insufficiency. The parties also stipulated that Rushing's average weekly wage was $1,701 with a temporary total disability rate of $588 per week. ABB, Slip Op. at *1-2.

Rushing petitioned to reinstate benefits in 2003.[6] On October 25, 2004, ABB petitioned to review compensation benefits and alleged that Rushing's average weekly wage was incorrect. ABB asserted that, based on Rushing's 1998 and 1999 tax returns his average weekly wage should have been $769.71. ABB, Slip Op. at *3.

The WCJ granted ABB's review petition and concluded that the $1,701 originally calculated as Rushing's average weekly wage did not result in a calculation of wages that would be an accurate and realistic measurement of what Rushing would have expected to earn had he not been injured because he was only scheduled for a three week job assignment. The WCJ further concluded that it was unrealistic to expect Rushing to earn over $88,000 in a year as a

[6] The reinstatement petition is not relevant to the discussion here.

boilermaker/welder in light of his gross wages in 1998, of $40,025 and his 1999 wages through the date of his injury on May 28, 1999, of $26,022. The WCJ calculated Rushing's average weekly wage by dividing his annual wages in 1998, by fifty-two weeks. ABB, Slip Op. at *3.

Rushing appealed to the Board which reversed. The Board determined that Rushing's average weekly wage should have been calculated under Section 309(d.2) of the Act, 77 P.S. §582(d.2), and that only wages from current employers may be considered when calculating a claimant's average weekly wage. Therefore, the WCJ erred when he calculated the average weekly wage based on Rushing's income in the year before he was injured. ABB, Slip Op. at *3-5.

ABB petitioned for review with this Court and contended that the WCJ's calculation of the average weekly wage should have been affirmed because of the unusual facts and circumstances in the case. This Court analyzed ABB's arguments and affirmed:

> Employer [ABB] contends that the Court's concern in Follett [v. Workmen's Compensation Appeal Board (Massachusetts Mutual Life Insurance Company), 551 A.2d 616 (Pa. Cmwlth. 1988)] was that the prior employer's higher wages may prejudice the current employer by inflating the AWW [Average Weekly Wage]. Applying Section 309(d.2), reinstates the inflated AWW [Average Weekly Wage] and inflicts the very harm that the Court sought to avoid. It cites Colpetzer [v. Workers' Compensation Appeal Board (Standard Steel), 582 Pa. 293, 870 A.2d 875 (2005)] and Hannaberry [HVAC v. Workers' Compensation Appeal Board (Snyder, Jr.), 575 Pa. 66, 834 A.2d 524 (2003)] for

the principles that the scheme under Section 309 was designed 'to ensure that an injured worker does not receive more on workers' compensation than the amount he would have earned had he not been injured' and that 'the employee was not overcompensated and the Employer overburdened.'. . . . Employer [ABB] claims that it is overburdened because the $769.71 AWW [Average Weekly Wage] would result in a weekly compensation rate of $512.63 instead of $588 based on the $1,701 AWW [Average Weekly Wage]. . . .

Claimant's [Rushing] counter-argument is that Employer [ABB] is asking the Court to ignore Section 309(d.2) and Follett, in which the Court stated that 'in calculating [the AWW [Average Weekly Wage]] of an employee whose occupation is not exclusively seasonal under Section 309(f), only wages earned in the employ of employers by which the claimant was employed on the date of the injury can be considered.' . . . . The decision in Hannaberry is factually distinguishable: the court there held that subsection (d) did not control the AWW [Average Weekly Wage] calculation where it would lead to a 'grossly and demonstrably' inaccurate measure of the claimant's AWW [Average Weekly Wage] and his part-time wages earned while in high school should not be permitted to dilute the benefit due to the claimant as a result of injury suffered after he became a full-time employee. . . . The decision in Colpetzer is distinguishable in as much as the court there addressed whether a claimant who receives benefits from a work injury and then returns to work and suffers a new injury should be penalized by including in the AWW [Average Weekly Wage] calculation the period when the claimant earned no wages because of the initial work injury.

Claimant [Rushing] submits that Hannaberry and Colpetzer resulted in higher AWW calculations consistent with the humanitarian purposes and liberal construction of the Act. He argues that neither Section 309(d.2) nor the decision in Follett is ambiguous. The legislature could have provided an exception to Section 309(d.2) for employees assigned jobs through a union hall, similar to the one for seasonal employees, but it did

not. The length of jobs assigned through a union hall is not subject to any regular schedule or duration: it may be short, long or permanent. Adopting Employer's [ABB] argument would require the courts to create a test to determine 'how long is long enough for the employer finally to be considered the employer for purpose of calculating the [AWW [Average Weekly Wage]]'. . . . Section 309(d.2) applies where, on the date of injury, he had worked for Employer for less than a period of thirteen weeks as a non-seasonal employee.

Section 309(d.2) of the Act 'provides for a **prospective** calculation of potential earnings' and 'contemplates persons for whom there is little work history with the employer upon which to calculate the AWW [Average Weekly Wage].' . . . . It applies in those instances where 'there [is], by definition, no accurate measure of AWW [Average Weekly Wage] other than taking the existing hourly wage and projecting forward on the basis of the hours of work expected under the employment opportunities.' . . . . Here, the Board was correct in applying Section 309(d.2) and in arriving at the AWW [Average Weekly Wage] of $1,701 by multiplying the hourly wage by the expected number of work hours.

The Court rejects Employer's [ABB] argument based on Hannaberry and Colpetzer, and it emphasizes that Employer stipulated to the AWW [Average Weekly Wage] of $1,701 during the claim petition proceedings before the WCJ. Employer [ABB] does not assert and the WCJ did not find, that the hourly rate or expected number of work hours used in calculating the $1,701 AWW was unrealistic or inflated. In Hannaberry and Colpetzer the court was presented with unusual situations rendering uncertain the applicability of Section 309(d), which would have resulted in an artificially deflated AWW. To provide an accurate, realistic measure of the claimant's earning capacity and to give effect to the Act's remedial nature, the court carved out exceptions for those particular cases to give relief to injured workers. The facts presented here are distinguishable from those in Hannaberry and Colpetzer.

> Claimant's [Rushing] case is clearly contemplated by Section 309(d.2) without any need for the application of an exception. . . . Moreover, the WCJ's conclusion that Claimant's [Rushing] earnings from prior employers represent an accurate and realistic measure of his earning capacity as a non-seasonal employee is without factual support and is contrary to law. . . . Employer's [ABB] argument that Claimant [Rushing] is overcompensated while it is overburdened therefore lacks merit. Lastly, the scheme under Section 309 demonstrates 'the General Assembly's intention that the baseline figure from which benefits are calculated should reasonably reflect the economic reality of a claimant's recent pre-injury earning experience, with some benefit of the doubt to be afforded the claimant in the assessment. . . . From its review of this matter, the Court must conclude that the Board correctly applied the law and thus committed no error when it reversed the WCJ's order granting Employer's [ABB] review petition. This Court affirms. (Citations omitted).

ABB, Slip Op. at *6-9.

The case here is quite similar to ABB. Claimant, like Rushing, was hired from a union hall to perform short term work for an employer at a comparatively high rate of pay. Claimant and Rushing both suffered work-related injuries shortly before the conclusion of their work. Here, the rate of pay received by Claimant was much higher than he would be expected to earn for the whole year based on his prior year's earnings as it was with Rushing. Neither Claimant nor Rushing had any expectation to work with his respective employer on a long term basis. This Court finds the analysis in ABB persuasive.

Employer argues that this Court should consider the economic reality of Claimant's situation as in Hannaberry HVAC v. Workers' Compensation Appeal Board (Snyder, Jr.), 575 Pa. 66, 834 A.2d 524 (2003).[7]

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[7] Snyder began working for Hannaberry HVAC (Hannaberry) when he was a high school student on a part-time basis. After he graduated from high school, he accepted a full-time position with Hannaberry. Three months later, he suffered a very serious work-related injury which left him a quadriplegic. Snyder's average weekly wages in the three quarterly periods for which he was a part-time worker were $57.25 for the period from September 20, 1995, to December 20, 1995; $96.87 for the period from December 20, 1995, to March 20, 1996; and $110.56 for the period from June 20, 1996. His average weekly wage for the quarter after he assumed full-time status was $473.65. Hannaberry, 575 Pa. at 68-69, 834 A.2d at 525.

The WCJ determined that Snyder's average weekly wage was $473.65 based on Snyder's argument that including his part-time wages while he was still in high school artificially decreased the wages he earned as a full-time worker. The Board affirmed. Hannaberry, 575 Pa. at 69, 834 A.2d at 526. This Court reversed on the basis that this Court could not deviate from the statutory formula. Hannaberry HVAC v. Workers' Compensation Appeal Board (Snyder, Jr.), 767 A.2d 650 (Pa. Cmwlth. 2001).

Snyder appealed to our Pennsylvania Supreme Court which reversed:

> Since Section 309 does not address the part-time to full-time paradigm presented here, and a reading of the statute as requiring dilution of the benefit would be contrary to the overall humanitarian purpose of the Act, resort to principles of statutory construction is appropriate. Those principles dictate that appellant's [Snyder] part-time wages not be permitted to dilute the benefit due to him as a result of an injury suffered after he became, and had been for some time, a full-time employee. Consideration of the 'occasion and necessity' for the 1996 amendment, 'the circumstances under which it was enacted,' the mischief it sought to remedy, the object it sought to attain, and the former law . . . all weigh in favor of calculating appellant's [Snyder] average weekly wage based upon his quarter of full-time employment. The change effected in the legislation, as noted above, was aimed at ensuring more, not less, accuracy in the computation of average weekly wage.

Hannaberry, 575 Pa. at 81-82, 834 A.2d at 533.

In ABB, this Court rejected the application of Hannaberry because in ABB, neither the hourly rate nor the hours expected to be worked were unrealistic or inflated. This Court distinguished Hannaberry on the basis that the applicability of Section 309(d) would have resulted in an artificially deflated average weekly wage. This Court is persuaded by the analysis in ABB.

Employer next contends that where Claimant stipulated that after his brief temporary job ended that he expected no future employment or wages from Employer, it was error to calculate his average weekly wage pursuant to Section 309(d.2) of the Act which is based on a projection of future earnings.

For support, Employer cites Burkhart Refractory Insulation v. Workers' Compensation Appeal Board (Christ), 896 A.2d 9 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 588 Pa. 790, 906 A.2d 1197 (2006). In Burkhart, Roy Christ (Christ) suffered a work-related injury and received benefits pursuant to a temporary notice of compensation payable. Both Christ and Burkhart Refractory Insulation (Burkhart), Christ's employer, petitioned to review benefits and alleged that the average weekly wage was incorrect. Based on the testimony of Burkhart's president, Oliver Harrison Burkhart, the WCJ granted Burkhart's review petition. Christ appealed to the Board which reversed. The Board determined that Section 309(d.2) of the Act, 77 P.S. §582, could not be utilized where Christ did not have a set number of hours per week to work because the work was sporadic. The Board determined that while Christ was employed for sixteen weeks, he only worked for twelve weeks. The Board then divided Christ's earnings by twelve to determine his average weekly wage. Burkhart petitioned for review with this Court and

alleged that because Christ worked one complete thirteen week period his average weekly wage should be calculated pursuant to Section 309(d.1) of the Act. Burkhart, 896 A.2d at 10.

This Court determined that Section 309(d.1) did not apply because Christ was not a long term employee with fifty-two weeks of employment and that Section 309(d.2) did not apply because Christ did not have an expected number of hours that he was expected to work. This Court adopted the Board's approach and affirmed. Burkhart, 896 A.2d at 12-13.

Although Employer cites Burkhart for the proposition that the determination of a claimant's average weekly wage must take into account the economic reality of the situation, Burkhart differs factually from the present case in that here Claimant was expected to work a set number of hours while in Burkhart that worker was not. In Reifsnyder v. Workers' Compensation Appeal Board (Dana Corporation), 584 Pa. 341, 357, 883 A.2d 537, 547 (2005), our Pennsylvania Supreme Court stated that Section 309(d.2) was "intended for instances that it plainly covers; i.e., those instances of work injuries to recently-hired employees for whom there was, by definition, no accurate measure of AWW other than taking the existing hourly wage and projecting forward on the basis of the hours of work expected under the employment agreement."

The General Assembly passed Section 309(d.2) of the Act, 77 P.S. §582(d.2). Section 309(d.2) is the section most applicable to this situation. This Court is persuaded by the reasoning of ABB.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

T. Bruce Campbell Construction, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Rosa), Respondent	:	No. 1064 C.D. 2012

O R D E R

AND NOW, this 24th day of January, 2013, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge