OPINION ENTERED: FEBRUARY 22, 2013

CLAIM NO. 201100911

BEVERLY JACKSON PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

GENTIVA HEALTH SERVICES
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Beverly Jackson ("Jackson") seeks review of the opinion, award and order rendered October 3, 2012 by Hon. John B. Coleman, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a work-related low back injury she sustained on

March 14, 2011 while working for Gentiva Health Services ("Gentiva"). The ALJ also awarded Jackson TTD benefits and medical benefits for a low back injury she sustained on September 29, 2010 which subsequently resolved. Jackson also seeks review of the November 2, 2012, order denying in part her petition for reconsideration.

The sole issue on appeal is whether the ALJ erred by excluding Jackson's mileage reimbursement as "wages" in calculating her average weekly wage ("AWW"). Because we determine the ALJ did not err in excluding this expense reimbursement from Jackson's AWW calculation, we affirm.

Jackson filed a Form 101 on June 21, 2011 alleging she injured her low back in work-related incidents occurring on September 29, 2010, and March 14, 2011. She testified by deposition on August 29, 2011 and at hearings held April 27, 2012 and August 6, 2012. We will only discuss the evidence pertinent to the issue raised on appeal.

Jackson is a certified nursing assistant. At all relevant times, she worked as a home health aide requiring daily travel to patients' homes.

Jackson testified her pay was based upon the number of visits, and the visit classifications or service provided. She testified she worked seven days a week, but the number of visits per day varied. Typically, she made

two to five visits during the morning and also made visits in the evening three days per week. Both at the August 29, 2011 deposition, and the April 27, 2012 hearing, Jackson testified, in addition to the per visit rate, she received mileage reimbursement at the rate of $2.50 per mile for her travels. However, the first trip each day to a patient's residence and her last trip back to her home were not covered. She further stated she was required to complete a visit slip for each trip in order to be reimbursed for her travel.

On September 23, 2011, Gentiva filed pre-injury wage records for the four quarters preceding both the September 29, 2010 and March 14, 2011 work incidents. The AWW-1 forms reflect an AWW of $465.56 for the September 29, 2010 injury and $593.24 for the March 14, 2011 injury. Both AWW calculations included mileage reimbursement. The wage records and paystubs reflect Jackson was paid mileage on a weekly basis, but such amounts were excluded from her taxable income.

On March 14, 2012, Gentiva submitted amended pre-injury wage records for the four quarters preceding both the September 29, 2010 and March 14, 2011 work injuries, excluding mileage reimbursement. Those AWW-1 forms indicate

an AWW of $402.21 for the September 29, 2010 incident and $515.48 for the March 14, 2011.

In the opinion, award and order rendered October 3, 2012, the ALJ determined Jackson failed to prove a permanent injury as a result of the September 29, 2010 event, and awarded medical benefits and temporary total disability benefits. Regarding the March 15, 2011 injury, the ALJ awarded TTD benefits, PPD benefits and medical benefits. In addressing Jackson's AWW, the ALJ stated as follows:

> The parties have been unable to agree on an average weekly wage. The plaintiff argues that the mileage reimbursement should be included in an average weekly wage. However, *KRS 342.140 (6)* specifically notes that a fuel or similar advantage is included in wages only to the extent that it is reported for income tax purposes. Therefore, the plaintiff's reimbursement for mileage for the use of her automobile is not wages which may be included in the determination of average weekly wage under *KRS 342.140 (1) (d).* The plaintiff's average weekly wage is found to be $515.48 resulting in a temporary total disability rate of $343.65.

Jackson filed a petition for reconsideration arguing, as she does on appeal, the ALJ committed a patent error in excluding mileage reimbursement in calculating her AWW. Jackson asserted KRS 342.140(6) provides a claimant is

entitled to have the reasonable value of fuel included in the calculation of AWW. Jackson asserted the ALJ erred in finding fuel is included only to the extent such income is reported to the IRS. Jackson argues the reporting requirement is limited to gratuities received from someone other than the employer and cites to 342.140(6), which provides ". . . and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes." Therefore, Jackson requested the ALJ correct his AWW calculation to reflect "$593.24 with a TTD rate of 395.49 and the resulting PPD benefits of 91.44 per week for 425 weeks."

In the order denying Jackson's petition for reconsideration issued November 2, 2012, the ALJ stated as follows regarding AWW:

> 1. In regards to the request to include mileage reimbursement for fuel in the [AWW] of the plaintiff, the petition is DENIED. As defined in KRS 342.140(6), the term "wages" includes the reasonable value of fuel or other advantage only to the extent it is reported for income tax purposes. The plaintiff's argument that this applies only to such value obtained from someone other than the employer is without merit. That language is in regard to gratuities only.

On appeal, Jackson argues the ALJ committed reversible error in calculating her AWW to be $515.48, and asserts it should have included the wages plus mileage reimbursement for a total of $593.24. Jackson again argues the ALJ misinterpreted KRS 342.140(6) when he found fuel is included in wages only to the extent it is reported for income tax purposes and relies upon this Board's opinion in Comair, Inc. v. Aubert, Claim No. 2005-64443, rendered February 5, 2008. Jackson asserts in Aubert, this Board determined a flight attendant's per diem benefits should be included in AWW and "it is not proper to make a distinction between taxable and non-taxable, as that distinction is only relevant for 'gratuities' from 'others than the employer.'"

Jackson asserts the requirement of being reported for income tax purposes found in KRS 342.140(6) only applies to gratuities from others than the employer. Since the provision does not apply to the facts of this claim, she argues the ALJ committed reversible error. She also asserts KRS 342.140(6) does not require the mileage reimbursement to constitute an economic gain in order to be considered wages. Nonetheless, she argues the $2.50 Jackson "received per mile far exceeded the actual cost per mile, and as such, the mileage reimbursement was part of her compensation for services rendered and was of economic benefit to her."

It is well established a claimant in a workers' compensation proceeding bears the burden of proving each of the essential elements of her cause of action. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

We cannot say the ALJ's determination Jackson's travel expense reimbursement should not be included in the AWW calculations is so flawed it must be reversed as a matter of law. We find Jackson's argument the ALJ erred in excluding her mileage reimbursement in calculating her AWW to be unpersuasive. KRS 342.140(6) states as follows regarding what is to be included as wages:

> The term "wages" as used in this section and KRS 342.143 means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes.

Likewise, KRS 342.0011(17) provides the following wage definition:

> "Wages" means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel, or similar advantages received from the employer, and gratuities received in the course of employment from persons other than the employer as evidenced by the employee's federal and state tax returns

The inclusion of mileage reimbursement in the calculation of AWW for purposes of determining PPD and TTD benefits does not appear to have previously been addressed.

In Rainey vs. Mills, 733 S.W.2d 756 (Ky. App. 1987), the Court of Appeals found fringe benefits such as employee pension fund contributions, health insurance benefits, and life insurance were not intended to be included pursuant to KRS 342.140 as "wages" on the basis that they did not fall within the class of "similar advantages received from the employer" such as board, rent, housing, or lodging.

In Comair, Inc. v. Aubert, supra, this Board addressed hourly per diem payments made to the claimant to pay for meals while traveling should be included in calculating AWW. The Board stated as follows in its analysis:

> There is a dearth of Kentucky case law on the subject of the inclusion of meals and lodging in average weekly wage. However, Professor Larson in his

treatise on workers' compensation instructs as follows:

> In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration of the work, as, for example, tips, bonuses, commission, room and board, even a car allowance, constituting real economic gain to the employee. (Footnotes omitted.) (Emphasis added.)

In Brooks v. Tri State Industrial Services, Inc., Claim No. 2006-97477, rendered April 30, 2009, this Board concluded vacation pay is a monetary payment for services rendered and therefore must be included in the calculation of AWW. In support of this conclusion, the Board noted the money received as vacation pay is treated in all ways as regular income for tax purposes, the employee earns vacation pay through work during the entire year, and it is paid at the regular rate the employee earns while working.

We find Aubert and Brooks instructive in the case *sub judice* in determining mileage reimbursement should not be included in the calculation of AWW. Mileage reimbursement is paid to reimburse an employee for employment-related expenditures, and is not paid unless the

mileage or travel is actually incurred. On the other hand, per diem is a set amount paid whether it is used for its intended purpose, or whether any expense is actually incurred.

In his treatise, Professor Larson notes a car allowance is includable as a wage only if it actually exceeds a truck or travel expense. A. Larson, Larson's Workers' Compensation law (2012) §93.01[2][a]. This mirrors the language in Shelley v. National Carbon Co., 285 Ky. 502, 148 S.W.2d 686 (Ky. App. 1941). In Zanders v. Golden Age Home Care Ctr., 705 So. 2d 296 (La. Ct. App. 1997), which we cite for illustrative purposes only, the Louisiana Court of Appeals found the $3.00 per mile travel reimbursement the claimant received for using her own vehicle was not to be included in calculating her wage because, as in the case *sub judice,* it was linked to an actual expense.

We acknowledge the last sentence of KRS 342.140(6) in discussing the income tax reporting requirement appears to modify only "gratuities received from third parties." However, this has been considered a factor in determining whether other types of pay should be considered as wages in calculating AWW. *See* Brooks, supra. In the case *sub judice*, Jackson testified she submitted a

"visit slip" for each client she visited per day in order to receive mileage reimbursement. In addition to her wages, Jackson received mileage reimbursement on a weekly basis, as reflected on her paystubs. However, the amount received for mileage was excluded from her taxable income. There is no evidence she reported the mileage reimbursement as taxable income, and we do not believe the ALJ erred in excluding it from her AWW calculation.

Accordingly, the October 3, 2012 Opinion, Award and Order and the November 2, 2012, Order denying Jackson's petition for reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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