

OPINION ENTERED: July 13, 2012

CLAIM NO. 201001440

COMMONWEALTH OF KENTUCKY
UNINSURED EMPLOYERS' FUND

PETITIONER

VS.

**APPEAL FROM HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE**

JESSE FLETCHER
DOYLE'S PALLETS, INC.
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**
* * * * *

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

STIVERS, Member. The Uninsured Employers' Fund ("UEF") seeks review of the December 22, 2011, opinion, award, and order of Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), finding Jesse Fletcher ("Fletcher") sustained a work-related injury to his left hand and awarding temporary total disability ("TTD") benefits, permanent partial

disability ("PPD") benefits, and medical benefits. The UEF also appeals from the January 31, 2012, order denying its petition for reconsideration.

Because the UEF only contests the ALJ's calculation of Fletcher's average weekly wage ("AWW"), we will only summarize the evidence germane to that issue.

Fletcher's Form 101 alleges he was injured on October 1, 2010, while "using a pallet-stripping table when it 'ran over' his left hand." Doyle's Pallets, Inc. ("Doyle's") maintained throughout the proceedings that Fletcher was not its employee and not on the premises on that date and thus did not sustain a work-related injury.

Fletcher testified at his July 28, 2011, deposition that he had worked for Doyle's in 2008 for approximately two weeks during a one-month period. At that time, he earned \$6.25 or \$6.50 per hour stripping pallets. Fletcher went to prison as a result of a parole violation and was released on May 26, 2010. He testified he worked in tobacco until approximately September 12 or 14, 2010, when he went to work for Doyle's. There he cut boards using a band saw or table saw and also worked at the pallet stripping table. Fletcher believes he earned \$6.50 per hour and worked approximately two weeks missing a day or two of work prior to his injury. Because he started in the

middle of the week, Fletcher believes he worked between seventeen and twenty-one hours his first week on the job. Later in his deposition, Fletcher testified he may have worked as much as twenty to twenty-five hours the first week. Fletcher testified he worked approximately forty-five hours the second week and forty-two hours the third week. On every occasion, he was paid in cash with no taxes deducted. Fletcher introduced a post-it note which he maintained was in the envelope containing his last week's wages which was given to him approximately a week after his injury. The post-it contains the following:

Jesse

42 Hr.

\$273.00

Fletcher testified he was injured while he was operating a pallet stripping machine when his "hand got caught between some kind of support rail and the big tabletop" on the machine. As a result, he broke bones in three fingers and "more or less popped [his] hand open." Fletcher was taken to the local hospital and then to the University of Kentucky Medical Center. The medical records of the University of Kentucky Medical Center indicate Fletcher had a crush injury to his left hand and the imaging studies revealed metacarpal shaft fractures in the

second, third, and fourth metacarpals and a scaphoid fracture as a result of displacement. Fletcher testified he has never worked at any other pallet business and does not know whether there were any pallet businesses in Harrison County. Further, he was unaware of any other pallet businesses located in other counties adjacent to Harrison County.

At the October 27, 2011, hearing, Fletcher testified he worked daily for three weeks except on Sunday. He testified he worked fifty to sixty hours a week earning \$6.50 or \$7.00 per hour.

Gary Doyle, Sr. ("Gary"), the owner of Doyle's, testified at his July 28, 2011, deposition that the only time Fletcher worked for Doyle's was in 2008 when he worked seven hours. Fletcher did not work for Doyle's on October 1, 2010, the date of the alleged injury. Gary denied knowing or employing any of the individuals who testified they worked for Doyle's during a portion of the time Fletcher worked for Doyle's in 2010. Gary testified he always paid the people who worked for him in cash. During the period in 2010 Fletcher was alleged to have worked, Gary testified Doyle's sold three to four loads of pallets per week. He testified 280 pallets constituted a load and therefore Doyle's was producing approximately 900 to 1200

pallets per week. Gary felt this was true throughout the month of October 2010. He testified his wife Sherry Doyle or his accountant could provide the 2010 gross sales. Gary had no record of who was present at the business on October 1, 2010. It is apparent from Gary's testimony there were no time cards and no checks evidencing the individuals who worked for Doyle's in 2010. Gary had no specific recollection who worked at the business on October 1, 2010, but believed only family members worked that day. Gary testified he would have to check with his wife or accountant to determine whether someone other than a family member worked for the business during October 2010.

At the hearing, Gary testified a check for \$43.68 was written to Fletcher on July 4, 2008, for seven hours of work. Gary testified Fletcher only worked for Doyle's on that one day.

Sherry Doyle ("Sherry") was deposed on July 28, 2011. Sherry testified she does the office work. She did not know Fletcher. She testified her records reflect Fletcher worked for seven hours sometime prior to the alleged injury. Sherry did not believe Doyle's had any employees on October 1, 2010. Doyle's paid all independent contractors in cash. Sherry probably gave Gary the cash to pay the independent contractors. Sherry did not believe

there were any records of payments to the independent contractors. Sherry testified that her daughters, two sons, and an individual named Randy Lyons did not work for the company but merely helped out. The family members were paid every week regardless of the type and location of the work performed. Sherry testified as follows:

Let's see. My children go down there and they help out. Do they work for the company? No. Do I pay them? Yes, but I pay them -- I pay them money every week, you know, whether it would be doing yard work or house work or garden, or what the case -- whatever the case may be. So when they go to the shop, do they get paid? Yes, but they get paid regardless.

Sherry could not remember the last time she deducted anything for taxes. Most of her records are kept at home and those records do not reflect the people who worked as independent contractors for Doyle's. She testified she has very few business records.

Based on the testimony concerning Fletcher's AWW, the ALJ entered the following findings of facts and conclusions of law:

Average weekly wage.

The parties have preserved an issue with respect to the calculation of plaintiff's average weekly wage. It is undisputed that the plaintiff was paid by the hour and that he worked for the defendant/employer for less than 13

calendar weeks immediately preceding the injury. Accordingly, plaintiff's average weekly wage is to be calculated pursuant to KRS 342.140(1)(e) which provides that if at the time of injury, the employee had been in the employ of the employer less than 13 calendar weeks immediately preceding the injury, his average weekly wage shall be computed under paragraph (d) by 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 13 calendar weeks immediately preceding the injury and had worked, when work was available, to other employees in a similar occupation.

The parties agree that the above-cited statutory provision controls the calculation of average weekly wage in this claim but disagree as to the result based thereon. The plaintiff contends that provision supports a finding that employees of the defendant worked seven and a half hours a day, six days a week, which supported the "reasonableness" of the determination that plaintiff's average weekly wage would be based on 42 hours per week at \$6.50 an hour, or \$243. The UEF, on the other hand, submits that by virtue of the plaintiff's testimony, he earned only \$708.50 during the two and a half week period that he worked for the defendant prior to the date of injury. It further contends that plaintiff submitted no proof with respect to what a "similarly situated employee" would have earned as required by the statute and that, consequently, his wages can only be determined by dividing his actual wages by 13, thereby yielding an average weekly wage of \$54.50.

While the Administrative Law Judge agrees with the UEF that there was no specific testimony with respect to actual earnings of a "similarly situated" employee, the undersigned also believes that there is sufficient evidence in the record from which a determination can be made as to what plaintiff would have earned had he been employed the full 13 calendar weeks prior to the date of injury. Although plaintiff testified that he worked between 40 and 60 hours per week, the Administrative Law Judge is more persuaded by the testimony of Michael Sumpter that, during the time he worked there, he worked seven and a half hours per day. Plaintiff testified that he worked six days a week and his mother confirmed that he, in fact, worked Saturdays as well as weekdays. Moreover, the testimony of Gary Doyle, Sr. establishes that Doyle's Pallets, Inc. was a going concern producing 900 to 1,200 pallets per week which it sold to its regular customers. There is no evidence that the work was seasonal, sporadic or that the 10 week period immediately prior to the time the plaintiff went to work in September of 2010 was in any way different in terms of work activities than the two and a half weeks that the plaintiff actually worked. Accordingly, I infer from the evidence that work was regularly available to employees, such as the plaintiff, performing pallet stripping work for the defendant for the 10 week period immediately prior to September 14, 2010, the day the plaintiff went to work for the defendant. I find, therefore, that such work was available to the plaintiff and that he would have worked, on average, 45 (6 X 7.5) hours per week earning \$6.50 per hour yielding an average weekly wage of \$292.50. I find, therefore, that the

plaintiff's average weekly wage is \$292.50.

Based on Fletcher's AWW, the ALJ awarded TTD benefits of \$195.00 per week from October 2, 2010 through January 24, 2011, and PPD benefits of \$21.45 per week beginning January 25, 2011, for 425 weeks.

The UEF filed a petition for reconsideration making, in part, the same argument it now makes on appeal. Concerning the UEF's argument regarding the calculation of Fletcher's AWW, in the January 31, 2012, order ruling on the petition for reconsideration, the ALJ stated as follows:

The Uninsured Employer's Fund next contends that the Administrative Law Judge erred in determining plaintiff's average weekly wage based on what it contends to be conflicting evidence in the record as well as the plaintiff's own testimony regarding his limited work activities during the two and a half weeks that he worked for the defendant. Admittedly, evidence with respect to plaintiff's wages was inconsistent. Moreover, since the plaintiff did not work the full 13 weeks prior to the date of injury, his wages must be calculated by reference to KRS 342.140(1)(e). In that regard, however, based on the testimony of Gary Doyle, Sr. with respect to the continuous and ongoing operation of the pallet company for a period extending beyond 13 weeks prior to the date of injury, and considering the plaintiff's testimony with respect to the

availability of work six days a week, the Administrative Law Judge declines to reweigh the evidence and arrive at a different average weekly wage calculation. From the evidence presented by Dr. [sic] Doyle as well as the plaintiff's testimony, the Administrative Law Judge believes it is reasonable to presume that work was available to other employees performing the same functions as the plaintiff for the 13 week period preceding plaintiff's injury. It is a well settled principle of law that the primary objective of KRS 342.140(1)(e) is to obtain a realistic estimation of what the injured worker would have expected to earn during a normal period of employment. *Affordable Aluminum, Inc. v. Coulter*, 77 S.W.3d 587 (Ky. 2002). Calculating the plaintiff's wages based solely on earnings he actually received during the brief time he worked for the defendant would not provide a reasonable estimate of his average weekly wage in accordance with KRS 342.140(1)(e). The finding with respect to the plaintiff's average weekly wage does not constitute error appearing on the face of the Opinion and, accordingly, this aspect of the UEF's petition for reconsideration is overruled.

On appeal, the UEF argues as a matter of law, the ALJ incorrectly determined Fletcher's AWW. The UEF acknowledges the determination of Fletcher's AWW is governed by KRS 342.140(1)(e). It argues that pursuant to paragraph (1)(e), Fletcher bears the burden of submitting evidence of "what similarly situated employees would have earned." The UEF asserts that while the ALJ "agreed with

the Uninsured Employers' Fund there was no specific testimony with respect to actual earnings of a 'similarly situated employee,'" he determined Doyle's production of between 900 to 1200 pallets per week was sufficient to support his finding of Fletcher's AWW. The UEF asserts this was "a leap of faith not supported by the claimant's burden of proof, the evidence, nor the statute and its interpretation through case law." It asserts pursuant to KRS 342.140(1)(e), a claimant must prove "the availability to other employees of work in a similar occupation as well as what other employers in a similar occupation actually earned" and Fletcher offered no such proof.

The UEF maintains the ALJ inferred the availability of work in a similar occupation. The UEF asserts Gary's testimony establishes the number of pallets Doyle's produced varied greatly and there was no evidence of how many man hours were required to produce these amounts of pallets. Further, there was no evidence that Doyle's would have employed any pallet strippers during the thirteen weeks prior to Fletcher's injury. Accordingly, the UEF argues there are too many variables to allow the ALJ to infer like employment was available to anyone prior to the time Fletcher began work for Doyle's. In addition, the UEF argues the ALJ automatically assumed work was

available at \$6.50 per hour for six days a week and there is no evidence to support that conclusion. Therefore, the UEF asserts the ALJ must divide Fletcher's total earnings by thirteen weeks.

Fletcher, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including his AWW. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Fletcher was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. See Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. See Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same

witness or the same adversary party's total proof. See Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. See Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving causation. See Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. See McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. See Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. See Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own

appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. See Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

KRS 342.140(1)(e) and (f) read 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:

. . .

(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 similar services where such services are rendered by paid employees.

In this case, no proof was submitted by Doyle's in order to establish an AWW pursuant to KRS 342.140(1)(e). In fact,

Doyle's made a concerted effort to ensure there were no earnings records for any of its employees. Likewise, Doyle's intentionally did not keep records regarding payments made to any individuals it characterized as independent contractors. The ALJ is required by KRS 342.140(1)(e) to compute the employee's average weekly wage pursuant to paragraph (d) by taking the wages, excluding overtime and premium pay, to be the amount Fletcher would have earned had he been so employed by the employer for the full 13 consecutive calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. Because of Doyle's actions, the ALJ had an extremely difficult job in applying KRS 342.140(1)(e).

The evidence available to the ALJ on this issue is admittedly scant. Fletcher testified he worked for Doyle's six days a week earning approximately \$6.50 per hour. Fletcher's deposition testimony reflects he worked approximately two and half weeks. He changed that testimony at the hearing indicating he worked for approximately a month. Clearly, Doyle's took every precaution to make sure there were no records of money paid to anyone who provided any kind of service to Doyle's either as an employee or independent contractor. Based on

the testimony and considering Doyle's conscious effort to ensure no wage records were available, the ALJ was permitted to infer that Fletcher would have worked forty-two hours per week at \$6.50 an hour for the ten plus weeks immediately preceding the day he began working for Doyle's. The ALJ was not required to multiply Fletcher's total earning by thirteen weeks.

Although Huff v. Smith Trucking, 6 S.W. 3d 819 (Ky. 1999) deals with an injury to a logger it does contain insightful language. In Huff the employer anticipated the project would take fifteen to twenty days of actual work but was expected to extend over a longer period because the work could only be performed in good weather. The claimant in that case was paid \$75.00 for the days he worked. The problem arose because the claimant had only worked five days over a two week period when he sustained a head injury resulting in the company ceasing operations after the accident and subsequently going bankrupt. The claimant did not work after the accident. The Supreme Court instructed as follows:

KRS 342.140(1)(e) applies to injuries sustained after fewer than 13 weeks' employment. It utilizes the averaging method set forth in KRS 342.140(1)(d) and attempts to estimate what the worker's average weekly wage would have been over a typical 13-week

period in the employment by referring to the actual wages of workers performing similar work when work was available. As was recognized in *Brock*, the goal of KRS 342.140(d) and (e) is to obtain a realistic estimation of what the injured worker would be expected to earn in a normal period of employment. In the instant case, the logging business had not yet operated for 13 weeks; therefore there was no 13-week period from which to estimate an average weekly wage for employment.

. . .

Although KRS 342.140(1)(e) may be less than artfully drafted with regard to a casual labor situation, it is clear that casual laborers are not exempted from workers' compensation coverage under the Act and that no special provision has been enacted for computing their average weekly wage. The same holds true for workers employed by newly established businesses which have been in operation for less than 13 weeks when a work injury occurs. KRS 342.140(1)(e) relies upon the earnings of employees in a similar occupation during the 13-week period immediately preceding the injury when determining what the injured worker would have earned for the full 13-week period had he been so employed. Because the logging business had not yet operated for 13 weeks when claimant was injured, and it ceased operation after the injury, there was no 13-week period from which to estimate what claimant would have been expected to earn had the defendant-employer conducted a logging operation for the full 13 weeks preceding his injury.

As we recognized in *Brock*, the computation of average weekly wage pursuant to KRS 342.140(1)(e) must take into consideration the unique facts and circumstances of each case. In doing so, the Court of Appeals' approach in the instant case was to view claimant's earnings over a two-week period as though that was all he would reasonably have been expected to earn had the employment existed for the 13 weeks immediately preceding his injury. We are not persuaded that the finding implicit in the calculation set forth by the Court of Appeals is supported by any substantial evidence; therefore, we reverse.

Id. at 822.

In this case, the ALJ had before him Fletcher's testimony he was paid \$6.50 per hour and worked approximately forty-two hours a week which was corroborated to a large extent by Michael Sumpter, a co-worker who testified in this case. Significantly, the testimony of both Gary and Sherry establishes Doyle's could not file an AWW-1 as required by 803 KAR 25:010 Section 13(9)(a) which would have provided the information needed to calculate an AWW for Fletcher. Moreover, Doyle's could not provide the wage records of its other employees who may have worked a longer period of time for Doyle's. Doyle's had no excuse for its inability to provide relevant evidence regarding the wages of any of its employees. Doyle's operated a cash only business avoiding the requirements of many state and

federal laws. To say the least, Doyle's operated a highly questionable business in that it paid the employees in cash, reported nothing and withheld nothing from the wages of its employees. Based on the available evidence, the ALJ concluded Fletcher would have averaged forty-two hours per week at the rate of \$6.50 an hour over a thirteen week period prior to his injury. Contrary to the UEF's assertion, Gary's testimony regarding the pallet production at or near the time of Fletcher's injury established work was and had been available at that business prior to Fletcher's injury. Given the testimony and Doyle's action we cannot say the ALJ's determination is unreasonable and is not supported by substantial evidence in the record.

We believe Abel Verdon Construction and Acuity Insurance v. Rivera, 348 S.W.3d 749 (Ky. 2011) rendered August 25, 2010, and corrected August 30, 2010, is controlling in this case. In Abel Verdon Construction and Acuity Insurance v. Rivera, supra, Rivera, a fifteen year old illegal immigrant went to work at the request of his distant cousin for Abel Verdon Construction picking up garbage for which he would be paid \$50.00 per day in cash. Rivera worked for two weeks working three days one week and four days the next. There was no question Rivera did not work a whole week and he received a total of \$250.00 over

the two week period. Based on this information, the ALJ arrived at an AWW of \$150.00. This Board affirmed the ALJ's calculation of the AWW. The Supreme Court, in affirming the ALJ's calculation of the AWW, stated as follows:

II. AVERAGE WEEKLY WAGE.

Verdon continues to assert that the claimant failed to meet his burden of proving an average weekly wage. We disagree.

The claimant testified that he worked for two weeks before he was injured and that he worked three days the first week and four days the second. He also testified that he was paid \$50.00 per day and earned a total of \$250.00. Martinez testified that the claimant was paid \$7.00 to \$8.00 per hour; performed necessary work; and received his wages in cash. He could not remember the exact number of days that the claimant worked but thought that he worked three days the first week and two days the second week. Verdon submitted no contrary evidence.

Noting the difficulty that a worker paid in cash encounters when attempting to prove his average weekly wage, the ALJ determined that the employer could not rely on the lack of written documentation as a defense. The ALJ found it difficult to apply KRS 342.140(1) under the circumstances but concluded that the claimant worked three days per week and earned \$50.00 per day, which yielded an average weekly wage of \$150.00. [footnote omitted]

KRS 342.140(1)(e) controls the average weekly wage calculation in this case because the claimant worked for less than 13 weeks before his injury occurred. KRS 342.140(1) provides in pertinent part 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:

....

(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.

Chapter 342 requires the findings of fact that support an award to be based upon substantial evidence. It does not require documentary proof of a worker's average weekly wage in a case where

nothing refutes testimony by the worker and his foreman that the employer paid its employees in cash. As stated previously, KRS 342.285(1) permits an ALJ to pick and choose from the witnesses' testimony and to draw reasonable inferences from the evidence. The ALJ relied on the testimonies of the claimant and Martinez to find an average weekly wage of \$150.00. The Court of Appeals did not err by affirming the finding because it constituted a reasonable estimate of what the claimant probably would have earned had he worked for the full 13-week period immediately preceding his injury when work was available. [footnote omitted]

Id. at 756-757.

Here, the ALJ was faced with the same task as the ALJ in Abel Verdon Construction. The opinion, award, and order and the order ruling on the petition for reconsideration establish the ALJ had a good understanding of the evidentiary requirements of KRS 342.140(1)(e) and correctly applied the facts in this case to the statute.

Accordingly, the December 27, 2011, opinion award, and order and the January 31, 2012, order ruling on the petition for reconsideration of Hon. Robert L. Swisher, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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