Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 22, 2016

CLAIM NO. 201496661

COX INTERIOR, INC. PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

JOSHUA A. PERKINS
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Cox Interior, Inc. ("Cox Interior") appeals from the April 29, 2016, Opinion, Order, and Award and the June 13, 2016, Order on Petition for Reconsideration of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. On

appeal, Cox Interior asserts the ALJ's calculation of average weekly wage ("AWW") utilizing a 40-hour work week was not supported by substantial evidence.

The Form 101 alleges Joshua Perkins ("Perkins") injured his right hand on January 29, 2014, in the following manner: "right hand got caught in a conveyor belt."

Perkins filed a Motion to Amend 101 to include a claim for psychological impairment secondary to his physical injury of January 29, 2014. By order dated September 17, 2014, the motion was sustained.

The February 10, 2016, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation as to Perkins' alleged psychological injury; Perkins' AWW; unpaid or contested medical expenses as it pertains to Perkins' alleged psychological injury; injury as defined by the Act as it pertains to Perkins' alleged psychological injury; extent of Perkins' entitlement to TTD benefits; the merit of each parties' claims of a safety violation; and Perkins' entitlement to vocational rehabilitation benefits. Under "Other" is the following: "1. an issue of AWW includes apprentice/trainee because only worked less than 13 weeks

w/ potential to be promoted. 2. whether Def's special defense of safety violation untimely filed."

Wage records filed by Cox Interior specify Perkins worked for six weeks before being injured. He earned $8.50 per hour, and worked from 13 to 29 hours per week during those six weeks. Also filed by Cox Interior is a list of the hours available to work during the weeks spanning from October 31, 2013, to January 29, 2014, for "same or similar occupations," and the hours available are all indicated as "29."

Perkins was deposed on August 19, 2014. Perkins testified he had a set schedule when he worked for Cox Interior which was 6 a.m. to 2:30 p.m., and he was paid hourly wages of $8.50. He worked 29 hours a week. He testified as follows:

> Q: And you were there from November until January; were you in a training program of any kind or were you set up to work 29 hours a week every [sic] until when you got hurt?
>
> A: What we were told was that if we stayed there long enough and if we got good at our jobs we would be moved to full-time and there may have- it was implied that there may have been a pay increase when that happened.
>
> Q: And when were you told that, like when you applied for the job or during some type of orientation program?

> A: During the orientation.
>
> Q: Was there any indication of how long that would take?
>
> A: If I'm remembering correctly it was somewhere in the area of three months, two or three months.
>
> Q: And at the time you got injured you had been there for about two months?
>
> A: I think I had been there for a month.

Perkins was deposed again on October 14, 2015, and testified at the February 24, 2016, hearing. However, none of this testimony is relevant to the issue on appeal.

The deposition of Ricky Myers ("Myers"), Cox Interior's Human Resources Director was introduced. Myers testified extensively regarding Cox Interior's full-time and part-time employees in 2014:

> Q: It's my understanding that you had, at least in January of 2014, both full-time employees and part-time employees, is that correct?
>
> A: Prior to that, probably- I don't know, maybe two or four months prior to that.
>
> Q: So something was started pretty recently?
>
> A: In the wintertime.
>
> Q: Okay. And- and as far as the part-time employees, did you have a few, multiple, do you know how many you had back then?

A: I don't know how many at the time. Just a- just a few.

Q: What was the purpose of starting up a part-time program versus your regular full-time staff?

A: It was in the- it was in the winter, and we wanted to cut some costs and if we wanted to have the employees work less than 30 hours, which would be full-time, and they lowered- and in order to- well, we wanted to save on the insurance and the benefits, so we hired them as part-time.

Q: Okay. And those employees that were part-time, how many hours were they getting per week?

A: 29- well, 29 or less.

Q: Okay. And were you able to keep them busy pretty much those 29 hours?

A: Yes.

Q: Okay.

A: Yes.

Q: And how did that work, did they come in part of the time every day, did they come in just a few days a week, how were you all generally-

A: They come in three and-a-half days a week.

Q: Okay.

A: We'd give them 29 hours.

Q: Okay. And it's my understanding that you all didn't continue with that particular program, is that fair to say?

A: Right, we did not continue.

Q: And I know it's been a while, but do you know at one point in time you decided that this just wasn't-

A: It just wasn't working for Cox Interior. It just wasn't working.

Q: Okay. Do you know when that was, just from the start?

A: It was probably- it was probably in the spring of 2014, I would say spring or summer.

Q: Okay. And why- and why was that particular policy not working out for you guys?

A: Because- because employees would tell me that they would- when they could go to Amazon or go to Murakami or to another company and get more hours, and they couldn't afford to work on- as a part-time employee.

Q: Okay. I think you answered, these workers didn't receive any- any benefits, is that correct?

A: Sir?

Q: These workers didn't receive any benefits?

A: No, they did not.

Q: Okay. What was the- I guess the turnover like during that time period?

A: Probably about 40 percent.

Q: Okay. So were you all having trouble keeping people?

A: We did.

Q: As far as when you hired these people on part-time, was there any promise that they would go full-time for you all?

A: No promise.

Q: Okay. You all didn't have a trainee transition into full-time policy or anything like that?

A: We had no policy.

Q: Okay. Were some of the employees that were on this part-time program, did you all decide to hire them full-time?

A: Some of them.

Q: Okay.

A: Some of them.

Q: What were you looking for and how many percent [sic] would you decide to go full-time, if you know?

A: We were looking for a person that was- attendance was nearly perfect, they get along with others well, their safety was zero, didn't have no [sic] safety issues, and they were good workers.

Q: Okay. So at some point would just a supervisor identify somebody, say, 'I think this person may be good full-time,' or how did- how did that-

A: The supervisor would get in conjunction with a plant manager, and then they would discuss putting them full-time and they would call me and say, 'We want to put this person full-time,' because- because they reason, he was a good worker, had good attendance,

> and got along well with others and done [sic] his job well.
>
> Q: Okay. But there is no written policy that you guys have regarding that?
>
> A: No.
>
> Q: Okay. When you did have these part-time workers that you decided to hire full-time, you mentioned a certain percentage of those would come up full-time, have any idea- and I don't want you guessing, but are we talking just a few or are we talking most, how- how many- how many people part-time would go full-time?
>
> A: Just a few.
>
> Q: Okay.
>
> A: Just a few.
>
> Q: Under half, over half, any idea?
>
> A: I would say under half.
>
> Q: Okay.
>
> A: Under half.

Regarding Perkins, Myers testified as follows:

> Q: Okay. And in Mr. Perkins' case, we talked earlier, he was part-time, was [sic] there any promises ever made to him that he would be initially put on full-time after a certain amount of time?
>
> A: No promises.

Myers testified everyone at Cox Interior started at an $8.50 per hour wage. Myers testified it is reasonable

for Cox Interior employees to expect raises if they stayed and performed their job well.

Myers testified Perkins worked for six weeks prior to his work injury. In January 2014, Cox Interior had about 350 employees, and around 65-75% of them were manual laborers like Perkins. He further testified as follows:

> Q: Okay. Was the plant busy during that time period?
>
> A: No, it was not, not really.
>
> Q: Okay. You already testified, it slacked off- business was a little slow-
>
> A: Right.
>
> Q: -and that's why you- you hired some part-time workers?
>
> A: Right.
>
> Q: But you did have almost all of those employees were full-time?
>
> A: Almost.

When Cox Interior ended the experimental part-time program in the spring of 2014, none of the remaining part-time employees were offered full-time positions.

In his March 21, 2016, brief to the ALJ, Perkins asserted his AWW should be calculated utilizing a 40-hour work week.

In the April 29, 2016, Opinion, Order, and Award, the ALJ determined as follows regarding AWW:

> The parties were unable to stipulate as to Plaintiff's average weekly wage (AWW) at the time of his injury. At the time of his injury Plaintiff was a part-time employee working 29 hours a week, earning $8.50 per hour. Plaintiff did not work for Defendant 13 continuous weeks immediately prior to his work incident.
>
> KRS 342.140 sets forth appropriate ways to determine an employee's average weekly wage. When an employee has worked less than 13 weeks immediately prior to his injury the goal of KRS 342.140 (1) (d) and (e) is to determine a realistic estimation of what a worker would have been expected to earn in a normal 13-week period of employment. It was acknowledged by the Supreme Court in *Huff v. Smith Trucking*, 6 S.W.3d 819 (Ky. 1999) that when an employee has worked less than 13 weeks or [sic] his earnings are effected by the availability of work, the pre-injury earnings, and a realistic estimate of the workers' earning capacity, [sic] many factors may be considered by the ALJ.
>
> Defendant's [sic] Ricky Myers testified, had Plaintiff been able to do so, there was a sufficient amount of work for him to have worked 40 hours per week during the 13-week period preceding his injury. It is undisputed Plaintiff was as a part-time employee earning $8.50 per hour. Had Plaintiff been able to work 40 hours per week at $8.50 per hour his average weekly wage would have been $340.00 ($8.50 x 40) per week. There is no reason to question whether this number is a

> reasonable gauging of Plaintiff's earning capacity at the time of his injury; consequently, it is determined Plaintiff's average weekly wage at the time of his injury was $340.00, which yields a comp rate of $226.67 ($340 X 2/3).

Cox Interior filed a Petition for Reconsideration asserting Perkins' AWW should be based upon a 29-hour work week and not a 40-hour work week.

In the June 13, 2016, Order on Petition for Reconsideration, regarding his AWW calculations, the ALJ explained:

> Defendant seeks reconsideration of the determination Plaintiff's average weekly wage was $340.00 per week. Defendant contends, since Plaintiff was working as a temporary employee - 29 hours per week - his average weekly wage should be based upon 29 hours per week. In the Opinion it was determined Plaintiff's average weekly wage (weekly earning weekly capacity) was $340.00 based upon Plaintiff working 40 hours per week.
>
> Under KRS 342.140 computation of an injured employee's average weekly wage, when the employee has not worked for the employer for 13 consecutive weeks immediately preceding his or her work injury, is based upon the amount earned by similarly situated employees during the full 13 weeks immediately preceding the work injury. When making a determination in such a situation the unique facts and circumstances of the work, including the temporary nature of employment, is based upon the

employee's earning capacity, not the employee's actual earnings.

Subsection (1) (e) of KRS 342.140 is designed to arrive at an average weekly wage based upon an employee's average weekly earning capacity, the average weekly wage is not necessarily always based upon actual wages earned. *C & D Bulldozing, Co. v. Brock*, 820 S.W.2d 482 (Ky. 1991).

Actual wages received over a short period of time may have no relation to a worker's earning capacity. *Lexington Mining Co. v. Richardson*, 150 S.W.2d 889 (Ky. 1941).

The proof herein indicates Defendant employed many full-time employees who performed the exact same work Plaintiff performed but on a part-time basis. This would seem to indicate Plaintiff's average weekly earning capacity, rather than his actual wages, would be the best indication of his earning capacity.

Defendant's [sic] Ricky Myers testified Plaintiff, when injured, was working as a participant in a temporary part-time employment program. Participating workers were allowed to only work 29 hours as explained by Mr. Myers, "…we wanted to have the employees work less than 30 hours, which would be full-time, then they lowered—and in order to—well, we wanted to save on the insurance and the benefits, so we hired them as part-time. (Myers' [sic] p.7).

The experiment failed because the participants went to other employers and got full-time work. (Myers' [sic] p. 8).

> Mr. Myer testified what Plaintiff was doing was similar to the work full-time employees were doing. (Myers' [sic] P. 21).
>
> An injured employee's average weekly earning capacity should not be based upon his working part-time in a temporary experimental program instituted by an employer to avoid paying benefits to employees, [sic] Plaintiff's earning capacity determination was based upon the demonstrated earning capacity of similarly situated workers.
>
> Determination of Plaintiff's average weekly wage was set forth on pages 21 through 22 of the Opinion, consequently, Defendant's Petition for Reconsideration on this issue is Overruled.
>
> The determination Plaintiff was working as a trainee when injured, (as above determined) and his average weekly earning capacity was, based upon what full-time employees earned (the determination made above) is not inconsistent. Plaintiff's AWW is based upon his earning capacity whereas the title of Plaintiff's work status (trainee v. full-time employee) has little, if anything, to do with his earning capacity.

An ALJ may draw reasonable references 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. 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). 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. 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. 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. 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. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

KRS 342.140(1)(e) governs the circumstances of this claim and states AWW:

> [S]hall 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.

In Huff v. Smith Trucking, 6 S.W.3d 819, 821 (Ky. 1999), the Supreme Court of Kentucky stated as follows regarding the purpose of the statutory provision:

> 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[sic](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 calculating AWW pursuant to KRS 342.140(1)(d), the ALJ "must take into consideration the unique facts and circumstances of each case." Id. at 822.

In the case *sub judice*, the ALJ primarily relied upon the testimony of Myers in calculating Perkins' AWW. Specifically, the ALJ opined, in the June 13, 2016, Order on Petition for Reconsideration, that Perkins' AWW should not be based on Perkins working in an experimental part-time program implemented by Cox Interior in order to avoid paying benefits. We agree. This is particularly within the

ALJ's discretion in light of Myers' testimony, as cited by the ALJ, indicating the experimental part-time program failed and part-time workers went to other employers and found full-time work. Myers' testimony indicates that the turnover rate for part-time workers in the program was 40%. Myers' testimony further indicates that the experimental part-time program was discontinued in the spring of 2014 which is shortly after Perkins sustained his injury in January 2014. While Myers' testimony indicates none of the remaining part-time workers were offered full-time positions after the experimental part-time program was discontinued, his testimony indicates that under half of the part-time employees were offered full-time positions at the time the experimental part-time program was still active. Particularly relevant is Myers' testimony indicating 65-75% of Cox Interior's roughly 350 employees in January 2014 were manual laborers just as Perkins was, and of those 350 employees, "just a few" were in the experimental part-time program.

Perkins, had he not been injured, could have been one of the part-time employees promoted to a full-time position. It is important to reiterate that when calculating AWW pursuant to KRS 342.140(1)(d), not only does the ALJ have the discretion to "take into

consideration the unique facts and circumstances of each case," rather, the ALJ "must" do so. Id. at 822. “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971), and there is substantial evidence in the record in support of the ALJ's calculation of AWW utilizing a 40-hour work week instead a 29-hour work week.

Accordingly, the April 29, 2016, Opinion, Order, and Award and the June 13, 2016, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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