OPINION ENTERED: July 26, 2013

CLAIM NO. 201197252

DEBRA SELLERS PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

LAKE CUMBERLAND COMMUNITY ACTION AGENCY, INC.
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Debra Sellers ("Sellers") appeals from the January 28, 2013, opinion and award and the March 5, 2013, order denying Sellers' petition for reconsideration of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"). In the January 28, 2013, opinion and award, the ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, Sellers asserts the ALJ "failed to follow the appropriate test for determination of seasonal employment." In the alternative, Sellers asserts if seasonal employment is appropriate, the TTD rate of $107.73 "is not in accordance with KRS Chapter 342."

The Form 101 alleges on January 21, 2011, Sellers "slipped and fell in the parking lot due to snow and ice, striking her head" while in the employ of Lake Cumberland Community Action Agency, Inc. ("Lake Cumberland"). The Form 101 indicates Sellers sustained the following injuries: "(1) Closed head injury with subachromial hemorrhage; (2) Post traumatic seizures, post traumatic vertigo, memory loss, headaches; (3) Neck; (4) Depression."

The November 29, 2012, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, average weekly wage, unpaid or contested medical expenses, injury as defined by the ACT, and TTD. Handwritten in "other" is the following: "extent & duration w/multipliers, TTD, PPD & PTD; medical expenses."

Sellers was deposed on August 20, 2012. Sellers worked for Lake Cumberland from October 2008 through April 2009 and again from September 2010 to January 21, 2011.

Sellers testified as follows regarding her second period of employment at Lake Cumberland:

> Q: And- but then you said they added the weatherization part?
>
> A: Weatherization? They hired me in September I believe for the weatherization; which Liheap doesn't start until October, so they hired me a month before to start the weatherization, to help Rhonda with the weatherization. So they hired me a month before to start with the weatherization. To help her with the weatherization; which when I was hired I was told my employment would continue on until further notice. So it wasn't contingent on the Liheap.
>
> Q: So it was your understanding that you'd be working twelve months?
>
> A: Uh-huh. Until- yeah. Until further notice.

At the November 27, 2012, hearing, regarding the nature of her employment with Lake Cumberland before the injury, Sellers testified as follows:

> A: What was [sic] my duties. I- I did data entry for the people that came into the office for they're [sic]- for....Okay, just a minute.
>
> Q: So it would be data entry. Was it on a form or was it on a computer?
>
> A: It was on a computer.
>
> Q: And how long have you been working at that position?

A: I had been doing that job for- for- for that time for- since October, but I done [sic] it previously, you know, for- for them before, but...

Q: When you?

A: Or since September, I'm sorry. Since September. Or I had done a different job, but that job started in October, but I done [sic] a different job with them in September.

Q: Now, prior to getting hired for this job how many times did you work for them previously?

A: Well- well, I guess, one other. Through another season, through another season.

Q: And when was that?

A: The year before. From October through April the last year.

[text omitted]

. . .

Q: Now, just to clarify is it the two instances that you would work for them or three instances that you would work for them?

A: Okay. What it is, is they- they have it broke up. They work from, like, October to December and that's one thing and then from January to April; so- but, I guess, that's all one season- I don't know if that's considered one season or two seasons that's why it's a little confusing.
Q: So, I guess, between October and December and then January and April, how many of those segments did you work for?

> A: I worked- I done [sic] two, and then I- I mean, I done [sic] one one year and then I done- well, October- well, I started in September I started a total different thing in September, but they hired me totally different. You know, they said you're hired, you know, until further notice. And then when it started in October I went to work for the Liheap, and it ended, the [sic] December. And when January started, then I had my injury. You know that's how it went.

On the issue of seasonal employment, the ALJ made the following limited finding in the January 28, 2013, opinion and award:

> The Plaintiff has indicated that the work that she performed for the Defendant was seasonal in nature and therefore KRS 342.140(2) applies. The wages earned by the Plaintiff in the year prior to the injury divided by 50 yields an average weekly wage of $161.60.

In her petition for reconsideration, Sellers asserted the ALJ erred in finding she was a seasonal employee. Sellers also asserted even if she is a seasonal employee, her TTD rate was miscalculated. She also requested additional findings, stating as follows:

> In the event that the ALJ disagrees with the Plaintiff's position that she was not a seasonal employee, then the Plaintiff respectfully requests the ALJ to make additional findings of fact. The Plaintiff submits that she is entitled to have the evidentiary basis for the ALJ's findings. **Shields v.**

> **Pittsburg and Midway Coal Mining Company, 634 S.W.2d 440 (Ky. App. 1982).**

On March 5, 2013, the ALJ signed a two-sentence order provided by Lake Cumberland denying Sellers' petition for reconsideration.

There are significant contradictions in the January 28, 2013, opinion and award. The first inconsistency deals with the ALJ’s statement in his summary of the evidence wherein he stated: "She thought it was going to be a seasonal position as before but she was kept on full-time." However, in the findings of fact the ALJ stated as follows: “The Plaintiff has indicated that the work that she performed for the Defendant was seasonal in nature and therefore KRS 342.140(2) applies.” Thus, we believe it was error for the ALJ to calculate Seller's average weekly wage ("AWW") based on KRS 342.140(2), the statutory provision pertaining to seasonal employment as Sellers’ testimony summarized herein firmly establishes she was a full-time employee. The ALJ’s summary of Sellers’ testimony and his finding Sellers indicated her work was seasonal cannot be harmonized.

Additional support for our conclusion the ALJ's findings are not consistent with the evidence is found in Sellers’ deposition testimony. Sellers testified it was her

understanding she would be working twelve months or "until further notice." Similarly, at the hearing, Sellers testified her second period of employment with Lake Cumberland was "totally different" from her first period of employment. She reiterated as follows: "You know, they said you're hired, you know, until further notice."

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). In the case *sub judice*, we are unable to determine the basis for the ALJ's finding Sellers' work was seasonal.

Accordingly, we vacate the ALJ's determination Sellers was a seasonal employee at the time of the January 21, 2011, injury, his calculation of AWW, and the award of TTD and PPD benefits and remand for additional findings. On remand, should the ALJ again conclude Sellers was a seasonal employee at the time of the injury, he must provide findings of fact supported by evidence in the record. If the ALJ concludes substantial evidence does not support such a finding, he must calculate Sellers' AWW pursuant to the appropriate subsection of KRS 342.140(1). 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).

We feel compelled to address the ALJ's use of the prepared order in ruling on the petition for reconsideration. We acknowledge the regulations require a party filing a motion to tender a proposed order.[1] However, in this case, Lake Cumberland did not file a motion or a petition for reconsideration. Rather, it tendered an order along with its response to Sellers' petition for reconsideration. In rare circumstances the use of a

[1] *See* 803 KAR 25:010§4(1).

prepared order *may* be appropriate; however it was not appropriate in the case *sub judice*. In her February 11, 2013, petition for reconsideration, Sellers specifically asked for additional findings of fact on the issue of seasonal employment. Instead of rendering additional findings or addressing the need for additional findings, the ALJ signed the two-sentence order attached to Lake Cumberland's reply to Sellers' petition for reconsideration. Given the nature of Sellers' petition for reconsideration, the ALJ should have specifically addressed the relief requested and either rendered additional findings as requested or explained why additional findings of fact were unnecessary.

In light of our decision vacating the ALJ's determination Sellers was engaged in seasonal employment at the time of her injury and his subsequent calculation of AWW, Sellers' second argument on appeal regarding the rate of TTD is, at this juncture, moot.

Accordingly, those portions of the January 28, 2013, opinion and award and the March 5, 2013, order ruling on Sellers' petition for reconsideration regarding the ALJ's finding Sellers' work was seasonal, the calculation of AWW, and the award of TTD and PPD benefits are **VACATED**. This claim is **REMANDED** for additional findings and entry of

an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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