

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 14, 2014

CLAIM NO. 201100140

HR SOLUTIONS OF AMERICA

PETITIONER

VS.

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

JIMMY GROSS,
ROAD DOG INDUSTRIAL, LLC,
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING AND ORDER

* * * * *

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

ALVEY, Chairman. HR Solutions of America ("HR") seeks review of the opinion and award rendered August 23, 2013 by Hon. John B. Coleman, Administrative Law Judge ("ALJ") awarding Jimmy Gross ("Gross") permanent partial disability ("PPD") benefits, temporary total disability ("TTD") benefits and medical benefits for a work-related low back

injury sustained on August 26, 2010. HR did not file a petition for reconsideration. On appeal, HR argues the ALJ erred in calculating Gross' average weekly wage ("AWW"). Because the ALJ's calculation of Gross' AWW is supported by substantial evidence in the record, we affirm.

Gross filed a Form 101 on February 1, 2011, alleging he injured his back while lifting a wheelbarrow full of rocks on September 22, 2010 and identified the employer as Road Dog Industrial, LLC ("Road Dog"). HR was subsequently joined as a necessary party on March 1, 2011. The parties later stipulated at the June 11, 2013 benefit review conference ("BRC") the correct date of injury as August 26, 2010. In the Form 101, Gross alleged he was a "construction worker" for Road Dog from June 2009 through September 2010 earning \$800.00 per week at the time of his injury. The Form 104 indicates Gross has been working as a "construction worker" since January 2002.

Gross testified by deposition on May 3, 2011 and at the final hearing held June 27, 2013. At his deposition, Gross testified he was born on February 18, 1959 and resides in Cecilia, Kentucky. He has a high school education and also took a nine week training course in operating heavy equipment in 1978, though did not earn a certificate. He testified his specialty is form carpentry in which he

"build[s] the building." He also has prior experience as a stone mason, heavy equipment operator, and forming and finishing concrete.

Gross explained Road Dog is a temporary employment company and he began working for them "about 4 months before I hurt myself" on August 26, 2010. Gross testified he had only been assigned to two jobs through Road Dog when he was injured, both with Kelley Construction. Gross agreed the first job assignment occurred in June 2010 in Louisville, Kentucky and the second began in August 2010 in Nashville, Tennessee. He did not work anywhere else between June and August 2010, although Gross actively looked for other employment. He did not work for anyone other than Road Dog in the year prior to his injury. On August 26, 2010, Gross was not employed by any other temporary employment agency nor did he hold any concurrent employment. Gross testified he was hired to do form carpentry and concrete work for both jobs with Kelley Construction. He stated he earned \$18.00 per hour.

Gross testified on August 26, 2010, he injured his back when he lifted a wheelbarrow full of rock while working at a jobsite in Nashville, Tennessee for Kelley Construction. This was his third day of the job assignment. During the previous two days, he had been doing "finish

concrete and labor." He notified the foreman, and was taken off the job. He continued to work light duty for Road Dog for approximately six weeks following his injury, running light errands for them. During this period of light duty work, Road Dog paid him \$511.00 per week. He has not worked since his employment ended with Road Dog.

At the hearing, Gross testified he was employed by Road Dog as a "concrete/carpenter" and stated he earned "twenty-nine something an hour." Gross agreed the June 2010 assignment lasted approximately two weeks. The August 2010 job assignment was supposed to last approximately a week and entailed finishing concrete work. However, Gross injured his back on the second day. Gross confirmed he did not actively work between the June 2010 and August 2010 job assignments.

Gross agreed he had worked for Road Dog for less than thirteen weeks prior to his work accident. However, Gross stated he had previously worked on other jobs for Mark Ballard, the owner of Road Dog. Although his testimony is unclear, Gross indicated he had previously worked in the capacity as foreman and also stated he has worked in the construction industry for approximately thirty years. Based upon his knowledge and experience, Gross stated, for non-scale jobs, a general laborer would earn approximately

\$12.00 to \$13.00 per hour, a form carpenter would earn no more than \$18.00 per hour, a person in his position at the time of injury would earn approximately \$22.00 to \$23.00 per hour and a foreman would earn an additional \$3.00 to \$4.00 per hour.

Elisha Ratterman ("Ratterman"), a national accounts handler for Road Dog, also testified by deposition on March 29, 2011. Road Dog is owned by Douglas Ratterman, her father, and Mark Ballard, her husband. She explained Road Dog provides skilled construction labor to various contractors and companies. In October 2009, Road Dog entered into a lease agreement with HR for payroll services and multi-state workers' compensation coverage. Ratterman testified the workers are considered employees of HR who in turn are leased to Road Dog. Ratterman took over the day-to-day processing of payroll in late May 2010 and is the custodian of the payroll and personnel records for Road Dog.

Ratterman explained each new worker completed an application packet, which was then forwarded to HR in order for payroll to be set up. Ratterman was not required to re-submit the information of a worker to HR when he or she was assigned to different projects during the same calendar year. Road Dog then dispatched workers to various

contractors. In describing what type of workers Road Dog assigned, Ratterman stated as follows:

Q: And what kind of workers are these?

A: Electricians, pipe fitters, welders, carpenters, boilermakers, x-ray welders, tank welders, superintendents, project managers. It's pretty much a full gamut of skilled labor for the industry.

Q: Do you-all also handle just manual labors doing the sweeping and picking up?

A: It's not really our forte. We - - carpenters are probably as low as we go on the totem pole. Mostly, our labor force is skilled.

Ratterman received a worker's hours from the contractor or construction company, which she entered into an excel payroll spreadsheet. The payroll spreadsheets for the weeks ending on June 6, 2010 and June 13, 2010 were attached as an exhibit. The weekly spreadsheet contained each worker's name and Social Security number, the company and jobsite they worked for, the state, weekly regular and overtime hours worked, pay rates, *per diem* rates and any advances. The spreadsheet also contained a four digit "WC Code" for each worker which Ratterman stated was the "work comp code they were working under." No other testimony was elicited explaining the meaning or relevance of the four digit number. In turn, Ratterman submitted the payroll

spreadsheet to HR. HR then processed and overnighted the paychecks, which were distributed on Fridays.

Ratterman testified Gross was hired on June 4, 2010 and stated "he's a carpenter." She also stated Gross and her husband knew each other, and Gross had previously worked for him for several years. Gross was assigned to Hall Contracting in Kentucky to work on a transmission pipeline, a project which lasted approximately two weeks from June 4, 2010 to June 13, 2010. Several exhibits were attached to Ratterman's deposition, including the payroll spreadsheets for the weeks ending June 6, 2010 and June 13, 2010 and copies of the corresponding paychecks issued to Gross. The payroll spreadsheets and paychecks indicate Gross worked 20 hours for the week ending June 6, 2011 and 35.5 hours for the week ending June 13, 2011, earning \$24.83 per hour.

In August 2010, Ratterman testified Gross was sent to work for Kelley Construction at a Motiva Plant in Tennessee. The project began on August 24, 2010 and Gross worked 10 hours. According to Ratterman, on August 25, 2010, Gross injured his low back after working 3.5 hours. Gross was paid \$18.00 per hour for the 13.5 hours worked. The project manager from Kelley Construction notified Road Dog of the work injury, who in turn notified HR. Therefore,

Gross had worked for approximately two weeks from June 4, 2010 to June 13, 2010, one full day on August 24, 2010, and a few hours on August 25, 2010 before he injured his low back. Following the work injury, Ratterman confirmed Road Dog continued to pay Gross a lower wage at \$15.00 per hour, or \$600.00 per week, while he was on restricted light duty until the end of the year. Ratterman testified she is unaware of any other employment Gross might have had from June 2010 to August 2010. Ratterman also testified "a lot" of workers had breaks in service between jobs, stating approximately 30% of the company's workforce appeared at multiple times during a given year on different jobs.

HR submitted the wage records and AWW-1 of Gross demonstrating his earnings for the 13 calendar weeks prior to his work injury. The record demonstrates Gross did not work during the week of June 6, 2010 or from the weeks of July 2, 2010 through August 20, 2010. Gross worked 20 hours for the week ending on June 13, 2010 at \$24.83 per hour, earning a weekly wage of 494.60. He worked 35.5 hours for the week ending on June 18, 2010 at \$24.83 per hour, earning a weekly wage of 881.47. He likewise worked 20 hours for the week ending on June 25, 2010, at \$24.83 per hour, earning a weekly wage of 494.60. He worked 13 hours for the week ending August 27, 2010, at \$18.00 per hour, earning a

weekly wage of 234.00. Therefore, the AWW-1 reflects an AWW of \$162.21.

Gross filed wage records received "from the Defendant pursuant to KRS 342.140(e) showing wages made by similar employees in the thirteen (13) calendar weeks immediately preceding [his] work injury." These records consist of the weekly excel payroll spreadsheets prepared by Road Dog for the week ending on May 30, 2010 through the week ending on August 22, 2010 and total approximately thirty pages. Again, for each week Road Dog entered the following information for each worker: their name, the contractor they were assigned to, the state the job was located, the "WC Code," the regular and overtime hours worked, the corresponding regular and overtime pay rates, the *per diem* hours and rates and any advances. Again, the "WC Code" is a four digit number, and the record does not contain any explanation as to what this number represents. The payroll records do not indicate what trade or specialty each individual worker practices. Generally, the payroll records of other workers reflect a variety of hours worked, wages anywhere from \$10.00 to \$40.00 per hour, and jobs or projects located in several states.

In the August 23, 2013 opinion, the ALJ summarized Gross' and Ratterman's testimony, and the medical evidence. The ALJ stated as follows regarding Gross' AWW.

There is a unique issue regarding the correct average weekly wage. The plaintiff had only worked a couple of days for the defendant on this occasion prior to his injury. As noted by the plaintiff, he was being paid a scale wage at the time of his injury at the rate of \$24.83 per hour. As the plaintiff had only been working a few days on this particular assignment, there were numerous records indicating the defendant had employed other individuals throughout the thirteen weeks prior to the plaintiff's injury date. Pursuant to *KRS 342.140 (1) (e)* and *Nesco v. Haddix, 339 SW3d 465 (Ky. 2011)*, I must determine what the plaintiff would have earned had he been so employed by the employer for the full thirteen calendar weeks immediately preceding the injury and had worked when work was available to other employees in a similar occupation. The records submitted indicates that work was available to other employees who generally earned \$18.00 per hour. The plaintiff's own experience with the defendant occurred in June 2010 when he worked 20 hours one week, 35.5 hours another week and then 20 hours the following week. When I review these particular facts, it seems clear to the undersigned that had the plaintiff been employed and had worked during that thirteen weeks, he would have averaged 25 hours per week at a rate of \$18.00 per hour. I am convinced that work was available during this timeframe to individuals in similar occupations. Therefore, the best evidence in the record directs an

average weekly wage of \$450.00 pursuant to *KRS 342.140 (1) (e)*.

Although the ALJ concluded Gross had some previous, severe degenerative changes in his lumbar spine, he determined the changes were dormant and the August 26, 2010 event aroused degenerative changes and caused them to become symptomatic based upon the opinion of Dr. Frank Burke. The ALJ awarded PPD benefits based upon a 7% impairment rating assessed by Dr. Burke and enhanced by the three multiplier, TTD benefits, and medical benefits. He awarded the employer a credit for TTD benefits already paid and referred Gross for a vocational rehabilitation evaluation. Pursuant to a petition for reconsideration filed by Gross, the ALJ amended the opinion to reflect an impairment rating of 12% as assessed by Dr. Burke on September 25, 2013. Neither Road Dog nor HR filed a petition for reconsideration.

On appeal, HR argues the ALJ erred in his calculation of Gross' AWW by not considering the sporadic nature of Gross' employment. HR asserts the following:

The wage records showed that there was only one other carpenter (WC code 5403) employed by Road Dog during the pre-injury 13 week period, and he only worked a single 20 hour week. All of the other Road Dog employees during this period, regardless of pay rate, were skilled electricians, pipe fitters, welders, boil makers, x-ray welders,

tank welders, superintendents, and project managers. ER 8.

HR asserts Gross was not called into work for 8 weeks from late June to early August 2010, because Road Dog had no work for carpenters. HR argues the pay records submitted by Gross actually demonstrate Road Dog had work available for people with different skill sets during this time. After citing KRS 342.140(1)(d) and (e), and C & D Bulldozing Co. v. Brock, 820 S.W.2d 482 (Ky. 1991), HR argues as follows:

'The calculation under KRS 342.140(1)(e) may be based on reasonable inferences drawn from the course of the parties' relationship as well as evidence of what similarly-situated employees would have earned. *Haddix v. Nesco*, 339 S.W.3d 465, 471 (Ky. 2011). The intention of the parties is best expressed by the actual work record. Gross was hired in June of 2010, and worked two 20 hour weeks and one 35.5 hour week during that month. After that, Road Dog had no work for him until August of 2010. Gross testified that he had worked with Road Dog supervisor Mark Ballard in the past. FH 13. Despite this relationship, Road Dog did not require Gross' services for 8 weeks during the summer of 2010. There simply was no work available for carpenters during that time. The people working for Road Dog during that time were skilled construction workers, for who Road Dog consistently has work for.

The ALJ exclusively relied on Gross' hourly pay rate for his consideration that work was consistently available for Gross. The rate of pay is not a factor to be used to determine AWW under KRS 342.140(1)(e) or in either *C & D*

Bulldozing Co. v. Brock or Haddix v. Nesco, supra. The ALJ's AWW calculation must be remanded for revision to reflect the sporadic availability of work for carpenters such as Gross employed by Road Dog.

Road Dog filed a respondent's brief agreeing with the position asserted by HR, and argued the true reflection of the average earning capacity by Gross for the type of employment HR had available for him is \$162.21.

Gross also filed a respondent's brief requesting this Board assess sanctions pursuant to 803 KAR 25.010 §21(14)(a) and 803 KAR 25:010 §24(4) against HR and Road Dog for failure to pay additional TTD benefits, PPD benefits or interest during the pendency of this appeal.

Gross, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including AWW. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Nesco v. Haddix, 339 S.W.3d 465 (Ky. 2011). Since Gross was successful in that burden, the question on appeal is whether substantial evidence of record supports the ALJ's decision. 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.

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. 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. 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 supporting a different outcome than 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 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).

Additionally, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

It is undisputed KRS 342.140(1)(e) is applicable in determining Gross' AWW since he had been employed less than thirteen calendar weeks immediately preceding the injury.

KRS 342.140 states, in relevant part, as follows:

The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined 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 or her 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 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;** (emphasis added)

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." Huff v. Smith Trucking, 6 S.W.3d 819, 821 (Ky. 1999). Therefore, subsection (e) includes the consideration of a normal 13-week period of hire so an employee's compensation will

reflect his future loss of earnings in his regular employment. C & D Bulldozing Company v. Brock, 820 S.W. 2d 482, 486 (Ky. 1991). KRS 342.140(e) utilizes the averaging method set forth in section (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." Huff v. Smith Trucking, 6 S.W.3d at 821. In calculating AWW pursuant to KRS 342.140(e), "the ALJ must consider the unique circumstances in a case involving an employment of less than 13 weeks and make a realistic estimate of what the individual probably would have earned in a normal 13-week period of employment." Nesco v. Haddix, 339 S.W.3d 465, 471 (Ky. 2011).

In C & D Bulldozing Company v. Brock, supra, Brock had either worked nine of fifteen weeks or seven of thirteen weeks before he was injured. The ALJ calculated Brock's AWW pursuant to KRS 342.142(d) by adding the wages earned during the thirteen week period preceding the injury and divided by thirteen. The Supreme Court concluded "(1) (d) was not the proper method of calculation and that (1) (e) should have been applied." Id. at 484. The Court noted calculating AWW pursuant to KRS 342.140(e) is determined upon what would have been earned had the employee been employed by the

employer for the full 13 calendar weeks immediately preceding the injury and had worked when work was available to other employees in a similar occupation. Id. at 486. However, "in this case there was no evidence that such work was available." Id. Therefore, the Court divided by 13 the total he earned during the 7 weeks he worked throughout the 13 calendar weeks immediately preceding his last injurious exposure in computing Brock's AWW. Id.

Based upon the above statutory and case law, we find substantial evidence exists in the record supporting the ALJ's calculation of Gross' AWW pursuant to KRS 342.140(1)(e). Unlike the claimant in Brock, Gross submitted the payroll records of all other workers assigned to various contractors by Road Dog during the 13 calendar weeks immediately preceding the work injury and also provided testimony regarding wages earned by various specialties in the construction industry. The ALJ also had before him Gross' actual earnings for the 13 weeks immediately preceding the injury, and Ratterman's deposition testimony. In determining had Gross worked during the full thirteen weeks, he would have averaged 25 hours per week at a rate of \$18.00 per hour and that work was available during this timeframe to others in similar occupations, the ALJ relied upon both Gross' actual work

history and the payroll records of other workers assigned by Road Dog. The ALJ properly considered the unique facts of this claim, including the sporadic availability of work for Gross, in determining his AWW. While HR is able to point to conflicting evidence in the record supporting a different AWW, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp, supra. We find it significant neither Road Dog nor HR filed a petition for reconsideration requesting additional findings of fact regarding calculation of AWW.

We feel compelled to address HR's following assertion:

The wage records showed that there was only one other carpenter (WC code 5403) employed by Road Dog during the pre-injury 13 week period, and he only worked a single 20 hour week. All of the other Road Dog employees during this period, regardless of pay rate, were skilled electricians, pipe fitters, welders, boil makers, x-ray welders, tank welders, superintendents, and project managers. ER 8.

A review of the payroll records do not indicate what specific trade or job each worker was engaged, whether it be carpentry, electricity, pipe fitting, welding, etcetera. HR seems to indicate the "WC Code 5403" reflects a worker's specific trade or specialty. Again, a review of the payroll records shows the "WC Code" as a four digit code with no

accompanying explanation. Further, additional explanation as to the "WC Code" or the specific trade a particular work was engaged in was not elicited in any deposition or hearing testimony. Rather the payroll records merely list all employees by name, the contractor and site, and corresponding hours worked and wages paid. It was well within the ALJ's discretion as fact-finder to conclude the wage records indicated the defendant had employed other individuals throughout the thirteen weeks prior to the plaintiff's injury date and that work was available to other employees who generally earned \$18.00 per hour.

We also acknowledge Gross' request for sanctions against Road Dog and HR pursuant to 803 KAR 25:010 §24 for defending without reasonable ground by failing to pay uncontested benefits during the pendency of this appeal under 803 KAR 25:010 §21(14)(a). Such request is not taken lightly. Finding HR and Road Dog, in this instance, did not defend the claim without reasonable ground in light of the unique factual circumstances surrounding the issue of Gross' AWW, **IT IS HEREBY ORDERED** the request for sanctions is **DENIED**.

Therefore, the August 23, 2013 opinion and award by Hon. John B. Coleman, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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