Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 6, 2016

CLAIM NO. 201487221

L.K.J. CRABBE, INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

RICKY SHEPHERD
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. L.K.J. Crabbe, Inc. ("LKJ") appeals from the November 18, 2015, Opinion, Order, and Award on Remand and the January 11, 2016, Order on Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ determined Ricky Shepherd ("Shepherd") was not working as a seasonal employee for LKJ

at the time of his injury and awarded permanent partial disability ("PPD") benefits consistent with this determination and medical benefits.

On appeal, LKJ asserts three arguments. First, it argues the ALJ's determination Shepherd is a seasonal employee is clearly erroneous. Second, it argues the ALJ's calculation of the average weekly wage ("AWW") is not in conformity with KRS 342.140. Finally, it argues the ALJ's calculation of PPD benefits is erroneous.

As this is the second time the Board has reviewed a decision in this claim, we will cite from our opinion entered August 21, 2015, as a means of efficiently setting forth the procedural history preceding this appeal:

> LKJ Crabbe, Inc. ("LKJ") seeks review of the March 17, 2015, Opinion, Order, and Award of Hon. Chris Davis, Administrative Law Judge ("ALJ") finding Ricky Shepherd ("Shepherd") sustained a work-related neck injury and awarding permanent partial disability ("PPD") benefits and medical benefits. LKJ also appeals from the April 23, 2015, Order denying its petition for reconsideration.
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> On appeal, LKJ challenges the ALJ's decision on three grounds. First, it contends the ALJ's finding Shepherd was not a seasonal employee is clearly erroneous. Second, LKJ asserts the finding of Shepherd's average weekly wage ("AWW") is not in conformity with the applicable statute, KRS 342.140. Finally, it maintains the

ALJ's calculation of Shepherd's award of PPD benefits is not in conformity with the statutes.

We will only discuss the evidence relating to the calculation of Shepherd's AWW, whether Shepherd was a seasonal employee, and the calculation of the award of income benefits.

Shepherd's October 10, 2014, deposition was introduced. Shepherd testified he worked for LKJ from 2005 to 2007 and then worked for Wham Steam Cleaning from 2007 to 2013. While employed by Wham Steam Cleaning, his job entailed cleaning dozers and heavy equipment. Shepherd testified his previous employment with LKJ from 2005 to 2007 was "like a summer job." During his first stint with LKJ, he was laid off in October and would resume work in March or April depending on the weather. Shepherd testified he worked from spring to fall and his last period of employment with LKJ was generally the same as the first term.

Shepherd's Form 104 work history reveals he worked for LKJ as a groundskeeper from 2005 to 2007. He worked for Wham Steam Cleaning from 2007 to 2013. He last worked for LKJ from April 1, 2013, through July 20, 2013, as a groundskeeper. [footnote omitted]

Shepherd testified he earned $15.00 per hour. [footnote omitted] He testified he injured his neck on July 20, 2013, in the course of operating a lawnmower. Shepherd estimated he worked approximately a half a day and then was taken off the lawnmower. He was off work a couple of days and then returned to work on light duty. He worked a

couple of months after he first saw the doctor on July 20, 2013.

At the hearing, Shepherd testified his last employment was with LKJ. Shepherd explained LKJ had a contract with state facilities and others to mow, clean, and take care of boat landings and other similar facilities. He worked on the grounds and his job included operating mowers and weed eaters. He estimated he earned approximately $15.00 an hour and worked thirty-two to thirty-three hours per week, and sometimes worked overtime.

Regarding the nature of his employment with LKJ, Shepherd provided the following testimony:

Q: How many years have you worked for this outfit?

A: Well, it might be two.

Q: Did you get laid off in the winter or did –

A: (Interrupting) Yeah.

A: -- you work year-round?

A: I got laid off.

Q: Now, is that because there was no work available or was it because you asked for it, or he – what was the reason?

A: There wasn’t no [sic] work.

Q: There was no work –

A: (Interrupting) Yeah.

Q: -- available for that crew?

A: Yeah.

Q: Was there other crews who worked through the winter servicing the equipment and taking care of stuff?

A: No.

Q: No?

A: No.

. . .

Q: When you started to work in 2013, the year you got hurt, how long had you been on the job that year? When did you-all start back to work?

A: April, I believe it was.

Q: Okay. Typically, how long did they work?

A: Probably, like, close to October, November in there at times.

Q: Was there anything that seemed to cut the work off?

A: If they ran out of money

(Unintelligible).

[text omitted]

Q: They ran out of money?

A: Yeah. That when the government closed down or something. It was for a while.

Q: What did he do during the winter months, your boss?

A: I got – I got no idea what he does.

Q: The equipment that you-all were operating, that was owned by the man you worked for?

A: Yes.

Q: Wasn’t government equipment?

A: No.

Q: Okay. Did he have a facility that he stored that in someplace that you knew of?

A: Yes.

Q: Where was it located?

A: Knott County.

Q: Did him and other people work on that equipment to getting it in good shape during the winter?

A: Yes.

Q: So there was, at least, somebody a working year-round, correct?

A: Yes.

Q: If you had been able to stay on, would that option have been given to you, that at some point in time, if you wanted to, you could have worked year-round or do you know?

[text omitted]

A: No.

In response to Shepherd’s request for production of documents, LKJ introduced its employment policy which contains nine numerical paragraphs. Paragraph six reads as follows:

Our work is seasonal, and the number of hours that you work will vary with monthly and seasonal needs, and also as the government calls for the work to be done. There may be days when there is no work at all.

At the bottom of this document, Shepherd printed his name, signed it, and dated it February 7, 2013. Immediately above his name and the date is the following sentence: "I understand and agree to the above items and terms, and I understand that I will be paid per contract worked." Also produced by LKJ is the W-4 form executed by Shepherd dated February 7, 2013.

LKJ introduced the "Employee Termination Form" for Shepherd. Under the heading Reason for Termination are two sub-headings one of which is Involuntary Termination. The reason checked under this heading was "completion of contract year." Under a separate heading of "termination due to" was checked "lack of work." The document was signed by Shepherd and his supervisor on October 24, 2013.

The document styled "Notice to Employer of Claim for Unemployment Insurance Benefits" relating to Shepherd's claim for unemployment insurance benefits from the Commonwealth of Kentucky, Division of Unemployment Insurance, states Shepherd indicated he had worked for LKJ from March 26, 2013, to October 14, 2013, and is no longer working "due to Lack of Work." It states Shepherd provided the following explanation regarding separation: "Laid Off In The Winter Time."

Relative to the calculation of the AWW and the award of PPD benefits, the ALJ entered the following findings of fact and conclusions of law:

The final question is that of average weekly wage. The Defendant does point out that this man should be

considered a seasonal employee and thus his entire earnings of $5391.56 should be divided by 50. Such a figure ignores the fact that he had other employment. Further, it fails to adequately compensate the Plaintiff for his lost wages. *Apache Coal Co. v. Fuller*, 541 S.W.2d 933 (Ky. 1976). As such the figure of $5391.56 shall be divided by 14, the exact number of weeks worked in 2013 prior to the date of injury. As such his AWW for this injury is $385.11.

The Plaintiff's, Ricky Shepherd, permanent partial disability award shall be 564.52 (comp rate subject to statutory maximum) x .05 (impairment rating) x .65 (grid factor) x. 3.6 (KRS 342.730(1)(c)1) = $66.05 a week, for 425 weeks, from July 20, 2013, and excluding any periods of temporary total disability benefits. He is also entitled to all reasonable and necessary, work-related, medical expenses for the injury to the cervical spine.

The ALJ awarded PPD benefits of $66.05 for 425 weeks beginning July 20, 2013.

LKJ filed a petition for reconsideration making the same arguments it now makes on appeal. It contended even though Shepherd had other employment, he offered no evidence as to other employment or the wages which should have been included from other employment in calculating his AWW. It contended Shepherd was a seasonal employee and his AWW should be calculated based on KRS 342.140(2). LKJ contended the only evidence of record shows Shepherd earned $5,391.56 for the twelve calendar months preceding the injury and that figure

divided by fifty results in an AWW of $107.83. Finally, it contended there is patent error appearing on the face of the award as the ALJ should not have calculated the award utilizing the statutory maximum of $564.52 for the year 2013 as Shepherd's AWW.

In overruling the petition for reconsideration, the ALJ provided the following:

1. The issue of concurrent wages was included. The Administrative Law Judge ruled upon that issue, effectively, by determining that the entire set of wages used to calculate the Plaintiff's AWW were those earned while employed by the Defendant. The Administrative Law Judge has never known the issue of 'concurrent wages' to mean anything other than analysis under KRS 342.140(5) and has never meant it to mean any analysis under KRS 342.140(1) or (2).

2. The Plaintiff testified that in addition to working for the Defendant he essentially was employed in an unbroken streak for at least twenty years. He has testified that some of the Defendant's employees did work year round. He used his wages to support himself and is now regulated to living with relatives and using food stamps.

3. 'The purpose of KRS 342.140 is to determine a given worker's wage-earning capacity so that the resulting income benefit will be based upon a realistic estimation of what the worker would have expected to earn had the injury not occurred.' *Desa International, Inc. v. Barlow*, 59 S.W. 3d 872, 875 (Ky. 2001).

4. Any average weekly wage based on a finding of seasonal employment would be based simply on a finding that the Plaintiff only worked seasonally, not that the job could only be seasonal. It would further not adequately compensate the Plaintiff.

Because the calculation of the AWW and the award of income benefits are not in accordance with the statute and are erroneous as a matter of law, we vacate the calculation of Shepherd's AWW and the award of PPD benefits.

In the opinion, order, and award, the ALJ failed to make a finding as to whether Shepherd was a seasonal employee. In the April 23, 2015, Order ruling on the petition for reconsideration the ALJ seems to indicate he did not find Shepherd to be a seasonal employee but does not specifically state such to be the case. Thus, on remand, the ALJ must enter specific findings of fact as to Shepherd's employment status at the time of the work injury. The record including Shepherd's testimony strongly indicates Shepherd is a seasonal employee. However, the case law is clear the determination of whether a claimant is a seasonal employee is made on a case by case basis. Thus, the ALJ must be given the opportunity, through findings of fact, to explain why Shepherd is not a seasonal employee.

In Desa Intern., Inc. v. Barlow, 59 S.W.3d 872 (Ky. 2001), the Kentucky Supreme Court dealt with facts similar to the case *sub judice*. The Supreme Court described the basis of the controversy as follows:

The claimant's history with the defendant-employer indicated that she

worked approximately 7–8 months per year. Both KRS 342.140(1)(d) and (2) take into account the injured worker's earnings during the year preceding the compensable injury. Applying subsection (1)(d), the lay-offs would have a minimal effect, if any, on the average weekly wage that was used to calculate the claimant's benefit because the benefit would be based upon the average amount she earned per week during the highest 13–week period of the year. Applying subsection (2), the earnings for the entire year are averaged over a 50–week period and, therefore, the claimant's lack of earnings during the lay-offs would result in an average that was considerably less than the amount she earned during the weeks that she worked. Simply put, the claimant's income benefit would be greater under subsection (1)(d). Hence, the controversy.

Id. at 873-874.

The Supreme Court provided the following summary of the relevant case law:

In *Department of Parks v. Kinslow*, Ky., 481 S.W.2d 686, 688 (1972), the injured worker did general maintenance and garbage pickup at a state park from April to October but was unemployed from October to the next April when services at the park were drastically curtailed. Focusing upon the statute's use of the word "occupations," he argued that because maintenance and garbage pickup were occupations that both can and must be performed year-round, they were not seasonal; however, such a construction of KRS 342.140(2) would have resulted in a workers' compensation benefit that exceeded his earnings for the year. Based upon the

seasonal nature of the patronage at the park and, therefore, the seasonal need for his services, we concluded that the employment was seasonal and that for the purposes of KRS 342.140(2) his occupation was seasonal. We characterized as overly broad a construction of KRS 342.140(2) that would have viewed an occupation as being seasonal only if it could not be carried on throughout the year. Citing a fruit picker in California as being the "classic example" of a worker who was engaged in a seasonal occupation, we refused to adopt the view that the occupation was not seasonal simply because it was done somewhere in the United States at all times of the year. We explained that the apparent intent of the legislature was to reduce a worker's recovery if the employment was "with a business that carried on naturally for only a particular season of the year" and that, other things being equal, seasonal workers should not receive the same compensation as those who work year-round.

We revisited this matter in *May v. James H. Drew Shows, Inc.*, Ky., 576 S.W.2d 524 (1978), wherein the injured worker was a high school student who worked as a roustabout for a traveling carnival while it visited his hometown. Reversing a finding that the occupation was seasonal, we explained that whether an occupation is considered to be seasonal is based upon what the injured worker's job, itself, entails. A job is not seasonal simply because the worker plans to work only for the summer. Thus, work as a lifeguard at an outdoor pool in Kentucky is seasonal; whereas, work as a roustabout for a traveling carnival is not. Reconciling the decision with *Department of Parks v. Kinslow*, *supra*, we explained that

Kinslow did not address whether a migrant fruit picker who moved with the harvest in order to work continuously was or was not a seasonal worker. We concluded that a roustabout with Drew Shows moved with the carnival and worked throughout the year; thus, the injured worker was not a seasonal employee simply because he chose to work only for the summer or because carnivals do not play in Kentucky during the winter. *Id*. at 526-27.

More recently, we affirmed a finding that work performed by a particular paving-company employee was not seasonal. In that case, evidence established that the injured worker assisted with maintenance work in the company shop during the winter months, that the company filled potholes with cold mix at that time, that the company's paving work was affected by the weather year-round, and that other local paving companies worked year-round. Affirming, we pointed out that the findings required by KRS 342.140(2) must take into account the unique circumstances of each case and that the fact that the injured worker worked for the company year-round should not be overshadowed by the fact that paving is dictated by the weather. *Travelers Insurance Co. v. Duvall*, Ky., 884 S.W.2d 665, 667 (1994).

Id. at 874-875.

The Supreme Court concluding by noting:

All other things being equal, the annual wage-earning capacity of a worker whose job involves only seven to eight months of work per year will not be as great as that of a worker who works year-round and, for that reason,

> such a worker is not entitled to receive as great an income benefit.

Id. at 875.

In addition to failing to explain why he concluded Shepherd was not a seasonal employee, the ALJ failed to cite to the statutory provision upon which he relied in calculating the AWW. Further, there is no statutory authority for using 14 in the divisor in calculating the AWW. Similarly, there are no findings of fact which explain how the ALJ arrived at $5,391.56 as Shepherd's total earnings from LKJ.

With respect to the ALJ's calculation of Shepherd's AWW, the ALJ did not explain how he obtained the figure $5,391.56. In resolving the issue of AWW, the ALJ indicated LKJ asserted $5,391.56 is Shepherd's entire earnings. However, the documents relating to Shepherd's earnings, specifically those supplied in response to Shepherd's request for production of documents do not support a finding of total wages earned of $5,391.56 prior to the date of injury. Those records reveal Shepherd's first week of earnings span the period from May 24, 2013, to April 6, 2013. [footnote omitted] Following his first day of work, Shepherd worked the following weeks prior to the week of his injury: [footnote omitted]

April 7, 2013, through April 13, 2013
April 14, 2013, through April 20, 2013*
April 21, 2013, through April 27, 2013
April 28, 2013, through May 4, 2013*
May 5, 2013, through May 11, 2013
May 12, 2013, through May 18, 2013*
May 19, 2013, through May 25, 2013
May 26, 2013, through June 1, 2013*

June 2, 2013, through June 8, 2013
June 9, 2013, through June 15, 2013*
June 16, 2013, through June 22, 2013
June 23, 2013, through June 29, 2013*
June 30, 2013, through July 6, 2013
July 7, 2013, through July 13, 2013*

Shepherd was paid bi-weekly based on the total hours earned through the above delineated dates.

The documents introduced by LKJ indicate that through the last full week Shepherd worked prior to the week during which he was injured, his year-to-date earnings not including overtime were $6,677.94. Shepherd had holiday pay through July 13, 2013, of $182.03 and overtime pay of $8.41 for total earnings of $6,868.38. [footnote omitted] LKJ also introduced the records concerning Shepherd's earnings post-injury which included the pay period from July 14, 2013, through July 27, 2013. Shepherd's earnings for the week spanning July 14, 2013, through July 20, 2013, the week Shepherd was injured cannot be utilized as KRS 342.140(1)(d) directs that only earnings during the weeks immediately preceding the injury are included in arriving at the AWW. Thus, the earnings through the week prior to the week of Shepherd's injury must be utilized. Here, it appears the ALJ accepted LKJ's representation that Shepherd's total earnings were $5,391.56 without consulting the record and entering findings of fact based on an independent review of the wage records. On remand, the ALJ must determine Shepherd's AWW based on his earnings through the week ending July 13, 2013.

Although briefly mentioned by the ALJ in his decision, we find no

evidence of concurrent employment, and as a noted by LKJ, Shepherd introduced no wage records evidencing concurrent employment prior to or at the time of the subject work injury.

Finally, the ALJ did not explain why he increased Shepherd's AWW to the statutory maximum of $564.52 in calculating the PPD award. Consequently, for this reason alone, the ALJ's utilization of $564.52 as Shepherd's AWW and the award of income benefits are clearly erroneous.

On remand, the ALJ must first determine whether Shepherd was a seasonal employee. Should the ALJ determine Shepherd is a seasonal employee, then he shall utilize the formula provided in KRS 342.140(2) in arriving at Shepherd's AWW. If the ALJ finds Shepherd is not a seasonal employee then the AWW shall be calculated based on KRS 342.140(d) as the wage records establish Shepherd worked more than thirteen consecutive weeks prior to his injury on July 20, 2013. Shepherd's wages for the week beginning July 14, 2013, through July 20, 2013, cannot be considered as the statute requires the consecutive calendar weeks immediately preceding the injury, which excludes the week during which Shepherd was injured. Therefore, Shepherd's AWW is either to be calculated on the basis of his status as a seasonal worker or pursuant to KRS 342.140(d) as Shepherd worked more than thirteen calendar weeks preceding the date of his injury.

In summary, the ALJ shall first determine Shepherd's employment status at the time of the work injury and shall enter the appropriate findings of fact and conclusions of law in support of his decision on this issue. Next,

> the ALJ shall determine the earnings to be used in calculating Shepherd's AWW. The ALJ shall then utilize Shepherd's AWW in calculating the award of income benefits. Stated another way, the ALJ shall not multiply the impairment rating by the statutory maximum of $564.52 as it is not applicable in the case *sub judice*.
>
> Accordingly, those portions of the March 17, 2015, Opinion, Order, and Award and the April 23, 2015, Order relating to the calculations of the AWW and the award of income benefits are **VACATED**. This claim is **REMANDED** for an amended opinion and award in conformity with the views expressed herein.

In the November 18, 2015, Opinion, Order, and Award on Remand, the ALJ set forth the following additional analysis and findings:

> This matter is before the Administrative Law Judge on Remand from the Kentucky Workers' Compensation Board. On Remand I am to determine if the Plaintiff was a year-round or seasonal employee and determine the Plaintiff's average weekly wage.
>
> In Kentucky Workers' Compensation we follow the Kentucky Civil Rules and the Kentucky Rules of Evidence unless otherwise so indicated in the statutes and regulations. An illustrative point is that the rules for using [sic] deposition as substantive evidence is different under the CRs and KREs than under the Act. Civil Rule 32.01 v. 803 KAR 25:010§17.
>
> However no such different rule exists for the handling of Responses to

the Request for Production of Documents, which is governed by CR 26.01. The information contained within any Response to a Request for Production of Documents contained herein is not evidence properly before the Administrative Law Judge.

To highlight this point is the fact that simply because they are not admissible evidence is not sufficient reason to object to providing them. *Newsome v. Lowe*, 699 S.W.2d 248 (Ky. Ct. App. 1985); *Ewing v. May*, 705 S.W.2d 910 (Ky. 1988).

Further, in order for anything incorporated into a Response to a Request for Production of Documents to be admitted into evidence, assuming it is otherwise admissible, then it must be authenticated and introduced, with the adverse party given an opportunity to object and/or cross-examine, just as with any other evidence. *Thrasher v. Durham*, 313 S.W.3d 545 (Ky. 2010). That did not occur in this claim.

Thus nothing contained within any Response to a Request for Production of Documents is admissible as evidence in this claim. In fact many ALJs request and direct attorneys to not file them with the Department. Many ALJs strike and return them to the proffering party and no explanation is needed as it is not an abuse of discretion to strike something that is, *ab initio*, inadmissible.

As for whether or not the Plaintiff was a seasonal worker the question is not what months did the Plaintiff do or not do the work but rather was the work capable of being done year-round or only on a seasonal basis. *May v. James H. Drew Shows,*

Inc., 576 S.W.2d 524 (Ky. Ct. App. 1978); *Travelers Ins. Co. v. Duvall*, 884 S.W.2d 665 (Ky. 1994).

As far as the admissible testimony regarding whether or not the Plaintiff was a seasonal employee or a year-round employee there are basically two sets of evidence and arguments.

The Defendant points to the statement made by the Plaintiff on his unemployment benefits application to the effect that he was laid off during the winter. The Plaintiff has further testified, at the hearing and at his deposition that he was laid off during the winter. The Defendant argues that this, in conjunction with his job description as a groundskeeper, requires that he be found to be a seasonable employee.

The Plaintiff points to his own testimony that some employees of the employer did work year-round. (Plaintiff's Depo., p. 18) Thus employees were laid off due to lack of work in the winter, but some weren't. The Defendant, who did produce wage records, job descriptions, emails and unemployment records, did not contradict this assertion. It is a logical assumption that if the party in control of evidence did not introduce that evidence then the evidence was adverse to the party in control of it. *Benjamin v. Ellinger's Administrator*, 80 Ky. 471, 4 Ky.L.Rpt 317, (October 26, 1882).

I find that even accepting that some employees, including the Plaintiff, were laid off in the winter that nonetheless the work was capable of being done year-round. As such the Plaintiff was not a seasonal employee.

I have been Ordered to exclude the week ending in July 20, 2013 in the Plaintiff's wage calculation. The rationale was that the Plaintiff was injured on July 20, 2013 and thus he was technically injured before this week ended. He was, however paid, for the entire day. His wage will be calculated with the last full week paid the week ending on July 13, 2013.

As such the last full week the Plaintiff was paid for was July 13, 2013. He began work on March 24, 2013, which was exactly fifteen weeks prior. Going backwards thirteen weeks from July 13, 2013 ends on April 13, 2013. The Plaintiff was paid bi-weekly. The wages for the pay period April 7, 2013 through April 20, 2013 are divided by two with each week being assume [sic] to have contributed equally to the pay period. This is the way it has always been handled in Workers' Compensation. The $50.00 paid for safety shoes is not included in the AWW.

Thus the Plaintiff's total wages in the thirteen weeks prior to his injury is $5023.08 and his AWW is $386.39. Benefits shall be awarded accordingly.

The following "Order" section is substituted for the "Order" section in the March 17, 2014 Opinion, Award and Order by this ALJ.

ORDER

1. The Plaintiff, Ricky Shepherd, shall recover of the Defendant-Employer, LKJ Crabbe, Inc., and/or its insurance carrier, as permanent partial disability benefits the sum of $30.14 a week, from July 20, 2013, and excluding any periods of temporary total

> disability benefits, for a total period of 425 weeks, with 12% interest on any past due portions and with the Defendant taking a credit for any benefits paid.
>
> 2. Plaintiff shall recover of the Defendant-Employer, and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances, as may be reasonably required for the care and relief from the effects of the work-related injury to the cervical spine. Defendant's obligation shall be commensurate within the limits set by the Kentucky Medical Fee Schedule.
>
> 3. Any motion for approval of attorney's fees shall be filed within thirty (30) days after final disposition of this award. Any such motion must include an itemization of services together with either the actual times or a reasonably accurate estimate of the time expended on each of the itemized services listed.

LKJ filed a petition for reconsideration setting forth two arguments. First, LKJ asserted the ALJ's finding Shepherd is not a seasonal employee is not supported by substantial evidence. Second, LKJ argues that the ALJ's conclusion that its response to Shepherd's request for production of documents is not evidence is error.

In the January 11, 2016, Order on Petition for Reconsideration, the ALJ determined as follows:

This matter is before the Administrative Law Judge on the Defendant's Petition for Reconsideration and the Plaintiff's Response thereto. Having reviewed the pleadings and being otherwise sufficiently advised the following findings and Orders are made.

1. The test of whether or not an occupation is seasonal is not what timeframe the injured worker did the work but if the work could be done year-round. *May v. James H. Drew Shows, Inc.*, 576 S.W.2d 524 (Ky. Ct. App. 1978); *Travelers Ins. Co. v. Duvall*, 884 S.W.2d 665 (Ky. 1994).

The evidence of record, as set forth in the original Opinion and the Remand Opinion, forms a sufficient basis to find the Plaintiff's work was not seasonal.

Paragraphs 1. and 2. Of the Petition for Reconsideration are OVERRULED.

2. As to paragraph 3 of the Petition, as noted in the Remand Opinion, striking the original Response for Production of Documents was not necessary because, *ab initio,* the filing of them with the Department of Workers' Claims was void and unnecessary. With respect the inclusion of them as evidence would run contrary to the general practice and expectations of the Bar.

Frankly, I don't think they could have changed the outcome. Only those wages the Board specifically Ordered me to include in the AWW calculation were included in the AWW calculation and, again, whether or not the Plaintiff was a seasonal or year-round employee, for

> AWW calculation, was resolved by the actual admissible evidence of record.
>
> Paragraph 3 of the Petition is OVERRULED.

LKJ's first argument on appeal is the ALJ's finding that Shepherd is not a seasonal employee is erroneous. It asserts as follows:

> The ALJ was clearly erroneous in his statement that the work was capable of being done year-round. There is simply no evidence to support that conclusion. Respondent's attorney asked him whether there were other crew who worked through the winter servicing the equipment and taking care of stuff. Respondent responded in the negative. Respondent's attorney then asked him whether the man he worked for and other people worked on equipment to get it in good shape during the winter and respondent answered in the affirmative.
>
> Respondent is a grounds keeper. He is not a mechanic. There is no evidence to indicate or to support a conclusion that respondent could have joined his employer and others, (not coworkers) in working on equipment to get it in good shape during the winter. The respondent's statement that his employer and others did some work is not sufficient evidence upon which to rely for a conclusion that respondent could have worked through the winter.
>
> ...
>
> Webster's defines seasonal as affected or caused by a seasonal need or availability, and the test for seasonal employment is whether the job

> itself was seasonal or permanent (as opposed to what the claimant intended the job to be). May v. James H. Drew Shows, Inc., 576 S.W.2d 524 (Ky. Court of Appeals, 1978). Respondent testified at both his deposition and the Final Hearing that he worked only from spring to fall doing grounds work. This was true during all three stints of employment. Respondent was laid off in October or November because there was no work available during the other months of the year. (Final Hearing transcript, p. 15-16). The Employer clearly did not intend the job to be year round, as there was no work for Plaintiff to do in the winter. Even if Respondent's boss worked servicing the equipment during the winter, Respondent clearly testified that this work was not available to him. (Final Hearing transcript, p. 18-19).

Because the ALJ’s analysis fails to demonstrate Shepherd was not a seasonal employee, we reverse the finding of his employment status. Further, we vacate the determination of the AWW and the award of PPD benefits.

As an initial matter, the ALJ's exclusion of evidence entered in response to Request for Production of Documents in the November 18, 2015, Opinion, Order, and Award on Remand and the January 11, 2016, Order on Petition for Reconsideration is not only ambiguous and dilatory but erroneous.

First, it is unclear in both the November 18, 2015, Opinion, Order, and Award on Remand and the January

11, 2016, Order on Petition for Reconsideration if the ALJ is referring only to LKJ's responses to Shepherd's August 11, 2014, Request for Production of Documents or also to Shepherd's responses to LKJ's October 16, 2014, Request for Production of Documents.

Second, the January 20, 2015, hearing order reveals the following:

> The following items have been filed by the defendant(s) to be considered as evidence: PLAINTIFF'S DEPO; JOHN VAUGHN M.D.; VOCATIONAL REPORT; ***JOB DESCRIP***; ***UNEMP RECS***; HUNT/FISH LICENSE; EDIE WRIGHT EMAIL; WAGES; JOHN VAUGHN M.D.(emphasis added).

The above abbreviated and generic description encompasses some of the documents filed by LKJ in response to Shepherd's request for production of documents which include, but are not limited to, a request for Shepherd's "written job description" and "entire personnel file." This includes LKJ's Employment Policy, signed by Shepherd on February 7, 2013, which states unambiguously that its work is "seasonal," LKJ's "Employee Termination Form," signed by Shepherd and his supervisor on October 24, 2013, that indicates Shepherd's termination was due to a "lack of work," and a "Notice to Employer for Unemployment Insurance

Benefits" indicating Shepherd is no longer working "due to Lack of Work."

Finally, the ALJ's blanket rejection of all documents filed in response to either parties' Request for Production of Documents comes far too late. The ALJ failed to strike any response to either LKJ's or Shepherd's Request for Production of Documents during the pendency of the litigation and failed to exclude the responses in the March 17, 2015, Opinion, Order and Award. Additionally, neither party filed objections to the submission responses at any point during the pendency of the litigation, including in their briefs to the ALJ. Admissibility of the responses was not made a contested issue at the December 3, 2014, Benefit Review Conference. Therefore, the ALJ's rejection of responses made to LKJ's and Shepherd's Request for Production of Documents *and* included as evidence to be considered in the January 20, 2015, Hearing Order is erroneous.

Further buttressing our opinion on this issue is 803 KAR 25:010 which specifically permits the admission of this evidence, stating as follows:

> (1) The Rules of Evidence prescribed by the Kentucky Supreme Court shall apply in all proceedings before an administrative law judge except as

> varied by specific statute and this administrative regulation.
>
> (2) Any party may file as evidence before the administrative law judge pertinent material and relevant portions of hospital, educational, Office of Vital Statistics, Armed Forces, Social Security, and other public records. An opinion of a physician which as expressed in these records shall not be considered by an administrative law judge in violation of the limitation on the number of physician's opinions established in KRS 342.033.

A review of both parties' Request for Production of Documents and all responses thereto indicate they were properly served on Hon. Dwight T. Lovan, Commissioner, as well as the opposing party. It is erroneous, then, for the ALJ to reject any document filed in response to LKJ's and Shepherd's Request for Production of Documents *and* included in the January 20, 2015, Hearing Order as evidence to be considered.

Regarding Shepherd's status as a seasonal employee, as set forth in the Board's August 21, 2015, opinion, Shepherd worked for LKJ as a *groundskeeper* from 2005-2007 and again from April 1, 2013, through July 20, 2013. In his October 10, 2014, deposition, Shepherd testified to the nature of his work for LKJ from 2005-2007:

> Q: Now, the first time that you worked for L.K.J., it looks like it was from

2005 to 2007. Was that on and off throughout the year?

A: I didn't get to come a time it was.

Q: Okay. It- it depended on the time?

A: Yeah.

Q: So was it like a summer job?

A: Yeah. Uh-huh. (Witness answers in the affirmative.)

Q: Would it- would you have worked in the winter?

A: I get laid off about October, the company would.

Q: When did you- so you were laid off by October?

A: Yeah.

Q: When did you start back on, in the spring?
A: Yeah.

Q: So-

A: March or April, something there. It's according to how warm it was.

Q: So it was spring to fall?

A: Yeah.

Q: Was it the same the second time you worked for them?

A: Yeah.

Shepherd testified concerning his work with LKJ in 2013 after his injury:

> Q: And when you went back to work, were you doing the same thing or was it something different?
>
> A: For a while they put me on light duty probably about a couple of days and then right back at it.
>
> Q: Is that right?
>
> A: Lawnmower and weed eating.
>
> Q: And I believe you said earlier that you worked for a couple more months. Is that right?
>
> A: Yeah, I worked all the way up to that winter, I did. That summer, I did.
>
> Q: And then did- when they laid you off, was it about the same time of year that you were laid off the first time you'd work for them?
>
> A: Uh-huh. (Witness answers in the affirmative.) Yeah.

Shepherd also testified at the final hearing that LKJ laid him off during the winter months because there was no work available to him. The hearing testimony pertinent to this appeal has been set forth in the Board's August 21, 2015, Opinion and quoted in its entirety herein.

In addition, the Board's August 21, 2015, Opinion references certain documents, documents the ALJ on remand chose to reject, that clearly indicate Shepherd was a seasonal employee at the time of his injury. These documents are detailed in the Board's August 21, 2015,

Opinion and include LKJ's employment policy, signed by Shepherd on February 7, 2013, which states unambiguously that its work is "seasonal"; LKJ's "Employee Termination Form," signed by Shepherd and his supervisor on October 24, 2013, indicates Shepherd's termination was due to a "lack of work"; and a "Notice to Employer for Unemployment Insurance Benefits" indicating Shepherd is no longer working "due to Lack of Work." As stated, these documents are encompassed in the January 20, 2015, Hearing Order as *evidence to be considered*, specifically under the designation "JOB DESCRIP; UNEMP RECS."

The November 18, 2015, Opinion, Order, and Award on Remand and the January 11, 2016, Order on Petition for Reconsideration reveals the ALJ misunderstood the standard under which to analyze the issue of seasonal employment. In the November 18, 2015, Opinion, Order, and Award on Remand and again in the January 11, 2016, Order on Petition for Reconsideration, the ALJ stated the determinative question is "not what months did the Plaintiff do or not do the work but rather was the work capable to being done year-round or only on a seasonal basis." In support of this statement, the ALJ cites to two cases- May v. James H. Drew Shows, Inc., 576 S.W.2d 524 (Ky. Ct. App. 1978) and Travelers Ins. Co. v. Duvall, 884 S.W.2d 665 (Ky. 1994). While this is not

a wholly inaccurate summation of the standard articulated by the Court of Appeals in May, supra, it does not reflect important adjustments made to the standard by the Supreme Court of Kentucky in cases subsequent to May.

In May, a high school student procured a summer job as a roustabout and truck driver with a carnival. The student claimed that but for the work-related accident he could have continued working as a truck driver throughout the year, notwithstanding his intent to only work the job during the summer. The Court of Appeals observed that carnivals do not operate in Kentucky during the winter, although they did so in more Southern states. It was held that May was not a seasonal employee since he could have continued working as a truck driver, an occupation that is not seasonable. What the worker intended to do, i.e., only work during the summer, was deemed irrelevant. The Court of Appeals stated as follows:

> A summer job for a student is not seasonal merely because the student is only planning to work during the summer, or in the Board's words, not what the plaintiff intended. Rather, an occupation is seasonal because of what the job itself entails.

Id. at 526.

Important to this discussion is another case decided by the Kentucky Supreme Court’s predecessor, the

Court of Appeals of Kentucky, Department of Parks v. Kinslow, 481 S.W.2d 686 (Ky. 1972) which precedes May, as this case is discussed and contrasted with May in the pivotal case decided by the Supreme Court of Kentucky, Travelers Insurance Co. v. Duvall, supra.

In Kinslow, the employee knew he was being hired only from April through October. Although the park to which he was assigned was open throughout the year, services were "drastically curtailed" from October until April. Id. at 687. The Court of Appeal's primary consideration in finding the employee was a seasonal employee was that patrons frequented the park only from late April through October and that the employee only worked six months out of the year. The Court stated as follows:

> The overriding purpose of workmen's compensation is to give recompense to an injured employee (or in this instance the widow of the deceased employee) for the loss of earning capacity due to a work-connected accident, but there are limitations. ***The apparent intent of the legislature in enacting KRS 342.140(2) was to reduce the amount of recovery if the employment was with a business carried on naturally only for a particular season of the year. The seasonal worker should not receive the same compensation as that of a nonseasonal worker.***

Id. at 688. (emphasis added).

In Duvall, the ALJ determined the claimant was not a seasonal employee. The ALJ identified several factors in finding the work was not seasonal. First, the ALJ noted that during winter months, the employee performed other work in the shop doing maintenance. Second, the ALJ observed paving can be affected by weather in the summer months as well. Third, maintenance work and pot-hole filling was performed in the winter. Finally, the claimant testified he had performed paving work year round for another company. Id. at 667. The Court stated the ALJ focused on the proper facts in determining if the occupation was "exclusively seasonal."

In Duvall, supra, the Court stated, in pertinent part:

> We believe the ALJ focused upon the proper facts to determine if this occupation was 'exclusively seasonal.' See KRS 342.140(2). We stress that what an ALJ will find determinative must, by necessity, vary from case to case because each situation involves unique circumstances. Therefore, the fact that in this case work was actually performed year-round should not be overshadowed by the fact that paving is dictated by the weather. Likewise, we do not find it necessarily incongruous that in Department of Parks v. Kinslow, Ky., 481 S.W.2d 686 (1972), the Court focused upon the truly seasonal work of a maintenance employee

> as such, and the conclusion reached in May v. Drew Shows, Ky. App., 576 S.W.2d 524 (1979), that employment as a roustabout for a traveling carnival was not seasonal simply because the carnival, as is customary, left the state of Kentucky to perform elsewhere during the winter months. ***We believe the final result in each of these cases, including the one at bar, exemplifies how to sift through the irrelevant details and focus upon what makes an occupation, on a case-by-case basis, actually and exclusively seasonal.***

Id. at 667 (emphasis added).

Finally, in Desa Intern., Inc. v. Barlow, 59 S.W.3d 872 (Ky. 2001), the Kentucky Supreme Court concluded that a worker who worked only seven to eight months a year for a manufacturer of residential heating units would not earn as much as a year-round worker and should not receive the same level of benefits. ***Testimony revealed employees were informed when hired that the work was seasonal.*** Id. at 875. The Barlow Court stated as follows regarding the purpose of KRS 342.140(2):

> ***The purpose of KRS 342.140 is to determine a given worker's wage-earning capacity so that the resulting income benefit will be based upon a realistic estimation of what the worker would have expected to earn had the injury not occurred.*** In other words, by operation of KRS 342.140 and KRS 342.730, the amount of the benefit increases in proportion to the amount

> of income that the worker has lost due to injury. Where a worker is employed by the defendant-employer for more than a year preceding the compensable injury, calculation of the worker's average weekly wage under either subsection (1)(d) or (2) takes into account the worker's earnings during the entire year preceding the injury. ***All other things being equal, the annual wage-earning capacity of a worker whose job involves only 7–8 months of work per year will not be as great as that of a worker who works year-round and, for that reason, such a worker is not entitled to receive as great an income benefit as a worker who works year-round.***

Id. at 875. (emphasis added).

In sum, the question of whether a particular occupation is seasonal depends upon the unique circumstances of the case, requires a case-by-case determination, and requires a resolution, as held by the Barlow Court, that allows for compensation "based upon a realistic estimation of what the worker would have expected to earn had the injury not occurred." Id. at 875.

As a matter of law, the evidence filed in this litigation, discussed in both the Board's August 21, 2015, Opinion and herein, indicates Shepherd was a seasonal employee of LKJ. Assuming, *arguendo*, the ALJ is correct in his belated exclusion of the evidence filed by LKJ and Shepherd in response to both parties' Request for

Production of Documents, Shepherd's testimony, indicating he was laid off by LKJ during the winter months due to a lack of work, is *prima facie* evidence supporting the conclusion that he was a seasonal employee. A "realistic estimation" of the compensation Shepherd "would have expected to earn" but for his injury must be based upon the evidence in this case, and the evidence in this case indicates when Shepherd worked for LKJ, he worked on a seasonal basis from March or April through October or November. Consequently, we reverse the ALJ's finding that Shepherd was not a seasonal employee and remand for the ALJ to determine the AWW pursuant to KRS 342.140(2) and base his calculation of PPD benefits on said AWW. Our determination of LKJ's first issue on appeal renders the final two issues on appeal moot.

Accordingly, the November 18, 2015, Opinion, Order, and Award on Remand and the January 11, 2016, Order on Petition for Reconsideration are **REVERSED** to the extent the ALJ has determined Shepherd was not a seasonal employee while working for LKJ. The ALJ's calculations of AWW and the award of PPD benefits are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and order finding Shepherd was a seasonal employee at the time of his injury and for additional findings and calculations

regarding AWW and PPD benefits consistent with the views set forth herein.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. Although I concur with the majority decision, I do not believe that responses to requests for production of documents are *per se* admitted into evidence even if served upon the Commissioner of the Department of Workers' Claims absent a specific notice of filing. However, in this instance, any objection to the filing of these documents was waived because none was raised by opposing counsel at any point during the original case before the ALJ. Therefore, I concur with the result reached by the majority in this case.

RECHTER, MEMBER, DISSENTS WITHOUT SEPARATE OPINION.

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