Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 21, 2015

CLAIM NO. 201487221

LKJ CRABBE, INC. PETITIONER

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

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

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. 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.

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.[1]

Shepherd testified he earned $15.00 per hour.[2] 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.

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[1] This is obviously incorrect as Shepherd's testimony and the payroll records reflect he worked until mid-October 2013.
[2] LKJ's payroll records reflect Shepherd earned $14.92 per hour.

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.[3] Following his first day of work, Shepherd worked the following weeks prior to the week of his injury:[4]

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.

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[3] It appears during the pay period from March 24 through April 6, Shepherd worked one day on Saturday, April 6, the last day of the work period.

[4] The week of the work injury is July 14, 2013, through July 20, 2013.

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.[5] 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.

[5] LKJ also introduced an "Employee Quick Report" of Shepherd's earnings which reflect his net earnings, not the total earnings.

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.

ALL CONCUR.

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