Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 10, 2016

CLAIM NO. 201371204

LARRY PRICE PETITIONER

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

FAIRDALE FIRE PROTECTION DISTRICT and
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Larry Price ("Price") seeks review of a decision rendered December 21, 2015 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits based upon a 3% impairment rating, enhanced by the three multiplier

pursuant to KRS 342.730(1)(c)1, and medical benefits for injuries he sustained while working for the Fairdale Fire Protection District ("Fairdale"). Price also appeals from the February 16, 2016 order denying in part his petition for reconsideration.

On appeal, Price argues the ALJ erred by failing to award vocational rehabilitation benefits pursuant to KRS 342.710. Price also argues the ALJ erred by failing to include his concurrent job earnings in calculating the average weekly wage ("AWW"). Because the ALJ's decision is both supported by substantial evidence and in accordance with existing law, and a contrary result is not compelled, we affirm.

Price filed a Form 101 alleging he injured his right ankle and right knee on August 16, 2013 when he fell off of a ladder while installing external lighting at Fairdale's firehouse.

Price testified by deposition on December 16, 2014 and at the hearing held October 21, 2015. Price was born on September 14, 1971 and is a resident of Fairdale, Jefferson County, Kentucky. He is a high school graduate and completed two years of college coursework. He stated he needs three hours of coursework to complete an associate's degree. Price's work history consists of

furniture repair and loading, managing a jewelry store, working on an automobile assembly line, emergency medical technician, making car seats, and as a firefighter. He additionally worked as a contractor for a realtor where he inspected and repaired properties.

As a firefighter, Price inspected vehicles and equipment, maintained the firehouse, provided fire prevention education, inspected buildings, responded to emergencies, conducted training and attended training. He previously served Fairdale as a fire captain, but at the time of the accident, he no longer held that position. Prior to his employment as a full-time firefighter, he was a volunteer firefighter, and worked at Ford installing bolts and seals around doors. Prior to his employment at Ford, he worked at another manufacturing facility where he made Ford and Corvette vehicle seats.

At the time of the accident, Price was climbing down a ladder which he had used to install external lighting at the firehouse. The ladder shifted causing him to fall an estimated six to eight feet. He landed on his feet and his right ankle popped, causing immediate pain. Bystanders observed the fall and provided first aid until his co-workers arrived on the scene. He was then taken to Baptistworx for treatment.

Price did not like the initial orthopedic surgeon he was sent to for treatment, and eventually treated with Dr. Michael Salamon, an orthopedic surgeon. He was off work until September 23, 2013 when he returned as a fire truck driver. He continued to work until he had right ankle surgery on March 7, 2014. Price eventually developed right knee problems, and had surgery in November 2014. He returned to work briefly in 2015. Fairdale terminated him on September 14, 2015 because he no longer met the physical requirements necessary to perform his duties as a firefighter. He currently has a light duty computer job for a different employer. Price indicated he would like to return to school to receive the education necessary to teach and train fire service professionals.

Price agreed with Fairdale his AWW was $866.23 per week for his work with the fire department, but he argued he also had concurrent employment with J. Pits Remax Executor. He testified Fairdale's fire chief had approved his concurrent employment. He described the concurrent employment as inspecting property, taking photographs and recommending repairs. He stated he was paid hourly, and earned approximately $1,200.00 per month for those services.

In support of the Form 101, Price filed the August 16, 2013 record from Norton Healthcare which noted he sustained an acute right ankle strain, with a suspected ligamentous injury with instability when he fell off of a ladder on August 16, 2013. Price also attached an April 29, 2014 physical therapy record which stated he was status post repair of a longitudinal split of the peroneous brevis tendon, tenolysis of peroneous longus tendon and dorsiflexion osteotomy of the first metatarsal. At that time, Price complained of right lateral ankle pain with activity, decreased right ankle range of motion, increased knee flection, decreased strength of the right foot and ankle musculature, decreased rear foot mobility for the right lower extremity and limited function.

Price also filed Dr. Salamon's July 14, 2014 office note. Dr. Salamon noted Price continued to complain of occasional right ankle pain, and right knee pain which continued after cessation of use of a walking boot. Despite complaints of tenderness, x-rays showed no fracture or dislocation. Dr. Salamon stated Price could continue with aggressive rehabilitation.

In addition to the records filed with the Form 101, Price filed the record from Baptistworx dated February 24, 2015 stating he was released to return to work with no

restriction. He also filed Dr. Salamon's note from April 10, 2015, which was illegible, and the April 20, 2015 note allowing him to return to work with no ladder or stair climbing, and no heavy lifting.

Price filed the report of Dr. Robert Byrd who evaluated him on April 2, 2015. Dr. Byrd diagnosed a partial tear of the anterior cruciate ligament with mild laxity, and a history of peroneal tendon repair. Dr. Byrd assessed a 3% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (AMA Guides) for the right knee injury, and 0% for the right ankle. He also stated Price should avoid lifting greater than fifty pounds on a maximum occasional basis or greater than twenty-five pounds on a more frequent basis. He indicated Price would have difficulty lifting from the ground level.

Price also filed 1099-MISC forms from 2012 and 2013 for payments he received from JTP, LLC. The 2012 form stated he received $2,409.30 for nonemployee compensation. The 2013 form stated he received $7,866.60 for nonemployee compensation.

Fairdale submitted the March 2, 2015 office note of Dr. Salamon which reflects Price could return to work without restrictions. Fairdale also submitted the August

10, 2015 letter from Dr. Salamon in which he assessed a 3% impairment rating for the right knee pursuant to the AMA Guides. Dr. Salamon stated Price reached maximum medical improvement ("MMI") by April 30, 2015.

Dr. Thomas Loeb evaluated Price at Fairdale's request on July 21, 2015. Dr. Loeb diagnosed an anterolateral ankle sprain with a split tear of the peroneous brevis tendon. He also diagnosed a contusion/ sprain with a slight injury to the ACL with aggravation of underlying chondromalacia of the patellofemoral joint. He opined Price reached MMI by July 2014, or four months after his surgery. Dr. Loeb assessed a 2% impairment rating for the right knee condition pursuant to the AMA Guides. Like Dr. Byrd, he assessed a 0% impairment rating for the right ankle. Dr. Loeb recommended Price avoid deep knee bending and excessive stair climbing. He recommended no additional treatment other than possibly a brace and strengthening exercises.

Fairdale also filed the September 8, 2015 report from Dr. Stacie Grossfeld. She stated Price would reach MMI on September 24, 2015, and did not require knee surgery.

A Benefit Review Conference ("BRC") was held on October 7, 2015. The contested issues preserved in the BRC

order and memorandum include whether Price retains the capacity to return to the type of work performed on the date of injury, benefits per KRS 342.730, work-relatedness/ causation, AWW, future medical bills, injury as defined by the Act, TTD, and whether the injury is temporary or permanent.

Concerning the issues on appeal, in the opinion, order and award rendered December 21, 2015, the ALJ found as follows:

> At the BRC the issue of Plaintiff's average weekly wage was listed as an issue. A stipulation was reached as to Plaintiff's average weekly wage earned while he worked for Defendant, but Plaintiff argues his AWW should be higher because of what he earned in his concurrent employment.
>
> KRS 342.140 (5) provides, "when the employee is working under concurrent contracts with two (2) or more employers and the Defendant employer has knowledge of employment prior to the injury, his or her wages from all the employers shall be considered as if earned from the employer liable for compensation."
>
> Plaintiff's credible, and uncontradicted, testimony was that Defendant was aware of his concurrent employment.
>
> For the wages an injured worker earned in concurrent employment to be included when calculating AWW, the concurrent employment must be covered by the Act, i.e., if the claimant worked as an

independent contractor in his concurrent employment, his concurrent earnings would not be included when figuring his AWW. *Hale v. Bell Aluminum, 986 S.W.2d 152 (Ky., 1999).*

During Defendant's discovery deposition Plaintiff indicated he was not an employee of his concurrent employer, he was a contractor. (Depo., p. 23). Based upon the nature of Plaintiff's working relationship with his concurrent employer, not being an employee, the wages earned from his concurrent employer cannot be included when calculating Plaintiff's AWW.

The parties stipulated Plaintiff's AWW for his employment with Defendant was $866.23.

. . .

Plaintiff seeks rehabilitation benefits under KRS 342.710 (3), which reads in pertinent part, "when as a result of injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment."

It has already been determined Plaintiff does not retain the physical capacity to return doing work he was doing when injured.

Plaintiff has a relatively high level of formal education and hands-on experience working various jobs other than fire fighting. Plaintiff is a high school graduate and just three credits short of earning an Associates' degree in Fire Science. While in high school

> Plaintiff received vocational training in an electrician's program. He has worked as an assistant manager of a jewelry store, as an assembly line worker for Ford and Corvette, and he has worked for a realtor photographing homes that will be sold and has the training to secure such houses. Plaintiff has worked as an instructor in fire service. Plaintiff likes teaching, and would like to pursue a degree in education.
>
> Plaintiff has not provided ample persuasive proof he is unable to perform work for which he has received previous training or for which he has experience; consequently Plaintiff's entitlement to vocational rehabilitation benefits is overruled.

In his petition for reconsideration, Price argued TTD should be paid through September 24, 2015, credit should only be allowed for overpayment of TTD benefits against the past due PPD benefits pursuant to Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemyer, 782 S.W.2d 628 (Ky. 1990), the ALJ should include his concurrent earnings in calculating the AWW, and the ALJ erred in refusing to award vocational rehabilitation benefits. In its petition for reconsideration, Fairdale argued the date of payment of TTD benefits should commence on August 17, 2013 rather than August 7, 2013 as reflected in the ALJ's decision.

In an order issued February 10, 2016, the ALJ granted Fairdale's petition for reconsideration and corrected the commencement date for the payment of TTD benefits to August 17, 2013. In an order dated February 16, 2016, the ALJ agreed with Price regarding the credit issue, and denied the remainder of the petition for reconsideration.

Price, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Price was unsuccessful in his burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence.

Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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 which otherwise could have been drawn from the evidence. Whittaker v. Rowland, supra.

We first address Price's appeal of the ALJ's refusal to award vocational rehabilitation benefits. The entitlement to such benefits is governed by KRS 342.710(3) which states, in relevant part, as follows:

> When as a result of the injury he is unable to perform work for which he has previous training and experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The administrative law judge on his own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, ***may*** refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation. Upon receipt of such report, the administrative law judge ***may*** order that the services and treatment recommended in the report, or such other rehabilitation treatment or service likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or his insurance carrier. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than fifty-two (52) weeks….
>
> (emphasis added.)

Use of the word "may" in KRS 342.710(3) indicates the issue of vocational rehabilitation benefits is entirely within the discretion of the ALJ. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000). In this instance, the ALJ clearly outlined the reasons he declined to award such benefits. Because the ALJ's decision regarding

entitlement to vocational rehabilitation benefits is supported by substantial evidence, and a contrary result is not compelled, his decision will not be disturbed.

Regarding Price's argument his concurrent earnings should be included in calculating his AWW, again the ALJ's decision will not be disturbed. It is well established that money earned as an independent contractor does not fall within the ambit of workers' compensation coverage. Hale v. Bell Aluminum, 986 S.W.2d 152 (Ky. 1998). In Hale, the Kentucky Supreme Court stated (as previously cited in 99 C.J.S. Workmen's Comp § 294):

> *Employments not within act, or not insured*. In case of concurrent employments, each employment considered must be such as would come within the scope of the act; and where in his employment by one employer the employee is not covered by compensation insurance, his salary therein will not be included with his salary in another employment with another employer, in which he is covered by such insurance, in determining the basis of the payment of compensation for an injury in the latter employment. (Wright v. Fardo, Ky. App., 587 S.W.2d 269 (1979) at 274).
>
> Since it has previously been determined that independent contractors are not employees and, thus, fall outside the scope of the Workers' Compensation Act, we agree with the Court of Appeals that **claimant's earnings as an independent contractor per his own aluminum siding company, Stephen & Son, should not be**

> **added to his wages earned per Bell in order to compute his average weekly wage.** *See* Fields v. Twin-Cities Drive In, Ky., 534 S.W.2d 457 (1976). Id. at 154-155 (emphasis added)

We additionally note pursuant to KRS 342.650(6), an individual who performs service as an independent contractor in the course of an employer's trade, business, profession, or occupation has effectively elected not to be covered by the Workers' Compensation Act. Hubbard v. Henry, 231 S.W.3d 124 (Ky. 2007).

Price bore the burden of proof regarding the inclusion of concurrent earnings in the calculation of his AWW. He testified at his deposition he worked concurrently as a contractor for a realtor. He established Fairdale was fully aware of this arrangement. The 1099 forms filed of evidence clearly state the earnings were for nonemployee compensation. Price’s situation is no different than Mr. Hale’s, and the holding in that case is dispositive of this issue. Here, the ALJ reviewed the information, and determined Price was a contractor, and therefore his concurrent earnings could not be included in the AWW calculation. This determination is supported by the evidence and is in accordance with existing case law. Because a contrary result is not compelled, we affirm.

Accordingly, the decision rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, on December 21, 2015, and the order ruling on the petition for reconsideration entered February 16, 2016, are hereby **AFFIRMED.**

ALL CONCUR.

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