OPINION ENTERED: DECEMBER 7, 2012

CLAIM NO. 201084325

MAGO CONSTRUCTION PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

BRADLEY K. BROWN
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

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

SMITH, Member. Mago Construction ("Mago") appeals from the June 13, 2012 Opinion, Award and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), and the July 16, 2012 Order denying Mago's Petition for Reconsideration. The sole issue on appeal is whether the ALJ erred in finding Bradley Brown ("Brown") was not a seasonal employee for purposes of calculating his average weekly wage ("AWW").

Brown testified by deposition on September 12, 2011. He stated he was employed as a “shovel man” for Mago on a paving crew. His job involved repairing holes in the asphalt behind the paving machine. Brown acknowledged Mago would lay off workers close to Thanksgiving but before Christmas, depending on the weather. Brown stated paving work on road projects could not be performed until the temperature was 45 degrees and rising. When asked what his impression was at the time he was hired, Brown stated “No, I – I knew it – it wasn’t a year round job, I knew it was seasonal.”

Thomas Rogers (“Rogers”), an engineer and vice president of Mago, testified by deposition on April 16, 2012. He stated Mago is an asphalt paving company which occasionally does stone work and light grading. Mago produces its own asphalt and typically does asphalt work from April through November, but its work season depends on work volume. He indicated work is controlled by temperature. Mago’s work consists mainly of paving projects for the Highway Department. Rogers explained that, when laying a base level for highway projects, the temperature must be 35 degrees and rising. For surface layers, the temperature must be 45 degrees and rising. Rogers stated the main obstacle to performing work after November is

temperature control. He stated it is expensive to heat the asphalt plant during the winter months. If Mago chose to perform work during the winter months, it would have to charge its clients the extra cost associated with heating the plant. Rogers could not remember Mago's crews ever working after mid-December. He stated Mago very seldom performed work prior to the first of April. During the winter months a few employees work on maintaining equipment, but the majority of the crew members are laid off.

Regarding the issue of seasonal employment the ALJ found as follows:

> The central issue in this claim is the proper calculation of the plaintiff's average weekly wage. The defendant/employer contends that the plaintiff was a seasonal employee and that his average weekly wage should be calculated pursuant to KRS 342.140(2) while the plaintiff argues that he was not a seasonal employee and that since he was paid by the hour the proper calculation of his average weekly wage is determined pursuant to KRS 342.140(1)(d).
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> KRS 342.140(2) provides that
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> > In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one fiftieth (1/50) of the total wages which the employee has earned from all occupations during

> the twelve calendar months immediately preceding the injury.

In support of its position that the plaintiff was a seasonal worker the defendant cites the plaintiff's own deposition testimony in which he acknowledged that he was hired on a seasonal basis and that he was laid off in late November of 2009 and did not return to work on the asphalt paving crew until May of 2010. Defendant further cited the plaintiff's testimony to the effect that workers at Mago were laid off every year around Thanksgiving when it became too cold to lay asphalt and that work would usually start back up in the spring when the weather typically was above 45 degrees. Defendant also submitted testimony from Thomas Rogers that the typical paving season runs from April through November and paving crews were laid off through the winter time with only the most senior employees retained to perform mechanical work. Rogers testified that the shortest layoff he could recall since working for Mago in 1990 was approximately three and a half months.

The plaintiff cited to the Opinion of the Workers' Compensation Board in Lexington Blacktop v. Jesse Dennis, (claim no. 04–87394) in which ALJ Borders determined that an employee of an asphalt company was not considered a seasonal employee simply because asphalt work is done primarily April through December. Judge Borders noted that it was a business decision not to pave in the winter months and noted that the plaintiff worked for 75% of the year for the asphalt paving company. Plaintiff argues by extension that the finding in *Lexington Blacktop* is consistent with the facts of the present claim in that

Rogers testified at his deposition that if the weather permitted the defendant could pave in the winter months but that the primary reason for not doing that is the cost of operating the asphalt plant. Rogers explained that there was a significant utility expense generated with respect to restarting the asphalt plant and that a prospective customer would have to agree to pay that in order for Mago to pave during winter months. He conceded, however, that paving does occur during winter months and acknowledged that a bridge project in Louisville was completed during winter months.

By its very terms KRS 342.140(2) requires that in order to be considered seasonal, an occupation must be exclusively seasonal, and more importantly, one which "cannot be carried on throughout the year." Although it is clear that it is the custom of the defendant, and perhaps other asphalt paving companies in Kentucky, to shut down during the winter months because of the cost associated with heating asphalt plants there is no evidence that the occupation in which the plaintiff was engaged on the paving crew cannot be carried on throughout the year. The ALJ acknowledges Mr. Rogers' testimony that some of the work performed by the plaintiff is highway construction work which requires that the air temperature be at least 45 degrees before paving can be conducted. There is no testimony, however, that other paving work is subject to those requirements. In fact, it is clear that the defendant could perform paving work for non-state related projects at any time as long as either it or its customer were willing to bear the added expense of keeping the asphalt plant at the proper temperature. This, of

course, is a business decision which has little bearing on the determination of whether asphalt paving work can be performed continually throughout the year. The ALJ infers from Mr. Rogers' testimony that asphalt paving work can be performed throughout the course of the year but that under certain climatic conditions is not economically feasible to do so. Likewise, the ALJ notes that the evidence submitted by the defendant establishes that the defendant typically performs paving work for eight out of 12 months every year. In other words, asphalt paving work is performed during roughly three of the four annual seasons. The undersigned further interprets the underlined [sic] policy of KRS 342.140(2) to limit calculation of average weekly wage in the situation where the claimant is employed in [sic] occupation which is by its nature limited to a certain season. In the present case, however, the plaintiff's occupation was unlimited with the exception, potentially, of only one season or four month period during the year. The ALJ believes that an occupation which can only be performed in a four month period (i.e. a season) [sic] be more likely considered seasonal than an occupation which can be performed continuously throughout the year with the possible exception of only one season. Therefore, based on the evidence presented by the parties and under analysis of the facts unique to this claim the ALJ finds and concludes as a matter of law the plaintiff was not a seasonal employee and that his average weekly wage is properly calculated by reference to KRS 342.140(1)(d). Based on AWW–1 form submitted by the defendant, the ALJ further finds that the plaintiff's average weekly wage is $519.50 ($6,753.46 ÷ 13).

On June 18, 2012, Mago filed a petition for reconsideration, arguing it did not, and could not, operate its business profitably in the winter months and, therefore, the ALJ should have found Brown's employment was seasonal. Mago also argued the ALJ's finding produced an absurd result since Brown's temporary total disability ("TTD") benefits for a full year would be greater than Brown's earnings for the year preceding his injury.

By order dated July 16, 2012, the ALJ overruled the petition for reconsideration noting he had considered and rejected the same issues when he reached his original decision.

On appeal, Mago argues the ALJ erred in finding Brown was not a seasonal employee for purposes of calculating his AWW. Mago argues the ALJ erred in his application of the law to the undisputed facts in the claim. Mago argues, pursuant to the holdings in Department of Parks v. Kinslow, 481 S.W.2d 686 (Ky. 1972) and Desa Intern., Inc. v. Barlow, 59 S.W.3d 872 (Ky. 2001), Brown must be found to be a seasonal employee.

Mago acknowledges a paving company employee was determined not to be seasonal in Travelers Insurance Co. v. Duvall, 884 S.W.2d 665 (Ky. 1994). However, Mago argues

Duvall is distinguishable since the claimant performed other services for the employer in the winter.

Mago argues Brown's testimony establishes he knew the job was seasonal and he did not perform work for Mago in the winter. Mago argues the ALJ should have found the work to be seasonal since it was not economically feasible to perform paving work in the winter. Finally, Mago again argues the ALJ's finding produces an absurd result. Mago contends the ALJ's finding regarding AWW leads to unrealistically high benefit rates.

KRS 342.140(2) provides:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
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> (2) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury.

The question of whether a particular occupation is seasonal depends on the circumstances of the case and requires a case-by-case determination taking into account the unique circumstances of each. Pike County Bd. of Educ. v. Mills, 260 S.W.3d 366, 369 (Ky. App. 2008); Travelers

Insurance Co. v. Duvall, supra. The determination is highly dependent upon the evidence actually presented in the particular case.

In the case *sub judice*, the ALJ determined asphalt paving could be performed throughout the year and was thus not exclusively seasonal. The ALJ noted it was the custom of the employer not to perform paving work in the winter because of the increased cost of heating the asphalt plant. However, the cost could be passed on to the customer if the customer wanted the work done during the winter months. The ALJ noted temperature is a factor in road paving projects for the state, but Mago's work was not limited to state projects.

In Barlow, *supra*, the Kentucky Supreme Court found that a worker who worked only 7 to 8 months a year for a manufacturer of residential heating units would not earn as much as 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. Testimony also revealed other manufacturers engaged in the same production schedule. The heaters produced by DESA were a product with seasonal demand. Warehousing products would be necessary if production were carried out during the entire year, placing DESA at a cost disadvantage with

its competitors. DESA's business decision was a factor in determining the employment was seasonal. Id at 872.

Although the ALJ in the present case relied in part on the Board's decision in Lexington Blacktop v. Jessie Dennis, claim no. 2004-87394, rendered June 19, 2006, we believe Barlow is controlling and establishes that where the economic realities of the company's business dictate the activity cannot be profitably conducted during the entire year, the employment is seasonal in nature.

Rogers' testimony established Mago only retained crew foremen during the winter to perform maintenance work. There was no testimony to establish sufficient demand for paving in the winter months. Rogers' testimony indicated that when work began in the spring, the initial work was performed by a crew made up of the foremen until sufficient work was available to require the call back of the other crew members.

In Kinslow, *supra*, 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's primary considerations in finding the employee was a seasonal employee were that patrons frequented the park only from late April through

October and that the employee only worked six months out of the year. Id at 688-689. Here, Brown admitted he knew paving work would be performed only from spring through late November or early December. While paving work was performed seven or eight months of the year, a slightly longer period than the employment in Kinslow. However, as noted by Mago, teachers who work nine months of the year are considered seasonal employees. The duration of Brown's employment is not sufficient to establish the employment was not seasonal.

The statute does not define seasonal employment other than by specifying occupations that are exclusively seasonal "cannot be carried on throughout the year." The ALJ indicated his belief that "exclusively seasonal" occupations are more likely to be found with employment carried out in a single season than those performed in multiple seasons. We agree the percentage of the year an activity is performed may have some bearing on the finding of whether employment is seasonal, although it may not be determinative on its own.

In Duvall, 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.
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> Id., at 667 (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." Certainly, the most significant difference between the facts in Duvall and the case *sub judice* is that, in Duvall, the claimant performed other work during the winter months while Brown did not.

Here, the facts were not in dispute and the ALJ was compelled as a matter of law to find Brown was a seasonal employee. The finding that Brown was not a seasonal employee was not properly supported by the evidence. We conclude the ALJ properly misconstrued KRS 342.140(2).

Accordingly, the June 13, 2012 Opinion, Award and Order and the July 16, 2012 Order on Petition for Reconsideration rendered by Hon. Robert L. Swisher, Administrative Law Judge, are hereby **REVERSED** and this matter is **REMANDED** for entry of an amended award finding Brown's employment was seasonal and calculating his average weekly wage pursuant to KRS 342.140(2).

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS AND FILES A SEPARATE OPINION.

MEMBER, STIVERS. I submit the following language in Desa Intern., Inc. v. Barlow, 59 S.W.3d 872 (Ky. 2001) dooms Brown's position in the case *sub judice*:

> 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.

Barlow's testimony establishes he knew his job was seasonal and he did not expect his employment at Mago to be "a year round job." Consequently, since Barlow had no expectation of earning wages for the entire year, he is only entitled to be compensated for the amount of income he has lost as a seasonal employee because of the injury. Consequently, his average weekly wage should be calculated pursuant to KRS 342.140(2).

COUNSEL FOR PETITIONER:

HON DOUGLAS A USELLIS
600 E MAIN ST STE 100
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON BEN T HAYDON
PO BOX 1155
BARDSTOWN, KY 40004

ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511