Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 18, 2014

CLAIM NO. 201201705

MARTIN COUNTY BOARD OF EDUCATION PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

JESSICA KIRK
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART
AND REMANDING

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

RECHTER, Member. Martin County Board of Education ("MCBE") appeals from the September 20, 2013 Opinion and Order and the November 25, 2013 Order on Reconsideration rendered by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"). On appeal, MCBE challenges the ALJ's method of calculating

Jessica Kirk's average weekly wage ("AWW"). Because the ALJ improperly included wages earned more than fifty-two weeks prior to Kirk's injury, we must vacate and remand this matter.

Kirk is employed by MCBE as a bus driver. On March 23, 2012, she sustained work-related injuries to her knee and back when she fell while performing a required walk-through inspection of her bus. The ALJ awarded temporary total and permanent partial disability benefits. In calculating these awards, the ALJ found Kirk's AWW was $406.64.

The evidence concerning the AWW came entirely from Kirk, as MCBE submitted no evidence concerning her wages. In her Form 101, she listed her hourly wage as $18.47. However, during her deposition testimony, Kirk indicated this figure was inaccurate, and believed her actual hourly rate was $18.08. At the final hearing, she also submitted a summary from MCBE's payroll company. This summary listed every check Kirk had received from June 29, 2011 through November 23, 2012, and the date and amount of each check.

At the final hearing, Kirk acknowledged MCBE's paychecks were "held back" for a period of time, meaning a check received on the last day of the month actually

reflected work performed earlier in the month. However, her testimony was contradictory and unclear. She first indicated the checks were held back for four weeks, but later seemed confused on cross-examination and could not conclusively say how long checks were held back. She was, however, certain her school-year pay was reduced so she would continue to receive a paycheck during the summer months, when she did not work. As to why the amount of her paychecks varied, Kirk explained she typically worked twenty hours per week, but often had the opportunity to drive "extra runs" for additional money.

In the September 20, 2013 Opinion and Award, the ALJ acknowledged Kirk's testimony and proof concerning her AWW was confusing. He further indicated she had submitted a summary of her payroll history "which documents wages paid to her from March 25, 2011 through June 29, 2011." He then concluded the wage information is accurate, and calculated her AWW as follows:

> [B]ased upon the ALJ's analysis of these wages, plaintiff's best 13 week period in the year prior to her injury of March 12, 2012 is the period from March 25, 2011 to June 10, 2011, which totals $5286.38 which divided by 13 weeks equals $406.64 (the week of 6-17-11 which equals $640.68 was divided in half to constitute the 13th week.). As such plaintiff's average weekly wage is hereby found to be $406.64 per week.

In a petition for reconsideration, MCBE argued the ALJ's calculations are not consistent with KRS 342.140 because he failed to take into account Kirk's testimony her paychecks were "held back". It also asserted the ALJ acted arbitrarily by dividing the week of June 17, 2011, and Kirk's payroll summary is too incomplete to be relied upon. The ALJ denied the petition, though he corrected a clerical error in the Opinion and Award to accurately reflect Kirk's injury occurred on March 23, 2012.

On appeal, MCBE continues to challenge the computation of Kirk's AWW. It first argues the payroll summary submitted by Kirk does not contain adequate proof to satisfy the requirements of KRS 342.140. MCBE again argues the ALJ acted arbitrarily by dividing the paycheck received on June 17, 2011 to arrive at Kirk's wages for the thirteenth week.

First, it is undisputed Kirk's AWW should be calculated pursuant to KRS 342.140(1)(d), which states:

> [If] [t]he wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar

> weeks in the fifty-two (52) weeks immediately preceding the injury.

We also acknowledge Kirk, as the claimant, bore the burden to prove every element of her claim, including the applicable AWW. Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984). Because she was successful in that burden, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Id.

MCBE's first argument is that Kirk's payroll print-out is not sufficient proof to establish her earnings. We disagree. While the evidence was minimal, it identified each paycheck written to Kirk, when it was issued, and in what amount. Importantly, MCBE did not dispute the validity of the summary. Instead, it merely argued the summary may be incomplete. As such, MCBE essentially concedes the summary establishes *the minimum* Kirk was paid during the summarized months. Furthermore, MCBE submitted nothing to rebut this proof. In fact, it introduced no documentation whatsoever to confirm Kirk's earnings during the applicable period. The ALJ, as fact-finder, enjoys the sole discretion to determine the quality, character, weight and substance of the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985). Under the circumstances of this case, we do

not believe the ALJ abused this discretion in relying upon the payroll summary supplied by Kirk.

As part of its argument, MCBE also asserts the ALJ should not have relied on a paycheck issued March 25, 2011. Because Kirk testified her paychecks were "held back", MCBE asserts the March 25, 2011 check stub cannot be relied upon as an accurate indication of her earnings for work performed within the fifty-two week period mandated by KRS 342.140(1)(d). We agree.

KRS 342.140(1)(d) requires the ALJ calculate the employee's most favorable thirteen weeks of wages through wages "*earned*" in the fifty-two weeks immediately preceding the injury. Thus, the ALJ was required to analyze Kirk's earnings from March 23, 2011 through March 23, 2012, her date of injury. The paycheck issued to Kirk on March 25, 2011 reflected gross wages of $891.82. According to Kirk's testimony, she was injured on March 23, 2012, a Friday, and did not work on March 24th or 25th. Thus, the March 25, 2011 paycheck necessarily included earnings prior to Kirk's date of injury. It appears likely this miscalculation occurred due to the clerical error concerning Kirk's date of injury. Nonetheless, it must be corrected.

For this reason, this matter must be remanded to the ALJ for recalculation of her AWW using only wages

earned between March 23, 2011 and March 25, 2012. This task can be accomplished through reference to the evidence submitted by Kirk, which we have determined is competent proof of earnings. Furthermore, we believe this conclusion will render moot MCBE's final argument concerning the use of the June 17, 2011 paycheck.

For the foregoing reasons, that portion of the September 20, 2013 Opinion and Order calculating the average weekly wage is **VACATED and REMANDED** for recalculation of the average weekly wage as detailed herein.

ALL CONCUR.

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