Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 13, 2014

CLAIM NO. 201201695

MATTINGLY CONSTRUCTION PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

JAMES C. SMITH
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Mattingly Construction ("Mattingly") seeks review of the August 27, 2013, opinion, award, and order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding James C. Smith ("Smith") totally occupationally disabled and awarding temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits enhanced pursuant to KRS 342.165, and medical benefits.

Mattingly also appeals from the September 25, 2013, order overruling its petition for consideration and sustaining Smith's petition for reconsideration.

On appeal, Mattingly challenges the ALJ's calculation of Smith's average weekly wage ("AWW") and the amount of PTD benefits awarded.

Smith was severely injured on his first day of work, October 1, 2010, when he fell through one of the skylights on the roof of the Marion County Highway Garage.[1] Mattingly had contracted to remove the metal roof on the garage and put on a new roof. In the course of removing a screw from a sheet of metal, Smith unknowingly shifted onto one of the unmarked skylights and fell approximately eighteen feet to the concrete floor of the garage. He fell within an hour after he started work. Smith sustained numerous severe injuries.

Smith either sought or Mattingly requested him to work on Friday and possibly Saturday removing the garage roof. There is no dispute on the following Monday, Smith was going to work for Buzick Construction on a full-time basis building whiskey warehouses. Smith testified that on the Friday he was injured there were three other employees

[1] Although the Form 101 alleges an injury on October 10, 2010, the parties stipulated Smith was injured on October 1, 2010.

working on the building. He was able to identify the owner's son, Bren Mattingly, as one of the employees, the other two he did not know.[2]

Mattingly filed the wage records of two "comparable employee[s]" covering two different thirteen week periods. One filing contained the weekly wages spanning the thirteen week period beginning with the week ending July 9, 2010, extending through the week ending October 1, 2010. The other filing contained the weekly wages of those same employees spanning the thirteen week period beginning with the week ending July 23, 2010, extending through the week ending October 15, 2010. In each filing the comparable employees had no wages for the weeks ending September 10, 2010, September 17, 2010, September 24, 2010, and October 1, 2010. The testimony revealed the employees had been working at the garage approximately four days prior to Smith's fall. For the thirteen week period beginning with the week ending July 9, 2010, extending through the week ending October 1, 2010, "comparable employee A's" total earnings were $3,516.50. For the same period "comparable employee B's" total

[2] The deposition testimony of James Ronnie Mattingly, the owner, and Bren, revealed the other two employees' were Daniel Knopp and Anthony Green.

earnings were $3,607.50. For the thirteen week period beginning with the week ending July 23, 2010, extending through the week ending October 15, 2010, "comparable employee A's" total earnings were $2,645.00 and during the same period "comparable employee B's" total earnings were $3,029.00.[3]

Smith filed a number of wage documents all of which cover the period beginning with the week ending June 25, 2010, extending through the week ending October 15, 2010. We are unable to determine the identity of some of the employees whose wages are reflected in the earnings records styled "Payroll Detail Review." We are also unable to determine if these wage records were compiled and supplied by Mattingly. Within the filing is the Payroll Detail Review for Anthony Green ("Green") and Daniel Knopp ("Knopp") during this period. Those records reflect Green and Knopp had no wages for the weeks ending September 10, 2010, September 17, 2010, September 24, 2010, October 1, 2010, and October 8, 2010. The filings provide the earnings of Green and Knopp for twelve weeks.[4]

Smith also introduced a copy of a letter sent to Mattingly's counsel providing a calculation of Smith's AWW

[3] See Mattingly's Notice to File Wage Records filed on May 28, 2013.
[4] See Smith's Notice of Filing Average Weekly Wage.

based on the weekly wages for the thirteen week period beginning with the week ending July 2, 2010, and extending through the week ending on September 24, 2010. Smith's calculations of the total wages were based on the highest weekly wage of either Green or Knopp during the thirteen week period.

The January 28, 2013, deposition testimony of James Ronnie Mattingly, the owner of Mattingly, and the April 12, 2013, deposition testimony of Bren Mattingly provide no insight as to whether the employees were paid at the end of the week for work performed that week or were paid on the following Friday for the work performed the previous week. Consequently, we are unable to determine whether the date on the printouts reflects the earnings for that particular week or the earnings of the previous week.

In the opinion, award, and order, the ALJ entered the following findings of fact and conclusions of law concerning Smith's AWW:

> Smith was injured early in the day on his first day on the job and, therefore, has no history of wage on which to base an average weekly wage. He bases his proposed average weekly wage figure calculation on KRS 342.140(1)(e) and, although not specifically stated, Defendant Employer seems to do the same:

> The employee has been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

Defendant Employer filed an AWW-1 based on earnings of a similar employee and proposes two possible figures, one based on earning paid on October 10, 2010 and the other based on earning paid on October 1, 2010, although, quite frankly, the reason for the calculations is not clear. The main problem with the calculations is the weeks where there are no earnings listed, weeks that report earnings as $0.00. There is no question for at least part of that time the men were working since they had been on the job several days or more prior to Plaintiff's injury which occurred on October 1, 2010. Therefore, the AWW-1 is not found to be reliable; it is not complete enough to conduct the calculations dictated by the statute.

Reviewing the figures on the "Payroll Detail Review," filed by Plaintiff, it is hard to tell which weeks the employees worked. The wages, for the most part, were weekly and dated on Fridays but there are gaps in

the chronology of weeks where no wage is listed. For example, wages are listed weekly until after September 2, 2010 at which time no wages are listed until October 15, 2010 but clearly there was work during that time since the injury occurred October 1, 2010 and there should at least have been wages dated the following Friday, October 8, 2010.

Therefore, without further proof to determine the actual wages for the 13 weeks preceding the injury, the average weekly wage will be calculated in the manner which appears most accurate. Beginning October 8, 2010 going back 13 weeks including July 16, 2010, there are 8 weeks where payroll is listed. The total $2,892.50 is divided by 8 to arrive at a figure of $361.56.

October 8	0.00
October 1	0.00
September 24	0.00
September 17	0.00
September 10	0.00
September 3	208.00
August 27	234.00
August 20	331.50
August 13	461.50
August 6	474.50
July 30	208.00
July 23	455.00
July 16	520.00*
	$2,892.50
	÷ 8
	$ 361.56

*Plaintiff added to the figure for this week holiday pay which was most likely paid for the July 4 holiday, a day when there is no question but that Plaintiff was not employed at that time and is outside the 13 week period. Therefore,

> it should not be included in this week's pay.
>
> While there is most likely no precedent for this calculation, there does not seem to be a clear cut answer for the average weekly wage calculation.
>
> Preserved as an issue is the rate of Temporary Total Disability (TTD) benefits. The parties stipulated to TTD being paid at a rate of $145.47 per week. By statute, TTD is to be paid at a rate representing sixty-six and two-thirds percent (66-2/3%) of the employees' average weekly wage. As the wage is determined herein to be $361.56, the rate should have been $241.04 and therefore, TTD was underpaid. Plaintiff is entitled to the difference.

The ALJ awarded PTD benefits based on an AWW of $361.56. Enhancement by 30% resulted in PTD benefits of $313.35.

In his petition for reconsideration, Smith asserted the ALJ failed to increase the award of TTD benefits by 30%, and he was entitled to TTD benefits enhanced by 30% of $313.35 per week. In its petition for reconsideration, Mattingly noted the ALJ determined the total wages during the applicable thirteen week period immediately preceding the injury to be $2,892.50. It argued the calculation of Smith's AWW is controlled by C & D Bulldozing Co. v. Brock, 820 S.W.2d 482 (Ky. 1991).

Thus, in calculating Smith's AWW the total amount earned in the thirteen weeks preceding the injury are to be divided by thirteen. Applying that formula to the present case results in an AWW of $222.50. It requested the ALJ correct the calculation to reflect Smith was entitled to PTD benefits of $192.83. Further, it noted since the ALJ found Smith was permanently totally disabled as of the date of the injury, the award of TTD benefits is redundant and the award should reflect it receives the appropriate credit for any payments of compensation against its obligation to pay PTD benefits.

In the September 25, 2013, order the ALJ sustained Smith's petition for reconsideration and enhanced the TTD benefits by 30% and awarded TTD benefits of $313.35 from October 1, 2010, through July 3, 2012. The ALJ denied Mattingly's petition for reconsideration.

On appeal, Mattingly first observes the ALJ determined the AWW based on thirteen weeks of earnings from July 16, 2010, through October 8, 2010, which totaled $2,892.50. Because there were only eight weeks of earnings in those thirteen weeks, the ALJ divided that amount by eight. Although it proposed a different thirteen week period to be utilized, Mattingly asserts the ALJ has the discretion to determine the appropriate thirteen week

period. However, Mattingly argues C & D Bulldozing Co. v. Brock, supra, requires the gross earnings to be divided by thirteen. It asserts there is no significant distinction between the facts in C & D Bulldozing Co. v. Brock, supra, and the case *sub judice*. Mattingly notes there is no evidence to support a finding Mattingly's workers "could expect to work anything other than on a consistently intermittent basis." It argues the wage records of the "two similar employees" must be considered Smith's most realistic earning capacity.

In addition, although Smith relied upon Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999) in its petition for reconsideration, Mattingly contends the Supreme Court in Huff applied the standard contained in C & D Bulldozing Co. v. Brock, supra. It insists if there were no similar employees, Smith's AWW would be whatever he was scheduled to earn on October 1, 2010, divided by thirteen. Mattingly notes it provided the wage records of two similar employees that reflect consistently intermittent employment and those records provide a realistic estimate of what Smith would have expected to earn during the thirteen week period. Thus, the total earnings of $2,892.00 must be divided by thirteen which results in an AWW of $222.50.

On the other hand, Smith asserts the ALJ's calculation of the AWW is correct. Smith also provides an alternative calculation of his AWW espousing the thirteen week period should begin with the week ending July 2, 2010, and extend through the week ending September 24, 2010. He posits the highest weekly earnings of the two employees should be used in arriving at the total earnings for the thirteen week period. The total earnings should then be divided by thirteen which results in an AWW of $334.46 and a compensation rate of $222.97 plus a 30% enhancement.

We vacate the determination of Smith's AWW, the award of TTD benefits and PTD benefits, and remand.

The applicable statute is KRS 342.140(e) which reads as follows:

> The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation;

Without question Smith had been employed for less than thirteen calendar weeks immediately preceding the injury.

Consistent with the provision of section (e), the parties introduced evidence as to what other employees working for Mattingly earned prior to Smith's injury. The statute requires the ALJ to determine what Smith "would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury." Thus, the thirteen week period could not encompass earnings of similarly situated employees during the week in which Smith was injured as that week was not a full calendar week preceding the injury. Smith testified he had not worked an hour on Friday before he fell. Thus, that week was not a full calendar week prior to the injury.

The last week of the applicable thirteen week period is the week ending September 24, 2010. The applicable thirteen week period includes the earnings for that week and the previous twelve weeks preceding the week ending September 24, 2010. The record is silent as to whether Mattingly's workers were paid at the end of each week for the hours worked that week or were paid on the following Friday for the hours worked the previous week. What is clear from both filings is that Green and Knopp received no wages on September 10, 2010, September 17, 2010, and September 24, 2010. That fact aside, the earnings for the thirteen week period beginning with the

week ending July 2, 2010, through the week ending September 24, 2010, are to be utilized in calculating Smith's AWW.

We disagree with Smith's assertion the higher of the two employee's weekly wages during this period should be utilized in determining the amount he would have earned over thirteen weeks. Calculating the total wages in this manner would not reflect the earnings of any Mattingly employee during the applicable thirteen week period. Rather, the ALJ must utilize the weekly wages of either employee during that period in calculating the amount Smith would have earned had he been so employed by Mattingly for the full thirteen calendar weeks immediately preceding the injury. The ALJ must divide that amount by thirteen, not by eight. The statute directs Smith's AWW to be determined by the amount a similarly situated employee would have earned during a full thirteen calendar week period. The fact Green and Knopp did not work during some of those thirteen weeks does not permit the ALJ to divide the total wages earned during this period by a number less than thirteen.

In C & D Bulldozing Co. v. Brock, supra, the Supreme Court instructed as follows:

> Initially, we hold that the Board erred by considering weeks of employment outside the 13–week period

immediately preceding the last injurious exposure. Calculations under either KRS 342.140(1)(d) or (1)(e) are made utilizing a 13–week period and the Board borrowed two weeks of employment from weeks 14 and 15 to reach a total of 9. The proper calculation would be based upon the wages earned for 7 weeks during the 13–week period preceding the injurious exposure under (1)(e).

Subsection (1)(e) is designed to arrive at an average weekly wage based upon an employee's earning capacity, since under that subsection, the average weekly wage is determined not upon actual wages earned, but upon what would have been earned had the employee been employed by the employer for the full 13 calendar weeks immediately preceding the injury and had worked when work was available to other employees in a similar occupation. [citation omitted]

. . .

The statutory scheme under (1)(e) was designed to compute an average weekly wage reflective of a realistic earning capacity, and therefore, (1)(e) includes the consideration of a normal 13–week period of hire so that an employee's compensation will reflect his future loss of earnings in his regular employment. In claimant's case, the evidence revealed that 7 weeks of work operating a bulldozer for C & D out of a 13–week period constituted a normal period of service. It is unfortunate that there is not a provision which is more narrowly tailored to accommodate consistently intermittent employment that is still not seasonal employment. However, the compensation scheme is based upon a determination of average weekly wages,

> and we must apply the statute as best we can to varying circumstances.
>
> Claimant's average weekly wage is $127.35 as calculated by dividing by 13 the total he earned during the 7 weeks he worked throughout the 13 calendar weeks immediately preceding his last injurious exposure. We believe this does in fact represent an average weekly wage based upon his future capacity to earn income under the normal and customary practices of hire in his employment with C & D in that irregular working time was a normal part of the job according to claimant's testimony.

Id. at 486.

In the case *sub judice*, during the applicable thirteen week period, Green and Knopp did not work some weeks. The purpose of KRS 342.140(1)(e) is to obtain a realistic estimation of what other employees in a similar occupation would have worked and earned during the applicable thirteen week period. We note neither party argues Green and Knopp are not similarly situated employees. Consequently, if Green and Knopp did not work during some of the weeks within the applicable thirteen week period, Smith too would not have worked during those same weeks. Here, the ALJ is calculating fictional earnings as Smith was to work one or possibly two days for Mattingly and on the following Monday, was going to work for Buzick Construction on a permanent full-time basis.

Therefore, the ALJ must utilize the total wages of either Green or Knopp during the applicable thirteen week period and divide by thirteen in arriving at an AWW.[5]

This is consistent with the Supreme Court's holding in Huff v. Smith Trucking, supra. There, the Supreme Court noted:

> KRS 342.140(1)(e) applies to injuries sustained after fewer than 13 weeks' employment. It utilizes the averaging method set forth in KRS 342.140(1)(d) and attempts to estimate what the worker's average weekly wage would have been over a typical 13–week period in the employment by referring to the actual wages of workers performing similar work when work was available. As was recognized in *Brock*, the goal of KRS 342.140(d) and (e) is to obtain a realistic estimation of what the injured worker would be expected to earn in a normal period of employment. In the instant case, the logging business had not yet operated for 13 weeks; therefore, there was no 13–week period from which to estimate an average weekly wage for the employment. Although *Brock* and *Wright v. Fardo*, Ky. App., 587 S.W.2d 269 (1979), are instructive concerning the purpose and mechanism of the statute, neither case is dispositive of these facts.
>
> In *Brock*, although the worker was hired more than 13 weeks before the injury, he had actually worked for fewer than 13 weeks when injured

[5] Neither party has raised as an issue the fact Smith was to be paid $10.00 an hour and Green and Knopp may have been paid $13.00 an hour. See page 16 of James Ronnie Mattingly's deposition.

> because work was not always available. The Court determined that KRS 342.140(1)(e) applied. *Brock* indicates that KRS 342.140(1)(e) "includes the consideration of a normal 13–week period of hire so that the employee's compensation will reflect his future loss of earnings in his regular employment." The Court determined that despite the fact that work had not been available every week during the 13–week period which immediately preceded the worker's injury, the 13–week period was normal for the employment.

Id. at 821-822.

In Huff, there were no prior weekly earnings from which to estimate what Huff would have expected to earn had Smith Trucking conducted logging operations for thirteen weeks preceding the injury. Here, there are prior earnings of two similarly situated employees of Mattingly who were working at the location where Smith was injured. In Huff, the Supreme Court noted there may be breaks in Huff's employment during the applicable thirteen week period stating:

> We are persuaded that claimant's uncontradicted testimony sufficiently demonstrated that timber cutting work was available at $75.00 per day in the area in which he resided. It is clear, however, that in arriving at an average weekly wage of $375.00 pursuant to KRS 342.140(1)(e), the ALJ and the Board failed to consider the effect of the weather upon the average weekly wage that claimant could reasonably have expected to earn as a timber cutter

> during the 13 weeks preceding his injury. The only evidence in that regard came from claimant's actual experience and indicated that the weather permitted timber cutting approximately 50% of the time. In view of that uncontradicted evidence, we, like the Court of Appeals, conclude that there was no substantial evidence to indicate that claimant would have worked every day during the relevant 13–week period.

Id. at 822-823.

Although, on appeal neither party takes issue with the thirteen weeks period utilized by the ALJ, we believe the ALJ's selection of the applicable thirteen week period is not in conformity with the statute. Based on the evidence in the record, the ALJ erred by utilizing the earnings for the weeks ending October 1, 2010, and October 8, 2010. Thus, the thirteen week period commences with the week ending July 2, 2010, and ends with week ending September 24, 2010. The total earnings during that thirteen week period as determined by the ALJ should be divided by thirteen in calculating Smith's AWW.

Although neither party raised this issue on appeal, we note the issue of an award of TTD benefits was raised by Mattingly in its petition for reconsideration. Since Smith was awarded PTD benefits commencing on October 1, 2010, the date of injury, TTD benefits should not have

been awarded. Mattingly correctly stated in its petition for reconsideration there should be no award of TTD benefits and it should be given credit for TTD benefits previously paid against its obligation to pay PTD benefits.

Accordingly, those portions of the August 27, 2013, opinion, award, and order relating to the calculation of Smith's AWW as well as the calculation of TTD benefits and PTD benefits are **VACATED**. In addition, the ALJ's September 24, 2013, order sustaining Smith's petition for reconsideration increasing TTD benefits and overruling Mattingly's petition for reconsideration are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and award determining Smith's AWW and the amount of PTD benefits to which he is entitled in accordance with the views expressed herein. Further, the ALJ shall direct Mattingly receive a credit for any TTD benefits it has previously paid against its obligation to pay PTD benefits.

ALL CONCUR.

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