OPINION ENTERED: DECEMBER 14, 2012

CLAIM NO. 201087450

PATRICK BURKE PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

ERS CONSTRUCTION, INC.
and HON. R. SCOTT BURDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING
* * * * * *

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

SMITH, Member. Patrick Burke ("Burke") appeals from the June 21, 2012 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), and from the July 18, 2012 order on reconsideration. On appeal, Burke argues the ALJ erred in re-deciding the merits of the claim on reconsideration, erred in calculating average

weekly wage ("AWW") and erred in limiting the compensation for his caregiver.

Burke filed a Form 101, Application for Resolution of Injury Claim, on February 15, 2011, alleging on May 25, 2010, as a result of falling debris, he injured his right arm/shoulder/hand, left arm/shoulder, ribs, and head. He also alleged the development of depression and anxiety secondary to his physical injuries. Burke alleged an AWW of $711.00.

Burke attached a statement to his Form 101 application showing earnings from numerous individuals and businesses in the thirteen weeks prior to his injury. Burke indicated he earned $200.00 from ERS Construction, Inc. ("ERS") / Ralph Stanley ("Stanley") for four hours worked on May 25, 2010. He alleged an AWW of $712.00 in this statement.

Burke testified by deposition on April 5, 2011 and at the formal hearing held April 26, 2012. His work history consists of employment in the construction industry including framing houses, plumbing, landscaping, light electrical work, and demolition. Prior to working in construction, Burke was employed as a bartender and a server in fast food service and catering. Burke testified he was working for ERS on May 25, 2010 doing demolition work. ERS is a business involved in renovations and remodeling. On

May 25, 2010, ERS was demolishing part of a house. Stanley approached Burke when he was on the job site and made an arrangement to pay him $200.00 to take down a chimney and fireplace. Burke climbed on top of the house and removed that portion of the chimney he could reach from the second floor inside the house. After completing that portion of the demolition, he moved to the first floor. At that time, other workers were using a backhoe to remove portions of the wall. Burke stated debris fell every time the house was struck by the backhoe. Suddenly, the chimney gave way and Burke was covered in what he estimated to be a ton of bricks. He sustained multiple injuries including two broken arms, lacerations to his ear, jaw, and the top of his head. Additionally, he had cracked ribs and pain in his knees. After treatment in the emergency room of Flaget Hospital, he received treatment from Dr. Sanjiv Mehta, an orthopedic surgeon.

Burke testified he did not carry workers' compensation insurance. He stated the demolition work for ERS was to have lasted for four or five days. There was no time limit for his work demolishing the chimney. He was to receive $200.00 for however long it took him to complete that job. Burke indicated he was working for Stanley's brother-in-law at Head Automotive doing painting work prior to agreeing to

perform demolition work for ERS. Burke stated Head Automotive carried workers' compensation insurance.

At the hearing, Burke testified he had initially agreed to work for ERS doing demolition work at a rate of $15.00 per hour, but Stanley pulled him aside and they made the deal for demolition of the chimney for a flat rate of $200.00. Burke testified that each of the employers he worked for during the 13 weeks prior to his injury paid him by the hour. He indicated the tools and supplies were provided by each of these employers. Burke was questioned at the hearing regarding his previous employers. He stated he built steps for Jeff Mattingly, performed plumbing work for Lois Wimsett, removed aluminum siding from a farmhouse for Milburn Howard, and put new floors in a house for his fiancée, Stacy Newton. He also cleaned the shop and lights for Jay Wimsett, and performed painting and landscaping around the shop for Head Automotive.

Stacy Newton ("Newton") testified by deposition on August 30, 2012. She testified she had been in a relationship with Burke prior to the work injury. Newton was employed in the Nelson County Circuit Clerk's office. She received a telephone call from Burke on May 25, 2010, informing her he had been hurt and was on his way to the hospital. Newton stayed with Burke at the hospital for

three to four hours. After his discharge, she provided care to him requiring her to take two weeks off from work. She testified Burke had both arms in a hard cast and was unable to feed himself initially. She indicated Burke was in severe pain from his rib injuries and did not have a recliner. Therefore, she had to physically hold him around the body to put pressure on him to enable him to sit up. She had to bathe him and assist him in using the restroom. She had to care for his stitches, cook, and administer medications. She assisted Burke in getting up and dressing. Newton stated the pain medication caused Burke to have problems with constipation and she had to give him enemas.

Newton was able to return to work after two weeks but continued to provide care for Burke in the evenings and at night. For a period of six to eight weeks, she continued to give Burke enemas, bathe him, and help him go to the bathroom. Newton confirmed the days she was off work to care for Burke were from May 25, 2010 through June 3, 2010.

Diane Thompson, Nelson Circuit Clerk, executed an affidavit on June 28, 2010 which was attached as an exhibit to Newton's deposition. The affidavit established Newton was off work for 51 hours between May 25, 2010 and June 24, 2010 to care for Burke and take him to his medical

appointments. Newton acknowledged she was paid for those hours at a rate of $10.38 per hour.

A June 24, 2010 note from Dr. Mehta was also attached as an exhibit to Newton's deposition. Dr. Mehta stated as follows:

> This is Ms. Stacy Newton, who is the patient's girlfriend. The patient was injured on 05/25/2010. The patient had [sic] 05/25/2010, 05/26/2010, 05/27/2010, 05/28/2010, and 06/01/2010, and 06/03/2010 taking care of the patient. The patient was then seen back by me in the office on 06/24/2010. The patient was therefore given [sic] note to be off work from 05/25/2010 through 06/03/2010 in the timeline outlined in the patient's chart and 06/24/2010 to bring the patient back to my office. This will be considered necessary because the patient had bilateral upper extremities injuries and was in the need of 24–hour care.

In his June 21, 2012 Opinion, Order and Award, the ALJ made the following findings relevant to this appeal:

> The first issue for determination is the appropriate average weekly wage. The Plaintiff argues that his wages for the thirteen weeks prior to the work injury should be considered in calculating his average weekly wage. Mr. Burke argues that he was not an independent contractor for the jobs he performed prior to his injury at the Defendant Employer. He argues that he was paid by the hour by his Employers and did not provide the instrumentalities, tools or place of work, and was not engaged [in] a distinct occupation or business. He

argues that specific details of his work were controlled by the people he worked for and that he performed work that is basically unskilled and he did not intend on being an independent contractor. See *Ratliff v. Redmond*, 396 SW2d 320 (KY 1965) and *Chambers v. Wooten's IGA Food Liner*, 436 SW2d 265 (KY 1969).

The Defendant Employer does not argue that Mr. Burke was an independent contractor to [sic] time of his work-related injury. However, they [sic] argue he generally worked as an independent contractor touting himself as a general handyman who performed work throughout the community on a contractual basis. They [sic] argue that the income earned by him as a result of his independent contract work is not to be included in determining his average weekly wage at the time of his accident. See *Wright vs. Fardo*, 587 SW2d 269 (KY APP. 1979). They [sic] argue that the employment relationship between Mr. Burke and DRS [sic] Construction was that of a consistently intermittent employee as defined in *C & D Bulldozing Company vs Brock*, 820 SW2d 482 (KY 1991).

The Plaintiff argues his average weekly wage should be calculated at $15.00 an hour times 40 hours a week or $600.00 per week. Deleting any money that he earned for selling scrap metal would reduce his average weekly wage to $530.38 per week.

The Defendant Employer argues Mr. Burke's wages should be figured by taking the $200.00 that he actually earned while working for the Defendant Employer and dividing it by thirteen weeks which would yield $15.38 per week average weekly wage.

In this specific instance, the Plaintiff testified he considered himself to be a general handyman. He testified the work he typically performed was for residents of his local community doing odd jobs on their property. He testified that he otherwise did handyman work as a painter, in the construction field, and performed some yard work. The Administrative Law Judge is of the opinion that this type of work constituted day labor. Therefore, the Administrative Law Judge finds the Plaintiff's arguments persuasive and finds that Mr. Burke had an average weekly wage of $530.38 per week as a result of his employment with ERS Construction.

. . . .

The next issue for determination is whether or not Mr. Burke is entitled to have compensation paid to his fiancée, who was his caretaker immediately after his accident. In this instance, the Plaintiff argues that Ms. Newton provided continuing care, day and night, to take care of Mr. Burke. Ms. Stacy Newton testified she continued in this capacity for 6 to 8 weeks following his injuries at first taking time off work to do so and thereafter did so when she got home from work. She admitted that she received $10.38 per hour for this work for the 51 hours that they paid her and does not challenge the hourly rate, but claims she is entitled to an additional $80.00 a day for at least 56 days for a total of $4,490.00.

The Defendant Employer argues that they [sic] paid her $10.38 per hour for the 51 hours that she missed work due to providing care to Mr. Burke. They [sic]

> argue she has been adequately compensated for her time and is not entitled to any additional compensation.
>
> In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds the arguments of the Defendant persuasive and finds that the Plaintiff is not entitled to any additional compensation for the services provided to him by Ms. Newton.

ERS and Burke filed petitions for reconsideration on June 28, 2012 and July 5, 2012, respectively. ERS argued Burke was a self-employed handyman and his only wages from work for ERS consisted of the $200.00 paid for the single day of work. ERS noted the other wages were not earned from ERS and were not earned in a capacity where Burke was insured for workers' compensation benefits. Burke argued in pertinent part that the compensation paid to Newton was inadequate.

The ALJ, in his July 18, 2012 order ruling on ERS' petition for reconsideration, held as follows:

> Furthermore, with regards [sic] to the claimant's AWW, the decision is amended as follows. This ALJ finds that the claimant was a general handyman who performed a variety of odd jobs for individuals. The claimant operated his own business as a handyman and, in the 13 weeks preceding his injury, the only wages he earned from any source, which were covered for workers' compensation purposes, were the $200.00 he was paid

> for the single days' work for this defendant.
>
> Under KRS 342.140(1)(d), when an individual's wages are fixed by the day, the AWW is determined by dividing the prior 52 weeks of wages into four 13-week quarters, each quarter consisting of the wages earned in that quarter "in the employ of the employer". The only wages claimant earned in the employ of the defendant in the 13 weeks preceding the injury was the $200.00 for the one days' work. The other "wages" earned by the claimant for the 13 weeks preceding his injury were not earned from this defendant and were not earned in a capacity where claimant was insured for workers' compensation benefits. Thus, those wages cannot be included in the calculation because the wages were earned from a different source and the statute permits an analysis only of wages earned for the employer/defendant, and, wages from work that is not covered for workers' compensation purposes cannot be included in an average weekly wage calculation. As such, this ALJ finds that claimant had an AWW of $15.38 per week at the time of the injury, which is consistent with the intention of the Act to compensate individuals only for injuries that occur in employment covered by workers' compensation insurance.

By order dated July 20, 2012, the ALJ overruled Burke's petition for reconsideration as a re-argument of the merits.

On appeal, Burke argues the ALJ exceeded his authority by changing his decision on the merits on reconsideration regarding his average weekly wage. In the original decision, the ALJ determined Burke worked as a day laborer

during the thirteen weeks prior to the injury. Burke notes the ALJ provided a detailed analysis of the distinction between an employee and an independent contractor and the evidence which supported his finding that Burke was a day laborer rather than an independent contractor. Thus, it was improper for the ALJ to reconsider the merits on this question. Burke concedes resolution of this issue is not necessarily dispositive of the remaining issues in the case.

Burke argues the ALJ erred in using KRS 342.140(1)(d) to calculate the AWW since his employment with ERS did not continue for a full thirteen weeks prior to the injury. Instead, Burke argues (1)(e) or (1)(f) should have been used. Burke notes his testimony that he agreed to work for ERS at a rate of $15.00 per hour is uncontroverted. He further asserts the employment was to be for eight hours per day. Burke states "There is no evidence available for a determination to be made that this work was available less than on a full time basis for 13 weeks." Burke contends the burden of going forward to show that work was not available to employees amounts to an affirmative defense for which ERS is required to submit evidence.

Burke concedes section (1)(e) does not necessarily fit the unique facts and circumstances of his claim because the evidence clearly establishes he "did not necessarily

maintain any employment over a long period of time." He admits he "was consistently an intermittent employee of different people and businesses." Further, he concedes the evidence shows it was not anticipated he would continue his employment with ERS beyond completion of the job on which he was injured. Burke argues section (1)(f) is a "catch-all provision" included in the statute to provide a means for determining AWW when it is impossible to do so otherwise. Burke acknowledges even this section does not fit well since his hourly wage at the time of injury is ascertainable. Burke argues the facts in his claim fit best under section (1)(f) because there is evidence documenting the "usual wage for similar services where the services are rendered by paid employees."

Burke observes the ALJ, on reconsideration, determined wages earned in the thirteen weeks prior to the injury could not be used in calculating the AWW since they were not earned from employment with ERS and were not earned in a capacity where Burke was insured for workers' compensation benefits. Burke argues these wages are relevant to a calculation under sections (1)(e) and (f) and must be considered since it is the best evidence of his wage earning capacity. Burke argues the ALJ's finding that the wages were not earned in a capacity where he was insured for

workers' compensation benefits is in error and not supported by the evidence. Burke states the evidence establishes he worked for wages at each job, the employers paid for all materials, provided tools and instructions for the work and directed the work to be performed. He submits the Board should direct the ALJ on remand to allow additional evidence on the AWW issue. Burke argues the Board has broad discretion to insure the ALJ's decision is factually and legally correct. He contends it is proper for the Board to exercise its power/discretion in this case. Burke further argues the ALJ could have taken judicial notice of statistics and information concerning wages available from state and federal government sources concerning workers in specific occupations.

Finally, Burke argues the ALJ erred in limiting the compensation paid to Ms. Newton to eight hours per day for the days she missed work to provide care. Burke notes Dr. Mehta made it clear in his office note that care was required twenty-four hours per day. He contends Ms. Newton was only paid one third of the amount she should have been paid for her services.

KRS 342.140(1)(d), (e) and (f) provide:

> The average weekly wage of the injured employee at the time of the injury or

last injurious exposure shall be determined as follows:

(1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:

(d) The 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;

(e) 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; and

(f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees.

Although Burke had performed some work for ERS in the past, he had no earnings from ERS within the thirteen weeks

immediately preceding his work injury. It is uncontroverted he was injured on his first day of employment with ERS. Thus, Burke is correct in arguing his AWW calculation does not properly fall under KRS 342.140(1)(d). Since he was in the employ of ERS for less than thirteen weeks, by the clear language of the statute his AWW should be calculated pursuant to section (1)(e). Unfortunately for Burke, a correct calculation of his AWW pursuant to that section produces the same result as that reached by the ALJ. This is so since the evidence fails to establish ERS had work available in a similar occupation during the thirteen weeks immediately preceding the injury.

Burke was performing demolition work for ERS when he was injured on the first day of the project. Further, the work Burke performed in the thirteen week period was for other individuals or businesses and was not demolition work. With the exception of the $200.00 earned from ERS for the day of work, there is no sufficient information to calculate Burke's AWW. Thus, calculation pursuant to section (1)(e) produces an AWW of $15.38 just as the calculation pursuant to (1)(d). As Burke acknowledges, his hourly wage is ascertainable. Thus, by the plain language of section (1)(e), calculation of Burke's AWW pursuant to that section is not proper.

We find no error in the ALJ's correction of the AWW in his July 18, 2012 order. Inclusion of the earnings from other employers constituted a legal error. The ALJ has authority to correct patent errors on petitions for reconsideration, including clerical, factual, or legal errors. Commonwealth, Dept. of Mental Health v. Robertson, 447 S.W.2d 857, 859 (Ky. 1986), overruled on other grounds in Whittaker v. Wright, 969 S.W.2d 209 (Ky. 1998); Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104, 106 (Ky. App. 1985).

We agree with the Supreme Court's statement in C & D Bulldozing Co. v. Brock, 820 S.W.2d 482 (Ky. 1991) that:

> 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.

An injured worker has the burden to prove every element of a claim for income benefits, including the applicable average weekly wage. Wolf Creek Collerieries v. Crum, 673 S.W. 735 (Ky. App. 1984); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Burke simply failed to provide adequate proof to support the calculation of a greater AWW.

We decline to direct additional proof taking on remand,

as 803 KAR 25:010 specifies the period within which the parties may take proof. Although 803 KAR 25:010, § 15 allows the time for taking proof to be extended, it requires the filing of a motion "no later than five (5) days before the deadline sought to be extended" and "a showing of circumstances that prevent timely introduction."

This is not a case in which an injured worker lacked guidance concerning the manner in which to prove an essential element of his claim for income benefits. Burke argued from the outset that KRS 342.140(1)(e) or (1)(f) governed the calculation of his AWW since his employment was less than thirteen weeks when his injury occurred. Having failed to submit adequate proof within the time allowed and absent any evidence of circumstances that prevented him from doing so, the claimant is not entitled to a second opportunity to prove his average weekly wage. Com., Uninsured Employers' Fund v. Rogers, --- S.W.3d --- 2012 WL 1453611 (Ky. 2012).

The compensability of caregiver services is recognized in the case of Bevins Coal Company v. Ramey, 947 S.W. 2d 55 (Ky. 1997) wherein the Court concluded in-home attendant caregiver services are compensable if reasonable and necessary for the cure and relief from the effects of the work-related injury.

Nowhere in the ALJ's opinion does he delineate the basis for his finding regarding the reasonable value of Newton's services. In assessing the value of her services, the ALJ cited to Newton's testimony indicating she provided care for a period of six to eight weeks immediately after the accident and that she took off fifty one hours from work to do so. The ALJ further noted she claimed she was entitled to compensation for an additional fifty-six days of compensation for services provided.

We believe the basis for the ALJ's finding regarding Newton's compensation is unclear. The ALJ seems to have adopted ERS' conclusion that the number of hours Newton took off from her regular employment was a proper basis for determining her compensation for services provided to Burke. We believe the ALJ's decision should have set out with more specificity the evidence demonstrating what period Burke required Newton's services. Clearly, Newton's testimony established she provided care in the initial two week period beyond the hours she took off from work. Dr. Mehta's June 24, 2010 note stating Burke required 24 hour care is uncontroverted. The ALJ made no findings of fact regarding what other home healthcare services were required and provided by Newton after that point.

We recognize it has been held by the Courts in Shields v. Pittsburg & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. 1982), and Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973), that it is unnecessary for the finder of fact to detail the entirety of his mental reasoning or provide a detailed discussion of either the facts or the law. However, the law does require that the conclusions of the ALJ, as expressed in his opinion, be supported with facts drawn from the evidence or through judicial notice, so that the parties may be properly apprised of the basis for his decision.

Competent evidence of a probative nature must establish every fact at issue. Humble v. Liggett & Myers Tobacco Co., 239 S.W.2d 469 (Ky. 1951). We believe the ALJ must cite the evidence providing the basis for his determination regarding Newton's entitlement to reimbursement for providing home healthcare. Likewise, the duration of Newton's entitlement to be paid for her services must also be more fully explained. We therefore vacate on this issue and remand this matter to the ALJ for issuance of an amended opinion containing additional fact-findings in accordance with this decision.

Accordingly, the June 21, 2012 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge,

and the July 18, 2012 order on reconsideration are **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for additional findings and entry of an amended decision in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BEN T HAYDON
PO BOX 1155
BARDSTOWN, KY 40004

COUNSEL FOR RESPONDENT:

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

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042