**OPINION ENTERED: June 15, 2012**

CLAIM NO. 201083112

SHEILA MCGOHON PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

ALYSSIA ENTERPRISES
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** Sheila McGohon appeals the December 19, 2011, opinion, order, and award of Hon. Edward D. Hays, Administrative Law Judge ("ALJ") in which the ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. McGohon filed a petition for reconsideration which was denied by order dated February 28, 2012, from which McGohon

also appeals. On appeal, McGohon asserts the ALJ "erred in not considering the Petitioner's proof of wages from her concurrent employer, Frascelli's, in determining the issue of average weekly wage."

McGohon's Form 101 alleges she injured her left knee and right foot while working for Alyssia Enterprises ("Alyssia") on September 8, 2009. The Form 101 claims the injury occurred as follows: "Taking a step from Deli area, tripped and fell only Left knee and right foot."

In a May 20, 2011, "Opinion and Order on Bifurcated Issues," the ALJ determined the "compensability of left knee replacement surgery recommended by Dr. Rhoades on the basis of causation, work-relatedness, reasonableness and necessity." In the ALJ's summary of the lay evidence, he stated as follows:

> She [McGohon] went to work as a server, taking orders, serving food and cleaning at Fraschelli's [sic] Deli in **July 2008**. She went to work cooking preparing food, cleaning, stocking store items and working as a cashier at Alyssia in July 2009 and continued to work at Fraschelli's [sic]. She was working part-time at Fraschelli's [sic] Deli from 4:00 p.m. to 10:00 p.m. at the time of her injury, earning $2.13 plus tips and was also working five eight-hour days at Alyssia Enterprises, earning $7.25 per hour.

(emphasis added).

Regarding her wages at Frascelli's, in her brief to the ALJ, McGohon stated as follows:

> Sheila McGohon has testified both at her deposition and at the Hearing that she worked at both the defendant/employer and Frascelli's at the time of her work-related injury. At the Hearing Sheila testified that she made at least $204.96 per week at Frascelli's (HT 18, 19). Upon request Frascelli's was unable to produce wage records for Ms. McGohon for an entire quarter prior to her date of injury. (In fact, Ms. McGohon did not start working at Frascelli's until 7/15/2009). As such Frascelli's provided wage records of a similarly situated employee. These wage records show an average weekly wage of $204.96 for the best quarter in the 52 weeks prior to Ms. McGohon's date of injury.

Concerning the issue of concurrent employment, in the December 19, 2011, opinion, order, and award, the ALJ determined as follows:

> At the hearing held on October 19, 2011, the parties stipulated that Ms. McGohon's average weekly wage at Alyssia Enterprises was $290.00 per week. The Plaintiff has also claimed she is entitled to an increase in her average weekly wage due to concurrent employment and has introduced earnings of a similar employee. However, the defendant claims Ms. McGohon had been employed by Frascelli's since July of 2008 and should have introduced her own actual wage records from Frascelli's for the purpose of calculation of the average weekly wage. The Plaintiff states in her brief (page 11) that she did not start working at Frascelli's

until July 15, 2009, in which event the wages of a similar employee would be properly admissible for the purposes of calculating the average weekly wage. At the Formal Hearing conducted on October 19, 2011, the plaintiff was questioned by her own attorney and the transcript reads as follows:

Q: Now, I want to ask you about your employment at Frascelli's (sic)- and I can't spell that so don't ask me. When did you work at Frascelli's?

A: Goodness, I worked until- let's see, August to May.

Q: Of what year?

A: Of- of '10, I'm sorry.

Q: Okay, and was that...

A: Or '09- '09, I'm sorry.

Q: Okay, and was that the same time that you were working at Alyssia Enterprises?

A: Yes, sir.

Q: And did the people at Alyssia Enterprises know of your employment at Frascelli's?

A: Yes, sir.

Q: And likewise did the folks at Frascelli's know about your employment at Alyssia Enterprises?

A: Yes, sir.

Q: I have filed some wage records obtained from Frascelli's for a like situated employee that show an average weekly wage of two hundred four dollars

and ninety-six cents. Did you make at least that much on a weekly basis when you worked at Frascelli's?

A: At least, but much more, yes.

Under cross-examination by defendant's counsel, the plaintiff's testimony was as follows:

Q: Now, you put into evidence herein in this case wage records of a like-kind employee, a person who held a similar job to you at Frascelli's.

A: Yes.

Q: And that's your evidence to show...

A: That's all we could do.

Q: What you earned there, is that right?

A: Yes.

Q: Okay, you had been working at Frascelli's from July of 2008, nearly a year- over a year before your injury, all the way through May of 2010, that's true, correct?

A: Yes.

Q: Okay, is there a reason then, given that history, why you couldn't get Frascelli's to give you- give us your wage records?

A: We tried, and Mr. Jobson- we tried. We went in there, we talked to them. He had to go through their attorney to get a simulated [sic] person's wages, which made a lot less than I did- worked a lot less hours.

Q: What about a W-2 for the years 2009 and 2008?
A: This is all we could get.

Q: Did you file a tax return for those years?

A: Yes, I did.

Q: And did you have a W-2 issues by Frascelli's showing you what you earned during those years?

A: I'm sure I do.

Q: Okay, but you didn't submit that to show what you actually earned at Frascelli's?

A: You know, I'd have to dig it out.

Q: Did- do you have copies- did you have copies of your tax returns?

A: I'm sure I do.

(Pages 38 and 39 of transcript of hearing)

Based on the foregoing testimony, the ALJ has no choice but to conclude that the claimant had worked at Frascelli's for more than a year at the time of her work-related injury. Thus, the applicable wages which should have been utilized to calculate the average weekly wage were the actually [sic] wages earned by Ms. McGohon at Frascelli's during the 52 weeks prior to the work-related injury of September 8, 2009. The claimant acknowledged that she probably had such records, but she would 'have to dig' them out. Rather than doing that, she sought and introduced the wages of a similar employee. However, the wages of a similar employee are not relevant

> unless the claimant had been in the employ of the concurrent employer for less than 13 weeks. (KRS 342.140(1)(e)). The claimant has the burden of proof as to all essential elements of her claim, including the average weekly wage. Thus, the ALJ concludes that the average weekly wage of Sheila McGohon was the sum of $290.00 per week and consists only of her earning from Alyssia Enterprises.

In McGohon's petition for reconsideration, she argued, in part, as follows:

> In the Opinion and Award dated December 19, 2011, on page 15 there appears a patent error when the ALJ finds that 'Based on the foregoing testimony, the ALJ has <u>no choice</u> but to conclude that the claimant had worked at Frascelli's for more than a year at the time of her work-related injury.' (emphasis added) And further down in the same paragraph when the ALJ states 'the wages of a similar employee are not relevant unless the claimant had been in the employ of the concurrent employer for less than 13 weeks.' In the direct examination quoted by the ALJ in the findings of fact, Ms. McGohon testified that she worked at Frascelli's from August to May starting in 2009 (one month before her work-related injury)(HT p.13). Also, on direct examination Ms. McGohon testified that she made at least two hundred four dollars and ninety-six cents ($204.96) per week on average while working at Frascelli's. (HT p. 13).
>
> The ALJ apparently based his finding of fact on the cross-examination by counsel for the employer quoted on page 14 of the Hearing Transcript. In that testimony Ms. McGohon mistakenly

> answered affirmatively when asked whether she worked at Frascelli's from July 2008 through May of 2010. As stated above Ms. McGohon had just testified on direct examination that she started working at Frascelli's in August 2009. As corroboration of this the Plaintiff points to her earlier testimony in her deposition of January 6, 2011, starting on page 13 where the Plaintiff makes it clear that she had already started working at Alyssia Enterprises when she applied for the job at Frascelli's. There is no dispute that Ms. McGohon did not start working at Alyssia Enterprises until July 2009. As such it is quite clear that Ms McGohon was simply confused when she answered the question about her dates of employment at Frascelli's posed by counsel for the defendant employer in the affirmative.

In the February 28, 2012, order ruling on the petition for reconsideration, the ALJ stated as follows:

> This claim is before the Administrative Law Judge on the plaintiff's Petition for Reconsideration of the Opinion, Award, and Order rendered herein on December 19, 2011. The ALJ has carefully considered the plaintiff's Petition, together with the response filed on behalf of the defendant-employer. The Plaintiff's testimony regarding the period of time which she worked at Frascelli's was inconsistent, as noted in the Opinion, the Petition for Reconsideration, and the response. The ALJ made findings based on what appeared to be the most reliable evidence in the record.

On appeal, McGohon makes the same arguments made in her petition for reconsideration. In her appeal, McGohon also asserts the following:

> Even if for some reason it is determined that the ALJ did not err in refusing to find that Ms. McGohon earned wages at her concurrent employer at the very least she is entitled to receive the state minimum wage as concurrent wages for the period of time that she received TTD benefits. KRS 342.730(1)(a) reads in pertinent part:
>
> > For temporary or permanent total disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability.
>
> Therefore, Ms. McGohon is entitled to have her average weekly wage increased by $138.86 (the state minimum wage for 2009) during the period she was awarded TTD benefits even if her average weekly wage is not increased for other purposes.
>
> KRS 342.140 (5) provides as follows:
>
> When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his wages from all the employers shall be considered as if earned from the employer liable for compensation.

There appears to be no debate McGohon was engaged in concurrent employment at Frascelli's and Alyssia was aware of that employment at the time of the September 8, 2009, work injury. Alyssia, in its brief to the ALJ, acknowledges as much by stating as follows: "Admittedly, the Plaintiff did have concurrent employment however it is the Plaintiff's burden to establish what the wage was with regard to the concurrent employment. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003)." The issue herein, however, concerns the length of time McGohon was employed at Frascelli's before the September 8, 2009, injury and, consequently, if McGohon's proof of her wages at Frascelli's- i.e. proof of wages of a similarly situated employee- was sufficient.

As noted, the ALJ determined McGohon's testimony regarding her tenure at Frascelli's before the September 8, 2009, injury at Alyssia is inconsistent. As the ALJ set forth this testimony verbatim in the December 19, 2011, opinion, order, and award, it is unnecessary to do so again here. We will, however, briefly summarize. Our review of the record reveals undeniable inconsistency regarding how long McGohon worked at Frascelli's. In the Form 101, McGohon indicated she worked at Frascelli's from **July 2008** through May 2010, and she worked at Alyssia from July 2009 through October 2009. At the October 19, 2011, hearing,

McGohon testified that she worked at Frascelli's from "August to May" in 2009. Later in the hearing, however, McGohon testified as follows:

> Q: Okay, you had been working at Frascelli's from **July of 2008**, nearly a year-- over a year before your injury, all the way through May of 2010, that's true, correct?
>
> A: Yes.

(emphasis added).

During McGohon's January 6, 2011, deposition, she testified as follows:

> Q: All right. You show here that you worked at Fraschelli's [sic] Deli from **July of 2008** through May of 2010, okay? And then you show, at Alyssia, you worked of [sic] 2009 through October of 2009?
>
> A: Right.
>
> Q: And your injury was September of 2009?
>
> A: Yes.

(emphasis added).

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and

believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Here, the ALJ resolved the inconsistencies in McGohon's testimony regarding when she worked at Frascelli's by stating as follows: "[T]he ALJ has no choice but to conclude that the claimant had worked at Frascelli's for more than a year at the time of her work-related injury." Under the discretion afforded to him under the law, it was proper for the ALJ to make such an inference based on the conflicting evidence in the record, and this inference will not be disturbed.

The record reveals McGohon filed wage records "of a similarly situated employee" at Frascelli's from July 15, 2008, to September 11, 2009. At the hearing, when asked why McGohon did not file her own W-2s showing what she actually made at Frascelli's, she stated she'd "have to dig them out." The ALJ ultimately concluded that the "wages of a similar employee are not relevant." The ALJ also concluded as follows:

> [T]he applicable wages which should have been utilized to calculate the average weekly wage were the actually [sic] wages earned by Ms. McGohon at Frascelli's during the 52 weeks prior to the work-related injury of September 8, 2009.

KRS 342.140(d) states as follows:

> (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.

KRS 342.140(1)(e) states as follows:

> **The employee had 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.

(emphasis added).

The ALJ, in his discretion, determined McGohon worked for more than a year at Frascelli's before the September 8, 2009, work-related injury at Alyssia. Thus, pursuant to the plain wording of KRS 342.140(1)(e), this statutory provision is not applicable when determining McGohon's average weekly wage ("AWW") at Frascelli's.

Where the language of a statute is clear and unambiguous, it is not open to construction or interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008). KRS 342.140(1)(e) is only applicable when "[t]he employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury." As noted, the ALJ determined McGohon had been employed at Frascelli's for "more than a year at the time of her work-related injury." Thus, the applicable statutory provision is KRS 342.140(d), and McGohon failed to put forth proof of her wages earned "in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury." KRS 342.140(1)(d). In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion before the ALJ with regard to every element of the claim, and McGohon failed in meeting her burden regarding her concurrent wages. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ's decision not to include McGohon's wages at Frascelli's in calculating her AWW is supported by substantial evidence and will not be disturbed.

Concerning McGohon's alternate argument that she is entitled to receive at least the state minimum wage as

her concurrent wage for purposes of calculating her TTD benefits, this argument has no merit. In calculating her AWW, the ALJ determined McGohon's wages at Frascelli's would not be considered. Thus, for purposes of TTD benefits, the ALJ utilized an AWW of $290.00 based on McGohon's wages at Alyssia. As noted in the December 19, 2011, opinion, order, and award, "[a]t the hearing on October 19, 2011, the parties stipulated Ms. McGohon's average weekly wages at Alyssia Enterprises were $290.00 per week." As determined by the ALJ, McGohon is not entitled to have her wages at Frascelli's taken into account for purposes of determining her AWW; thus, the ALJ's calculation of McGohon’s TTD will not be disturbed.

Accordingly, concerning the issue raised on appeal, the ALJ's December 19, 2011, opinion, order, and award and the February 28, 2012, order on McGohon's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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