OPINION ENTERED: AUGUST 8, 2012

CLAIM NO. 200788274

TRACY SELF PETITIONER

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

HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE,
BROOKSIDE PROPERTIES, INC. RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Tracy Self, ("Self"), seeks review of the opinion, order and award rendered April 23, 2012, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for right carpal tunnel syndrome, right cubital

tunnel syndrome, and right lateral epicondylitis sustained on April 30, 2007, while employed by Brookside Properties, Inc. ("Brookside"). The ALJ dismissed her claim for thoracic outlet compression. Self also appeals from the May 22, 2012 order overruling her petition for reconsideration.

Self's sole argument on appeal is the ALJ erred by relying upon wage records submitted by Brookside in determining her average weekly wage ("AWW") to be $302.50. She argues such reliance was arbitrary, capricious, and amounted to an abuse of discretion. We affirm.

On September 24, 2007, Self filed a Form 101, alleging injuries to her right upper extremity, right elbow, right shoulder and neck due to repetitive scraping of paint, painting and cleaning. In the claim form she alleged her AWW as $400.00. Self worked for Brookside from February to May, 2007. We will only review evidence pertaining to the calculation of the AWW since it is the sole issue raised on appeal.

On September 8, 2011, Brookside filed wage records indicating Self worked for twelve weeks, at a rate of ten ($10.00) dollars per hour. The wage record reflects she worked a total of 363 hours. The record indicates the total wages paid to be $3,630.00. This divided by twelve

yields $302.50. No evidence was introduced of the wages of another similarly situated employee. Self did not object to the filing of this wage information.

Self filed no wage documentation. At the hearing, she testified as follows:

> Q. All right, while you were working for Brookside, do you remember how much you were paid?
>
> A. Ten dollars per hour.
>
> Q. And, could you tell the Judge how many hours a week that you worked?
>
> A. I worked forty hours a week, every week.
>
> Q. And, did you fill out paper work to that effect?
>
> A. Yes I did.
>
> Q. And, you turned in a time sheet, I guess?
>
> A. Yes sir.
>
> Q. Okay, and you recall that every week you were there, you worked forty hours a week?
>
> A. Yes sir.
>
> Q. Okay.
>
> A. If I – - if I was off maybe an hour or so, and I don't want to - - but, it was usually always forty hours because there would be times - - I had keys to - - to Brookside, so there were times - - like I told you, I volunteer for Louisville soccer, so I

> would work late until four in the morning on Thursday nights, and then on Fridays, I would - - she would tell me, just come in when you can. And, if I came in a little late, I would stay late.
>
> Q. Okay.
>
> A. We'd do anything to get those forty hours. And, that's - - that's the way that she worked it out with me. If - - if - - you know, if you're missing a few hours here, we'll make it up here - - we'll make it up here, as long as you get your forty hours.

A Benefit Review Conference was held prior to the hearing held on February 21, 2012. At that time, the parties stipulated the contested issues were benefits per KRS 342.730; work-relatedness and causation; average weekly wage; unpaid or contested medical expenses; whether Self sustained an injury as defined by the Kentucky Workers' Compensation Act; temporary total disability benefits; and entitlement to vocational rehabilitation benefits. No issue was raised regarding the admissibility of the wage records filed by Brookside.

In the opinion and award rendered April 23, 2012, the ALJ found as follows:

> The next issue for determination is the appropriate average weekly wage. Ms. Self testified that she earned $10.00 an hour and work[sic] 40 hours per week therefore, reflecting an average weekly

wage of $400.00. The Defendant Employer has submitted wage records for the 12 week she worked. She earned $3,630.00 which would average out to an average weekly wage of $302.50.

KRS 342.140 (1)(d) states in pertinent part, that were[sic] the wages are fixed by the hour, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages of said employee earned in the employee of the Employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury.

KRS 342.140 (1)(e) states in pertinent part, if the employee had been an employee of the Employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage should be computed under paragraph (d) taking the wages for that purpose to be the amount he would have earned had he been so employed by the Employer[sic] for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

In this instance, there has been no proof submitted regarding a similarly situated employee for determination of the appropriate average weekly wage. However, the Defendant Employer has submitted all of the wage records reflecting all earnings made by Ms. Self from the date of her hire to the date of her injury. These records clearly reflect that Ms. Self earned $3,630.00 for the twelve week[sic] she worked the Defendant Employer.

> Therefore, dividing that amount by the twelve weeks of[sic] Ms. Self actually worked reflects an average weekly wage of $302.50 and the Administrative Law Judge so finds.

Self filed a petition for reconsideration on May 3, 2012 arguing, as she does on appeal, the wage records filed by Brookside were inadequate, and the ALJ erred in finding her AWW to be $302.50. She argues the only accurate wage information upon which the ALJ could have relied was her testimony at the hearing. Therefore, the appropriate finding of AWW should have been $400.00 per week. The petition for reconsideration was overruled by order entered May 22, 2012.

As we have stated numerous times in the past, the ALJ's discretion is broad. As noted by the ALJ, Self did not object to the wage information when it was filed by Brookside on September 8, 2011. The issue was neither raised at the Benefit Review Conference held on February 21, 2012, nor at the hearing held the same day. It was not until Self filed her brief to the ALJ on March 29, 2012, over six and a half months after the wage records were filed, that she first complained regarding the veracity of the records.

Self, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including the correct calculation of the AWW. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where the claimant is unsuccessful with regard to that burden, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority

to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Like the ALJ, we find it significant Self waited over six months to complain about the wage evidence submitted by Brookside. Self's arguments regarding the

reliance upon those records rings hollow. Self cites to no evidence in her argument regarding those records with anything other than innuendo unsupported by the record. We find nothing improper in the ALJ's reliance upon those records. The ALJ's reliance upon the wage records submitted by Brookside rather than Self's testimony does not constitute an unwarranted arbitrary, capricious abuse of discretion.

Finally, we believe the manner in which the ALJ calculated Self's AWW was appropriate. Since she worked for less than thirteen weeks, the calculation of Self's AWW is governed by KRS 342.140(1)(e) which reads 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:
>
> . . .
>
> (e) 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.

In Huff v. Smith Trucking, 6 S.W.3d 819, 821-822 (Ky. 1999) the Kentucky Supreme Court pointed out:

> 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 employment.
>
> . . .
>
> Although KRS 342.140(1)(e) may be less than artfully drafted with regard to a casual labor situation, it is clear that casual laborers are not exempted from workers' compensation coverage under the Act and that no special provision has been enacted for computing their average weekly wage. The same holds true for workers employed by newly established businesses which have been in operation for less than 13 weeks when a work injury occurs. KRS 342.140(1)(e) relies upon the earnings of employees in a similar occupation during the 13-week period immediately preceding the injury when determining what the injured worker would have earned for the full 13-week period had he been so employed. Because the logging business

> had not yet operated for 13 weeks when claimant was injured, and it ceased operation after the injury, there was no 13-week period from which to estimate what claimant would have been expected to earn had the defendant-employer conducted a logging operation for the full 13 weeks preceding his injury.

The purpose of the various methods for calculating AWW under KRS 342.140 is to obtain a realistic reflection of the claimant's earning capacity at the time of his injury. Huff v. Smith Trucking, *supra*; *see* also C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991). The computation must take into consideration the unique facts and circumstances of each individual case. *Id*. The ultimate objective is to ensure the claimant's benefit rate is based upon "a realistic estimation of what the worker would have expected to earn had the injury not occurred." Desa International, Inc. v. Barlow, 59 S.W.3d 872, 875 (Ky. 2001). While the ALJ may rely on a claimant's testimony, he is not compelled to do so. As is his prerogative, the ALJ could rely upon the wage records submitted by Brookside, or Self's testimony. He chose the former rather than the latter.

Accordingly, the opinion and award rendered April 23, 2012 by Hon. R. Scott Borders, Administrative Law

Judge, and the order overruling the petition for reconsideration dated May 22, 2012 are hereby **AFFIRMED.**

ALL CONCUR.

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