

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 13, 2015

CLAIM NO. 201100211

UNINSURED EMPLOYERS' FUND

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK  
ADMINISTRATIVE LAW JUDGE

KARA SIDEBOTTOM AKA KARA HARVILLE  
WHITNEY BRAND INC.  
HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART  
VACATING IN PART  
AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** The Uninsured Employers' Fund ("UEF") appeals from the May 29, 2015 Opinion, Order and Award and the July 14, 2015 order overruling its petition for reconsideration rendered by Hon. Grant S. Roark,

Administrative Law Judge ("ALJ"). The UEF argues the ALJ erred in considering attachments filed with Kara Sidebottom's ("Sidebottom") application, erred in the calculation of average weekly wage ("AWW") and erred in enhancing permanent partial disability ("PPD") benefits by the three multiplier. For the reasons set forth herein, we affirm in part, vacate in part and remand.

Sidebottom testified at the hearing held March 30, 2015. She was employed at Whitney's Diner as a waitress. Her duties included seating customers, taking orders, running the orders to the tables, stocking the salad bar, doing dishes, bussing tables and cashing out the customers. Sidebottom began her employment in December, 2009 and initially was paid \$2.10 per hour plus tips.

In May, 2010, the owner approached her regarding changing her pay to \$100.00 per week plus tips. Because the owner anticipated spending less time at the restaurant, Sidebottom's job duties changed. She was given a key to the door to open and close the restaurant, and was provided the safe code to take out money in the morning and put the money in at night. Sidebottom continued to report her tips to the employer. However, unbeknownst to her, the employer did not continue to report the tip income to the IRS, even though Sidebottom continued to report her tips daily on a log sheet

her employer provided. Sidebottom did not know the employer had ceased reporting tip income until she received her W-2. Although she knew the employer had not reported tip income, she did not claim tip income in her tax return.

Sidebottom was injured on December 3, 2010, when she slipped and fell, landing on her buttocks. She did not return to her employment as a waitress and underwent fusion surgery. She later found employment as a receptionist in a tax office. We will discuss the medical evidence further below, as it relates to the issues on appeal.

The ALJ rendered his decision on May 29, 2015. He determined Sidebottom suffered a work-related low back injury resulting in a 20% whole person impairment. In determining her AWW, the ALJ explained:

The parties were not able to stipulate to a preinjury average weekly wage. Part of the problem in doing so is that plaintiff's method of payment was changed from hourly to weekly back in May of 2010. Plaintiff acknowledged in her own testimony that her pay was changed to \$100 per week beginning in May of 2010. The UEF therefore maintains that KRS 342.140(1)(4)(d) does not apply because, at the time of her injury, plaintiff was not paid by the day, hour, or her output. The UEF points out that plaintiff received substantial tips and that, by not reporting her tips, plaintiff's take-home pay actually increased significantly after the change in the method of payment in May, 2010.

For her part, plaintiff does not argue that her unreported tips should be included as part of her average weekly wage but maintains it would be an accurate [sic] to state that plaintiff was a salaried employee beginning in May, 2010. She points out that both sides obviously contemplated that tips would continue to be a significant part of her income. Therefore, her wages were not "fixed" by salary.

The Administrative Law Judge is persuaded by plaintiff's argument. The wage records she filed demonstrate that from January, 2010 through April, 2010 she was paid a low hourly rate in addition to what she received in tips. The testimony establishes she continued to receive tips after her method of pay changed to a base salary of \$100 per week plus tips. It is therefore determined the most accurate means of accounting for the average weekly wage plaintiff earned at the time of her injury would include going back as many quarters or weeks available from May, 2010 up to the injury and from January, 2010 up to May, 2010 by looking at the hours worked for that earlier period multiplied by her rate of pay of \$2.10 per hour. For these reasons, the Administrative Law Judge is persuaded plaintiff was not a salary employee and her average weekly wage should be calculated as plaintiff maintains. It is therefore determined plaintiff's average weekly wage at the time of her injury was \$259.22.

The ALJ further noted the parties disagreed on whether any multiplier is appropriate. However, based upon the lumbar fusion and the restrictions assessed by Dr.

Anthony J. McEldowney, the ALJ was persuaded Sidebottom does not retain the physical ability to return to her job at Whitney's Diner, which included washing dishes and bussing tables. Thus, the ALJ enhanced the award of PPD benefits by the three multiplier pursuant to KRS 342.730(1)(c)1.

The UEF filed a petition for reconsideration raising the same arguments it makes on appeal. By order dated July 14, 2015, the ALJ denied the UEF's petition without providing additional findings.

The UEF first argues the ALJ erred in considering the attachments to Sidebottom's application as evidence. It maintains the Form 101 is merely a pleading with no evidentiary value. However, the UEF fails to identify exactly which documents were erroneously considered, or how it was prejudiced by such consideration. We will therefore address the documents attached to Sidebottom's Form 101.

The ALJ noted he reviewed the medical reports attached to Sidebottom's application. However, his findings regarding causation and the applicable multiplier were specifically based upon the claimant's testimony and Dr. McEldowney's reports, which were filed in evidence on November 20, 2014. Additionally, at the final hearing, counsel for Sidebottom identified for consideration by the ALJ records from Norton Immediate Care Center, Dr. Sherrell

Nunnelley and KORT, all of which were attached to the Form 101. The UEF did not object at the hearing, nor did it raise an objection to that evidence in its brief before the ALJ. Thus, the records in question were introduced into evidence without objection and therefore were properly considered by the ALJ. See 803 KAR 25:010 §8(4). Hence, any objection presently raised concerning admissibility of those records has long since been waived.

The UEF next challenges the method of computing Sidebottom's AWW. It argues Sidebottom was paid a weekly salary at the time of her injury and, therefore, her AWW must be determined pursuant to KRS 342.140(1)(a). The UEF notes tip income was not claimed after May, 2010. Thus, Sidebottom's wages must be viewed as being "fixed" by the week at \$100.00.

The definition of wages contained in KRS 342.140(6) provides:

The term 'wages' as used in this section and KRS 342.143 means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes.

KRS 342.140(1)(a) provides:

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: [t]he wages were fixed by the week, the amount so fixed shall be the average weekly wage.

Calculation of AWW for a tipped employee is somewhat problematic. The employee's compensation is not strictly "fixed" by either the hour or week, but rather is a combination of the hourly or weekly wage combined with the tip income. Although Sidebottom's hourly pay was changed to weekly pay on May 1, 2010, her compensation continued to include tips. Her employment did not materially change. Sidebottom was not aware, until she received her W-2, that the employer failed to report her tip income after May 1, 2010. She did not report tip income in her tax return for the period after May 1, 2010 and acknowledges that income may not now be included in the calculation of her AWW. For these reasons, we disagree with the UEF that Sidebottom's wages were "fixed" by the week, thereby compelling a calculation pursuant to KRS 342.140(1)(a).

It is important to note the purpose of KRS 342.140 is to estimate the injured worker's earning capacity. Marsh v. Mercer Transportation, 77 S.W.3d 592, 595 (Ky. 2002). 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 vs. Smith Trucking, 6 S.W.3d 819, (Ky. 1999). See also C and D Bulldozing vs. Brock, 820 S.W.2d 482 (Ky. 1991). The computation must take into consideration the unique facts and circumstances of each individual case. 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. vs. Barlow, 59 S.W.3d 872, 875 (Ky. 2001). An AWW of \$100.00 as urged by the UEF clearly does not represent Sidebottom's earning capacity at the time of the injury.

In light of the evidence presented in the present claim, we believe the ALJ was well within his authority to rely on the wage records concerning the period that included hourly wages and reported tip income. We cannot say this is an unreasonable estimation of Sidebottom's earnings, and the conclusion is based on substantial evidence. Accordingly, we are obliged to affirm. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

For its third argument, the UEF contends Sidebottom is able to return to the same work, but even if she is not, she still only qualifies for the two multiplier. The UEF asked for additional findings regarding the

appropriate multiplier, but its petition was denied without addressing the issue. The UEF notes Sidebottom was underemployed at the time of the injury based upon her education, which includes a Bachelor of Arts in Psychology. She is currently working at a greater wage and can continue to earn that wage for the foreseeable future. Thus, the ALJ was required to perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

Sidebottom's testimony and the opinions of Dr. McEldowney constitute substantial evidence supporting the application of the three multiplier to Sidebottom's award. Dr. McEldowney indicated Sidebottom was not presently able to return to her previous work activities. He opined she does not retain the physical capacity to return to the type of work she performed at the time of her injury. Dr. McEldowney assigned restrictions of occasionally lifting or carrying ten pounds and frequently lifting or carrying less than ten pounds. She is restricted from prolonged sitting, frequent or repetitive bending and twisting, bending and lifting, or bending and carrying. She should not push or pull greater than twenty pounds unless her back is stabilized. The ALJ could reasonably conclude these restrictions, applied to the work duties described by Sidebottom, would preclude her return to the type of

employment she performed at the time of her injury. This proof would support application of the three multiplier.

However, Sidebottom testified at the March 30, 2015 hearing that she started working for a tax office in January, 2014. She testified as follows concerning her post-injury employment and earnings:

Q. And you mentioned the job that you're doing now. Tell us about that.

A. I am a front office receptionist for a tax office where I pretty much answer phones, make appointments, take care of the front end duties of a tax office, cashing people out -- mainly just desk job. Receptionist type duties.

Q. How much do you make per hour?

A. \$9 an hour.

Q. How many hours do you typically work?

A. 40 hours. It's tax season so . . . .

Q. Do you think you're going to be able to continue working that job?

A. Yes.

Q. Any problems doing that job? You've mentioned needing to stand every 40 minutes or so. Any other problems?

A. No.

The above testimony could be sufficient to support application of KRS 342.730(1)(c)2. However, fact-finding

authority lies solely with the ALJ and not with this Board. Therefore, we must vacate the ALJ's finding regarding the applicable multiplier. On remand, the ALJ must determine whether Sidebottom returned to work at an AWW equal to or greater than that earned at the time of her injury. If so, the ALJ must perform a Fawbush analysis to determine which multiplier is more appropriate.

Accordingly, the May 29, 2015 Opinion, Order and Award and the July 14, 2015 order overruling the UEF's petition for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** for additional findings consistent with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART AND FILES A SEPARATE OPINION.

**STIVERS, MEMBER.** Respectfully, I dissent from that portion of the majority's opinion affirming the ALJ's determination of Sidebottom's average weekly wage ("AWW").

In resolving the issue of AWW, the ALJ discusses the UEF's argument that KRS 342.140(1)(d) does not apply, because at the time of the injury Sidebottom was not paid by the day, hour, or based on her output. The ALJ noted

the UEF contended Sidebottom received substantial tips, and by not reporting her tips Sidebottom's take home pay increased significantly after the method of payment changed in May 2010.

Concerning Sidebottom's argument, the ALJ noted Sidebottom was not arguing her unreported tips should be included in calculating her AWW. Rather, she maintained it would be inaccurate to state she was a salaried employee beginning May 2010. The ALJ noted Sidebottom took the position that both sides obviously contemplated the tips would continue to be a significant part of her income. Therefore, her wages were not "fixed" by salary. After stating he was persuaded by Sidebottom's argument, the ALJ did not identify the subsection of KRS 342.140(1) upon which he relied in determining Sidebottom's AWW. This fact alone mandates the matter be remanded to the ALJ for further findings.

KRS 342.140(6) prohibited Sidebottom from including her tips as wages since her gratuities were not reported for income tax purposes. That being the case, Sidebottom's wages were fixed by the week. Sidebottom testified that in May 2010 she began receiving \$100.00 a week as salary. There is no dispute her wages also included tips. However, since Sidebottom did not report

these tips, the tips cannot be included for purposes of calculating her AWW. Hence, the weekly wages received after May 2010 must be the basis of the AWW calculation.

In the ALJ's calculation of AWW, Sidebottom receives the benefit of not reporting her tips and by having her income computed based on her wages prior to May 2010. Respectfully, this is an inequitable result. Since Sidebottom did not report her tips for income tax purposes, the ALJ was required to find her wages were fixed by the week as of May 2010 and to calculate AWW based on Sidebottom's fixed weekly wages of \$100.00 a week. I would vacate the ALJ's determination of Sidebottom's AWW and remand for a calculation of her AWW based on KRS 342.140(1)(a).

**COUNSEL FOR PETITIONER:**

HON. C.D. BASTON  
1024 CAPITAL CENTER DR #200  
FRANKFORT, KY 40601

**COUNSEL FOR RESPONDENT:**

HON. TAMARA TODD COTTON  
429 W MUHAMMAD ALI BLVD #1102  
LOUISVILLE, KY 40202

**ADMINISTRATIVE LAW JUDGE:**

HON. GRANT S. ROARK  
PREVENTION PARK  
657 CHAMBERLIN AVE  
FRANKFORT, KY 40601