OPINION ENTERED: June 14, 2013

CLAIM NO. 201200929

WOODALL CONSTRUCTION PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

ELIGE GREGORY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Woodall Construction ("Woodall") appeals from the January 10, 2013, Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Elige Gregory ("Gregory") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits. Woodall also

appeals from the February 4, 2013, Opinion and Order on Reconsideration.

On appeal, Woodall argues the ALJ erred in awarding TTD benefits and PTD benefits during the time Gregory continued to work for Woodall, erred in finding an average weekly wage ("AWW") contrary to the evidence, and committed an abuse of discretion in finding Gregory is permanently totally disabled. Finding merit in each of Woodall's arguments, we reverse in part, vacate in part, and remand.

Gregory filed a Form 101, Application for Resolution of Injury Claim, on July 13, 2012, alleging injuries to his left foot and knee as a result of a July 20, 2010, accident. Gregory stated he was putting up fence panels when a forklift driver "dumped 400 pounds of panels on him."

Gregory alleged he was paid at a rate of $32.00 per hour for forty hours per week at the time of the accident; however, he filed no wage documentation with the Form 101.

Gregory testified by deposition on December 19, 2012, and at the hearing held January 9, 2013. At the deposition, Gregory testified he was paid $16.00 per hour in all of his positions with Woodall. Gregory stated he

worked “quite a bit” of overtime. Gregory testified his knee and foot were struck by fence panels on the jobsite, knocking him to the ground. His foot began to swell, so he took off his boot. He had to wait for Woodall’s safety supervisor before he was taken to a clinic for treatment. He was provided with braces for his foot and knee. Gregory returned to work the next morning operating a Bobcat, which did not require the use of foot controls. Gregory continued to work until he was laid off in December. He stated he usually was laid off when the weather got cold in December. Gregory acknowledged he had a five pound lifting restriction as a result of a back injury which occurred prior to the 2010 injury.

At the hearing, Gregory testified he had worked for Woodall for twenty-six years. Gregory testified he could have continued to work operating a Bobcat or some other equipment that did not require the use of his leg and foot and there were other positions at Woodall he could have performed if given the opportunity. Gregory continues to have weakness in his left ankle and pain in his left ankle and the top of his foot. He also continues to have pain extending from his knee to his foot. Gregory indicated his pain is worsened by walking up stairs, on uneven ground, and for long distances. Gregory estimated

he could stand for approximately ten or fifteen minutes at one time.

On cross-examination, Gregory acknowledged he returned to work following the December 2010 layoff and was later terminated after missing work when his truck “broke down.”

After direct and cross-examination was completed, the ALJ asked the following questions:

> Q. Mr. Gregory, I want to ask you some questions about your wages. At the time you were injured how many hours per week were you averaging? Give me one number.
>
> A. Forty.
>
> Q. And, what was your hourly wage at that time?
>
> A. It was scale. It was 32, I think it was.
>
> Q. Just—just give me one hourly wage. What is it?
>
> A. 32.
>
> Q. $32 an hour?
>
> A. Yes. That’s correct.

Gregory submitted the report of Dr. Jared Wilson Madden who performed an evaluation on August 23, 2012. On examination, Dr. Madden found as follows:

> Left knee: pain to palpation noted along medial more than lateral joint

> line, edema mild, no erythema, positive for crepitus noted with flexion/extension, decreased flexion noted on passive examination left compared to right, pain noted with attempts at full extension both active and passive, negative for pain with compression, chronic somatic dysfunction noted with decreased tibial rotation, posterior fibular head proximally, positive anterior drawer testing suggesting ACL injury, positive medial stress testing suggesting MCL injury.

Dr. Madden diagnosed “left knee pain, suspicious for ligamentous injury (ACL, MCL).” Dr. Madden stated the work injury was the cause of Gregory's complaints. He explained the causal relationship as follows:

> The patient continues to experience significant impairment related to the work related injury of 7/20/10. The chronic pain symptoms are negatively impacting nearly all aspects of daily living. I disagree with placing the patient at MMI at this point. Medical records reviewed support the need for additional diagnostics and further treatment; however, this request for additional evaluation and intervention is incomplete at this point. The impairment listed below is based on the patient's current physical examination. It is quite possible that without appropriate intervention to correct the worsening left knee problem, this patient will continue to progressively worsen with respect to musculoskeletal dysfunction. With this progressive deterioration, the patient's impairment will also continue to increase. Based on the exacerbation and progression of symptoms since the initial date of

> injury, and considering the patient's physical exam compared to the lack of imaging, it is most probable that without appropriate stabilization, this progressive decline in function will continue. As such, one would expect the negative effects on activities of daily living to progressively increase due to worsening musculoskeletal dysfunction. To that effect, Mr. Gregory is, at this point, completely disabled from returning to employment in the same fashion as prior to his injury on 7/20/10.

Pursuant to Table 17-33 of the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Madden assessed a 10% whole person impairment based upon cruciate and collateral ligament laxity, moderate degree. Dr. Madden stated Gregory did not have an active impairment prior to the work injury. Dr. Madden did not believe Gregory had reached maximum medical improvement ("MMI"), because he needed further evaluation and treatment in the form of an MRI and orthopedic consultation for probable ACL and MCL injury/left knee internal derangement. Dr. Madden indicated Gregory should be restricted to light duty until further evaluation and completion of treatment.

Woodall submitted the report of Dr. Thomas M. Huhn, who performed an evaluation on December 11, 2012. Dr. Huhn opined Gregory sustained a minor direct trauma

resulting in sprains of the knee, ankle, and foot. Dr. Huhn noted Gregory had osteoarthritis of the knees and feet with a history of left ankle fracture pre-existing the work injury. Dr. Huhn believed Gregory reached MMI four to six weeks after the injury, or approximately August 31, 2010. Dr. Huhn found no objective medical findings to support an impairment rating attributable to the work injury, and no objective abnormality on examination. Dr. Huhn stated Gregory maintained appropriate strength, sensation, reflexes, dexterity, alignment, and range of motion in the knee, left ankle, and left foot. Dr. Huhn opined no further treatment was reasonable or necessary for any condition arising from the work injury. Dr. Huhn felt Gregory could return to the type of work he performed at the time of his injury without restrictions. Dr. Huhn criticized Dr. Madden's impairment rating, noting he relied heavily on Gregory's subjective reporting of pain and worsening condition. Dr. Huhn was critical of Dr. Madden's emphasis on laxity of the ACL, possible ligamentous laxity of the MCL and an "anterior drawer sign." Dr. Huhn noted there was no evidence of swelling or fluid in the joint on

x-rays immediately following the work injury. On examination, Dr. Huhn did not find laxity.[1] Dr. Huhn indicated Gregory has normal imaging studies and examination, walks without a limp, is able to navigate a flight of stairs without difficulty, has appropriate active ranges of motion, has full function of his left knee, ankle and foot, and requires no restrictions. Dr. Huhn stated there was no evidence to suggest Gregory had not returned to his pre-injury baseline.

Gregory and Woodall submitted medical records from BaptistWorx. These records reflect Gregory was seen by Dr. Eric Morse on July 20, 2010, for left leg and foot pain. Gregory was diagnosed with strain/sprains of the left knee, ankle, and foot and abrasions of the knee, lower leg, and foot. He was given a Tordol injection, prescribed Lortab and ibuprofen, and provided ointment and gauze for the abrasions. He was given restrictions on lifting, pushing and pulling, kneeling/squatting, and climbing stairs that were expected to be removed in two to three weeks. Dr. Morse indicated he did not suspect any significant or serious medical problem. A July 28, 2010, radiology report indicates Gregory had a normal left tibia

[1] Likewise, the physicians at BaptistWorx and the physical therapists made no notation of laxity.

and fibula. Gregory had degenerative changes in his left foot, but there were no fractures or dislocations and soft tissues were “satisfactory” in appearance.

Gregory was seen on September 16, 2010, for knee pain. He reported his pain had increased lately due to “much overtime pain climbing on/off equipment, pushing pedal a lot.” It was noted his foot was better. Gregory was allowed to return to regular work as of September 16, 2010. He was continued on ibuprofen and referred for physical therapy. Gregory was seen again on December 22, 2010, and reported his knee was worse. It was noted Gregory had been laid off because of winter. Gregory had normal range of motion, sensation, strength/tone, and gait/station. Dr. Morse again indicated he did not suspect any significant or serious medical problem. Gregory had negative anterior and posterior drawer, Lachman, and McMurray tests.

Woodall submitted the report of Dr. Stephanie Barnes who performed a vocational evaluation on December 12, 2012. She determined Gregory has a limited education and is approaching advanced age. Based upon Dr. Huhn’s report, she believed Gregory retained the physical capacity to return to the work performed at the time of the injury. She noted Dr. Madden limited Gregory to sedentary or light

work which would eliminate his past work duties. Dr. Barnes stated neither Dr. Huhn nor Dr. Madden found Gregory totally unable to work. Pursuant to Dr. Madden's report, she believed Gregory could perform work as a security monitor, information clerk, cashier/checker, manufacturing sorter, clerical addressor/labeler, manufacturing packer, machine operator, and small products assembler.

Woodall submitted personnel records and a Form AWW-1 wage certification. The Form AWW-1 indicates Gregory worked eight weeks during the thirteen week period preceding the work injury. Gregory worked a total of 292.5 hours during the eight weeks he worked, for an average of approximately 36.5 hours per week. His total earnings were $6430.92. The records included a verification of employment and wages completed in connection with the December 2010 layoff giving "inclement weather/lack of work" as the reason for the layoff. The form indicated a gross income of $592.00 received on December 10, 2010, for 37 hours worked and $584.00 received on December 17, 2010, for 36.50 hours worked.

The ALJ's findings relevant to this appeal are as follows:

A. Injury as defined by the act; work–relatedness/causation.

KRS 342.0011(1) defines “injury” to mean any work–related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines “objective medical findings” to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

I saw and heard Mr. Gregory testify at the hearing and found that he was a credible and convincing witness. Based upon the totality of the evidence, specifically including the plaintiff’s sworn testimony and the medical report from Dr. Madden, I make the factual determination that Mr. Gregory did sustain significant physical injuries due to his work–related accident on July 20, 2010.

B. Average weekly wage.

Based on the plaintiff’s sworn testimony, the provisions of KRS 342.140(1)(e) and the decision of the Supreme Court of Kentucky in *Abel Verdon Construction v. Rivera*, 348 S.W.3d 749 (Ky. 2011), I make the factual determination that Mr. Gregory's average weekly wage at the time of his work–related injury was $1280.00, based upon an average work week of 40 hours and an hourly wage of $32 per hour.

. . .

D. Benefits per KRS 342.730; permanent and total disability.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of the evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). Based upon the medical report of Dr. Huhn, I make the factual determination that Mr. Gregory reached maximum medical improvement on August 31, 2010. I also find very persuasive the medical report of Dr. Madden and make the factual determination that the plaintiff sustained as a result of his work accident on July 20, 2010 a 10% whole person permanent impairment.

"Permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury…." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

"The ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both

> before and after being injured." Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).
>
> In this case, I considered the severity of the plaintiff's work injuries, his age, his work history, his education, sworn testimony of Mr. Gregory and the very compelling and persuasive medical evidence from Dr. Madden regarding his permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled. Plaintiff's award of permanent and total disability benefits shall begin to run effective September 1, 2010.
>
> **E. Temporary total disability.**
>
> KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.
>
> Based on the credible and convincing sworn testimony from the plaintiff, I make the factual determination that his period of temporary total disability began to run as of the date July 20, 2010 and continued up to August 31, 2010.

Woodall filed a petition for reconsideration raising essentially the same arguments it raises on appeal. The ALJ rendered his Opinion and Order on Reconsideration

on February 4, 2013, denying Woodall's petition for reconsideration, noting he had discussed in the January 10, 2013, Opinion and Order all of the contested issues raised by the parties.

On appeal, Woodall argues the ALJ erred in awarding TTD benefits and PTD benefits during Gregory's continuing employment. Woodall argues Gregory failed to satisfy the two prong test enunciated in W.L. Harper Constr. Co., Inc. v. Baker, 858 S.W.2d 202 (Ky. App. 1993) for eligibility for TTD benefits. There, the Court of Appeals held TTD benefits are payable when the claimant has not reached MMI and has not reached a level of improvement that would permit a return to his job or some other employment of which he is capable which is available in the local labor market. Woodall notes the evidence establishes Gregory did not miss work following the injury and continued to work at regular duty until his layoff on December 10, 2010, due to "Inclement weather/lack of work."

Woodall notes Gregory drew unemployment benefits after being laid off in December until he was recalled in the spring. He continued to work regular duty until he was terminated in May 2011 for failure to appear for work due to transportation issues. Thus, Woodall argues as a matter

of law the award of PTD benefits could not commence prior to the cessation of employment in May 2011.

Woodall also argues the ALJ's determination of Gregory's AWW is contrary to the evidence. Woodall notes Gregory was regularly laid off during the winter. Woodall contends the appropriate method of calculating Gregory's AWW is set forth in C & D Bulldozing Co. v. Brock, 820 S. W. 2d 482 (Ky. 1991) where the Supreme Court addressed "consistently intermittent employment." There, the employee worked for C & D on a sporadic basis when work was available and did not maintain an employment relationship during the intervening periods of unemployment. The Court held the proper calculation under KRS 342.140(1)(e) was to divide by thirteen the earnings for the seven weeks the employee worked prior to the injury. Here, Woodall notes Gregory only worked eight weeks of the thirteen week period prior to the injury. Woodall asserts the ALJ committed a clear abuse of discretion and assumed the role of advocate at the hearing by questioning Gregory on this issue since he had already testified regarding his earnings. Further, Woodall asserts the ALJ instructed Gregory "to provide an answer that was less than complete and truthful."

Woodall argues the ALJ abused his discretion in finding Gregory permanently totally disabled and that

determination is not supported by substantial evidence. Woodall notes the issue of permanent total disability was preserved at the benefit review conference. However, in his position statement, Gregory requested an award of TTD benefits and additional treatment or, alternatively, an award of permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)2. Woodall maintains Gregory candidly acknowledged he remains capable of performing the same work he performed in the months following the work injury. Further, he acknowledged his usual employment as a heavy equipment operator was not heavy and involved sitting and operating controls for the entire day. Woodall asserts Gregory's counsel stressed his client remained capable of working for Woodall and would have continued in that employment had he not been terminated in 2011. Woodall argues Gregory continued to work through the most acute phase of his injury. Woodall objects to the ALJ's reliance on Gregory's testimony, stating:

> In light of the unrebutted facts and Mr. Gregory's own admissions with respect to his retained physical capacity for work, we [sic] are [at] a loss to understand precisely what sworn testimony on which the ALJ relied to conclude he is permanently totally disabled.

Woodall contends the opinions of Dr. Madden do not constitute substantial evidence. Woodall asserts Gregory's testimony and the other medical evidence detract from the weight of Dr. Madden's evaluation to the point of rendering his opinions incredible. Woodall notes Dr. Huhn explained the "anterior drawer sign" suggested by Dr. Madden would not be present without a complete disruption of the ACL. However, Gregory had no evidence of swelling or fluid in the joint on the x-rays following the work injury, and neither the treating physician nor the physical therapist found evidence of ligamentous laxity or ACL disruption. Similarly, Woodall notes Dr. Madden stands alone in his speculation with respect to MCL pathology. Woodall asserts Dr. Madden's opinions are based entirely on speculation and possibility and do not rise to the level of expert opinions given within a reasonable degree of medical probability.

Gregory, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Gregory was successful in that burden, the question on appeal is whether there is substantial evidence of record to support the ALJ's decision. Wolf Creek

Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial

probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Concerning the award of TTD benefits, Woodall correctly notes both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra must be satisfied before TTD benefits may be awarded. As pointed out by the Court of Appeals in W.L. Harper Construction Co. v. Baker, supra:

> To summarize, TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, as

> the Board noted, the question presented is one of fact no matter how TTD is defined.

Id. at 205.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

Id. at 580-581.

Here, the ALJ awarded a period of TTD benefits extending from the date of injury through August 31, 2010. Though not explicitly stated, implicit in this finding is the conclusion Gregory was neither at MMI nor capable of returning to his customary work immediately following the injury until August 31, 2010. Dr. Huhn opined Gregory reached MMI four to six weeks following the accident, or on August 31, 2010. Thus, the ALJ's implicit finding that Gregory reached MMI on August 31, 2010, is supported by substantial evidence. However, the evidence is uncontadicted Gregory operated a Bobcat for Woodall during

the entire period TTD benefits were awarded. Nothing in the record indicates the position was a “make work” job; rather, it was work for which Gregory had training or experience. Even though Gregory may not have attained MMI, he was not precluded from performing work for which he had training or experience. Since substantial evidence does not support a conclusion Gregory was incapable of performing work for which he had training or experience and he performed such work during the period TTD benefits were awarded, the ALJ’s award of TTD benefits is reversed.

Regarding the onset date for the award of PTD benefits, Woodall correctly argues the ALJ improperly awarded PTD benefits during the time Gregory continued to be employed on a full time basis. Again, it is important to note the work Gregory performed for Woodall was work for which he had training and experience. Further, Gregory testified he was physically capable of performing the work through the date of his termination, and he remained capable of performing that work and other positions at Woodall even after his termination. In Gunderson v. City of Ashland, 701 S.W.2d 135 (Ky. 1985), the Supreme Court made it clear that an individual can be found totally occupationally disabled and continue to work full-time where the claimant continued to work only because the

employer had made considerable modifications so he could perform the job. Here, Gregory merely changed jobs operating a different piece of equipment which was a customary part of Woodall's operations. Again, substantial evidence does not support the commencement of an award of PTD benefits prior to Gregory's cessation of employment with Woodall in May 2011. We therefore reverse the award of any PTD benefits prior to the date Gregory ceased his employment with Woodall.

We also vacate the ALJ's finding of a permanent total disability and the award of PTD benefits. In finding Gregory permanently totally disabled, the ALJ relied upon, in part, "the sworn testimony of Mr. Gregory and the very compelling and persuasive medical evidence from Dr. Madden regarding his permanent impairment and occupational disability." However, Dr. Madden did not believe Gregory had reached MMI, did not assign permanent restrictions, and expressed no opinion regarding permanent disability. Dr. Madden merely stated, at the time he examined Gregory he was "completely disabled from returning to" the employment he engaged in prior to the injury. Significantly, Dr. Madden restricted him to light duty until further evaluation and treatment.

Similarly, Gregory's sworn testimony establishes he continued to perform his post-injury work as well as other types of work at Woodall. Neither Dr. Madden's opinion nor Gregory's testimony constitutes substantial evidence supporting a finding of permanent total disability. Therefore, we vacate and remand for additional findings regarding the extent and duration of Gregory's disability. Further, if the ALJ determines on remand that Gregory is permanently totally disabled, the ALJ must set forth, with specificity, the evidence relied upon in reaching that determination, stating how the evidence relates to the factors set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). If the ALJ determines Gregory is partially disabled, the ALJ must address any appropriate multiplier and, if applicable, perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

We note the ALJ has the discretion to rely on the impairment rating assessed by Dr. Madden. The ALJ was convinced Gregory reached MMI by August 31, 2010. Dr. Madden did not believe Gregory had reached MMI. However, Dr. Madden explicitly stated his rating was based upon Gregory's condition at the time his examination was performed. An ALJ is free to accept a doctor's opinion

regarding an impairment rating while rejecting the same doctor's opinion regarding MMI.

Finally, regarding Gregory's AWW, we note the ALJ acknowledged Gregory's AWW was to be calculated pursuant to KRS 342.140(1)(e). However, because the ALJ did not properly calculate the AWW pursuant to KRS 342.140(1)(e), we vacate his determination of the AWW. Since Gregory worked fewer than thirteen weeks prior to the injury, his wage must 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." KRS 342.140(1)(e). In the claim *sub judice*, the only evidence regarding the availability of work in the thirteen week period is that Gregory only worked eight of the thirteen weeks. There is nothing to indicate Woodall had work available in the remaining five weeks of the thirteen week period. Gregory testified layoffs in the winter were common. Although the ALJ was able to elicit statements that the "one number" that represented the number of hours Gregory worked per week was forty and the "one hourly wage" was $32.00 per hour, Gregory clearly testified his hourly rate was "scale," thus indicating it would vary. Interestingly, Gregory filed no documentation

of his wages. Further, the AWW-1 and the verification filed with the state for unemployment purposes indicate Gregory's testimony was incorrect. The AWW-1 reveals Gregory averaged slightly more than 36.5 hours per week during the eight weeks of employment prior to the injury. The total earnings divided by the number of hours worked produces an hourly rate substantially lower than $32.00 per hour. Further, Gregory's deposition testimony indicates Woodall always paid him $16.00 per hour prior to his injury.

The ALJ's finding of an AWW of $1,280.00 was not calculated properly, is not supported by substantial evidence, and does not accurately reflect what Gregory would have earned had he been so employed for the full thirteen weeks preceding the injury and had worked, when work was available to him and others in a similar job, as required by KRS 342.140(1)(e). *See* Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999). In that case, the 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 the employment.

We therefore vacate the ALJ's finding regarding AWW and remand for computation of the AWW in accordance with KRS 342.140(1)(e) and the evidence filed in the record.

Accordingly, the January 10, 2013, Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge, and the February 4, 2013, Opinion and Order on Reconsideration are **REVERSED IN PART,** and **VACATED IN PART**. This claim is **REMANDED** for entry of an amended opinion, award, and order in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

COUNSEL FOR PETITIONER:

HON MICHAEL T KUNJOO
300 E MAIN ST STE 400
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J RUDLOFF
400 EAST MAIN ST STE 300
BOWLING GREEN KY 42101