Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 2, 2021

CLAIM NO. 201896086

KEN LASHLEY PETITIONER

VS. **APPEAL FROM HON. TONYA M. CLEMONS, ADMINISTRATIVE LAW JUDGE**

KY VOLUNTEER FIRE DEPARTMENT and
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING & REMANDING

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

BORDERS, Member. Ken Lashley ("Lashley") appeals from the February 10, 2021 Opinion, Award and Order and the March 15, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge ("ALJ Clemons"), awarding temporary total disability benefits and medical benefits. ALJ Clemons found Lashley sustained a 2% impairment rating for his injury. However, she determined Lashley was bound by a prior Interlocutory Order

rendered on December 22, 2018 by Hon. Jeff V. Layson, Administrative Law Judge ("ALJ Layson"). ALJ Layson determined Lashley, a volunteer firefighter, could not be awarded permanent income benefits because he could not use income from self-employment to establish a pre-injury average weekly wage ("AWW") as he was an "independent contractor" which does not constitute "regular employment".

On appeal, Lashley argues ALJ Clemons did not issue a proper award concerning the pre-injury AWW and did not perform a proper analysis of the law regarding the AWW for volunteer firefighters who are self-employed. For the reasons set forth herein, we reverse and remand.

Lashley testified he was regularly employed as a fence contractor prior to his accident, doing business as Ken Lashley Construction ("Lashley Construction"). Lashley Construction is a sole proprietorship, unincorporated business. Lashley also volunteered as a firefighter for the City of Clarkson. He was injured when he slipped on ice on a medical run as a volunteer firefighter for the City of Clarkson. In his job performing construction work Lashley would generally bid for work either by the job or by an hourly rate, but he received a set amount for the work he and/or his employees performed. Lashley testified he earned on average of $35.00 per hour and consistently worked 40 to 50 hours per week. Tax records were filed concerning his income from Lashley Construction.

ALJ Layson issued an Interlocutory Opinion and Order on Petition for Reconsideration holding Lashley's self-employed income cannot be used to calculate his AWW pursuant to KRS 342.140(3). He found as follows *verbatim*:

KRS 342.140(3) states:

> In the case of volunteer firemen, police, and emergency management agency members or trainees, the income benefits shall be based on the average weekly wage in their regular employment.

In their briefs, both parties put forth theories and arguments as to how Mr. Lashley's pre-injury average weekly wage should be calculated based on earnings as a fencing contractor. However, before getting to the question of *how* those earnings are to be translated into an average weekly wage, it is necessary to determine whether they *can* be used for that purpose. In other words, the question is whether Mr. Lashley has "wages" from "regular employment" for purposes of the Kentucky Workers' Compensation Act.

The unrebutted evidence in this case is that Mr. Lashley owned and operated a fence contracting business which was a sole proprietorship. In *Hale v. Bell Aluminum*, 986 S.W.2d 152 (Ky. 1998), the Kentucky Supreme Court cited the long-established principle of workers' compensation law that "independent contractors are not employees and, thus, fall outside the scope of the Workers' Compensation Act" and held that a "claimant's earnings as an independent contractor per his own aluminum siding company . . . should not be added to those wages earned . . . in order to compute his average weekly wage."

The cases cited by the parties in their briefs are distinguishable in that they deal with claimants who, while the may be paid and report their income as independent contractors, are statutory employees as defined by Kentucky workers' compensation law. In this case, it is simply not possible that Mr. Lashley could be considered an employee of Lashley Construction. If he were injured while working on a fencing job, he would not be able to file a compensable workers' compensation claim against Ken Lashley Construction.

The only exception would be if Mr. Lashley had purchased workers' compensation insurance for Ken Lashley Construction and opted to have himself covered under the policy. KRS 342.012(1) states:

> For purposes of this chapter, an owner or owners of a business, including qualified partners of a limited liability company, whether or not employing any other person to perform a service for hire, shall be included within the meaning of the term employee if the owner, owners, qualified partners, or qualified members of a limited liability company elect to come under the provisions of this chapter and provide the insurance required thereunder. (Emphasis added).
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> While it is undisputed that Mr. Lashley is the sole owner of Lashley Construction, he submitted no evidence or testimony which would establish that he elected coverage under a policy of insurance purchased by or for the contracting business. Since Mr. Lashley can not be considered an employee of Lashley Construction for purposes of the Act, he can not claim money earned as the owner of that business as wages for the purpose of calculating his pre-injury average weekly wage as a fireman.
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> Based on the foregoing, the Administrative Law Judge finds that the Plaintiff did not not have any wages in "regular employment" for purposes of KRS 342.140. As a consequence, any disability benefits paid in this case are subject to the minimum weekly benefit set forth in the Schedule of Weekly Workers' Compensation Benefits published by the Department of Workers' Claims. With regard to TTD benefits, the minimum weekly benefit for injuries occurring in 2018 is $169.67.

Lashley filed a Petition for Reconsideration arguing ALJ Layson erred in excluding self-employment as "regular employment." Lashley argued he is statutorily deemed an employee as a member of a volunteer fire department. Therefore, the only question is whether he had "regular employment" at the time of the injury. He noted the Kentucky Workers' Compensation Act does not define "employment". He argued self-employment is included in the definition of

employment by both statute and case law. In his Order on Petition for Reconsideration, ALJ Layson provided as follows *verbatim*:

> As set forth in the Interlocutory Opinion, the undisputed facts in this case are: 1) the Plaintiff was injured while working as a volunteer fireman, and; 2) during the time the Plaintiff worked as a fireman, he also owned and operated a contracting business involved in the installation of fences. The Plaintiff argued that the revenue generated by the fencing business could be used to calculate his average weekly wage upon which to award workers' compensation benefits for the injury he sustained while working as a fireman.
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> KRS 342.140(3) states:
>
> In the case of volunteer firemen, police, and emergency management agency members or trainees, the income benefits shall be based on the average weekly wage in their regular employment.
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> In his Petition, the Plaintiff argues that the term "employment" allows for the inclusion of his earnings as an independent contractor. However, it has long been the established law in Kentucky that an independent contractor is not an employee for the purposes of the Act. The owner of a business may be included as a statutory employee if he elects to come under the provisions of the Act by purchasing workers' compensation insurance coverage, which the Plaintiff in this case did not do. The ALJ reiterates his finding in the Interlocutory Opinion and Order that the Plaintiff in this case was not an employee as defined by the Act. Consequently, he did not have any regular employment.
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> Additionally, as also noted in the Interlocutory Opinion and Order, the Plaintiff's earnings as the owner of the fence contracting business do not qualify as wages under the statute. *Hale v. Bell Aluminum*, 986 S.W.2d 152 (Ky. 1998). KRS 342.140(3) specifically uses the term "average weekly wage." Since the Plaintiff has no wages as defined by Kentucky workers' compensation law, it is not possible to calculate an average weekly wage pursuant to KRS 342.140(3).

> Based on the foregoing, the Plaintiff's Petition for Reconsideration is overruled.

Lashley appealed to the Workers' Compensation Board and Court of Appeals, both of which dismissed Lashley's appeal as being taken from an interlocutory order. The claim was reassigned to ALJ Clemons, who held as follows:

> The parties have listed average weekly wage as an issue in this matter. The issue of average weekly wage was previously determined to be $0 pursuant to the December 22, 2018 Interlocutory Opinion and Order. Plaintiff argues that his average weekly wage is $1.656.12 rendering him a maximum wage earner for 2018. Defendant conversely maintains that Plaintiff's average weekly wage has been previously determined under the prior Interlocutory Opinion and Order and should be incorporated in this matter.
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> As a general rule in this jurisdiction, an ALJ may not "reverse a dispositive interlocutory factual finding on the merits in a subsequent final opinion absent a showing of new evidence, fraud, or mistake." Bowerman v. Black Equipment Co., 297 S.W.3d 858,867 (Ky. App. 2009). Without such a showing in this matter, the ALJ lacks authority to reverse the dispositive interlocutory factual findings of the interlocutory opinion. Accordingly, consistent with the December 22, 2018 Interlocutory Opinion and Order, the ALJ adopts the finding that Plaintiff's pre-injury average weekly wage is $0.

Lashley filed a Petition for Reconsideration arguing ALJ Clemons made a patent error in holding she lacked authority to reverse ALJ Layson's December 22, 2018 Interlocutory Opinion that, *sua sponte*, found self-employed income cannot be used to calculate his AWW pursuant to KRS 342.140(3). Lashley argued Bowerman v. Black Equipment Co., 297 S.W.3d 858, 867 (Ky. App. 2009)

deals only with factual findings, and the issue of whether or not he has an AWW is a legal issue subject to review and revision in a final Opinion.

In her Order on Petition for Reconsideration, ALJ Clemons again held Bowerman indicates that without a showing of new evidence, fraud, or mistake, an ALJ lacks authority to reverse dispositive interlocutory factual findings of an interlocutory opinion. She further indicated the Petition on this issue is a re-argument of the merits of the claim.

On appeal, Lashley argues ALJ Clemons overlooked or misconstrued controlling statutes and precedent in finding income derived from self-employment cannot be utilized in calculating an AWW pursuant to KRS 342.140(3). Lashley argues ALJ Layson erred in using a combination of Hale v. Bell Aluminum, 986 S.W.2d 152 (Ky. 1998) and KRS 342.012(1) to construct a definition for "regular employment" contained in KRS 342.140(3) that excludes Lashley's self-employment as "regular employment." Lashley maintains ALJ Layson's position is misplaced and therefore the adoption of the opinion by ALJ Clemons is misplaced. Pursuant to KRS 342.640(3), Lashley is statutorily deemed an employee as a member of a volunteer fire department. Therefore, he asserts the only question is whether he had "regular employment" at the time of the injury. Lashley argues the Kentucky Workers' Compensation Act does not specifically define "employment". Per black letter law, case law and statute, self-employment is included in the definition of employment. The black letter law definition of "employment" certainly includes being employed in one's own business. Lashley notes Black's Law Dictionary (2nd Ed. 1910) Provides, "Employment - This word does not necessarily import an

engagement or rendering services for another. A person may as well be 'employed' about his own business as in the transaction of the same for a principal." (Emphasis in original).

Lashley notes Kentucky Courts have consistently found self-employment has been determined as employment. For example, it is used to form the basis of lost wages in personal injury cases and in computing child support in divorce cases. Kentucky law has consistently held that employment includes self-employment. Lashley notes an individual who fails to return to his customary self-employment when so directed by the secretary is disqualified from receiving unemployment benefits by KRS 341.370. Lashley requests that the Board reverse and remand, directing ALJ Clemons to find self-employment qualifies as "regular employment" under KRS 342.140(3) and to properly calculate the AWW.

We determine ALJ Clemons was not bound by the holding in the Interlocutory Opinion on the question of law regarding the use of self-employment income in the calculation of the AWW. 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).

Lashley correctly argues that Bowerman applies to factual findings. In Bowerman, supra, the Court of Appeals held the reversal of prior dispositive factual findings rendered by an ALJ in an interlocutory opinion**,** absent introduction of new evidence, fraud, or mistake, is arbitrary, unreasonable, unfair, and unsupported by

sound legal principles. This appeal concerns the legal question of whether self-employment constitutes "regular employment" for purposes of KRS 342.140(3). On questions of law, or mixed questions of law and fact, the Board's standard of review is *de novo*. Uninsured Employer's Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991). For purposes of awarding an injured volunteer fire fighter income benefits, the benefit, "shall be based on the average weekly wage in their regular employment." It is uncontroverted that Lashley regularly performed work in a self-employed capacity on a "regular" basis. He is deemed an employee of the volunteer fire department pursuant to KRS 342.640(3). Lashley could not have a contract of hire with the volunteer fire department because he had no expectation of receiving wages in that employment. Coverage for his injury exists solely because it was extended to him by KRS 342.640(3). The statute does not define "regular employment" and places no specific limit on what is considered "regular employment." We believe ALJ Layson improperly imposed conditions or limitations not specifically stated in the statutory provision

The obvious purpose of deeming volunteer firefighters as employees is to make benefits available to them should they be injured, thereby making it easier for the fire department to secure volunteer firefighters. The intent of the provision is to provide a stream of benefits including replacement of lost income. To exclude self-employed individuals from permanent partial disability or permanent total disability benefits runs counter to the purpose of the provision extending coverage to volunteer firefighters and makes it more difficult for volunteer fire departments to recruit personnel. Whether Lashley elected to be covered by a policy in his work for

Lashley Construction is irrelevant since his injury did not occur there. Clearly, Lashley's income was placed at risk by his work as a volunteer firefighter.

We recognize Justice v. Kimper Volunteer Fire Department, 379 S.W.3d 804 (Ky. App. 2012) holds that no AWW can be calculated where the firefighter is unemployed, and thus has no wages. However, the question of whether income from self-employment may be used to calculate an AWW has not been addressed by the courts in Kentucky. While we do not cite previous decisions from this Board as authority, we do reference them as guidance, and for consistency. The Board previously addressed wages from self-employment in Summerville Volunteer Fire Department v. Patterson, claim number 92-15696, rendered June 3, 1994. In that case, we held the ALJ could properly use the earnings of a self-employed mechanic to calculate an AWW for his injury sustained as a volunteer firefighter. The Board reasoned as follows:

> This claim presents an average weekly wage issue of first impression. Citations of authority by the litigants are to foreign cases, Larson's Workmen's Compensation Law, Section 60.12 and an Attorney General Opinion (OAG 72-203). We accept as an appropriate beginning point in our analysis recognition that the average weekly wage to which compensation benefits are hinged should reflect a worker's actual earnings. Larson, supra. This is so because the fundamental purpose of compensation benefits is to restore the stream of the employee's income to the extent it has been severed by a work-related injury.
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> Bearing in mind this elementary principle, we find no fault with the general scheme utilized by the ALJ to calculate Patterson's average weekly wage. Resort to KRS 342.140(1)(c) was appropriate, although with appropriate evidence before him, the ALJ could have elected to determine Patterson's wage under subsection (1)(f). However, we conclude that the ALJ should have

> deducted the claimant's business expenditures so as to arrive at an approximation of Patterson's earnings. This methodology treats the claimant much the same as a regular employee and would include, as earnings, those portions of his income allocated to state and local income taxes and FICA. Business taxes and licenses would be deducted. Those items upon Patterson's Form 1040, Schedule C which represent business expenses paid to others should be deducted.
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> A difficult question to be resolved is whether the expense item delineated as depreciation for shop and equipment should be subtracted from earnings of Patterson's enterprise before division by fifty-two to yield his applicable average weekly wage. Admitting departure from the path we followed in a prior claim, it now appears to the Board that depreciation should be treated in the same fashion as the other expenditures made by Patterson to conduct his business. Depreciation is a distinctive item because there is no payment of it to a creditor. Although not taxed as income, the sum represented by depreciation is passed through the business and ends up in Patterson's pocket as part of his disposable earnings. Yet, in attempting to place the self-employed individual on the same footing as a regular wage earner, we deem it critical that depreciation is not "earnings" in the general sense. Depreciation can be equated to passive income, not borne of the fruits of Patterson's labor, but rather recaptured money in the nature of a return on his prior investment in the business facilities.

We believe self-employment is "regular employment" as that term is contemplated in KRS 342.140(3). If the legislature intended otherwise the statute would so reflect, but it does not. Accordingly, we reverse the decision of ALJ Layson and ALJ Clemons' adoption of that decision and remand the claim for calculation of an AWW and entry of an amended decision awarding permanent partial disability benefits based upon Lashley's income from his self-employment.

Accordingly, the February 10, 2021 Opinion, Award and Order and the March 15, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge, are hereby **REVERSED**. This claim is **REMANDED** for entry of an opinion in conformity with the Board's Opinion.

ALL CONCUR.

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