Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2020

CLAIM NO. 201998462

ELLIOTT COUNTY EMS PETITIONER

VS. **APPEAL FROM HON. BRENT E. DYE, ADMINISTRATIVE LAW JUDGE**

KATHY NIECE AND
HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Elliott County EMS ("Elliott County") appeals from the March 31, 2020 Opinion, Award, and Order rendered by Hon. Brent E. Dye, Administrative Law Judge ("ALJ"). The ALJ awarded Kathy Niece ("Niece") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related right shoulder injury she sustained on December 19, 2018, while assisting a co-worker with positioning a patient in an

ambulance. The ALJ additionally found Niece's concurrent earnings from Menifee County EMS ("Menifee County") and from Morgan County EMS ("Morgan County") were appropriately included in her average weekly wage ("AWW") calculation. Elliott County also appeals from the April 17, 2020 Order granting Niece's Petition for Reconsideration, and denying its Petition for Reconsideration.

On appeal, Elliott County argues the ALJ erred by including Niece's earnings from Menifee County and Morgan County in calculating her AWW. In support of its position, Elliott County cites to the holding by the Kentucky Supreme Court in Garrard County Fiscal Court v. Camps, 469 S.W.3d 409 (Ky. 2015). Because we determine the ALJ did not err by including Niece's earning from Menifee County and Morgan County in calculating her AWW, we affirm.

Niece filed a Form 101 on May 14, 2019 alleging she sustained multiple upper extremity strains caused by lifting in the course of her job at Elliott County. The Form 104 work history indicates Niece worked for multiple emergency service providers as either an EMT or as a paramedic from 2001 until her December 19, 2018 work injury. The form indicates she was employed by multiple entities during the same periods.

Niece testified by deposition on July 8, 2019, and at the final hearing held February 24, 2020. Niece was born on October 24, 1967. At the time of her deposition, Niece was a resident of Jeffersonville, Indiana. By the time of her hearing, she had moved to Milton, Kentucky. At her deposition, Niece testified she had not returned to work since her injury. At the hearing, Niece testified she is unable to perform the work activities required of either an EMT or paramedic. She

now works at a call center recruiting medical providers for a healthcare network. Niece testified that in addition to working for Elliott County at the time of her injury, she was also still employed by Menifee County and Morgan County on a PRN, or "as needed" basis. She also worked for Clark Memorial Hospital in October and November 2018, and Louisville Metro as a dispatcher from late November 2018 until early December 2018, but she was no longer employed by either facility at the time of her accident.

On December 19, 2018, Niece and her partner were dispatched to assist a severely inebriated patient. As they attempted to pull the patient up on the ambulance cot, she experienced a pop or tearing sensation in her right shoulder. She called her supervisor, Michael Burling ("Burling"), and reported the incident. She initially sought treatment with Dr. Parker Banks at the St. Claire Emergency Clinic in Elliott County. She next saw Dr. Stacie Grossfeld, who apparently was not in the insurer's network. She followed up with Dr. Ty Richardson, who eventually performed right rotator cuff and right biceps surgery. She also had physical therapy in Jeffersonville, Indiana.

Niece testified Burling was aware of her concurrent employment with Menifee County and Morgan County. She testified that in fact she had worked with him in Morgan County. She testified most EMTs and paramedics work in the same capacity at other locations. She also testified that she was still on the schedule for both Menifee County and Morgan County as of her injury date, and she had never resigned from either location.

Raven Ross ("Ross"), the Director at Morgan County, testified by deposition on October 31, 2019. Ross testified she worked with Niece from 2012 to 2018. She was aware of Niece's work injury. She testified Niece was still an active employee of Morgan County on December 19, 2018. She also testified Niece is still considered an active employee for Morgan County. She stated Niece had been invited to an "employee only" picnic hosted by Morgan County in July 2019. Ross testified it is normal for EMTs/paramedics to be employed by multiple ambulance services at the same time.

Brian Plank ("Plank") testified by deposition on October 31, 2019. He was Morgan County's Director from December 2018 until March 2019. He was also aware of Niece's work-related injury. He testified Niece was still an employee on a PRN basis at the time of her injury. She remained on the employee rosters during his tenure as Director. He was aware Niece was working for Elliott County. He testified the majority of the Morgan County employees worked for multiple ambulance services.

We will not review the medical evidence since the only issue on appeal concerns the inclusion of concurrent employment in Niece's AWW calculation. A Benefit Review Conference ("BRC") was held on September 11, 2019. The BRC Memorandum indicates the issues preserved for determination included whether Niece retained the physical capacity to return to the type of work performed on the date of the injury, "injury" under the Act, work-relatedness/causation, AWW, TTD benefits (MMI), KRS 342.730 benefits, proper use of the AMA Guides, and unpaid/contested medical expenses.

In the Opinion, Award & Order rendered March 31, 2020, the ALJ awarded Niece TTD benefits, PPD benefits based upon an 11% impairment rating assessed by Dr. Gregory Snider (enhanced by the multipliers contained in KRS 342.730(1)(c)1), and medical benefits for the injuries she sustained on December 19, 2018. The ALJ additionally excluded from the calculation of Niece's AWW her earnings with Louisville Metro and Clark Memorial, but included her earnings from Menifee County and Morgan County. The ALJ made the following specific determinations regarding the inclusion of Niece's concurrent wages *verbatim* as follows:

> **II. Aww**
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> A claimant has the burden, and non-persuasion risk, concerning his/her Aww. Fawbush v. Gwinn, 103 S.W.3d 5, 10 (Ky. 2003). KRS 342.140(5) states that "[w]hen the employee is working under concurrent contracts with two…or more employers and the defendant employer has knowledge of the employment prior to the injury, his or her wages from all the employers shall be considered as if earned from the employer liable for compensation."
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> Claimants have the proof burden, and non-persuasion risk, concerning KRS 342.140(5)'s two required elements. Fayette County Bd. of Educ. v. Phillips, 439 S.W.2d 319 (Ky. 1969). To include a concurrent employment's wages in his/her average week wage, the claimant must prove: (1) two or more contracts for hire simultaneously existed, and (2) his/her employer knew the other employment existed. Garrard County Fiscal Court v. Camps, 469 S.W.3d 409, 412 (Ky. 2015).
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> **A) Contracts for hire**
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> A contract for hire simply means the worker receives payment, or expects to receive payment, for performing the work. The concurrent employment must

exist when the injury occurs. Id. For example, if the claimant quit his/her other job the day before the work-related injury occurred, then he/she did not have concurrent employment.

Intermittingly working for the alleged concurrent employer, and not receiving payment at the time the work-related injury occurs, does not negate a contract for hire's existence. Wal-Mart v. Southers, 152 S.W.3d 242 (Ky. App. 2004). In Southers, the Court upheld the ALJ's finding that concurrent employment existed despite the claimant having not worked, or receiving payment for performed services, within the three month period before her work injury occurred. The claimant intermittently worked, and was "on-call."

The Southers Court explained that "…there is nothing in the relevant statute that requires proof of remuneration [at the time the work-related injury occurs] to establish concurrent employment." Id. at 246. The Court further noted that there was not "…any support for [the Defendant's] contention that intermittent employment necessarily negates the existence of mutuality of obligation." Id.

i. Louisville Metro & Clark Memorial

The credible evidence establishes that Niece was not simultaneously working under contracts for hire with Elliott, Louisville Metro, and Clark Memorial when her December 19, 2018 injury occurred. Niece admitted she resigned her Louisville Metro and Clark Memorial employment before her December 19, 2018 injury occurred.

ii. Menifee County Ambulance Service

The credible evidence establishes that Niece was working under contracts for hire with Elliott and Menifee when her December 19, 2018 injury occurred. The wage records show that Niece performed services for Menifee between November 10, 2018 and November 16, 2018, and received payment on November 16, 2018. The records show she worked 23 hours. This was approximately one month before her work injury.

Niece explained that she did not have a set schedule, and worked on a per-needed basis. Niece testified that, before her work injury occurred, she was even scheduled to work a Menifee shift on December 22, 2018. Elliott did not rebut Niece's credible testimony. The ALJ finds Niece was under a Menifee contract for hire when her Elliott injury occurred.

iii. Morgan County Emergency Ambulance Service

The credible evidence establishes that Niece was also working under contracts for hire with Morgan and Elliott when her December 19, 2018 injury occurred. Niece testified that, despite not having performed services for Morgan since approximately July 31, 2018, she remained an active Morgan employee. The Morgan employment file and its representatives (Plank and Ross) support Niece's credible testimony.

On July 2, 2018, Niece sent Morgan an email advising that she wanted to transfer from full-time to a per-needed basis. The email stated, "I, Kathy Niece will no longer be working full time at morgan county ambulance but request that I remain prn, effective 07/02/2018." This email does not state Niece was resigning her employment - like she subsequently advised Louisville Metro and Clark Memorial. The records show that she worked 28 and 29 days later - on July 30, 2018 and July 31, 2018.

Morgan's prior (Plank) and current (Ross) directors testified that they considered Niece an active employee at the time her December 19, 2018 injury occurred. They explained that Niece was still listed on the active roster, and had the ability to work on December 18, 2018, the day before her injury occurred, without having to go through the re-hiring process.

This process would have included completing a new employment application, and having the board approve it. If Morgan had removed Niece from its active roster, and did not consider her employee, she would have had to reapply and have the board approve her employment. Although she had not worked since approximately July 31, 2018, Plank and Ross explained

Niece was an active employee. Niece also considered herself an active Morgan employee. Elliott did not rebut this testimony from Niece, Plank, and Ross.

Morgan even invited Niece to its July 4, 2019 picnic party. Ross and Niece explained this party was only for employees. This illustrates that Morgan even considered Niece an active employee in July 2019, almost a year after she had last worked and approximately 6.5 months after her injury.

Ironically, Niece did not perform services for Elliott County from December 2017 through March 2018. She began re-performing services sometime in April 2018. Despite this approximate five month period off, Niece testified she did not have to go through the application and re-hiring process. She indicated that Elliott still considered her an active employee. This is very similar to the situation involving Morgan.

Niece, Plank, and Ross testified that it is common for EMS workers to work for multiple entities. It is how they survive. The credible evidence shows that Niece, following July 2, 2018, intermittently worked for Morgan on a per-needed basis. She was essentially on-call. The evidence shows she remained on Morgan's active roster, and it considered her in active employee. The ALJ finds Niece was under a Morgan contract for hire when her Elliott injury occurred.

B) Elliott knew the concurrent employment existed

The evidence shows Elliott knew Niece also had concurrent employment with Menifee and Morgan. Michael Burlington was Niece's supervisor and the Ellitott director. Niece explained that Burlington was her working partner at Menifee before he became Morgan's director. Niece testified that she and Burlington discussed her Menifee employment.

The same rings true for Niece's Morgan employment. Niece explained that Burlington was on Morgan's board. Niece testified that she and Burlington discussed her Morgan employment. Niece's testimony is unrebutted. Based on the credible evidence's totality,

> the ALJ finds Elliott knew Niece had concurrent employment.
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> **C) Combined Aww**
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> Niece's Aww from just her Elliott employment equals $506.02. This comes from the second 13-week period preceding her injury. Niece's Aww from her Elliott and Menifee employment equals $862.54. This comes from the fourth 13-week period preceding her injury.
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> Niece's Aww from her Elliott and Morgan employment equals $967.93. This comes from the third 13-week period preceding her injury. Finally, Niece's combined Aww from her Elliott, Menifee, and Morgan employment equals $1,283.18. This comes from the third 13-week period preceding her injury. The ALJ finds $1,283.18 is Niece's combined Aww.

Both Niece and Elliott County filed petitions for reconsideration. Niece argued the ALJ erred in determining her AWW was $1,283.18 after including her earnings from Menifee County and Morgan County, and the correct AWW is $1,371.44. Elliott County argued, as it does on appeal, the ALJ erred by including Niece's earnings from Menifee County and Morgan County in calculating her AWW. In the April 17, 2020 Order, the ALJ granted Niece's petition, and amended his decision to reflect her AWW was $1,371.45, with a commensurate TTD rate of $914.30. The ALJ denied Elliott County's petition, finding it amounted to no more than an impermissible re-argument of the merits of the claim.

We initially note that, as the claimant in a workers' compensation proceeding, Niece had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Niece was successful in her burden, we must determine whether substantial evidence of record

supports 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). Although a party may note evidence supporting a different outcome than 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).

KRS 342.140(5) provides, "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 or her wages from all the employers shall be considered as if earned from the employer liable for compensation." We find no merit in Elliott County's argument that the ALJ erred by including Niece's earnings from Menifee County and Morgan County in calculating her AWW. Unlike the situation in Garrard County Fiscal Court v. Camps, supra, the ALJ determined Niece was still employed by both Menifee County and Morgan County at the time of her injury.

Unlike Niece, Camps worked as a full-time paramedic for Garrard County Fiscal Court, and had ceased working for Clark County EMS at the time of her injury, hoping to obtain another position closer to her residence. The injury she sustained while working for Garrard County occurred before she obtained other employment. Therefore, the ALJ could not include concurrent earnings from Clark County in calculating her AWW because she was no longer employed there at the time of her injury. The Supreme Court noted specifically as follows:

> Thus, the wages to be considered are those earned by the employee at the moment she was injured. KRS 342.140(5) then states that "when the employee is working under concurrent contracts" and the petitioner employer knows of that second contract, the combined wages from both jobs are to be considered as earned from the liable employer. (Emphasis added). So reading these two statutes together indicates that before an employee can be considered to have concurrent employment, the employee must be working under two

> contracts for hire at the time of the injury and the employer at which the claimant was injured must be aware of the second job. Thus, the analysis provided in *Southers* is correct and is controlling in this case.
> Id. at 412.

We additionally note the holding in Wal-Mart v. Southers, 152 S.W.3d 242 (Ky. App. 2004) establishes there is no requirement for an employee to work for a concurrent employer each and every week, and employment may be very sporadic. Southers worked for Wal-Mart, and intermittently for H & R Block. She admitted her concurrent employment was primarily during tax season (January through April). Her last paycheck from H & R Block was on May 20, 1998, over three months prior to her work injury at Wal-Mart. Wal-Mart disputed the concurrent employment based on the irregularity of her hours with H & R Block. The Court noted the statute at issue, KRS 342.140(5), only requires that the claimant was working under contracts with more than one employer at the time of injury, and that the petitioner employer had knowledge of the employment.

Niece was working under contracts with Elliott County, Menifee County, and Morgan County at the time of her work injury. The uncontroverted evidence establishes Elliott County was aware of the concurrent employment with the other two entities, and that it was a common practice for employees to work for multiple ambulance services. We additionally note Niece had worked with her Elliott County supervisor at the other services, and he had accommodated her shift start times for her to arrive after her shifts ended elsewhere. There is no evidence establishing Niece ever terminated her employment with Menifee County and Morgan County. Therefore, the ALJ did not err by including her earnings from both

of those employers in calculating her AWW. While it was appropriate for the ALJ to exclude Niece's earnings from Louisville Metro and Clark Memorial in accordance with the holding in Garrard County Fiscal Court v. Camps, supra, it was equally appropriate to include her earnings from Menifee County and Morgan County in accordance with the holding in Wal-Mart v. Southers, supra.

Accordingly, the Opinion, Award & Order rendered March 31, 2020 and the April 7, 2020 Order issued by Hon. Brent E. Dye, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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