

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000868-WC

DOLPHIN POOLS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-02-67983 AND WC-03-02334

MARK MEADOWS; TIPTON TEMPORARY SERVICE;
HON. DONNA H. TERRY, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dolphin Pools petitions this Court to review a decision of the Workers' Compensation Board entered March 25, 2005. We affirm.

Mark Meadows was employed by Dolphin Pools. On September 27, 2002, he suffered a work-related back injury while in the employment of Dolphin Pools. Following a hearing, the Administrative Law Judge (ALJ) found that Meadows suffered from an 8% permanent partial disability and awarded Meadows \$48.96 per week for 425 weeks. Dolphin Pools was unsatisfied with the

award and sought review in the Workers' Compensation Board (the Board). Therein, Dolphin Pools argued that Meadows was a seasonal employee and that his average weekly wage should have been calculated under Kentucky Revised Statutes (KRS) 342.140(2). The Board rejected Dolphin Pools' argument and affirmed the ALJ's decision. This appeal follows.

Dolphin Pools' sole allegation of error is that the ALJ erred by not finding Meadows to be a seasonal employee and by failing to compute his average weekly wage under KRS 342.140(2). KRS 342.140 reads, in relevant part, 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:
 - (a) The wages were fixed by the week, the amount so fixed shall be the average weekly wage;
 - (b) The wages were fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve (12) and divided by fifty-two (52);
 - (c) The wages were fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two (52);
 - (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second,

- third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury.
- (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.
 - (f) The hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees.
- (2) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury.

The record indicates that Meadows worked for Dolphin Pools from May 2002 until his injury in September 2002. As Meadows' injury occurred in September, he was only employed by Dolphin Pools during the summer and early fall. He was not employed by Dolphin Pools during the winter months, and there is

no evidence as to Dolphin Pools' specific work practices during those winter months. Meadows did testify concerning his past employment with Hampco Pools. In his prior employment with Hampco Pools, he stated that he worked throughout the year except the months of January and February. During these months, he generally drew unemployment benefits but did work when the temperature rose above freezing.

Upon the issue of whether Meadows was a seasonal employee, the ALJ particularly found:

However, in a case more factually similar to the instant situation, in Traveler's [sic] Insurance Company v. Duvall, 884 S.W.2d 665 (Ky. 1994), an employee who worked for a paving and construction company was found not to be a seasonal worker. While the paving company's business was affected by the weather, work was also available during the winter months, including equipment maintenance and filling potholes with cold mix. In that case, the Supreme Court held that the factors to be considered by an ALJ in each case must, by necessity, vary from case to case because each situation involves unique circumstances.

In this case, there is no information regarding Dolphin Pools' practice of providing year-round work. Mr. Meadows' previous employment at Hampco, another employer in the same industry, established a pattern that employees were sometimes called to work on days above freezing during January and February, but otherwise drew unemployment benefits for those two months. Because Mr. Meadows was not hired by Dolphin until May, 2002 and there are no records of wages for similar employees, the extent of

work which was normally performed at Dolphin Pools during January and February of each year cannot be ascertained. However, even if only sporadic work is available during the coldest months in the swimming pool installation and maintenance industry, employment cannot be considered "exclusively seasonal" and wages earned by its employees should be calculated pursuant to KRS 342.140(1). After consideration of the unique factors in this case, the Administrative Law Judge finds that calculation under KRS 342.140(1) provides the method most likely to give a realistic estimate of Mr. Meadows' earning capacity. . . .

In essence, the ALJ found that during the winter months Meadows' employment was best characterized as sporadic but that the sporadic nature of his employment did not transform it into exclusively seasonal employment. In so finding, the ALJ believed Travelers Insurance Company v. Duvall, 884 S.W.2d 665 (Ky. 1994) to be dispositive. We agree with the ALJ's analysis and, likewise, believe that the sporadic nature of Meadows' employment during the winter months did not transform the employment into seasonal employment. Accordingly, we are of the opinion that Meadows was not a seasonal employee within the meaning of KRS 342.140(2) and the ALJ properly calculated Meadows' average weekly wage under KRS 342.140(1).

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James R. Carpenter
BAKER, KRIZ, JENKINS &
PREWITT, P.S.C.
Lexington, Kentucky

BRIEF FOR APPELLEE MARK
MEADOWS:

Zaring P. Robertson
MORGAN, MADDEN, BRASHEAR &
COLLINS
Richmond, Kentucky

BRIEF FOR APPELLEE TIPTON
TEMPORARY SERVICE:

Scott M.B. Brown
JONES, WALTERS, TURNER &
SHELTON, PLLC
Lexington, Kentucky