

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 6, 2013

CLAIM NO. 201286011

MICHAEL E. POTTER

PETITIONER

VS.

APPEAL FROM HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

L & S CONSTRUCTION
and J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Michael E. Potter ("Potter") seeks review of the decision rendered June 19, 2013, by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for an injury he sustained on May 2, 2012 while

working for L & S Construction ("L & S"), but denying his request for the assessment of a 30% safety penalty pursuant to KRS 342.165(1). Potter also appeals from the order on reconsideration issued July 22, 2013.

On appeal, Potter argues the CALJ erred in finding he has the ability to perform his former work as a carpenter, and in finding he did not sustain work-related cervical or lumbar spine injuries in the May 2, 2012 accident. Potter also argues the CALJ erred in failing to award increased benefits for a safety violation pursuant to KRS 342.165(1). Because we determine the CALJ acted within his discretion in finding the alleged cervical and lumbar injuries noncompensable, in finding he retains the capacity to return to work as a carpenter, and in finding the assessment of a safety penalty against L & S is not compelled, we affirm.

Potter filed a Form 101 on November 30, 2012 alleging right arm, right wrist, neck, low back and right leg injuries when he tripped over rebar while pouring concrete on May 2, 2012. It is undisputed he fell at the worksite on the date alleged, and sustained a right wrist fracture. It is likewise undisputed he was entitled to an award of TTD benefits, PPD benefits and medical benefits for that injury.

Potter testified by deposition on February 25, 2013, and at the hearing held April 24, 2013. Potter did not assert L & S committed a safety infraction until after he testified by deposition. L & S also introduced the November 7, 1995 deposition transcript from a previous workers' compensation claim. Potter resides in West Paducah, Kentucky, and has a GED. He has also taken some college courses, including a real estate class. He testified he has spent most of his adult life working as a carpenter or a contractor. He also worked for a period of time as a route salesman for a beer distributor in Florida.

Potter sustained a low back injury while working in Florida from lifting a keg of beer. He was off work approximately three years, and settled a workers' compensation claim in Florida for \$22,000.00. He did not return to work for the beer distributor, and acknowledged he was restricted from heavy lifting. Potter sustained a neck injury in 1995 while working for a different contractor. He filed a workers' compensation claim, and treated with Dr. Monte Rommelman, who imposed some restrictions.

Potter testified he was using a trowel, smoothing concrete on May 2, 2012. He was in a hurry because a truck was preparing to dump a second load of concrete. He

tripped over rebar, causing him to fall onto his right side. He admitted he was not impaled on the rebar.

Potter stated Chris Potter (his nephew and L & S's owner) was present at the time of the accident. Potter's wife took him to the emergency room. Dr. Brian Kern subsequently performed surgery, and Potter was placed in a cast for six to eight weeks. He then had physical therapy for his right wrist for six weeks. Potter stated his neck and back began bothering him as his wrist began to heal.

Potter has not attempted to return to work as a carpenter. He testified he has daily pain in his back going into both legs, mostly on the right. He also complained of ongoing neck pain radiating into his right shoulder and arm. Potter attached a photocopy of an alleged photograph of the worksite, which the CALJ noted was blurry. He also attached a copy of 29 CFR 1926.701(c) which requires the guarding of reinforcing steel "to eliminate the hazard of impalement."

On November 7, 1995, Potter testified regarding the previous low back injury which caused him to miss three years of work. He also testified regarding a neck injury he sustained when a sheetrock panel stuck him in the neck. He subsequently missed six weeks of work, and continued to

experience dizziness, headaches and neck pain. He also testified regarding ongoing chiropractic treatment.

Chris Potter also testified at the hearing. He and his wife own L & S. L & S is a residential and light commercial construction company which employs eleven to twelve workers. He stated that prior to the accident his uncle, Potter, missed work a few days each month due to complaints of neck and back pain. He observed Potter's fall, but did not see him trip over anything. He stated rebar was present, and it was bent over so it would not have to be capped.

In support of the Form 101, Potter filed Dr. Kern's October 16, 2012 report. Dr. Kern, an orthopedic surgeon from Paducah, Kentucky, stated Potter sustained a right distal radius fracture of the wrist when he fell at work on May 2, 2012. Dr. Kern treated the injury with open reduction and internal fixation. He assessed a 1% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides"). Dr. Kern indicated Potter would have no restrictions, but may experience some wrist stiffness.

Potter also filed the October 19, 2012 report of Dr. Brandon Strenge, an orthopedic surgeon from Paducah,

Kentucky. Dr. Strenge began treating Potter on June 19, 2012. Potter reported falling after tripping over rebar at work, injuring his neck, back and right wrist. Potter reported he had no previous problems with the neck, back or wrist, so Dr. Strenge stated the current symptoms were due to the work injury. Dr. Strenge assessed a 5% impairment rating based upon the cervical complaints, and a 5% impairment rating based upon the lumbar complaints, both based upon the AMA Guides. Dr. Strenge stated Potter is unable to return to his usual employment, and noted he treats with a chiropractor, as well as with anti-inflammatory medication, pain medication and muscle relaxers.

L & S filed Dr. Thomas O'Brien's report. Dr. O'Brien is an orthopedic surgeon, who evaluated Potter on September 19, 2012. Dr. O'Brien diagnosed a closed intraarticular right distal radius fracture due to the May 2, 2012 work incident, which was treated by Dr. Kern with open reduction internal fixation. Dr. O'Brien opined Potter did not sustain cervical or lumbar injuries due to the work incident. He assessed a 1% impairment rating pursuant to the AMA Guides, for the right wrist injury, with no restrictions. He stated resuming normal activity would reduce any residual stiffness. He specifically found

Potter did not have any aggravation, acceleration or precipitation of his pre-existing unrelated cervical and lumbar degenerative disk disease. Dr. O'Brien stated no additional treatment is necessary, and he should discontinue taking narcotic pain medication. He stated Potter had reached maximum medical improvement on September 19, 2012.

L & S filed the July 10, 2012 lumbar MRI report of Dr. Amy Oberhelman. Dr. Oberhelman noted multi-level degenerative changes primarily at L4-L5. She noted congenital shortening of the pedicles. L & S also filed the Lourdes Hospital drug screen report dated May 2, 2012 which was positive for Oxazepam, Nrdiazepam, and Carboxy THC. Potter testified he did not recall taking any medication prior to the accident, and was not intoxicated at the time of the fall. L & S also filed the June 27, 1994 hospital record from Lourdes Hospital indicating Potter's complaints of general weakness and low back pain which had persisted for several months.

A benefit review conference ("BRC") was held on April 10, 2013. The BRC order and memorandum reflects the contested issues as benefits per KRS 342.730; work-relatedness/causation; injury as defined; additional TTD benefits; and a safety violation pursuant to KRS 342.165.

In his decision rendered June 29, 2013, the CALJ determined Potter did not sustain either cervical or lumbar injuries due to the work accident, and dismissed his claim for those conditions, based in large part upon Dr. O'Brien's report. He found Potter sustained a right wrist injury, and awarded additional TTD benefits through October 16, 2012, based upon Dr. Kern's report. He awarded PPD benefits based upon the 1% impairment rating assessed both by Drs. Kern and O'Brien.

Potter has not returned to work. Regarding whether he retains the ability to do so, the CALJ found as follows:

Concerning Plaintiff's wrist injury, Dr. Kern, Plaintiff's treating orthopedic surgeon, released him to return to work without restrictions on October 16, 2012. Defendant Employer's evaluating orthopedic surgeon, Dr. O'Brien, noted on September 19, 2012 that Plaintiff could return to work with no restrictions. The only evidence that could support a finding that Plaintiff's wrist injury has resulted in him no longer retaining the physical capacity to return to the type of work he was performing at the time of the injury is Plaintiff's testimony.

Plaintiff testified that he can hardly use his right hand and, as a carpenter, is unable to perform his usual work as [sic] result of the right wrist injury. The CALJ is not convinced that Plaintiff is telling the truth concerning the condition of his right

wrist. While it is always distasteful to challenge an individual's credibility, that is the function of the trier of fact. In this instance, the trier of fact is not convinced that Plaintiff has the extent of pain and dysfunction in his right hand, wrist and arm of which he complains. Based on the medical evidence both from Dr. Kern and Dr. O'Brien the CALJ finds, concerning the injury to the right wrist, Plaintiff retains the physical capacity [sic] were to return to the type of work he was performing at the time of his injury.

Regarding Potter's request for an enhancement of his award pursuant to KRS 342.165(1) for L & S's violation of a safety penalty, the CALJ found as follows:

Finally, Plaintiff alleges entitlement to an increase in his occupational disability benefits awarded herein pursuant to KRS 342.165. Once again, Plaintiff's testimony has failed to convince the trier [sic] fact that his workers compensation injury to his wrist was caused in any degree by an intentional failure of Defendant Employer to comply with a specific statute or lawful administrative regulation relating to safety. Chris Potter testified that Plaintiff told him that he had simply fallen on flat ground. The CALJ found Chris Potter's testimony to be very credible. The CALJ is further unconvinced by Plaintiff's testimony or his "photograph" there was a safety violation which contributed to his fall.

Potter filed a petition for reconsideration on July 3, 2013, essentially rearguing the merits of his

claim. On July 22, 2013, the CALJ entered an order denying the petition for reconsideration.

Potter, 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 he was unsuccessful in his burden regarding his alleged cervical and lumbar injuries, enhancement of his award by the three multiplier pursuant to KRS 342.730(1)(c)1, and the assessment of a safety penalty, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a contrary result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

"Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same conclusion as an ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As fact-finder, an ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v.

General Refractories Co., 581 S.W.2d 10 (Ky. 1979). Where evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

An ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of an ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Because we determine the CALJ's determinations regarding the cervical and lumbar injuries, as well as the application of the three multiplier are supported by substantial evidence, and no contrary result is compelled, the CALJ's determinations are affirmed. Specifically, the opinions of Drs. O'Brien and Kern constitute substantial evidence of which the CALJ is free to rely upon.

We note KRS 342.165 states as follows:

If an accident is **caused in any degree by the intentional failure of the employer to comply with any specific statute** or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the executive director or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter, shall be decreased by fifteen percent (15%) in the amount of each payment. (Emphasis added)

Potter argues L & S violated a specific safety regulation, 29 CFR 1926.701(c), and was therefore liable for a 30% increase in benefits pursuant to KRS 342.165 for failing to place guards or caps on exposed rebar. Chris Potter testified no guarding was required because the rebar was bent over, thereby eliminating the risk of impalement. Potter admitted he fell, fractured his wrist and was not impaled. Therefore, it is apparent the risk identified in the regulation had no relationship to Potter's injury.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who

intentionally fail to comply with known safety regulations. Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation caused or contributed to his injury. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). The injury must relate to the violation of the safety rule. As the Kentucky Supreme Court noted, the enhancement applies if the violation "in any degree" causes a work-related accident. AIG/AIU Insurance Co. v. South Akers Mining Co., LLC, 192 S.W.3d 687 (Ky. 2006). Here, Potter points to a safety regulation guarding against the risk of impalement. He was not impaled. The CALJ determined Potter did not prove his wrist injury was caused by an intentional failure by L & S to comply with a specific statute or lawful administrative regulation. It was his prerogative to do so. Because a contrary result is not compelled, the CALJ's determination is affirmed.

Accordingly, the decision rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge, on June

19, 2013, as well as the Order ruling on the petition for reconsideration entered July 22, 2013, are hereby **AFFIRMED**.

ALL CONCUR.

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