

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 3, 2014

CLAIM NO. 201183831

EMPLOYMENT SOLUTIONS, INC.

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

CHARLES BREEZE
MCKINNLEY MORGAN
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * *

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

ALVEY, Chairman. Employment Solutions, Inc. ("Employment Solutions") appeals from the July 3, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), awarding Charles Breeze ("Breeze") temporary total disability ("TTD") benefits, permanent partial

disability ("PPD") benefits, and medical benefits. Employment Solutions also appeals from the August 2, 2013 Order on Reconsideration.

On appeal, Employment Solutions argues the ALJ erred in relying upon the impairment rating assessed by Dr. Robert Johnson. Employment Solutions next argues the ALJ erred in assessing a safety penalty pursuant to KRS 342.165. Finally, Employment Solutions argues the ALJ erred in approving the attorney fee for Breeze's attorney prior to the finality of his decision. Because the ALJ did not err in relying upon the impairment rating assessed by Dr. Johnson or in approving the attorney fee, we affirm in part. Regarding the assessment of a safety penalty, we determine the ALJ failed to provide an analysis regarding the basis for his assessment, and therefore vacate in part, and remand.

Breeze filed a Form 101 on November 5, 2012 alleging on June 21, 2011, he injured his right hand when the board he was cutting on a table saw kicked, causing his hand to go into the blade. He asserted a safety penalty was applicable because the blade guard was not working properly, and he had reported it on numerous occasions.

Breeze testified by deposition on February 18, 2013. He also testified at hearing held on May 3, 2013,

2013. Breeze, a Lexington resident, is a high school graduate. He later received training from a previous employer in voice data and fiber optic cable. His employment history includes working as an electrician, and as a field manager for a fiber optic cable company. He began working as an instructor for Employment Solutions in 2009, and since his work injury has been promoted to the lead instructor in building trades technology.

On June 21, 2011, Breeze was assisting a student with cutting a board on a table saw. When the saw blade encountered a knot in the wood, the board shifted causing Breeze's right hand to go into the blade. Breeze testified at his deposition the saw was old, and he had asked for it to be replaced. The saw had a sticker bearing the date of 2003. However, he also stated the guards were in proper working order. He stated the motor bracket was broken which caused some movement, but in reference to the saw and the guards he stated, "I'd say it worked properly." At the hearing, Breeze testified he felt the saw was unsafe to operate because the operating switch had been replaced, broken motor brackets allowed too much blade movement, and the guards did not function properly. He stated the lead instructor did not wish to replace the saw. Since the accident, a new saw has been purchased which has additional

safety features, including a moisture sensor. He stated all saws except the ones with the new moisture detector are unsafe. Breeze allowed students to operate the saw despite his safety concerns. It is noted Breeze has kept the allegedly defective saw in his shed.

Breeze underwent right hand surgery by Dr. Vikas Dhawan, at the UK Healthcare Department of Orthopedic Surgery. He was off work from the date of the accident until September 17, 2011. He returned to his regular job, and was later promoted. He last saw Dr. Dhawan for treatment in January 2012, and takes Meloxicam for an unrelated knee injury. He testified he has difficulty holding a drill, hammer or screwdriver.

Rick Christman ("Christman"), the Chief Executive Officer for Employment Solutions, testified on April 30, 2013. Christman stated Employment Solutions is a non-profit organization. He stated Breeze is the instructor for the building trades' technology program. He disputed Breeze's claim the previous lead instructor did not desire to replace the saw. He stated the saw was purchased in 2003, and was not used frequently. He stated the saw has been replaced with one which has a moisture sensor.

In support of the Form 101, Breeze filed several office notes and the operative report of Dr. Dhawan. On

June 24, 2011, Dr. Dhawan performed surgery which included stabilization of the metacarpophalangeal and proximal phalangeal joints due to the finger laceration. He first saw Breeze on June 22, 2011, and last treated him on January 11, 2012. He referred Breeze to Dr. Timothy S. Prince for "MMI ratings".

Breeze also filed Dr. Johnson's Form 107-I report. Dr. Johnson evaluated Breeze on December 6, 2012. He noted complaints of lack of bending of the right middle, ring and little fingers. He also noted complaints of tingling and numbness in the dorsal part of the middle finger. Breeze explained he primarily uses the left hand, and uses the right as a helper. Breeze stated the finger lacerations to the dorsum of the right hand caused stiffness, pain and loss of grip strength. Dr. Johnson assessed a 23% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and opined Breeze retains the physical capacity to perform the job he performed at the time of the injury.

Employment Solutions filed Dr. Prince's March 26, 2012 report. Dr. Prince stated Breeze sustained an injury with extensive trauma to the third through fifth fingers of his dominant hand, particularly with fracture and tendon injury to the fourth finger. He assessed a 12% impairment

rating based upon the AMA Guides. Regarding restrictions, Dr. Prince opined Breeze would have difficulty with grip and repetitive forceful use of the fingers of the right hand.

In a subsequent report dated February 26, 2013, Dr. Prince reiterated the 12% impairment rating. He stated he had reviewed Dr. Johnson's report. He noted he and Dr. Johnson had used different methods in arriving at their respective impairment ratings. Dr. Prince noted why he did not include grip strength in his calculations, but stopped short of stating Dr. Johnson's methodology is incorrect.

A benefit review conference ("BRC") was held on April 19, 2013. The issues preserved in the BRC order and memorandum were benefits per KRS 342.730 (including application of multipliers), appropriate TTD rate, and a safety penalty per KRS 342.165.

The ALJ issued an opinion, award and order on July 3, 2013, awarding PPD benefits based upon the 23% impairment rating assessed by Dr. Johnson. The ALJ also conducted an analysis pursuant to Fawbush v. Guinn, 103 S.W.3d 5 (Ky. 2003), and declined to award the three multiplier pursuant to KRS 342.730(1)(c)1.

Regarding the assessment of a safety penalty, the ALJ stated he had not been directed to any specific violation of safety rule or regulation. Rather, he relied

upon the "general duties" requirements of KRS 338.031(1)(a). He noted pursuant to that statute, an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

While the ALJ noted Breeze had previously complained to his supervisor regarding the saw, the complaints appear to have been made regarding the lack of the most current safety features. The ALJ acknowledged Christman testified money was available for equipment replacement and upgrade if necessary. He noted several items of equipment had been replaced prior to the accident, and more afterward, including the table saw.

Employment Solutions filed a petition for reconsideration on July 12, 2013, arguing the ALJ erred in awarding PPD benefits based upon the 23% impairment rating assessed by Dr. Johnson, and in assessing a safety penalty. The petition for reconsideration was denied by order entered July 22, 2013.

We first address Employment Solutions' argument the ALJ erred in basing his opinion on the 23% impairment rating assessed by Dr. Johnson. Breeze, 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 successful in that burden, the question on appeal is whether there was 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).

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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Dr. Johnson was not cross-examined regarding his assessment of impairment rating. Although Dr. Prince advised he did not include the loss of grip strength in his assessment of impairment, he outlined instances when the inclusion of such loss may be appropriate. He stopped short of stating Dr. Johnson's assessment of impairment may be inappropriate. Dr. Prince's assessment of impairment is merely contrary evidence upon which the ALJ could have relied. Here, Dr. Johnson's report constitutes substantial evidence upon which the ALJ could and did rely, and therefore his determination based upon a 23% impairment rating is affirmed.

In assessing a safety penalty pursuant to KRS 342.165, the ALJ relied upon the general duty clause pursuant to KRS 338.031 in determining Employment Solutions had committed a safety violation subjecting it to a penalty. Although not argued before, or relied upon by the ALJ, OSHA requirements for guarding are set forth in 29 CFR 1926.304.

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. See 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 regulations. See Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

Application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Second, evidence of "intent" to violate a specific safety provision must also be present.

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may be grounds for assessment of the safety penalty in the absence of a specific regulation or statute addressing the matter. Apex Mining v. Blankenship, supra; Brusman v. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). KRS 338.031(1)(a) requires the employer "to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm" to the employees. Two cases in which the court discussed the violation of KRS 338.031(1)(a) for the purposes of determining the applicability of KRS 342.165(1) are discussed below.

In Apex Mining, supra, the injured worker was required to operate a grossly defective piece of heavy equipment which had a throttle that was wired open, malfunctioning brakes, and a history of causing prior accidents. The Supreme Court found the egregious behavior of the employer justified imposition of the safety penalty in the absence of a specific statute or regulation. Regarding "intent" to violate KRS 338.031(1)(a), the Supreme Court of Kentucky opined as follows:

After reviewing the evidence, we reject the employer's assertions that the ALJ misunderstood the evidence and that the ALJ's findings of employer intent and causation were not supported by substantial evidence which conformed to the requirements of KRS 342.165. As noted by the Court of Appeals, there was evidence that supervisory personnel, including claimant's foreman, were aware of the defective condition of the grader. Furthermore, KRS 338.031, a part of the Kentucky Occupational Safety and Health Act (KOSHA), was enacted in 1972, precluding an argument that the employer was unaware of its requirements. Under those circumstances, we agree that substantial evidence supported the ALJ's inference that the employer's violation of KRS 338.031 was intentional.

Id. at 228.

However, in Cummins, supra, the Supreme Court stated not every violation of KRS 338.031(1)(a) required

the imposition of a penalty for the purposes of KRS 342.165. In that case, the claimant's work site where he taught refrigeration, air conditioning, and heating at an adult vocational school was not properly ventilated. The Supreme Court agreed with the Board that the employer's action was not an obvious and egregious violation of basic safety concepts such as would overcome the general language of KRS 338.031. The court distinguished the facts from Apex Mining, supra, stating as follows:

The decision in Blankenship clearly was based on the egregious nature of the particular violation of KRS 338.031(1)(a) which had occurred. Nowhere did we state or imply that every violation of KRS 338.031(1)(a) constituted the violation of a specific safety statute for the purposes of KRS 342.165. What we did determine was that where a worker was required to operate a piece of grossly defective equipment, the condition of which created a safety hazard which was patently obvious, even to a lay person, which had caused prior accidents, and which was known to the employer for some time but was not corrected, it was not necessary for a statute or regulation to specifically prohibit the equipment from being operated in that condition. KRS 338.031(1)(a) would suffice.

Cummins, supra, at 836.

As articulated in Cummins, supra, not "every violation of KRS 338.031(1)(a) constitute[s] the violation

of a specific safety statute for the purposes of KRS 342.165." Id. The facts in this case do not rise to the level of the standard set in Apex Mining, supra, which involved an egregious safety hazard- a grader, a heavy piece of equipment, with a defective decelerator, defective brakes, and a throttle that was tied open. With respect to the grader, there was a history of other employees having "to crash the defective machine into other equipment in order to stop it." Id. at 229. The Supreme Court determined the egregious scenario in Apex Mining, supra, was within the protection of KRS 338.031(1)(a) against "recognized hazards," as the safety hazard was not only egregious on its face but the employer knew about the hazard.

Here the ALJ relied upon Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000) in assessing the safety penalty. In that case Offutt, a police trainee, sustained a heat stroke during recruit training. Each training officer involved recognized high heat creates a potential hazard for individuals engage in physical activity. The officers, noting police officers must be able to function under all conditions, agreed to proceed with the training despite the high heat.

Regarding assessment of the safety penalty, the ALJ specifically found as follows:

The final issue in this claim is whether or not Plaintiff is entitled to a penalty enhancement pursuant to KRS 342.165. The ALJ has carefully considered the positions of both parties. The ALJ has not been directed to any violation of a specific rule or regulation and the ALJ knows of none. However, the ALJ must further consider whether or not a violation has occurred under the "general duties" requirements of KRS 338.031(1)(a). Under the general duties statute, an employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Mr. Breeze had complained to his supervisor on previous occasions that the table saw on which he was injured was unsafe and needed to be replaced. His complaints were either ignored or considered but rejected. Mr. Christman testified that he was unaware of any problems or defects in the saw. He testified that money was available for replacement of the saw and he assumed that Mr. Ison, the immediate supervisor, would have purchased a new saw if he had found merit in Plaintiff's complaints. Subsequent to Mr. Breeze's injury, the saw was replaced with a new model that contained a device that causes the saw to stop or shut down if moisture activates a sensor. Obviously, the new saw is a later model and contains a safety device not contained on the saw used by Mr. Breeze at the time in question. However, the saw was only 7

years old, according to Mr. Christman and had not been over-used. The ALJ is faced with the decision of whether or not the availability of a newer and safer model table saw is tantamount to an unsafe or hazardous environment or place of employment. Is an employer required to promptly purchase a newer model that contains new or additional safety devices? The presence of a knot or warp in a piece of wood will inevitably cause a "kicking back" effect. The newer model of the table saw that has now been purchased by Defendant-Employer contains a moisture sensor that causes the machine to shut down if it comes into contact with a part of the body. Again, the question is whether or not the employer's failure to purchase a newer and safer model, in and of itself, constitutes a violation of KRS 338.031, and thus, a violation of KRS 342.165. See Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996).

In his deposition, the Claimant acknowledged that the table saw on which he was injured did contain a guard and that it was in place and functioning at the time of his injury. (pp. 21-22 Breeze deposition) Mr. Breeze even acknowledged (at p. 22) that the guard was working properly at the time of his injury. However, he further testified that the machine was "very old" and that he had mentioned to Brad Ison that the saw needed to be replaced. Mr. Breeze testified that in words or in substance he made a statement such as, "Hey, Brad, this saw's kind of old. I think we might check into replacing it."

In the matter of Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky App. 2000), the court adopted a four-pronged test that was

first enunciated in *Nelson Tree Services, Inc. v. Occupational Safety & Health Review Commission*, 60 F.3d 1207 (6th Cir. 1995). The test for violation of the general duty clause is as follows:

- (1) A condition or activity in the work place presented a hazard to employees;
- (2) The cited employer or employer's industry recognized the hazard;
- (3) The hazard was likely to cause death or serious physical harm; and
- (4) A feasible means existed to eliminate or materially reduce the hazard.

In the case at hand, the use of table saws in close proximity with the body parts of employees is an obvious hazard. The fact that guards and other safety devices are utilized on machines such as table saws is recognition by the employer's industry of the hazard presented. The hazard was likely to cause death or serious physical harm. Finally, a feasible means existed to eliminate or materially reduce the hazard. A newer and safer model table saw was available on the market. Considering the Defendant-Employer is a training facility for students, and further considering that Plaintiff had warned his supervisor that a safer machine should be made available to the employees, as well as the instructor, the ALJ finds that violation of the statute has occurred and that Plaintiff is entitled to an enhancement of 30% of the benefits awarded to him. The Defendant-Employer failed to furnish the Plaintiff with a place of employment free from recognized hazards

that were likely to and did cause serious physical harm to Mr. Breeze.

Because Breeze's testimony is equivocal, it is necessary for the ALJ to identify what evidence he relied upon in making his determination. Breeze's primary complaint is newer technology with advanced safety features existed on the market at the time of the accident. No evidence was produced as to whether the equipment lacked any safety features violative of any established safety rule or regulation. At his deposition, Breeze testified the guard was functioning properly, although at the hearing held two months later, he testified it did not. Because the testimony relied upon by the ALJ in reaching his conclusion is inconsistent, it is necessary for him to identify the portions of Breeze's testimony he relied upon in making his determination. It is unclear whether the ALJ believed Employment Solutions' failure to purchase a safer saw or its failure to repair the saw after receiving repeated warnings from Breeze was the basis for the imposition of the safety penalty.

This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision

must adequately set forth the basic facts upon which the ultimate conclusions were drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). However, the parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Accordingly, the ALJ's determination to impose a 30% safety penalty pursuant to KRS 342.165 is **VACATED**, and the claim is **REMANDED** for entry of an amended opinion, order, and award consistent with the views set forth herein.

Finally, Employment Solutions argues the ALJ erred in awarding an attorney fee to Breeze's counsel when the opinion was not yet final. First we note Employment Solutions has no standing to challenge or question the award of an attorney fee absent unusual circumstances. Peabody Coal Co. v. Goforth, 857 S.W.2d 167 (Ky. 1993). Here, the ALJ may review the award of attorney fees for possible amendment to accurately reflect what is proper

based upon the actual award. We find no error in the ALJ's award, and he certainly may revisit the attorney fee award on remand.

Accordingly, the January 2, 2013 Opinion, Order and Award rendered by Hon. Edward D. Hays, Administrative Law Judge, and the August 2, 2013 Order on Reconsideration are **AFFIRMED IN PART, REVERSED IN PART AND REMANDED** for the reasons set forth above.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, DISSENTS AND WILL NOT FURNISH A SEPARATE OPINION.

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