Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 1, 2013

CLAIM NO. 201101471

JEREMY LEISTNER — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

TITAN CONTACTORS — RESPONDENT/ CROSS-PETITIONER

and

HON. CHRIS DAVIS,
ADMIINSTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Jeremy Leistner ("Leistner") seeks review of the decision rendered May 14, 2013, by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability

("PPD") benefits, and medical benefits for an injury he sustained on October 18, 2010 while working for Titan Contracting ("Titan"), but denying his request for the assessment of a 30% safety penalty pursuant to KRS 342.165(1). Leistner also appeals from the order on reconsideration issued July 2, 2013. Titan also seeks review of the May 14, 2013 decision.

On appeal, Leistner argues the ALJ erred by failing to award increased benefits for a safety violation pursuant to KRS 342.165(1). Leistner next argues the ALJ erred in concluding an OSHA, or other "disinterested" investigation of a safety violation must be performed prior to the assessment of a safety penalty pursuant to KRS 342.165. Finally, Leistner argues the ALJ apparently did not review the entirety of its evidence when he stated no violation of a specific safety statute had been filed. Conversely, Titan argues the ALJ erred in not assessing a 15% safety penalty against Leistner pursuant to KRS 342.165. Because we determine the ALJ acted within his discretion, and the assessment of a safety penalty against either Titan or Leistner is not compelled, we affirm.

Leistner filed a Form 101 on November 15, 2011 alleging left ankle injuries. It is undisputed he fell into a hole while working on October 18, 2010, and

sustained a left ankle injury which later required surgery. It is likewise undisputed he was entitled to an award of TTD benefits, PPD benefits and medical benefits. Since the medical treatment and benefit awards are not in dispute, we will not discuss them further.

Leistner testified by deposition on January 26, 2012, and again at the hearing held April 8, 2013. He was born on September 8, 1975, and is a resident of Hawesville, Kentucky. He completed the eighth grade, later obtained a GED, and is an ASME certified welder. His work experience includes working as an automobile repairman, sawyer and welder/fitter. He worked for Titan for three years as a tube welder/boilermaker.

On October 18, 2010, Leistner was working at a power plant in Hancock County, Kentucky. The plant was undergoing an outage, or partial shutdown for routine maintenance and repair, which Titan had been hired to effectuate. Leistner and two co-workers had crawled into a dimly lit duct to assess what tools would be required to perform the repairs. A halogen lamp had been placed at the end of the duct. When Leistner crawled out of the duct, he stated he was temporarily blinded, and crawled past the light. He took a different path than had been utilized to enter the duct. He then stood, attempting to walk forward

in the dark, and fell into a vent shaft. Leistner admitted he had a flashlight, but did not use it. He stated safety guards had apparently been in place at one time, but had been cut. He estimated he fell approximately ten feet, and was caught by a support. His left foot was injured in the fall. He was assisted from the hole by a co-worker, Allen Chinn ("Chinn").

Subsequent to the fall, Leistner was taken to Convenient Care for treatment. He subsequently returned to work, and spent the rest of the shift sitting on a bucket. He continued to work for Titan, and later became employed by Precision Welding, where he is still employed. Leistner alleged a safety violation by Titan for failing to perform a proper inspection of the work area. He stated at the time of the accident, Melody (last name unknown) watched the vent hole where the work was to be performed, and tracked who came and went from the work area.

James Randolph Gray ("Gray"), president and owner of Grayhawk Safety & Health Consulting, testified by deposition on March 19, 2013. Gray stated the accident occurred because the floor hole was left open from a previous outage repair. He stated a pre-site audit or survey should have been performed. He stated it was Titan's responsibility to perform an inspection, and

identify and mitigate hazards. Gray did not know who placed the halogen light at the end of the duct, or whether Titan required employees to carry flashlights. He did not know all entities or contractors located at the site. He cited to 29 CFR 1926.501-503, and 29 CFR 1926.56(a) as specific statutes which were violated.

Chinn testified by deposition on November 9, 2012. He is a journeyman boiler maker/master welder, who was working with Leistner at the time of the accident. He confirmed Titan was performing maintenance/repair work for a power plant at the time of the accident, which consisted of repairing cracks, patching holes and replacing metal. Prior to Titan's arrival, power plant personnel had determined where repairs were needed. The halogen light was in place prior to the arrival of Titan personnel. Prior to entering the vent, Russ Peters, the company safety man, determined no poisonous gases were present. Chinn stated the hole where Leistner fell was a few feet behind the halogen light, and could have been seen with the use of a flashlight. He also stated the hole would have been missed if Leistner had followed the cord they had used as a guide to enter the duct.

Jerry Maggard, Sr. ("Maggard") testified at the hearing. He is the vice president of corporate safety for

Horne Industrial Services, and oversees safety for Titan. At the time of the accident, he was the corporate safety manager. Titan was performing maintenance and repair during a planned outage at a power plant in October, 2010. Maggard reviewed blueprints of the work area and determined the accident could not have occurred as described by Leistner. He noted the opening where Leistner fell was six to eight feet behind the light. He stated the power plant was responsible for identifying and eradicating hazards. He also testified there was no reason for Leistner to be near the hole because it was outside of their work area.

A Benefit Review Conference ("BRC") was held on April 8, 2013, immediately prior to the hearing. The BRC order and memorandum reflects the issues preserved were benefits per KRS 343.730, safety penalty pursuant to KRS 342.165, and entitlement to vocational rehabilitation benefits.

In its brief to the ALJ, Titan argued when Leistner left the vent, he used a different route, and fell in the hole because he failed to use his flashlight. Leistner argued a safety penalty should be assessed against Titan, citing to Gibbs Automatic Molding v. Bullock, 438 S.W.2d 793 (Ky. 1969); Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996); AIG/AIU Ins. Co. v. South Akers

Mining Co., 192 S.W.3d 687 (Ky. 2006); Chaney v. Dags Branch, 244 S.W.3d 95 (Ky. 2008); Abel Verdon Const. v. Rivera, 348 S.W.3d 749 (Ky. 2011); and Hornback v. Hardin Memorial Hosp., --- S.W.3d ----, 2013 WL 2285206 (Ky., May 23, 2013).

In his decision rendered May 14, 2013, the ALJ found as follows:

> In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.
>
> The undersigned recognizes that the safety violation was well litigated and argued. Regardless, no record of any OSHA violation was filed and no specific safety statute or regulation, or any statute or regulation, was filed regarding the safety violation. Both attorneys are highly skilled and, as noted, paid particular attention to this issue, yet could not offer a stronger claim via actual statutes and governmental or at least disinterested investigations. This omission is telling.
>
> Of the two the Defendant's claim is weaker; the undersigned simply cannot understand how using a flashlight would have diminished the Plaintiff's light blindness and prevented his fall.
>
> As for the Plaintiff's claim his arguments seems to hinge on an argument of a generally unsafe condition. However, the overwhelming weight of the

> evidence herein indicates that the unsafe condition, if any, was not created by the employer but by the Big River Power Plant. The inspection being conducted by the Plaintiff appears to be the first time any employee of his employer was in this particular duct work, at least during this job period.
>
> In short simply because something is seen, in layman's terms, as "unsafe" does not mean it arises to the point of a workers' compensation safety violation. I can find no evidence that the hole, and resulting fall, was any kind of workers' compensation safety violation.

Leistner filed a petition for reconsideration on May 24, 2013, alleging numerous errors by the ALJ. He first argued the ALJ was mistaken when he opined there was no specific allegation or violation of any safety statute or regulation in the record. He also argued the ALJ erred in finding a safety penalty could not be assessed because no OSHA citation had been levied. He also argued the ALJ erred because there is no requirement for a finding the employer created the hazard. Leistner next argued the ALJ erred in not finding a safety violation due to the insufficiency of lighting, and because there was a failure of a "competent person" to conduct a walk-through inspection. In an amended petition for reconsideration, Leistner argued the ALJ was required to perform the four-

part test set forth in Lexington–Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000).

In his order overruling the petitions for reconsideration entered July 2, 2013, the ALJ stated as follows:

> 1. The Plaintiff states, again, that eight different OSHA violations occurred. Yet he filed no evidence of OSHA having determined that those violations occurred, only his own opinion and the opinion of his paid and retained expert. The undersigned is therefore not persuaded that any specific violations occurred.
>
> 2. The Plaintiff's next argument is that a general duty to provide a safe work place was violated. As noted in the opinion simply because an accident occurred at work is not sufficient reason to find that the work place was unsafe to a degree so as to bring it under KRS 342.165. The Plaintiff retains the burden to demonstrate that the condition meets the requirements of KRS 342.165, which is a greater burden than proving a work injury.
>
> There are many factors which support this decision. Only the Plaintiff was injured on that day, despite having co-workers present and presumably subject to the same danger, which implies either chance or even carelessness on his part. Given the type of work being done the party responsible for the unsafe work condition is not the employer herein and perhaps a better remedy would be a civil action. The Plaintiff was himself an experienced worker and his argument that he was inadequately

> trained and/or supervised is non-persuasive. To find a violation under the general duty principle is an even greater burden than finding a safety violation when a specific statute was violated.
>
> Ultimately the Plaintiff did not carry his burden.

Leistner, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including the assessment of a safety penalty pursuant to KRS 342.165. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Likewise, Titan had the burden of proving Leistner violated a safety penalty or rule, entitling it to a 15% reduction of benefits pursuant to KRS 342.165. Since neither party was successful in their respective burdens regarding 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 the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As fact-finder, the 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). The 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 the 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).

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.

Leistner argues Titan violated several specific safety statutes, and further was liable for a 30% increase in benefits pursuant to KRS 342.165 for failing to provide a safe work place based upon KRS 338.031. In support of these arguments, Leistner relies upon Gray's opinion, and his own testimony, upon which the ALJ chose not to rely, which was his prerogative. Likewise, the ALJ did not believe Leistner committed any safety violation for which his award of benefits should be decreased.

Here, Titan was hired to perform maintenance and repair work at a power plant. The ungrated vent where Leistner fell was apparently not on the path originally

used to enter the duct where the repairs were to be performed. The record is unclear as to what safety inspection occurred along the path to the duct entrance, or at the duct, except for a determination as to whether any poisonous gas was present. It is undisputed Leistner followed two co-workers into a duct to determine the tools necessary to perform a job. When entering the duct, the workers followed an extension cord. Upon leaving the duct to obtain tools, Leistner did not follow along the cord, and attempted to take a different path. Along the way, he encountered a vent opening which was not covered, although it apparently had been in the past, and he fell.

It was reasonable for the ALJ to conclude the accident occurred in an area for which the power plant was responsible. This determination is supported by the fact no accidents occurred along the pathway to the work area when following the cord, or in the duct area itself, and further because it was not located on the path to the site where the repair work was to be performed. It is further noted the cases relied upon by Leistner involve worksites totally within control of the employer, or at their own places of business. Here, as a vendor or contractor, assessments as to needed repairs and their precise locations had been performed prior to bringing Titan on

board. The halogen light and presumably the cord were in place prior to Titan employees entering the duct.

While Gray's testimony constituted evidence upon which the ALJ could have relied in assessing a safety penalty against Titan, he was not compelled to do so. Likewise, testimony of Maggard and Chinn could have supported the assessment of a safety penalty against Leistner, but such finding was not compelled. Therefore, we find no error in the ALJ's determination not to assess a 30% safety penalty against Titan, or a 15% safety penalty against Leistner.

Accordingly, the decision rendered by Hon. Chris Davis, Administrative Law Judge, on May 14, 2013, as well as the Order ruling on the petition for reconsideration dated July 2, 2013, are hereby **AFFIRMED**.

ALL CONCUR.

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