Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 10, 2014

CLAIM NO. 201197197

SEKISUI S-LEC, LLC PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

ALLIE FRANCES BENTON (now GOODWIN)
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * * *

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

ALVEY, Chairman. Sekisui S-LEC, LLC ("Sekisui") seeks review of the opinion, order, and award rendered June 20, 2014, by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). The ALJ found Allie Frances Benton (now Goodwin)[1]

[1] At the time of the accident, Respondent's last name was Benton. She subsequently divorced her husband and changed her name to Goodwin.

("Goodwin") permanently totally disabled due to work-related injuries to her left hand, left upper extremity, and post-traumatic stress disorder ("PTSD") caused by a traumatic accident occurring on January 12, 2011 when her left hand was crushed in a machine while working for Sekisui.

The ALJ awarded permanent total disability ("PTD") benefits and medical benefits. The ALJ also referred Goodwin for a vocational rehabilitation evaluation, and further ordered as follows:

> Upon receipt of the vocational evaluation report, the employee and employer or insurance carrier shall cooperate in the implementation of services designed to restore the employee to suitable employment. Upon the commencement of the Plaintiff's active participation in this ordered vocational rehabilitation program, she shall be entitle [sic] to 80% of her average weekly wage, that being $655.84 (six hundred fifty five dollars and eighty four cents).

The ALJ also awarded a thirty percent enhancement of income benefits pursuant to KRS 342.165(1) due to Sekisui's violation of a safety regulation. The ALJ found Goodwin did not violate a safety rule, and therefore her benefits were not reduced pursuant to KRS 342.165(1). No petition for reconsideration was filed.

On appeal, Sekisui argues the award of PTD benefits should be reversed because the totality of the

evidence demonstrates Goodwin is not permanently totally disabled. Sekisui also argues the evidence does not support the ALJ's determination the accident occurred due to its failure to comply with applicable safety regulations. Finally, Sekisui argues the evidence compelled a finding Goodwin's injuries were caused by her own intentional violation of a safety rule. On these issues, we disagree and affirm. Although we find no error in the ALJ's referral for a vocational rehabilitation evaluation, she erred in presumptively ordering the implementation of any vocational training recommended without review pursuant to KRS 342.710(3). Therefore, we vacate in part and remand for a further determination of feasibility or implementation of vocational rehabilitation benefits upon review of any applicable recommendations.

Goodwin filed a Form 101 on October 28, 2013 alleging she dismembered her left fingers and most of her left thumb in a de-gloving accident which occurred on January 12, 2011 while working for Sekisui. She also claimed she injured her left hand, wrist, elbow, forearm, upper arm and shoulder in the accident, and subsequently developed PTSD, depression and anxiety. Goodwin testified by deposition on January 29, 2014 and at the hearing held April 25, 2014.

Goodwin is a high school graduate with no specialized vocational training. Her work history consists of employment as a production worker, child care-giver, electronic sales manager, technician supervisor, and co-owner of a customized sign shop. Goodwin began working as a temporary employee at Sekisui in December 2007. After she was there three months, she was hired on a permanent basis. She stated Sekisui manufactures a film which goes between two pieces of glass for windshields and windows.

On January 12, 2011, Goodwin was training a new employee on a machine. She stated she had never actually performed the job, and had seen it done only one time. A piece of film had fallen, and as she attempted to re-thread it through the rollers, her glove got caught causing her left upper extremity to be pulled into the machine to a point above her elbow. Her supervisor and a co-worker moved her arm backward through the rollers to release her from the machine. She stated when she saw her left upper extremity it appeared to be “mauled”. She stated the company should have provided more training, and should have insured proper guards were in place.

Subsequent to the accident, Goodwin was treated at the University of Kentucky Medical Center (“UKMC”) with Dr. James Liau, a plastic surgeon. She received inpatient care

at the UKMC for over two weeks. She then had rehabilitative care at Cardinal Hill Hospital. Sekisui eventually referred Goodwin for evaluation by Dr. Michael Best who stated she had not reached maximum medical improvement ("MMI") and referred her to Dr. Joseph Kutz, a hand surgeon in Louisville. She was advised she may be a candidate for a left hand transplant, but was later told she was not placed on the recipient list due to her PTSD. She was told if her PTSD improved, she may be a candidate for the procedure. She is unable to use her prosthesis because it causes tears in her skin.

In addition to treatment for her physical injuries, Goodwin has treated with Dr. Harry Cecil, Ph.D. for her PTSD. Dr. Cecil provides counseling, and has helped her cope with this condition. She stated the counseling from Dr. Cecil has been beneficial, and she would like to continue treating with him.

Goodwin testified she is unable to perform any of her past jobs due to her injuries. She stated Sekisui offered her one-handed work, which she declined. She was terminated from her employment in February 2013. She has not worked since the date of the accident, nor has she made any attempt to return to work. She stated she is currently unable to pursue education or re-training due to her PTSD.

If she is able to get this condition under control, she stated she may be willing to pursue vocational retraining. She stated she has some interest in operating her own business.

Goodwin filed the September 24, 2013 report of Dr. Kutz with her Form 101. Dr. Kutz stated she has a 55% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). She additionally filed the April 24, 2012 report of Dr. Cecil who stated it is difficult for Goodwin to function due to her PTSD, chronic pain and amputation. He recommended additional counseling.

Goodwin filed the report of Dr. Best who evaluated her on February 26, 2013 at Sekisui's request. Dr. Best noted the history of injury and subsequent treatment which included debridement of the left arm and hand, K-wire fixation of small fingers and thumb, and VAC replacement. He diagnosed amputation and disarticulation of digits one through four; amputation and disarticulation of the left thumb; crush of the left upper limb; crush injury of the axillary region; crush injury of the left upper arm and crush injury of the left elbow and forearm. Dr. Best stated, "She is a very complicated and complex care and

management issue." Regarding MMI, Dr. Best stated, "Therefore, before this patient is placed at MMI or additional recommendations made, a complete and thorough consultation by the hand transplant team at Kleinert, Kutz and Associates Hand Care Center must be performed."

Goodwin next filed additional treatment records with Dr. Cecil from June 2, 2011 through January 30, 2014. During that time, Dr. Cecil saw Goodwin on sixty occasions for counseling for treatment of her PTSD, and sleep difficulty. He stated these discussions were necessary to assist in keeping her functional.

Goodwin submitted the report of Dr. E. Paul Evensen, Ph.D., a psychologist who evaluated her on March 14, 2014. Dr. Evensen diagnosed her with major depression, moderate with anxiety; PTSD, in partial remission; and a GAF of 45. He assessed a 30% impairment rating for these conditions pursuant to the 2nd and 5th Editions of the AMA Guides. Dr. Evensen opined Goodwin is incapable of work due to fluctuations in her mood due to her depression.

Goodwin next filed records from the Kentucky Labor Cabinet, Occupational Safety and Health Program. This filing was objected to by Sekisui. The ALJ permitted the filing of the records pursuant to 803 KAR 25:010 §14(2) which allows the filing of public records. Those records

reveal Sekisui received a citation for a serious violation of 29 CFR 1910.212(a)(1) due to Goodwin's accident. That specific regulation states as follows:

> Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are-barrier guards, two-hand tripping devices, electronic safety devices, etc.

The citation further stated:

> On or before January 12, 20111, an employee of Sekisui S-LEI America was severely injured when her arm was trapped in the in-going nip point between unguarded roller #3 and #4 on the emboss machine in the production line of the film forming room.

The documentation further notes:

> Management officials stated they were aware the rollers were unguarded. Management stated they had a work rule and procedures that prohibit employees from attempting to re-thread the film should it come loose. This illustrates that management had knowledge that the rollers were a hazard. Unfortunately these procedures did not adequately protect employees.

Sekisui was initially fined seven thousand dollars, which was later reduced to five thousand dollars.

Sekisui filed the report of Dr. Thomas Gabriel, a hand surgeon, who evaluated Goodwin on March 5, 2014. Dr.

Gabriel diagnosed a severe de-gloving/crush injury to the left arm; transmetacarpal amputation of the left hand; chronic limb pain with poor skin coverage; and status post traumatic transmetacarpal amputation of the left upper extremity. Dr. Gabriel stated Goodwin had not reached MMI, but he assessed a 55% impairment rating pursuant to the AMA Guides. He stated she could return to one-handed duty only.

Sekisui filed the report of Dr. Timothy J. Allen, a psychiatrist who evaluated Goodwin on February 26, 2014. Dr. Allen stated she had reached MMI, and diagnosed her with PTSD, chronic, in partial remission. He stated she can drive and perform activities of daily living. He stated she should continue using Cymbalta for the foreseeable future, and her PTSD had improved.

Christopher Neal Sellers ("Sellers"), assistant production director at Sekisui, testified at the hearing held April 25, 2014. He stated Sekisui produces an interlayer film for automotive windshields. According to Sellers, the Sekisui safety policy is to stop machines if there is a problem. Safety briefings are held daily at shift changes. He stated Goodwin assisted in preparing instructions for operation of some equipment, and noted the documentation instructs caution around moving conveyor belts. He admitted Sekisui received a serious citation due

to Goodwin's accident, but there was no indication it was for intentional conduct. He stated it was improper for Goodwin to attempt to rethread the machine, and he is unaware of any other attempts to manually do so. He agreed the citation received was for lack of guarding. He was unaware of any documentation indicating Goodwin had received any education for the proper procedure for the machine upon which she was injured.

On appeal, Sekisui argues the ALJ's award of PTD benefits is not supported by the evidence, and the award of vocational rehabilitation benefits is inconsistent with her determination. We disagree. As the claimant in a workers' compensation proceeding, Goodwin had the burden of proving each of the essential elements of her cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Goodwin was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting 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).

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 discretion to determine 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). 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). Although a party may note evidence supporting a different outcome than that 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).

The function of the Board in reviewing an ALJ's decision is limited to determining 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, supra. 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). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Here, the evidence relied upon by the ALJ supports the award of PTD benefits. In her opinion, the ALJ specifically noted Goodwin's complaints of pain, the fact she sustained a significant injury, and continues to experience PTSD. The ALJ noted based upon both the medical evidence and Goodwin's testimony, she is incapable of returning to her previous employment or any full time work. The ALJ's decision is supported by substantial evidence, and she provided a basis for her determination. Therefore, the award of PTD benefits will not be disturbed.

Regarding the referral for a vocational evaluation, again the ALJ's decision will not be disturbed. KRS 342.710, in relevant part, states as follows:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment.
>
> …

> (3) An employee who has suffered an injury covered by this chapter shall be entitled to prompt medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable. When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The administrative law judge on his or her own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation.

Here the ALJ determined Goodwin could not return to her previous employment. Therefore, we find no error, pursuant to the statute outlined above in referring her for a vocational evaluation, despite the award of PTD benefits. If Goodwin at some point in time is able to return to employment, Sekisui's remedy lies in KRS 342.125. We find no error in the ALJ's referral for an evaluation pursuant to

KRS 342.710(3). However, the ALJ erred by prematurely ordering implementation of the rehabilitation plan.

Vocational rehabilitation, as provided in KRS 342.710(3), is a two-step process. The first step is ordering a referral for a vocational evaluation, as has been done. The second step is to review the report and determine whether the recommended rehabilitation is reasonable and feasible. Specifically, the statute states:

> **Upon receipt of such report**, the administrative law judge may order that the services and treatment recommended in the report, or such other rehabilitation treatment or service likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or his insurance carrier. (emphasis added)

Here, the ALJ presumptively ordered initiation of the plan prior to its receipt which is impermissible. Therefore, that portion of the ALJ's determination regarding implementation of a vocational rehabilitation plan is vacated, and this claim is remanded for further determination once the report has been received.

Finally, Sekisui argues the ALJ erred in enhancing Goodwin's benefits by thirty percent pursuant to KRS 342.165, and in failing to reduce the award by fifteen percent.

KRS 342.165(1) 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.

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

The 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. 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 worker also has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

In this instance, the ALJ reviewed the applicable evidence, including the citation received by Sekisui for a serious violation. The ALJ reasoned Sekisui's violation of 29 CFR 1910.212(1)(a) contributed to Goodwin's injuries. This determination is supported by the citation, and Goodwin's testimony regarding both the lack of guarding and inadequate training. The ALJ's determination regarding assessment of the thirty percent safety penalty is supported by substantial evidence.

We likewise determine the ALJ did not err in refusing to assess a fifteen percent reduction in Goodwin's award for her failure to follow a safety rule pursuant to KRS 342.165. Sekisui bore the burden of proving Goodwin's failure to comply, and a contrary result is not compelled. "Compelling evidence" is defined as that which is 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). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. 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, supra. Here, the ALJ relied, in part, upon Goodwin's testimony she received limited or inadequate training of the machine she was operating at the time of injury. Again, this supports the ALJ's determination and a contrary result is not compelled.

Accordingly, the decision rendered June 20, 2014 by Hon. Jeanie Owen Miller, Administrative Law Judge, is **AFFIRMED IN PART, VACATED IN PART**, and **REMANDED** for entry of a decision in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON PATRICK J MURPHY II
3151 BEAUMONT CENTRE CIRCLE, STE 200
LEXINGTON, KY 40513

COUNSEL FOR RESPONDENT:

HON MICHAEL F EUBANKS
225 WEST IRVING STREET
RICHMOND, KY 40476

ADMINISTRATIVE LAW JUDGE:

HON JEANIE OWEN MILLER
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601