

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: February 19, 2016

CLAIM NO. 201298686

SWIFT ROOFING, INC.

PETITIONER/  
CROSS-RESPONDENT

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

TONY RAY  
and  
HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENT/  
CROSS-PETITIONER

RESPONDENT

OPINION  
AFFIRMING IN PART,  
VACATING IN PART, & REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Swift Roofing, Inc. ("Swift Roofing") appeals and Tony Ray ("Ray") cross-appeals from the Opinion and Order rendered August 14, 2015 and the Opinion and Order on Reconsideration issued September 21, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The

ALJ awarded Ray temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits commencing on May 13, 2014, and medical benefits for his "work injuries" sustained on January 10, 2012. The ALJ found both Swift Roofing and Ray committed safety violations pursuant to KRS 342.165(1).

On appeal, Swift Roofing argues the evidence is neither substantial nor supportive of a finding of permanent total disability. Swift Roofing argues the ALJ failed to address the causation/work-relatedness of Ray's cervical problems. Swift Roofing next argues the ALJ's finding of a compensable psychological claim should be reversed. Swift Roofing also argues the ALJ erred in finding it committed a safety violation. Finally, Swift Roofing argues the ALJ failed to specifically find it entitled to credit for TTD benefits it overpaid.

On cross-appeal, Ray argues the ALJ erred in reducing his benefits by 15% since he failed to perform the proper analysis in finding Ray committed a safety violation. Ray also argues the ALJ erred by failing to commence the award of PTD benefits from the date of injury.

We affirm the ALJ's determination Ray sustained a psychological injury as a result of his work accident since it is supported by substantial evidence, and we

additionally find the ALJ sufficiently stated Swift Roofing is entitled to a credit for overpaid TTD benefits. However, we vacate and remand for additional findings of fact regarding Ray's physical injuries sustained as a result of the fall, whether he is permanently totally disabled, the application of the safety penalty against both parties, and whether the medical treatment for Ray's cervical complaints is compensable.

Ray filed a Form 101 stating on January 10, 2012 he fell approximately fourteen feet from a roof while working as a roofer. Ray alleged injuries to his "head, left shoulder, left clavicle, right hand, right groin area, and any other condition identified as work-related in the medical record filed into evidence."

Ray testified by deposition on February 5, 2014 and at the hearing held August 5, 2015. Ray was born on March 15, 1968 and resides in Murray, Kentucky. He graduated from high school and has vocational training in auto body repair. Ray's work history consists of work as a machine operator, and laborer in the construction industry. Ray began working for Swift Roofing in 2009 on the repair and maintenance crew. He and his direct supervisor, Dan Reeves ("Reeves"), would inspect a job site's roof, identify the problem, and make necessary repairs. Prior to

his accident, Ray regularly worked at least forty hours per week. During the winter months, Ray and other Swift Roofing employees were laid off and received unemployment benefits because the weather prevented roof work.

On January 10, 2012, Ray testified he and Reeves were working at the Pogue Library at Murray State University. Ray was on the roof of the library which was surrounded by a wall. Ray stepped over the wall onto a ledge to receive roofing materials and tools from Reeves. Ray used a handheld rope to pull up buckets of material and tools. Ray tripped while on the ledge and fell approximately fourteen feet onto concrete. Ray testified he did not lose consciousness. Ray was transferred to the emergency room where lacerations to his scalp and right groin area were surgically repaired. He also fractured his left clavicle which was treated by Dr. Derek Morgan. In July 2012, Dr. Morgan released Ray from his care and allowed him to return to work with no restrictions.

Ray testified he returned to work with Swift Roofing on July 2, 2012 following his release by Dr. Morgan. Ray testified he was placed on the commercial roofing crew instead of the maintenance and repair crew where he had worked prior to his injury. Ray described the commercial crew roofing work as more physically demanding.

Ray testified he voluntarily quit in May 24, 2013 due to his pain stating the work "was killing me." Ray does not believe he is capable of returning to the position he held at the time of the accident for Swift Roofing.

After he quit working at Swift Roofing, Ray installed insulation beneath the house and floors of his attorney for compensation. Ray could only work three to four hours a day due to his pain limitations. Ray testified the job should have only taken two or three days with no assistance, but took him approximately two weeks and he required assistance to complete the job. Ray testified he also drove his attorney's clients to appointments in Louisville, Lexington and Cincinnati from Murray, Kentucky. Ray testified he did trim and paint work for another individual for a period of time.

Regarding the safety violation issue, Ray testified at the time of his fall he was not tied off or wearing a harness. Ray testified he and Reeves, his supervisor, agreed Ray would be on the ledge of the roof while Reeves would tie material to the rope below. Ray testified Reeves knew he was not wearing a harness or tied off. Ray admitted Swift Roofing provided annual safety training, which included fall protection. Ray agreed he was knowledgeable of the OSHA requirements, and

acknowledged he should have been wearing a harness and lanyard at the time of his fall. Swift Roofing provided him with a harness and lanyard, which was kept on site in its work truck.

Ray testified Swift Roofing encouraged him not to wear proper fall equipment in order to get jobs done quicker. He explained putting on and taking off a harness every time he was on a roof would have slowed him down. Ray stated he had worked for Swift Roofing, and with Reeves specifically, every day for two years prior to the accident. Ray stated he never wore a safety harness when working on the roofs at Murray State University. Reeves was aware Ray did not wear proper safety harnesses. He stated Reeves never talked to him about needing to wear them on job sites. Ray stated he never saw Reeves wear a harness when they worked.

Ray testified his pain has worsened since his injury. He currently experiences pain in his neck and in the area where he fractured his left clavicle, as well as migraine headaches. Ray now has difficulty sleeping due to the pain, and he also described the psychological toll his work injuries have taken on him.

Larry Suiter ("Suiter"), the superintendent of Swift Roofing, testified by deposition on May 28, 2015.

Ray was hired as a laborer on October 28, 2010 and was placed with Reeves to perform maintenance and repair, primarily on commercial roofs. Suiter did not witness the fall, but came to the job site after learning of Ray's accident. Suiter testified Pogue Library had a flat roof. The roof's perimeter contained a parapet wall, which qualifies as a guardrail for OSHA purposes. Suiter testified OSHA does not require use of a harness and lanyard when working at heights within the guardrail. However, a harness and lanyard is required if you go on or over the parapet wall. He understood Ray was not wearing a harness at the time of the fall.

Subsequent to the January 10, 2012 fall, Ray did not return to work until July 2, 2012. Upon his return, Ray was placed on the commercial crew for approximately a month. In August 2012, Ray was moved to the repair crew and continued to work without interruption until December 26, 2012. During the August to December 2012 time period, Suiter stated Ray, "complained a little . . . said he - - he made the statement he just couldn't do it, that he needed to be back on the maintenance crew. And I'm not sure if that's the same timeframe of it that's the last . . . ." From December 26, 2012 through April 24, 2013, there was a customary lay-off due to weather. When Ray returned

in April 2013, he was placed back on the commercial crew. Suiter testified Ray voluntarily quit on May 22, 2013. Ray did not provide any off-work slips or documentation, but he stated he could not do the commercial roofing job anymore.

Suiter testified all Swift Roofing employees are provided safety training by Chris Jordan ("Jordan") with Construction Safety Consultants, which includes instruction on fall protection. Jordan investigated Ray's January 10, 2012 fall and prepared a written report. This report was not filed into evidence. Suiter testified Swift Roofing also holds annual "OSHA 10" classes, but did not know if documentation of the classes were maintained in the employee records. Suiter testified Ray was provided a harness and lanyard, and was trained on its proper use. The safety equipment was typically kept in the work truck. Suiter testified when he visited jobs, he saw Ray using his harness and lanyard when he should have been. Suiter agreed part of a supervisor's job is to ensure safety protocols are being followed at a job site, and Ray had the required safety equipment on. Suiter indicated he never had any problems with Ray's job performance either prior to or after the fall.

In support of his claim, Ray attached the January 10, 2012 records from the emergency room at Murray-Calloway

County Hospital. CTs of the pelvic and head showed a tiny laceration within the right inguinal region, and a very large scalp laceration. A CT of the cervical spine was normal. An x-ray of the left clavicle demonstrated a fracture. Dr. James Dowdy surgically irrigated, treated and closed the scalp and right inguinal wounds. Ray was provided a splint for the clavicle fracture. He was discharged the following day with diagnoses of complex scalp laceration, right inguinal laceration, left scapular fracture, and multiple contusions and abrasions. Ray was prescribed pain medication and advised to follow-up with Dr. Morgan for his clavicle fracture.

Ray filed the treatment records from Dr. Morgan, who primarily treated his clavicle fracture from January 17, 2012 through July 26, 2012. On his first visit on January 17, 2012, Ray complained of pain in his left shoulder/clavicle area, and numbness from his ear to the tip of his shoulder. Dr. Morgan offered Ray a spine referral for his neck complaints. Dr. Morgan recommended surgery for the left clavicle fracture. On January 25, 2012, Dr. Morgan performed a left clavicle open reduction internal fixation ("ORIF") using a plate and locking screws. Thereafter, Dr. Morgan assigned work restrictions, and ordered physical therapy and a bone stimulator. Ray

was released to return to work with no restrictions on July 2, 2012. On July 26, 2012, Dr. Morgan released Ray from his care.

In a report dated February 28, 2014, Dr. Morgan diagnosed a left clavicle fracture with gross displacement attributable to the January 10, 2012 fall. Dr. Morgan assessed a 0% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") and opined Ray did not require work restrictions. In a subsequent report, Dr. Morgan indicated he disagreed with the impairment rating assessed by Dr. Samuel Chung.

Ray received no additional medical treatment after his last visit with Dr. Morgan on July 26, 2012 until over two years later when he saw Dr. Spencer Romine on September 26, 2014. Ray complained to Dr. Romine of pain overlying his left clavicle radiating into his neck and shoulder. He complained of cracking, popping, and headaches. Dr. Romine took x-rays and diagnosed status post severe injury status post fall with continued left shoulder and neck pain after ORIF of the clavicle. Dr. Romine suggested removal of the hardware but cautioned such procedure may not help his current symptoms. Dr. Romine surgically removed the hardware on November 20, 2014. On

January 13, 2015, Ray reported improved shoulder pain, but the continuation of pain on the lateral side of his cervical spine. Dr. Romine discharged Ray from his care and referred him to a spine specialist. On January 22, 2015, Dr. Romine determined Ray had reached maximum medical improvement ("MMI") from the left clavicle fracture and hardware removal.

Ray also treated with his primary care physician, Dr. Patrick Sean Kelly from November 5, 2014 through May 4, 2015 for neck pain, shoulder pain, and depression. Dr. Kelly prescribed medication, ordered a cervical MRI and referred Ray to Dr. John Sallee, a psychiatrist, and Dr. Thomas Gruber, a neurosurgeon. The March 9, 2015 cervical MRI demonstrated mild foraminal narrowing on the right at C3-4 and C4-5 which did not appear significant but showed mild facet arthropathy at a few levels. On the last visit of record on May 4, 2015, Dr. Kelly diagnosed cervicgia, a history of a fracture of the clavicle, and a generalized anxiety disorder. He prescribed Oxycodone, Cymbalta, and Valium.

Ray treated with Dr. Gruber on one occasion on April 28, 2015 for neck and shoulder pain. Dr. Gruber concluded Ray does not require cervical surgery. Dr. Gruber ordered an EMG/NCV to rule out brachial plexopathy,

and recommended a referral to a chronic pain management specialist.

Ray also sought treatment for his psychological complaints with Four Rivers Behavioral Health in January 2015. During his initial mental health assessment on January 9, 2015, Ray complained of increased anxiety, depression and trouble sleeping due to his pain following his accident. Ray was diagnosed with major depressive disorder, recurrent and moderate; and anxiety disorder due to general medical condition. Mental health counseling was recommended. Ray received counseling for his depression and anxiety twice a month. In a March 19, 2015 letter, Richard Kranz, LPCA, noted Ray is working on anxiety issues related to his medical condition as well as processing the traumatic events which occurred at work. He noted Ray is also dealing with chronic pain which exacerbates his anxiety and depressive symptoms. Richard Kranz opined Ray's anxiety, depression, and difficulty sleeping are due to his injuries, and require continued treatment until his condition improves or resolves.

Swift Roofing filed two medical fee disputes during the pendency of this claim. On December 24, 2014, Swift Roofing filed a medical fee dispute challenging Dr. Kelly's November 5, 2014 referral to a psychiatrist. In

support of its dispute, Swift Roofing attached the December 19, 2014 utilization review denial by Dr. Bart Olash, who concluded the referral is not medically necessary or appropriate for treatment of the work injury. On February 5, 2015, Swift Roofing filed another medical fee dispute challenging Dr. Romine's referral to a spine specialist. In support of its dispute, Swift Roofing filed the January 28, 2015 physician review report by Dr. Peter Kirsch who concluded Ray's present cervical symptoms have no medical relationship to the work injury of January 10, 2012. No motions to join Drs. Kelly or Romine were filed, there is no additional reference to the medical disputes, and Drs. Kelly or Romine were never joined as parties to the claim.

In support of his claim, Ray filed Dr. Chung's October 7, 2015 report. Dr. Chung diagnosed: 1) residual from left scalp laceration status post I&D with ongoing disfigurement due to the scar; 2) residual from fall causing left clavicle fracture status post ORIF of the left clavicle with clavicle plates with six locking screws with ongoing symptomology; and 3) residual from right inguinal puncture status post-surgical closure with resolved symptoms. Dr. Chung assessed a 3% impairment rating for the scalp laceration resulting in disfigurement due to scarring, 5% for the left clavicle, and 0% for the inguinal

injury, for a combined 8% impairment rating pursuant to the AMA Guides. Dr. Chung restricted Ray from overhead work, work away from the body, and work requiring repetitive flexion, extension, and rotation of his left shoulder. Dr. Chung did not offer an opinion addressing Ray's ability to return to his former job, or any other work.

Swift Roofing filed the October 7, 2014 report of Dr. Jeana Lee. She diagnosed Ray with a closed left clavicle fracture due to the January 10, 2012 fall requiring ORIF with plate and screws, laceration to his left scalp area, which has healed with a visible scar, and a healed puncture wound along the right inguinal region. Dr. Lee assessed a 0% impairment rating for the clavicle fracture and a 2% impairment rating for the scalp laceration pursuant to the AMA Guides. Dr. Lee opined it would not be unreasonable for Ray to request hardware removal, which would be related to the work injury. Dr. Lee felt restrictions were unnecessary.

Swift Roofing also filed the April 21, 2015 report of Dr. Calvin Dyer. His cervical examination demonstrated tenderness but no asymmetric movements or atrophy. He noted Ray had residual subjective complaints of pain and subjective paresthesias into the left thumb. Ultimately, Dr. Dyer found no indication for cervical

surgery, and he stated Ray would not retain any permanent partial impairment for his neck complaints. He found no medical reason why Ray could not return to construction work.

Ray filed the April 9, 2015 psychological report of Dr. Tom Wagner, who evaluated him at his attorney's request on March 23, 2015. After administering a battery of tests, Dr. Wagner diagnosed major depressive disorder (moderate) R/O Mood Disorders, and R/O Personality disorder. He stated psychosocial stressors include depressive symptoms, anxiety symptoms, income loss, job loss, and chronic pain. Dr. Wagner stated Ray's ability to understand, remember and carry out detailed instructions is moderately affected by his impairment; moderately restricted his ability to interact appropriately with the public and supervisors; would be moderately impaired in responding appropriately to work pressures and changes in a routine work setting in a detailed work environment. He also stated Ray has stress limitations in that he can have "no more than occasional interaction with the public (1/3 work day) + supervisors, no work requiring sustained focus on detailed tasks." Based upon the above work restrictions and the characteristics of his diagnoses, he opined Ray would not be expected to engage in work activities in

excess of these restrictions. In an April 17, 2015 addendum, Dr. Wagner stated Ray's psychological difficulties are the direct result of his 2012 work injury, and result in a 25% impairment rating using the 2<sup>nd</sup> and 5<sup>th</sup> Editions of the AMA Guides.

Swift Roofing filed the psychiatric report of Dr. John Griffin. He reviewed the medical records and Ray's current symptoms. Dr. Griffin also noted Ray's history of extensive alcohol abuse and current marijuana use. Dr. Griffin ultimately concluded Ray does not have a psychiatric disorder caused by the January 10, 2012 work injury, is capable of returning to work, and he found no basis to assess any psychiatric impairment.

Ray filed the August 5, 2014 vocational report of George Kennedy, a vocational evaluator. He stated Ray would be incapable of repetitive or physical labor intensive work based on his description of his left shoulder limitations. Ray would require a part-time job involving sedentary to light tasks without extensive repetitive work or requiring work with his arms about the shoulder, and with no frequent lifting.

Swift Roofing filed the vocational report of Ralph Haas, a vocational counselor. Using Dr. Chung's restrictions, Mr. Haas stated at a minimum Ray could

perform jobs not requiring intensive or repetitive use of the left hand, spanning nearing all roles across the sedentary, light and medium sectors of the labor market for which he was previously qualified. In light of Ray's education, training, restrictions, and academic capabilities, Mr. Haas opined Ray could return to work in remunerative competitive employment.

A benefit review conference ("BRC") was held July 7, 2015. The BRC order reflects the parties stipulated Swift Roofing had paid TTD benefits at the rate of \$448.48 per week from January 11, 2012 to July 2, 2012, and from November 20, 2014 through January 23, 2015, as well as medical benefits totaling \$44,168.63. The parties identified the following contested issues: work-relatedness/causation, benefits per KRS 342.730, credit for unemployment benefits paid, TTD, medical benefits, safety violations by both parties, and permanent total disability.

In the August 14, 2015 opinion and order, the ALJ listed the evidence filed into the record. The ALJ provided summaries of Ray's testimony, and the reports of Dr. Chung, Dr. Wagner, Mr. Kennedy, Dr. Kirsch, Dr. Lee, Dr. Griffin, and Dr. Haas. Under the section entitled, "work-relatedness/causation," the ALJ reviewed the statutory definitions of "injury" and "objective medical

findings," and found Ray a credible and convincing witness.

He then made the following analysis:

I make the determination that the medical evidence from both Dr. Chung and Dr. Wagner, as covered above, is very persuasive, compelling and reliable. Dr. Chung stated that under the AMA Guides, Fifth Edition, Mr. Ray will sustain an 8% permanent whole person impairment as a result of his January 10, 2012 work injuries, and that Mr. Ray should avoid overhead work, work away from his body, and work requiring repetitive flexion, extension and rotation of his left shoulder. Dr. Wagner stated that Mr. Ray suffers from major depressive disorder and that his psychological injuries were the direct result of his 2012 physical injuries. Dr. Wagner stated that the plaintiff has a Class 3 psychological impairment and will under the AMA Guides, Second Edition, sustain a 25% psychological impairment. Dr. Wagner stated that Mr. Ray has work restrictions based on his depression, anxiety, irritability, temperament and tendency to make errors in the work place, and would not be expected to engage in work activities above those restrictions.

I, therefore, make the determination that the plaintiff sustained both serious physical impairment and serious psychological impairment as a result of his work accident on January 10, 2012.

The ALJ determined Ray reached MMI on May 13, 2014, the day of Dr. Chung's examination. Without explanation or analysis, the ALJ determined Ray is entitled to TTD benefits from January 11, 2012 to July 1, 2012.

Under his analysis addressing permanent total disability, the ALJ quoted the statutory definition contained in KRS 342.0011 and reviewed the analysis required pursuant to Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ then stated as follows supporting his finding of permanent total disability:

The very recent decision of the Kentucky Supreme Court in *City of Ashland v. Stumbo*, 461 S.W.3d 392 (Ky.2015), requires me to undertake a five-step analysis in order to determine whether Mr. Ray is totally disabled.

(1) Based upon the persuasive, compelling and reliable expert evidence from both Dr. Chung, as covered above, and from Dr. Wagner, as covered above, I make the determination that Mr. Ray sustained both serious physical injuries and psychological injuries as a result of his work-related fall while employed by the defendant on January 10, 2012.

(2) I next make the determination, as noted above, that as a result of the plaintiff's serious physical injuries on January 10, 2012, Mr. Ray will sustain under the AMA Guides, Fifth Edition, an 8% permanent whole person impairment as per the expert evidence from Dr. Chung, and further that under the expert evidence from Dr. Wagner the plaintiff will sustain as a result of his physical injuries a major depressive disorder, consisting of 25% psychiatric impairment under the AMA Guides, Second Edition.

(3) I next make the determination that Mr. Ray has a permanent occupational disability as shown by the persuasive, compelling and reliable medical evidence from Dr. Chung, as covered above, and also a resultant serious psychological impairment and occupational disability under the persuasive, compelling and reliable expert evidence from Dr. Wagner, as covered above. Dr. Chung stated that Mr. Ray should avoid overhead work, work away from his body and work requiring repetitive flexion, extension and rotation of his left shoulder. Dr. Wagner stated that Mr. Ray will have work restrictions based on his depression, anxiety, irritability, temperament and tendency to make errors in the work place, and that he would not be expected to engage in work activities.

(4) Mr. Ray had a good work history from 1988 to 2012 as a construction laborer, a roofing laborer and a machinist, all of which require physically demanding work. Based upon the persuasive, compelling and reliable expert evidence from both Dr. Chung and Dr. Wagner, as covered above, I make the determination that the plaintiff is physically and psychologically unable to perform any type of work.

Mr. Ray is now 47 years old, meaning that he is now in late middle age. As noted above, his work history has been at strenuous physically demanding work for almost 25 years. All of his jobs have required regular repetitive strenuous physical activities. He has had a very good work history, giving strong evidence that he has a very good work ethic. The parties stipulated that Mr. Ray last worked back on September 10, 2014, which is almost one

year ago. He is not currently working or earning any wages. Based upon the plaintiff's physical limitations and his age, as well as his work history, I make the determination that if he went out into the highly competitive job market he would have a very difficult and probably impossible time, in finding any regular gainful employment.

In this case, I considered the serious nature of the plaintiff's work injuries, as documented by Dr. Chung and Dr. Wagner, his educational level, being[sic] a high school diploma many years ago, his vocational training in autobody work and his credible and convincing lay testimony, which is covered above. The plaintiff testified that he has neck and left chest pain, which is constant and which is getting worse. He has frequent headaches. He suffers from insomnia and depression. I make the determination that if Mr. Ray could return to work, he would do so. I considered all of the above factors in reaching the legal conclusion that Mr. Ray is permanently totally disabled.

(5) Based upon all of the above-cited factors, I make the determination that the plaintiff's total disability is the result of his serious physical and psychological injuries sustained while employed by the defendant on January 10, 2012.

Based upon all of the above-specified evidence, I reach the legal conclusion that the plaintiff's permanent total disability began on May 13, 2014, when he reached maximum medical improvement as documented by Dr. Chung's medical report.

The ALJ then determined Ray was entitled to past and future medical benefits for his "work-related physical and psychological injuries." In addressing "Safety violation by both parties," the ALJ first quoted KRS 342.165(1) and provided the following analysis:

I read with interest the decision of the Kentucky Supreme Court in *Hornback v. Hardin Memorial Hospital*, 411 S.W.3d 220 (Ky. 2013). There, the Court stated that there are four tests to determine whether there was a safety violation and whether the plaintiff is entitled to the penalty benefit: (1) Did the condition or activity present a hazard to the employee? (2) Did the employer's industry generally recognize the hazard? (3) Was the hazard likely to cause death or serious physical harm to the employee? (4) Did a feasible means exist to eliminate or reduce the hazard?

The plaintiff testified that he received safety training from the defendant. He admitted that he should have been wearing his safety harness at the time of his fall and injuries. He admitted that he never wore his safety harness. He admitted that his supervisor knew that he never wore his safety harness and that the supervisor himself never wore a safety harness.

In light of the applicable law, I make the determination that the plaintiff's activity at the time of his fall and work injuries presented a hazard to him. I also make the determination that the employer's industry generally recognized the hazard to the plaintiff. I also make the determination that the hazard to the plaintiff was likely to

cause death or serious physical harm to the employee. In addition, I make the determination that there was a feasible means, i.e., wearing a safety harness, which existed to eliminate or reduce the hazard to the plaintiff. I, therefore, make the determination that the plaintiff's recovery from the defendant shall be increased 30% in the amount of each payment. I further make the determination that the plaintiff's accident was caused by his intentional failure to use his safety harness and that the plaintiff's recovery against the defendant shall be decreased 15% in the amount of each payment.

The ALJ awarded TTD benefits at the rate of \$417.61 from January 11, 2012 to July 1, 2012, PTD benefits beginning May 13, 2014, and medical benefits. He increased Ray's award against Swift Roofing by 30% pursuant to KRS 342.165(1) for a safety penalty. He also decreased the award by 15% due to a safety penalty assessed against Ray pursuant to KRS 342.165(1). The ALJ awarded Swift Roofing a "credit for any workers' compensation benefits heretofore paid or payable" and a credit for any unemployment benefits paid.

Both parties filed petitions for reconsideration. Swift Roofing asserted the ALJ did not address the issue of causation regarding Ray's cervical complaints and treatment despite arguing to the contrary in its position statement. Swift Roofing also requested the ALJ specifically find it

had overpaid TTD in the amount of \$30.87 per week. It had voluntarily paid TTD at a rate of \$448.48 but the parties later stipulated an average weekly wage of \$626.41, making the TTD rate \$417.61.

Ray asserted the award of PTD benefits should commence on the date of injury, January 10, 2012, pursuant to Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009). He also asserted the ALJ did not perform the proper analysis pursuant to Whitaker v. McClure 891 S.W.2d 80 (Ky. 1995) in finding the 15% safety penalty applicable. Ray asserted the ALJ failed to address whether Swift Roofing regularly enforced its safety rules regarding fall protection and requested additional findings of fact on this issue.

The September 21, 2015 opinion and order on reconsideration largely repeats the same analysis and findings of fact contained with the August 14, 2015 opinion and order. The only additional finding of fact addressed Swift Roofing's TTD argument. The ALJ stated, "Clearly, the defendant was granted a credit for the overpayment of [TTD] benefits, since page 20 specifically states that defendant shall be entitled for any workers' compensation benefits heretofore paid or payable."

On appeal, Swift Roofing argues the finding of permanent total disability should be reversed. In support of its argument, Swift Roofing asserts the ALJ did not consider Dr. Morgan's opinions. It asserts Ray returned to work for Swift Roofing for nearly a year, and Suiter testified he was not provided any off-work documentation when he quit. Ray also performed a variety of odd jobs for his attorney and performed paint and trim work for another individual. Swift Roofing also points to the vocational report of Mr. Haas. Finally, Swift argues the ALJ's finding of permanent total disability was based in part on Ray's disputed psychological injury, which it argues is not causally related to the work injury.

Swift Roofing argues the finding of a compensable psychological claim should be reversed asserting Dr. Wagner's opinion does not constitute substantial evidence to support a finding of a causal relationship. Swift Roofing asserts Dr. Wagner only considered the work injury, and did not take into consideration Ray's other stressors in his life in forming his opinions.

Swift Roofing argues the ALJ failed to address the issue of work-relatedness/causation of Ray's cervical claim. It points out Ray did not complain of cervical

problems until he began seeing Dr. Romine in January 2015<sup>1</sup>. It notes the March 2015 MRI revealed no positive findings, and the fact Dr. Gruber found no need for surgery. Dr. Dyer agreed there was no need for cervical surgery and declined to assess any impairment rating. Based upon the above, Swift Roofing argues Ray's cervical complaints are unrelated to the fall, and did not result in any permanent injury. Despite its request for additional findings of fact, this was not addressed in the order on reconsideration. Swift Roofing argues it is entitled to know, "what body parts affected, and injuries sustained, are deemed compensable for medical benefit payment purposes," and requests the claim be remanded for a specific finding on this issue. In response, Ray asserts he neither requested income benefits nor future benefits for his neck problems. However, Ray asserts his past treatment for his neck should be compensable because it was rendered to ascertain and to rule out his neck being the source of his pain.

Swift Roofing argues the ALJ erred in finding the 30% safety violation applicable pursuant to KRS 342.165(1). After reviewing the testimony of Ray and Suiter, Swift

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<sup>1</sup> The January 2015 reference does not appear to be accurate. The records indicate Ray first saw Dr. Romine for a consult on September 26, 2014 for neck and shoulder pain.

Roofing argues Ray failed in his burden in proving a violation of a specific statute or regulation, or intent.

Finally, Swift Roofing argues although the ALJ made an award of a general credit for any payments of compensation previously made, it is more appropriate for an actual finding as to an overpayment of TTD benefits and credit due for such overpayment against past due benefits.

On cross-appeal, Ray argues the ALJ erred in commencing the award of PTD benefits on May 13, 2014, the date of Dr. Chung's evaluation rather than the date of injury on January 10, 2012 and cites to Sweasy v. Walmart Stores, Inc., 295 S.W.3d 835 (Ky. 2009). Ray also argues the ALJ erred in assessing a 15% safety violation penalty against him since he did not perform the proper analysis pursuant to Whittaker v. McClure, supra, and Louisville Metro Government v. Hunter, No. 2010-CA-002135 (Ky. App. 2011)(unpublished). Ray asserts pursuant to the above case law, three elements must be established for a safety violation to be assessed against a Claimant. Ray argues the ALJ did not address the third element - the use of the safety equipment was routinely enforced by Swift Roofing, even after requesting additional findings in his petition for reconsideration.

As the claimant in a workers' compensation proceeding, Ray 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 Ray was successful in his 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).

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 that would have supported 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).

However, such discretion is not without limit. In reaching a determination, the ALJ must also provide findings sufficient to inform the parties of the basis for the 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

In the case *sub judice*, Ray alleges his January 10, 2012 fall resulted in both physical and psychological injuries. Regarding Ray's psychological claim, we find Dr. Wagner's report, the records of Four Rivers Behavioral Health, and Ray's testimony, constitute substantial evidence supporting the determination Ray sustained psychological injuries due to his January 10, 2012 fall. In his April 9, 2015 report, Dr. Wagner took a history and administered a battery of tests. He diagnosed Ray with: 1) major depressive disorder (moderate) R/O mood disorders; 2) R/O Personality Disorder (NOS); and 3) psychosocial stressors include depressive symptoms, anxiety symptoms,

income loss, job loss, chronic pain. In a subsequent report dated April 17, 2015, Dr. Wagner clarified he opined, "Ray's psychological difficulties are a direct result of his 2012 work related injury," and assessed a 25% impairment rating. Swift Roofing's criticisms go to the weight of the evidence, and do not render Dr. Wagner's opinion unsubstantial.

Ray has received treatment since January 2015 from Four Rivers Behavioral Health for depression and anxiety. In a March 19, 2015 letter, Richard Kranz, LPCA, opined Ray's anxiety, depression, and difficulty sleeping are due to his injuries, and require continued treatment. Likewise, Ray testified regarding the psychological symptoms he attributes to his work injury. Therefore, as noted above, substantial evidence supports the ALJ's determination of causation regarding Ray's psychological condition.

With that said, we find the ALJ's analysis regarding Ray's physical injuries, specifically his determination Ray sustained serious "work injuries," is wholly insufficient. This claim involves allegations of injuries to more than one body part and it is incumbent upon the ALJ to identify the specific body parts he found were injured as a result of the work accident before he can

address issues of extent and duration of disability. The Form 101 contains allegations of injuries to Ray's head, left shoulder, left clavicle, right hand, right groin area, and any other condition identified as work-related in the medical record filed into evidence." At his deposition, Ray testified he injured his head, left clavicle, right hand and wrist, right groin, and neck. At the hearing, Ray stated he has migraine headaches, and pain in his left clavicle region and neck. Voluminous medical records were filed by both parties documented treatment Ray received, as well as several medical reports.

In the opinion and order on remand, the ALJ summarized Dr. Chung's report, which he found "compelling", and determined Ray sustained "serious physical impairment" and "serious physical injuries" as a result of the work accident. In light of the alleged multiple injuries, the ALJ's findings of "serious physical injuries" do not constitute sufficient findings to allow for meaningful review. Therefore, the award is vacated and the claim is remanded to the ALJ to state with specificity what body parts Ray injured as a result of the work accident, and to identify the permanent impairment ratings, if any, attributable to each injury. The ALJ must cite to specific evidence of record supporting his determinations.

In light of the need for additional findings of fact regarding the extent of Ray's physical injuries, and the possibility such findings could change or alter the ALJ's analysis regarding the extent of Ray's disability, we also vacate the ALJ's determination Ray is permanently totally disabled. KRS 342.0011(11)(c) defines permanent total disability as, "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury." Work means the ability to provide "services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(34). In considering whether an injured employee is permanently totally disabled, the ALJ is required to conduct an individualized analysis of the injured worker's age, education, vocational skills, post-injury medical restrictions, and the likelihood of resuming work. Ira Watson Department Store v. Hamilton, supra. The Kentucky Supreme Court recently explained, "An ALJ cannot simply state that he or she has reviewed the evidence and concluded that a claimant lacks the capacity to perform any type of work. The ALJ must set forth, with some specificity, what factors he or she considered and how those factors led to the conclusion that the claimant is

totally and permanently disabled.” City of Ashland v. Taylor Stumbo, 461 S.W.3d 392, 396-397 (Ky. 2015).

In this case, this analysis must necessarily include a review of Ray’s post-injury work for Swift Roofing and his other odd jobs. We note merely stating Ray is 47 years old, meaning he is now in late middle age, and he has a very good work ethic does not explain how this affects his ability to obtain employment. On remand, after specifying Ray’s physical injuries resulting from the work accident, the ALJ is directed to undertake the proper analysis mandated by Ira Watson Department Store v. Hamilton, supra, and City of Ashland v. Taylor Stumbo, supra, and determine whether Ray is permanently partially or permanently totally disabled. In doing so, the ALJ must explain the basis for his determination citing with specificity to the evidence upon which he relied.

In a related issue, Swift Roofing argues the ALJ failed to address the issue of work-relatedness/causation of Ray’s cervical claim. Swift Roofing argues Ray’s cervical complaints are unrelated to the fall, and resulted in no permanent injury. Swift Roofing points out it requested additional findings of fact on this issue in its petition for reconsideration, which the ALJ failed to do. In response, Ray asserts he neither requested income

benefits nor future medical benefits for his neck problems. However, Ray asserts his past treatment for his neck should be compensable because it was rendered to ascertain and to rule out his neck being the source of his pain.

In light of the above, we find it necessary for the ALJ to address the compensability of the treatment Ray received for his cervical complaints. KRS 342.020 requires the employer to "pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical and hospital treatment . . . as may be reasonable be required at the time of the injury and thereafter during disability . . . ." Therefore, on remand, the ALJ must address the compensability of Ray's past medical treatment for his cervical complaints.

Next, because the ALJ failed to perform the proper analysis, we must also vacate the ALJ's application of the 30% safety penalty against Swift Roofing and remand for additional findings of fact.

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 commissioner 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 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. 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 regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). On the other hand, as a general rule workers' compensation acts are no fault. The purpose of workers' compensation is to pay benefits to an injured worker without regard to negligence on the part of either the employer or the employee. See Grimes v. Goodlet and Adams, 345 S.W.2d 47 (Ky. 1961).

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. Secondly, 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. See Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may well constitute grounds for assessment of a 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 employees.

In the opinion and order on reconsideration, the ALJ did not clearly address the elements required in finding the 30% safety penalty applicable. On remand, the ALJ must identify the specific statute or regulation, whether state or federal, Swift Roofing violated based upon the evidence of record. We decline to assume the ALJ found Swift Roofing violated the general duty clause of KRS 338.031(1)(a) by his use of the four-part test in Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220 (Ky. 2013). We decline to make this assumption particularly since the ALJ stated, "There, the Court stated that there are four tests to determine whether there was a safety violation and whether the plaintiff is entitled to the penalty benefit." This is incorrect. The Kentucky Supreme Court utilized this four-part test only to determine whether a violation of KRS 338.031 had occurred. Only after finding substantial evidence supporting the finding the test was satisfied, did the Court address the second element of KRS 342.165, an intentional violation. See also, Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000). With that said, if the ALJ does perform an analysis pursuant to Hornback and Offutt to determine

whether the general duty clause has been violated, the mere recitation of the four elements in the affirmative without providing any additional explanation is insufficient. The ALJ must specify what evidence or factors he considered in addressing each of the four elements. Once the ALJ makes a proper determination of whether Swift Roofing has violated a specific statute or regulation, the ALJ is then required to make specific findings addressing intent.

On the other hand, Ray contends the ALJ erred in assessing a 15% safety violation against him since he did not consider or address whether Swift Roofing proved it routinely enforced the use of safety equipment despite requesting additional findings of fact on this issue in his petition for reconsideration. KRS 342.165(1) provides, "If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer . . . the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment." Swift Roofing bore the burden of proving Ray intentionally disregarded a known safety rule or intentionally failed to use any safety appliance furnished by Swift Roofing. Ray concedes he received safety training prior to his injury, safety equipment was

available to him, and he was not wearing a harness at the time of his fall. Indeed, as noted by the ALJ, Ray testified he had received safety training which included fall protection, and he should have been wearing a safety harness at the time of his fall. However, Ray insists Swift Roofing failed to prove it routinely enforced the use of the safety equipment. In Whittaker v. McClure, supra, the Kentucky Supreme Court stated as follows:

Under such circumstances, it could not be said that the employer had proved a knowing violation of a safety rule by the worker. In other words, even where a safety rule exists, if the employer fails to enforce the rule, it cannot hope to penalize a worker for failing to follow the rule. The decision in Barnet was consistent with the legislature's purpose in setting forth corresponding employer and worker obligations in KRS 338.031 and with the purpose of the penalty provisions contained in KRS 342.165.

There is conflicting testimony on the issue of whether Swift Roofing enforced the rules regarding fall protection. Ray testified he was encouraged not to wear safety equipment because it slowed his work down. Ray testified he had worked for Swift Roofing and with Reeves every day for two years prior to the accident. Ray stated he never wore a safety harness when they were working on the roofs at Murray State University. Reeves was aware Ray

did not wear proper safety harnesses. He admitted he had never talked to Ray about needing to wear safety harnesses on job sites. Suiter testified all Swift Roofing employees, including Ray, are provided safety training, and it holds annual "OSHA 10" classes. Suiter testified Ray was provided a harness and lanyard, and was trained on its proper use. The safety equipment was typically kept in their work truck. Suiter testified when he did visit jobs, he saw Ray using his harness and lanyard when required. Suiter also agreed part of a supervisor's job is to ensure safety protocols are being followed at a job site and Ray had the required safety equipment on.

In light of the above conflicting testimony on the enforcement of the safety rules, and the fact Ray requested additional findings of fact on this issue, we find it necessary to vacate the ALJ's application of the 15% safety penalty, and remand for additional findings addressing whether Swift Roofing enforced its rules regarding fall protection.

Finally, with regard to Swift Roofing's argument regarding TTD, we find the ALJ clearly found it was entitled to a credit for its overpayment of TTD benefits particularly in light of his additional findings in the order on reconsideration. In the opinion, the ALJ also

awarded Swift Roofing a credit for any benefits "paid or payable." In the order on reconsideration, the ALJ additionally stated, "Clearly, the defendant was granted a credit for the overpayment of [TTD] benefits, since page 20 specifically states that defendant shall be entitled for any workers' compensation benefits heretofore paid or payable." Based upon the language contained in the opinion and order on reconsideration, we find the ALJ sufficiently addressed Swift Roofing's entitlement to a credit for its overpayment of TTD benefits in the opinion and order on reconsideration.

Therefore, the August 14, 2015 Opinion and Order and the September 21, 2015 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED IN PART AND VACATED IN PART**. This claim is **REMANDED** for entry of an amended decision in conformity with the views expressed herein.

ALL CONCUR.

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