

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002041-WC

JEREMY LEISTNER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-01471

TITAN CONTRACTORS; HON. MARC
CHRISTOPHER DAVIS, Administrative
Law Judge; and WORKERS' COMPENSATION
BOARD

APPELLEES

and

NO. 2014-CA-000078-WC

TITAN CONTRACTING

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-01471

JEREMY LEISTNER; HON. MARC
CHRISTOPHER DAVIS, Administrative
Law Judge; and WORKERS' COMPENSATION
BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

COMBS, JUDGE: Jeremy Leistner petitions for review of an opinion of the Workers' Compensation Board that affirmed the decision of the Administrative Law Judge (ALJ). The ALJ awarded Leistner temporary total disability benefits, permanent partial disability benefits, and medical benefits for a work-related injury, but it denied his request for assessment of a safety penalty. Leistner contends that the Board improperly reviewed his claim under an abuse of discretion standard. Finding no error on the part of the Board, we affirm.

Leistner began working for Titan Contractors as a welder in February 2008.¹ On October 18, 2010, he and a crew had just finished evaluating the maintenance work that they had been assigned to undertake at a Hancock County power plant when Leistner fell eight to ten feet through an open shaft in the plant's duct network. He was seen at a walk-in clinic and diagnosed with a broken left ankle.

Leistner testified that the area in which the crew was directed to work could only be entered during the very limited times each year when the plant shut down operations for maintenance. He indicated that he did not see the open shaft upon

¹ A discrepancy exists in these petitions for review relating to the correct name of the employer. Leistner designated Titan Contractors as an appellee in Petition No. 2013-CA-002041-WC, and Titan Contracting identified itself as the cross-appellant in Cross-Petition for Review No. 2014-CA-000078-WC. While it appears that Titan Contracting is correct, for the purposes of this opinion Titan Contractors and Titan Contracting are considered to be the same employer.

entering the duct work because his sightline was blocked by a turning vane.² As he exited the area to retrieve the tools necessary to complete the work, Leistner claimed that he was blinded by a halogen lamp set to illuminate the area. He stepped beyond the turning vanes and fell into the open shaft. Leistner admitted that he was not in an area of the duct network where he was slated to be and that he did not have his flashlight illuminated. There was no work to be completed in the area where Leistner fell.

Another member of the crew, Allen Chinn, testified that he was behind Leistner on the crew's way out. He indicated that the open shaft was several feet beyond the halogen lamp and that Leistner would have seen it if he had illuminated his flashlight. Chinn indicated that Titan required a flashlight in its tool kit. He testified that he had not been blinded by the halogen lamp and that Leistner would not have encountered the open shaft if he had followed the marked route back out of the duct network. Chinn also indicated that a hard barrier had been in place around the open shaft at some point, that the barrier had been removed, and that such a barrier was necessary in order to maintain safety.

James Randolph Gray, an occupational health and safety consultant and former OSHA compliance officer, testified that Titan should have identified the hazard and mitigated the potential danger. Gray indicated that if he had been called upon to investigate as a compliance officer, he would have visited the site

² Turning vanes are set into a duct channel in a series and are designed to redirect airflow smoothly through an angle of the ductwork.

and assessed the environment against several regulatory standards associated with fall prevention.

The ALJ was not persuaded that Titan was liable for an increase in Leistner's compensation as a penalty for the violation of a safety standard. He rejected Gray's opinion testimony and dismissed the argument that Leistner was inadequately trained and/or inadequately supervised. The ALJ also rejected Titan's argument that Leistner's compensation should be decreased as a consequence of his intentional failure to use a safety appliance. The ALJ found that the accident was a result of Leistner's carelessness.

Leistner filed a petition for reconsideration, contending that the ALJ had erred by concluding that a safety penalty should not be assessed. The ALJ denied the petition. On appeal, the Workers' Compensation Board affirmed.

The applicable standard of the Board's review differs depending upon whether questions of fact or law are presented for consideration. As the claimant, Leistner has the burden of proving each of the essential elements of his claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). As the fact-finder, the ALJ is free to judge the credibility of the testimony and to choose which evidence to believe. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). When the claimant is unsuccessful before the ALJ, the standard of review is whether the evidence compelled a finding in his favor. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). However, the ALJ's application of the law to the facts as he finds them is subject to the Board's plenary review. *A & A Mechanical*,

Inc. v. Thermal Equipment Sales, Inc., 998 S.W.2d 505 (Ky. App. 1999). When reviewing the Board's decision, we may reverse *only* if the Board has overlooked or misconstrued controlling law or has so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

Leistner contends that the ALJ erred as a matter of law by denying his claim for enhanced benefits pursuant to the provisions of Kentucky Revised Statute(s)(KRS) 342.165(1) and that the Board's proper standard of review under the circumstances was *de novo*. We disagree.

KRS 342.165(1) provides, in part, 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.

The provisions of KRS 342.165 were enacted in an effort to reduce industrial accidents by imposing a penalty upon those employers who intentionally fail to comply with known safety regulations. *Apex Mining v. Bankenship*, 918 S.W.2d 225 (Ky. 1996). The claimant has the burden to establish an employer's intentional violation of a safety statute or regulation. *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834 (Ky. 1997).

In order to prevail on a claim for enhanced benefits under the provisions of KRS 342.165, a claimant must show that the employer violated a safety provision and that the work-related accident was caused in some degree by the violation. Causation is a finding of fact to be made by the ALJ; it cannot be disturbed if supported by substantial evidence.

The ALJ found that Leistner failed to follow the designated pathway to the work area. He found that Leistner had fallen as a result of his own carelessness and that his injury was not caused in any degree by Titan Contracting's safety violation. The evidence did not compel a contrary finding in favor of Leistner.

Although Leistner contends that the ALJ and the Board erred as a matter of law by failing to examine and apply the requirements of various safety regulations, it is apparent from the ALJ's finding of fact that the safety requirements had no causal relationship to Leistner's injury since he was not where he was required or intended to be. The ALJ did not find that the hazard existed in Leistner's work area, and the evidence did not compel such a finding. The Board did not overlook or misconstrue controlling law or so flagrantly err in evaluating the evidence that it has caused gross injustice by affirming the decision of the ALJ.

We affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE LEISTNER:

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BRIEF FOR APPELLEE/CROSS-
APPELLANT TITAN
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