RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002582-WC

SIDNEY COAL COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-058507

MARVIN THACKER;
HON. LLOYD R. EDENS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. Sidney Coal Company (Sidney Coal) appeals from the Workers' Compensation Board's opinion of November 20, 2002, affirming the May 21, 2002, opinion, order and award of the Hon. Lloyd R. Edens, Administrative Law Judge (ALJ). The ALJ found that Marvin Thacker (Thacker) was permanently partially disabled at the rating of 24.15% and awarded $276.60 per week for four hundred twenty-five weeks beginning November 6, 2001. The ALJ later modified this amount. The ALJ awarded Thacker temporary

total benefits (TTD) in the amount of $661.74 per week from December 2, 2000, until November 5, 2001. Furthermore, the ALJ found that Sidney Coal had intentionally failed to comply with its roof control plan as required by 30 CFR 75.220(a)(1). Thus, the ALJ applied the penalty found in KRS 342.165(1) and increased Thacker's award by 30 percent.

On appeal to this Court, Sidney Coal argues that Thacker was not entitled to additional TTD since he failed to reserve it as a contested issue before the ALJ and that the ALJ's decision to award additional TTD was not supported by substantial evidence. Sidney Coal also argues the ALJ's imposition of the 30% penalty pursuant to KRS 342.165(1) was not supported by substantial evidence. Finding that Thacker was entitled to additional TTD and that both of the ALJ's decisions were supported by substantial evidence, we affirm.

The record reflects that Sidney Coal had paid TTD benefits to Thacker from December 1, 2000, to April 24, 2001. However, in its opinion, order and award, the ALJ awarded Thacker TTD benefits from the date of the injury, December 1, 2000, to November 5, 2001, the date Dr. Fannin recommended Thacker consult with neurosurgeon Dr. Gilbert, although the ALJ did credit Sidney Coal for the amount it had previously paid.

On appeal, Sidney Coal argues that Thacker was not entitled to the additional TTD benefit period because he did not

demand additional TTD benefits when his claim was originally pending before the ALJ. Sidney Coal insists that the ALJ lacked the ability to award the additional TTD benefits because Thacker failed to preserve the issue as a contested issue. Thacker never argued for additional TTD benefits before the ALJ; thus, the ALJ could not address the issue.

Moreover, Sidney Coal insists the ALJ's decision was not based on substantial evidence because in its opinion, order and award it relied exclusively on Dr. Fannin's testimony to support the award. Sidney Coal argues that Dr. Fannin's testimony does not constitute substantial evidence because he never opined that Thacker had reached maximum medical improvement. Further, Sidney Coal points out that Dr. Fannin never described Thacker as temporarily totally disabled.

Also in its opinion, order and award, the ALJ imposed the 30% penalty pursuant to KRS 342.165(1). In support of this, the ALJ found that Sidney Coal had intentionally failed to comply with its roof control plan as required by federal regulation 30 CFR 75.220(a)(1) and had caused the accident to some degree due to this intentional failure.

Sidney Coal argues that the ALJ's decision was not supported by substantial evidence. According to Sidney Coal, Thacker had the burden of proving: 1) that Sidney Coal failed intentionally to comply with its roof control plan and 2) that

Sidney Coal's intentional failure contributed to Thacker's injury to some degree. Sidney Coal argues that Thacker failed to prove that it intentionally spaced the roof bolts improperly. Sidney Coal points to Billy Slone's testimony in which he opined that the roof bolts were being spaced wide because the roof bolters were inexperienced. Sidney Coal argues that inexperience does not equal intent; thus, Thacker failed to prove it intentionally failed to comply with its roof control plan. Sidney Coal also points out that Thacker, Blackburn, Williamson, and Slone, all experienced miners, testified that 100% compliance with a roof control plan did not guarantee that a roof fall would not occur. Furthermore, Sidney Coal argues that Thacker failed to prove that the rock, which fell on him, fell from an area that had been improperly bolted.

When we review decisions of the Workers' Compensation Board, we will reverse the Board only when we determine that it has overlooked or misconstrued the controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. Daniel v. Armco Steel Company, Ky. App., 913 S.W.2d 797, 798 (1995). This ultimately leads us to review the ALJ's decision. Where, as in the case sub judice, the ALJ has found in favor of the claimant who had the burden of proof, we must determine whether the ALJ's findings were supported by substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d

641, 643 (1986); see also Wolf Creek Collieries v. Crum, Ky., 673 S.W.2d 735 (1984). The Supreme Court of Kentucky has defined substantial evidence as, "some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people." Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971). Stated more simply, substantial evidence is, "evidence which would permit a fact-finder to reasonably find as it did." Francis, 708 S.W.2d at 643. We point out that the ALJ, not this Court nor the Board, had the sole discretion to determine the quality, character, and substance of the evidence presented before it. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999), citing Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); see also Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Furthermore, as the fact-finder, the ALJ may choose to believe or disbelieve any part of the evidence presented, regardless of its source. Whittaker, 998 S.W.2d at 481, citing Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

Regarding temporary total benefits, this Court stated:

> To summarize, TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the

> local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

W.L. Harper Constr. Co. v. Baker, Ky. App., 858 S.W.2d 202, 205 (1993). As the Board pointed out in its opinion, Dr. Daniel Primm (Dr. Primm) performed an independent medical examination of Thacker on September 14, 2001. Dr. Primm opined that Thacker could return to light duty work and from the date of September 14, 2001, Thacker would reach MMI in four to six weeks. According to Dr. Primm, Thacker could have reached MMI as early as October 12, 2001, or as late as October 26, 2001. Based on Dr. Primm's report alone, the ALJ reasonably determined that Thacker's underlying condition had stabilized, he had reached MMI by November 5,2001; thus, Thacker was entitled to receive TTD benefits until that time.

Moreover, as Thacker mentioned in his brief, reports and testimony of Dr. William Fannin (Dr. Fannin) support the ALJ's decision as well. Thacker points out that on November 5, 2001, Dr. Fannin, Thacker's treating physician, recommended that Thacker consult with a neurosurgeon to explore the possibility of surgery. As Thacker points out, Dr. Fannin could not have felt that Thacker had reached MMI since Dr. Fannin wished to explore the possibility of surgery. We believe that the ALJ could have reasonably inferred from Dr. Fannin's testimony that Thacker did not reach maximum medical improvement until

November 5, 2001. Based on this inference, the ALJ not only could but also did reasonably find that Thacker's underlying condition did not stabilize until November 5, 2001. At that point, the ALJ reasonably found that Thacker had reached MMI. As a result, Thacker was entitled to receive TTD benefits until November 5, 2001; thus, we deem that the ALJ's decision was supported by substantial evidence.

In addition, Sidney Coal fails to cite any statute, administrative regulation or case law to support its proposition that Thacker was not entitled to the additional TTD benefits because he failed to reserve it as a contested issue. Noting this deficiency, we fail to find Sidney Coal's argument persuasive and decline to disturb the ALJ's decision.

In KRS 342.165, the General Assembly codified a penalty against employers that fail to comply with safety laws. KRS 342.165(1) reads in pertinent part:

> 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.

According to the former Court of Appeals of Kentucky, now the Supreme Court of Kentucky, "[t]he basis of the statutory penalty

is that the injury is the result of an intentional failure to comply with a regulation which has been communicated to the employer." Gibbs Automatic Moulding Company v. Bullock, Ky., 438 S.W.2d 793, 794 (1969). Furthermore, the high court concluded, "[i]n order to have an intentional failure to comply, there must be actual knowledge, or such period of time must have elapsed as would create a presumption of knowledge." Id.

In Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996), appellee was permanently disabled due to an accident that he had while operating a road grader. The ALJ found that appellant-employer had supplied to appellee a grader that had its throttle tied wide open and had defective brakes and brake pedal. The ALJ found that appellant knew about the defective condition of the grader, failed to repair it, and intentionally failed to comply with KRS 338.031. The ALJ concluded that appellant would have been subject to the penalty in KRS 342.165 but for the fact that appellee had previously received benefits for total disability. Id. at 227.

According to the high court, the record revealed that appellant's supervisory personnel, including its foreman, knew about the defective condition of the grader, and the record showed that KRS 338.031 had been in effect since 1972, precluding any argument that appellant lacked knowledge of the statute. Id. at 228. The high court stated:

> Under those circumstances, we agree that substantial evidence supported the ALJ's inference that the employer's violation of KRS 338.031 was intentional. Likewise, the ALJ cited ample evidence to support the conclusion that the grader was moving faster than it would have been had it not been defective, thereby contributing to the severity of the accident. This finding satisfies the requirement of KRS 342.165 that the work-related accident be caused "in any degree" by the employer's safety violation.

Id.

Likewise in this case, we believe that the ALJ's decision to impose the penalty found in KRS 342.165 was supported by substantial evidence. We note that the FMSHA requires all mine operators to develop and follow a roof control plan that has been approved by the federal agency's district manager. 30 CFR 75.220(a)(1). The record reflects that Sidney Coal knew about this regulation. Vernon Blackburn, its former mine manager at Clean Energy, testified that he was familiar with Sidney Coal's roof control plan. He testified that the plan called for the roof bolts to be spaced no wider than forty-eight inches apart. He testified that the purpose of the plan was to provide the mine's employees with a work environment that was as safe as possible. He further testified that he knew the federal inspector had cited Sidney Coal on both November 20th and November 30th due to wide roof bolts. Patsy Cain, Sidney Coal's safety director testified that Sidney Coal's roof control plan

required the roof bolts to be forty-eight inches apart. She too knew about the citations. She testified that she failed to report Thacker's accident to the FMSHA as required and that Sidney Coal had been fined as a result. Thacker, a former mine superintendent himself, testified that Sidney Coal was pressuring its roof bolters to work faster which resulted in wide bolts. Slone, another experienced miner, testified that he noticed other wide roof bolts and reported them. He also opined that Sidney Coal was pressuring its inexperienced roof bolters to work faster, which caused problems with wide roof bolts.

The record established that Sidney Coal's supervisory personnel knew about 30 CFR 75.220, knew about its own roof control plan and knew about its cited violations of its own roof control plan. The record reveals that Sidney Coal was pressuring its new, inexperienced roof bolters to work faster and this caused a persistent and re-occurring problem with wide roof bolts. Given this evidence, the ALJ reasonably found that Sidney Coal intentionally failed to comply with its roof control plan as required by federal regulation.

Furthermore, Thacker testified that when the accident happened, he was working in the area between the continuous miner and the rib of the mine. He testified that in this area there was approximately six feet between the last roof bolt and the rib of the mine, which indicates a violation of the roof

control plan. Thacker insisted that the rock that fell on him was approximately five feet long and three and one-half to four feet wide. Williamson, who witnessed the accident, testified that the rock was four and one-half feet long and five and one-half feet wide. Slone, who measured the rock, testified that it was greater than forty-eight inches wide. He also testified that the area in which it fell had been improperly spot bolted.

The record reveals that Sidney Coal's roof control plan required that its roof bolts be spaced no wider than forty-eight inches. The record also reveals that the rock that fell on Thacker was between five and six feet long, in other words, between sixty and seventy-two inches. The record reveals that the accident site had been improperly bolted, since approximately six feet of space existed between the last line of roof bolts and the rib of the mine. The record reveals that the rock that fell on Thacker was approximately the same size as the area that was improperly bolted. Given this, one could reasonably infer Sidney Coal's intentional failure to follow its own plan not only contributed to causing the accident but also contributed to the severity by causing the large size of the rock. We adjudge that the ALJ reasonably found that Sidney Coal's intentional failure to comply caused to some degree the accident.

As the Administrative Law Judge's opinion was supported by substantial evidence, we affirm the Workers' Compensation Board's opinion of November 20, 2002.

ALL CONCUR.

BRIEF FOR APPELLANT:

A. Stuart Bennett
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BRIEF FOR APPELLEE:

Miller Kent Carter
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