

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001174-WC

ALCOA/REYNOLDS METALS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00433

ALFRED SMITH;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

DIXON, JUDGE: Alcoa/Reynolds Metals, Inc. seeks review of a decision of the
Workers' Compensation Board affirming the award of an Administrative Law
Judge in favor of Alcoa's former employee, Alfred Smith. We affirm.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The record before us reveals that Alcoa vigorously disputed Smith's claim for workers' compensation benefits following an injury to his left shoulder in August 2008. Smith, who was born June 2, 1960, began working for Alcoa's aluminum foil manufacturing plant in October 2007. In his capacity as a line tender, Smith was responsible for threading foil through a machine. At the time of the injury, Smith was turning the wheel of the spooling mechanism to thread the foil when he felt a "pop" in his upper left shoulder. Smith sought medical treatment and was diagnosed with a rotator cuff tear. Dr. Akbar Nawab surgically repaired the tear and performed a distal clavicle resection. Smith was released to return to work with lifting restrictions in March 2009; however, Alcoa terminated Smith's employment.

Smith filed a claim for workers' compensation benefits in April 2009. Alcoa contested the claim on several grounds, including pre-existing condition and Smith's alleged failure to truthfully report his medical history to Alcoa. At the final hearing, in addition to Smith's own testimony, the ALJ reviewed medical evidence and deposition testimony from numerous physicians. In November 2009, the ALJ rendered a lengthy opinion in favor of Smith, finding that he suffered a compensable work injury and that he was entitled to vocational rehabilitation benefits. The Board affirmed the ALJ's award, and this petition for review followed.

In its petition, Alcoa challenges the sufficiency of the evidence and contends the ALJ erroneously rendered inconsistent findings of fact. Alcoa's argument

relates to the ALJ's findings regarding Smith's medical history and his alleged misrepresentations regarding a prior injury. Based on the medical evidence and Smith's testimony, the ALJ concluded that Smith had suffered a neck injury at the C4-C5 level in 2005, with radiating pain to his left shoulder. The ALJ found that the prior neck condition was unrelated to Smith's complaints of shoulder pain following the 2008 injury. Alcoa concedes that this finding was supported by substantial evidence; however, it opines that such finding required the ALJ to conclude that Smith intentionally misrepresented his medical history during his pre-employment physical with Alcoa. On this issue, the ALJ stated in relevant part:

The plaintiff disclosed his prior neck injury during his physical examination and also disclosed his prior employment with Porter Paints. Further, there is no causal connection between that neck injury and his current left shoulder injury as the prior neck injury did not bring about the current shoulder problem. Finally, the defendant did not rely on a false representation in making the decision to hire the plaintiff. He disclosed the prior injury and the employer. I believe the plaintiff honestly informed the examiner that he had no problems from the prior injury and was not willfully or knowingly trying to mislead the defendant in any way.

Alcoa asserts Smith intentionally misrepresented the severity of his prior neck injury and that such conduct precluded recovery of workers' compensation benefits.

KRS 342.165(2) states:

(2) No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation

would otherwise be payable falsely represents, in writing, his or her physical condition or medical history, if all of the following factors are present:

- (a) The employee has knowingly and willfully made a false representation as to his or her physical condition or medical history;
- (b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and
- (c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

In *Baptist Hosp. East v. Possanza*, 298 S.W.3d 459, 463 (Ky. 2009), the Kentucky Supreme Court addressed KRS 342.165(2), noting that each of the specific statutory provisions must be proven in order to bar a claimant's recovery. In the case at bar, the record indicates that Alcoa failed to satisfy the three prongs of the statute. After careful review, we agree with the Board's assessment of this issue. The Board stated:

As the ALJ noted, Smith reported his neck injury and the name of the employer at the time of that injury when he underwent his pre-employment physical with Alcoa. As we noted above, Dr. Bilkey stated there was no direct relationship between the [2005] injury to the cervical spine and the August 25, 2008 injury to the left shoulder. Thus, as in Possanza, the employer has not shown a causal link and cannot satisfy the third prong of the test in KRS 342.165(2) and its defense based on KRS 342.165(2) must necessarily fail. Even if we assumed *arguendo* Smith misrepresented his prior cervical condition, Alcoa cannot prevail since the current injury is a shoulder injury, specifically a rotator cuff tear, and no connection has been established between the cervical condition and the rotator cuff tear.

Although Alcoa opines that its interpretation of the evidence warrants reversal, we must be mindful of our standard of review. It is well settled that the ALJ “has the authority to determine the quality, character and substance of the evidence[,]” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), and he is free “to believe part of the evidence and disbelieve other parts of the evidence . . . [.]” *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). When this Court reviews a workers’ compensation decision, our function is to correct the Board only where we believe “the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). After careful consideration, we conclude the ALJ did not render inconsistent findings and his decision was supported by substantial evidence.

Alcoa’s second argument relates to the ALJ’s award of vocational rehabilitation benefits. Alcoa points out, at the time of the hearing, Smith was working part-time as a basketball coach, and his past work history included employment as a teacher’s aide and a program director for a youth facility. In light of Smith’s prior employment in those capacities, Alcoa contends that rehabilitation benefits were not justified.

The relevant statute, KRS 342.710(3), states in pertinent part: “When as a result of the injury [an employee] 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 *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 802 (Ky. App. 1995), this Court interpreted the meaning of this statute, concluding:

In light of the spirit and purpose of the workers' compensation statutes, we hold that ‘work for which an [employee] has previous training or experience’ must be suitable employment. By ‘suitable employment’ we mean work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement.

We note that Alcoa raised this argument in its appeal to the Board. After careful review, we agree with the Board’s conclusion:

Here, the ALJ found Smith lacked the physical capacity to return to the work he performed at the time of his injury. The ALJ also noted he faced a five pound lifting restriction with his left hand. The ALJ found Smith lacked the ability to perform his past work. As observed by the ALJ, Smith has college credit, but does not have a degree. Smith never returned to employment at the same or greater AWW. Since Smith does not have a degree, the ALJ could reasonably believe Smith’s employment as a part-time basketball coach does not constitute suitable employment. Smith earned \$8.75 per hour at 14 hours per week in that job. Smith’s AWW at the time of his injury was \$850.96. There is no indication as to Smith’s income when he worked as a youth worker at a youth detention facility from 1996-1998. He testified he left the job at the youth facility to earn a better wage at Porter Paints. There is simply nothing in the record to indicate any other previous jobs Smith might be capable of performing would constitute suitable employment.

Despite Alcoa's argument to the contrary, we believe the record supports the ALJ's decision. Accordingly, we find no error in the award of rehabilitation benefits.

For the reasons stated herein, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lyn Douglas Powers
Louisville, Kentucky

BRIEF FOR APPELLEE:

Wayne C. Daub
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