

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000197-WC

KENNETH SCRUGGS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-96516

WESTLAKE PVC CORPORATION;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2012-CA-000339-WC

WESTLAKE PVC CORPORATION

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-96516

KENNETH SCRUGGS;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kenneth Scruggs petitions and Westlake PVC Corporation (Westlake) cross-petitions this Court to review an Opinion of the Workers' Compensation Board (Board) affirming an award of permanent partial disability benefits to Scruggs. We affirm Appeal No. 2012-CA-000197-WC and Cross-Appeal No. 2012-CA-000339-WC.

Scruggs was employed by Westlake when he suffered a work-related injury on February 16, 2009. On that day, a co-worker fell from a railcar while utilizing a harness/restraining safety system. The harness/restraint safety system was designed to prevent workers from falling when working on equipment like the railcar. Later that day, Westlake's safety engineer requested Scruggs to "try out the system" by utilizing the harness/restraint safety system while on top of a railcar. Westlake's Brief at 4. Scruggs did so, and while attempting to navigate from one railcar to another railcar, the harness/restraining safety system malfunctioned causing Scruggs to fall between the railcars and suffer injury.

Consequently, Scruggs sought workers' compensation benefits. He claimed permanent injury to both knees and permanent injury as a result of a deep vein thrombosis in his leg. Based upon the medical and other evidence, the Administrative Law Judge (ALJ) found that Scruggs suffered a permanent partial

injury as a result of injury to both knees and as a result of a deep vein thrombosis. The ALJ fixed Scruggs' permanent partial impairment rating at 16 percent and awarded benefits accordingly. Both Scruggs and Westlake were dissatisfied with the ALJ's award and pursued appeals to the Board. The Board ultimately rejected Scruggs' and Westlake's allegations of error and affirmed the ALJ's award. This review follows.

To begin, our review of an ALJ's award is limited. The ALJ's findings of facts are affirmed if supported by substantial evidence of a probative value. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). And, it is within the sole province of the ALJ to judge the credibility and weight of evidence. *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797 (Ky. App. 1995). We, of course, review issues of law *de novo*.

We shall initially consider Scruggs' petition for review and then consider Westlake's cross-petition for review.

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Scruggs contends that the ALJ erred by failing to award him increased benefits for Westlake's safety violation per Kentucky Revised Statutes (KRS) 342.165. Scruggs points out that Westlake was fined by Occupational Safety & Health Administration (OSHA) for a safety violation in connection with his injury. Specifically, Scruggs maintains that Westlake breached its duty under KRS 338.031(1)(a) to "furnish . . . a place of employment . . . free from recognized hazards . . . likely to cause death or serious physical harm to his employees[.]"

According to Scruggs, the safety engineer knew that a few hours earlier an employee was injured while utilizing the harness/restraint safety system and violated KRS 338.031(1)(a) by requiring Scruggs to test the harness/restraint safety system. Scruggs argues that Westlake ignored OSHA's requirement to take the safety system out of service pending an inspection by the manufacturer.

The statute at issue is KRS 342.165(1), and it provides:

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.

Under KRS 342.165(1), an employer is liable for an increase of 30 percent in benefits if the work-related injury resulted from the employer's "intentional failure" to comply with workplace safety-related statutes or regulations.

In this case, it is undisputed that Westlake was fined for violating a workplace safety statute – KRS 338.031(1)(a). However, it is disputed whether Westlake's violation was "intentional" per KRS 342.165(1). While Westlake's safety engineer certainly knew that an accident occurred earlier, it is unclear

whether the safety engineer recognized that the harness/restraint safety system presented a hazard. *See Lexington-Fayette Urban Co. Gov't v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000). As found by the ALJ, the safety engineer was simply unaware of the cause of the previous accident and was investigating to “ensure the workplace was indeed safe.” Thus, the ALJ found that Westlake did not intentionally fail to follow KRS 338.030(1)(a). While this Court might have found differently, it is within the sole province of the ALJ to judge the credibility and weight of the evidence. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000). Upon the whole, we conclude that the ALJ’s finding that Westlake’s breach of KRS 338.031(1)(a) was unintentional is supported by substantial evidence of a probative value.

Consequently, we cannot say that the Board erred by affirming the ALJ’s decision not to enhance Scruggs’ benefits under KRS 342.165(1).

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Westlake contends that the ALJ erred by finding that Scruggs suffered a permanent partial injury to both knees. Westlake points out that the ALJ relied upon the medical testimony of Dr. Warren Bilkey to support his finding that Scruggs suffered a permanent partial injury to both knees. Westlake argues that Dr. Bilkey’s testimony “does not rise to the level of substantial evidence, particularly when viewed in the context of the other evidence presented.” Westlake Brief at 13. We disagree.

The ALJ painstakingly set forth its reasons and analysis in finding Dr.

Bilkey's testimony credible:

[Westlake] points out that at the time of his last visit with his treating physician in December of 2009, [Scruggs'] range of motion studies were within the normal range and they continued to be so at the time of the evaluation of Dr. DeGruccio. However, the evaluation of Dr. Bilkey on October 12, 2010[,] indicated a slight loss of range of motion leading to the assessment of impairment under the AMA Guides. [Westlake] argues [Scruggs] would have no impairment as the measurements obtained in December of 2009 and April of 2010 were above the measurements necessary for assessment of impairment under Table 17-10. However, Dr. Bilkey reviewed the evidence from Dr. DeGruccio and noted his measurements did indeed reveal [Scruggs] had lost flexion in both lower extremities to the point that the range of motion was less than 110 degrees as required for the assessment of 4% impairment for each lower extremity. A review of the evidence indicates Dr. Patel released [Scruggs] to return to active duty work in December of 2009 but estimated he would actually not reach maximum medical improvement from his injuries until August of 2010. After reviewing the evidence, I am convinced the range of motion measurements by Dr. Bilkey were correct in that each of the physicians have indicated there was no indication in any of the medical evidence that [Scruggs] was in any way non-cooperative in his examinations in regards to his range of motion. The simple fact is, the measurements taken by Dr. Bilkey were the measurements taken after the treating physician felt [Scruggs] would have reached maximum medial improvement. Therefore, I am convinced Dr. Bilkey correctly assessed impairment for the loss of range of motion of the left and right knees due to the repaired quadriceps tendon. In addition, I note Dr. Bilkey fully explained the reasons for the loss in range of motion in his report, noting the repair would actually shorten the tendon causing limitations in flexion and range of motion. He also noted the presence of heterotopic

ossification which may also be leading to the loss of range of motion.

In this case, the medical evidence concerning the injury to Scruggs' knees was conflicting. The ALJ simply chose to believe Dr. Bilkey's testimony, and his medical testimony was sufficient to support the ALJ's finding that Scruggs suffered a permanent partial injury to both knees. We, thus, reject Westlake's argument to the contrary.

Westlake also maintains that the ALJ erred by finding that Scruggs suffered a permanent partial injury due to a deep vein thrombosis in his leg. Specifically, Westlake argues that the ALJ again erred by relying upon the medical testimony of Dr. Bilkey.

In this case, the ALJ conceded that the proper impairment rating was a close call but was persuaded to adopt Dr. Bilkey's opinion because Scruggs continued to have swelling of the calf due to the deep vein thrombosis. Again, it was well-within the discretion of the ALJ to view Dr. Bilkey's testimony as to the impairment rating more credible. We believe that Dr. Bilkey's testimony constituted substantive evidence; thus, the ALJ's finding was not clearly erroneous.

In sum, we conclude that the Board properly affirmed the ALJ's award to Scruggs based upon a 16 percent permanent partial disability.

For the foregoing reasons, the Opinion of the Workers' Compensation Board is affirmed in Appeal No. 2012-CA-000197-WC and Cross-Appeal No. 2012-CA-000339-WC.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
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