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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000170-WC

EMPLOYMENT SOLUTIONS, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-11-83831

CHARLES BREEZE; HON.EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Employment Solutions, Inc., petitions this Court to review an opinion of the Workers' Compensation Board entered January 3, 2014, affirming in part, vacating in part, and remanding an award of the Administrative Law Judge (ALJ). We affirm.

Charles Breeze experienced a work-related injury on June 21, 2011, while employed by Employment Solutions. Breeze was an instructor for the building trades program at Employment Solutions. Breeze was using a table saw to cut a wood board when the saw blade hit a knot in the wood; thereupon, the wood board "kicked" causing Breeze's right hand to go into the saw's blade.

Breeze filed a workers' compensation claim based upon the injury to his right hand. The ALJ heard the evidence, and by opinion and award on July 3, 2013, the ALJ found that Breeze suffered a 23 percent permanent impairment and awarded benefits accordingly. The ALJ also assessed a safety penalty pursuant to Kentucky Revised Statutes (KRS) 342.165 against Employment Solutions. Employment Solutions then sought review with the Board. By Opinion entered January 3, 2014, the Board affirmed the ALJ's finding of 23 percent permanent impairment but vacated and remanded the assessment of the safety penalty for more specific findings of fact. Being dissatisfied with the Board's opinion, Employment Solutions filed this petition for our review.

To begin, our review in a workers' compensation case is limited. We reverse the Board's opinion only where "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." *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In reviewing the Board's opinion, we necessarily look to the ALJ's opinion. The ALJ's findings of fact may only be set aside if not supported by substantial evidence. Moreover, the ALJ, as fact-finder, has the sole authority

to determine the weight of evidence and to draw reasonable inferences therefrom. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

Employment Solutions initially contends that the ALJ erred by finding that Breeze suffered a 23 percent permanent impairment. Specifically, Employment Solutions maintains that the ALJ improperly relied upon the medical opinion of Dr. Robert Johnson, who assessed the 23 percent permanent impairment rating. Employment Solutions argues that Dr. Johnson based 12 percent of the 23 percent permanent impairment rating upon Breeze's loss of grip strength due to the work-related injury. According to Employment Solutions, the American Medical Association, *Guides to Evaluation of Permanent Impairment*, 5th Edition (AMA Guides) forbids the inclusion of grip strength when assessing the permanent impairment rating for Breeze's hand injury.

At the hearing before the ALJ, Dr. Johnson opined that Breeze suffered a 23 percent permanent impairment and believed that inclusion of loss of grip strength was appropriate under the AMA Guides. Conversely, Dr. Scott Prince opined that Breeze suffered a 12 percent permanent impairment and did not include loss of grip strength in reaching his impairment rating. But, Dr. Prince did not state that Dr. Johnson's assessment of a 23 percent permanent impairment rating was improper.

Here, we believe that the ALJ was presented with conflicting medical opinions and simply found Dr. Johnson's opinion more credible. In adopting Dr. Johnson's opinion, the ALJ found that "Dr. Johnson's opinion on the rating issue

more accurately reflects the severity of [Breeze's] injuries . . . ." ALJ's Opinion at 10. Upon the whole, we are of the opinion that substantial evidence supports the ALJ's opinion that Breeze suffered a 23 percent permanent impairment.

Employment Solutions next argues that the ALJ erred by assessing a safety penalty under KRS 342.165 and that the Board erred by vacating and remanding the safety penalty issue to the ALJ for more specific findings of fact. In particular, Employment Solutions maintains:

> 1) [T]here was no evidence in the record to establish that the table saw malfunctioned at the time of Breeze's injury; 2) there was no evidence in the record to establish "an industry standard" as to the type/model of table saw(s) that are acceptable within the industry; and 3) there was no evidence in the record to establish that the new model table saw was available as of June 21, 2011.

Employment Solutions' Brief at 6.

In its opinion and order, the ALJ found that Employment Solutions breached its duty under KRS 338.031(1)(a) to furnish Breeze "a place of employment . . . free from recognized hazards that are causing or are likely to cause . . . serious physical harm . . . ." ALJ's Opinion at 12. Based upon Employment Solutions' breach of such duty under KRS 338.031(1)(a), the ALJ believed that a violation of KRS 342.165(1) occurred and assessed the safety penalty.

KRS 342.165(1) 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. . . .

The Board determined that the ALJ's findings of fact concerning the safety penalty were unclear and remanded for specific findings of fact:

> In assessing a safety penalty pursuant to KRS 342.165, the ALJ relied upon the general duty clause pursuant to KRS 338.031 in determining [whether] Employment Solutions had committed a safety violation subjecting it to a penalty. Although not argued before, or relied upon by the ALJ, OSHA requirements for guarding are set forth in 29 CFR 1926.304.
>
> 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. The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation[s].
>
> Application of the safety penalty requires proof of two elements. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Second, evidence of "intent" to violate a specific safety provision must also be present.
>
> Violation of the "general duty" clause set out in KRS 338.031(1)(a) may be grounds for assessment of the safety penalty in the absence of a specific regulation or statute addressing the matter. 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 the employees. . . .
>
> . . . .

> Because Breeze's testimony is equivocal, it is necessary for the ALJ to identify what evidence he relied upon in making his determination. Breeze's primary complaint is newer technology with advanced safety features existed on the market at the time of the accident. No evidence was produced as to whether the equipment lacked any safety features violative of any established safety rule or regulation. At his deposition, Breeze testified the guard was functioning properly, although at the hearing held two months later, he testified it did not. Because the testimony relied upon by the ALJ in reaching his conclusion is inconsistent, it is necessary for him to identify the portions of Breeze's testimony he relied upon in making his determination. It is unclear whether the ALJ believed Employment Solutions' failure to purchase a safer saw or its failure to repair the saw after receiving repeated warnings from Breeze was the basis for the imposition of the safety penalty.
>
> This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusions were drawn so the parties are reasonably apprised of the basis of the decision. However, the parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. . . .

ALJ's Opinion at 9-10, 17-18 (citations omitted). We agree with the Board's decision to vacate the assessment of the safety penalty and remand to the ALJ for specific findings of fact. The basis of the ALJ's opinion is unclear and remand is appropriate.

Upon the whole, we cannot say that the Board overlooked controlling law or erred in assessing the evidence so as to cause a gross injustice. *See W. Baptist Hosp.*, 827 S.W.2d 685.

For the foregoing reasons, opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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