

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001462-WC

JUDY CONSTRUCTION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-59605

SHAWN SMITH; HON. MONICA
RICE-SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Judy Construction petitions this Court to review an August 18, 2017, Opinion of the Workers' Compensation Board (Board) that affirmed an Opinion and Award of the Administrative Law Judge (ALJ) awarding Shawn Smith permanent partial disability benefits. We affirm.

Smith was an employee of Judy Construction. While working for Judy Construction on December 2, 2015, Smith fell approximately forty feet from a bridge and sustained significant injuries.¹ Smith filed a claim for workers' compensation benefits seeking benefits for injuries caused by his fall on December 2, 2015. The ALJ conducted a hearing and rendered an Opinion and Award on May 9, 2017.

Relevant to this appeal, the ALJ refused to decrease Smith's benefits due to his alleged safety violation per Kentucky Revised Statutes (KRS) 342.165(1). The ALJ specifically found the safety violation penalty set forth in KRS 342.165(1) was inapplicable because Smith did not intentionally fail to utilize his safety harness when he fell from the bridge. Being dissatisfied with the ALJ's Opinion and Award, Judy Construction sought review with the Board. By Opinion entered August 18, 2017, the Board affirmed the ALJ and determined that the ALJ acted within her discretion by denying to apply the safety violation penalty of KRS 342.165(1). Our review follows.

Upon review of the Board's opinion, we are limited to determining whether "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 Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

¹ The record indicated that Shawn Smith sustained injuries to his spleen, bowels, head, wrists, elbow, knees, back, ribs, and pelvis.

In so doing, we must necessarily review the opinion of the ALJ. The ALJ is the ultimate fact-finder and possesses sole discretion to judge the credibility of testimony. *Miller v. E. Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997).

Judy Construction contends that the ALJ erred by failing to reduce Smith's benefits due to his safety violation per KRS 342.165(1). In particular, Judy Construction maintains that Smith was not wearing his safety harness at the time the fall from the bridge occurred. Judy Construction points out that Smith ignored a known safety rule and imposition of the safety violation penalty was warranted.

KRS 342.165(1) provides, in relevant part:

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), the intentional failure of an employee to utilize a safety appliance results in a 15 percent reduction in benefits where such failure is a cause of the work-place accident.

In her Opinion and Award, the ALJ specifically found that Smith did not intentionally fail to wear the safety harness:

[Smith] had worn his harness all day and was wearing his hard hat. On this occasion, after taking his harness off to go to the bathroom near the end of the day, he simply without thinking went to help get the last form down after his supervisor said once that was done they would get ready to head home. In that moment while trying to hurry to go home, [Smith] inadvertently forgot to put back on his harness. The accident occurred not as a result of any willful misconduct of [Smith] but due to a simple act of negligence.

Opinion and Award at 15.

The Board reviewed the ALJ's findings and conclusions as to the safety violation. The Board believed the ALJ properly applied the law and properly considered the evidence:

Here, the ALJ determined Smith did not intentionally violate a safety rule, and outlined her reason for doing so. The ALJ found persuasive Smith's testimony he had worn his safety harness and hard hat for the entire day prior to the accident. He removed his harness near the end of his workday in order to use the restroom. At that time, his supervisor told the crew to take down the last form and then they could go home. Smith testified that he "wasn't thinking" and was "in a hurry" when he jumped across the bridge without his safety harness on. The ALJ concluded, "In that moment while trying to hurry to go home, Plaintiff inadvertently forgot to put back on his harness. The accident occurred not as a result of any willful misconduct of the Plaintiff but due to a simple act of negligence." We believe the ALJ acted within her authority in drawing this conclusion from Smith's testimony. As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence, and reasonable inferences to be drawn. We note that Judy Construction provided no additional evidence regarding the safety violation.

Worker's Compensation Board Opinion at 16 (citations omitted).

The burden was on Judy Construction to prove that Smith intentionally failed to utilize the safety harness. *See Cabinet for Workforce Dev. v. Cummins*, 950 S.W.2d 834 (Ky. 1997). As Judy Construction did not prevail before the ALJ, Judy Construction must demonstrate that the record compels a contrary finding to prevail on appeal. Judy Construction did not do so.

The only evidence concerning Smith's failure to use the safety harness was from Smith. The ALJ found Smith's testimony credible and decided that he did not intentionally fail to use the safety harness. Considering the evidence presented, we are simply unable to conclude that the Board erred by failing to disturb the ALJ's decision.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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Monteia Mundy Owenby
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BRIEF FOR APPELLEE SHAWN
SMITH:

James R. Martin II
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