# IMPORTANT NOTICE
## NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 24, 2012
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2011-SC-000356-WC

ALSTOM POWER — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001574-WC
WORKERS' COMPENSATION NO. 08-78373

DUSTIN ALLEN;
HONORABLE J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

The claimant alleged that he sustained a work-related back injury, which he related to two incidents that occurred on August 8, 2008. Affirming decisions by an Administrative Law Judge (ALJ) and the Workers' Compensation Board, the Court of Appeals determined that substantial evidence supported the findings that he sustained a work-related injury and that an 8% permanent impairment rating resulted. Moreover, the circumstances did not require the ALJ to determine whether the second alleged incident actually occurred. We agree and affirm.

The claimant worked at a power plant as an apprentice millwright. He testified that the first incident occurred while he was preparing holes into

which bolts would be installed to anchor a pump or motor into a four-inch thick concrete base that rested on the floor. Drilling the holes and then shimming and anchoring a pump or motor required him to bend, stoop, kneel, crouch, crawl, push, pull, and sometimes work while twisting around a pipe. The claimant described the incident as the onset of a sharp catch in the center of his lower back while he was bent over putting epoxy into the holes. He had difficulty standing upright and the pain radiated down his left side and into the back of his left leg, almost to the knee, making it difficult to work. He informed his co-worker, Thomas "Tony" McCarty, when McCarty returned from an errand; reported the incident to the union steward; and went to the company nurse. She had him prepare an accident report, and then she gave him some Aleve for what she thought was a pulled muscle and sent him back to work.

The claimant testified that he returned to his task though in pain and that he was bent over, working, when he heard someone call out that water was coming into the area and noticed that his tool bag was getting wet. He stated that he went over to move it and his left leg gave out or slipped as he bent over. He jerked the leg back, then bent over and was unable to move. McCarty was not present at the time, so another co-worker summoned the union steward, who with the foreman drove him in a golf cart to the safety office. Although he asked if he could go to the emergency room, the safety officer reviewed the accident report for the previous incident and speculated after questioning him that his problem was probably a kidney stone. After completing the shift, the claimant drove himself to the emergency room.

According to the ALJ, a medical report from Highlands Regional Medical Center noted a history of chronic low back pain and of a possible recent work-related injury when pain began after the claimant bent over and felt a pull in his low back that radiated into his left leg. The physician diagnosed myofascial pain in the lumbar region.

The claimant testified subsequently that he did not recall whether he reported both work-related incidents to the emergency room physician. He presented medical reports from Drs. Owen and Bilkey, neither of whom reported a history that included the first of the alleged incidents.

Dr. Owen evaluated the claimant in July 2009 and noted a history of back pain due to an injury that occurred on August 8, 2008 when the claimant slipped in water and twisted his back. He diagnosed persistent low back pain associated with positive MRI findings and dysmetria and muscle spasm, which he attributed to the injury. Dr. Owen assigned a 7% permanent impairment rating and restricted the claimant from lifting more than 20 pounds and lifting more than 10 pounds frequently.

Dr. Bilkey evaluated the claimant in August 2009. He reported that the claimant had suffered low back pain that radiated into his left leg since he slipped and twisted his back on August 8, 2008. He noted that the lumbar spine MRI revealed a central disc herniation at L5-S1 with mild bilateral foraminal encroachment and a minimal degree of diffuse bulging at the L4-5 disc. Dr. Bilkey diagnosed a lumbar strain and left hip muscle spasm, which he attributed to the work-related injury. He assigned an 8% impairment rating

and restricted the claimant to lifting 25 pounds occasionally and restricted him from repetitive bending.

Dr. Menke evaluated the claimant for the employer in April 2009, before Drs. Owen and Bilkey conducted their evaluations. He received a history of the onset of low back pain on August 8, 2008 when the claimant was "leaning over and exerting himself" while working on a pump motor. He noted that the claimant returned to work and experienced an increase in back pain when he slipped in water while bending over to pick up his tool bag. Dr. Menke opined that the claimant suffered a lumbar strain that produced low back pain and atypical left leg symptoms, which he attributed to the "alleged work accident." Dr. Menke assigned a 6% impairment rating and restricted the claimant to lifting no more than 20 pounds or 10 pounds frequently, stating that he should perform work between shoulder and waist height.

Dr. Menke noted in an addendum to his report that the lumbar MRI performed in January 2009 revealed a central disc herniation at L5-S1 with anterior impression on the thecal sac and a mild degree of bilateral neuroforaminal encroachment. It also revealed a minimal degree of diffuse bulging at L4-5. He testified when deposed that the L5-S1 herniation was abnormal for an individual of the claimant's age. The record indicates that the claimant was 22 years old when the MRI was performed.

Mr. Pounds, a physical therapist, also testified for the employer. He stated that the claimant reported experiencing low back pain after working in a

bent position and slipping in water. He opined that the claimant could perform sedentary to medium work and some heavy work.

Tony McCarty testified that he did not notice any water on the floor in the area where he and the claimant were working on August 8, 2008. The craft supervisor also testified that there would not have been any standing water in the area. Both of them stated that they had no knowledge of the second alleged incident.

The employer did not dispute that the first incident occurred and paid eight months of temporary total disability benefits as well as approximately $3,600.00 in medical benefits voluntarily. It asserted, however, that the second incident did not occur; that nothing corroborated the claimant's testimony concerning the presence of water on the floor; and that he failed to give notice of the incident until he presented an affidavit that he prepared on August 23, 2008. The employer concluded that the claimant did not sustain a compensable injury because his medical experts attributed his injury and impairment rating to the second incident, which did not occur.

Having found the claimant to be a "very credible witness," the ALJ determined that he sustained a work-related injury on August 8, 2008 but did not specify whether the "work-related traumatic event(s)"[1] that comprised the injury included the first or second incident or both. The ALJ based income benefits on an 8% impairment rating, attributing the rating to Dr. Owen.

[1] *See* KRS 342.0011(1).

Amending the award pursuant to the employer's petition for reconsideration, the ALJ attributed the 8% impairment rating correctly to Dr. Bilkey. The ALJ denied the employer's request to specify whether the first or second alleged incident or both constituted the injury and to reconsider whether an impairment rating resulted, reasoning that a specific finding was unnecessary because the previous finding "was of a 'work-related injury' which was the result of either one or both of the incidents."

The employer appealed, asserting that the ALJ erred by failing to determine whether or not the second incident occurred. It reasoned based on *Cepero v. Fabricated Metals Corp.*[2] that the opinions of the claimant's medical experts did not constitute substantial evidence of a work-related injury or the resulting impairment if the second incident did not occur because they were based on a substantially inaccurate history that included only that incident. The Board and the Court of Appeals found no error in the decision, however, and affirmed.

An injured worker has the burden to prove every element of a claim, including causation and the extent of disability.[3] The claimant presented evidence to satisfy his burden of proving that he sustained a work-related injury on August 8, 2008, which shifted to the employer the burden to go

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[2] 132 S.W.3d 839 (Ky. 2004) (opinion of causation based on a substantially inaccurate history and supported by no other credible evidence cannot constitute substantial evidence).

[3] *Roark v. Alva Coal Corporation*, 371 S.W.2d 856 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App.1984); *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979).

forward with at least equally convincing evidence to the contrary. KRS 342.285 designates the ALJ as the finder of fact with the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences.[4] The employer based its defense on the premise that the second alleged incident did not occur, but the ALJ found the claimant to be a "very credible witness" and determined that he sustained a work-related injury on August 8, 2008 that produced an 8% impairment rating.

Nothing requires an ALJ to make detailed findings of fact. The findings must only be sufficient to support the ALJ's legal conclusions; enable the parties to understand the basis for the conclusions; and permit a meaningful appellate review.[5] We agree with the Court of Appeals that the ALJ met and exceeded the requirement.

The employer continues to argue that the ALJ erred by failing to make the requested finding. Noting that the two alleged incidents involved different mechanisms of injury, the employer maintains that the opinions of Drs. Owen and Bilkey did not constitute substantial evidence of a work-related injury or the resulting impairment under *Cepero* because they were based on a substantially inaccurate history that included only the second incident. We conclude, as did the Court of Appeals, that the argument fails for at least three reasons.

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[4] *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

[5] *Cook v. Paducah Recapping Services*, 694 S.W.2d 684, 689 (Ky. 1985); *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526, 531 (Ky. 1973); *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982).

First, the evidence in the employer's favor was not so overwhelming as to compel a finding that the second alleged incident did not occur.

Second, Dr. Menke received a history that the claimant experienced sharp low back pain that radiated into the left leg while bending over and exerting himself when working on a pump and, later, experienced a sudden increase in pain after slipping in water. The history and Dr. Menke's opinion that the "alleged work accident" accounted for the claimant's condition provided evidence from which the ALJ could conclude reasonably that the claimant sustained a work-related injury on August 8, 2008, regardless of whether the second incident occurred.

Third, having determined that the claimant sustained a work-related injury, nothing precluded the ALJ from choosing to rely on any of the medical experts when finding the permanent impairment rating that resulted.[6] Although the physicians received a history of different mechanisms of injury and assigned different impairment ratings, the medical evidence reveals no significant disagreement concerning the nature of the harmful physical changes that remained at maximum medical improvement. Under the circumstances, assigning an impairment rating to those changes involved no more than an evaluation of his present physical condition under the *Guides to the Evaluation of Permanent Impairment.* The ALJ was free to rely on Dr. Bilkey

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[6] *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977) (fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof).

because an accurate history regarding the mechanism of the claimant's injury was immaterial to the impairment rating that his physical condition warranted.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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