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RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000020-WC

KENNETH SCRUGGS

APPELLANT

ON APPEAL FROM COURT OF APPEALS

V. CASE NO. 2012-CA-000197-WC AND 2012-CA-000339-WC
WORKERS' COMPENSATION BOARD NO. 09-96516

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

APPELLEES

AND

2013-SC-000052-WC

WESTLAKE PVC CORPORATION

CROSS-APPELLANT

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ADMINISTRATIVE LAW JUDGE; AND
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CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART

Appellant, Kenneth Scruggs, appeals from a Court of Appeals decision which upheld the Administrative Law Judge's ("ALJ") determination that he was not entitled to increased benefits for his employer's safety violation pursuant to KRS 342.165. Scruggs argues that since his employer, Appellee Westlake PVC Corporation, was assessed a penalty due to the accident he is entitled to the benefit enhancement as a matter of law. Westlake cross-appeals contending that the ALJ erred by awarding Scruggs permanent partial disability ("PPD") benefits for his bilateral knee condition and lower extremity phlebotic condition. For the reasons set forth below, we agree with Scruggs, and affirm in part and reverse in part, the decision of the Court of Appeals.

Scruggs was employed by Westlake as a chemical operator when he suffered a work-related injury. Scruggs's job duties involved three primary tasks: computer monitor; dryer; and loader. The dryer and loader job tasks required Scruggs to climb up and down and move around railroad cars.

On the morning of the day of Scruggs's injury, a co-worker fell from a railcar while using a harness/restraining safety system ("safety system") which was installed one month earlier. Scruggs aided his co-worker and reported the incident. Westlake's safety engineer, Dustin Ray Davis, took the injured worker to the hospital and told the other employees to not use the safety system until he had the opportunity to inspect it. Davis admitted in his deposition that he received training a month earlier which informed him that if a malfunction of the safety system occurs, the system is not to be used until it can be inspected by a representative of the manufacturer.

After returning from the hospital, Davis inspected the safety system and could not find anything wrong with it. Davis asked Scruggs to put on his harness and attach to the safety system so that it could be tested. Scruggs complied and began to walk on top of a railcar while attached to the safety system. While attempting to move from the top of one railcar to another, the safety system malfunctioned causing Scruggs to fall. As a result of the fall, Scruggs suffered an injury to his right knee. A few days after the accident, while attempting to walk up some stairs, Scruggs fell again causing an identical injury to his left knee. He ultimately underwent surgery on both knees, performed by Dr. Shiraz Patel, and stayed in an assisted living facility for approximately two months to rehabilitate. After the surgery, Scruggs developed a blood clot which required him to wear a compression stocking.

Scruggs was able to return to his job about seven months after the work-related accident. He says that he can perform all of the required job tasks, but suffers pain in doing so. Scruggs continues to have stiffness and tightness in his knees.

Scruggs filed a claim for workers' compensation benefits for the injuries to both of his knees and for the deep vein thrombosis in his left leg. The ALJ found that Scruggs suffered a permanent partial disability as a result of his injuries and assigned him a 16% impairment rating to the body as a whole.¹ In so holding, the ALJ relied on the medical testimony of Dr. Warren Bilkey

¹ Dr. Bilkey assigned a 4% impairment rating for each knee and 9% for the deep venous thrombosis.

instead of the testimony of Dr. Andrew DeGruccio. Contrary to Dr. Bilkey's findings, Dr. DeGruccio found that Scruggs had a 0% impairment rating. The ALJ's opinion and order set forth the following reasoning for holding that Dr. Bilkey's opinion was credible:

[Westlake] points out that at the time of his last visit with his treating physician in December of 2009, [Scruggs's] 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 medical 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.

While the ALJ did find that Scruggs was entitled to PPD benefits, he refused to grant increased benefits for Westlake's alleged safety violation per KRS 342.165. That statute provides in pertinent part that:

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 ALJ held that KRS 342.165 did not apply because: the safety system was recently installed for the safety of Westlake's employees; Davis and Westlake were unaware that the safety system was the cause of the prior worker's injury that day; and Scruggs's injury occurred while Davis and Westlake were investigating the prior accident in an attempt to improve workplace safety.

The ALJ did not grant Scruggs the enhanced benefits despite the fact that OSHA fined Westlake \$4,500² for penalties related to the accident. OSHA found that Westlake violated KRS 338.031(1)(a) because it did not take the safety system out of service immediately after the first employee was injured. The violation and penalty were classified as "Serious." A petition for reconsideration was filed by both parties and denied except for a requested typographical error correction which was granted.

Both Scruggs and Westlake appealed the ALJ's decision to the Workers' Compensation Board. Scruggs argued that he should have received enhanced benefits per KRS 342.165 and Westlake argued that the ALJ erred by granting

² This fine was later amended down to \$2,250.

Scruggs permanent partial disability benefits. The Board, in a two to one decision affirmed the ALJ's holding not to apply KRS 342.165 to Scruggs's benefits. Board Member Stivers dissented, believing that Westlake used Scruggs as a "guinea pig" to test the safety system which it knew caused the previous injury to his co-worker. The Board unanimously affirmed the granting of PPD benefits to Scruggs. The Court of Appeals affirmed the Board and this appeal follows. We will first review Scruggs's argument and then Westlake's cross-appeal.

**SCRUGGS IS ENTITLED TO ENHANCED BENEFITS PURSUANT TO
KRS 342.165**

Scruggs's sole argument is that the ALJ erred in holding that he was not entitled to the enhanced benefits pursuant to KRS 342.165. Scruggs contends that the ALJ misunderstood the legal definition of what constitutes an intentional act and that he failed to apply the two-part test set forth in *Chaney v. Dags Branch Coal Co.*, 244 S.W.3d 95 (Ky. 2008). He also argues that the ALJ should have placed more weight on the fact that OSHA found Westlake violated KRS 338.031(1)(a) by asking Scruggs to test the safety device after another employee fell when using the same equipment. KRS 338.031(1)(a) states that "Each employer: Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." We agree with Scruggs that he is entitled to enhanced benefits due to Westlake's safety violation for the following reasons.

Because Westlake prevailed before the ALJ, Scruggs has the burden to prove that his conclusion was not supported by any substantial evidence. Substantial evidence is defined as “evidence of substance and relative consequence having a fitness to induce conviction in the minds of reasonable men.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

Because Westlake was found to have violated KOSHA’s “general duty” provision, *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000) is instructive instead of *Chaney*³. In *Offutt*, the claimant was granted enhanced benefits for a violation of KRS 338.031 which occurred because LFUCG failed to take precautions to prevent heat stroke during a two mile running exercise conducted as part of police training. The Court of Appeals applied a four-part test to determine whether a violation of KRS 338.031 occurred. This test established that a violation of a general duty clause occurs when, “(1) [a] condition or activity in the workplace presented a hazard to employees; (2) [t]he cited employer or employer’s industry recognized the hazard; (3) [t]he hazard was likely to cause death or serious physical harm; and (4) [a] feasible means existed to eliminate or materially reduce the hazard.” *Offutt*, 11 S.W.3d at 599.

In this matter, the first, third, and fourth parts of the *Offutt* test are clearly satisfied. The safety system did present a hazard to Westlake’s employees, the hazard did cause serious physical harm to Scruggs, and there

³ Unlike this matter, *Chaney* did not concern a violation of KOSHA’s general duty provision. KRS 338.031

would not have been a hazard if the safety system was not used until properly inspected. The more difficult question is whether Westlake knew the safety system presented a hazard. The ALJ found that Westlake did not know the safety system caused the injury to Scruggs's co-worker based in part on Davis's testimony that he did not know what caused the prior fall. However, Davis's actions the day Scruggs fell cast doubt on that testimony.

If Davis was completely unaware that the safety system caused the prior accident, it does not make sense for him to have instructed workers at Westlake to not use the equipment until he could inspect it. Then, after personally inspecting the equipment (which violated a safety protocol because only the manufacturer should inspect the safety system after an accident) Davis had Scruggs use the equipment in an attempt to re-create the prior accident to test it. While Davis might not have had actual knowledge of what caused Scruggs's co-worker to fall, he certainly had suspicions the safety system created a hazard. He should not have instructed Scruggs to place himself in danger until a proper inspection conducted by the manufacturer was complete. The second part of the *Offutt* test is satisfied and the ALJ's conclusion to the contrary is not supported by substantial evidence.

However, a finding that KRS 338.031 was violated does not automatically grant Scruggs enhanced benefits. KRS 342.165 requires that the employer intentionally violate a specific safety statute. While KRS 338.031 is not a specific safety statute, certain cases have involved general safety violations which were egregious enough to warrant enhanced benefits under KRS

342.165. See *Offutt*, 11 S.W.3d at 601; *Hornback v. Hardin Memorial Hospital*, 411 S.W.3d 220 (Ky. 2013); *Brusman v. Newport Steel Corporation*, 17 S.W.3d 514, 520 (Ky. 2000); *Apex Mining v. Blankenship*, 918 S.W.2d 225, 228 (Ky. 1996). In this matter Davis intentionally placed Scruggs into a position of danger by having him test the safety system when he clearly suspected something was wrong with it. As stated by the dissenter to the Board's opinion, "Westlake used Scruggs as a guinea pig." Enhanced benefits for Westlake's violation of KRS 338.031 are appropriate under the facts of this matter. Thus, this portion of the opinion of the Court of Appeals is reversed and this matter is to be remanded to the ALJ for entry of an order granting Scruggs enhanced benefits pursuant to KRS 342.165.

SCRUGGS WAS ENTITLED TO PPD BENEFITS

Westlake cross-appeals arguing that the ALJ erred by awarding Scruggs PPD benefits for his bilateral knee injuries and lower extremity phlebotic condition. Westlake contends that the testimony of Dr. Bilkey was unsupported when reviewed with other evidence in the record. Since Scruggs prevailed before the ALJ, the ALJ's conclusion must be upheld unless it is not supported by any substantial evidence. *Smyzer*, 474 S.W.2d at 369.

The ALJ's determination that Scruggs is entitled to PPD benefits for his knee injury and phlebotic condition is supported by substantial evidence. The ALJ has the discretion to choose between various medical expert testimony. Here, the ALJ found Dr. Bilkey's testimony to be the most credible for the reasons he set out in his opinion and order. The ALJ did not abuse his

discretion by so finding. This portion of the decision of the Court of Appeals is affirmed.

CONCLUSION

Thus, for the above stated reasons, we reverse the portion of the Court of Appeals decision which held that Scruggs was not entitled to enhanced benefits pursuant to KRS 342.165 and remand this matter back to the ALJ for proceedings consistent with this opinion. We affirm the portion of the Court of Appeals decision which affirmed the award of PPD benefits to Scruggs.

All sitting. All concur.

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