

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001574-WC

ALSTOM POWER, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-78373

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

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,¹ SENIOR JUDGE.

KELLER, JUDGE: Alstom Power, Inc. (Alstom) appeals from the opinion of the Workers' Compensation Board (the Board) affirming the Administrative Law Judge's (the ALJ) opinion awarding benefits to Dustin Allen (Allen). On appeal, Alstom argues that the ALJ erred by failing to distinguish in his opinion between

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

two alleged injuries. Allen argues that the record contains sufficient evidence to support the ALJ's finding of a work-related injury and that distinguishing between the two alleged injuries is unnecessary. Having reviewed the record and the arguments of the parties, we affirm.

FACTS

Allen, who worked as an apprentice millwright, testified that he suffered a work-related low back injury on August 8, 2008, as a result of two incidents. The first occurred when he felt pain in his lower back while bending over putting epoxy into holes that were going to be used to anchor a pump or motor. It is undisputed that Allen reported this incident to supervisory personnel and the plant nurse; that the nurse gave him pain medication; and that Allen returned to work. Allen testified that the second incident occurred after he returned to work when he slipped in water and twisted his back. According to Allen, he again reported this incident to supervisory personnel and sought treatment with the company nurse.

Alstom disputes the occurrence of the second incident. In support of its position, Alstom presented testimony from Tony McCarty (McCarty), one of Allen's coworkers, and Shawn Michael Crace (Crace), craft supervisor for Alstom. McCarty testified that, on the date of the alleged injuries, he did not notice any standing water near where he and Allen were working. Crace testified that there would not have been any standing water near where Allen and McCarty were

working, and both Crace and McCarty testified that they were not aware of the second alleged incident.

In addition to his own testimony, Allen filed the reports of Dr. James Owen and Dr. Warren Bilkey. In his report, Dr. Owen noted that Allen slipped in water and twisted his back. He did not mention that Allen experienced back pain while working in a bent position. Based on that history, his review of the medical records, and his examination findings, Dr. Owen made diagnoses of persistent low back pain associated with positive findings on MRI and "dysmetria and muscle spasm." In terms of causation, Dr. Owen stated that Allen's "injury of August 08, 2008 was the cause of his complaint." Furthermore, Dr. Owen attributed Allen's pain "to severe torsion and torque," assigned Allen a 7% impairment rating, and restricted him to lifting a maximum of twenty pounds, ten pounds frequently.

Dr. Bilkey stated in his report that Allen had slipped and twisted his back on August 8, 2008, and had suffered from low back pain radiating into his left leg since then. Dr. Bilkey, like Dr. Owen, did not note a history of pain beginning while Allen was working in a bent position. Following his examination and review of the medical records, Dr. Bilkey made diagnoses of "work injury with lumbar strain, left hip muscle spasm." Dr. Bilkey assigned Allen an 8% impairment rating and restricted him to lifting twenty-five pounds occasionally with no repetitive bending.

Alstom filed the reports and deposition of Dr. Thomas E. Menke and the deposition of physical therapist Rick Pounds (Pounds). Allen reported to Dr.

Menke that he began to experience low back pain while "leaning over and exerting himself." Allen also reported the alleged slipping-in-water incident to Dr. Menke. Based on that history, his review of Allen's medical records, and his examination, Dr. Menke concluded that Allen suffered a "lumbar strain evolving into chronic low back pain and atypical left leg symptoms." Dr. Menke related this diagnosis to the "alleged work accident" and assigned Allen a 6% impairment rating. Initially, Dr. Menke restricted Allen to lifting twenty pounds maximum, ten pounds frequently; however, he later amended those restrictions, indicating that Allen could perform medium and some heavy work activity.

Pounds testified that Allen reported experiencing back pain when he straightened up after working in a bent position and after slipping in water. The functional capacity evaluation Pounds administered to Allen revealed the ability to perform sedentary to medium and some heavy work activity.²

Based on the above evidence, the ALJ found that Allen suffered a work-related injury on August 8, 2008, and he awarded Allen benefits based on Dr. Owen's 8% impairment rating and Dr. Menke's initial restrictions. The ALJ did not specify whether he believed that Allen's injury arose from the first incident, the second incident, or a combination of the two.

Alstom filed a petition for reconsideration noting that Dr. Owen assigned a 7% impairment rating, not an 8% impairment rating, and it asked the

² We note that the parties filed proof that is not summarized herein; however, that evidence is not pertinent to the issue on appeal.

ALJ to amend his opinion accordingly. Alstom also asked the ALJ to address Allen's "allegation of a second injury" and to reconsider his assessment of an impairment rating based on his findings regarding that alleged injury.

The ALJ amended his opinion and award to reflect that the 8% impairment rating he relied on came from Dr. Bilkey, not Dr. Owen. However, the ALJ denied Alstom's request to address the allegation of a second injury, stating:

Defendant Employer also complains that the ALJ did not make a finding distinguishing between Plaintiff's claimed "first incident" and the claimed "second incident." Defendant Employer points out that it has acknowledged the occurrence of the first incident but denies the occurrence of the second incident. What Defendant Employer overlooks is the fact that the finding was of a "work related injury" which was the result of either one or both of the incidents. There is no need to find that the second incident did not occur.

Alstom appealed to the Board. As it does here, Alstom argued that the ALJ was required to make a finding regarding the second incident, because Allen's physicians based their opinions on a history that included only that incident. According to Alstom, if the second incident did not occur, the opinions of Allen's physicians would be fatally flawed because of their reliance on an inaccurate history. The Board affirmed the ALJ, finding that his opinion and award was supported by sufficient evidence of substance.

STANDARD OF REVIEW

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and 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 party's total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). If the party with the burden of proof fails to convince the ALJ, that party must establish on appeal that the evidence was so overwhelming as to compel a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

ANALYSIS

At the outset, we note that the ALJ was only required to set forth sufficient facts to support the conclusions he reached, so the parties could understand his decision, and we could conduct meaningful review. *Cook v. Paducah Recapping Services*, 694 S.W.2d 684, 689 (Ky. 1985); *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982); *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526, 531 (Ky. 1973). Having reviewed the ALJ's opinion and award and his order denying Alstom's petition for reconsideration, we hold that the ALJ met and exceeded the preceding requirement.

Having noted that, we turn to the issues raised by Alstom. Alstom argues that this matter should be remanded to the ALJ for a finding regarding the occurrence of the second incident. According to Alstom, if the ALJ finds that the second incident did not occur, he must then ignore the opinions of Drs. Owen and Bilkey because they are based on a history of that incident.

Alstom's argument is flawed for three reasons. First, although there is evidence that the second incident did not occur, that evidence is not so overwhelming as to compel a finding in Alstom's favor. Therefore, the ALJ would be free to find that the second incident occurred and to leave his opinion unaltered.

Second, there is no dispute that the first incident occurred. Even if the opinions of Drs. Owen and Bilkey were found to be fatally flawed regarding causation because they are based on a faulty history, Dr. Menke's opinion is not. Therefore, there is sufficient evidence to support the ALJ's finding of a work injury.

Third, under the AMA Guides, once a physician determines that a work injury has occurred, he or she converts examination findings into an impairment rating. Thus, Dr. Bilkey's opinion regarding impairment is based on Allen's condition, not the mechanism of injury. While an accurate history of the injury might have a negative impact on Dr. Bilkey's opinion regarding causation, it has no impact on the validity of his impairment rating.

CONCLUSION

Clearly the credibility of Allen was at issue herein. Based on the record before us, if we had been the trier of fact, we may have found differently. However, for the reasons outlined above, after careful review of the record, the opinion and award of the ALJ, the Board's opinion, and the arguments of the parties, we are constrained to affirm the Board.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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