RENDERED: FEBRUARY 16, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000721-WC

CHRISTOPHER GREGORY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 11-WC-77648

A & G TREE SERVICE; HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND

NO. 2015-CA-000839-WC

A & G TREE SERVICE — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 11-WC-77648

CHRISTOPHER GREGORY;
ADMINISTRATIVE LAW JUDGE DOUGLAS GOTT; AND
WORKERS' COMPENSATION BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: This appeal and cross-appeal come from a decision of the Workers' Compensation Board ("Board") which affirmed in part, vacated in part, and remanded a decision of Administrative Law Judge ("ALJ") Douglas Gott. The Board vacated the ALJ's finding that Christopher Gregory had a 45% permanent partial disability ("PPD") because the ALJ insufficiently set forth the facts relied upon. In so doing, the Board also vacated Dr. Warren Bilkey's assessment of a 4% right shoulder impairment and Dr. Richard Eiferman's 6% right eye impairment. Finally, the Board affirmed the ALJ's conclusion Gregory was not entitled to a "safety violation" benefit enhancement.

On appeal, Gregory argues the Board erred by vacating the 4% and 6% impairment ratings and by affirming the denial of the benefit enhancement. On cross-appeal, A & G Tree Service ("A & G") claims the ALJ made sufficient findings to support his 45% PPD rating and the Board erred in vacating said award.

Finding the Board made no error, we affirm.

I. FACTS.

In August 2011 Gregory began working as a tree trimmer for A & G. On August 18, 2011, James Coleman, Gregory's supervisor, was driving a company truck with Gregory and other A & G employees as passengers. The vehicle was involved in an accident when it sideswiped a school bus. Gregory alleged Coleman had smoked marijuana 30 minutes to one hour before the accident. He also claimed it was raining at the time and Coleman was driving too fast and erratically. One of the employees in the truck died of injuries sustained in the accident and Gregory was severely injured. This workers' compensation case revolves around the injuries Gregory sustained in the crash.

The ALJ heard extensive evidence and determined the following permanent impairment ratings: 5% cervical;[1] 20% thoracic;[2] 4% right shoulder;[3] 10% hernias;[4] and 6% right eye.[5] He also determined Gregory was not currently suffering any psychological impairment. The ALJ did not believe Gregory was totally disabled, holding Gregory remained capable of returning to some work activities, and assigned a 45% whole person permanent impairment rating for

[1] Based on evidence from Dr. Bilkey and Dr. Ellen Ballard.

[2] Based on evidence from Dr. Bilkey.

[3] Based on evidence from Dr. Bilkey.

[4] Based on evidence from Dr. Bilkey.

[5] Based on evidence from Dr. Eiferman.

purposes of determining the extent and duration of PPD income benefits under KRS[6] 342.730(1)(b) and (c). In addition, the ALJ also determined Gregory was not entitled to the safety violation enhancement set forth in KRS 342.165(1) based on his finding of no evidence suggesting A & G knew Coleman would operate a company truck in an unsafe manner, thereby creating an intentional safety violation.

The Board affirmed the ALJ's determination of no safety violation enhancement, but vacated his determination of a 45% whole person permanent impairment rating, remanding the claim for additional findings. Specifically, the Board held the ALJ provided insufficient findings with citation to specific evidence supporting his assessment of a 45% whole person impairment rating and his determination that Gregory was not totally disabled due to the extensive injuries. Further, the Board held the ALJ erroneously relied on Dr. Bilkey's assignment of a 4% right shoulder impairment rating because the physician admitted the condition had not reached maximum medical improvement, as defined and required by the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*[7] *(Guides)*. In addition, the Board held the ALJ erroneously relied on

[6] Kentucky Revised Statutes.

[7] *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, Linda Cocchiarella & Gunnar B.J. Anderson, American Medical Association (*AMA* Press, 2000).

Dr. Eiferman's 6% right eye impairment rating because the physician failed to state the rating was based on the *Guides*, as required by KRS 342.0011(35) and KRS 342.730(1)(b). Finally, the Board held Coleman's actions could not be imputed to A & G because the employer had no reason to believe Coleman would drive dangerously. This appeal followed.

II. STANDARD OF REVIEW

"The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the [sic] Court perceives 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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

> The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor. . . . If the board finds against a claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining whether or not the total evidence was so strong as to compel a finding in claimant's favor.

Snawder v. Stice, 576 S.W.2d 276, 279-80 (Ky. App. 1979) (citations omitted). "Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999) (citation omitted).

III. ANALYSIS

Gregory first argues the Board erred in vacating and remanding the ALJ's finding of a 4% right shoulder permanent impairment rating. Pursuant to the *Guides*, "[i]mpairment is considered to be permanent 'when it has reached maximum medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.'" *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 217 (Ky. 2006) (citation omitted). Dr. Bilkey's report states Gregory's right shoulder injury was not at MMI. Because the Board did not overlook precedent or commit error causing gross injustice, we hold the Board correctly vacated and remanded this issue.

Gregory next contends the Board erred when it vacated Dr. Eiferman's 6% right eye permanent impairment rating without compelling the ALJ on remand to assess a 15% right eye permanent impairment rating based on the medical opinions of Dr. Ballard and Dr. Bilkey. Dr. Ballard had assessed a 15% permanent impairment rating based on the *Guides*, and Dr. Bilkey adopted Dr. Ballard's assessment. Gregory argues if the 6% permanent impairment rating is to be disregarded, then the 15% permanent impairment rating must be adopted.

Because this claim is being remanded to the ALJ for reconsideration of the whole-body disability rating, we discern no reason to reverse the Board's decision regarding this issue, or to compel adoption of a 15% impairment rating.

Gregory cites to no authority authorizing such action by an appellate court, and we hold the Board has correctly remanded the matter to the ALJ, as finder of fact pursuant to KRS 342.285, to reassess Gregory's whole body permanent impairment rating based on the remaining probative evidence.

Gregory next alleges the Board erred in affirming denial of the safety violation enhancement. KRS 342.165(1) states in relevant part:

> [i]f 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.

Further, to receive an enhanced award, claimant must prove the employer's intentional violation of a safety statute or regulation contributed to the claimant's injury. *Cabinet for Workforce Dev. v. Cummins*, 950 S.W.2d 834, 837 (Ky. 1997).

Here, Gregory argues Coleman, his supervisor, violated the "general duty" clause of KRS 338.031 by intentionally driving in a reckless manner, and Coleman's intent should be imputed to A & G. KRS 338.031 states in relevant part:

> (1) Each employer:
>
> (a) 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;
>
> (b) Shall comply with occupational safety and health standards promulgated under this chapter.

To prove a violation of KRS 338.031, Gregory must show:

> (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) feasible means existed to eliminate or materially reduce the hazard.

Lexington-Fayette Urban Cty. Gov't v. Offutt, 11 S.W.3d 598, 599 (Ky. App. 2000) (footnote and internal quotation marks omitted). Our analysis hinges on an understanding of the Kentucky Supreme Court's decisions in *Offutt* and *Hornback v. Hardin Mem'l Hosp.*, 411 S.W.3d 220, 227 (Ky. 2013).

In *Offutt*, Karen Offutt was training to become a Lexington-Fayette Urban County Government (LFUCG) police officer. During training, she

> sustained a heat stroke after participating in a two-mile running exercise directed by the LFUCG police. Offutt suffered a permanent brain injury and numerous neurological impairments as a result of the heat stroke.
>
> As a result of her injuries, Offutt filed a claim for workers' compensation benefits including enhanced benefits pursuant to KRS 342.165 on the basis of an alleged safety violation. She alleged that the LFUCG intentionally violated its general statutory duty to furnish its employees a place of employment free from

> recognized hazards that were causing or likely to cause death or serious physical harm. Offutt settled her claim for workers' compensation benefits with the LFUCG, with the exception of the alleged safety violation and benefit enhancement issue. That issue was submitted to an ALJ, who found that the LFUCG had violated the general duty clause of KRS 338.031, and accordingly awarded Offutt an enhancement of her award of 15% under KRS 342.165. The Board affirmed the ALJ's decision[.]

Offutt, 11 S.W.3d at 598-99. A panel of this Court affirmed, holding all four factors were met. Specifically, the Court held: (1) training in extreme heat led directly to Offutt's injury; (2) training officers were aware training in high heat could lead to injury—LFUCG had published a newsletter for its supervisors, listing signs of heat stroke, and officers in charge were trained on dangers of exercising in heat; (3) the hazard did, in fact, cause Offutt's injury; and (4) training officers could have lessened the amount of exercise required of recruits at time of extreme temperature. *Id.* at 600. The Court also held intent to violate KRS 338.031 was shown for these same reasons.

In *Hornback*, Patricia Hornback worked for Hardin Memorial Hospital as a custodian. While working, she became trapped in a stalled elevator. Hardin Memorial Hospital's security personnel attempted to rescue her, but their efforts led to her falling down the elevator shaft and sustaining serious injury. The ALJ enhanced her workers' compensation award under KRS 342.165(1), finding a violation of KRS 338.031. The ALJ stated:

> Turning back to the four (4) questions posed in *Offutt*: (1) Did the condition or activity present a hazard to the employee? The answer to this question is 'yes.' [Hardin]'s activity of ignoring their own safety procedures and attempting to remove a person from a malfunctioning elevator with an unrestricted 'open' elevator shaft just a foot or two away presented a grave hazard to [Hornback]. (2) Did the employer's industry generally recognize this hazard? Again, the answer to this question is 'yes.' That is why [Hardin] had in its possession documentation of exactly how to safely remove individuals from a malfunctioning elevator stopped between floors. (3) Was the hazard likely to cause death or serious physical harm to employee? The answer to this third question is also 'yes.' Removing an individual from an elevator with an exposed and open elevator shaft just a foot or two away, which the individual could fall down, without blocking the open elevator shaft or securing the individual, clearly sets the scene for a devastating injury, which is exactly what happened in this instance. (4) Did a feasible means exist to eliminate or reduce the hazard? Lastly, the answer too is 'yes.' Not only did a feasible means exist to eliminate the hazard, [Hardin] had an entire policy on how to safely extract people from elevators stuck between floors. [Hardin] simply refused to adhere to its own safety policy, resulting in [Hornback]'s significant injuries.

Hornback, 411 S.W.3d at 223. The Board affirmed this decision; however, the Court of Appeals reversed. Granting discretionary review, the Kentucky Supreme Court reinstated the ALJ's decision.

Just as in *Offutt* and *Hornback*, we have an instance of one employee injuring another employee by disregarding a safety issue. However, we conclude not all four mandatory *Offutt* factors have been met in the present appeal. Though

the Board concluded none of these factors were met, we hold the first three factors were satisfied, but the fourth remains unmet.

The first factor is whether there was a condition in the workplace which could cause a hazard to an employee. This was met because A & G provided a vehicle to Coleman and permitted him to transport employees to worksites. It is axiomatic that unsafe driving can be hazardous.

The second factor is whether the employer recognized the hazard. This, too, was met. A & G's own employee handbook declared it was a drug free workplace, and stated negligent care and use of company vehicles was prohibited.

The third factor is whether the hazard was likely to cause death or serious physical harm. Again, unsafe driving obviously creates a risk of harm, and this factor was conclusively proven when Gregory was, in fact, seriously injured in the accident and another co-worker was killed.

However, the fourth factor is whether there was a feasible means to eliminate or reduce the hazard. We hold this final mandatory factor was not met. A & G took reasonable precautions before allowing employees to drive company vehicles. It randomly obtained drug screenings of employees, and periodically checked employee driving records of all employees authorized to drive company vehicles. Thus, A & G clearly implemented reasonable means to eliminate or reduce the hazard. A & G could not have reasonably known or anticipated

Coleman would drive recklessly or while under the influence because it had received no prior reports of positive drug screens or hazardous driving behavior. Had A & G been aware of a history of such drug use or hazardous driving, it might have taken additional steps to prevent the hazard. However, an unknown hazard cannot be reasonably avoided or limited. Post-accident, A & G suspended Coleman from work for a period, and thereafter precluded him from driving a company vehicle.

Thus, we hold the Board did not err in determining Gregory failed to meet all four *Offutt* factors. By proving only three of the required four factors, no violation of KRS 338.031 can be found. Therefore, denial of the KRS 342.165(1) safety violation enhancement was proper.

Finally, on cross-appeal, A & G argues the ALJ's finding of PPD should be reinstated. This issue revolves around whether the ALJ made sufficient findings to support his conclusion that Gregory was PPD instead of PTD. The first eleven pages of the ALJ's opinion and award provide a detailed summary of the evidence submitted in this claim. However, when the ALJ determined Gregory was PPD rather than PTD, he did not state with specificity the evidence supporting his conclusion. A & G argues the ALJ's recitation of the evidence at the beginning of the opinion was sufficient. However, the Board disagreed and remanded the matter. The Board concluded it could not sufficiently review the claim without

additional findings citing specific supporting evidence. We discern no error, and will not disturb the Board's holding.

For the foregoing reasons, the Board's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT AND CROSS-APPELLEE CHRISTOPHER GREGORY:

Tamara Todd Cotton
Louisville, Kentucky

BRIEF FOR APPELLEE AND CROSS-APPELLANT A & G TREE SERVICE:

Rodney J. Mayer
Louisville, Kentucky