RENDERED: APRIL 14, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000776-WC

VANMETER CONTRACTING, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-12-67588

JAMIE PAULA GROCE; HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

ACREE, JUDGE: VanMeter Contracting, Inc. appeals the opinion of the Workers' Compensation Board (Board) reversing in part, vacating in part, and remanding the opinion, award, and order of the Administrative Law Judge (ALJ) which determined VanMeter Contracting employee, Jamie Groce, did not sustain her burden of proving her employer's intentional violation of a safety statute or

regulation and, according to the ALJ, should not be entitled to the 30% increase in compensation benefits for a safety penalty as provided in KRS 342.165(1). After careful review, we conclude that the Board misconstrued controlling authority and flagrantly erred in evaluating the evidence. Therefore, we reverse the Board and remand for reinstatement of the ALJ's opinion and order.

Factual and Procedural Background

Thirty-four-year-old Jamie Groce was seriously injured on October 8, 2012, while working with a crew constructing a concrete retaining wall next to a highway in Glasgow, Kentucky. Groce was on top of the wall when it collapsed. Two VanMeter Contracting employees were also injured in the incident; one other employee was killed.

Groce was life-lifted to University of Louisville Hospital. She sustained a collapsed lung; shoulder fracture; pelvic fracture; and right leg fractures in the tibia, fibula, ankle and foot. Groce remained in the hospital for approximately two weeks. She was then transferred to a rehabilitation hospital where she stayed until December 2012. Throughout that time, Groce endured additional surgeries. She had a metal rod inserted in her pelvis and a bone graft from her hip taken to reconstruct her ankle. She has been diagnosed with Complex Regional Pain Syndrome (CRPS) in her lower extremities, which requires the use of a walking boot or a walker when not using the boot. She uses a TENS Unit for pain relief. Groce now takes medication for pain and depression and has incurred over $250,000 in medical expenses.

The incident and resulting injuries to the VanMeter Contracting employees triggered an investigation by the Kentucky Occupational Safety and Health Administration (KOSHA). The KOSHA report describes the accident as follows:

> The accident occurred on Monday October 8, 2012, approximately 11:30 AM at 3939 Burkesville Rd. Glasgow, Ky. Four (4) employees were engaged in pouring concrete into a retaining wall form. The employees were working from a Form Scaffold, twenty four (24) inches wide by twenty four (24) foot long mounted to a Plate Girder Forming System retaining wall form 12.5 feet above the ground below. The retaining wall form was eight (8) foot wide at the base narrowing to one (1) foot wide at the top, 12.5 foot tall and twenty four (24) foot in length. The employees were pouring concrete into the form using a bucket and crane system and a vibrator machine to settle the concrete. The form was over 95% filled with approximately fifty four (54) yards of concrete. As the employees were topping off the fill, they heard a loud pop and the entire form raised and toppled to the east toward the crane. Three (3) employees were thrown toward the crane and one (1) employee fell backwards into the concrete surging out from under the toppled form.

(R. at 141).

As a result of the investigation, KOSHA issued three citations: one for improper fall protection at the job site; one for inadequate trenching at the job site; and one for improper support or bracing of formwork to protect against the failure of vertical and lateral loads. The proposed penalty for each violation was $5,600. VanMeter Contracting conceded liability on the first two citations. It further maintained that those citations did not contribute to the failure of the wall.

VanMeter Contracting, however, contested the third citation relating to the alleged failure to properly secure the form. The following explains the allegations of the third citation:

> The anchoring, bracing and supports gave way as a result of a Telescoping Push-Pull Pipe Brace used to hold the setup down not being used and anchor bolt spacing being irregular and not in four (4) foot intervals as prescribed by the Plate Girder Technical Data sheet (page five (5)[)]. The result was that the entire form work raised and toppled to its side throwing the employees into a nearby crane and into the concrete[.]

(R. at 93). As a result, KOSHA requested the KOSH Commission to review and affirm the citation, assess the penalty, and affirm the original period of abatement against VanMeter Contracting. VanMeter Contracting denied the allegations.

In time, VanMeter Contracting and KOSHA entered into a Stipulation and Settlement Agreement, which provided:

> a. [VanMeter Contracting] represents the alleged violations in the citation issued on March 21, 2013, have been abated.
>
> b. Citation 1, Items 1-3 remain cited as Serious.
>
> c. The total proposed penalty shall be reduced from $16,800.00 to $14,000.00 and shall be paid upon execution of the Stipulation and Settlement Agreement. Payment shall be made payable to the Kentucky State Treasurer.
>
> d. [VanMeter Contracting's] agreement as set forth hereinabove and its execution of this Settlement Agreement are not admissions by [VanMeter Contracting] of any violation of the Act or the standards or regulations promulgated thereunder nor admissions of [VanMeter Contracting] of the truth of any of the

> allegations or conclusions contained in the Citations or Complaint; provided, however, that the Citations and withdrawal of Notice of Contest may be used as a basis for subsequent failure to abate or repeated Citations issued after approval of this Settlement Agreement by the Kentucky Occupational Safety and Health Review Commission, and may be referred to in subsequent Kentucky Occupational Safety and Health Program inspections and cases.

(R. at 441). An order was subsequently entered adopting the Settlement Agreement, and the agreed-upon penalty was paid.

In the meantime, Groce was pursuing claims under the Workers' Compensation Act. In addition to her claim for income benefits, Groce made a claim for enhanced benefits for a safety violation pursuant to KRS 342.165(1). On December 3, 2015, the ALJ awarded Groce permanent total disability benefits as well as medical expenses for her injuries sustained on October 8, 2012. The ALJ found Groce's impairment to be 54% and found that she would not be able to return to work on a regular and sustained basis based upon the evidence presented.

However, in that same order, the ALJ found that Groce had not met her burden for proving a violation of a safety statute or regulation or the general duty clause of KRS 338.031(1)(a), and therefore, she was not entitled to an enhanced award.

Groce filed a petition for reconsideration arguing that in a co-worker's workers' compensation claim based upon the same incident, the ALJ found a safety violation and enhanced benefits accordingly. Groce cited to the testimony of her co-worker, Steve Nelson, who stated he informed a supervisor that the form

had not been properly constructed prior to the collapse. The ALJ denied Groce's petition for reconsideration.

Groce then sought review by the Board of the ALJ's opinion and award on the sole issue of the safety penalty. Groce argued to the Board that Nelson's testimony demonstrated an intentional safety violation by VanMeter Contracting; a finding of a safety violation in a co-worker's claim was collateral estoppel; that VanMeter Contracting's payment of the fine per the terms of the Settlement Agreement is evidence of negligence *per se*; and lastly, Groce argued that the general duty provision of KRS 338.031(1)(a) was violated.

In a 2-1 vote, the Board reversed the ALJ's decision on the safety penalty:

> Regardless of the language contained in the settlement agreement, it is abundantly clear VanMeter withdrew its contest of Citation 01 Item 003, acknowledged its failure to comply with 29 [Code of Federal Regulations] C.F.R. 1926.703(a)(1),[1] and paid a fine. In the settlement agreement, VanMeter agreed that the violation for which it paid a fine was serious. Consequently, the ALJ erred in finding Groce did not sustain her burden of proving a violation of a specific safety statute or regulation.
>
> . . . .
>
> Here, VanMeter withdrew its contest of Citation 01 Item 003, agreed its violation was serious and paid a fine.

[1] 29 C.F.R. 1926.703(a)(1) is titled "General requirements for formwork" and says:

> (1) Formwork shall be designed, fabricated, erected, supported, braced and maintained so that it will be capable of supporting without failure all vertical and lateral loads that may reasonably be anticipated to be applied to the formwork. Formwork which is designed, fabricated, erected, supported, braced and maintained in conformance with the appendix to this section will be deemed to meet the requirements of this paragraph.

> Therefore, we believe the ALJ was required to find VanMeter committed a violation of a specific administrative safety regulation.
>
> . . . .
>
> The record compels a finding VanMeter violated 29 C.F.R. 1926.703(a)(1) as it relates to the formwork utilized in erecting the concrete retaining wall.

(R. at 1151-52, 54-55). Consequently, the Board vacated the award of income benefits and remanded the claim for entry of an amended opinion, award, and order finding VanMeter Contracting violated 29 C.F.R. 1926.703(a)(1). Additionally, the Board directed the ALJ to determine whether VanMeter Contracting's violation of the safety regulation in any degree caused Groce's work-related accident and, then, to enter the appropriate award of income benefits.

One member of the Board dissented objecting to the Board's determination that the ALJ was required to find the employer in violation of KRS 342.165(1) solely on the basis that the employer settled its enforcement proceeding before KOSHA on the citation at issue. VanMeter Contracting now appeals. Additional facts will be discussed as they become relevant.

Standard of Review

When reviewing a decision of the Board, we will affirm so long as the Board has not (1) misconstrued or overlooked controlling precedent or (2) committed flagrant error in evaluating the evidence that results in gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). This requires a review of the ALJ's decision. 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 . . . ." *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329 (Ky. App. 2000). If the party with the burden of proof fails to convince the ALJ that party must then establish on appeal that the evidence in their favor was so overwhelming as to compel a favorable finding. *Hanik v. Christopher & Banks, Inc.*, 434 S.W.3d 20, 23 (Ky. 2014); *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). In other words, although a party may point to evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000) (citing *McCloud v. Beth–Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974)). Rather, "the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." *Id.* (citing *Special Fund v. Francis*, 708 S.W.2d at 643).

Analysis

VanMeter Contracting's sole argument is that the Board erred in finding its settlement of a KOSHA enforcement action and payment of a fine equivalent to the finding of a safety violation in a worker's compensation proceeding. We agree; the Board did so err in reversing the ALJ.

We will look first at the applicable statute. KRS 342.165(1) is designed to give both "employers and workers a financial incentive to follow safety rules . . . ." *Chaney v. Dags Branch Coal Co.*, 244 S.W.3d 95, 101 (Ky. 2008). It discourages

an employer from disregarding safety measures by allowing an injured employee 30% more in workers compensation benefits if the employer's disregard is intentional and contributes in any way to the injury. But, it also discourages employees from disregarding safety at the risk of losing 15% of otherwise available workers compensation benefits if that disregard contributed to the employee's injury. In full, the statute states:

> 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. 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.

KRS 342.165(1) (emphasis added).

In this case, we are concerned only with the employer's compliance or noncompliance with safety statutes and regulations.

Effectively, in reversing the ALJ, the Board applied the concept of offensive collateral estoppel to award benefits to Groce under KRS 342.165(1) based on findings of a different administrative tribunal. We have rejected such administrative agency use of offensive collateral estoppel. *Berrier v. Bizer*, 57

S.W.3d 271, 280-81 (Ky. 2001) (citing *Board of Education of Covington v. Gray,* 806 S.W.2d 400, 403 (Ky. App. 1991); Restatement (Second) of Judgments § 83(3) (A.L.I. 1982) ("[a]n adjudicative determination by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim.")). There is good reason for this rule.

The mission of KOSHA in enforcing 29 C.F.R. 1926.703 is different from the mission of the Board in enforcing KRS 342.165(1). Suppose a KOSHA investigation revealed evidence upon which it concluded an employee failed to use available safety equipment; would we prohibit the employee's proof to the contrary in a workers compensation hearing? No. Nor should we.

We must focus on the evidence presented to the ALJ of VanMeter Contracting's violation of KRS 342.165(1). And we must consider whether the Board so misconstrued that evidence as to have committed flagrant error.

The Board's decision cites the deposition testimony of Groce's co-worker, Steve Nelson, taken from Nelson's own worker's compensation claim. Nelson testified that when workers were constructing the form, he noticed there was nothing on the top of the form to hold it down. Nelson said he then asked the job foreman why they weren't using tie-downs on the form for the wall. Nelson testified that the foreman told him that tie-downs were not needed because the anchor bolts in the footer were in place to hold the wall. Nelson testified to his

belief that the bolts were only going to hold the wall from going out, not up or down, but did not further question the foreman. Nelson stated that he had used tie-downs on other similar projects on which he had worked in the past.[2]

The ALJ did not find Nelson's testimony credible. Offered in his own claim for benefits, that testimony is necessarily self-serving. The ALJ pointed out that Nelson asserted that VanMeter Contracting should have used tie-downs in addition to the anchor bolts. However, as the ALJ noted, VanMeter Contracting was cited for improper spacing of anchor bolts, not the absence of tie-downs. We will return to the question of anchor bolt spacing soon enough. For now, we express agreement with the ALJ that Nelson was not qualified to establish the existence of a safety requirement, such as tie-downs, not otherwise required by statute or regulation.

Notwithstanding Nelson's testimony, the ALJ concluded VanMeter Contracting did not violate a statute or regulation notwithstanding KOSHA's issuance of the third citation against VanMeter Contracting.[3] That conclusion was based on the testimony of the job foreman, the job superintendent, VanMeter Contracting's owner, and review of the KOSHA investigation materials.

The ALJ analyzed the third citation in two parts because the citation itself broke down the violation in that way. The first basis for the citation was that

[2] If this is so, it might have been of interest in the KOSHA investigation and its consideration of future measures to prevent injury. But there is nothing in the record that indicates the use of tie-downs is already required by statute, regulation or rule.

[3] As we noted earlier, of the three citations issued against VanMeter Contracting by KOSHA, only the third implicated KRS 342.165(1).

VanMeter Contracting failed to use a "Telescoping Push-Pull Pipe Brace to hold the setup down." The ALJ could not find evidentiary support for this citation anywhere in the KOSHA materials. To the contrary, in testimony before the ALJ, the job foreman and job superintendent demonstrated that such pipe bracing was indeed used on the wall, and photographs were submitted as proof.

The second basis for the citation was that VanMeter Contracting improperly spaced the anchor bolts in the wall. The citation made reference to a requirement that the anchor bolts were to be spaced at four-foot intervals.

The ALJ further mentioned a portion of Nelson's testimony that was not self-serving – testimony to his recollection that the anchor bolts were set anywhere from eighteen inches to two feet apart, well within the required four-foot intervals specified in the citation.

Furthermore, the ALJ closely examined the KOSHA inspector's initial report which suggested this requirement of anchor bolt spacing had been violated. However, KOSHA later determined that VanMeter Contracting actually exceeded the manufacturer's specifications in the placement of the anchor bolts. Also, that original KOSHA inspector's notes from the date of the incident recorded at least sixteen bolts at four-foot intervals. The ALJ found it noteworthy that the inspector's final report only listed two violations relating to inadequate guardrails and unsafe excavating practices – the basis of the first two citations. The KOSHA inspector's final report makes no mention of pipe bracing or spacing of anchor bolts.

The owner of VanMeter Contracting, Mark VanMeter, testified that the wall was built based on the collective experience of himself and employees. He testified that two other retaining walls had been built in the same fashion as this wall without incident. Mr. VanMeter testified that after the incident, the manufacturer of the forms reviewed the incident and stated that his company had even more anchor bolts than recommended. He testified that the wall collapsed because the anchor bolts going into the footer failed, but he did not know why this happened. Failure of anchor bolts does not constitute, *per se*, violation of a safety regulation.

The ALJ remarked that Groce provided no witnesses or evidence to challenge the testimonial and documentary evidence presented by VanMeter Contracting.

The Board's opinion relied on the fact that VanMeter Contracting entered into a settlement agreement with KOSHA and paid a fine for serious violations. The Board cited to *Chaney v. Dags Branch Coal Co.*, 244 S.W.3d 95 (Ky. 2008). The Board found it significant that the employer in *Chaney* was cited for violations by the Mine Safety and Health Administration (MSHA) but not fined, yet the safety penalty was still imposed. However, the fact that there were citations with no documented fine in the opinion was not dispositive of the *Chaney* decision. The issue was whether under the circumstances presented, the evidence compelled a finding that the incident resulted to any degree from the employer's intentional failure to comply with a specific safety regulation. The ALJ in *Chaney* considered

the MSHA records as well as extensive testimony about the incident before reaching a decision. The focus was not based simply on the fact that the employer had received citations.

In this case, the payment of the fine by VanMeter Contracting led to the Board's conclusion that, regardless of the language of the settlement agreement, the ALJ was required to find a violation and impose the 30% safety penalty. This was error. "The fact that the employer settled the KOSHA citation without admitting a violation is immaterial. In the context of a workers' compensation claim, it is the responsibility of the ALJ to determine whether a violation of a statute or administrative regulation has occurred." *Brusman v. Newport Steel Corp.*, 17 S.W.3d 514, 520 (Ky. 2000).

An ALJ's decision which is supported by substantial evidence will not be set aside on appeal. *Id.* Furthermore, the Board "shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact[.]" KRS 342.285(2). We disagree with the Board's determination that the ALJ's decision "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000); KRS 342.285. Based on the preceding, the ALJ's opinion was supported by evidence of substance. The ALJ articulated what evidence and testimony was and was not persuasive and specified its reasoning. The testimony cited by the Board in its decision was not credible in the opinion of the ALJ. The ALJ, not the Board, is empowered "to determine the quality,

character and substance of the evidence." *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). Additionally, it is the ALJ who makes the determination of whether a violation of a safety statute or administrative regulation has occurred. A settlement agreement for KOSHA citations and resulting fine is not evidence sufficient to compel a finding of an intentional safety violation.

Conclusion

For these reasons, we conclude the Board erroneously reversed the ALJ's decision. Therefore, we reverse and remand this matter to the Board for reinstatement of the ALJ's opinion, award and order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas A. U'Sellis
Louisville, Kentucky

BRIEF FOR APPELLEES:

Scott F. Scheynost
Louisville, Kentucky