Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 30, 2015

CLAIM NO. 201187090

BRAKE PARTS PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

THERESA MIDDLETON and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART & REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Brake Parts d/b/a Affina Brake Parts ("Brake Parts") seeks review of the decision rendered August 14, 2014, by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for injuries sustained by

Theresa L. Middleton ("Middleton") on May 6, 2011. The ALJ enhanced the income benefits by 30% pursuant to KRS 342.165(1). Brake Parts also appeals from the September 10, 2014 order denying its petition for reconsideration.

On appeal, Brake Parts argues the ALJ erred in finding a safety violation. While the evidence may very well establish the basis for the assessment of a safety violation against Brake Parts pursuant to KRS 342.165(1), we vacate the ALJ's decision regarding this issue. On remand, the ALJ is directed to more clearly set forth the basis for her determination.

Middleton filed a Form 101 on January 10, 2013, alleging she sustained multiple injuries when she stepped backward and fell approximately four feet off of a manlift while stacking parts. We will not summarize the medical evidence as it is not relevant to the issue on appeal.

Middleton testified by deposition on March 8, 2013, and at the hearing held June 13, 2014. Middleton began working for Brake Parts in 2001 initially packaging finished brakes. She was later transferred to the lab which involved inspecting parts. She was subsequently transferred to the lean cell department which involved the manufacture of brake parts. She was initially a leader in that department, then became a machine operator. After two

to three years in the lean cell department, Middleton was transferred to the logo room where the names or logos for different companies were affixed to the parts. On the day of the accident, Middleton had been detailed away from her usual job to the bulk, or storage area, where she had only worked on a few previous occasions. The storage area is where the parts and supplies necessary for the manufacturing process were stored and dispensed.

On the date of the accident, Middleton was using a manlift to stack parts on a shelf. She stated she had operated the lift a few times prior to the accident, and had received very little training. On the first day she worked in the bulk area she was shown the key to the manlift, how to charge the battery, where everything plugged in, and how to use the joystick. At the time of the accident, she had stacked some supplies on a shelf, and was returning to ground level. As the lift was descending, it stopped. She believed she was at ground level and stepped backward. Unbeknownst to her at the time, she estimated the lift was still four to five feet from ground level, and she fell backward onto the concrete floor. She stated she was not using a safety harness or belt, and had never been instructed to do so. She also stated no such equipment was available.

Middleton returned to light duty from July to September, then returned to full duty for two days before her doctor took her off work.

Jeff Martin ("Martin"), the Environmental Health and Safety Engineer for Brake Parts, testified by deposition on September 18, 2013. Martin has a bachelor's degree in Industrial Technology from Morehead State University. Martin personally investigated the accident, and reviewed the scene of the accident. At the time of the accident, Middleton was operating a JLG lift, also known as a personal manlift or personal order selector. He stated a harness is not required unless working above the six foot level. He estimated the platform was three to three and a half feet above floor level when Middleton fell. He stated there were no witnesses to the fall. Martin was unaware of any actual training Middleton received except for what she testified to in her deposition. He stated despite JLG's requirement for the use of a lanyard, noted in the operator's manual, the use of a fall restraint system was not used on the machine because it was not required by OSHA. He noted there were no training videos for the use of the machine at the time Middleton was injured. He stated there was no OSHA investigation of the accident, and no citations were issued.

James Randolph Gray ("Gray"), president and owner of Grayhawk Safety and Consulting from Benton, Kentucky, testified by deposition on December 4, 2013. Gray holds a bachelor's degree from Murray State University in occupational safety and health. Gray worked as an inspector for OSHA for twenty-five years, retiring in December 2008. He occasionally conducts OSHA training nationwide.

Based upon his review, Gray stated Brake Parts breached its statutory duty to provide adequate training. He stated no records exist evidencing Middleton received the training necessary to operate the equipment. He stated the initial training must be provided by someone who is competent in understanding the equipment. Upon completion of the training, the employer is required to provide an operator card. He also stated there is no evidence Brake Parts complied with a maintenance program.

According to Gray, Middleton should have been wearing fall protection when working. While fall protection is required while working at or above six feet in a construction setting, in an industrial setting it is required when working at a height of greater than four feet pursuant to 29 CFR 1910.178. He also noted the manufacturer required the use of a lanyard as stated in the operator's

manual. He opined the use of a lanyard would have prevented Middleton's fall.

Gray also noted the JLG machine did not have an interlock system which would have prevented the opening of the door until the platform reached the floor. He stated Brake Parts breached its duty to conduct inspections. He stated Brake Parts violated the general duty clause for not providing a safety lanyard, and specifically violated 19 CFR 1910.178 for failing to comply with the instructions in the operator's manual.

A benefit review conference was held on April 22, 2014 at which time one of the issues preserved for decision was whether there had been a safety violation pursuant to KRS 342.165.

The ALJ issued her decision on August 8, 2014. She awarded TTD benefits, PPD benefits and medical benefits. The ALJ enhanced the award of PPD benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. In finding Brake Parts committed a safety violation, and in enhancing the award by 30%, the ALJ found as follows:

E. KRS 342.165 Safety Violation.

1. <u>Principle of law</u>.

> The goal of KRS 342.165(1) is to promote workplace safety by encouraging workers and employers to follow safety

rules and regulations. *Apex Mining v. Blankenship*, 918 S.W.2d 225, 228 (Ky. 1996). The relevant portion of the statute provides:

> 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.

Application of the safety penalty requires the claimant to prove two elements: (1) evidence of the existence of a violation of a specific safety provision, whether state or federal; and (2) evidence of "intent" to violate a specific safety provision. *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834 (Ky. 1997). Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. See *Chaney v. Dags Branch Coal Co.,* 244 S.W.3d 95, 101 (Ky. 2008).

KRS 338.031(1)(a), commonly known as Kentucky's "general duty" provision, requires every employer to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Even a general duty violation that results in a worker's accident and injury may be sufficient to fall under

KRS 342.165(1). See Ap*ex Mining v. Blankenship, supra*.

2. <u>Findings of fact and conclusions of law.</u>

Middleton is entitled to 30% enhancement of benefits pursuant to KRS 342.165(1) as the employer failed to provide a workplace free from recognized hazard. Middleton has also proven intent to violate on the part of the employer.

3. <u>Evidentiary basis and analysis</u>.

Brake Parts is required to provide a workplace free from recognized hazards. 29 CRF outlines the duty to provide training and the requirement of operating under direct supervision until training is completed. The formal instruction, practical training and evaluation, all must be conducted by a qualified person. The training should be documented, certification completed and the equipment inspected on a regular basis. Furthermore, fall protection should have been provided. None of this was done, as Middleton testified. Although Martin, the safety director for the company, testified Middleton would have received safety training as evidenced by logs of such training, no logs were ever produced. Martin did not believe a training program was required.

In the absence of proof of training, Middleton's testimony is the most believable. She had not been properly trained on safe operation of the equipment as was required by the owner's manual and the federal code. Randy Gray, Plaintiff's expert, testified concerning the federal and state requirements to provide training

> on such a lift, requirements appearing to be fairly obvious even to a lay person.
>
> The element of intent of noncompliance is inferred from Defendant Employer's failure to keep logs and to document training. Documented safety training is a somewhat easy preventative solution for employers in order to avoid the enhancement of benefits under the statute.
>
> Defendant Employer's analogy to *Apex, supra,* arguing the failure to provide a lanyard was not an obvious unsafe condition is rejected and its argument of no OSHA violation is disingenuous as there was no OSHA inspection. None was required since Middleton was not hospitalized overnight.
>
> Reviewing of [sic] the cases cited by Defendant Employer, the main argument is that in order to prove a violation of the general duty clause, intentional disregard for a safety hazard must be shown. It is the opinion herein that failure to provide training and to maintain documentation thereof demonstrates an intentional disregard for safety.

Middleton filed a petition for reconsideration arguing the ALJ erred in failing to enhance the award of TTD benefits by 30% pursuant to the safety violation. Brake Parts filed a petition for reconsideration requesting additional finding regarding the alleged absence of training, noting Martin testified Middleton would have received such training. Brake Parts requested time to

allow the introduction of training records. Brake Parts noted the ALJ found safety violations based upon lack of training, and failure to provide a lanyard. Brake Parts requested the ALJ to clarify whether there was a violation of a specific statute or regulation or of the general duty clause. If the ALJ's finding was based upon the general duty clause, it requested an analysis based upon the "four prong test".[1]

The ALJ entered an order on September 10, 2014, granting Middleton's petition for reconsideration, and assessed the thirty percent enhancement on the TTD benefits awarded. She denied Brake Parts' petition for reconsideration.

On appeal, the sole raised by Brake Parts is whether the ALJ erred in assessing a safety violation against it. As the claimant in a workers' compensation proceeding, Middleton had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the

[1] Presumably pursuant to the test set forth in Lexington–Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000).

evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

That said, the ALJ must provide a sufficient basis to support her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). In this instance,

Brake Parts requested a clarification, and more specific findings which the ALJ failed to do. This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of her reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the Kentucky Supreme Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

There is no question Middleton was involved in an a work accident on May 6, 2011 causing significant injuries. Regarding the safety penalty issue, KRS 342.165(1) provides in pertinent part as follows:

> 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 purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally failed to comply with known safety regulations. *See* Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). On the other hand, as a general rule workers' compensation acts are no fault. The purpose of workers' compensation is to pay benefits to an injured worker without regard to negligence on the part of either the employer or the employee. *See* Grimes v. Goodlet and Adams, 345 S.W.2d 47 (Ky. 1961).

The application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Secondly, evidence of "intent" to violate a specific safety provision must also be present. Enhanced benefits do not automatically flow from a showing of a

violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). The worker also has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. *See* Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may well constitute grounds for assessment of a safety penalty in the absence of a specific regulation or statute addressing the matter. Apex Mining v. Blankenship, supra; Brusman v. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). KRS 338.031(1)(a) requires the employer "to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm" to employees. Two cases wherein the court discussed the violation of KRS 338.031(1)(a) for the purposes of KRS 342.165(1) are discussed below.

In Apex Mining v. Blankenship, supra, the injured worker was required to operate a grossly defective piece of

heavy equipment which had its throttle wired open, the brakes did not work, and it had caused prior accidents. The court found the egregious behavior of the employer justified imposition of the safety penalty in the absence of a specific statute or regulation.

However, in Cabinet for Workforce Development v. Cummins, supra, the Court stated not every violation of KRS 338.031(1)(a) required the imposition of a penalty for the purposes of KRS 342.165. The claimant's work site as a teacher of refrigeration, air conditioning, and heating at an adult vocational school was not properly ventilated. The Court agreed with the Board that the employer's action was not an obvious and egregious violation of basic safety concepts such as would overcome the general language of KRS 338.031. The Court distinguished the facts from Apex Mining, noting the potentially dangerous condition of the piece of heavy equipment and the fact the employer had taken no steps to correct it.

We believe the facts in Apex Mining illustrate one end of a continuum of employer conduct that ranges from egregious to the other end of the continuum illustrated in Cummins where the employer's conduct is innocuous.

Here, the ALJ's finding of a safety violation, and assessment of a safety penalty is confusing. In her

decision, the ALJ clearly found Brake Parts had committed a safety violation, but the analysis blends elements of both a specific infraction of the safety regulations, and a violation of the general duty clause contained in KRS 338.031. On remand, the ALJ is directed to more clearly set forth the basis for her findings on this issue. We note evidence exists which may well support the finding of a safety violation, and the assessment of a penalty. However, the ALJ must clearly provide the basis for doing so.

For the foregoing reasons, the August 8, 2014 Opinion, Award and Order and the September 14, 2014 Order on Reconsideration rendered by Hon. Jane Rice Williams are hereby **VACATED IN PART** and **REMANDED** for additional findings and entry of an amended decision consistent with the views expressed herein.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, DISSENTS AND ISSUES A SEPARATE OPINION.

RECHTER, Member. I respectfully dissent because I believe the ALJ's analysis was sufficiently clear to apprise the parties of the basis of her decision. Mr. Gray provided testimony concerning the OSHA training requirements set forth in 29 CFR 1910.178(l)(1), and a copy of these

regulations were admitted into evidence as part of his report. The ALJ summarized this testimony in her Opinion and Order. She also accurately summarized the applicable case law relating to safety violations. In her analysis of the issue, the ALJ cited to the training requirements set forth in “29 CFR”. She made the factual determination that no training was provided to Middleton, a conclusion which is supported by substantial evidence. While the ALJ might have more specifically cited to 29 CFR 1910.178(l)(1), when read in the context of the overall opinion, it is abundantly clear that she concluded the safety penalty set forth in KRS 342.165 is applicable due to Brake Parts’ failure to provide training as required by federal regulation. Any reference to the general duty clause in the ALJ’s analysis is simply an acknowledgement of arguments advanced by Brake Parts. Because the basis of the ALJ’s decision is clearly articulated, I do not believe remand is required.

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