

OPINION ENTERED: April 10, 2012

CLAIM NO. 200981735

JJ'S SMOKE SHOP, INC.

PETITIONER

VS.

APPEAL FROM HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

MARY J. WALKER, ADMINISTRATRIX
FOR THE ESTATE OF JOSHUA PENDELTON
PRISCILLA PENDLETON
JADEYN PENDLETON
and HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. JJ's Smoke Shop ("JJ's") appeals from the November 18, 2011, opinion and award by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") awarding Mary Jo Walker, Administratrix of the Estate of Joshua Pendleton ("Joshua") a lump sum death benefit of \$68,198.54 pursuant

to KRS 342.750(6) and death benefits pursuant to KRS 342.750(1) to Priscilla Pendleton ("Priscilla"), Joshua's wife, and Jayden Pendleton ("Jayden"), Joshua's daughter. JJ's filed a petition for reconsideration requesting the ALJ to make additional findings of fact. By order dated December 16, 2011, the ALJ made additional findings and denied JJ's petition for reconsideration. JJ's Smoke Shop also appeals from the December 16, 2011, order ruling on the petition for reconsideration.

The Form 101 alleges on July 22, 2009, Joshua was killed while in the course and scope of his employment with JJ's. The description of the event is as follows: "Assailants entered store in robbery attempt and stabbed claimant resulting in his death." In the Notice of Claim Denial, JJ's explained its denial of the claim as follows:

The Defendant specifically denies that 'assailants entered the store in robbery attempt and stabbed Claimant resulting in his death.' While the investigation is ongoing, it appears that Mr. Pendleton had closed and locked the store at his usual quitting time, and then returned to the store, with two other individuals, for reasons which are not clear. The Defendant specifically denies that the Plaintiff's death was in any way related to his employment with Defendant.

The September 9, 2011, benefit review conference ("BRC") order lists the following contested issues: "work-relatedness/causation; injury as defined by the ACT; is the death compensable?; are benefits payable per KRS 342.750?"

The findings of fact and conclusions of law in the November 18, 2011, opinion and award are as follows:

FINDINGS OF FACT

1. Joshua Pendleton was an employee of J & J's [sic] Smoke Shop on July 22, 2009.
2. On July 22, 2009, Joshua Pendleton was murdered. His body was found on his work premises shortly after 10: p.m.
3. Priscilla Pendleton is the widow of Joshua Pendleton.
4. Jayden Pendleton is the child of Joshua Pendleton.
5. Mr. Pendleton worked on July 22, 2009. His shift ended at 8:30 p.m. He locked the doors to the premises at approximately 8:40 p.m.
6. When Mr. Pendleton left the premises, he had a key to the door and knew how to operate the alarm system.
7. Mr. Pendleton voluntarily left the premises.
8. Mr. Pendleton was later picked up by his murderers under the pretext of going to get some 'weed' or 'smoke.'
9. J & J's [sic] Smoke Shop is a business that is more subject to

robbery and burglary than ordinary retail businesses.

10. Andrew Marra repeatedly lied to the investigators. I give his testimony little weight.

11. Samuel Marra may or may not have been lying to the investigators. Because of his status as a juvenile and as a felon, I give his testimony less weight. Because of his story's consistency portions of it may be reliable.

CONCLUSIONS OF LAW

1. In early cases the Kentucky Court of Appeals, now known as the Kentucky Supreme Court dealt with cases involving employees who had been murdered. In *Howard v. Dawkins Log & Mill Company*, 284 Ky. 9, 143 SW.2d 741 (Ky. 1940) the court dealt with a watchman and general maintainer of the peace who had been murdered. The watchman had been shot from ambush by an unknown perpetrator. This occurred on the employer's premises. The court found that the murder occurred 'arising out of the employment' but could not determine that it occurred 'in the course of employment.' The rule approved in that case is that 'there must be a direct causal connection between the employment and the injury.' *Id* at 744. Later, in *Henry Vogt Machine Company v. Chamberlain*, 279 S.W.2d 224 (Ky. 1955) two employees were killed by an insane assailant. The court stated that the rule in this jurisdiction is that 'compensation will be granted for injuries due to an assault by a fellow employee when they are fairly traceable to an incident of employment, and will be denied where they are the result of personal

grievances not connected in any way with the employment.' *Id* at 226.

2. More recently, in *Carnes v. Tremcoo. [sic] Manufacturing Company*, 30 S.W.3d 172 (Ky. 2000), the court quoted favorably from *January Wood Company v. Schumacher* 231 KY. 705; 22 S.W.2d. 117 (1929) that 'there must be a direct causal connection between the employment and the injury. That is an essential connecting link to the operation of the act.' This was in a case where an employee was murdered by a co-employee arising out of personal difficulties between them. The court in *Carnes* did not cite KRS 342.680 which was enacted in 1972.

3. 342.680 provides:

In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work related, that sufficient notice of the injury has been given, and that the injury or death was not proximately caused by the employee's intoxication or by his willful intention to injure or kill himself or another.

4. Joshua Pendleton was an employee who was killed. His body was found on the premises of his employment. He was in an establishment where he was subject to higher risk of robbery. I deem the presumption of KRS 342.680 to apply. The question then becomes whether or not there is substantial

evidence that the death was not work related.

5. Although Joshua voluntarily got into the motor vehicle after his usual work hours, it was probably under a false pretext. Because he was murdered, Joshua Pendleton was unable to testify. It is highly unlikely that he volunteered to be murdered as a part of a scheme to rob the smoke shop. The owner of the smoke shop testified that he did not believe that Joshua was involved in a plot to rob the store. I do not believe that that has been established either. I find that he was not a participant in the burglary.

6. The employer asserts that he left the course and scope of his employment after he closed up the shop. I agree. But he was later forced back into his role as an employee when he was either duped or forced into reopening the shop and into turning off the alarm.

7. In *Carnes v. Tremco Manufacturing Company*, 30 S.W.3d 172 (Ky., 2000) the Kentucky Supreme Court quoted favorably from Larson's Workers Compensation Law to the effect that a workplace assault which has its origins in a private relationship may be viewed as compensable where the employment environment facilitated or contributed to causing an assault which would otherwise not have occurred. The court quoted from *January Wood Company v. Schumacher*, 231 Ky. 705, 22 S.W.2d 117 (1929) which denied benefits to the widow of a night watchman who was killed not because he was the watchman on duty but because he was the husband of the murderer's paramour. In the *Schumacher* case the court stated that, 'There must be a direct causal connection between the employment and

the injury. That is an essential connecting link to the operation of the act.' KRS 342.680 was enacted after the *Schumacher* decision.

8. I believe that the perpetrators of the murder knew that Joshua Pendleton could get them into the store and disable the alarm. In the course of perpetrating the burglary, they decided to kill Joshua Pendleton. There is a direct relationship between Mr. Pendleton's knowledge and capability of getting into the store and his murder. The case is compensable.

In its November 30, 2011, petition for reconsideration, JJ's requested the ALJ to make several additional findings of fact. In the December 16, 2011, order ruling on the petition for reconsideration, the ALJ stated as follows:

This case comes before the Administrative Law Judge on petition for reconsideration filed by the Defendant. A response has been filed. I have reviewed the record again and the Opinion and Award entered on November 18, 2011. I do not find patent errors appearing on the fact of the Opinion and Award. This should be sufficient to dispose of the petition for reconsideration. I do not accept the defendant's theory of the case.

The plaintiff is entitled to the presumption under KRS 342.680 by reason of the fact that he was murdered and his body was found in his place of employment. He had access to the retail store where he worked. There is no reason to believe that he was part

of the criminal actions of the Marra brothers. If the Marra brothers wanted to kill Mr. Pendleton, they did not need to take him back to the store to do it. If they wanted to burgle the store, without setting off an alarm, it would be helpful to have access to the store. This they could get from an employee. Therefore it is likely that they used him as a way to have access to the store.

The defense theories are based on innuendo, not on substantial evidence. Therefore the presumption stands.

The petition for reconsideration is **DENIED**.

On appeal, citing Shields v. Pittsburg and Midway Coal Mining Company, 634 S.W.2d 440 (Ky. App. 1982), JJ's asserts the ALJ failed to make sufficient findings of fact. However, in the body of its argument, JJ's fails to set forth a reasoned argument outlining the additional necessary fact-finding. Instead, JJ's set forth its lengthy interpretation of why Joshua was murdered, including its theory that Andrew Marra ("Andrew") murdered Joshua out of jealousy over Andrew's girlfriend, Brandy Barnhart ("Brandy"), who allegedly used to work with Joshua at JJ's. JJ's makes two undeveloped arguments in this section of its brief which will be briefly addressed. First, JJ's states as follows:

The ALJ's finding of fact was that he gave 'less weight' to the testimony of

Samuel Marra because he is a juvenile and a felon, but that some of his story may be reliable. We [sic] don't know what part of Sam's statement the ALJ chose to believe, and what parts he chose to disbelieve, or why?

Secondly, JJ's argues as follows:

The ALJ made what may be a significant incorrect finding of fact, when he stated that JJ's a business that is more subject to robbery and burglary than ordinary retail businesses. There is no evidence whatsoever of this in the record. In fact, the testimony of John Blakeman tends to indicate that JJ's had never been robbed before. If this was the ALJ taking judicial notice of a commonly held fact, then we [sic] submit that it is a [sic] just as commonly held fact in a certain community in Louisville that Andrew Marra was intensely jealous of Joshua's association with his girlfriend, Brandy Barnhart, and that when Andrew Marra is jealous of another man, he can become quite violent.

While the ALJ's decision must adequately communicate the evidence upon which his ultimate conclusions are drawn so the parties may discern the basis of his decision, "it is not incumbent upon the [ALJ] to provide for the record a discussion and analysis of either the evidence or the law." Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 531 (Ky. 1973). It is abundantly clear from the ALJ's November 18, 2011, opinion and award and the December 16, 2011, order ruling on the

petition for reconsideration that the ALJ believes Joshua was murdered by the Marra brothers in the course of a robbery.

A review of Samuel Marra's ("Samuel") September 16, 2009, recorded statement reveals testimony consistent with the ALJ's inference regarding the events of July 22, 2009. Samuel stated, in part, as follows:

A: We uh, stopped at Burger King 'cause uh, I didn't eat breakfast and uh...we uh, I didn't eat breakfast and uh...we uh, got to Louisville about 7:50, I think 7 o'clock estimated, somewhere in there...and uh, the first place we stopped was at the Smoke Store that uh, I'm being questioned about. And uh, I bought a pop, uh, I was the only one that went in that time, and uh, after we left there, then we went to Wal-Mart uh, right across the street, right next to it. And uh, Andrew, he bought some clothing at...I believe.

...

And we stopped at the Smoke Store again before we went to my trailer. He bought two packs of cigarettes, I got a candy bar.

...

And uh, and uh, we left the, his trailer, went to uh, pick up some guy, one's [sic] of his friends that we had seen earlier [sic] the day, at the, as a cashier at the store. And uh, we uh, we went and picked him up and we went...they were talkin' about somethin' about 20/20, 20/40 about weed...they were gonna split...and uh,

on the way, in the phone call, on the way down there, he said, Andrew told the man that he left his wallet in the store. And when we picked him up and we went back to the store and uh, on the way back to the store Andrew uh, had a taser...had a taser...one of those self-defense weapons...and uh, shocked the guy while he was in the front seat. And uh, the guy got spooked, was like this, all shaky, and asked what was goin' on. Andrew said he was gonna rob the place.

...

Q: Okay. Was the robbery ever mentioned at all on the way to Louisville?

A: Uhm, pro'bly before he went and picked up the guy, he told me he was gonna rob the place on the car ride over there.

...

Q: Okay. So when did he tell you about that he was gonna rob the store?

A: Uh, when we got in the car, when we were on the way over to the guy's house.

Q: Okay. Let's talk about that for a little bit. What'd he tell ya?

A: Well, he said uh, he...uh, was gonna rob the store. He said uh, he had planned on going in and doing it earlier, but there was...he said there were two guys in there when he had went in so he didn't do it at that time. And uh, when we did go back later and he told me he was gonna do it and uh, the store was closed at that time. It was, it was after it closed.

Q: Did he say how he was gonna rob it?

A: No.

Q: You didn't ask any questions, you just went along for the ride. Okay, you're gonna rob the store...you didn't ask anything?

A: No, he was my only, was my only ride there and back from Tennessee.

Q: So you just were gonna go along with the robbery.

A: I didn't have anywhere else to go. Stuck in the wrong place.

...

Q: So he, you all are drivin' to the Smoke shop after you picked up Josh and, and Andrew shocks him with the taser. Does he tell him he's gonna rob him? He has plans on robbin' the Smoke Shop at this point? What's Josh sayin' to him? Did he get knocked unconscious? How did he respond to the taser?

A: He said uh, on the way down there, after he got shocked, he was confused, he's like what's goin' on? Then that's when my older brother said he was going to rob the place. Guy's like okay, but I'm gonna be compliant with you, but just let me go home to my family and everything. He's like I don't care if you rob the place, just let me go home to my family.

Samuel discussed, in detail, the robbery and what was taken from JJ's including two bank bags, cigarettes, and a computer modem. Samuel testified Andrew told him,

before leaving Jellico, Tennessee that he needed Samuel's help in Louisville to help move some things into a trailer.

In his September 17, 2009, statement, Samuel continued to discuss the robbery that occurred on July 22, 2009, stating:

A: Uh, woke up that day, it was 3:30...4:30...uh, we left and uh, headed towards Louisville. My uh, when we were in my room, and we were talking, uh, my older brother, uh, my dresser there was a knife. And uh, my brother had put it in his pocket, and uh, we left and uh, once we left uh, he said we're, he was gonna move up to Tennessee and that he was packin' his things and his kids were with uh, Brandy's ex-husband, and uh, he was only up there a couple days. Uh, uh...we uh, we stopped at Burger King and uh, we had small talk, he was like uh, you know, we're goin' to Louisville, we're moving the stuff, and uh, once we got to uh, it was about 80 miles before we got to Louisville, he told me what he had planned to do. He said he was gonna rob this place and uh, if he had to he was gonna kill the guy.

...

And uh, and once we got to Louisville, uh, we went to the same places, went to the store and got a pop and uh, he asked me to go in to see how many people were working. And I bought a pop. And when I came back out and told him two people were workin', he said oh, well, I'll figure somethin' out later. 'Cause he had planned to do it at the time but there were two guys workin' when there was supposed to be

one. And, and uh, went over to Wal-Mart and uh, he bought some clothes. He said we were gonna have to change clothes after we robbed this place, and I had to go to the bathroom 'cause I was nervous.

...

And uh, he [Andrew] parked it around the corner, and uh, and uh...when we went to go in to his trailer, and once we left he got back in the car over there and uh, he called the guy [Joshua], said uh, I got, I found a drug dealer, you know, to get some weed from. And then he goes oh, I left my wallet in the store. And uh, he picked up the guy [Joshua]...uh, Andrew, uh, picked up the guy uh, drove around uh, I remember it was under...he said the drug dealer was out in Fairdale. So he was drivin' down the freeway and uh, just had small talk, you know, and once he got to Fairdale uh, it was only like eight miles from the Dixie Highway, and uh, he...where you get off the, the exit ramp, take a left, there's like a underpass...

...

...(inaudible) and uh, he, before we picked the guy up, he said when I act like I'm adjustin' the rearview mirror, to grab the guy's neck and hold him. Uh, he adjusted the rearview mirror and uh, when we were comin' underneath the overpass. And I, I froze for a minute and then he tased the guy and then once the guy sat back in the seat and knew he was robbin' the store, I had to put my neck around, and uh, you know, like held him hostage, kind of.

...

Uh, earlier that day, when he was tellin' me, as we were drivin' down the highway, uh, 80 miles before, and he was talkin' about that how he was gonna do everything, he said Brandy worked at the store and uh, he said he was talkin' to Brandy about it for a few days before, and that he was gonna do it. And uh, said he was gonna rob the store. He didn't tell her he was gonna kill some guy.

...

Q: What do you mean by family? What, what was the reason he gave why he was gonna do it?

A: I don't know. I guess he was short on money or somethin'.

Q: Did he say that?

A: Umm, no.

Q: Did he give you any reason? Did he say why he was gonna rob him?

A: No, he did not.

Q: You kinda just assumed it was for money or his family?

A: He said, I got bills to pay and stuff.

Q: Okay.

A: Uh, at the time, uh, the electric was off in his trailer...or the water, it was one of the two. Uh...so...

Q: So you knew he was, he was strapped for cash. Him and Brandy.

A: Uh, I would say, yeah.

...

A: When we pulled up, he said, go see how many people are there, get a pop or somethin', and he gave me the money to get a pop 'cause I didn't have my wallet.

Q: Did y'all think y'all were gonna rob it right then?

A: That's, that's what he said. He said if there's just one guy workin' I'll have to come in. We'll just rob the place.

Q: Okay. Alright. So you went in, bought a pop, and you saw there was two guys in there workin'. When you told him there was two people workin' when you came back out, what did he do then?

A: He stopped and thinked. He didn't say anything else. He was sittin' there thinkin', and he's like oh, well, we'll do it later. And uh, that's why he came back the second time. He said I'm gonna get this guy's phone number, and uh...

...

Q: Did he mention anything else about the robbery?

A: No, not...not while we were sittin' there. He...

Q: ...Did he mention anything else about the robbery from the time y'all left Wal-Mart, went back to the Smoke Shop again, and then back to the trailer?

A: Uh, the trailer, when we went to uh, pick up the guy, he's like well, I'm gonna tell this guy I left my

wallet in the store. And that's what he did.

Q: Okay. But, but after y'all left the Smoke Shop the second time till the time you all left the trailer, did he say anything else about how, how he was gonna do it?

A: No.

Q: Okay. So pretty much you didn't get the, how it was gonna go down until y'all were on the way to Josh.

A: I didn't know how he was gonna do anything.

Q: Okay.

A: And I...

Q: ...But I mean he told, he told you that, well, how I want, mean, when y'all left the trailer's when he started to tell you we're gonna...I'm gonna call Josh, we're gonna get weed...I'm gonna tell him I left my, my wallet at the Smoke Shop and that's when he said about when I look, adjust my rearview mirror and all that...I want you to grab him.

A: He, he uh, he didn't tell me he was gonna call Josh and say oh, I left my wallet...he, he did it. He called Josh...

Q: ...Okay...

A: ...and said, oh, I left my wallet...

Q: This was after y'all were already in the car or the trailer?

A: We were in the car on the way over and he uh, said oh, I left my wallet. Then he said Josh would grab his keys, you know, he'd have his keys on him.

It is apparent from the language in the ALJ's November 18, 2011, opinion and award and December 16, 2011, order ruling on the petition for reconsideration that the ALJ relied upon Samuel's recorded statements, recited herein, in finding Joshua was murdered during the course of the Marra brothers' robbery of JJ's. The ALJ set forth a summary of events which he believed to be based upon the credible evidence in the record. The ALJ's summary of those events is supported by Samuel's recorded statements. The ALJ is not required to set forth, in detail, the exact statements of Samuel from which he formulated his opinions. Thus, as the ALJ's findings as to what took place on the day in question is supported by substantial evidence in the record, they will not be disturbed.

JJ's also asserts the ALJ erred when he stated JJ's is a business that is more subject to robbery and burglary than ordinary retail businesses. A review of the record reveals substantial evidence supports this conclusion. John Blakeman, who along with his wife owned JJ's at the time of Joshua's murder, gave the following testimony supportive of the ALJ's inference:

Q: All right. Mr. Blakeman, back to where we were, you said Josh normally worked about-- and again, just averaged about 35 hours a week at the Smoke Shop?

A: That is correct.

Q: All right. Is there a regular shift that he would work?

A: Mostly night work, but-- yeah, yeah, with him it was mostly-- always night work--

Q: Okay.

A: -- because I had a-- a couple of ladies, and they-- they weren't as keen about-- and I wasn't-- didn't really want them in there at night either.

. . .

Q: Mr. Blakeman, when this first had happened, reading through the criminal file, did the police call you, or I thought there was some other gentleman that lived near the shop that found out about it first and then had called you?

A: The alarm company-- if the alarm is not set by 10:00 p.m., they call me at my house. I called a friend of mine to go in with me, because I've always been paranoid of something like this happening.

Q: Okay.

A: There's more safety in numbers.

Blakeman stated he knew Joshua closed the store at 8:30 p.m. at the end of his shift on July 22, 2009. His testimony is as follows:

Q: Mr. Blakeman, do you know if Josh actually closed the store up at 8:30? Whether or not he locked the doors and set the alarm?

A: Yes.

Q: Okay.

A: The-- the alarm company verified that.

Q: All right. Obviously, the doors were unlocked and the alarm was disabled later on that evening, correct?

A: Yes, sir.

Q: Do you know what time?

A: It was my understanding it was right around 10:00 o'clock.

Blakeman testified that he talked to his employees about what to do should a robbery occur stating:

Q: Okay. Okay. All right. Mr. Blakeman, did you ever speak with your employees or have you ever spoken with them about-- if there is a robbery at the store or someone makes an attempt at a robbery--

A: Oh, yes.

Q: --what they're supposed to do?

A: Hand over everything and be as nice as you-- if they want you to carry it out, then carry it out for them.

Q: Okay. So basically, just to be cooperative?

A: Absolutely.

Q: Give them what they want?

A: (Witness nods head affirmatively.)

Q: Yeah. And I assume so, hopefully, nobody will get hurt.

A: Don't be a hero.

We believe the ALJ could reasonably infer from Blakeman's testimony that JJ's was a business more susceptible to robbery. It is well-established, as the finder of fact, the ALJ has the discretion to draw reasonable inferences from the evidence. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000). We take no issue with the ALJ's inference.

JJ's second argument on appeal is the ALJ made an "erroneous conclusion of law" by finding Joshua's murder arose out of and in the course of his employment. JJ's states as follows:

The claimants had the burden to prove every element of this claim, including that the assault occurred in the course and scope of Joshua's employment with JJ's, and that the assault arose out of Joshua's employment with JJ's. Here, the ALJ never got past the presumption [in KRS 342.680], even though there was substantial evidence in the record establishing that the assault did not occur in the course and scope of employment and that the assault did not arise out of the employment. Thus, the ALJ erred as a matter of law.

In Williams v. White Castle Systems, Inc., 173 S.W.3d 231, 235 (Ky. 2005), the Supreme Court of Kentucky stated as follows regarding the rebuttable presumption contained in KRS 342.680:

The claimant bears the burden of proving every element of a workers' compensation claim, including causation. See Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky.2000). Even when a worker's death occurs on the employer's premises, the burden is on those seeking compensation to establish that the death was connected to the individual's work in order for it to be compensable. See Stapleton v. Fork Junction Coal Co., 247 S.W.2d 372 (Ky.1952); Harlan Collieries v. Shell, 239 S.W.2d 923 (Ky.1951); and Bluegrass Pastureland Dairies v. Meeker, 268 Ky. 722, 105 S.W.2d 611 (1937). Enacted effective January 1, 1973, and amended effective December 12, 1996, KRS 342.680 addresses the problem of proving work-relatedness in instances where the injured worker dies and, therefore, is unable to testify regarding an injury. It authorizes a rebuttable presumption that the injury or death was work-related and precludes an intoxication or suicide defense if there is prima facie evidence that the injury or death was work-related and no substantial evidence to the contrary. The procedural effect of the presumption is to shift to the employer the burden of going forward with substantial evidence that the injury or death was not work-related; however, the burden of proving causation remains on the claimant. See KRE 301; Magic Coal Co. v. Fox, 19 S.W.3d at 95. If the employer fails to meet its burden, the claimant is entitled to the

presumption and prevails on the issue of causation. If the employer does meet its burden, the claimant is not entitled to the presumption of causation and must go forward with evidence that is persuasive enough to convince the ALJ that the injury or death was work-related.

In AK Steel Corp. v. Adkins, 253 S.W.3d 59, 63-64 (Ky. 2008), concerning shifting the burden of proof when there is a rebuttable presumption, the Supreme Court stated:

A rebuttable presumption shifts to the party against whom it is directed the burden of going forward with evidence to rebut or meet it but does not shift the burden of proof (i.e., the risk of nonpersuasion) from the party upon whom the burden was originally cast. If the presumption is not rebutted, the party with the burden of proof prevails on that issue by virtue of the presumption. If the presumption is rebutted, it is reduced to a permissible inference. The ALJ must then weigh the conflicting evidence and decide which is most persuasive.

In this case, the ALJ ultimately determined the rebuttable presumption in KRS 342.680 is applicable and JJ's failed to put forth substantial evidence to rebut the presumption. We find no error in the ALJ's determination, and it will not be disturbed.

JJ's interpretation of the events that took place on July 22, 2009, has no relevance on appeal. The record contains substantial evidence supporting the ALJ's conclusion that the rebuttable presumption in KRS 342.680 is applicable and JJ's failed to put forth substantial evidence proving Joshua's murder was not work-related. *There is prima facie evidence in the record, from all witnesses, which supports the ALJ's conclusion Joshua's murder occurred during the Marra brothers' robbery of JJ's.* The above-cited statements of Samuel are supportive of the ALJ's inference that Joshua was murdered during the course of a robbery. Andrew Marra, in his second recorded statement of July 23, 2009, mislabeled "Third July 23, 2009 Recorded Statement" admitted to the robbery stating:

Q: Then why would he say that? Did you or did you not tell Sam you was gonna rob the Smoke Shop when you got in Louisville and he tells you he didn't want any part of it?

A: Yeah. Yeah.

Q: Did you? Or you're just saying yes to answer?

A: Yes. No, he...I...I said it. I told him that and he said he didn't want no part of it. I said fine you don't have to be a part of it.

Q: Was he standing out front when you robbed the store?

A: No.

Q: As your lookout?

A: No.

Q: Why would Sam say it?

A: Because he's scared.

Deposition testimony by Blakeman is consistent with the fact that JJ's was robbed. Blakeman testified as follows:

Q: Okay. When you got to the store, was the door open?

A: Yes, it was unlocked.

Q: Okay. Okay. You and Terry went into the store?

A: Terry walked in briefly. He seen that the money was missing. I told him to get out of the store, and let's call the police.

...

Q: Okay. All right. Now, you said that money was missing. Is there a safe?

A: Yes, sir.

Q: Okay. Was the safe open?

A: (Witness nods head affirmatively.)

Q: Okay. Is that a 'yes'?

A: Yes. I'm sorry.

Additionally, deposition testimony by Terry West ("West"), Blakeman's friend who occasionally worked at JJ's,

confirmed JJ's was robbed on July 22, 2009. West testified as follows:

Q: Did Mr. Blakeman call you sometime during the evening on that date?

A: He called me that night.

Q: What did he tell you?

A: Asked me if I had seen Josh. I said no, why. He said, well-- and he called him the little shit, didn't set the alarm.

Q: Mr. Blakeman told you that Mr. Pendleton had not set the alarm?

A: Had not set the alarm, the alarm company had called him. I looked out, and I said, 'Well, his car's at home.'

Q: Is at home?

A: I said his car was at home. Like I said, he was just three or four doors down the street from me. I told him, I said, 'You stay at home. I'll ride down there and check the store,' and I did, and when I got to the store-- there was an accordion type security gate on the front of the store that was open. I told John--

Q: Is that on the building itself or was this on a fence?

A: No, it's on the building itself. I called John and told him what I found. I told him to stay on the phone with me. I was going to circle the building. I circled the building. Nothing was out of place or nothing was wrong. Went back around front, parked and went up and tried the door, and the door was unlocked, and went inside. As

I entered the store I went to the right, that's where the storeroom is and the registers and all that. Went in the storeroom, the safe was open and everything was gone, and I told John, I said, 'John, you've been robbed. You need to get your pants on and get down here.' He hung up, and I dialed 911 and explained what I found. The dispatcher told me, in fear of them still being in the store, I needed to get out, so I did.

The above-cited evidence is prima facie evidence in support of the applicability of the rebuttable presumption of KRS 342.680, since Joshua's murder, as determined by the ALJ, was carried out during the Marra brothers' robbery of JJ's. The ALJ, as fact-finder, must determine whether JJ's put forth substantial evidence in opposition to the rebuttable presumption in KRS 342.680. The ALJ ultimately determined JJ's did nothing to vitiate this presumption. The evidence in the record does not compel a different result than that reached by the ALJ.

Regarding the alleged jealousy between Andrew and Joshua, in his September 16, 2009, statement, Samuel stated he did not know of any history between Joshua, Andrew, and Brandy. Samuel stated as follows:

Q: So you don't know any history between the victim, your brother, or Brandy, or anything like that?

A: No.

Further, West testified as follows:

Q: Did you ever see anything yourself that would lead you to believe that there was some jealousy between Mr. Andrew Marra and Mr. Pendleton over Brandy?

A: No, none.

Likewise, the following deposition testimony from Blakeman fails to establish such a link:

Q: Mr. Blakeman, do you have any reason or have you heard anybody mention or have you been told that-- what would have prompted Andrew Marra to do this? Either talking to the cops or talking to anybody else that may have had any information?

A: Speculation was that he was jealous of Josh. And I think Josh had discussed it with one of the other employees that his girlfriend had a crush on Josh, but Josh didn't care for her. So jealousy would be my biggest guess.

Q: Okay. Now, you say 'speculation.' Is that just folks talking that come up to the shop or--

A: Right.

...

Q: You think there might have been some jealousy between Mr. Marra and Mr. Pendleton over Brandy?

A: That was the-- that was rumored pretty heavily.

...

Q: I know you said there had been some speculation that Andrew may have been jealous of Josh, because Brandy may have stated she liked him. But, obviously, the Marras robbed the store. Is that true?

A: Absolutely.

Q: Okay. Okay. And whether or not that had-- you know, Josh's death had anything to do with-- over the Brandy events. I mean, that's pure speculation; is that correct?

A: Yes, sir.

We acknowledge there are hints or insinuations of jealousy between Andrew and Joshua stemming from their own relationship, alluded to in Andrew's second July 23, 2009, recorded statement, mislabeled "Third July 23, 2009 Recorded Statement," wherein he states as follows:

Q: What'd you do?

A: I killed Josh.

Q: Why'd you kill him?

A: Jealous, I guess, I suppose.

Q: Jealous about what?

A: Our relationship; his relationship, with other people.

...

Q: How many times you think you stabbed Josh if you had to put a number on it? One, ten, twenty? Did you have rage?

A: Yeah. But...yeah.

Q: Were you mad at him?

A: Yes.

Q: Who was he cheating on you with?

A: I don't know. Somebody's supposed to meet him.

Q: Your little girl, Brandy's feelings are hurt.

A: How's that?

Q: Because you thought she cheated on you.

A: I knew she'd cheat on me. I knew she'd...

Q: Well, why'd you tell Thomas you'd kill Josh...

A: Huh?

Q: ...for sleeping with Brandy.

A: Uh to blow off steam.

Q: Is that more being mad at Josh because he cheated on you or being mad because Brandy cheated on you?

A: Just Josh.

However, as the ALJ indicated in the November 18, 2011, opinion and award, he gave "little weight" to Andrew's testimony as Andrew "repeatedly lied to the investigators." The ALJ, as fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of

the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329, 330 (Ky. 1997). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Indeed, a review of Andrew's three recorded statements on July 23, 2009, reveal substantial inconsistencies. In Andrew's first statement, he denied robbing JJ's and murdering Joshua on July 22, 2009. In this first statement, Andrew also testified to having a bisexual relationship with both Joshua and Brandy. In Andrew's second statement on July 23, 2009, mislabeled "Third July 23, 2009 Recorded Statement," he admitted to murdering Joshua on July 22, 2009. In Andrew's third recorded statement on July 23, 2009, mislabeled "Second July 23, 2009 Recorded Statement," he claimed his brother Samuel robbed JJ's and murdered Joshua on July 22, 2009. Therefore, the ALJ's decision to give no weight to Andrew's statements due to fairly blatant inconsistencies is a proper exercise of his discretion. The ALJ's determination

that the presumption in KRS 342.680 is applicable to Joshua's death and was not rebutted is supported by the evidence and will not be disturbed.

This Board acknowledges the peculiarity of the fact pattern in this case, as the record reveals, by virtue of Blakeman's testimony, Joshua left JJ's after his shift ended at 8:30 p.m., closed the store, and set the alarm. In its appeal brief, JJ's adamantly asserts Joshua's murder did not arise out of or in the course of his employment as it took place when Joshua was intending to buy marijuana with Andrew and Samuel Marra. JJ's also maintains Joshua violated "specific orders from [his] employer not to return to the shop without first calling the manager, John Blakeman."

In the November 18, 2011, opinion and award, the ALJ addressed Joshua leaving the store at the end of his shift and returning by stating as follows:

The employer asserts that he left the course and scope of his employment after he closed up the shop. I agree. But he was later forced back into his role as an employee when he was either duped or forced into reopening the shop and into turning off the alarm.

In the December 16, 2011, order ruling on the petition for reconsideration, the ALJ stated as follows:

If the Marra brothers wanted to kill Mr. Pendleton, they did not need to take him back to the store to do it. If they wanted to burgle the store, without setting of an alarm, it would be helpful to have access to the store. This they could get from an employee. Therefore it is likely that they used him as a way to have access to the store.

The ALJ ultimately determined Joshua was "forced into reopening the shop and into turning off the alarm"; consequently, Joshua was "forced back into his role as an employee." This determination will not be disturbed. Samuel's statements, upon which the ALJ relied, are consistent with the finding Joshua was forced by physical and verbal coercion to return to JJ's after being tased by Andrew, and subdued by Samuel. Thus, irrespective of the circumstances leading to Joshua getting into the car with the Andrew and Samuel, the record reveals circumstances quickly changed as Joshua was forced to return to his role as a clerk of JJ's and required to make the smoke shop accessible to Andrew and Samuel by shutting off the alarm and opening the safe. Further, we believe there is no question *the record reveals JJ's was robbed*. While we note this is not necessarily a straight-forward example of a death arising out of and in the course of one's normal work shift, we cannot imagine a more appalling example of an

employee being physically forced to return to his place of employment, and into his role of an employee, than what was experienced by the deceased on the night of July 22, 2009.

Regarding JJ's statement that Joshua violated Blakeman's orders by returning to the shop without first calling, we deem this to be irrelevant to the issue of whether the presumption in KRS 342.680 applies. JJ's theorizes Joshua could have called Blakeman after being informed by Andrew that he left his wallet in the store. Samuel's testimony is consistent with the fact that Andrew informed Joshua over the phone, before picking up Joshua, that he left his wallet in the store. However, we do not have insight into whether Joshua was planning to call Blakeman *after* entering the car with the Marra brothers. After all, Joshua certainly had no way of knowing, before getting into the car, he was entering a dangerous situation that would preclude him from making a phone call. The record clearly indicates Joshua was not in a position to call anyone shortly after he entered the Marra brothers' car, as he was both tased, informed of the imminent robbery, and restrained. We refer to Blakeman's deposition testimony in which he stated he informed his employees not to be uncooperative or a hero in the course of a robbery. As Samuel noted in his statements, Joshua, once being tased

and informed of the robbery, expressed his full cooperation and a desire to be able to return safely to his family, thus following Blakeman's advice regarding what to do in the event of a robbery.

The November 18, 2011, opinion and award and the December 16, 2011, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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