

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 6, 2015

CLAIM NO. 201176078

JAMES HUFF

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

HALL CONTRACTING OF KENTUCKY, INC.
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * *

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

STIVERS, Member. James Huff ("Huff") seeks review of the July 22, 2014, Opinion and Order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") dismissing his claim after determining his injury was caused by horseplay and did not arise out of the course and scope of his employment. Huff also appeals from the October 13, 2014, Order denying his petition for reconsideration.

The controversy centers around Huff's actions on August 26, 2011, the date he sustained a severe injury to his left hand when an object he was holding exploded while he was working for Hall Contracting of Kentucky, Inc. ("Hall Contracting") on its job site located in Owensboro, Kentucky. Since the medical evidence is not germane to the issue on appeal, we will not discuss it. The testimony of Huff, his co-worker Keith White ("White"), Susan Summers ("Summers"), Hall Contracting's Human Resources Manager, and James Steven Martin ("Martin"), a police officer with Owensboro City Police Department comprise the relevant evidence.

Huff's November 15, 2013, and June 9, 2014, depositions were introduced. Huff was employed by Hall Contracting as an equipment operator which entailed operating dozers, excavators, backhoes, cranes, and trenchers. The job on which he was working was located on the riverfront of Owensboro. His immediate supervisor was Dennis Hardesty ("Hardesty"). Huff explained an old boat ramp had been torn down and Hall Contracting was filling dirt and leveling the ground. Each day he would arrive at work between 6:00 and 7:00 a.m. On the date in question, Huff estimated he arrived at work between 6:00 or 6:30 a.m. The area in which he worked was a fenced secured site.

Every morning Hardesty would conduct a safety meeting which lasted approximately ten minutes. Huff estimated they started work after the safety meeting before 7:00 a.m. on August 26, 2011. That morning was cloudy or overcast and he had the forklifts headlights on.

Huff and White were to move telephone poles taken down by the city using a forklift. White was the only person to assist him. White's job was to walk next to the forklift as a spotter. A place had been designated at which to place the telephone poles and White and Huff were looking for something upon which to lay the telephone poles so the forks of the forklift could get under the poles.

Huff first saw the object which exploded in his hand when White walked over to him holding the object in his hand. He had not seen the object before White brought it to him and handed it to him. White told him he found it next to some pallets and asked Huff if he knew what it was. Huff was adamant he did not take the object out of White's hands. Huff testified he had never seen anything like it. He described the object as dark in color; however, he was not sure if it was black or shiny with a black texture. The object was round and "was indented almost all the way through." Huff described it as being similar to a crevice which "funneled down into a deep hole inside the object."

The object was larger than a golf ball but smaller than a tennis ball and was not very heavy. Nothing was protruding out of the object and there was no wick or fuse. Huff testified nothing like this object had been used on the job site. There was nothing on the object indicating it was flammable or an explosive. Similarly, there were no letters, pictures, or symbols on the object. While looking for markings or lettering on the object which would identify it, Huff removed his lighter from his pocket. He testified he never dreamed it was an explosive. He did not discard the object because like White, he was curious what it was. Huff noted there were thirteen contractors on site and he did not know if one of them was using the object. Huff did not take the object to management because there was nothing indicating it was dangerous. He testified this was a secure area as the gates were locked every night and he had not seen anything like this in the three and a half years he had worked on this site. Huff explained they had to pick up and deal with anything they found in the immediate area.

Huff acknowledged White did not force him to inspect the object. As he was removing his lighter from his pocket with his right hand, it was possible White told him not to light the object or put the object near the

lighter. White moved away as soon as Huff was removing the lighter from his pocket. Although he was not positive, it appeared to him White knew the object was an explosive because White spun the other direction. However, Huff questioned why White would bring an explosive to him inquiring of its nature. As soon as he ignited the lighter the object blew up in his left hand. Huff knew that if he suspected the object was potentially flammable or an explosive, the company safety procedure was not to handle it and report it to the supervisor.

Huff explained his left palm was torn up and his thumb was hanging toward his upper arm. Huff testified he was in shock and terrible pain and yelled for someone to call 911. He was immediately taken to the Owensboro Hospital and then flown to Jewish Hospital in Louisville. Surgery was performed that day by Kleinert Kutz. Huff subsequently underwent a second surgery, a number of skin grafts, and extensive hand therapy.

Huff testified Hall Contracting terminated him because its position was the object should have been taken to the supervisor and his actions were horseplay. Huff testified he did not know the object was a firework and did not intend to explode it. Further, he did not tell anyone he intended to light or explode the object. Huff testified

Hall Contracting had provided no warning there was a possibility explosive material was in the work area. Huff was asked about the accident report prepared by Hardesty stating Huff had seen a foil wrapped ball, picked it up, and while attempting to light the fuse, it exploded. Huff denied ever talking to Hardesty. He also denied telling Summers he had willingly picked up the item and willingly lit it. He acknowledged he had a telephone conversation with Summers on the Sunday after the accident, but at that time he was in extreme pain and on "painkillers." Huff explained the object did not appear to be dangerous or an explosive as it had no wick or fuse. He testified the lighter never touched the object and it was approximately a foot from the object when it exploded.

White's May 16, 2014, deposition was introduced. He testified Hall Contracting was building a park along the Ohio River and he and Huff were moving telephone poles which had been taken down. He estimated they started work around 6:00 or 6:30 a.m. Although he was not sure of the time of the accident, he believed they had been working approximately an hour and a half when it occurred. At the time of the injury, White explained the sun had risen and there was "full light." No other employees worked along-

side them, and only he and Huff witnessed what occurred when Huff was injured.

White discovered a Roman candle and "a silver looking ball" the size of a tennis ball in front of the office. The Roman candle was lying on the ground but the silver ball was sunk in mud. He picked up the items, studied them, and then threw the Roman candle on the ground. White then showed the "silver ball" to Huff to "look at it." He testified the ball had a real thin coating and looked like it was wrapped in aluminum foil. The ball was round and had "a nipple or a place where a wick would be." He observed part of the ball was protruding just a little bit, but there was no wick or fuse. He estimated the ball weighed a couple of ounces. There was no writing, pictures, or design which would identify the ball. White explained there appeared to be a place for a wick because there was a "burnt spot" as if something had burned down to the surface of the ball. The burnt spot was located at the top of the nipple. White was worried but was not sure of the nature of the ball. He acknowledged it could have been a firework. White testified that while he was looking at the ball, Huff took it from him and started looking at it. However, later during his deposition he testified he gave the ball to

Huff. White explained they both had it in front of their faces rolling it around and looking at it. White believed the nipple and the burnt mark were visible as it was light enough for him to see both characteristics.

When White saw Huff "fishing in his pockets," he assumed Huff was getting his lighter and started to back up. He told Huff "I wouldn't do that" because he thought Huff was getting ready to ignite the lighter. He estimated approximately forty-five seconds to a minute elapsed between the time Huff received the ball and he retrieved his lighter from his pants pocket. White acknowledged both commented it could be a smoke bomb or a firework but neither knew its exact nature. Although Huff did not say he intended to light the ball, White was moving away because he was afraid of what the ball might be and did not want to get in trouble. He knew it was not a good idea to light the lighter. At the time of the explosion, White was approximately six or seven feet away from Huff, had turned away, and did not see the explosion. He heard an enormous, really loud boom.

White acknowledged he knew the company policy required that when an employee discovers something dangerous or thinks is dangerous, a foreman or a supervisor is to be notified. White testified if he had had the

opportunity to summon a foreman or supervisor he probably would have showed the object to him and asked what he thought about it and what it was. He acknowledged he did not know for sure what the ball was as he had never seen anything like it before. White explained he did not take the object to the supervisor because he did not think it was dangerous. He testified if he had thought the object was dangerous he would not have picked it up and would have called the supervisor to come look at it. White estimated he was approximately fifteen feet away from Huff when he threw down the Roman candle and did not know if Huff saw the Roman candle.

Summers' May 16, 2014, and June 9, 2014, depositions were introduced. She testified she had a telephone conversation with Huff on Sunday, August 28, 2011. During the conversation, Huff told her he was looking at an object he found on the job site and lit it. He described the object as "a silver type material with a foil type thing wrapped around it." Summers stated Huff said he did not know why he lit it and thought it was a smoke bomb. Huff described the object as being bigger than a golf ball but smaller than a baseball. Huff told her he made a stupid decision. He did not tell Summers it was dark. Summers knew Huff sustained hearing damage due to

the explosion and was to see a doctor for this problem the following week. She testified Huff told her he willingly picked up the object and willingly lit it.

Summers testified she spoke with White and believed his deposition testimony mirrors what he told her. Summers denied speaking with the police. Summers testified she did not have an accident report or internal investigation report due to computer problems occurring in 2012. She had input in the decision to discharge Huff because he endangered himself and others. She denied having any prior problems with Huff. She denied reducing to writing anything Huff told her.

At her June 9, 2014, deposition, Summers testified Huff told her the firework was found on the job site, he took out his lighter to see what it was, and lit the item. Huff also told her he was not sure but he thought it was a smoke bomb. Summers specifically asked Huff if he lit it and he said he did. When she asked him why, Huff stated he did not know, it was just a stupid decision. Summers denied testifying previously that Huff told her he found the object and picked it up.

At his June 4, 2014, deposition, Martin testified that based on what White told him he wrote in his report Huff thought he found a smoke bomb at the construction

site, picked it up with his left hand, and lit a short fuse resulting in the item exploding. Martin did not have any recollection one way or another of having talked to Huff. He testified White told him Huff picked up the silver aluminum object with his left hand and lit a short fuse. Martin explained that all of what he knew about the accident he learned from White.

In his findings of fact and conclusions of law, the ALJ summarized the testimony he apparently relied upon as follows:

In reviewing the evidence in this claim, the ALJ was mindful of Huff's testimony that he emphasized at the Hearing - that he had not engaged in horseplay because he did not light the object; rather, he ignited his lighter to better examine the object and it exploded instantaneously. This theory was reinforced in Plaintiff's Brief, where he argued that his 'improper intent,' a requisite in the case law, had not been demonstrated. *Haines v. BellSouth Telecommunications, Inc.*, 133 S.W.3d 497 (Ky. 2004). But upon careful review of the evidence, the ALJ finds insufficient support for that position; Huff has not sustained his burden of proving the work relatedness of his injury.

The ALJ found Huff to have given unreliable testimony as to the extent of daylight and the nature of the weather on the morning of his accident. The Defendant's evidence as to the weather that day and the testimony from Keith White confirm that there was

plenty of daylight as of 7:00 a.m., the earliest suggested time from the evidence for when the accident occurred. There was no need for a lighter to better illuminate the object. Even if there had been inadequate light, there was a recognition between the two men, according to White, that the object had an indentation that might accommodate a fuse; that it might be a firework or smoke bomb; and that it might be dangerous - circumstances that create an act of horseplay in the very act of igniting the lighter. White said to Huff, "Bill, I wouldn't do that," when Huff appeared to be reaching for a lighter, and backed away out of concern for his own safety; Huff acknowledged that he heard and observed this from White and proceeded to ignite the lighter anyway. White said he and Huff were waiting for the supervisor to return to their work area after a cell phone call to give instruction on where to move the telephone poles, so there was no reason not to leave the object alone until the supervisor returned. (p. 31-32). Huff ventured outside the course and scope of his employment in igniting the lighter, which therefore renders the resulting injury not compensable.

The ALJ also relied on the testimony from Summers, who spoke to Huff the day after the accident. Huff told her it was a "stupid decision" to light what was believed to be a smoke bomb; and he made no remark to her about not having intended to light the object, or about alleged darkness being the reason he used the lighter to better see what he was holding. The ALJ believes that Huff acknowledged the nature of his actions to Summers because her company would not have

otherwise abruptly terminated a good employee.

The ALJ also provided a brief summary of the referee's decision regarding Huff's claim for unemployment benefits and the Unemployment Insurance Commission's order reversing.

Consequently, the ALJ concluded Huff's injury did not arise out of the course and scope of his employment, but was caused by horseplay.

Huff filed a petition for reconsideration requesting the ALJ re-examine the facts based on the principles set forth in Jones v. Dougherty, 412 S.W.3d 188 (Ky. 2012) and Haines v. Bell South Telecommunications, Inc., 133 S.W.3d 497 (Ky. App. 2004) as well as other cases addressing the issue of course and scope of employment. Huff requested a finding there was no substantial evidence in the record establishing his conduct removed his injuries from outside the course and scope of his employment. Huff took issue with the ALJ's reliance upon the testimony of Summers which he characterized as questionable.

In overruling the petition for reconsideration, the ALJ further explained as follows:

While response to the arguments again by Plaintiff is not required, the ALJ will note the following. As to the assertion that the weather conditions

were not important, the ALJ states that Plaintiff claimed that the lighter was necessary to observe the object because of inadequate daylight, and it is therefore important to the analysis that the evidence revealed that it was completely daylight at the time of the accident, making the use of a lighter unnecessary. Separately, Plaintiff emphasized Keith White's testimony wherein he stated that if he thought the object was dangerous when he picked it up he would have given it to his supervisor. While White may have had that belief upon first observing and handling the object, he also said he came to fear the object during further observation and while Huff was handling it; he told Huff not to ignite his lighter and backed away in concern for his own safety when Huff reached into his pocket. Huff acknowledged that reaction from White, but proceeded with the unreasonable risk of igniting the lighter anyway.

On appeal, Huff argues this case involves an issue of first impression in Kentucky, delineating the issue as follows:

Is it horseplay when an employee, through curiosity, while at his work station, engages in action in the form of using his cigarette lighter to obtain a better look at an unknown object, which results in an explosion and injury to the Plaintiff?

Huff asserts he is unaware of any case which addresses this issue. He argues Larson's Workers' Compensation Law Section 23.07(6) and Sections 23.30 to 23.35, clearly place

the facts in the case *sub judice* in the curiosity category.

Huff cites the following contained in Larson's:

Along with all the other frailties of the average person - carelessness, prankishness, a tobacco habit, a cola habit, the inclination to rest once in a while and chat with one's neighbor - there must also be expected one more: the natural human proclivity for sticking one's head in mysterious openings, putting one's fingers in front of fan blades, and pulling wires and pins on strange mechanical objects that one finds.

Huff observes one of the key factors in determining whether curiosity crosses the line into horseplay is the degree of diversion and/or temporary abandonment of employment duties by the worker immediately prior to the accident. He asserts if the worker was at his work station and did not deviate from his employment, a momentary or impulsive act resulting in injury does not result in horseplay.

Huff attacks the ALJ's reliance upon Summers' testimony maintaining her testimony concerning what Huff told her more than two and a half years prior to her deposition was contrary to his testimony and, more importantly, White's testimony. Huff contends it is reasonable to expect Summers would have taken a written statement either in person or over the telephone. Instead

of relying upon Summers' account of her conversation with him, Huff argues the ALJ should have looked more to White's testimony which provides more information as to what happened on the date in question. He contends this is especially true since Summers testified White's testimony was consistent with the statement she took from him.

Huff cites to White's testimony that neither knew the nature of the object. He maintains the fact neither White nor Huff knew what the object was, is absolutely critical as it establishes Huff did not knowingly light a dangerous object. He also observes White's testimony is contrary to that of Summers as he stated he did not see a wick or fuse. Further, White did not testify Huff lit the object.

Huff asserts in the case *sub judice* it was established: 1) he had not deviated from his employment; 2) there was no contractor on the job using explosives and he had not been told to watch for explosives; 3) both he and White did not know the nature of the object; 4) the job duties of Huff and White was to pick up objects in the immediate area before they could move telephone poles; and 5) out of curiosity Huff engaged in an instinctive act in lighting his cigarette lighter to gain a better look at the object. Given these facts, Huff asserts there is no

question he engaged in an impulsive or instinctive act in lighting the cigarette lighter to gain a better look at the object. Huff argues an impulsive act is not a deviation from his employment. Huff cites to various decisions of other jurisdictions cited in Larson's in which compensation was awarded. Huff submits the same element present in those cases is also present in the case *sub judice* which are: 1) the employee was at the work station when the accident occurred; and 2) the act was based on curiosity and was a momentary impulsive act rather than a deliberate or conscious excursion or abandonment of the job duties.

Next, Huff argues the ALJ erred in relying, in part, upon Hayes Freight Lines v. Burns, 290 S.W.2d 836 (Ky. 1956) and in failing to rely upon Haines v. BellSouth Telecommunications, supra, and Jones v. Dougherty, supra. He asserts the facts in Hayes Freight Lines v. Burns, supra, are completely different than the facts in the case *sub judice*, as Burns, the claimant, was an active participant in the horseplay and his actions contributed to a firecracker being lit causing him to lose an eye. Huff asserts the holdings in Haines v. BellSouth Telecommunications, supra, and Jones v. Dougherty, supra, establish he was not engaging in ill or improper intent

which must be present for the conduct to rise to the level of horseplay.

Because we conclude as a matter of law Huff did not engage in horseplay, we reverse.¹ On the date in question, Huff and White were working together on a job site on the riverfront of Owensboro. At the time of the events in question, there was no one else working with them. There is no dispute White found the spherical object in question and was unsure of its nature. White described it as a silver ball the size of a tennis ball. Although the object did not have a fuse or wick, there was a place or a nipple where a wick would be located. White took the object to Huff and he either gave it to him or Huff took it from him.² White became concerned because Huff was going to "light the lighter." As he turned away, White said to Huff he "wouldn't do that."

In Rex-Pyramid Oil Co. v. Magan, 287 Ky. 459, 153 S.W.2d 895, 897 (Ky. App. 1941), the former Kentucky Court of Appeals characterized horseplay as follows:

It is contended by appellant that at the time of the accident Magan was engaged in 'horseplay' i.e., a sportive

¹ We will not address Huff's argument concerning curiosity as discussed in Larson's. Since it was not raised before the ALJ, Huff cannot raise the argument for the first time on appeal.

² White's testimony is conflicting on this point as he initially testified Huff took the object and later testified he gave it to Huff.

act of his own, and was not acting in the course of his employment and that the accident did not arise out of his employment.

The Court of Appeals later stated:

It will thus be seen that the elements of time, place, and conditions necessary to establish the fact that the deceased was 'in the course of his employment' have been amply proven and the claimant is entitled to recover if the accident arose 'out of his employment' and not out of the play with Stinnett.

Id.

Webster's II New College Dictionary, Third Edition, defines "sportive" as follows: "[p]layful: frolicsome."

Larson's § 23.62(a) provides the following regarding what constitutes horseplay:

Under the present approach, the closest cases of all are those in which there is in fact no deviation whatever from the direct duties of the employment, but where the horseplay takes the form of a whimsical method of performing those very duties.

Webster's defines whimsical as follows:

1. Capricious, playful, or fanciful.
2. Erratic or unpredictable.

The first definition of whimsical is more in line with what Kentucky case law defines as horseplay.

Based on the facts as found by the ALJ, we conclude Huff did not engage in horseplay as he did not engage in a whimsical or sportive act. White and Huff were dispatched to a specific location early in the morning. The ALJ concluded there was enough daylight so Huff did not need to further illuminate the spherical object. Regardless of that fact, without question Huff was made aware of and shown this spherical object by White in the course of Huff's employment. Significantly, the evidence does not reveal Huff was ever made aware that White also picked up a Roman candle and discarded it. White was specifically asked by Hall Contracting's counsel if Huff had seen the Roman candle and White indicated he did not know if Huff had seen him discard the Roman candle. Thus, there is no evidence establishing Huff was ever aware that in addition to finding the spherical object in the mud, White also found the remnants of an exploded Roman candle, a powerful firework.

Without question Huff was made aware of the spherical object in the course of his employment. He either received the spherical object or took it from White who had picked it up in the performance of his work duties. White and Huff did not venture from the course and scope of their employment but attempted to determine the nature of

the object. White testified he would not have picked up the object if it was dangerous. White also testified that if he had thought the spherical object was dangerous, he would have had the superintendent "come and look at it."³ At the time White brought the spherical object to him, Huff was where he was supposed to be and had not engaged in a whimsical or sportive act.

Huff's last act of either igniting the lighter or lighting the object did not constitute a whimsical or sportive act.⁴ The fact Huff ignited his lighter causing the object to ignite or according to Summers "lit a fuse" does not constitute horseplay as defined by Kentucky case law or Larson's. At this juncture, we emphasize our holding is not based upon what we perceive the facts to be but the facts as determined by the ALJ. Although White's statement to Officer Martin is diametrically opposed to his deposition testimony, that fact is not relevant to our inquiry as we have no fact-finding authority. Further, the fact Summers initially testified Huff told her he picked up the spherical object and lit it even though White testified

³ See page 40 of White's May 16, 2014, deposition.

⁴ The ALJ relied on White's testimony that Huff ignited the lighter and Summers' testimony Huff told her he lit the object in finding Huff engaged in horseplay.

he found the object and there was no wick or fuse on the item is not relevant to our inquiry.

The testimony of White and Huff establish Huff was not attempting or planning to engage in any type of mischief or playful conduct when he ignited his lighter causing the spherical object to explode. Clearly, Huff exercised poor judgment after receiving the spherical object. However, the testimony of White and Huff establish they had a duty to determine whether the object was dangerous and, if so, to ensure it did not impose a threat to anyone's safety. As noted by Huff, he and White could not discard the item as they must deal with anything they found.

Based on the evidence, the ALJ could have either concluded Huff intended to further illuminate the area around the spherical object to determine its nature or for some reason intended to ignite the object causing it to explode in his hand. The fact Huff held the object in his hand when he ignited his lighter, without the intent to engage in a subsequent inappropriate act, does not constitute horseplay. The evidence does not establish Huff intended to engage in a sportive or whimsical act which would affect White or any portion of the job site.

Notably, White's testimony does not establish Huff intended to light the object and throw it or explode it.

Finally, the ALJ's reliance upon Hayes Freight Lines v. Burns, supra, is misplaced. In Hayes Freight Lines v. Burns, supra, an employee entered a room with a firecracker. The claimant, Burns, allowed the employee to use Burns' lit cigarette to light the fuse of the firecracker. The employee then threw the firecracker against the floor whereupon it exploded causing a foreign object to fly into Burns' left eye. As a result of the injury, Burns lost his left eye. The Court of Appeals concluded Burns was not an innocent victim and was a participant in horseplay. The facts in Hayes Freight Lines v. Burns, supra, are vastly different from the facts in the case *sub judice*. The evidence reveals White brought the object to Huff and Huff either took or received the object from White and ignited his lighter causing it to explode, or lit a fuse, neither White nor Huff saw, causing it to explode. That act alone does not constitute horseplay as defined in Rex-Pyramid Oil Co. v. Magan, supra, or Larson's.

In addition, the language of the Court of Appeals in both Haines v. BellSouth Telecommunications, Inc., supra, and Jones v. Dougherty, supra, is insightful.

In Haines v. BellSouth Telecommunications, Inc., supra, a supervisor sounded a boat horn within one foot of Haynes. As a result, Haynes alleged she suffered serious hearing loss and permanent nerve damage. The trial court dismissed the action holding BellSouth Telecommunications, Inc. was entitled to workers' compensation immunity. In affirming, the Court of Appeals discussed horseplay stating:

It seems to be the general rule that compensation is not recoverable for injuries sustained through horseplay, done independently of an unconnected with the work of employment.

. . . .

We conclude that the immunity provisions of KRS 342.690 are not applicable to a fellow employee whose actions are so far removed from those which would ordinarily be anticipated by the employer that it can be said that the employee causing the injury has removed himself from the course of his employment or that the injury did not arise out of the employment.

. . . .

An act which would ordinarily be considered to be within the scope of employment may be deemed to be 'horseplay,' or outside the scope of employment, if it is committed with improper intent.

Id. at 500.

In Jones v. Dougherty, supra, the employee, Jones, was employed as a teacher and Dougherty was employed as an assistant principal at Hopkinsville High School. Dougherty entered Jones' office holding a snake. When Jones observed Dougherty holding the snake, she jumped out of her seat, started screaming, and ran into a concrete wall behind her chair. As she continued to scream, Dougherty just stood and laughed. He stated Jones was a "sissy" because she was afraid of the snake. Eventually, Jones' aid was able to get Dougherty to leave the office. Jones alleged the incident caused her to suffer injuries to her knees and heart as well as post-traumatic stress syndrome. The trial court dismissed Jones' action holding her exclusive remedy was under the Workers' Compensation Act. In its analysis, the Court of Appeals reaffirmed its definition of horseplay as set forth in Haines stating:

On appeal, this Court determined that the supervisor was acting within the scope of his employment when he sounded the boat horn and was thus entitled to the Act's exemption from liability. Furthermore, we determined that the supervisor's actions would not be deemed "horseplay" so as to negate the exemption. It is in undertaking the horseplay analysis that we discussed "ill intent," finding that some ill intent was necessary to establish that the supervisor was engaged in horseplay. We found no such intent and

affirmed the lower court's summary judgment.

The Appellants have not argued that Dougherty was engaged in horseplay, which is defined as an action independent of and not connected with work. [citation omitted]

Id. at 193.

Although Haines v. BellSouth Telecommunications, Inc., supra, and Jones v. Dougherty, supra, involved civil actions and are not on all fours with the case *sub judice*, the language in both cases unequivocally require that ill or improper intent must be established for horseplay to be present. Significantly, the ALJ made no finding of improper intent. In fact, the ALJ made no finding concerning Huff's mindset when he removed his lighter from his pocket and ignited it. Since the facts do not establish any ill or improper intent on the part of Huff or that he engaged in a sportive or whimsical act, there is no evidence Huff engaged in horseplay as defined in Haines v. BellSouth Telecommunications, Inc., supra, Jones v. Dougherty, supra, Rex-Pyramid Oil Co. v. Megan, supra, and Larson's. Therefore, Huff's injuries must be deemed to have arisen in the course of and out of his employment.

Accordingly, the July 22, 2014, Opinion and Order and the August 13, 2014, Order of the ALJ finding Huff

engaged in horseplay and dismissing his claim are **REVERSED**. This claim is **REMANDED** to the ALJ for entry of a decision resolving all remaining contested issues.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FURNISHES A SEPARATE OPINION.

CHAIRMAN, ALVEY. I respectfully dissent. The majority is engaged in improperly substituting its judgment for that of the ALJ.

In making his factual determination, the ALJ found Huff's testimony unreliable as to the amount of daylight and weather at the time of the incident. He determined, "Huff ventured outside the course and scope of his employment in igniting his lighter, which therefore renders the resulting injury not compensable." The ALJ also relied upon Summers' testimony regarding her investigation of the accident, and Huff's admission he made a poor decision in lighting what he thought was a smoke bomb. The ALJ also noted in Huff's application for unemployment benefits, which was filed as evidence, he stated he was "given an unexplained object, lit it and it exploded in my left hand." The ALJ determined, "Because Plaintiff's injury did not arise out of the course and scope of his employment, but rather was suffered as a

result of horseplay, his claim for workers compensation benefits is dismissed.”

Here the ALJ took note of discrepancies in Huff’s testimony pertaining to the daylight available at the time of the incident, and the weather on that date. He further noted, based upon the totality of the evidence, both Huff and White were fully aware the object may be a firework or smoke bomb. The ALJ further acknowledged the investigation by Summers, and Huff’s abrupt termination. Based upon the totality of the evidence, the ALJ determined Huff’s actions amounted to horseplay, and the claim was dismissed because the injuries did not arise within the scope of his employment.

Huff bore the burden of proving each of the essential elements of his cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002); Stovall v. Collett, 671 S.W.2d 256 (Ky. App. 1984). Because he was unsuccessful, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

“Compelling evidence” is defined as evidence which is so overwhelming no reasonable person could reach

the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the 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 (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, supra.

Here, the ALJ determined Huff's injuries were incurred due to engaging in horseplay, specifically the lighting of the object. Based upon the totality of the evidence, he determined Huff's actions were sufficient to arise to non-compensable horseplay. This is a factual

determination supported by the record. The majority has engaged in unauthorized fact finding, and substituted its judgment for that of the ALJ in reversing the decision. Because the ALJ properly exercised his discretion, and a contrary result is not compelled, I would affirm.

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