OPINION ENTERED: April 26, 2013

CLAIM NO. 201078249

KENTUCKY DEPARTMENT OF CORRECTIONS PETITIONER

VS. **APPEAL FROM HON. ALLISON E. JONES, ADMINISTRATIVE LAW JUDGE**

ALICIA HOWETH-ENGLAND
RAFAEL PRIETO, M.D.
and HON. ALLISON E. JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING
* * * * * *

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

STIVERS, Member. The Kentucky Department of Corrections ("KDC") appeals from the November 19, 2012, opinion, order, and award and the December 17, 2012, "order on petitions to reconsider" of Hon. Allison E. Jones, Administrative Law Judge ("ALJ"). The ALJ awarded Alicia Howeth-England ("Howeth-England") permanent partial disability ("PPD")

benefits enhanced by 30% pursuant to KRS 338.031 and KRS 342.165, temporary total disability ("TTD") benefits, and medical benefits. On appeal, KDC argues the ALJ's determination KRS 338.031(1)(a), the "general duty" provision, was violated is not supported by substantial evidence. Additionally, KDC argues the ALJ misapplied the law with regard to a violation of KRS 338.031.

In the case *sub judice*, substantial evidence does not support the ALJ's determination to impose the 30% safety violation penalty pursuant to KRS 338.031 and KRS 342.165; thus, we reverse and remand.

The Form 101 alleges Howeth-England injured her "[u]pper left leg/thigh and lower back" on August 29, 2010, in the following manner:

> Plaintiff was walking into the building towards her office when she tripped over the concrete lip of a metal plate in the floor in front of the office and fell forward. Plaintiff landed on her knees, first the left knee and then down on the right knee.

Howeth-England testified by deposition on June 1, 2012. She was working as a correctional officer at the Western Kentucky Correctional Complex at the time of the August 29, 2010, injury. She testified, in relevant part, as follows:

Q: Can you describe for me what happened that day?

A: Yes, ma'am. I showed up to work. I'm usually in the alpha dormitory, but that night I was asked to go into the bravo dormitory. I'd never been in that dormitory before. It's -- in the alpha and the bravo, it's one correctional officer, whereas in the delta, you have two.

Once you are in a dormitory, your yard officer locks you in, and you are in there until relieved. My yard officer came in around 4:30 a.m. She wanted to check and see if I wanted to get fresh air. I went out, locked her in, went walking around, got some fresh air. I went into the main building and got me [sic] some more fresh coffee.

Then I came back into the bravo dormitory, locked us in. As I was walking towards the office, the next thing I know, I'm trying to catch my balance. I went down on my knees, and then I went down on my stomach, and I basically laid there for a few--

My yard officer about freaked, of course, checking to make sure I'm okay. She contacted our supervisor to inform him that I had fallen. I was- my superior showed up and asked if I could make it to the main building. I started to walk. My knees were hurting, and so they called for a wheelchair. My pride went down the drain then.

I went to the nurse. She checked my knees, and she gave me two Tylenol. I was wheeled to my superior's office. I was asked at that time, do I think I can continue with my shift. At that time, I said, 'Let's give it about an hour and see what happens.' After, you

know, a while, I turned around and said, 'It might be best if I went home.'

Q: If we can back up just a little bit. When you say you were walking toward the office and then you went down, can you explain to me what caused you to go down onto your knees or your stomach?
A: Yes, ma'am, There is this metal plate in front of this office. And, apparently, I had hit the metal plate, and that's what took me down.

...

A: What caused me to fall? Oh, the metal thing. Apparently, it's got some edges that are sticking up. And, apparently, I guess, my boot had caught on to it or something that made me fall.

Q: Is that the safety violation you're alleging?

A: Yes, ma'am. There was [sic] no yellow strips or anything like that to indicate that there was a problem with it. Which I didn't realize there was until I fell.

Q: When you talk about this metal plate, is that like the plate that would run to the doorway, or is that something else?

A: It is right outside, a couple feet away from the office door.

Q: What kind of a plate is it? I'm trying to understand what exactly it is.

A: It is a square plate, a metal square plate, I guess. I really couldn't tell

> you, honestly. That's the first I have ever worked in that dormitory.
>
> Q: Do you know whether your employer was aware of any problems with that metal plate?
>
> A: From what I heard, hearsay, other employees have tripped over it after the fact of me falling.
>
> Q: Do you know if your employer was aware of it prior to this incident where you tripped on it?
>
> A: I believe so.
>
> Q: What is your basis for believing that?
>
> A: Due to the hearsay of other employees.
>
> Q: And was that- was the metal place intended to stick up, or was that something that was wrong about it? Do you understand what I'm asking?
>
> A: I wouldn't be able to answer that question.
>
> Q: How high was that edge sticking up that your boot caught on?
>
> A: I could not answer that question.
>
> Q: Have you personally seen anyone who has tripped on that metal plate?
>
> A: No, ma'am.

Howeth-England also testified at the September 18, 2012, hearing that the area where the plate was located is "pretty dark."

The August 22, 2012, deposition of James Ray Purdy ("Purdy"), safety specialist for the Western Kentucky Correctional Complex, was introduced. Purdy is familiar with the area where Howeth-England fell. Purdy testified he reviewed the accident reports the prison keeps for this particular facility, and there were no reported injuries as a result of the metal plate in question prior to August 29, 2010. Additionally, there were no documented complaints from employees, staff, or visitors prior to August 29, 2010, regarding the metal plate in question.

Purdy was presented with photographs of the metal plate in its current state and testified the pictures accurately depict the plate on August 29, 2010, as far as location. However, "[t]he edges were sharper [and] a little bit taller" on August 29, 2010. He testified the edges have been rounded off since then. When asked how tall the plate was before changes were made, Purdy testified as follows:

> A: On the one side, it was approximately a quarter to three-eighths of an inch.
>
> Q: And that's before any changes were made?
>
> A: Yes, sir.
>
> Q: Okay. Did you measure that?

> A: All I did was laid a pencil down on the floor beside of [sic] it is how I measured it.
>
> Q: And then you estimated-
>
> A: The pencil was roughly a quarter inch thick.
>
> Q: And when did you make that measurement?
>
> A: I don't remember the exact day. I believe it was the next day after the accident.

He testified the plate was located near the dorm officer's office, and every time the officers leave or enter the office, they walk over it.

Purdy testified that at the time of the accident, he believes the plate was "a burnt- burnt brown, brownish color. It was darker than the floor." He further testified as follows:

> Q: Well, if it was brown and the flooring around it was brown, did it blend into the color of the floor?
>
> A: No. It was darker than the floor.
>
> Q: A darker shade of brown?
>
> A: Yes, sir, a darker shade of brown.

Purdy testified the metal plate is in Bravo Dormitory which houses inmates. The plate is located in a "dayroom" which is "where the inmates watch TV or sit around." The plate is an access plate for either plumbing

or electrical wiring. The dormitory building is "more than 20" years old.

Exhibits three and four to Purdy's deposition are photographs of the metal plate with a yardstick held up to it. The photographs indicate the plate is one foot, eight inches wide and appears to be a perfect square.

Regarding imposition of a safety violation penalty, the ALJ determined as follows in the November 19, 2012, opinion, order, and award:

> 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." A general duty violation that results in a worker's accident and injury may be sufficient to comply with KRS 342.165(1). *See Apex Mining v. Blankenship*, *supra*.

The metal plate at issue was the [sic] nearly the same color as the floor, had sharp edges and was about a quarter inch higher than the surrounding floor. It was on an area of the floor that the prison staff used to travel to and from the main prison dorm. Mr. Purdy testified that every time the prison employees left the office area to go to the dorm they would have to walk over the plate. Howeth-England testified that this portion of the prison was "kind of dark".

The ALJ finds that a raised metal plate that is close to the same color as the floor, with sharp edges, in a dark walkway is the type of obvious hazard that even a layperson should recognize. Upon review of the facts, the ALJ finds that failure to mark or remove the

> plate constitutes "a gross disregard of [a] patently obvious, basic safety concept." *See Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834, 837 (Ky. 1997) (analyzing *Apex Mining v. Blankenship*, *supra*).
>
> As such, Howeth-England is entitled to a 30% increase in her benefits. The ALJ has determined that Howeth-England's weekly PPD benefit is $184.42 thirty percent is $55.37. Thus, by virtue of the safety violation penalty, Howeth-England's weekly PPD benefit is increased to $239.79.
>
> The ALJ notes that the KDOC has objected to the introduction of proof related to the fact that it rounded off the plate and painted it yellow after the fall claiming such evidence is inadmissible as a subsequent remedial measure. The ALJ does not believe that the subsequent remedial measure statute is applicable to workers' compensation claim because the standard is not one of negligence. As such, the ALJ admitted the evidence. The ALJ, however, did not rely upon it in finding the safety penalty applied.

KDC filed a petition for reconsideration, asserting the ALJ failed "to adequately put forth a basis that there was an intentional violation of a safety penalty" and requested additional findings of fact.

In the December 17, 2012, "order on petitions to reconsider," the ALJ responded to KDC's petition as follows:

> Defendant Employer petitions the ALJ "to issue additional findings of fact

on the issue of a safety penalty." Defendant Employer asserts that "[i]t is unclear from the ALJ's Opinion how a metal plate which had never resulted in a complaint or injury from any staff or inmate prior to Plaintiff's fall could be considered either 'obvious' or a 'hazard' . . .without prior accidents or injuries from this metal plate, there was no basis for finding that the employer intentionally disregarded an obvious safety hazard." As such, Defendant Employer maintains that the ALJ's Opinion "fails to adequately put forth a basis that there was an intentional violation of a safety statute."

The ALJ has reviewed the prior Opinion and finds that it adequately addressed why the ALJ concluded that the metal plate constituted an "obvious" and "hazardous" condition. On page 18 of the Opinion, the ALJ found:

> The metal plate at issue was the nearly the same color as the floor, had sharp edges and was about a quarter inch higher than the surrounding floor. It was on an area of the floor that the prison staff used to travel to and from the main prison dorm. Mr. Purdy testified that every time the prison employees left the office area to go to the dorm they would have to walk over the plate. Howeth-England testified that this portion of the prison was "kind of dark".

The ALJ finds that a raised metal plate that is close to the same color as the floor, with sharp edges, in a dark

> walkway is the type of obvious hazard that even a layperson should recognize. Upon review of the facts, the ALJ finds that failure to mark or remove the plate constitutes "a gross disregard of [a] patently obvious, basic safety concept." *See Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834, 837 (Ky. 1997) (analyzing *Apex Mining v. Blankenship*, supra).
>
> 11/19/2012 Opin. at p. 18.
>
> The ALJ believes that the prior Opinion sufficiently addressed the factual and legal basis for the finding of a safety violation. Nevertheless, because Defendant Employer has requested additional findings, the ALJ will amend the Opinion to include such findings.
>
> Accordingly, **IT IS ORDERED** that Defendant Employer's petition for reconsideration is **SUSTAINED/GRANTED**. The November 19, 2012, Opinion, Order & Award is **AMENDED** to include the following, additional findings of fact:
>
> Defendant Employer relies on the fact that no one had previously complained about or been injured by the plate in the floor. The ALJ finds that this fact is not sufficient to avoid liability for a safety violation penalty. An employer should not be able to avoid taking corrective measure to ensure the safety of its employees until one of its employees sustains an injury. Moreover, the ALJ does not believe that an employer should be permitted to remain "willfully blind" to obvious hazards that its employees might encounter in the workplace.
>
> While certain hazards might not be easily ascertainable, and therefore, not sufficient to give rise to a

finding of an intentional violation, the ALJ found that this case presented the type of safety violation that even a layperson could easily recognize. In other words, it is common sense that an unmarked, raised plate in a dim walkway poses a tripping hazard.

Citing *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834 (Ky. 1997), Defendant Employer attempts to distinguish this case from *Apex Mining*. *Cummins* was a case in which the employee claimed that the shop in which he worked was unsafe because it did not have a ventilation system or monitors. In *Cummins*, there was no evidence as to what the actual conditions at the shop were, or their significance. Nor was there evidence as to what type of ventilation was appropriate for that particular environment. The *Cummins* court went on to distinguish the facts in that case from those in *Apex Mining*, by stating that *Apex Mining* involved a "gross disregard of patently obvious, basic safety concepts." *See also, Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598, 601 (Ky. App. 2000).

For the reasons sated [sic] above as well as those stated in the November 19, 2012, Opinion, Order & Award, the ALJ finds that failure to mark or grind down the plate is the type [sic] "gross disregard of [a] patently obvious, basic safety concept" that is tantamount to an intentional safety violation.

KRS 342.165(1) provides in pertinent part:

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 fail 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 regulations. *See* Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

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.

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may be grounds for assessment of the 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 the employees. Two cases in which the court discussed the violation of KRS 338.031(1)(a) for the purposes of determining whether KRS 342.165(1) is applicable are discussed below.

In Apex Mining, supra, the injured worker was required to operate a grossly defective piece of heavy equipment which had a throttle that was wired open, malfunctioning brakes, and a history of causing prior accidents. The Supreme Court found the egregious behavior of the employer justified imposition of the safety penalty in the absence of a specific statute or regulation. Regarding "intent" to violate KRS 338.031(1)(a), the Supreme Court of Kentucky opined as follows:

> After reviewing the evidence, we reject the employer's assertions that the ALJ misunderstood the evidence and that the ALJ's findings of employer intent and causation were not supported by substantial evidence which conformed to the requirements of KRS 342.165. As noted by the Court of Appeals, there was evidence that supervisory personnel, including claimant's foreman, were aware of the defective condition of the grader. Furthermore, KRS 338.031, a part of the Kentucky

> Occupational Safety and Health Act (KOSHA), was enacted in 1972, precluding an argument that the employer was unaware of its requirements. Under those circumstances, we agree that substantial evidence supported the ALJ's inference that the employer's violation of KRS 338.031 was intentional.

Apex Mining, supra, at 228.

However, in Cummins, supra, the Supreme Court stated not every violation of KRS 338.031(1)(a) required the imposition of a penalty for the purposes of KRS 342.165. In that case, the claimant's work site where he taught refrigeration, air conditioning, and heating at an adult vocational school was not properly ventilated. The Supreme 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, supra, stating as follows:

> The decision in *Blankenship* clearly was based on the egregious nature of the particular violation of KRS 338.031(1)(a) which had occurred. Nowhere did we state or imply that every violation of KRS 338.031(1)(a) constituted the violation of a specific safety statute for the purposes of KRS 342.165. What we did determine was that where a worker was required to operate a piece of grossly defective equipment,

> the condition of which created a safety hazard which was patently obvious, even to a lay person, which had caused prior accidents, and which was known to the employer for some time but was not corrected, it was not necessary for a statute or regulation to specifically prohibit the equipment from being operated in that condition. KRS 338.031(1)(a) would suffice.

Cummins, supra, at 836.

As articulated in Cummins, supra, not "every violation of KRS 338.031(1)(a) constitute[s] the violation of a specific safety statute for the purposes of KRS 342.165." Id. The facts in this case do not rise to the level of the standard set in Apex Mining, supra, which involved an egregious safety hazard- a grader, a heavy piece of equipment, with a defective decelerator, defective brakes, and a throttle that was tied open. With respect to the grader, there was a history of other employees having "to crash the defective machine into other equipment in order to stop it." Apex Mining at 229. The Supreme Court determined the egregious scenario in Apex Mining, supra, was within the protection of KRS 338.031(1)(a) against "recognized hazards," as the safety hazard was not only egregious on its face but the employer knew about the hazard.

In the case *sub judice* there was a metal plate, conspicuously one foot and eight inches wide, that rose a mere one quarter to three-eighths of an inch from the floor. Purdy's testimony establishes there were no reported injuries or complaints prior to the August 29, 2010, incident as a result of the metal plate. The standard set forth in Apex Mining, supra, requires some level of awareness of the alleged safely hazard on behalf of the employer before KRS 338.031(1)(a) is implicated. The Supreme Court stated as follows:

> However, we observe that this case does not concern a safety hazard of which this employer could reasonably have been unaware, but one that was obvious. *There was substantial evidence that the employer was aware of the defective condition of the grader*, and it is apparent, even to the lay person, that a piece of heavy equipment without brakes, with a decelerator that is not in proper condition, and with a throttle which is fastened in the wide open position creates a safety hazard.

Apex Mining, supra, at 229. (emphasis added).

Here, the record indicates KDC could not have known the metal plate posed any kind of a safety hazard before August 29, 2010. To permit the factual scenario in the case *sub judice* to justify a safety penalty would broaden the

application of the statute to include factual situations not contemplated by the Supreme Court and the legislature.

Accordingly, the ALJ's determination to impose a 30% safety penalty pursuant to KRS 342.165 is **REVERSED**, and the claim is **REMANDED** for entry of an amended opinion, order, and award consistent with the views set forth herein.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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