

OPINION ENTERED: SEPTEMBER 10, 2012

CLAIM NO. 201100673

LEROY PERRY

PETITIONER

VS.

**APPEAL FROM HON. JOSEPH JUSTICE,  
ADMINISTRATIVE LAW JUDGE**

LONG FORK COAL COMPANY, INC.  
and HON. JOSEPH JUSTICE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AFFIRMING**

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

**SMITH, Member.** Leroy Perry appeals from the portion of the March 27, 2012 Opinion, Award and Order rendered by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ"), which dismissed Perry's claim for an employer safety violation against Long Fork Coal Company, Inc. ("Long Fork"). Perry's sole argument on appeal is that the ALJ erred in denying the 30% enhancement pursuant to KRS 342.165(1). We disagree and affirm.

Perry testified by deposition on August 8, 2011 and at the hearing held January 18, 2012. Now age 54, Perry has a high school education and "mining foreman papers", but has no other training or certifications. At the time of his injury, Perry had been employed by Long Fork as a plant mechanic since 2002.

Perry testified the accident occurred on March 29, 2010 as he was working inside a CMI dryer. The following is a truncated quote of his very detailed explanation at the formal hearing:

Q. But, if you would, just briefly tell us what happened to you in (sic) March 29th of 2010?

. . . .

A. ...Well, the boy had came in that was supposed to help me. He's about eighteen or nineteen years old. And, he ran me a torch down in there. And, I'm in an area that -- if you could imagine this room closed off in a -- in a funnel like this and going down to a hole that was wide, that's the way that shaft -- bottom of that CMI dryer is. So, the boy reached me the torch in. I started burning the bolt off that would let that dustpan cover come down. And when I started burning the bolt off I had my goggles on, and I'm burning it. And, I'm burning it real slow because I've got dust and coal in there, so I don't want to cause a big fire, so I'm just burning it real slow, real easy.

. . .

. . . .

So, when that bolt started melting in two, I saw it giving, and the bolt dropped, and that shoot -- that dustpan cover, you know, where it's got two bolts in it like this, it came down like this. And, when it did flames -- where I had that torch right there, when that thing dropped down flames shot all around me like this, whoooooooooooo (sic), and blowed me backwards. Well, I'm on fire. I screamed at the boy outside I'm on fire, I'm on fire. But, I knew he couldn't get to me. I knew that he could not get to me where I was at and me on fire in that shoot. So, I threw the torch. I threw my hat and I started beating my head trying to put the fire out in my face and my head. And, I -- I fell down through the shoot, through this shoot now, that I had just crawled into. . .

. . . .

I cannot remember how I got there, but the next thing I remember was I was on a concrete floor on my knees and I was still putting the fire out on my face.

. . . .

I said I've got to get to water. So I knew the only water was in the bathhouse, which is five floors down, and to the-outside. So, I had to go five floors down not knowing exactly where I was going, but I just

followed steps and went to the outside, and got to the shower, and turned the showers on, and was standing in it. Well, in just a little bit here was my foreman and my maintenance foreman; good friends of mine.

. . .

And, I'm standing there in the shower and they said, well, we've got an ambulance coming, we've got an ambulance coming. And, they were putting rags on me just constantly.

. . .

Q. So, how long, were you hospitalized?

A. They kept me in the hospital the first time, I think four days. They moved me from the burn clinic down to the intensive care. And, the doctor came to me down there, he said we've got a lot of staff infection... (Errors in original)

Perry testified the mine inspectors now have leather masks that are to be worn in similar situations in the future. When asked whether he should have had a leather mask at the time of the incident, Perry stated "Yeah, yeah. It would have been nice. But see, the thing was it had never happened before. So, you know, no one really knows how to judge what is going to happen until after it happens." He further stated "what it was

is, this had never happened before. So there was no way to be ready for it."

Perry stated workers were able to wash down the outside of the equipment but they were not able to wash inside the equipment. Throughout the years, he had experienced coal dust catching fire and he would "just put it out." He stated coal dust will not explode, even if mixed with air. Perry opined methane was present since there was an explosion but he had never dealt with methane before in the plant.

Perry introduced records from the United States Department of Labor, Mine Safety and Health Administration ("MSHA").<sup>1</sup> Order number 8241399, issued on March 29, 2010 noted an accident occurred at 9:15 a.m. and prohibited all activity in the entire preparation plant until "MSHA" determined it was safe to resume normal mining operations. At 13:07 p.m. on March 31, 2010, the order was modified to allow an "on-shift examination" of the entire plant and to allow the day shift crew "to return to work after receiving training on hazard recognition." The order was terminated at 7:59 a.m. on April 1, 2010.

Order numbers 8241826, 8241827, and 8241828 relating to coal dust accumulations were issued on March 31, 2010. Each order indicated there was a high degree of negligence. Order number 8241826, in reference to "all coal driers located in the preparation plant" described the condition or practice as follows:

The operator failed to take suitable precautions to ensure that open flames or sparks do not result in a fire. Accumulations of fine coal and coal dust was [sic] not removed from the coal dryer, located on the sixth floor of the preparation plant, prior to cutting and welding inside the dryer unit. This condition resulted in an accident causing serious burns to the face, head and neck of a miner. This is an unwarrantable failure to comply with a mandatory standard.

Order number 8241827 in reference to the sixth floor of the preparation plant, described the condition or practice as follows:

The operator failed to report and correct a hazardous condition located on the sixth floor of the coal preparation plant. Accumulations of loose coal and coal dust is [sic] allowed to accumulate in the area of the #3 clean coal drier. Accumulations measured from a thin layer to 2 inches in depth. This

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<sup>1</sup> Numerous citations and orders were issued as a result of the investigation following Perry's injury. However, those unrelated to the accident will not be reviewed.

condition resulted in an accident causing serious burns to the face, head and neck of a miner. This is an unwarrantable failure to comply with a mandatory standard.

Order number 8241828, in reference to "clean coal dryers" described the condition or practice as follows:

Coal dust in dangerous amounts is allowed to accumulate in the clean coal drier located on the sixth floor of the preparation plant. The accumulations measured approximately six inches in depth. This condition resulted in an accident causing serious burns to the face, head and neck of a miner. This is an unwarrantable failure to comply with a mandatory standard.

Long Fork completed rebuttal forms for these three orders. In regard to order number 8241826, Long Fork stated "The members working in the affected area cleaned the combustible dust that was visible. They were unable to see the dust that burned the member, because the cover that was removed had dust under it."

In regard to order number 8241827, Long Fork noted the accumulation of coal dust referred to was due to cleaning the dryer after the lid was removed. It noted the accumulation was on the outside of the dryer and the accident happened inside of the dryer. Long Fork noted

there was no spark or open flame in the area of the outside of the dryer when the accident occurred.

In regard to order number 8241828, Long Fork noted the member was replacing a belt tunnel cover on a CMI dryer and patching holes. Long Fork noted there were no areas inside the CMI dryer that had six inches of visible accumulation. The accumulation was under a cover and could not be seen. Long Fork noted the member cleaned the affected area of visible dust due to normal operation of the dryer. He was unable to see the dust under the belt tunnel cover.

Additionally, citation number 8241829 was issued that same date concerning proper protective clothing. The citation listed the condition or practice as follows:

Proper protective clothing and face shields is [sic] not being worn [sic] by miners while performing overhead cutting and welding. This condition resulted in serious burns to the face, head and neck of a miner. This clothing shall be provided and worn [sic] to prevent miners from receiving serious burns while performing such duties.

Long Fork completed a rebuttal form indicating Perry was not wearing leather sleeves or face shield while using a torch at eye level but was using cutting

goggles, cotton clothes, leather gloves and a hardhat. Long Fork indicated the surrounding area had been cleaned by running a belt to remove the fine coal. Long Fork further noted the coal that burned the member was under a cover and could not be seen.

On June 11, 2010, MSHA's district manager issued a letter to Long Fork stating in part:

As you may know, the Mine Safety and Health Administration has conducted a special investigation regarding Order Nos. 8241826, 8241827 and 8241828. We have decided not to pursue further investigative action at this time and the case is closed.

The ALJ issued the following analysis, findings of fact and conclusions of law relating to Perry's claim of a safety violation pursuant to KRS 342.165:

Plaintiff has alleged a safety violation on the part of Defendant/employer. In Plaintiff's testimony and in his brief, he states that the "employer intentionally failed to comply with a safety method in which they failed to regulate the methane concentration inside of the mine, directly resulting in the injury suffered by Plaintiff[\"]. In support of its [sic] position Plaintiff has filed certain citations of MSHA in support of his position. The pertinent citation states:

The operator failed to take suitable precautions to ensure that open flames or

sparks do not result in a fire. Accumulations of fine coal and coal dust was not removed from the coal dryer, located on the sixth floor of the preparation plant, prior to cutting and welding inside the dryer unit. This condition resulted in an accident causing serious burns to the face, head and neck of a minor [sic]. This is an unwarranted failure to comply with a mandatory standard.

An additional citation was that proper clothing and face shields had not been worn [sic] by the minor [sic] while performing overhead cutting and welding.

The Defendant filed a "rebuttal form," stating as follows:

The members working in the affected area cleaned the combustible dust that was visible. They were unable to see the dust that burned the member, because the cover that was removed had dust under it.

Member had goggles, leather gloves, cotton clothes, and hardhat. The surrounding area had been cleaned by running a belt to get rid of the fine coal. Coal that burned the member was under a cover that couldn't be seen.

The Plaintiff insisted that what caused the explosion was the ignition of methane gas. The problem with this theory is that there is nothing in any of the MSHA records to substantiate that the ignition of methane was what caused the injuries. It attributed the explosion to the ignition of coal dust.

In a letter that was filed, the MSHA District Director informed Defendant that Order Nos. 8241826, 8241827 and 8241828, which do not seem to encompass the two citations, were being closed. There is no additional evidence in the record regarding the outcome of the two citations mentioned above.

The practice in the MSHA citation procedures is that the citations are issues [sic] without consultation with the operator. The operator can then file objections or rebuttal forms to the citations. There is no evidence in the record that these citations were ever brought to hearing or the outcome of the citations.

The fact that a citation was issues [sic] by MSHA is not, *per se*, evidence that a violation of KRS 342.165(1) or KRS 342.031(1)(a), the "safe place to work" statute was violated.

Plaintiff testified, if the ALJ understood his testimony, is [sic] that the dust came from another area after he cut through the metal encompassing the container he was in. If the rebuttal of the operator is to be believed, Plaintiff may have violated the safety standard in that he held foreman certification, which

required safety training, was an experienced preparation plant mechanic; was charged with removing dust before cutting in the area; and was charged with wearing goggles and protective clothing in such torch cutting.

The allegation and proof of safety violations has been very perplexing to this ALJ. Plaintiff retains the burden of proof in all elements of its [sic] case. A mere fact that a Federal regulatory agency issued a citation is not sufficient by itself to translate into proof that an operator has violated KRS 342.165(1). The ALJ read an exposition of the law by Board Member Gardner that explained the law very well. He said:

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 regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

As referenced above, application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific

safety provision, whether state or federal. **Secondly, evidence of "intent" to violate a specific safety provision must also be present. Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. See Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2000). Intent is not inferred as a matter of law but is a question of fact which must be addressed by the ALJ.** (Emphasis supplied)

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 employees. Two cases wherein the court discussed the violation of KRS 338.031(1)(a) for the purposes of KRS 342.165(1) are discussed below.

In Apex Mining v. Blankenship, supra, the

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

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

We believe the facts in Apex Mining illustrate one end of a continuum of employer conduct that ranges from egregious to the other end of

the continuum illustrated in Cummins where the employer's conduct is innocuous. The question here is whether the hazard to which Barnes was exposed is one the employer had actual or imputed knowledge so as to justify awarding an increase in compensation.

Here, Barnes did not allege violation of a specific statute or administrative regulation and his argument was premised entirely upon an alleged violation of KRS 338.031(1), the "general duty" clause. Violation based upon KRS 338.031 still requires an element of intent. Here, the ALJ clearly found Barnes had not satisfied the intent element of KRS 342.165. He found the defendant/employer merely asked Barnes to watch the young men. The ALJ stated the defendant/employer did not ask Barnes to run off the boys or chase the boys or to confront them. The ALJ specifically found the employer could not foresee Barnes would go beyond the scope of his instructions and choose to pursue and confront the boys.

The facts in this claim may reasonably be viewed as placing this matter in the category of claims controlled by the holding in Cummins, supra, where, even if there were a violation of KRS 338.031(1), the employer's

action was not so obvious and egregious a violation of basic safety concepts that would warrant imposition of the 30% enhancement pursuant to KRS 342.165(1). We cannot say the ALJ's conclusion was so wholly unreasonable that it must be reversed as a matter of law. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

The mere evidence that a citation was **issued, without more, is not sufficient for the ALJ to make a finding that there was a violation of KRS 342.165(1) to invoke the enhancement of benefits.**

On appeal, Perry argues the ALJ's decision regarding the safety violation is not supported by substantial evidence and must be reversed as a matter of law compelling a finding in his favor. Perry argues the ALJ acted without or in excess of his powers, the order, decision, or award is not in conformity with the provisions of the chapter, is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record and is arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Perry argues Long Fork "intentionally failed to comply with a safety requirement by failing to regulate the methane

concentrations inside of the mine [sic], directly resulting in the injury suffered by Perry." Perry further argues Long Fork failed to provide a place of employment free from recognized hazards as required by KRS 338.031(1)(a).

Perry contends that, since methane is an odorless product of decomposition of coal, he would not have known it was present. He states "If the employment site was forced to shut down for days following the accident in order for the methane gasses to reach an acceptable level, then how was the employer furnishing a place of employment free from recognized hazards?" Perry states Long Fork's failure to maintain a safe level of methane gas is simply unacceptable. He asserts the ALJ's failure to punish the Long Fork for same is an unacceptable and clearly unwarranted exercise of discretion.

Perry notes the ALJ stated the inspectors attributed the explosion to the ignition of coal dust. Perry argues this finding is undeniable proof Long Fork violated KRS 338.031(1)(a) and KRS 342.165 since an explosion did occur. Perry stresses there is no doubt methane was present.

Perry contends the ALJ picked and chose only the wording that would substantiate his ruling, not the facts supported by the thirty-six pages of MSHA documents. Perry argues order numbers 8241826, 8241827 and 8241828 clearly show Long Fork knew of the problem with coal dust and apparently did not follow the MSHA order issued January 28, 2010. Perry argues that, had Long Fork maintained clean conditions, there would have been no dust to explode, causing the burns to his face, head and neck.

Perry contends the orders and citations establish a safety violation occurred. He contends the handwritten dollar amounts in the condition or practice section of the orders infer that this was the amount of the fine for each order or citation. Perry believes Long Fork was penalized with at least four fines.

Perry further alleges the ALJ has either a bias against safety regulation citations or an inability or unwillingness to read and understand MSHA regulatory documents. Perry notes the ALJ made reference to the MSHA citation handbook, but he contends the ALJ's statements do not correspond with his own interpretation of that book. Thus, Perry argues he is entitled to have a copy of the documents the ALJ studied to prepare his

opinion. Perry requests that the Board remand this matter:

. . . for a thorough review of the MSHA information, giving the ALJ specific guidelines regarding the obtaining of all MSHA Handbook for Citations and other documentation regarding the Citations and Orders, the Rebuttal forms and all records pertaining to fines levied against Long Fork Coal Company Preparation Plant for the Plaintiff's work related injury that occurred on 03/29/10.

It is axiomatic a claimant in a workers' compensation case bears the burden of proving each essential element of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Perry, the party with the burden of proof, was unsuccessful before the ALJ on the issue of whether a safety violation occurred, the question on appeal is whether the evidence compels a contrary conclusion. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that 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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). It is not enough for Perry to merely

show some evidence supports his position. See McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As long as the ALJ's decision is supported by evidence of substance, the Board may not reverse. Special Fund v. Francis, *supra*.

KRS 342.165(1) provides in pertinent part as follows:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally 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 regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

As referenced above, 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. Second, evidence of "intent" to violate a specific safety provision must also be present. Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). The worker also has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. See Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

After reviewing the evidence, the ALJ simply was not convinced Perry met his burden of proof to establish entitlement to the safety penalty. The ALJ noted Perry produced no evidence, other than his own testimony, that methane gas was present in the preparation plant. The ALJ was not obligated to accept Perry's hearing testimony regarding the presence of methane. The law is well settled that the testimony of a claimant or interested party, even if unrebutted, compels no particular result. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). None of the MSHA records

give any indication methane was present. The records attribute the fire to coal dust.

The ALJ also correctly determined the record did not reflect the outcome of some of the citations or orders. The June 11, 2010 letter regarding the three orders related to coal dust accumulations indicates MSHA decided "not to pursue further investigative action at this time and the case is closed." The MSHA documents do not establish the outcome of citation number 8241829 related to protective clothing. While Perry points to handwritten dollar figures on copies of the citations or orders and argues the ALJ should infer these were fines assessed to Long Fork, these figures could just as easily represent proposed amounts prior to the filing of the rebuttal forms. Significantly, the June 11, 2010 letter closing the three orders related to dust accumulation says nothing about the employer agreeing to pay fines.

The record contains very little evidence concerning the employer's knowledge or intent. Perry argues the issuance of an order or citation on January 28, 2010 is proof the employer had knowledge and committed an intentional violation. However, the prior citation/order was not filed in evidence and there is no indication concerning precisely what the prior alleged violation involved. The mere fact a

citation or order was issued does not compel any particular finding. The ALJ has authority to consider any evidence in the record that detracts from the violation asserted in the citation or order.

Nothing in Perry's testimony indicated the employer knew of the presence of dust inside the dustcover prior to the accident. Perry indicated the outside of the dryer was washed down, but "you can't wash down the inside of the equipment." He further stated ". . . the thing was it had never happened before. So, you know, no one really knows how to judge what is going to happen until after it happens."

Citation number 8241829 references 30 CFR section 77.1710 which provides the employee shall be required to wear "Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist." It also provides protective gloves shall be used when performing work which may cause injury to the hands and a hardhat shall be used where falling objects may create a hazard. Thus, since Perry wore goggles, gloves and a hardhat, it is not clear that 30 CFR section 77.1710 was violated.

The evidence falls far short of compelling a finding of a violation of a specific safety statute or regulation by the employer. Likewise, the evidence does not compel a finding the employer violated KRS 338.031(1)(a), the general duty provision. The ALJ could reasonably conclude the employer's conduct was not so obvious and egregious a violation of basic safety concepts that would warrant imposition of the 30% enhancement. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

We see no basis in the record for Perry's arguments concerning bias. Perry merely alleges bias based upon the ALJ's failure to find a violation in the claim *sub judice* and in Usher Transport, Inc. v. Fitzgerald, 2012 WL 1573521, Ky. App. (No. 2011-CA-001601-WC) rendered May 4, 2012 and designated not to be published. In Usher, ALJ Justice declined to assess a safety penalty because he was not convinced the regulation regarding safety railings applied to tanker trailers. Also, an expert testified the regulation did not apply since no such railings existed in the tanker industry, and it would be unfeasible to put rails on a tanker trailer. Given those facts, we fail to see the ALJ's ruling in Usher as indicative of bias. Bias or prejudice by a judge must be based on more than mere conclusory allegations, and subjective conclusions or

opinions that bias or appearance of impropriety may exist ordinarily are insufficient to require a judge's disqualification. It is actual existence of prejudice on the part of a judge not mere apprehension of it by a party which disqualifies. Howerton v. Price, 449 SW2d 746 (Ky. 1970). In the instant claim, the ALJ clearly and carefully considered all of the evidence presented in this claim and found the evidence concerning the safety penalty lacking in probative value. The Board is without authority to conclude otherwise.

Accordingly, the March 27, 2012 Opinion, Award and Order rendered by Hon. Joseph W. Justice, Administrative Law Judge, is **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, DISSENTS WITHOUT SEPARATE OPINION.

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