

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 2, 2013

CLAIM NO. 201081010

RYDER INTEGRATED LOGISTICS

PETITIONER

VS.

APPEAL FROM HON. JEANIE OWEN MILLER,  
ADMINISTRATIVE LAW JUDGE

RICHARD THOMPSON  
and HON. JEANIE OWEN MILLER,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Ryder Integrated Logistics ("Ryder") seeks review of the opinion and award rendered April 1, 2013 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), awarding Richard Thompson ("Thompson") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the multipliers

contained in KRS 342.730(1)(c)1 and 3, and medical benefits. Ryder also appeals from the order on reconsideration issued May 2, 2013.

On appeal, Ryder argues the ALJ's denial of the defenses pursuant to KRS 342.165 were erroneous pursuant to the law and the facts of the case. Ryder argues "intent" was proven as a matter of law, and the ALJ's failure to make such a finding was clearly erroneous, and not supported by any substantive facts. Ryder also argues the ALJ misapplied the law in failing to find causation and her determination is clearly erroneous. Ryder next argues the ALJ misunderstood the facts supporting KRS 342.165(2)(b), for "substantial factor in hiring" as a causation argument for KRS 342.165(2)(c). Finally, Ryder argues the ALJ's requirement that a "job application" be produced to succeed under KRS 342.165(1) was clearly erroneous and a misapplication of the statute. Because the ALJ did not err as a matter of law, and further because her determination is supported by substantial evidence and a contrary result is not compelled, we affirm.

Thompson filed a Form 101 on October 18, 2011, alleging injuries to his back, ribs and right wrist due to a motor vehicle accident ("MVA") which occurred on July 26, 2010 while delivering parts for Ryder.

Thompson testified by deposition on March 26, 2012 and August 27, 2012. He also testified at the hearing held January 31, 2013. Thompson was born on November 4, 1954, and is a resident of Berry, Kentucky. Thompson is a high school graduate, and has no specialized vocational training. He worked as a forklift operator from 1973 to 2001, then drove a truck for Ryder until the July 26, 2010 MVA, after which he was terminated on September 17, 2010.

Thompson stated on July 26, 2010 he was driving to Georgetown, Kentucky from Paris, Kentucky when he began feeling faint. He does not remember the accident. When he came to his senses, he was in the truck, felt dazed, and noticed pain in his right arm. He was taken to the Harrison Memorial Hospital emergency room in Cynthiana, Kentucky, where he was treated for a broken wrist.

For several years Thompson had experienced dizziness when he arose too quickly from lying down. He had no history of fainting or blacking out except for once when he was a child. He also had a brain MRI in 2009 due to dizziness. Thompson failed to disclose his longstanding history of dizzy spells to physicians who examined him for obtaining his commercial driver's license ("CDL"). When examined for his CDL in November 2009, he failed to disclose the recent brain MRI. He stated none of his previous

physicians had advised he could not drive due to dizziness. Thompson also noted he has experienced difficulty sleeping for several years.

In addition to the dizziness, Thompson stated he had previously experienced low back pain and strains periodically which always resolved after a few days. He had in fact treated with a chiropractor in early 2010. He also reported a problem with memory loss. He currently takes Lortab three times per day for pain. He also takes medication for depression and over-the-counter Aleve. Thompson stated he experiences constant low back pain which has worsened since the accident. Despite being released to return to work on September 16, 2010, he does not believe he can drive a truck due to a fear of blacking out, constant aching in his arms and numbness in his fingers.

Greg McCoy ("McCoy"), the senior logistics manager with Ryder, testified at the hearing held January 31, 2013. McCoy stated Thompson would not have been allowed to drive a truck if he had disclosed his medical problems. He also stated Thompson would not have been hired if he had not passed the physical examination required to obtain a CDL. McCoy stated Thompson was terminated because the accident was determined to be preventable.

In support of the Form 101, Thompson filed Dr. Timothy Wilson's July 28, 2010 office note. Dr. Wilson stated Thompson sustained a right distal radius fracture when he passed out at the wheel, ran off the road and hit a ditch. Dr. Wilson performed a functional capacity evaluation on January 28, 2011 which demonstrated Thompson could perform limited light to medium work.

Ryder filed Dr. Wilson's treatment records from July 28, 2010 through February 23, 2011. Dr. Wilson initially treated Thompson for a right distal radius fracture and low back pain. On August 11, 2010, Dr. Wilson noted Thompson was going to his family physician to determine why he blacked out. On October 22, 2010, Dr. Wilson opined Thompson had reached maximum medical improvement ("MMI"). On January 2, 2011, Dr. Wilson noted Thompson had good range of motion and improved strength. On February 23, 2011, Dr. Wright assessed a 2% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Thompson filed records from Dr. Stephen Arthur Besson with Licking Valley Internal Medicine for office visits from September 23, 2009 through September 16, 2010. Thompson sought treatment on September 23, 2009 for

arthritis, headaches and dizziness. An MRI of the brain performed October 9, 2009 revealed no specific abnormality. Dr. Besson subsequently allowed Thompson to return to truck driving with no limitations. Dr. Besson treated Thompson in March and April 2010 for complaints of low back pain. A lumbar MRI revealed multilevel disk degeneration. Subsequent to the MVA, Dr. Besson performed a tilt-table test which demonstrated no syncope. Thompson again treated at Licking Valley Internal Medicine in February, March and June 2011 for dizziness and low back pain.

Ryder filed records from Licking Valley Internal Medicine dated August 17, 2007 and August 26, 2008. In 2007, Thompson complained of dizziness and numbness in his face. He noted he had experienced dizziness for twenty-five years, which physicians had been unable to diagnose. Thompson was diagnosed with headaches, syncope and collapse, and insomnia. Dr. Besson diagnosed Thompson with tennis elbow and restless leg syndrome on August 26, 2008.

Dr. Warren Bilkey evaluated Thompson on November 26, 2011. In his report, Dr. Bilkey noted Thompson was injured in a MVA on July 26, 2010 when he blacked out. Thompson complained of bilateral low back and flank pain radiating into the right lower limb, as well as right wrist pain. Dr. Bilkey diagnosed a lumbar strain, chronic low

back pain, and a right wrist fracture involving the radius. Dr. Bilkey stated Thompson had reached MMI, and assessed a 10% impairment rating pursuant to the AMA Guides. Dr. Bilkey opined Thompson is precluded from resuming his usual work duties performed prior to the MVA.

Thompson filed Dr. Phillip Tibbs' May 20, 2010 office note. Dr. Tibbs, a neurosurgeon at the University of Kentucky Medical Center noted Thompson had experienced a severe onset of right flank and chest wall pain in January with 95% improvement. Dr. Tibbs stated Thompson may have experienced some "intercostal nerve involvement at T12/L1 on the right, but it appears that this has resolved clinically."

Ryder submitted the generally illegible records from Dr. Ardy C. Wright. The August 27, 1998 note appears to state, "Truck Driver exam all ok c/o diff sleeping." Thompson was prescribed Ambien. An entry dated February 1, 1999 appears to state Thompson had complaints of low back pain. A CDL examination was conducted on August 31, 2000 which Dr. Wright indicated was "All OK."

Ms. Judith Cleary, P.A.C., a physician's assistant, testified by deposition on November 5, 2012, at Ryder's request. She conducted Thompson's November 30, 2010 CDL examination. Ms. Cleary stated she had reviewed

numerous medical records prior to her deposition. She stated the responses Thompson provided to the inquiry regarding his health were inconsistent with his actual medical history. Ms. Cleary stated she approved Thompson's medical certification card on the basis of an inaccurate medical history, and would not have done so if she had been provided accurate information. She stated whether or not Thompson knew of his condition, the information provided at the time of the evaluation was inaccurate. She stated she would have found Thompson unfit to drive a commercial vehicle if she had been provided an accurate history.

Dr. Benjamin Lyon, an internist, testified by deposition on November 15, 2012. He stated Ms. Cleary is competent in performing CDL examinations. He is unsure what Thompson actually told Ms. Cleary. He noted the responses Thompson provided regarding his health condition were inconsistent with the actual medical history.

Ryder filed the September 16, 2010 note from Sarah Florence, ARNP, with Licking Valley Medicine and Pediatrics, P.S.C. Ms. Florence stated Thompson could return to work without restrictions.

Ryder also filed records from the Harrison Memorial Hospital for treatment administered on July 26, 2010; August 18, 2010; and September 3, 2010. The July

record indicates Thompson experienced a syncopal episode while driving a truck. The August record indicates EEG testing was normal. The September record reflects tilt-table testing was normal. Thompson reported additional dizzy spells, but no black-outs.

Dr. Henry Tutt, a neurosurgeon, evaluated Thompson at Ryder's request on March 1, 2012. Dr. Tutt noted Thompson complained of back pain, left leg pain, right hand pain, intermittent dizziness and memory loss. Dr. Tutt noted Thompson suffered a non-displaced distal right radial fracture which healed without incident or complication, for which he qualified for no impairment rating. Dr. Tutt likewise assessed no impairment rating for the low back, and opined the problems were symptomatic and active prior to the MVA. Dr. Tutt assessed no impairment rating due to the MVA, and no restrictions. He stated Thompson is physically capable of returning to work. He also noted Thompson has a twenty-five year history of occult seizure disorder, and therefore, is not a good candidate for long-distance driving. He stated Thompson reached MMI by August 26, 2010.

Dr. Christopher Allen ("Dr. C. Allen"), Ph.D., a psychologist, evaluated Thompson on March 12, 2012. Thompson filed the Form 107-P medical report completed by Dr. C. Allen on the date of the examination. Dr. C. Allen

assessed a 19% impairment rating pursuant to the AMA Guides, of which he found 8% due to pre-existing active conditions. Dr. C. Allen diagnosed a cognitive disorder, not otherwise specified; depressive disorder not otherwise specified; and status post mild traumatic brain injury with possible syncope. Dr. C. Allen recommended treatment with medication and psychotherapy.

Dr. C. Allen testified by deposition on October 23, 2012. He noted Thompson had no pre-morbid psychological difficulties or history of passing out, but had experienced episodic dizziness. Dr. C. Allen stated Thompson's problems are due to pain and inability to perform adequately in his daily life. He found no suggestion of malingering or exaggeration on testing. He stated Thompson exhibited signs of a person who is depressed, distressed in general, or a person with dizziness and syncope. He noted memory loss can contribute to depression. Dr. C. Allen stated it is more probable than not, Thompson does not remember the accident because he sustained a brain injury rather than merely passing out. He stated a force significant enough to break Thompson's wrist could jar his head. He stated syncope is a neurological term for passing out, and is not synonymous with dizziness.

Dr. Timothy Allen M.D. ("Dr. T. Allen"), a psychiatrist, evaluated Thompson on August 5, 2012 at Ryder's request. In his report, Dr. T. Allen diagnosed pain disorder associated with both psychological factors, and a general medical condition. He assessed a 5% impairment rating based upon the AMA Guides due to the pain disorder developed after the MVA.

Dr. T. Allen testified by deposition on November 2, 2012. He noted a discrepancy between Thompson's self-reported history, and that outlined in the medical records. He stated Thompson presented with complaints of memory loss, weakness, numbness in the right upper extremity, and difficulty with language-related skills. Thompson reported feelings of depression secondary to perceived limitations. He noted Thompson was taking Prozac prior to the MVA, and the reported timeline of symptoms was inaccurate. Dr. T. Allen disagreed with Dr. C. Allen regarding whether Thompson sustained a traumatic brain injury. He stated, "I find no evidence of a traumatic brain injury or any cognitive impairment related to that." He stated Thompson's poor effort and inconsistent responses invalidated a lot of findings on testing. He determined Thompson's psychological condition was pre-existing. He admitted Dr. Besson allowed Thompson to drive subsequent to the 2009 MRI.

Ryder also submitted a copy of the police report from the accident, and the notice of Thompson's termination. The accident report reflects Thompson experienced weakness, and attempted to pull the truck to the right side of the road to stop. The next thing he knew, he was off the road on the left. No safety violations were noted in the police report.

A Benefit Review Conference ("BRC") was held on January 31, 2013. The BRC order reflects the contested issues were benefits per KRS 342.730; work-relatedness/causation; KRS 342.165 violation; exclusion for prior active; falsification of a CDL application; fraud; late filing of a Form 111; and effect of late filing of Form 111 or special defenses asserted.

In the opinion and award rendered April 1, 2013, the ALJ determined, relevant to this appeal, as follows:

**2. Falsifying application for CDL and failure to disclose condition on application.**

The Defendant/employer has raised affirmative defenses in its Special Answer including: Falsifying application for CDL and failure to disclose condition on application. The Defendant/employer bears the burden of proof on all affirmative defenses. Teague vs. South Central Bell, 585 SW2d 425 (Ky. Ct. App. 1979). In arguing the Plaintiff falsely represented his physical condition at the time the

Defendant/employer hired him, the Defendant must prove the statutory provisions contained in KRS 342.165(2). The statute provides as follows:

No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his physical condition or medical history, if all of the following factors are present:

(a) The employee has knowingly and willfully made a false representation as to his physical condition or medical history;

(b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and

(c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

The courts have interpreted this statutory provision to require medical proof as to the causal relationship between the false representation and the injury. In Baptist Hosp. East vs. Possanza, 298 SW3d 459 (Ky. 2009) the Kentucky Supreme Court held:

Enacted in 1994, KRS 342.165(2) was a legislative response to cases in which an injured worker misrepresented his physical condition to the employer in the process of obtaining employment and later received an injury that was causally related to the misrepresentation.<sup>[1]</sup> KRS 342.165(2) codified a judicially-adopted test that prohibits compensation if all of the three listed factors are present.<sup>[2]</sup>

---

The hospital asserts that the ALJ interpreted and applied KRS 342.165(2) properly, arguing that its reliance on the claimant's misrepresentation was not used to satisfy both the second and third prongs of the test set forth in KRS 342.165(2). Instead, the ALJ based the finding of a causal connection on the fact that the claimant would not have been hired if he had told the truth and, thus, would not have performed work that exceeded his lifting restriction and been injured. The hospital concludes that a neck injury due to a slip and fall or reaching for a chart would have been compensable, but a neck injury due to exceeding the lifting restriction was not.

We presume that by listing three separate factors and by stating that all must be present, the legislature intended for KRS 342.165(2) to create three distinct requirements.<sup>[3]</sup> **If subsection (c) requires only proof that the injury would not have occurred because the worker would**

not have been hired, an employer will always win simply by showing that it relied on a misrepresentation and would not have hired the worker had it known the truth. KRS 342.165(2)(c) requires " a causal connection between the false representation and the injury for which compensation has been claimed." The hospital states correctly that the claimant failed to disclose his lifting restriction; that he exceeded the restriction by lifting a heavy patient; and that he injured his neck as a consequence of lifting the patient. We do not agree that these facts supported a finding under KRS 342.165(2)(c) because we view whether exceeding the lumbar lifting restriction helped to cause the claimant's neck injury to be a medical question. (Id.) (Emphasis ours).

The Defendant/employer's argument in the case at bar is essentially the same as the one in Baptist Hosp. East vs. Possanza, supra, and must meet the same fate. The requirements of KRS 342.165(2) are not met in Plaintiff's situation because there is no medical proof linking the cause of the work injury to any alleged "misrepresentations or omissions" made by Plaintiff on his application for employment.

The Defendant/employer proffers the same argument rejected by the court above in that the injury would not have occurred because Plaintiff would not have been hired, because the Defendant/employer relied on a misrepresentation and would not have hired the worker had it known the truth. The statute

requires more and the Defendant/ employer fails to prove that connection. I agree with the Plaintiff's argument that no medical evidence has been introduced to show that Plaintiff's pre-existing condition, if any, was the same condition that caused this MVA.

Adding to the lack of proof is the fact that no job application was produced by the Defendant/employer. Mr. McCoy, the employer representative, testified the Defendant/employer relied only on the CDL licensing process and did not require the Plaintiff to complete any health questionnaires or other representations upon hire. The Defendant/employer must have shown that an alleged false representation on the CDL medical examination at the time of hiring met the requirements of the statute. The records from the CDL examination in 1998 were filed by Defendant\employer but no testimony connected any "misrepresentation" on that examination to the issuance of that license. Indeed, in reviewing the records of Dr. Wright it is noted the Plaintiff disclosed a sleep disorder and medication for that condition as well as a low back condition. (See Dr. Wright records filed by Defendant/ employer on February 27, 2012)

I find no merit in the Defendant/ employer's demonstrative argument and accusations that Plaintiff was purposely untruthful. Nor do I find merit in the Defendants/employer's insistence Plaintiff was, with some malice of forethought, deceiving the CDL examiners. While it is true the medical records show Plaintiff had an MRI of his head in 2009 - the chief complaint in the report prompting the test was "headache". Much is made of

him telling the paramedics he had "passed out" about one month prior to the accident. In contrast there is a history given on August 18, 2010, in preparation for an EEG, that Plaintiff had previous "dizzy spells" but had never blacked out before the MVA. The questionnaires completed by Plaintiff in connection with his DOT CLD[sic] license renewals showed he checked "no" to the box for "Fainting, dizziness." Plaintiff maintains he never passed out or fainted with the exception of one time in grade school.

I observed the Plaintiff both before the hearing and throughout the long hearing during which he was subjected to strenuous cross-examination. It was apparent to me that he was having difficulty processing the questions from not only Defendant/employer's counsel but his own attorney as well. He did not seem to understand many of the questions and was unable to answer many of the questions in a timely manner. I found Plaintiff's slow responses, his lack of understanding the most simple of questions, and his demeanor during a tough examination, convincing evidence that he would have a difficult time fabricating any story. The Plaintiff testified he had had[sic] dizziness in the past but that it had never occurred while driving. He admitted he sought treatment for symptoms including dizziness several years after he was employed by the Defendant/employer. However, his testimony that he was never restricted from driving is confirmed by the medical records, which indicate after a series of tests - no definitive diagnosis and no restrictions were placed on his driving.

Dr. Lyon, under whose license the certification for a CDL license most recently was obtained in 2009, testified that Plaintiff "may or may not" have been passed to drive if his prior problems had been disclosed. Judy Cleary, a Physician Assistant, provided testimony she would not have passed Plaintiff as to his physical examination for his CDL if she had been given his complete medical history. Based upon a review of the record and the observation of Plaintiff, I find that he has not falsified his application for employment pursuant to KRS 342.165(2).

Ryder filed a petition for reconsideration on April 17, 2013, arguing *inter alia* the ALJ erred by failing to address the applicability of KRS 342.165(1). In her order issued May 2, 2013, the ALJ determined as follows:

2. The second error averred by the Defendant/employer/petitioner is the undersigned failed to make any findings of fact on the defense of KRS 342.165(1). The contested issue was identified as "KRS 342.165 violation". The undersigned provided findings only on KRS 342.165(2). Therefore, to accurately provide an analysis regarding the entirety of KRS 342.165 the Opinion and Award is **AMENDED** to include and state the following:

"KRS 342.165(1) states 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. **If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter, shall be decreased fifteen percent (15%) in the amount of each payment. (Emphasis ours).**

Because the Defendant/employer sought a favorable finding under KRS 342.165(1), it had the burden to show that the accident resulted in some degree from the claimant's intentional failure to use safety appliances, or abide by an administrative regulation or order of the Commissioner of the Department of Workers' Claims or the employer.

Mr. Thompson's testimony provided the most credible testimony regarding this issue. For many of the same reasons the undersigned found Mr. Thompson did not violate KRS 342.165(2), I find Mr. Thompson did not consciously disregard any administrative regulation or order of

the DWC, or the DOT for that matter. Nor did he consciously disregard the employer's policy. The employer asserts that the evidence compelled a finding that the Plaintiff knew he had suffered from some dizziness in the past. However, no evidence of substance contradicted the Plaintiff's version of the events leading up to this accident. Specifically, there is no causal link between any purported conscious failure on Mr. Thompson's part to abide by DOT regulation, and this accident. The Defendant/employer bore the burden of proving Mr. Thompson intentionally disregarded a known safety rule. See Whittaker vs. McClure, 891 SW2d 80, 82 (Ky. 1995). Thus, before any penalty could be assessed against Thompson, Ryder had to prove Thompson willfully disregarded some safety rules and/or regulations (for which it had supplied training and education) and his disregard caused, in some part, this accident. Ryder did not prove that scenario. It is only upon successfully establishing these items that Ryder could prevail on its claim that Thompson should be assessed a fifteen percent statutory penalty. It would be error to impose a safety penalty on Thompson when KRS 342.165 requires proof of an intentional failure by the employee to follow a known safety rule and the failure in some way caused the accident. The employer in this situation did not prove those facts to the satisfaction of the undersigned. See Barnet of Kentucky Inc. vs. Sallee, 605 SW2d 29 (Ky. App.1980)."[sic]

3. Lastly, the Defendant/employer avers: there is no "medical requirement" for KRS 342.165(2)(c).

The undersigned addressed this issue in pages 17 through 22 of the

Opinion and Award. I find no error in the analysis of the law and the application of the facts to the law. Therefore, the Opinion and Award will remain as decided on this alleged error.

As fact finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). 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). Although a party may note evidence supporting different outcome than reached by the ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

That said, the function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to weight and credibility or by noting other

conclusions are reasonable inferences that otherwise could be drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Thompson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). However, Ryder had the burden of establishing the affirmative defenses pursuant to KRS 342.165(1) and (2) regarding whether Thompson falsely represented his physical condition, or violated a safety rule, and whether such violations were the cause of his accident and resulting injuries. See Teague v. South Central Bell, 585 S.W.2d 425 (Ky. App. 1979). Because the ALJ determined Ryder failed in its burden of proof establishing the two affirmative defenses, the question on appeal is whether upon consideration of the whole record, the evidence compels a finding in its favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence 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).

The crux of Ryder's appeal is the ALJ erred by failing to either dismiss the claim due to Thompson's

falsification or misleading statements on his CDL examination, or in failing to assess a fifteen percent safety penalty. 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, and conversely, the burden is upon the employer to establish an employee's intentional violation. See Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

KRS 342.165 provides as follows:

(1) 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. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been

liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

(2) No compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represents, in writing, his physical condition or medical history, if all of the following factors are present:

(a) The employee has knowingly and willfully made a false representation as to his physical condition or medical history;

(b) The employer has relied upon the false representation, and this reliance was a substantial factor in the hiring; and

(c) There is a causal connection between the false representation and the injury for which compensation has been claimed.

We find the evidence does not compel a finding this claim is barred by the application of KRS 342.165(2). The ALJ noted the case *sub judice* is factually similar to the situation in Baptist Hospital East v. Possanza, 298 S.W.3d 459 (Ky. 2009). There, Possanza suffered a previous lumbar injury resulting in two prior surgeries and in significant permanent restrictions. Possanza failed to disclose his prior lumbar injury or related restrictions when he was hired by Baptist Hospital. Possanza

subsequently lifted a heavy patient and sustained a neck injury. The employer argued it would not have hired Possanza had he disclosed his prior lumbar injury and restrictions, and therefore he would not have lifted a heavy patient in excess of his lifting restrictions and sustained an injury. Id. at 460-461. The Supreme Court noted KRS 324.165(2) provides no compensation shall be payable for work-related injuries if the employee at the time of entering the employment of the employer by whom compensation would otherwise be payable falsely represented in writing his physical condition or medical history if three factors were present. Those factors include the employee knowingly and willfully made a false representation as to his physical condition or medical history; the employer relied upon the false representation and the reliance was a substantial factor in the hiring; and there was a causal connection between the false representation and the injury for which compensation had been claimed. Id. at 462. The Court explained the application of the three factors as follows:

We presume that by listing three separate factors and by stating that all must be present, the legislature intended for KRS 342.165(2) to create three distinct requirements. [footnote omitted] If subsection (c) requires only proof that the injury would not

have occurred because the worker would not have been hired, an employer will always win simply by showing that it relied on a misrepresentation and would not have hired the worker had it known the truth. KRS 342.165(2) (c) requires "a causal connection between the false representation and the injury for which compensation has been claimed." The hospital states correctly that the claimant failed to disclose his lifting restriction; that he exceeded the restriction by lifting a heavy patient; and that he injured his neck as a consequence of lifting the patient. We do not agree that these facts supported a finding under KRS 342.165(2) (c) because we view whether exceeding the lumbar lifting restriction helped to cause the claimant's neck injury to be a medical question.

Id. at 463.

The Court further noted Possanza's injury did not involve lumbar weakness or symptoms contributing to the mechanism of the injury. Nor did the claimant's lumbar condition increase his susceptibility to the type of harm incurred. The court noted no medical evidence established the prior lumbar surgeries or working in excess of the resulting lifting restriction would cause a neck injury.

Id.

Here, Ryder bore the burden of establishing Thompson's health condition causing his longstanding complaints of dizziness when rising from a prone position caused his syncope at the time of the MVA pursuant to KRS

165(2)(c). The ALJ determined Ryder failed to establish the syncope was related to the dizziness. Dr. C. Allen clearly explained syncope is not synonymous with dizziness. Likewise, as the ALJ noted, the October 2009 MRI was performed due to complaints of headaches, not syncope or blacking out. Dr. Besson, who ordered the testing, was aware of the longstanding complaints of dizziness as established through the office notes filed of record by both Ryder and Thompson. After the MRI was performed, Dr. Besson allowed Thompson to continue to work as a truck driver without imposing any restrictions. Although Thompson testified he had experienced dizziness in the past, there is no evidence he had previously encountered dizziness or syncope while driving.

The ALJ determined no medical evidence was introduced establishing Thompson's pre-existing condition, if any, was the same condition he encountered at the time of the MVA. It was therefore reasonable for the ALJ to conclude Ryder failed to establish a causal link between the longstanding dizziness issue and the accident as mandated by KRS 342.165(2)(c).

Further, the ALJ concluded Thompson was a credible witness. This falls squarely within her role as fact-finder. The ALJ determined Thompson did not

consciously disregard any administrative regulation or order of the Department of Workers' Claims, the Department of Transportation, or policy of his employer based primarily on the same reasoning she applied to determine he had not violated KRS 342.165(2). The ALJ further determined no causal link was established between any purported conscious failure on Thompson's part to abide by DOT regulation, and this accident.

Regarding the allegation of a violation of a safety rule, and assessment of a fifteen percent penalty pursuant to KRS 342.165(1), as noted by the ALJ, Ryder bore the burden of proving Thompson intentionally disregarded a known safety rule. See Whittaker vs. McClure, 891 S.W.2d 80, 82 (Ky. 1995). 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. If a specific statute or regulation was violated, "intent is inferred from the failure to comply with a specific statute or regulation." Chaney v. Dags Branch Coal Co., 244 S.W.3d 95 (Ky. 2008).

Here, the ALJ determined Thompson did not intentionally violate a safety rule, and clearly outlined her reason for doing so. Contrary to Ryder's assertion, "intent" was not proven as a matter of law. While the ALJ could have made a determination to the contrary, she was not compelled to do so.

In order to succeed with its affirmative defenses, Ryder was required to demonstrate the accident was caused by the condition Thompson allegedly failed to disclose. Ryder failed to establish the cause of the syncopal episode, and also failed to establish the accident was caused by a condition Thompson failed to disclose. The ALJ properly exercised her discretion in reaching her determinations regarding the applicability of KRS 342.165(1) and (2). The ALJ's determination Ryder failed in its burden of proving Thompson intentionally violated a safety rule or falsified his medical history is supported by substantial evidence, and a contrary result is not compelled.

Accordingly the April 1, 2013 decision by Hon. Jeanie Owen Miller, Administrative Law Judge, and the May 2, 2013 order on reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON JOHN C TALBOTT  
1000 N HURSTBOURNE PKWY, 2ND FL  
LOUISVILLE, KY 40223

**COUNSEL FOR RESPONDENT:**

HON JACKSON W WATTS  
131 MORGAN STREET  
VERSAILLES, KY 40383

**ADMINISTRATIVE LAW JUDGE:**

HON JEANIE OWEN MILLER  
PO BOX 2070  
OWENSBORO, KY 42302