Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 30, 2015

CLAIM NO. 201380504

SWIFTY TRANSPORTATION PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

DAVID PRYOR
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Swifty Transportation ("Swifty") appeals from the September 17, 2014 Opinion, Award and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), and from his October 14, 2014 Order on reconsideration. The sole issue on appeal is whether the ALJ erred in declining to reduce David Pryor's ("Pryor")

benefits by 15% for a safety violation pursuant to KRS 342.165. Finding no error, we affirm.

Pryor testified by deposition on April 24, 2014 and at the hearing held July 22, 2014. He was employed by Swifty as a fuel truck driver from 1983 until May, 2013. On May 31, 2013, Pryor was involved in a single vehicle accident while driving a tractor trailer containing fuel from Louisville to Owensboro.

According to Pryor's testimony regarding the cause of the accident, he was unfamiliar with the stretch of highway where the Natcher Parkway ends at the Wendell Ford Expressway. It was 5:00 a.m. and dark outside as he approached the terminus of the Natcher Parkway. The exit ramp contains a hairpin turn. As Pryor approached the exit, he heard his GPS system say something and he looked down to clarify the instructions. When he looked back up, "… I was already right on the guardrail, and it hit the guardrail. I come [sic] off the guardrail, and it bumped it again, and I think come [sic] off again." The truck flipped over the guard rail and rolled 75 to 100 feet down an embankment.

Pryor indicated he always observes the speed limits and has never been cited for speeding as a truck driver. As he travelled the Natcher Parkway on the morning of May 31, 2013, he observed the posted speed limit of 65

mph. Though he was unsure of his exact speed as he entered the exit ramp, Pryor did not believe he was speeding. The posted speed limit on the ramp is 35 mph. Rather, he attributed the accident to his unfamiliarity with the route and the very sharp curve of the ramp. Police officers arrived at the scene of the accident.

Swifty filed the accident report completed by the Daviess County Sheriff Department. The report noted the accident occurred on the shoulder of the road on dry asphalt. The tractor trailer went through a guardrail in a curve on an exit ramp and down an embankment, rolling several times and coming to rest on its side. Pryor reported he was not speeding or intoxicated, and had not fallen asleep. He stated he went into the turn, hit the guardrail and lost control. The officer did not issue a citation and noted the cause of the accident as “unknown.” The officer noted “none detected” for human factors, vehicular factors and environmental factors.

Robert W. Elgin (“Elgin”), Swifty’s Vice President of Operations, testified by deposition on July 14, 2014. He arrived at the accident scene at 8:00 a.m. and conducted an investigation. Elgin did not take any notes, nor did he prepare a written report. He was not aware of any other investigation of the accident. Elgin personally drove the

route Pryor had taken and indicated there were highly visible warning signs and speed limit signs approaching the exit. He thought the speed limit on the ramp was 35 mph. Elgin concluded the cause of the accident was driver error, and suspected Pryor must have been speeding or inattentive. However, Elgin also conceded he had no evidence to prove Pryor was asleep or the speed of the truck at the time of the accident. Elgin does not have training in accident reconstruction and has no experience in law enforcement.

Elgin also verified Swifty's employee handbook, which Pryor acknowledged receipt of on February 20, 2012. The handbook provides that the employees shall abide by all federal, state and local laws as well as rules and regulations applicable to them. At page 8, the handbook indicates negligent, willful or illegal acts which could result in damage to the company, a customer, employee or other person will not be tolerated. At page 23, the handbook states safe driving is expected and speeding, reckless or unlawful driving in a company vehicle will not be tolerated. Elgin felt Pryor violated the handbook provisions regarding speeding and negligent driving.

The ALJ ultimately concluded Swifty failed to meet its burden in proving Pryor violated the provisions or KRS 342.165, explaining:

KRS 342.165(1) reads as follows:

> … 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.

The purpose of KRS 342.165 is punitive in nature and requires conduct by a party that constitutes more than simple negligence, that being an intentional failure of an employee to comply with safety regulations. Apex Min.v. Blankenship, 918 S.W.2d 225, 228 (Ky.1996). The Defendant/Employer bears the burden of proving an employee's safety violation. Whittaker vs. McClure, 891 S.W.2d 80, 82 (Ky. 1995).

The Workers' Compensation Board described the elements:

> Specifically with regard to KRS 342.165(1), our courts have held that its application requires proof of two elements. First the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal, or, as in the instant claim, a specific safety policy or order of an employer.

> Secondly, evidence of 'intent' to violate the specific safety provision must also be present. This does not mean that the party must be intent on purposely causing an injury or producing an accident. Rather, there must be evidence within the record from which the ALJ can conclude or infer that there was some degree of *conscious indifference to the consequences of the act*. Inadvertent negligence by the employee is not enough. There must be a level of awareness by the party not merely with regard to the existence of a safety regulation or policy, but *an immediate cognizance* that the conduct causing the injury is in contravention to the policy or regulation.

Terry v. AFG Industries, WCB Opinion No. 00-94292 (January 2, 2003) (Emphasis Added), *citing* Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996) and Barmet of Kentucky v. Sallee, 605 S.W.2d 29 (Ky. 1980)).

In this case, Plaintiff's actions do not amount to intentional or willful disobedience or a violation of a safety policy. First of all, Defendant cannot articulate any specific policy that Plaintiff violated. When offering the nebulous language contained in its Handbook (admitted by Mr. Elgin to be merely guidelines), Defendant confessed that many of its key terms and terminology are undefined.

To justify both its termination of Plaintiff and its basis for a safety violation, Defendant referred to an investigation done by Mr. Elgin, who

possessed no training in accident investigation, no background in law enforcement or accident reconstruction, generated no written report, took no notes, and involved no one else in the investigation.

Mr. Elgin, in his capacity as Vice-President for Operations of the Defendant/Employer, concluded Plaintiff was at fault and found that he must have been speeding, inattentive, or asleep.

When cross-examined about how fast Plaintiff was going, Mr. Elgin, responded that he didn't know.

When asked how he concluded Plaintiff was asleep, Mr. Elgin answered that it was pure speculation on his part. As Mr. Elgin observed, there are no cameras inside the truck to monitor the drivers.

The defendant/Employer has the burden of proof, yet it cannot show that that Plaintiff violated any legitimate rule, law, regulation or policy. According to the police report, Plaintiff was not cited for speeding or any other statute or regulation, there were no contributing human factors, and the cause of the accident was deemed "unknown".

No entity, other than the Defendant/Employer, attributed any fault on the part of the Plaintiff for the accident.

The Plaintiff gave his version of what happened to several sources consistently – he was not asleep, he was not speeding, he violated no safety policy- he just lost control. There is no probative evidence that contradicts the Plaintiff's statement of the cause

> of the accident, which was essentially adopted by the Daviess County Sheriff in the absence of any other plausible evidence to the contrary.
>
> I note the Defendant's argument regarding signage and notice of dangerous conditions, which the Plaintiff claims not to have seen, but I don't think that makes any difference in my analysis. He was unfamiliar with what is clearly a dangerous stretch of highway that has seen its share of accidents before. Looking at the schematic prepared by the investigating officer, even traveling at 35 MPH, had he looked at his GPS and away from the road it is entirely conceivable that the Plaintiff was in a hairpin turn before he was aware of it and simply could not correct in time to avoid going off the pavement. In sum, Defendant has not, and cannot from the record, meet its burden of showing that Plaintiff consciously disregarded the safety rules of the employer. At most, based upon Plaintiff's statements and the investigation by the Daviess County Sheriff, upon which I rely because I find them more persuasive, this is a case of simple negligence which does not trigger the statutory safety penalty.

Swifty challenged the ALJ's finding regarding the safety violation issue in its petition for reconsideration. In his order dated October 14, 2014, the ALJ noted the refusal to find a safety violation was based upon facts as articulated in the Opinion and reaffirmed that finding.

On appeal, Swifty argues the ALJ erred as a matter of law in failing to reduce the award by 15% pursuant to KRS

342.165. Swifty contends Pryor violated KRS 189.390 by travelling in excess of the posted speed limit on the ramp and by driving in a negligent manner in violation of its policies as provided in the employee handbook. Swifty notes Pryor testified he was travelling at 65 mph on the Parkway. Swifty then bases its contention that Pryor was speeding solely upon the following question and answer from his deposition.

> Q. Okay. And you would agree that by the time you were in the ramp, you had not slowed down from what you were travelling on the William Natcher?
>
> A. I don't think so.

Swifty interprets Pryor's response as meaning he did not think he slowed down on or before the ramp and, therefore, is a judicial admission of a violation.

We begin by noting judicial admissions play no role in Kentucky's Workers' Compensation administrative proceedings. *See* General Elec. Co. v. Turpen, 245 S.W.3d 781 (Ky. App. 2006). Civil Rule 36, governing requests for admission, is specifically excluded from application in workers' compensation proceedings. *See* 803 KAR 25:010 § 17(1); Wadlington v. Sextet Mining Co., 878 S.W.2d 814 (Ky. App. 1994). Instead, when facts are undisputed, the parties in workers' compensation actions before the ALJ are required

to enter agreed stipulations. *See* 803 KAR 25:010 § 16. Therefore, Pryor's statement cannot and does not constitute a judicial admission.

KRS 342.165(1) states as follows:

> … 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 executive director 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 by fifteen percent (15%) in the amount of each payment.

The application of the safety penalty requires proof of the violation of a specific safety provision, whether state or federal. Second, evidence of "intent" to violate a specific safety provision must also be present. Finally, the violation must be a cause of the accident. Application of KRS 342.165 does 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 ALJ did not err in refusing to assess a 15% reduction in Pryor's award for his failure to follow a safety rule pursuant to KRS 342.165. Swifty bore the burden of proving Pryor's failure to comply. Cabinet for Workforce

Development v. Cummins, 950 S.W.2d 834 (Ky. 1986). Because it was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as that 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. 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, 708 S.W.2d 641 (Ky. 1986).

Contrary to Swifty's assertions, Pryor's ambiguous statement is far from determinative. While Swifty interprets "I don't think so" as an admission by Pryor that he was speeding, it can also be interpreted as Pryor indicating he does not agree with the assertion that he did not slow down. Pryor was not cited for speeding, and no evidence conclusively establishes his speed at the time of the accident. In his earlier testimony, he indicated he was travelling 65 mph on the Natcher Parkway, but he did not

know how fast he was travelling on the ramp. Pryor also indicated in that testimony he did not believe he was travelling 65 mph as he entered the ramp. He acknowledged the speed limit was 35 miles per hour on the ramp and denied he was speeding. The record contains no substantial evidence to establish Pryor was speeding at the time of the accident. The ALJ concluded Swifty failed to prove anything other than negligence. Although negligent action may be sufficient to warrant disciplinary action by the employer concerning the employment, the ALJ correctly held mere negligence is insufficient to warrant application of the provisions of KRS 342.165.

Accordingly, the September 17, 2014 Opinion, Award and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge, and the October 14, 2014 order on reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BRIAN WIMSATT
303 N HURSTBOURNE PKWY #110
LOUISVILLE, KY 40222

HON JOEL W AUBREY
303 N HURSTBOURNE PKWY #110
LOUISVILLE, KY 40222

COUNSEL FOR RESPONDENT:

HON PAUL A BRIZENDINE
300 MISSOURI AVE #200
JEFFERSONVILLE, IN 47130

ADMINISTRATIVE LAW JUDGE:

HON. STEVEN G. BOLTON
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601