Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 24, 2022

CLAIM NO. 202073185

AARON NICKLES PETITIONER

VS. **APPEAL FROM HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE**

YOKOHAMA INDUSTRIES AMERICAS, INC. and
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * * *

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

ALVEY, Chairman. Aaron Nickles ("Nickles") appeals from the February 15, 2022 Opinion, Award, and Order rendered by Hon. W. Greg Harvey, Administrative Law Judge ("ALJ"). The ALJ awarded Nickles temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits pursuant to KRS 342.020 for a work-related low back injury he sustained on July 15,

2020 while working at Yokohama Industries Americas, Inc. ("Yokohama"). However, the ALJ rejected Nickles' claim alleging Yokohama committed a safety violation pursuant to KRS 342.165(1) and KRS 338.031 which would have entitled him to enhanced benefits. Nickles also appeals from the March 10, 2022 Order denying his Petition for Reconsideration as it relates to the safety violation claim.

Nickles' sole issue on appeal relates to the ALJ's decision to reject his claim that Yokohama committed a safety violation. He argues the ALJ erred in summarily finding Yokohama is not responsible for a safety violation pursuant to KRS 342.165(1). Nickles argues the ALJ did not conduct the appropriate analysis required pursuant to Lexington-Fayette Urban County Government v Offutt, 11 S.W.3d 598 (Ky. App. 2000), which is material to this claim because all the criteria are satisfied. Because we determine the ALJ failed to perform the appropriate analysis required by Lexington-Fayette Urban County Government v Offutt, supra, we vacate and remand his decision, in part, for further consideration as set forth below. Since the only issue on appeal concerns the application of KRS 342.165(1), we will not summarize the medical evidence.

Nickles filed a Form 101 on July 13, 2021, alleging he sustained a work-related low back injury on July 15, 2020 when he slipped on a set of stacked pallets (also known as "skids") he was climbing to access on the back of a semi-trailer, falling approximately four feet to the ground. The Form 104 reflects Nickles' employment history includes working as a fork-lift operator, engine technician, and as a hardware store manager.

Nickles also timely filed a Form SVC on July 15, 2021 alleging Yokohama committed a safety violation pursuant to KRS 342.165(1) by violating the general duty requirements pursuant to KRS 338.031. Nickles did not allege a violation of any specific statute or regulation. In support of this claim, Nickles attached a photo illustrating a semi-trailer backed up to two sets of stacked pallets. Nickles alleged the following:

> The Employer failed to provide a workplace that was free from recognized hazards likely to cause physical harm to its employees. Specifically, [Nickles] (whose job it was to load semi-trailers) was not provided with a ramp, a fixed ladder, or a loading dock to assist in getting in and out of the trailers. Instead, wood pallets were stacked on top of each other in front of the semi-trailer's loading door and were to be used in place of a ladder or loading dock to get in and out of the trailer…. In addition, several wood pallets were also stacked inside each trailer to be used as "ladders" for stacking product to the top of each trailer.
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> [Nickles] was injured trying to get in the trailer. As he was climbing in, he grabbed one of the pallets inside the trailer to help pull himself up, but it slid towards him, he fell out of the trailer and while falling his legs tangled and got caught in the stack of pallets outside the trailer. If proper equipment like a loading dock, ramp, or fixed ladder was being utilized, [Nickles] would not have been injured as he never would have fallen from the trailer in this manner and his legs would not have gotten caught in the stack of pallets.

Nickles testified by deposition on September 9, 2021, and at the hearing held December 17, 2021. Nickles was born on October 16, 1987 and he resides in Harrodsburg, Kentucky. He is a high school graduate. In addition to the jobs listed in the Form 104, he previously worked in the fast food industry. He also received DOT hazmat training.

Nickles began working for Yokohama, a rubber sealing company, in November 2018 at its Versailles, Kentucky facility. He initially worked in sealant production for six to seven months, then moved to shipping and receiving. Nickles was working in shipping and receiving when he was injured. In this role, his job duties primarily involved loading and unloading pails and drums of primer and/or sealant into and off of semi-trailers, and pulling empty 55-gallon drums for production. These "smooth" drums weighed approximately 30 to 40 pounds each. Nickels was responsible for pulling the number of smooth drums on his work ticket for a given day.

Nickles testified the trailer housing the smooth drums was kept in the parking lot away from the main loading docks. He pulled drums from this trailer at least four times per week. He stated Yokohama had fashioned a makeshift loading dock out of stacked wooden pallets in the parking lot; when the product trailers came in to be dropped off, the employees repositioned them so their backs aligned with the stacked pallets. He testified the employees climbed the stacked pallets to get into the back end of the trailer to pull the drums. He stated, "We had to use them as a ladder, more or less."

Nickles stated his team leader, Todd Collier ("Collier"), had trained him to use the stacked pallets since "day one" of his time in shipping and receiving and, in fact, that system was in place even when he first started in production. Nickles testified he had never witnessed anybody using stepladders to unload the trailer containing the smooth drums. While there were stepladders on the premises, they were kept in the main building which he estimated was a 10 to 15-minute walk,

and their use needed to be approved by the maintenance department, "because they're maintenance ladders the only ones I know of." Even if an employee used a ladder with this particular trailer, Nickles testified, "If you set it up on the side of the trailer, you would still be walking over to the pallets, but to access directly in the trailer you would have to move the pallets and then move the ladder to put the pallets back." Nickles admitted there was a "picking ladder" located in the "chem room" in the building employees would use to access shelves, but opined this particular ladder would not have been conducive to accessing the trailer outside because there is a basket at the top of the ladder, which ultimately would have been in the way. He also stated handrails would have been in the way.

Nickles stated it was impossible to access the trailer without some assistance because it sits approximately four feet off the ground. In his deposition, Nickles described his injury as follows:

> So we had pulled the drums, had them staged on assembly where they go and when we was going to leave I had went by to plug my truck up and realized that they had switched production on us right at the end. Well, at that point the other people in receiving or shipping was gone so that left pretty much me and the supervisor or team leader. . . . So we had talked and I went outside and I had to pull 44 drums by myself within a matter of, you know, I had a time frame, and as I went out, you know, I was by myself so I had to pull the truck up, you know, stage it to the skids and then we have to climb the skids to access the semi—the trailer. Once you get so far up you really don't have anything to grab, so you have to reach inside and rely on skids that are stacked inside to pull yourself in, and as I reached in the skid kind of – they wasn't – they wasn't sturdy, I guess, and I went to pull and I seen that it was going to pull towards me[.] I couldn't rely on it to finish getting in the truck. So I kind of lost my footing and that's when I kind of fell back I guess, and I think what had really happened is

> my right leg had got kind of stuck in the skid for a second and it kind of threw me off and that's when I come down on my . . . left leg.

Nickles testified he was not provided with a safe working environment at Yokohama regarding unloading the smooth drums. He believes if there had been handrails or something stable attached to the pallets running up to the semi-trailer, or a ramp, or if the truck had been placed in one of the loading docks, he would have had solid footing and his injury would have been prevented. He believed accessing the trailer by climbing the pallets was the only option Yokohama provided. Nickles testified he had asked numerous times to change the system they used to access the trailer.

> I had actually asked them in the past because we have an empty dock around back – I had asked them – you know, we very rarely used it. I asked if we couldn't – because I had actually got the – I guess you call it promotion to take over receiving. And I asked them, you know, why I can't move this trailer to the back and dock it so we could access it, slide them out on to the concrete floor, set them on skids. They didn't want that. They wanted to keep that dock open for just in case reasons… .

Nickles also stated he had asked "several times, you know, can we not get a ladder, something that would lock onto a trailer, even if it was to climb – you know, to sit beside the skids to access on top of the skids so we wasn't particularly climbing the skids. And it never would happen." He stated he had specifically made this request to Collier, as well as to the previous team leader Bill Webber, and Sam Baker, the direct supervisor, to no avail. He testified, "I'm going to say seven, eight months that we had talked about it off and on. Between it and just docking the

trailer – I mean it was talked about… . And none of that ever – they never would do it." Nickles never returned to work at Yokohama following his injury on July 15, 2020.

Collier testified by deposition on October 11, 2021. He had been employed by Yokohama for 15 years and was Nickles' team leader at the time of the injury. He provided more guidance in that role, working directly with "the guys," as opposed to having disciplinary authority. Collier testified in shipping and receiving, they are responsible for all materials coming in that are sorted and restacked, as well as pulling drums for production. In receiving, they also do what is called the "shutter line" which entails going to the warehouse to stage material for the shuttle driver to pick up.

Collier testified they load and unload empty drums into and off of trailers. He stated there are four loading docks at the Yokohama facility. Of the four docks, one has a trailer in it full-time from which they pull ribbed drums every day. The other trailer is docked separately, "on the outside of the parking lot over by the grass area" from which they only pulled drums once or twice a week. He stated the second trailer with the smooth drums – where Nickles was injured – stays in the parking lot because Yokohama does not "have any more available docks that we could put it in without causing a hassle for shipping, because we only have four docks." Collier stated they always leave the two shipping docks open because they may have multiple trucks show up at a time.

Collier testified employees could access the trailer in the parking lot with stacked pallets if they chose to, but stated they have "multiple stepladders that

are inside the building." He believed Nickles was aware of the stepladders because he had seen him use them previously inside the building to access shelves in one of the rooms. Collier testified he believed the employees chose to use the stacked pallets to access the undocked trailer out of convenience, "because sometimes if it's raining or something, you know, we're trying to get in without the material and stuff getting wet" and the pallets are already there on the truck. Collier stated they try to reserve the job of pulling drums for two people – one driving the truck and moving skids out of the way, the other guy in the trailer loading them on the skids – but admitted on the day Nickles was injured they were short staffed and he was working alone.

Collier testified the protocol for reporting a safety concern would be to go to the team leader and, if nothing gets done, the employee can just follow the chain of command. Collier had no recollection of having a personal conversation with Nickles about possibly pulling the truck with the smooth drums into one of the loading docks for better access, or Nickles' feeling the makeshift pallet system was unsafe. He testified he had no direct knowledge if Nickles ever reported to any other superiors whether he felt the pallets were unsafe. Collier admitted, however, "We had all made a comment that it would be nice if we could [move the trailer to a dock.] But we do not have an onsite truck that's capable of hooking up and moving a trailer from dock to dock." He claimed the employees were not told they were either prohibited from using the stacked pallets or required to use ladders to access the trailers. He stated, "Well, I mean, we use a ladder . . . We have a ladder . . . . A

stepladder that was made to do that. But we kept it inside because of the rain and stuff. And it was operator discretion whether they wanted to use it or do the pallets."

A Benefit Review Conference was held on November 3, 2021. The safety violation allegation was listed as a contested issue.

In the Opinion, Award, and Order issued February 15, 2022, the ALJ dismissed Nickles' safety violation claim. The ALJ stated, *verbatim*,

> Nickles alleges that his benefit should be enhanced by 30% pursuant to KRS 342.165. That statue imposes a 30% increase in benefits where a workplace accident is caused by the intentional failure of the employer to comply with a specific statute or regulation regarding safety. Nickles alleges Yokohama violated its' general duty to provide a safe workplace. Specifically, Plaintiff contends the use of pallets stacked to climb into the rear of trailers was a violation of Yokohama's duty to provide a workplace free from hazards.
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> Collier testified employees were not encouraged or told to use the stacked pallets to get into the trailer to unload drums. He also acknowledged they had not been told to avoid doing so. Ladders were present inside to allow access to the trailer but he felt employees preferred stacking pallets because it made it easier for them to unload the drums and then forklift them to production.
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> The ALJ acknowledges the makeshift loading dock is not ideal. However, the statute makes it clear that the employer must intentionally disregard a known safety statute or regulation. Collier's testimony that employees used the pallets to make the loading more convenient is persuasive. Although Nickles may not have come up with the makeshift loading dock, he did utilize it in lieu of getting a ladder. The ALJ understands Nickles' testimony about his perception of the pallets being used and suggestion of other methods. However, the ALJ is not persuaded the use of the pallets by employees of the Defendant is violative of KRS 342.165 or the general duty provision of KRS 338.031.
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> For these reasons, the ALJ declines to enhance Nickles' award by 30%.

Nickles filed a Petition for Reconsideration on February 24, 2022, arguing the ALJ erred in dismissing the safety violation claim without providing a detailed analysis of the 4-part test set forth in Offutt, supra. He argued the opinion addressed the safety violation but did not indicate the Offutt analysis was applied to the facts of this case. He maintained the Offutt analysis is material to his claim because all the criteria outlined in that case were satisfied.

The ALJ entered an Order on March 10, 2022 overruling the Petition for Reconsideration as it related to the safety violation claim. He noted Nickles' argument that Yokohama violated the general duty to provide a safe workplace, contending "the pallets used to climb into the rear of trailers was (1) a condition that posed a hazard; (2) the employer recognized it as a hazard; (3) the hazard was likely to cause death or harm; and (4) feasible means existed to reduce or eliminate the hazard." The ALJ stated he was persuaded by Yokohama's argument that, even applying the factors outlined in Offutt, supra, there was no intent on its part, and absent that, the claim cannot prevail.

As the claimant in a workers' compensation proceeding, Nickles had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was unsuccessful in his burden of proving entitlement to the 30% enhancement of compensation permitted by KRS 342.165(1), 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 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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(1) is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. 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). The 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).

A violation of the "general duty" clause set out in KRS 338.031(1)(a) can satisfy the requirement set out in KRS 342.165(1) that a "specific statute" was intentionally ignored. However, not all violations of KRS 338.031(1)(a) automatically rise to a violation egregious enough to justify granting an enhancement pursuant to KRS 342.165(1). Cabinet for Workforce Development v. Cummins, 950 S.W.2d at 836. *See* Apex Mining v. Blankenship, supra. In order for a violation of the general-duty provision to warrant enhancement pursuant to KRS 342.165(1), the employer must be found to have intentionally disregarded a safety hazard that even a lay person would obviously recognize as likely to cause death or serious physical harm. Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 226 (Ky. 2013).

The worker has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation can be inferred from an employer's failure to comply with a specific statute or regulation because employers are presumed to know what state and federal regulations require.

The Kentucky Supreme Court in Chaney v. Dags Branch Coal Co., 244 S.W.3d 101 (Ky. 2008), stated as follows:

> Absent unusual circumstances such as those found in *Gibbs Automatic Moulding Co. v. Bullock,* 438 S.W.2d 793 (Ky. 1969), an employer is presumed to know what specific state and federal statutes and regulations concerning workplace safety require. Thus, its intent is inferred from the failure to comply with a specific statute or regulation. If the violation "in any degree" causes a work-related accident, KRS 342.165(1) applies. *AIG/AIU Insurance Co. v. South Akers Mining Co., LLC,* 192 S.W.3d 687 (Ky.2006), explains that KRS 342.165(1) is not penal in nature, although the party that

> pays more or receives less may well view it as such. Instead, KRS 342.165(1) gives employers and workers a financial incentive to follow safety rules without thwarting the purposes of the Act by removing them from its coverage. It serves to compensate the party that receives more or pays less for being subjected to the effects of the opponent's "intentional failure" to comply with a safety statute or regulation.

Violation of the "general duty" clause set out in KRS 338.031(1)(a) may well constitute grounds for assessment of a 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. The Kentucky Court of Appeals in Lexington-Fayette Urban County Government v. Offutt, supra, applied a four-part test to determine whether a violation of KRS 338.031 had occurred. This test established a violation of a general duty clause occurs when "(1) [a] condition or activity in the workplace presented a hazard to employees; (2) [t]he cited employer or employer's industry recognized the hazard; (3) [t]he hazard was likely to cause death or serious physical harm; and (4) [a] feasible means existed to eliminate or materially reduce the hazard." Id. at 599.

In the context of a workers' compensation claim for a safety violation, it is the responsibility of the ALJ to determine whether a violation of a statute or regulation has occurred. KRS 342.165(1); Brusman v Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). In this case, the ALJ determined Yokohama did not intentionally violate the statute. The only evidence addressing Yokohama's alleged

violation comes from Nickles' testimony and the photo he attached to his Form SVC. Nickles testified there were empty docks available for use, but Yokohama would not approve moving the smooth drum trailers into the empty docks out of deference to possible incoming shipments. The ALJ determined that while using the stacked pallets was "not ideal," he believed Nickles could have used a stepladder if he chose to. In the Order on Petition for Reconsideration, the ALJ noted the criteria outlined in Offutt, but he but failed to conduct a thorough analysis.

The ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his or her reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

That said, we find the ALJ's analysis regarding dismissal of Nickles' safety violation claim is inadequate. While the ALJ listed the factors required by Lexington-Fayette Urban County Government v Offutt, supra, he failed to provide any analysis. His determination is conclusory and does not sufficiently address the required analysis. We therefore vacate the ALJ's decision regarding the alleged

safety violation, and remand for the ALJ to perform the complete analysis outlined in Offutt and provide a basis for his determination. We do not direct any particular result, and the ALJ may make any determination based upon the evidence and after consideration of the appropriate factors.

Accordingly, the Opinion, Award, and Order rendered February 15, 2022, and the March 10, 2022 Order denying Nickles' Petition for Reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge, are **VACATED, IN PART**. This claim is **REMANDED** for a determination in accordance with the directions set forth above.

ALL CONCUR.

DISTRIBUTION:

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