Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **December 14, 2018**

CLAIM NO. 201563653

KEVIN CARDWELL PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

McLEAN COUNTY FISCAL COURT
And HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Kevin Cardwell appeals from the June 29, 2018 Opinion, Award and Order and the July 31, 2018 Order rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). On appeal, Cardwell argues the ALJ erred in failing to award enhanced benefits pursuant to KRS 342.165 for an alleged safety

violation by McLean County Fiscal Court ("McLean County"). For the reasons set forth herein, we affirm.

Cardwell and his co-workers were installing a drainage pipe on October 27, 2015. The team was using a backhoe for the project, and the controls of the backhoe's bucket were in the operator's coat pocket. Cardwell was securing bands between pipes while standing at the bottom of a ditch, beneath the backhoe. The operator of the backhoe remained in the seat. The control became caught in the operator's coat pocket, causing the bucket of the backhoe to drop pipes onto Cardwell. Both of Cardwell's legs were broken, and he suffered significant injuries to his hips and knees.

The issues on appeal concern only Cardwell's allegation of a safety allegation and, for this reason, the medical evidence is not relevant. David Lynn, road supervisor for McLean County, was present at the time of the Cardwell's injuries. He testified Richie Blakely was operating the backhoe at the time of the accident. He leaned forward to hear instructions and, when he sat back down, his jacket pocket caught the joystick control and caused the pipe in the bucket of the backhoe to move.

Lynn testified Blakely was an experienced equipment operator. When the backhoe was delivered, the representative from John Deere trained employees on safety features of the equipment. The training included instruction on pilot controls and the lockout button, which immobilizes the backhoe when activated. Lynn believed Blakely attended this training.

In his testimony, Lynn speculated the accident may not have happened if the backhoe was functioning properly and had been locked out. He further indicated

he held safety meetings two or three times per year that addressed general safety concerns. However, Lynn conceded he did not review OSHA regulations or the safety instructions in the backhoe manual at the meetings. Nor does Lynn conduct specific training associated with OSHA or Kentucky regulations.

Cardwell introduced portions of the operator's manual for the backhoe involved in the accident. The manual provides, "Be careful not to accidentally actuate control levers when co-workers are present. Always lock hydraulics on backhoe during work interruptions. Lock hydraulics before allowing anyone to approach machine."

The ALJ entered the following findings regarding the alleged safety violation:

> The plaintiff argues lockout-tagout is a safety procedure used to ensure dangerous machines are properly turned off and not able to be started again prior to completion of maintenance or repair work. OSHA requires an employer to instruct their employees in the avoidance of unsafe conditions and to control or eliminate any hazards or other exposure to illness or injury.
>
> It appears the plaintiff is alleging a violation of KRS 338.031(1)(a) which is known as the "general duty" clause. In Lexington-Fayette Urban County Government vs Offutt, 11 SW3d 598 (Ky App 2000), the Court set out the following four prong test: (1) there was a condition or activity in the work place that presented a hazard to employees; (2) the cited employer or employer's industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; (4) a feasible means existed to eliminate or reduce the hazard.
>
> However, violating KRS 338.031(1)(a) does not automatically result in a KRS 342.165 safety penalty as the ALJ must also determine intent. For example, an

> employer's inadvertent negligence is not enough to prove intent but instead "intent" requires a fact finder to determine whether the employer ignored, or willfully overlooked a reasonably foreseeable safety hazard. Hornbeck vs Hardin Memorial Hospital, 411 SW3d 220 (Ky 2013).
>
> In this case, the ALJ has considered the plaintiff's testimony along with the testimony of David Flynn [sic] and is not persuaded that there was an intentional violation. This appears, at most, to be a case of inadvertent negligence on the part of a co-employee. The coworker was an experienced operator and obviously he did not intentionally injury [sic] the plaintiff. The accident, however, was caused by the jacket of the co-worker catching the controls of the equipment he was operating. The ALJ simply fails to see any intent on the part of the employer in this case to violate the general duty clause. Therefore, a safety penalty will not be assessed.

Cardwell filed a petition for reconsideration requesting that the ALJ review his factual determination regarding the intent requirement. The ALJ overruled Cardwell's petition for reconsideration, stating as follows:

> The ALJ in his original Opinion discussed the alleged safety violation. The ALJ has again considered the arguments of the Plaintiff; however, he remains persuaded the alleged safety violation was not intentional but merely inadvertent negligence on the part of a co-employee. The violation of KRS 338.031(1)(a) requires intent, which the ALJ does not find in this case.

On appeal, Cardwell argues the ALJ erred in not finding McLean County violated specific OSHA safety training requirements and the manufacturer's safety rules related to the lockout of the equipment. Cardwell cites 29 CFR 1910.147(c), which requires an employer to ensure employees understand the purpose and function of the energy control program. Cardwell also cites 29 CFR 1926.21(b)(2),

which requires an employer to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury."

In addition, Cardwell claims McLean County violated the general duty provision of KRS 338.031, which requires an employer to furnish a safe workplace. Cardwell contends the facts in this case satisfy the four part test in Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000). He argues the work activity clearly presented a hazard to him, and McLean County was aware of the lockout procedures as a remedy. The hazard caused him serious, permanent harm. Finally, training on lockout procedures would have prevented the injury and was a feasible means to eliminate the hazard. Cardwell further contends intent should be assumed because of the failure to properly train and enforce safety rules.

KRS 342.165(1) provides in pertinent part:

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

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. 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, id. First, the record must contain evidence 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. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Rather, the worker has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Nonetheless, intent to violate a regulation may be inferred from an employer's failure to comply, as employers are presumed to know what state and federal regulations require. Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

We first note Cardwell pursued the safety penalty as a violation of the general duty clause in KRS 338.031(1)(a), and did not cite any specific state or federal regulatory violation in his arguments before the ALJ. Violation of the "general duty" clause in KRS 338.031(1)(a) may constitute grounds for assessment of a safety penalty in the absence of a specific regulation or statute addressing the matter. Apex Mining v. Blankenship, id.; 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.

In Offutt, the Kentucky Court of Appeals applied a four-part test to determine whether a violation of KRS 338.031 had occurred. A violation of the 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. 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. Cabinet for Workforce Development v. Cummins, 950 S.W.2d at 836. *See also* Apex Mining v. Blankenship, id. In order for a violation of the general-duty provision to warrant enhancement pursuant to KRS 342.165(1), the employer must 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 (Ky. 2013).

As the claimant, Cardwell bore the burden to establish a safety penalty should be imposed against McLean County. Because he 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 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).

The ALJ was not convinced by the evidence that any action or inaction by McLean County rose to the level of an intentional violation. Lynn testified Blakely

was an experienced backhoe operator, and the accident occurred when he inadvertently left the control in his coat pocket. Cardwell did not depose Blakely to further establish his actions on the day of the accident, or the training he received from the John Deere representative.

Given the minimal proof submitted to establish a safety violation occurred, we find no error in the ALJ's decision. The testimony from Cardwell and Lynn sufficiently supports the ALJ's conclusion that McLean County did not intentionally disregard a safety hazard. Rather, he concluded the evidence before him established nothing more than inadvertent negligence by Blakely. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said his conclusions are so unreasonable as to compel a different result.

Cardwell references 29 CFR 1910.147 in its brief to the Board. Again, Cardwell did not allege McLean County violated a specific federal regulation in his arguments to the ALJ. Regardless, the provision is inapplicable. That regulation relates to control of energy, such as electricity, to a piece of machinery or equipment while it is being serviced or maintained, and the regulation states it does not apply to construction and agricultural equipment. Likewise, Cardwell references 29 CFR 1926.21(b)(2) which generally provides the employer shall instruct each employee in the recognition and avoidance of unsafe conditions. Again, it was Cardwell's burden to establish the employees did not receive adequate training. Lynn testified that the safety meetings included instruction on "watching out for each other, being aware of what you're doing on the machinery, being aware of your surroundings, what's going on out there." The safety meetings and the training by the John Deere representative

could satisfy the regulatory requirement of instruction in the recognition and avoidance of unsafe conditions, and Cardwell failed to establish the provided training was insufficient. The evidence does not compel a finding of a failure to train in violation of 29 CFR 1926.21(b)(2).

Accordingly, the June 29, 2018 Opinion, Award and Order and the July 31, 2018 Order rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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