Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 18, 2019

CLAIM NO. 201499315

ROBERT PETE NETHERLY PETITIONER

VS. **APPEAL FROM HON. JEFF V. LAYSON, ADMINISTRATIVE LAW JUDGE**

MORAN FOODS LLC
d/b/a SAVE A LOT LTD
and HON. JEFF V. LAYSON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART & REMANDING
* * * * * *

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

STIVERS, Member. Robert Pete Netherly ("Netherly") appeals from the August 24, 2018, Opinion, Award, and Order and the September 24, 2018, Order of Hon. Jeff V. Layson, Administrative Law Judge ("ALJ"). In the August 24, 2018, Opinion, Award, and Order, the ALJ awarded Netherly temporary total disability ("TTD") benefits and permanent total disability ("PTD") benefits reduced by 15% pursuant to KRS 342.165(1) and medical benefits.

On appeal, Netherly asserts the ALJ erred by finding KRS 342.165(1) applicable. In his first sub-argument, Netherly argues mere negligence is insufficient to apply KRS 342.165(1). In his second sub-argument, Netherly asserts substantial evidence does not support applicability of KRS 342.165(1).

The Form 101 alleges Netherly sustained the following work-related injuries on December 30, 2013, while in the employ of Moran Foods LLC D/B/A/ Save-A-Lot, LTD ("Save-A-Lot"): "Machinery malfunction of dock plate that fell onto Plaintiff causing crush injuries to twelve ribs, bruised lung, injury to sternum, both hands, blood clot of right leg, right shoulder, right hip, neck and back pain and short term memory loss."

Netherly was deposed on April 11, 2018. At his job with Save-A-Lot, there were 60 dock plates. The dock plates broke at a rate of two to three a day, "sometimes maybe every other day." He explained how a dock plate works:

> A: Okay. It sits up like in a vertical position, but it doesn't sit straight up, it leans back away from the doors. It's all – the ones we have now are all hydraulics. Until you push the button, you know, it's not going to move. It won't go – it won't come down. You – it's got safety devices on it. You have to raise the door – or you did have. They took all of those off when they installed new ones. But you push the button to lower it, push the button to raise it in a stored position.
>
> Q: Now, this button, was this on like a panel located –
>
> A: It was on a panel, electrical panel, beside the plate.
>
> Q: Okay. Just like on the wall?
>
> A: On the wall, yes, sir.
>
> Q: And you said hydraulics controlled it?

A: Yes, like –

Q: Is that like located under the plate or like attached to?

A: It's attached to the plate, like a little reservoir attached to the plate.

Earlier in the day on December 30, 2013, Netherly had worked on the hydraulic system of the dock plate that ultimately injured him. He was injured when he returned to the dock plate to replace a cylinder. He testified concerning the lock down procedure he was required to follow before working on the plate:

A: Yes, sir, there's – there was actually three steps: You had to disconnect the power, which it had a disconnect there, but I always went inside and disconnect [sic] the power. Then I would turn it off and I would put a lockout-tagout on it. There was a steel pin that went in front of the plate as a safety device. And there's also like a safety strut that goes in behind it. And all of those had to be in place before I ever go in behind them.

Q: So after you, you know, disconnected the power, put the lockout on it, put the steel pin in, put the safety strut in, you could go ahead and start working on it?

A: Yes, sir.

Q: Okay. Tell me about the safety strut. What exactly is that?

A: It's just like when the – when the plate is sitting, you know, vertical, it just sits in behind it, kind of helps to keep it from leaning forward.

Q: Okay. Is it just like a piece of metal that you stick in there?

A: Yes.

Q: Okay.

A: Yeah, it's what they supply with the plates. That's their safety strut. Well, it's a safety out-of – out-of-service strut too, let's the guys know that they're not allowed to use it.

Netherly testified concerning what occurred on the date of injury:

Q: All right. Going back to the day of the injury, you came to work and it was, you know, pretty much a normal day. You said you replaced the cylinder?

A: I earlier – earlier in the day, earlier that morning.

Q: Okay. And so after you replaced the cylinder, did you, you know, I guess lock everything out and then come back and perform that same process?

A: No, sir, everything stayed locked out. I never unlocked anything. Everything was still in lockout.

Q: So you went ahead – when you first started working on it, you know, you locked out the – was it the electrical panel?

A: No, sir, it was already locked out.

Q: Okay. And then you put the pin in in the front?

A: No, sir, all of that was still in there.

Q: Okay. And the safety strut was still in there?

A: Yes, sir.

Q: Now, was there like a certain place that you kept the pin and the safety strut, like in storage, before you used them?

A: They have – they have a place for them on the plate or on a little chain so you can't – you know, so you can't lose them, no one can't [sic] them. And they have a place to store it all there.

Q: Like on the –

A: On the plate itself.

Q: - on the plate itself?

A: Yes, sir.

Q: Okay. And so you replaced the cylinder earlier that day and you came back to work on it. You tell me everything you can remember at that point.

A: I check – I check to make sure everything was in place. Of course I always – I've always done that. I've worked on them for like 17 years and I've always done that before I ever go in behind one. And everything was still in place. And before I put the velocity fuse in, before I take the old one out, put the new one in, the new one has little blue caps and I was taking those out and that's the last I remember.

Q: So you hadn't take – had you already taken the old velocity fuse out?

A: Not to my knowledge I hadn't, no.

Q: What exactly does the velocity fuse do?

A: It works kind of like a check valve. When it receives too much pressure, like the plate's falling too fast, it locks itself up, won't let it come down.

Q: Okay.

A: And it won't let it raise either.

Q: Now, there was one of your co-workers with you at the time, correct?

A: Yes, sir.

Q: Who was that?

A: David Pelfrey.

Q: Was he like helping you with the maintenance or were you just talking to him?

A: He come [sic] over to – asked if I needed any- anything as far as cleanup.

> Q: So I guess both of you were standing behind the plate, and then as you were taking the caps off, that new velocity fuse had just started coming down?
>
> A: All I can remember is him telling me that it's falling, and he said I told him to jump and I don't – I don't remember telling him jump, but that's what he said he told me – or I told him to jump.

Netherly testified at the June 27, 2018, Hearing. Concerning what he remembered about following the required safety procedures, he testified:

> Q: Now, your employer contends that you violated a safety regulation and that you did not properly lock out the hydraulics on the plate, but do you – do you know anything about that?
>
> A: Well, I always – I always locked them out. I mean, like I said, I don't really remember what happened the day of the accident. Well – but I always – I always locked them out. I assumed that I would have locked it out. I mean, I've been working on the equipment for all of those years.
>
> Q: About some 20 years, right?
>
> A: Some – 20 some years and I never had an accident.
>
> ...
>
> A: (Interrupting) So, you know, I can only – I can only guess that I did lock it out, but I –
>
> Q: (Interrupting) Well –
>
> A: (Interrupting) – I can't – I can't come out and say I did. I don't – I don't really know.
>
> …
>
> Q: Okay. Would it be fair to say that if you – for some reason, did not lock out the plate like you were supposed to, you did not do that intentionally?
>
> A: Well, I don't know of anybody that would go in behind one of those plates weighing 2500-pound [sic] that didn't

have the safety devices in it. I mean, that – no, I wouldn't- I wouldn't do that intentionally. I wouldn't…

Regarding the safety procedure, he testified:

Q: Okay. Now, I just want to ask you a couple of questions about the – the safety issue, all right? So there is a locking pin and safety strut that needed to be placed in there, correct?

A: Well, the locking pain and safety strut before I ever worked on any of them was always placed in there.

Q: Okay. Because you placed it in there?

A: Yes, sir.

Q: It was your responsibility to put that in there?

A: Anyone – anyone that went in behind those plates to do anything, including the janitors or whatever, that had to be put in place before they could clean out. No one was supposed to go in behind there without that device being put in.

Q: Okay. And are you aware that there was [sic] a number of investigations after the accident about what happened and what caused it?

A: Well, I've heard all kinds of stuff, you know, that…

Q: Okay. If those investigations came to the conclusion that the safety strut locking pin had not been applied, do you have any reason to doubt those findings?

A: Like I said, I don't – I don't remember what happened. I do know that I always did it. I don't know why they wouldn't be there. But I do know that I always did it before I went it behind them.

Jon Brian Wilson was the distribution center manager at the time of Netherly's accident. He was questioned as part of the OSHA investigation about

Netherly's use of the lock-out/tag-out procedures prior to this accident. He testified as follows:

> Q: Okay. All right. In terms of Pete's use of the lock-out/tag-out procedures, did you have an opportunity during the years that you worked with him to observe him working in his job?
>
> A: Yes.
>
> Q: How often would he have been called upon to utilize the lock-out/tag-out procedures?
>
> A: More than likely on a daily basis.
>
> Q: Did you find him to be a very conscientious individual?
>
> A: Yes.
>
> Q: And during the times that you worked with him as the manager of that facility, are you aware of any similar accidents having occurred, or by accident I mean any time that – are you aware of him ever having failed to utilize the lock-out/tag-out procedures properly?
>
> A: No.

Netherly refused to sign the reprimand he was issued by Human Resources "for failure to perform all the necessary acts in lock-out/tag-out."

Several KY-OSHA documents pertaining to its investigation of the accident were filed in the record by both parties. The April 24, 2014, Citation and Notification of Penalty, Citation 01 Item 001, states, in relevant part, as follows:

> a. On 12-30-13, procedures were not utilized for the control of potentially hazardous energy when the Maintenance Manager was engaged in replacing the Velocity fuse on the #10 loading dock. The Maintenance Manager failed to lock out the loading dock, causing it to descend on himself and another employee causing both to be injured and sent to the hospital.

In the citation narrative, the following language is included:

> According to employee interviews, Robert P. Netherly follows the LOTO instructions in the operator's manual.
>
> …
>
> Employees stated that Robert P. Netherly had been seen locking out everything he was working on. Several employees stated that he was always safe in everything he did. The manager of the plant stated that he had observed Robert P. Netherly lock out all the different items that he had worked on.
>
> …
>
> Robert P. Netherly had been employed doing the same duties for many years. He was the only maintenance employee and he was the only employee that worked on equipment and performed LOTO.

In the attached "Appendix 1 - Incident/Accident Report" is the following language:

> It is our determination that this incident would have been completely prevented had Mr. Netherly followed the established manufacturer's safety guidelines for this equipment. While again, we have not been able to meet with Mr. Netherly for his version of the events, we have been unable to determine any reason why he could not have utilized any of the three safety devices.

Also attached is a portion of Save-A-Lot's "Lockout/Tagout Program" manual.

The June 13, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, TTD (overpayment/underpayment), and safety violation against employer and employee.

In the August 24, 2018, Opinion, Award, and Order, concerning the issue of Netherly's alleged safety violation, the ALJ set forth the following findings:

The Defendant/Employer argues that the Plaintiff's disability benefits should be decreased pursuant to KRS 342.165(1), which states in part:

> 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 KOSHA investigation reports states:

> It is our determination that this incident would have been completely prevented had Mr. Netherly followed the established manufacturer's safety guidelines for this equipment.

It is indisputable that Mr. Netherly was aware of those safety guidelines and the employer's lock-out/tag out policy. With the sole exception of the incident which happened on December 30 2013, he observed that policy without fail. He testified that it was his custom to follow the three-step procedure to safely secure the dock plate but he could not specifically remember doing so that day.

In *Barmet of Kentucky, Inc. v. Sallee,* 605 S.W.2d 29 (Ky. 1980), the Kentucky Supreme Court said that the standard set forth in KRS 342.165 is "intentional failure" which "applies both to employees and employers." The term "intention" means a "determination to act in certain way or to do a certain thing."

Whether the actor intended to do a particular act can be a matter of inference to be drawn from all the attendant circumstances. The Administrative Law Judge has the sole authority to judge all reasonable

> inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329 (Ky. 1997). In this case, Mr. Netherly was the only maintenance employee at the Save-A-Lot facility. The evidence indicates that Save-A-Lot had a detailed lock-out/tag out safety program which it required Mr. Netherly to follow without exception. Mr. Netherly was aware of the employer's lock-out/tag out program and routinely utilized the three-step safety procedures. The sole exception was on December 30, 2013, which led to the accident which injured Mr. Netherly.
>
> For whatever reason, Mr. Netherly failed to follow the safety procedures which he knew were required by his employer. The Administrative Law Judge finds that Mr. Netherly did violate K.RS 342.165 and that his weekly disability benefits should be reduced by 15%.

Netherly filed a petition for reconsideration setting forth the same arguments he now makes on appeal. In the September 24, 2018, Order, the ALJ set forth the following additional findings:

> This matter is before the Administrative law Judge upon a Petition for Reconsideration filed by the Plaintiff regarding the Opinion, Award and Order issued on August 24, 2018. The Plaintiff argues that it was error for the ALJ to reduce the Plaintiff's disability benefits by 15% pursuant to KRS 342.165(1) because the Plaintiff did not act within intent when he failed to use the proper lock-out/tag-out procedures which could have prevented the incident which led to the Plaintiff's injuries. The Defendant/Employer has filed a response.
>
> At the outset, the Administrative Law Judge states that this ruling in the Opinion and Award should in no way be interpreted as a finding that Mr. Netherly intentionally set out to injure himself. However, his actions or inactions regarding lock-out/tag-out procedures prior to the injury show a willful disregard for those procedures. As set forth in the Opinion, there is no question that Mr. Netherly was aware of the proper lock-out/tag-out procedures and that his employer required him to follow those procedures without fail. Moreover,

> he had properly utilized these procedures without incident on an almost daily basis.
>
> The specific lock-out/tag-out procedures applicable to the type of work on the loading dock which Mr. Netherly was performing at the time of the injury consisted of a three step process: 1) disconnecting the power from the dock plate; 2) installing a safety strut which secures the dock plate in the upright position, and; 3) installing a pin at the base of the dock plate which keeps it from descending all the way to the ground. According to the OSHA investigation, step 1 was done but steps 2 and 3 were not done.
>
> The safety devices required by steps 2 and 3 were to be installed on the dock plate itself. Their absence is something the was easily noticeable by anyone in the vicinity of the dock plates, especially anyone who was working on the dock plates. Given the fact that Mr. Netherly was very much aware of the requirement that these safety devices be properly put in place and, further, that he easily could have determined whether they were properly placed, the ALJ concluded that the failure to complete steps 2 and 3 rises above mere negligence and required at least some degree of volition on the part of Mr. Netherly.
>
> The Plaintiff's Petition for Reconsideration is overruled.

Netherly first asserts mere negligence on behalf of the employee is insufficient to apply KRS 342.165(1), directing us to the Board opinions in Terry v. AFG Industries, WCB Opinion No. 2000-94292 (January 2, 2003) and Judy Construction v. Shawn Smith, WCB Opinion No. 2015-59605 (August 18, 2017), affirmed by the Court of Appeals in Judy Construction v. Smith, No. 2017-CA-001462-WC, 2018 WL 3602945 (Ky. App. July 27, 2018) (Unpublished) in support of his position. We vacate the ALJ's imposition of the 15% reduction pursuant to KRS 342.165(1) and remand for additional findings.

The Board opinion of James T. Terry v. AFG, cited by Netherly in his appeal brief, provides the appropriate standard that must be met before a safety penalty can be assessed against an employee pursuant to KRS 342.165(1). In Terry, the ALJ imposed a 15% reduction of income benefits against Terry for intentionally failing to utilize certain safety devices in contravention of AFG's written safety policies and procedures. The Board's factual summary states, in part, as follows:

> Terry suffered a work-related injury on February 1, 2000. Prior to the accident, he and a co-worker, Danny Dozier, had already loaded several other trucks. Terry described the accident as follows:
>
> > A: Okay. We had loaded two crates nailed together and put it on the trailer. We was very busy that day. In fact, we had already loaded other trucks before that. It wasn't container trucks, but other trucks, and I still had my safety equipment on. Some jobs require safety equipment, some jobs don't. But where we was in a hurry, I just left mine on. It come break time, we took a five-minute break instead of taking our regular 15 minutes we was in such a rush, and when we went and grabbed the next two cases, we set them down on the truck. Being in a hurry, we didn't pay attention to what we had not done, and when we set them two cases down, it rocked the trailer to make the other two cases fall over on me.
>
> There is very little dispute with regard to the facts surrounding the incident. Apparently, because Terry and his co-worker were so rushed, they simply forgot to lock the bar in place necessary to stabilize the flatbed and the container. The wheels of the trailer holding the container had also not been stabilized, nor had the landing gear of the trailer been affixed and lowered to the ground. Terry stated that he recalled informing the driver of the truck to chalk the trailer's wheels and put down the landing gear. He then proceeded with other job activities and failed to

> check that the driver had followed his instructions or that the locking mechanism for the flatbed and container were engaged. Terry attributed these oversights to the fact that he and Dozier were "just pushing it as fast as we could to get it done to where we could go onto the next truck." When loading began, Terry admitted he did not check to verify that all safety procedures had been complied with regarding that particular container, or that all safety devices were in engaged. Consequently, when the overhead crane lowered the first crates, the load shifted, causing two crates of glass to fall, striking Terry on his left shoulder. Terry was inside the container, which was open at the top, at the time of the accident.
>
> When the container and flatbed collapsed, Terry stated he was struck on the left shoulder by approximately 10,000 pounds of weight and driven to the floor. As a result of the accident, Terry missed two weeks of work for which he received his regular salary. He then returned to his job on light duty and has continued to work for AFG.

In reversing the ALJ's determination that Terry intentionally violated AFG's safety procedures, the Board set forth the following legal analysis that is equally applicable to the case *sub judice*:

> With regard to that penalty, KRS 342.165(1) states, in relevant, part 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.
>
> Hence, before the 15% reduction in an injured worker's benefits may occur, the record must establish by means of substantial evidence that the injured worker either (1) intentionally failed to use a safety device or furnished by

the employer, or (2) intentionally failed to obey the safety orders of the employer or a safety regulation imposed by law. Regardless, the first element that must be established is the "intentional failure" by the employee.

What then constitutes "intentional failure" for purposes of the Act? We begin by noting that it must be more than simple negligence. Why? Because the fundamental premise of Kentucky's Workers' Compensation Act is that simple or inadvertent negligence is irrelevant with regard to that body of law. As a general rule, in their development, Workers' Compensation Acts nationwide have been no-fault. Moreover, specifically pertaining to Kentucky, time and again our courts of justice have noted that the purpose of workers' compensation is specifically without regard to negligence on the part of either the employer or the employee. See, Tyler-Couch Construction Co. v. Elmore, 264 S.W.2d 56 (1954); Harlan Collieries Co. v. Shell, 239 S.W.2d 923 (1951); Morrison v. Carbide & Carbon Chemicals Corp., 278 Ky. 746, 129 S.W.2d 547 (1939); and Grimes v. Goodlett and Adams, Ky., 345 S.W.2d 47 (1961). Consequently, in most instances, workers' compensation cases are adjudicated without any determination that a party is blameworthy.

Even so, the Act is not merely a general accident insurance policy. Historically, a few types of advertent actions by either an employer or an employee that occur within a work setting may give rise to or estop certain legal defenses, or influence the compensability of a claim in various degrees. In those instances, the *mens* of one or both of the parties becomes legally relevant and fault becomes an issue.

KRS 342.165(1) is the codification of one of those exceptions to the universal precept that fault has no bearing in workers' compensation. According to Professor Larson in his famed treatise, Larson's Workers' Compensation, under statutes such as KRS 342.165, an intentional violation of safety laws or regulations by either the employee or the employer is viewed as comparable to the commission of an intentional tort under common law. See, § 68. Whereas, in a lawsuit involving simple negligence, punitive damages are not recoverable, the recovery of such damages is permitted in actions alleging intentional tort. Warford v. Lexington

Herald-Leader Co., Ky., 789 S.W.2d 759 (1990). By correlation, therefore, the penalties mandated pursuant to KRS 342.165(1) are punitive in nature, and consequently require a level of conduct by a party equivalent to malfeasance, rather than misfeasance or nonfeasance. The state of mind of the party violating the safety regulation or policy at the time the accident occurs, and against whom the penalty is sought to be imposed, constitutes an essential finding to be made by the ALJ in such instances. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985).

What then is the level of *mens* necessary to trigger the exaction of penalties under KRS 342.165(1) against a party? In Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382 (1985), the Kentucky Supreme Court stated as follows with regard to the assessment of punitive damages:

> The instructions in an intentional tort case define this characteristic as misconduct of a character that is 'willful, malicious, and without justification,' with the understanding that '[m]alice may be implied from outrageous conduct, and need not be express so long as the conduct is sufficient to evidence conscious wrongdoing.' (Emphasis ours).

Id. at 389.

Specifically with regard to KRS 342.165(1), our courts have held that its application requires proof of two elements. Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996). 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. Barmet of Kentucky v. Sallee, Ky. App., 605 S.W.2d 29 (1980). In other words, the injury must be the result of conscious wrongdoing. The act causing the injury must be desired by the doer, and the consequences reasonably foreseeable. The violation must be advertent and rise to the level of at least reckless disregard [footnote omitted] or willful misconduct [footnote omitted]. See, Larson's Workers' Compensation, § 31. Only then, if the accident caused by the employee is attributable "in any degree" to his failure to use any safety appliance furnished by his employer, or his failure to obey any lawful and reasonable order or administrative regulation of the Commissioner or his employer for the safety of employees or the public, shall the compensation for which his employer is liable be decreased by 15% in the amount of each payment.**

(emphasis added.)

The requisite standard was reiterated by the Board in Judy Construction v. Shawn Smith, supra, and the Board was ultimately affirmed by the Court of Appeals.

In the September 24, 2018, Order in the case *sub judice*, the ALJ concluded Netherly's failure to complete steps two and three of the lock-out/tag-out procedure comprises a "willful disregard for those procedures" and "rises above mere negligence and required at least some degree of volition on the part of Mr. Netherly." However, in support of this conclusion, the ALJ, in the same order, stated the safety strut and pin required by steps two and three of the lock-out/tag-out procedure are *"***easily noticeable by anyone in the vicinity of the dock plates, especially anyone who was working on the dock plates.**" (emphasis added). Yet, the ALJ provided no

factual support for his conclusory statement of fact, and our review of the record reveals no testimony consistent with this assertion. On remand, the ALJ must set forth the evidence, if any such evidence exists, that supports his finding regarding the alleged conspicuousness of the safety strut and pin to anyone working on or in the vicinity of the dock plate. This is particularly important in light of Netherly's deposition testimony indicating he was certain he went through the complete lock-out/tag-out procedure on the morning of December 30, 2013, before working on the same dock plate, "everything stayed locked out" from that morning, and when he returned that afternoon "everything was still in place." This Board acknowledges the tenor of Netherly's testimony changed slightly at the hearing, as he testified he can only assume he did lock-out the dock plate but he does not remember. *Nonetheless, Netherly's hearing testimony is not tantamount to an admission by him that he observed the absence of the safety strut and pin the afternoon of December 30, 2013, and intentionally continued to work on the dock plate despite their absence.*

On remand, before the ALJ can reduce the award by 15%, he must cite specific evidence that establishes willful misconduct on behalf of Netherly or a reckless disregard of the consequences stemming from the alleged safety violation. See, Larson's Workers' Compensation, § 31. Simply concluding the absence of a safety strut and pin is "easily noticeable" without evidentiary support is insufficient to meet this standard. Additionally, the OSHA investigation indicating steps two and three were not carried out is insufficient, on its own, to elevate Netherly's conduct above mere negligence. *Rather, there must be evidence indicating Netherly was aware that steps two and three of the lock-out/tag-out procedure were not in place the afternoon of December 30, 2013,*

and he worked on the dock plate with a reckless disregard of the consequences. If the ALJ is not able to find this evidence in the record, he cannot reduce the award by 15% pursuant to KRS 342.165(1).

Accordingly, the findings of fact and conclusions of law concerning Netherly's violation of KRS 342.165(1) and the reduction of his award of TTD and PTD benefits by 15% pursuant to KRS 342.165(1) contained in the August 24, 2018, Opinion, Award, and Order and the September 24, 2018, Order are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings on this issue consistent with the views set forth herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY AND FILES A SEPARATE OPINION.

RECHTER, Member. Because I do not believe there is evidence in the record to support a finding Netherly intentionally violated a known safety regulation, I would reverse the ALJ's application of the safety penalty. Even when viewed in the light most favorable to Save-A-Lot, there is insufficient proof to establish conscious wrongdoing or reckless disregard on Netherly's part. The ALJ relied on the fact that the safety panel is visible to anyone in the vicinity of the dock plates. He also cited Netherly's long history of following the proper safety protocol. These facts are not probative of Netherly's mindset at the time of the accident. Rather, these circumstances establish only that he was aware of the proper safety protocol, a fact which Netherly acknowledged. Save-A-Lot has pointed to no other circumstantial evidence tending to prove Netherly knowingly, recklessly or willfully disregarded the lock-out, tag-out

protocol. What remains, then, is Netherly's testimony. He testified it was his long-standing habit to follow the known safety procedures, though he could not specifically recall whether he followed the procedure immediately before the accident. This testimony establishes, at best, negligence, which is insufficient to support the imposition of a penalty pursuant to KRS 342.165(1). Therefore, I would reverse the ALJ's conclusions regarding the safety penalty.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON JAMES J VARELLAS LMS
249 W SHORT ST STE 201
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON JO ALICE VAN NAGELL LMS
HON BRIAN W DAVIDSON LMS
300 E MAIN ST STE 400
LEXINGTON KY 40507

ADMINISTRATIVE LAW JUDGE:

HON JEFF V LAYSON LMS
657 CHAMBERLIN AVE
FRANKFORT KY 40601