

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002237-WC

LOPKE QUARRY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 01-WC-088695

RICHARD L. CLARK,
HONORABLE J. KEVIN KING,
ADMINISTRATIVE LAW JUDGE, and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, and PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Lopke Quarry petitions for review of an opinion by the Workers' Compensation Board (Board) affirming an award by an administrative law judge (ALJ) of benefits to Richard L. Clark based on a permanent partial disability in connection with an injury to his right knee. The ALJ increased the benefits to which Clark would otherwise have been entitled

by 30% in accordance with KRS¹ 342.165(1) after finding that Lopke Quarry had intentionally failed to comply with safety regulations. The sole issue on appeal is whether the ALJ erred in increasing the benefits in accordance with the statute. We affirm.

On April 27, 2001, Clark suffered a significant injury to his right knee when a split-rim tire wheel exploded while he was attempting to inflate a truck tire. The injury occurred during his course of employment with Lopke. The injury required surgery, and Clark returned to work on July 2, 2001.

Following Clark's injury, the U.S. Department of Labor, Mine Safety and Health Administration, conducted an investigation of the incident. As a result of the investigation, Lopke was issued three citations for violations of federal safety regulations. Lopke was cited because a standoff inflation device for the tire was not used, because Clark had not received training in the use of such a device, and because the rims were in poor condition.

Clark filed a claim for benefits and testified that he did not use the standoff device when attempting to inflate the tire and that he had not received any training concerning the proper procedure. He also testified that a week or two following the accident, Lopke had a tire company come to the

¹ Kentucky Revised Statutes.

business and train the employees as to the proper manner of inflating tires.

Richard Voyles, testified on behalf of Lopke. Voyles testified that he was the operations manager but that he was not employed at Lopke on the date Clark was injured. He further testified that Lopke had standoff devices on site and that "we assumed that they were being used." Voyles also testified that Lopke was challenging the citations issued against it by the Mine Safety and Health Administration.

The ALJ awarded Clark benefits based on a permanent disability rating of 6.8%. However, the ALJ further ordered that the benefits be enhanced by 30% pursuant to KRS 342.165(1).

The statute states in relevant 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.

KRS 342.165(1).

In his opinion, the ALJ addressed the three citations issued to Lopke by the Mine Safety and Health Administration. Concerning the use of defective rims, Voyles testified that a third party had mounted the tires and that Lopke did not have

the ability to determine if the rims were defective. The ALJ found Voyles' testimony credible in this regard and determined that Clark would not be entitled to enhanced benefits based on an alleged violation due to defective rims. However, the ALJ determined that Clark was entitled to enhanced benefits based on the other two alleged safety violations.

Concerning whether Clark had received training as to inflating tires, the ALJ found Clark's testimony more credible than that of Voyles. The ALJ noted that Voyles was not employed at Lopke at the time of Clark's injury and had "no actual knowledge of pre-injury training activities." The ALJ also noted an inconsistency in Voyles' testimony. Voyles testified that the Mine Safety and Health Administration annually conducted safety and training sessions for Lopke employees. However, the Mine Safety and Health Administration issued the citation to Lopke for failing to train Clark as to the proper procedure for inflating tires. The ALJ stated that Voyles' testimony that the agency trained the employees concerning the proper procedure for inflating tires, but that it nonetheless issued Lopke a citation for not training Clark, is "somewhat inconsistent."

The ALJ also addressed the citation that Lopke violated a safety regulation by failing to use the standoff device. As we have noted, Voyles stated that standoff devices

were available and that Lopke assumed the employees used them. The ALJ determined that "assuming an employee is using a safety device is not sufficient to insulate Lopke from the enhanced liability of KRS 342.165." The ALJ also stated that "Lopke has an obligation to take some steps to ensure that safety devices are actually being used." Following an award of enhanced benefits to Clark based on the two violations of safety regulations, Lopke appealed to the Board.

Citing Lexington-Fayette Urban City Gov. v. Offutt, Ky. App., 11 S.W.3d 598 (2000), the Board stated that the record must contain substantial evidence to support an inference by the ALJ that Lopke intentionally violated a specific safety statute or administrative regulation. Further, citing Apex Mining v. Blankenship, Ky., 918 S.W.2d 225 (1996), the Board noted that the application of KRS 342.165(1) requires proof of the existence of a violation of a specific safety provision and evidence of an intent to violate the provision.

There was no question that the standoff device was not used as required by the regulation. As to whether Clark had received the required training, he testified that he did not. The Board determined that the ALJ's findings concerning safety violations were supported by substantial evidence. We agree. The issues involved the credibility of witnesses, and "the ALJ, as fact-finder, has the sole authority to judge the weight,

credibility and inferences to be drawn from the record." Miller v. East Ky. Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329, 331 (1997).

The sole issue raised by Lopke in its petition is whether the Board erred in affirming the ALJ's determination that Lopke's violation of the safety regulations was intentional. We must determine whether the ALJ's findings in this regard were supported by substantial evidence. See Barmet of Kentucky, Inc. v. Sallee, Ky. App., 605 S.W.2d 29, 32 (1980). We conclude they were.

Regarding the issue of intent, the Board concluded as follows:

We also find substantial evidence sufficient to support the ALJ's conclusions regarding intent under the second prong of the test. This element centers on what constitutes "intentional" for purposes of KRS 342.165(1). While we agree with the petitioner there was no intent on behalf of Lopke to purposely injure Clark, and there is no direct evidence Lopke deliberately set out to violate any specific safety provisions, we do not believe these are the only criteria sufficient to trigger sanctions under KRS 342.165(1). Rather, we interpret the standard to be somewhat less rigid.

Intent for purposes of KRS 342.165(1) is directed towards the failure by an employer to follow the specific safety statute or regulation. A violation is intentional when a potential hazard either is or should have been reasonable foreseeable, yet ignored or willfully

overlooked by an employer or an agent of an employer, in the normal course of business in order to achieve some end desired by the employer or its agent, and this foresight and desire results in the violation producing injury to an employee through the operation of the will of the employer or its agent. In this way it is comparable to an "intentional act." [Footnote omitted.] Consequently, we believe an intentional violation may be generally implied from the facts of the individual case.

It is not enough that an accident merely happens, or that it results from a malfunction of some equipment. The nature of the intentional act and violation on the part of the employer must be egregious. There must be some degree of pre-existing knowledge on the part of the employer, unless the circumstances of the danger are so readily obvious as to lead to an inference of pre-existing knowledge. Moreover, where the situation involves the failure on the part of the employer to utilize a legally required safety device, the more obvious the need for and lack of use of the safety device, the less proof that is necessary to prove intent.

In the case at bar, unlike the circumstances in which someone unknown has modified a safety appliance on a piece of machinery, the fact that a standoff device was not used on April 27, 2001 at the time of the explosion is open and obvious. Although Voyles claimed such devices were readily available for use at Lopke's job cite at the time of Clark's 2001 injury, those allegations are not borne out by the MSHA investigation. The report of that investigation nowhere mentions such a device present and available at Clark's work location. Consequently, we believe the obvious nature of this situation, coupled with the Clark's own testimony, provides for a reasonable inference on the part of the

ALJ that there was an intentional failure on the part of Lopke. Jackson vs. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

Concerning the three alleged safety violations, Lopke correctly notes in its brief that the ALJ determined that the alleged violation concerning the poor rim condition was decided by the ALJ in Lopke's favor. We agree with Lopke that the Board did not need to address this alleged violation. Lopke further correctly notes in its brief that the Board did not address the ALJ's determination that Lopke violated a safety regulation by failing to properly train Clark. As is noted in the portion of the Board's opinion above, the Board did address the safety violation for failing to use the standoff device. Lopke argues that the standoff devices were present and that it assumed they were being used by employees such as Clark.

Clark testified that his supervisor directed him to change the tire and was on site with him when he was injured. He further testified that he was not directed to use the standoff device and had never received any training in this regard. We agree with the ALJ that any assumption Lopke had that employees were using standoff devices was not sufficient to insulate them from enhanced liability under the statute. We agree with the ALJ that Lopke had an obligation to ensure that the devices were actually being used. As Clark had not been trained on the proper procedure for inflating a tire and as his

on-site supervisor directed him to inflate the tire but yet did not direct him to use the standoff device, we conclude there was substantial evidence to support the conclusion that Lopke intentionally failed to comply with safety regulations and thus was subject to paying enhanced benefits pursuant to the statute.

The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
RICHARD L. CLARK:

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