

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001501-WC

RICHARD PENROD

APPELLANT

PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
v. ACTION NO. WC-02-90766

PRIDE JOHNSON HEATING, COOLING AND  
ELECTRIC; HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>  
McANULTY, JUDGE: Although Richard Penrod (Penrod) was injured in  
an accident while driving his work truck to his next service  
call as a heating and air conditioning service technician, an  
Administrative Law Judge (ALJ) determined that his voluntary  
intoxication was the "proximate cause" of the accident. Thus,

---

<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KRS 342.610(3) barred recovery of workers' compensation benefits. The Workers' Compensation Board (Board) unanimously affirmed, but Penrod continues to maintain that the ALJ made an impermissible inference from the opinion of Pride Johnson Heating, Cooling and Electric's (Pride Johnson) toxicology expert. Because the ALJ's conclusions as to intoxication and causation are questions of fact properly decided by the ALJ and the ALJ's findings were not unreasonable under the evidence, we affirm.

The accident occurred on March 27, 2002. On that day, Penrod reported to work in the morning then left the shop to make his service calls. At some point in the morning, he took a Lortab 5, which had been prescribed by his doctor for lower back pain. At about 10:00 a.m., he had one beer from a cooler which he kept in the toolbox on his work truck.

At a little after 11:00 a.m., he was driving his work truck, and he reached down to grab a pack of cigarettes. While reaching for the cigarettes, he allowed the tires of his truck to glide off the road. Penrod could not get the tires turned to get back on the road. While off the road, Penrod's vehicle hit a road sign. After hitting the sign, Penrod dove for the floorboard of the truck to prepare for the collision, which he believed was imminent at that point.

The vehicle continued driving off the road until it hit a 15-foot culvert. This caused the truck to overturn and eventually come to rest on the opposite side of the road. Penrod sustained injuries as a result of the accident. Penrod was not wearing a seatbelt.

Police and emergency personnel arrived on the scene. The state trooper responding was Mark Combs (Trooper Combs). Trooper Combs detected a strong smell of alcohol coming from Penrod. And Penrod admitted to drinking one beer to the officer. Penrod refused a breathalyzer test at the scene; however the hospital drew a blood sample about two hours and twenty minutes after the accident occurred. After investigating the accident, Trooper Combs issued a citation charging Penrod with driving under the influence, second offense. Penrod later pled guilty to that charge.

Tony R. Bethel (Bethel) and Barry Groves (Groves) were the paramedics that treated Penrod at the accident site and transported him to Muhlenburg Community Hospital. During the transport, Bethel drove and Groves stayed in the back with Penrod.

Groves prepared the accident report. He noted that Penrod had no loss of consciousness, and that he was alert and oriented. He also recorded that Penrod had a strong smell of

alcohol and that he was uncooperative. Penrod informed Groves that he had a beer for breakfast.

Bethel also recalled that Penrod was uncooperative when the emergency medical technicians were trying to treat him. This action is consistent with an intoxicated person. But it is also consistent with a person who has a head injury. Neither paramedic could say whether Penrod's actions were attributable to alcohol and drug consumption or a head injury.

Penrod filed a workers' compensation claim. Pride Johnson denied compensability of the claim on the grounds that the accident was caused by Penrod's voluntary intoxication.

In order to refute Pride Johnson's voluntary intoxication defense, Penrod introduced the report of Dr. Thomas H. Kelly, a Ph.D. in experimental psychology/behavioral pharmacology, who worked for the University of Kentucky College of Medicine. Penrod's attorney asked Dr. Kelly to provide an opinion as to whether or not Penrod would have been intoxicated or impaired by alcohol use to the extent that such intoxication or impairment was the proximate cause of the accident.

Dr. Kelly obtained the analysis of the blood sample taken at the hospital, which was 8 mg per deciliter of alcohol. He considered Penrod's weight and health, the time of the accident, the time the hospital took the sample, and Penrod's reported heavy alcohol use (six or more beers a day). Assuming

that Penrod consumed one beer at 10:00 a.m. as Penrod consistently reported, Dr. Kelly concluded that Penrod's blood alcohol at the time of the accident would have been in the range at which he tested two hours and twenty minutes later.

As to Penrod's impairment, Dr. Kelly noted that individuals who are regular alcohol consumers, like Penrod, develop a tolerance to the performance-impairing effects of alcohol. Thus, it was unlikely that Penrod's performance would have been adversely affected by his alcohol consumption. But, Dr. Kelly did not mention in his report Penrod's ingestion of one Lortab 5 earlier that morning. Dr. Kelly's conclusion was that alcohol was not the proximate cause of the accident.

After Penrod submitted Dr. Kelly's report, Pride Johnson submitted the report of Dr. Saeed A. Jortani, Ph.D., DABCC, of the Forensic Toxicology Program at the University of Louisville Health Sciences Center. Dr. Jortani estimated that Penrod's blood alcohol concentration was 42 mg/dl to 58 mg/dl at the time of the accident. Dr. Jortani cited one article showing that volunteers participating in a commercial merchant ship handling study exhibited significant performance impairment at alcohol levels between 40 to 50 mg/dl.

Dr. Jortani further considered the effects of the Lortab 5 that Penrod admitted taking prior to drinking the beer. He explained that Lortab 5 contains hydrocodone. Hydrocodone is

a narcotic, and it would potentiate alcohol's depressant and impairing effects.

Dr. Jortani opined -- with reasonable scientific probability -- that "by drinking alcohol voluntarily prior to operating his employer's vehicle the morning of 3/27/2002, Mr. Penrod had increased the probability of impairing his senses, attention and vigilance which were required for safe driving."

The ALJ determined that Penrod suffered a work-related injury. The ALJ's analysis did not end there, however, because he further concluded that the provision of KRS 342.610(3) barred Penrod's claim for workers' compensation benefits. The ALJ found that -- based on the expert and lay testimony as well as Penrod's guilty plea -- Pride Johnson met its burden of proving that Penrod was voluntarily intoxicated and his voluntary intoxication was the primary cause of his injuries.

Penrod filed a petition for reconsideration, which the ALJ denied. So Penrod filed an appeal before the Board. In his appeal, he argued that the ALJ erred as a matter of law in finding that he was intoxicated at the time of the work-related accident. In support, Penrod pointed to Dr. Kelly's report and characterized it as uncontroverted scientific medical testimony. Alternatively, Penrod argued that even if there was substantial evidence to conclude Penrod was intoxicated, there was no

evidence to support the ALJ's finding that Penrod's intoxication was the proximate cause of the accident.

The Board adopted the ALJ's factual findings and affirmed the ALJ's decision. Penrod filed this petition for review of the Board's decision.

Penrod argues in his petition that the Board erred in concluding that there was sufficient evidence to support the ALJ's finding that Penrod's voluntary intoxication proximately caused the accident. Penrod contends that Dr. Jortani's opinion does not meet the standard for competent evidence. In particular, it does not establish that Penrod's consumption of alcohol and/or taking of prescription medication impaired him to the point that he was intoxicated and that the primary cause of the accident was his intoxication. In addition, Penrod asserts that there is no other evidence in the record that establishes that Penrod was impaired due to intoxication. Finally, Penrod argues that the blood alcohol evidence clearly established that Penrod was not impaired and did not come close to meeting the legal definition of intoxication that is utilized in criminal prosecutions.

This Court's function of reviewing the Board's affirmance is to correct the Board only where we perceive that the "Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so

flagrant as to cause gross injustice." Western Baptist Hosp. V. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). And, in cases such as this one, "[w]hen the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.610(1) holds an employer liable for compensation for a work-related injury without regard to fault. But KRS 342.610(3) relieves the employer from liability if a worker's injury is "proximately caused primarily by voluntary intoxication as defined in KRS 501.010[.]" Voluntary intoxication is an affirmative defense that the employer must both plead and prove.

KRS 501.010(4) defines voluntary intoxication as follows:

[I]ntoxication caused by substances which the defendant knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such duress as would afford a defense to a charge of crime.

Intoxication "means a disturbance of mental or physical capacities resulting from the introduction of substances into the body." KRS 501.010(2).



In this case, the ALJ determined that Penrod was intoxicated. In so doing, he considered the circumstances of the accident, the lay testimony and the expert testimony. Penrod's expert, Dr. Kelly, did not believe that Penrod's operation of the work truck was affected by his consumption of alcohol, however, Dr. Kelly did not consider the effect of Penrod's use of alcohol after taking a Lortab 5. And Dr. Jortani did consider that effect.

The ALJ's findings of intoxication and causation were issues of fact. The ALJ had the sole authority to judge the weight to be afforded the conflicting reports of the two toxicology experts in light of Penrod's testimony as to how the accident occurred and the officer's and paramedic's testimony as to Penrod's behavior at the scene. See McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974). The ALJ did not believe Penrod's account of the accident and placed greater weight on Dr. Jortani's report and the lay opinions. The Board affirmed the ALJ. And we perceive no error in the Board's assessment of the case. Thus, we must affirm the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy J. Wilson  
Wilson, Polites & McQueen  
Lexington, Kentucky

BRIEF FOR APPELLEES:

Ronald M. Sullivan  
Sullivan, Mountjoy, Stainback  
& Miller, P.S.C.  
Owensboro, Kentucky