

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000364-WC

SAMUEL L. HOWARD, DECEASED;
MONICA B. HOWARD, WIDOW

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-82780

HARLAN RETREADING COMPANY, INC.;
DONALD G. SMITH, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

EMBERTON, CHIEF JUDGE: Samuel L. Howard was killed as a result of a gun shot wound to the abdomen. His widow and child sought workers' compensation benefits alleging that Samuel's fatal wound was accidentally inflicted during the scope of his employment. The Workers' Compensation Board found that Howard was not performing work-related duties at the time of the shooting and reversed the ALJ's award of benefits.

Samuel, who had a history of mental depression, was the manager of Harlan Retreading which was owned by his mother and

father. On April 14, 1999, after he failed to appear at work for Harlan Retreading, he was discovered fatally shot in a barn on his property but rented by Harlan Retreading to store tires and equipment. Much of the medical and lay testimony concerned Samuel's mental status on the day of the shooting and whether his gunshot wound was self-inflicted or accidental. As anticipated, much of the testimony concerning the issue is conflicting. However, as found by the Board, a threshold issue is whether the evidence supports a finding that Samuel was engaged in a work-related activity at the time of the shooting. We agree with the Board that the facts relevant to this issue are largely uncontradicted and are correctly summarized by the Board as follows:

The barn was on the property of Sam Howard. Harlan paid rent to use this building for the storage of mining tires and state police tires. Additionally, there were some state police snow tires that were apparently in the loft area. It is uncontradicted that periodically and as frequently as once a week an inventory of the state police tires would be conducted. It is uncontradicted that the state police tires were kept in a separately locked area within the barn. It is uncontradicted that this was on the first level of the barn and not in the loft. It is uncontradicted that this area remained locked. It is uncontradicted that Sam Howard's set of keys were in the lock on the outside of the barn. There is no evidence that either of the locked areas, one containing the state police tires, the other containing the large mining tires, had been or were opened on that morning. There is no evidence that in April of 1999 there was any call for snow tires. The only evidence of Sam Howard's purpose in entering the barn that morning comes from Monica Howard, as relayed by her in her testimony and as also told by her to the state police investigator and her father-in-law, that Sam Howard had

said he was going to check on a weedeater which was stored in the loft. The purpose of checking on the weedeater was a conversation in which the Howards' engaged on the preceding evening and in the early morning hours of April 14, 1999, that at the end of the day they would all participate in yard work. The evidence is that the location of the snow tires in the loft was not in the same location as were either the gun or the ladder were found. The evidence is that the ladder, which had fallen, was discovered near the body of Sam Howard while the gun was more than 11 feet away. No writings were discovered indicating Sam Howard had or intended to conduct an inventory of the state police tires or any other tires within the barn. Simply put, the evidence provides only one direct independent reason for Sam Howard entering the barn on the morning of April 14, 1999.

When death occurs on the employer's premises, the employee must still establish a degree of work-related activity.¹ We agree with the Board that there is no substantial evidence to support the ALJ's finding that the gunshot wound arose out of and in the course of Samuel's employment.² The uncontradicted evidence establishes that he entered the barn for the purpose of retrieving a weedeater for use other than related to his employment. Precisely how this tragedy occurred is of no relevance to this proceeding.

The opinion and order of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Otis Doan, Jr.
Harlan, Kentucky

BRIEF FOR APPELLEE HARLAN
RETREADING COMPANY, INC.:

J. Gregory Allen
RILEY & ALLEN, P.S.C.
Prestonsburg, Kentucky

¹ Stapleton v. Fork Junction Coal Co., Ky., 247 S.W.2d 372 (1952).

² Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).