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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000081-WC

KEVIN CARDWELL APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-63653

MCLEAN COUNTY FISCAL COURT;
HON. R. ROLAND CASE, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Kevin Cardwell appeals from an opinion of the Workers' Compensation Board (hereinafter referred to as the Board) which affirmed the opinion of the administrative law judge (hereinafter referred to as the

ALJ). The only issue on appeal is the holding of the ALJ and Board that Cardwell was not entitled to the safety penalty enhanced benefits found in Kentucky Revised Statute (KRS) 342.165. We find no error and affirm.

Cardwell was employed by the McLean County Road Department as a laborer. On October 27, 2015, Cardwell and his co-workers were installing a drainage pipe. The team was using a backhoe for the project. Cardwell was securing bands between the pipes while standing at the bottom of a ditch. The pipes were being supported by the backhoe. The operator of the backhoe, Richie Blakely, repositioned himself inside the cab of the backhoe. When he moved, the sleeve of his coat got caught on the controls of the backhoe. This caused the backhoe to drop the pipes onto Cardwell. Both of Cardwell's legs were broken, and he suffered significant injuries to his hips and knees.

Cardwell sought enhanced workers' compensation benefits pursuant to KRS 342.165(1). KRS 342.165(1) states in relevant 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.

Cardwell argued that he was injured due to the failure to use a lockout button located inside the cab of the backhoe. If this button had been pushed, the backhoe cannot be moved. He claims this safety feature would have prevented his injury.

Before the ALJ, Cardwell argued that the failure to use the lockout button, and the failure of the McLean County Road Department to generally hold safety meetings, was a violation of KRS 338.031(1). KRS 338.031(1) states:

> (1) Each employer:
> (a) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
> (b) Shall comply with occupational safety and health standards promulgated under this chapter.

This is referred to as the general duty provision and can lead to safety penalty enhanced benefits.

The ALJ found that what happened to Cardwell was a terrible accident, but was not caused by the intentional failure to follow the general duty provision. The ALJ held that this was, at most, inadvertent negligence because Mr. Blakely was an experienced backhoe operator and did not intend to injure Cardwell. The ALJ found no evidence of intent on the part of the employer.

Cardwell then appealed this decision to the Board. Before the Board, Cardwell again argued that he was due safety penalty enhanced benefits because of the violation of the general duty provision. This time, however, he also argued that

his employer violated two Occupational Safety and Health Administration (OSHA) regulations, 29 CFR[1] 1910.147(c) and 29 CFR 1926.21(b)(2). The Board affirmed the ALJ's decision as to the general duty provision. The Board also held that Cardwell did not raise the specific regulations before the ALJ; therefore, that argument was not preserved. Alternatively, the Board held that the McLean County Road Department did not violate the two regulations. This appeal followed.

"The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives 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).

> KRS 342.285 designates the ALJ as the finder of fact. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985), explains that the fact-finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986), explains that a finding that favors the party with the burden of proof may not be disturbed if it is supported by substantial evidence and, therefore, is reasonable.

AK Steel Corp. v. Adkins, 253 S.W.3d 59, 64 (Ky. 2008). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce

[1] Code of Federal Regulations.

conviction in the minds of reasonable men." *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

> The claimant bears the burden of proof and risk of persuasion before the [ALJ]. If he succeeds in his burden and an adverse party appeals to the [Board], the question before the [Board] is whether the decision of the [ALJ] is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the [ALJ], and he himself appeals to the [Board], the question before the [Board] is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky. App. 1984).

Cardwell's first argument on appeal is that his employer's violation of the two OSHA regulations entitles him to the safety penalty enhanced benefits. We agree with the Board that this issue was not presented to the ALJ; therefore, it is not preserved. The "failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review, or as an initial matter on discretionary review to this Court." *Urella v. Kentucky Bd. of Med. Licensure*, 939 S.W.2d 869, 873 (Ky. 1997) (citations omitted). Because the ALJ is the ultimate finder of fact in workers' compensation cases, every argument must be presented at that time. Since this argument was not raised before the ALJ, it is not preserved for our review.

Cardwell also argues that the Board erred in holding that there was no violation of the general duty provision. There are four factors to consider when

determining if the general duty provision has been violated. The four factors are: "(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." *Lexington-Fayette Urban Cty. Gov't v. Offutt*, 11 S.W.3d 598, 599 (Ky. App. 2000).

> A violation of [the general duty provision] can satisfy the requirement in the weekly benefit enhancement provided in KRS 342.165 that a "specific statute" was intentionally ignored. Not all violations of KRS 338.031(1)(a) automatically rise to a violation egregious enough to justify granting an enhancement under KRS 342.165. Although some of our opinions have found the employer's egregious behavior to trigger enhancement, "KRS 342.165(1) does not require an employer's conduct to be egregious or malicious." In order for a violation of the general-duty provision to warrant enhancement under KRS 342.165(1), the employer must be found to 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 Mem'l Hosp., 411 S.W.3d 220, 226 (Ky. 2013)(footnotes omitted).

We believe that the four factors are met in this case. The inadvertent movement of a backhoe can present a hazard to employees. Also, the threat is recognized by the industry because the backhoe has a lockout button and the backhoe instruction manual, which was introduced into evidence, contained a

section on the lockout safety feature. In addition, the unintentional movement of the backhoe did cause severe injury in this case. Finally, the lockout button was a feasible means to reduce the hazard.

While the violation of a safety statute can imply intent, *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 758 (Ky. 2011), not all violations of the general duty provision warrant a safety penalty benefit enhancement. *Hornback*, *supra*. The ALJ, as fact-finder, weighed the evidence and found a lack of intent. We agree. Here, testimony produced before the ALJ indicated that Mr. Blakely was an experienced backhoe operator who had been instructed on the use of this particular backhoe when it was purchased by McLean County. In addition, Cardwell's supervisor, David Lynn, testified that the road department has safety meetings two or three times a year, although the lockout feature of the backhoe has not been discussed since the acquisition of the machine. The Board and ALJ's decisions were based on substantial evidence and the evidence in Cardwell's favor is not so overwhelming as to compel a finding in his favor.

Based on the foregoing, we affirm the judgment of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Daniel Caslin
Owensboro, Kentucky

BRIEF FOR APPELLEE MCLEAN COUNTY FISCAL COURT:

J. Christopher Hopgood
Henderson, Kentucky