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NOT TO BE PUBLISHED OPINION

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RENDERED: September 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0761-WC **DATE** 10-9-03 *EIA Grant, DC*

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

APPELLANTS

APPEAL FROM COURT OF APPEALS

2002-CA-0364-WC

V.

WORKERS' COMPENSATION BOARD NO. 99-82780

HARLAN RETREADING CO., INC.; HON. DONALD
G. SMITH, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that Samuel L. Howard sustained a work-related gunshot wound that resulted in his death and awarded death benefits to his widow for herself and their minor son. In a decision that was later affirmed by the Court of Appeals, the Workers' Compensation Board (Board) determined that the award must be reversed because there was no substantial evidence that Howard's death was work related. We affirm.

Howard was the manager of Harlan Retreading Co., which was owned by his parents. On April 14, 1999, he died as the result of a self-inflicted gunshot wound to the abdomen. The incident occurred in a barn that was located on Howard's property but that was leased by the business for the storage of certain types of tires. Howard had a lengthy history of treatment for psychological problems and had been

hospitalized several times due to bipolar disorder. There was evidence that on more than one occasion, he had seriously considered harming himself or others.

Howard's widow maintained that while he was in the barn to check inventory and to check on a weedeater, he fell from a ladder and accidentally shot himself. Whereas, the employer asserted that his sole purpose for being in the barn was to check on the weedeater and that he committed suicide. The parties presented extensive testimony with respect to the circumstances surrounding Howard's death.

Dr. Stoltzfus, prescribed various medications and saw Howard regularly. He stated that in December of 1998, Howard had informed him of his decision to stop taking Lithium, indicating that he felt good and did not think that he needed it. Dr. Stoltzfus then prescribed various other psychotropic medications. Although Howard had some problems in March, 1969, Dr. Stoltzfus did not see signs of a significant depression.

Howard's widow testified that on the evening before his death, she and Howard had helped their son with a homework assignment and had discussed future plans, including a trip with the Harlan Boys' Choir of which their son was a member. Howard had suggested that they do some yard work on the following day after work and indicated that he would check on a weedeater that was in the barn. She testified that Howard did not seem to be depressed or irritable on either the preceding evening or the morning of his death. They had no financial difficulties, were not having marital problems, and there was no indication that he was considering harming himself. She testified that her husband regularly brought money home from the store at night for safekeeping and usually carried a gun in his truck to ensure his safety in transporting it.

He went to the barn periodically and frequently took a gun with him because there were groundhogs and snakes.

Ms. Howard testified that the morning of April 14, 1999, began normally. She went to work at about 7:30 and, as usual, called her husband at work somewhere between 10:30 and 11:15 a.m., shortly before lunch. Her husband usually began working at 8:00, so when she was told that he had not arrived for work, she went home. She noticed her husband's pick-up truck near the barn. It was unlocked, and the bank bag with the money was in plain sight on the seat. Furthermore, the door to the barn was slightly ajar, and keys were hanging from the padlock. She walked up to the barn and yelled for her husband but received no response. Apprehensive, she went to the house, called her father-in-law, and asked him to come and help. When he arrived, he went into the barn and discovered Howard's body, dressed in his work clothes. Ms. Howard testified to her belief that her husband would not harm himself and certainly would not do so where she or their son would be likely to discover him.

Howard's father testified that the business rented the barn from his son to store tires and equipment that were no longer used. Other items were stored there, including aluminum cans that were saved for recycling and lawn equipment. The barn was primarily used to store mining tires, which were very large, and special tires for the state police. The state police tires were kept in a locked room and were inventoried as frequently as once a week. Snow tires were stored in the loft together with some old equipment, including a weed eater.

The father testified that he had been around his son for several hours on the preceding day and noticed nothing unusual. Although he knew of his son's prior mental problems and hospitalizations, he was not aware that he had ever considered or

threatened suicide. As far as he knew, his son continued to take Lithium. He testified that although his son usually arrived at work around 8:00 a.m., he was not there on the morning of April 14. He indicated that when he entered the barn, he found his son lying on the floor with some knocked over tables around him. He also stated that there was a ladder nearby and that some cans were knocked over. He immediately asked his daughter-in-law to call for an ambulance and the state police. He did not see a gun. He testified that Howard's brother arrived and moved the ladder outside the barn, apparently thinking that it was in the way.

Roy Pace, a state police detective, testified that a small derringer was discovered approximately 11 ½ feet from the body. There was a single gunshot wound to the upper abdomen, and one shot had been expended from the derringer. Testing later determined that it was the gun that caused Howard's death. Pace's examination of the gun revealed a shell casing in the upper chamber and an unexpended cartridge in the lower chamber, but ballistic reports indicated that the fatal bullet was fired from the lower chamber. Although this discrepancy concerned him, it did not alter his opinion that the gunshot wound was self-inflicted and consistent with suicide. He acknowledged there were other possible causes and that a fall may have caused the gun to fire, but he did not consider this likely. He explained that the gun required 11-17 pounds of pressure in order to fire and that there appeared to be bruising on Howard's thumb which, in his opinion, was due to pulling the trigger of the derringer.

Furthermore, testing revealed the presence of gun residue on the back of Howard's hand. There was a bullet hole through the front of his shirt and t-shirt, but there was no damage to the work jacket or any of his other clothing. In his opinion, Howard was shot at one end of the barn, staggered towards the open door, and collapsed and died.

Although there was an indication that there had been a ladder near the body when it was discovered, it was not in that location when he arrived. There was a knocked over table. The keys used to open the barn were in the padlock on the outside of the door, and the padlocks on the doors inside the barn remained locked. Pace testified there was no evidence of any third-party involvement in the shooting.

Dr. Davis, the medical examiner, testified that the fatal bullet entered the body in a fairly straight line in the upper abdomen, just below the solar plexus, and traveled slightly downward and to the left. The cause of death was a single gunshot wound to the abdomen. He testified that while a medical examiner determines the cause of death, the coroner determines the manner of death. Nonetheless, his opinion was that the manner of death was probably suicide. The entry wound was consistent with the muzzle of a gun being placed against the skin when it was discharged. Although it was possible that the wound was consistent with Howard falling and landing on the gun, one would expect more bruising around the wound if that had occurred. Yet, there was no evidence of bruising or any other injuries. He indicated, however, that he was comfortable with the coroner's conclusion that the manner of death could not be determined. He testified that even after sustaining a mortal wound, an individual may have a period of consciousness. Thus, Howard may have remained conscious for some period after the gunshot wound was inflicted. He testified that the gunpowder residue test was notoriously unreliable and that residue could be on the hands from merely handling a gun that had recently been fired. Finally, he testified that in determining the manner of death, both the cause of death and the surrounding circumstances are considered.

The coroner testified that he found the small gun that caused Howard's death. Initially, he considered suicide as the potential manner of death, but he later concluded that it was appropriate to designate the manner of death as: "could not be determined."

A close friend testified that Howard generally confided in him about his problems. He testified that his recent conversations with Howard revealed no indication that he was experiencing undue stress or considering harming himself.

After reviewing Howard's medical records and the information surrounding the death, Dr. Granacher concluded that he had committed suicide. He testified that individuals with bipolar disorder are very susceptible to significant mood alterations, particularly when they cease taking Lithium. Individuals who have made previous suicide attempts or who have seriously considered suicide are much more likely to actually do so at a later time. Furthermore, it is not particularly unusual for the individual to fail to give strong signs that he might be considering self harm. Dr. Granacher noted that Howard had considered harming himself or another on more than one occasion and that the numerous medications that were in Howard's system at the time of his death would also point to suicide even if the medications were prescribed.

Focusing on the evidence concerning the manner of death, the ALJ noted that there was no witness to the shooting and stated that there were "too many discrepancies" to determine with any degree of reasonable probability that the death was a suicide. Therefore, the ALJ concluded that Howard was in the barn as a regular part of his work duties when he was accidentally shot. As provided in KRS 342.750, Howard's widow was awarded survivors' benefits for herself and their minor son, and the employer appealed.

The Board reversed, concluding that the evidence established, as a matter of law, that Howard was not engaged in a work-related activity at the time of his death. The Board noted that two areas on the first level of the barn were locked, one for state police tires and the other for large mining tires. Although acknowledging the uncontradicted evidence that state police tires were inventoried as often as weekly, the Board pointed out that there was no evidence that either of the locked areas had been opened on the morning of the shooting, and Howard's keys were found in the lock on the outside of the barn. Furthermore, there was no paperwork or anything else to indicate that he had conducted or intended to conduct an inventory of the state police tires or any other tires within the barn. The only evidence of his purpose in entering the barn that morning was Ms. Howard's testimony that he had said he was going to check on a weedeater that was stored in the loft. The reason for checking on the weedeater was their plan to do yard work at the end of the day on April 14, 1999.

The Board noted that the only discrepancy in the evidence concerned which chamber of the gun was the source of the fatal bullet. It also noted that there was no evidence of any call for snow tires, and snow tires were not stored in the part of the loft that was near the area where the gun and the ladder were found. The ladder, which had fallen, was supposedly discovered near Howard's body, while the gun was more than 11 feet away.

Although Ms. Howard asserts on appeal that a minor deviation from work to perform a personal task does not preclude a finding of work relatedness, the doctrine would only apply if Howard's primary reason for being in the barn was work-related rather than personal. With respect to a worker who is unable to testify concerning the circumstances of an injury, KRS 342.680 provides as follows:

In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work-related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work-related, that sufficient notice of the injury has been given, and that the injury or death was not proximately caused by the employee's intoxication or by his willful intention to injure or kill himself or another.

Even if a worker's death occurs on the employer's premises, the burden is on the survivors to establish that the death was connected to the individual's work in order for it to be compensable. See Stapleton vs. Fork Junction Coal Co., Ky., 247 SW2d 372 (1952); Harlan Collieries vs. Shell, Ky., 239 SW2d 923 (1951); and Bluegrass Pastureland Dairies vs. Meeker, 268 Ky. 722, 105 SW2d 611 (1937). KRS 342.680 addresses the problem of proving work relatedness in instances where the injured worker dies and, therefore, is unable to testify. It authorizes a presumption that the death was work-related if there is prima facie evidence to that effect and no substantial evidence to the contrary. If there is substantial evidence that the death was not work-related, the survivors must go forward with evidence to persuade the ALJ that the death was work-related.

Ms. Howard had the burden to prove that her husband's death was work-related in order for it to be compensable. Although it was undisputed that certain tires in the barn were inventoried frequently, there was no evidence that Howard had inventoried them or intended to do so on the morning that he was shot. Furthermore, Ms. Howard's testimony concerning her husband's plan to check on the weed eater clearly provided substantial evidence of a nonwork-related reason for him to be in the barn on the morning of April 14, 1999. Under those circumstances, there was no presumption of work relatedness. Absent any evidence that her husband's primary reason for being in

the barn was work-related, Ms. Howard failed to meet her burden of proving a connection between his death and his work. Therefore, it was immaterial whether the shooting was the product of an accident or suicide. Although it was tragic, it was not compensable.

The decision of the Court of Appeals is affirmed.

All concur.

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