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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: September 18, 2003
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2002-SC-0881-WC DATE 10-9-03 ELIA GRAVITH, D.C.

PERDUE FARMS, INC. APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1354-WC
WORKERS' COMPENSATION BOARD NO. 99-97262

TERRY STOGNER; HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

It is undisputed that on December 24, 1998, the claimant injured his left hand and arm while working and that his blood alcohol content was measured later in the emergency room at 0.15. Nonetheless, after considering the circumstances, an Administrative Law Judge (ALJ) determined that the employer failed to meet its burden of proving that the claimant's voluntary intoxication was the primary proximate cause of his injury. KRS 342.610(3). The Workers' Compensation Board (Board) and the Court of Appeals affirmed the decision. Appealing, the employer maintains that the decisions below are based upon a misinterpretation of KRS 342.610(3). We affirm.

The claimant worked in the sanitation department at the defendant-employer's Beaver Dam, Kentucky, chicken processing plant. He was responsible for cleaning equipment in the picking room, and on December 23 and 24, 1998, he was scheduled

to work a double shift. He worked from 10:00 p.m. on December 23 until 8:30 a.m. on December 24. The second shift began 3 ½ hours later, at noon.

During the 3 ½-hour period between the shifts, the claimant left the facility with two co-workers, Lonnie Eversole and Robert Farley. After leaving Eversole at his home in Beaver Dam, the claimant and Farley drove to Owensboro to pick up Farley's check and to purchase some beer. While there, they drove to a friend's home where, according to his testimony, he drank one glass of wine. Shortly thereafter, they returned to Beaver Dam and picked up Eversole. After the claimant and Farley dropped off their purchases at their homes in Centertown, the men returned to work. The claimant testified that he had nothing to eat and did not sleep during the period between the shifts. He also testified that he was not intoxicated and had only one glass of wine to drink on the day he was injured.

The claimant testified that about 20 to 30 minutes into the noon shift, he noticed that an arm on the rehanging machine was malfunctioning. The machine has 12 to 15 arms that hold eviscerated chicken carcasses and transfers them from one line to another. While attempting to explain the problem with the machine to Lonnie Patton, a maintenance employee, the claimant pointed to the malfunctioning arm. When he did so, his latex glove was caught in the machine, and his left hand was pulled into it. Although he was able to free himself quickly, he sustained severe injuries to his left hand and arm and was taken to the hospital. On October 28, 1999, he returned to work, performing maintenance for the local water and sewer district.

Eversole and Farley testified that the claimant had driven them to work on the day of the accident. Both described the events of December 24, 1998, and testified that he did not appear to be intoxicated. Lonnie Patton described the circumstances of

the accident, verifying the claimant's testimony. He indicated that the claimant had freed himself from the machine before he was able to turn it off.

Dr. Gregory treated the claimant in the emergency room and testified that he had something that smelled like alcohol on his breath. Blood that was drawn from the claimant at 1:30 p.m. had an alcohol content of 0.15. Dr. Gregory testified that alcohol impairs judgment but indicated that he did not know the claimant's tolerance for alcohol, indicating that the degree of impairment varies among individuals. In addition to recording the claimant's blood alcohol content, the emergency room report noted a statement by the claimant that he had drunk two beers at 10:00 a.m.

Dr. Nelson, a clinical pharmacologist, reviewed the claimant's medical records. He testified that the claimant's physical and mental abilities were impaired at the time of the injury. More specifically, he testified that a blood alcohol level in the range of 0.12 to 0.18 would impair psychomotor coordination and judgment.

The ALJ determined that the claimant sustained a work-related injury. Turning to the question of voluntary intoxication, the ALJ noted that at 1:35 p.m. on December 24, 1998, the claimant's blood alcohol content was 0.15. Furthermore, the ALJ was persuaded by Dr. Gregory's testimony that such a level was sufficient to cause some level of impaired judgment. Proceeding with the analysis, the ALJ stated as follows:

> Intoxication is an affirmative defense pursuant to 803 KAR 25:010(1)(9)(e). Accordingly, the burden of proof rests with the party alleging the defense. In Woosley v. Central Uniform Rental, Ky., 463 S.W.2d 345 (1971), the Court construed the proximate cause requirement as meaning that the injury would not have occurred but for intoxication.
>
> In this instance, Mr. Lonnie Patton, who was the maintenance employee, described the incident and testified in his deposition that he agreed with the description of it by [the claimant]. At the time of the accident, the [claimant] had worked from 10:00 p.m. on the night of

> December 23rd until 8:30 a.m. on the morning of December 24th and then returned to work and began working again at 12:00 noon. He stated that he had not eaten nor did he sleep during the 3 ½ hours between shifts. In view of the totality of the circumstances in this instance, which included lack of sleep, extended working hours and the testimony by Dr. Gregory that the effect of alcohol upon an individual varies, as well as the testimony of Mr. Eversole and Mr. Farley, who is now a foreman at the facility, concerning their observations of [the claimant], I am not persuaded that the [claimant's] injury was proximately caused primarily by voluntary intoxication.

On that basis, the ALJ concluded that the claim was not barred by KRS 342.610(3) and awarded both income and medical benefits. The employer's petition for reconsideration maintained that the decision was erroneous but requested no specific findings of fact. Thus, after noting that the petition simply reargued the merits, the ALJ denied it.

Appealing the decision, the employer maintained that the ALJ erred by failing to determine that the claimant's voluntary intoxication was the primary proximate cause of his injury. In support of its position, the employer argued that the ALJ failed to consider the public policy implications of permitting benefits to be awarded to a worker who was intoxicated when injured. It also argued that the ALJ arbitrarily and capriciously rejected uncontradicted medical evidence that the claimant's injury was proximately caused primarily by his voluntary intoxication. Finally, relying upon Shields v. Pittsburg & Midway Coal Mining Co., Ky.App., 634 S.W.2d 440 (1982), the employer argued that the ALJ failed to make sufficient specific findings to support a conclusion that the claimant's employment was the proximate cause of his injury. Nonetheless, the arguments failed to convince the Board or the Court of Appeals that the ALJ's decision was erroneous. The employer now maintains that the ALJ erroneously relied upon Woolsey, supra, and failed to apply KRS 342.610 as construed in Campbell v. City of

Booneville, Ky., 85 S.W.3d 603 (2002), which was rendered one day before the Court of Appeals' decision to affirm the claimant's award.

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." As noted by the ALJ, voluntary intoxication is a special or affirmative defense that the employer must both plead and prove. For that reason, where a worker is injured in the course and scope of his employment, the burden is on the employer to prove that voluntary intoxication was the primary cause of the injury.

Woosley, supra, involved the voluntary intoxication defense under a statute that was later repealed. The statute provided a defense if an injury was "caused by" the worker's voluntary intoxication. In Woosley, the Court refused to construe the statute as requiring that intoxication be "the proximate cause" of the injury on the ground that such a construction would amount to a requirement that it be the only cause. Instead, the Court determined that an accident was caused by intoxication only if it would not have happened had the worker not been intoxicated. Whether other factors contributed to causing the accident was immaterial.

The General Assembly enacted KRS 342.610(3) in 1972, thereby fulfilling its responsibility to determine public policy and translate that policy into legislation. Unlike its predecessor, KRS 342.610(3) addresses situations where an injury has multiple causes and provides a defense only in those situations where a worker's voluntary intoxication was the primary proximate cause of the injury. Therefore, "if a worker's voluntary intoxication was the primary cause of an injury, it is immaterial whether other factors contributed to causing it. The injury is not compensable under

KRS 342.610(3)." Campbell v. City of Booneville, supra, at 606. Whereas, if a number of factors contributed to causing an injury, and the employer fails to prove that voluntary intoxication was the primary cause, the injury is compensable. In Campbell, the ALJ determined that the worker's voluntary intoxication was the primary cause of the automobile accident in which he was injured, granted the employer an intoxication defense, and the decision was upheld on appeal.

It is undisputed that the claimant's injury occurred within the course and scope of his employment and, on its face, the injury arose from the employment. Thus, in order to prevail on the question of work-relatedness, the burden was on the employer to prove the intoxication defense. Although there was uncontroverted evidence that an individual with a 0.15 blood alcohol level has some impairment in judgment, such evidence would not necessarily compel a finding that intoxication was the primary cause of the claimant's injury in the face of persuasive evidence that it was not.

Although the ALJ referred to the "but for" standard of causation that was set forth in Woosley, supra, the analysis that followed and the ultimate finding were consistent with KRS 342.610(3). In analyzing the evidence, the ALJ pointed to circumstances such as the claimant's lack of food and sleep and to his extended working hours as factors that were likely to have contributed to causing the injury; to the testimony of Patton concerning the circumstances of the accident; and to the testimonies of Eversole and Farley concerning the events of the 3 ½-hour period between the two shifts and their observations of the claimant's behavior during that time. Finally, the ALJ noted the uncontroverted medical evidence that the effect of alcohol on a particular individual varies. After considering all of the circumstances, the ALJ concluded that the employer

failed to meet its burden of proving that the claimant's injury was proximately caused primarily by voluntary intoxication.

Contrary to the employer's argument, the evidence in this case was not comparable to the evidence in Campbell v. City of Booneville, supra, where a decision to grant the intoxication defense was upheld on appeal. Furthermore, here, the ALJ determined that the employer failed to meet its burden of proof. After considering the evidence and the arguments of the parties, we are persuaded that the evidence in the employer's favor was not so overwhelming that it compelled a favorable finding. The decision was reasonable under the circumstances, and it was properly affirmed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The decision of the Court of Appeals is affirmed.

All concur.

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