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RENDERED: FEBRUARY 19, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000344-WC

OMICO PLASTICS — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-000346-WC
WORKERS' COMPENSATION BOARD NO. 05-93352

SPARKLE ACTON;
HONORABLE A. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) enhanced the claimant's income benefit under KRS 342.165(1) based on findings that her employer failed to provide her with a workplace free from recognized hazards and violated OSHA regulations. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer asserts that the ALJ erred because no specific safety violation caused the claimant's accident and because no substantial evidence showed the intent that KRS 342.165(1) requires.

We affirm. Nothing indicates that the ALJ failed to consider any relevant evidence or misapplied the law. The record contains substantial evidence to support the findings of fact and resulting award.

On February 26, 2005, the machine that the claimant operated malfunctioned, injuring her right hand. Her job was to relieve other workers when they took breaks. She testified that when she relieved Sharon Wells that night, Wells warned her to be careful because the machine's secondary saw and drill unit had been malfunctioning. Wells advised her that she had reported the problem to the foreman but that the foreman was unable to make the machine malfunction or determine the cause.

The machine makes spray tubes, a process that requires it to saw a spout on one end of a part and drill holes in the opposite end. The claimant testified that it operated properly for a while but later misfired as she inserted a part. The clamps came down on her hands and the secondary drill and saw unit "activated on its own." It crushed the middle finger of her right hand, amputated the index finger, and cut the thumb, causing nerve damage. Although the drill hit her left middle finger, it only broke the skin. The claimant acknowledged that when the machine worked properly, safety mechanisms prevented the clamps from operating unless both of her hands were pushing on buttons. She noted, however, that she could not have had a hand on either button when the machine clamped both of her hands.

Chris Sapp is an electrician who is in charge of automation at the plant. He testified that clamps on the spray tube machine come down when both hands push on the start buttons. When the buttons are released, a saw on the right side of the machine cuts the spout and a drill on the left side makes holes. He stated an anti-tie-down device prevents the machine from being operated with only one button and that the clamps will not come down unless both hands are on the controls. Sapp testified that he did not interview the claimant but did take the machine to his shop after being notified of her accident the next morning. He determined that a kink in an air line caused the pneumatic controls to malfunction and then replaced them with electronic controls before placing the machine back in service. He stated that a machine is normally shut down for repair when a problem is reported; that the safety director would inform him of a problem immediately; and that he was on call 24 hours a day. He also stated that no one had voiced a concern about the spray tube machine before February 26, 2005.

Connie Blanton became the defendant-employer's human resources manager approximately two months after the claimant's injury and had no personal knowledge of the events of February 26, 2005. She testified that machine operators inspect the machines daily and confirmed from company records that the spray tube machine was inspected during the claimant's shift. To her knowledge, no one else had experienced a problem with the machine. She stated that employees are directed to stop a machine that malfunctions

and get a foreman or maintenance person to examine it. After the machine is serviced or repaired, the safety director or supervisor generally makes certain that it is operating properly before placing it back in service.

Blanton stated that she accompanied OSHA representatives when they investigated the claimant's accident in May 2005. She acknowledged that the employer received two "serious" citations, both of which it paid without contest. She then proceeded to take issue with item 1A and to testify that items 1B and 2 were unrelated to the accident.

Item 1A stated that "[e]mployees were not protected from the point of operation and pinch points" on the drill and saw unit on February 26, 2005. Blanton stated that the citation concerned the machine on which the claimant was injured. She acknowledged that the pneumatic controls malfunctioned and "were changed to PLC controls" after the accident. Nonetheless, she disagreed with the citation, maintaining that two-handed controls were an OSHA-approved method of protecting employees, that the machine continued to have such controls, and that "they do protect you as long as there's not a misfire."

Blanton testified that Item 1B was unrelated to the claimant's accident, explaining that it concerned an incident that occurred on the inspection date and involved a different saw. Item 2 stated that the guard on the spray tube machine's secondary drill and saw unit "was not attached or secured on both sides." She acknowledged that the citation concerned the machine on which

the claimant was injured but stated that the guard was located to the left of the machine, toward the back and nowhere near where the claimant was injured.

In her brief to the ALJ, the claimant alleged that her employer violated KRS 338.031(1), which requires an employer to provide a safe workplace and to follow all OSHA regulations. She also alleged that her employer violated specific safety provisions as demonstrated by the uncontested OSHA citations. She asserted that the violations were intentional because a co-worker informed the employer that the spray tube machine had malfunctioned. Yet the employer failed to take it out of service until the cause was found and corrected, ignoring or willfully overlooking the machine's reasonably foreseeable potential for harm. As a consequence, the machine malfunctioned again and injured her.

Relying on the claimant's unrebutted testimony regarding the events of February 26, 2005, the ALJ found that the employer knew the machine had malfunctioned but chose not to take it out of service or determine the cause until after her injury. Thus, its conduct went beyond simple negligence, was egregious, and demonstrated an intentional disregard for a foreseeable safety hazard. The ALJ also determined that the employer violated specific safety provisions that related to the machine and the claimant's accident. At issue is whether substantial evidence supported the decision.[1]

KRS 342.165(1) provides as follows:

[1] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

> 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. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the executive director or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter, shall be decreased fifteen percent (15%) in the amount of each payment.

An injured worker has the burden to prove every element of a claim.[2] KRS 342.165(1) requires proof that an "intentional" violation of a specific safety statute or regulation caused the accident in which the worker's injury occurred. Thus, an award under KRS 342.165(1) must be based on substantial evidence that a violation occurred and was intentional.[3] KRS 342.165(1) encourages employers to comply with safety provisions.

Although the ALJ found the employer's conduct to be egregious, KRS 342.165(1) does not require evidence that an employer deliberately set out to violate a safety provision or engaged in egregious or malicious conduct. ALJs

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[2] Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984); Snawder v. Stice, 576 S.W.2d 276 (Ky.App. 1979).

[3] See Barmet of Kentucky, Inc. v. Sallee, 605 S.W.2d 29 (Ky. App. 1980) (no substantial evidence that employer failed intentionally to keep floor "so far as possible" in dry condition although its corrective measures may have been negligent).

may presume that employers know the requirements of statutes and regulations concerning workplace safety that have existed long enough to create a presumption of knowledge.[4] Intent is a question of fact for an ALJ to determine.[5] It may be inferred reasonably from an employer's knowing violation of a specific safety provision. KRS 342.165(1) authorizes an increase in compensation if the intentional violation "in any degree" caused the accident in which a worker was injured.

KRS 338.031(1)(a), commonly known as KOSHA's "general duty" provision, requires every employer to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." The words "recognized hazards" are not specific and may be construed broadly to include hazards that safety experts recognize but that workers and employers may not. Thus, the mere fact that a general duty violation occurs will not support an inference that the violation is intentional for the purposes of KRS 342.165(1).

The court determined in Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996), that a general duty violation that results in a worker's accident and injury may be sufficient to comply with KRS 342.165(1). Although Blankenship's employer violated only KRS 338.031(1), the ALJ applied KRS

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[4] See Gibbs Automatic Moulding Co. v. Bullock, 438 S.W.2d 793 (Ky. 1969).

[5] See Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2000) (claim remanded for finding whether violation was intentional); Brusman v. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000) (fact that employer settled KOSHA citation without admitting violation is immaterial, it is ALJ's responsibility to determine if violation has occurred).

342.165(1) based on findings that his employer knowingly provided him with a grader without brakes, with a decelerator not in proper condition, and with a throttle fastened in the wide open position. Workers had been forced to crash the machine into other equipment in order to stop it. The court reasoned that the employer knew of the grader's condition and could not reasonably have been unaware of the safety hazard that it created. Thus, its knowing disregard of the obvious hazard supplied the intent that KRS 342.165(1) requires.

The employer's conduct in Blankenship was egregious, but a general duty violation need not be based on a finding of egregious or malicious conduct. It requires the intentional disregard of a safety hazard that would be obvious to a layperson and likely to cause death or serious physical harm. Blankenship and its progeny stand for the principle that an employer's knowing disregard of such a safety hazard supports the application of KRS 342.165(1) although the employer violated only the "general duty" provision.[6]

The employer raises two arguments on appeal: 1.) that no specific safety violation caused the claimant's accident and injuries; and 2.) that no substantial evidence showed the intent that KRS 342.165(1) requires. We

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[6] See Brusman (conduct not so egregious as in Blankenship, but substantial evidence supported finding of intent because railway cars with sides bowed out two feet created an obvious hazard of which employer had knowledge and employees routinely rode ladders on sides of cars without punishment); Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997) (evidence did not compel a finding of intent where it failed to show that employer disregarded patently obvious safety concepts or a specific statute or regulation); Lexington-Fayette Urban County Government v. Offutt, 11 S.W.3d 598 (Ky. App. 2000) (substantial evidence of intent where weather reports, safety guides, and medical testimony showed conditions were hazardous for physical exercise and testimony by training officers as well as LFUCG newsletter showed employer's awareness of hazard).

disagree on both counts. Despite the employer's assertions, nothing indicates that the ALJ failed to consider any relevant evidence. Moreover, the record contains substantial evidence to support the award.

As the employer points out, the mere fact that a machine malfunctions will not support an award under KRS 342.165(1). This is not such a case. The ALJ determined reasonably that the employer ignored or willfully overlooked the foreseeable hazard created by the spray tube machine's erratic operation. The record also supported reasonable findings that the employer knew the machine malfunctioned earlier on the claimant's shift; that it kept the machine in service although the cause of the malfunction was not found or repaired; that the machine malfunctioned again, causing the claimant's accident; and that the malfunction and resulting accident demonstrated the lack of protection from the point of operation to which the Item 1A citation referred.

The ALJ found the claimant to be a credible witness. Contrary to the employer's assertion, no testimony from Ms. Blanton, Mr. Sapp, or any other witness rebutted her testimony concerning the events of February 26, 2005. Mr. Sapp testified that a kink in the pneumatic line caused the spray tube machine to misfire. Ms. Blanton acknowledged that citation Item 1A concerned the machine and also acknowledged that the employer failed to contest the citation. Item 1A indicated that workers were not protected at the point of operation on February 26, 2005. Ms. Blanton may be correct in stating that two-handed controls are an OSHA-approved method of protecting workers, but

substantial evidence indicated that the machine malfunctioned earlier in the claimant's shift on February 26, 2005; that the employer knew of the malfunction; and that it disregarded the obvious hazard that the malfunction revealed and failed to protect workers by removing the machine from service until the cause was found and repaired. Substantial evidence also indicated that the claimant's accident and injury occurred as a consequence.

The ALJ did not err in applying KRS 342.165(1). Contrary to the employer's assertion, the claimant alleged that the employer violated both subsections of KRS 338.031(1), i.e., that it failed to comply with both the general duty provision and specific safety regulations. The ALJ determined reasonably that the employer's conduct exceeded simple negligence and demonstrated the intentional disregard of an obvious safety hazard that KRS 342.165(1) requires for a general duty violation. The ALJ also determined reasonably that the conduct showed an intentional violation of a specific safety provision. The employer's intentional disregard of the obvious hazard that the erratically operating safety controls created also demonstrated an intentional disregard of the regulation that required it to protect workers at the point of operation, the regulation for which it received the Item 1A citation.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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