

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
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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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE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 BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2013-SC-000114-WC

JJ'S SMOKE SHOP, INC.

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-000851-WC
WORKERS' COMPENSATION NO. 09-81735

MARY J. WALKER, ADMINISTRATRIX OF
THE ESTATE OF JOSHUA PENDLETON;
PRISCILLA PENDLETON, WIDOW OF
JOSHUA PENDLETON; JADEYN PENDLETON,
MINOR CHILD OF JOSHUA PENDLETON;
HONORABLE RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, JJ's Smoke Shop, Inc., appeals from a Court of Appeals decision which upheld an award of death benefits to the Estate of Joshua Pendleton. Joshua Pendleton was purportedly murdered in the bathroom of his employer, JJ's, by Andrew Marra, after the store was closed for the night. Along with murdering Pendleton, Andrew and his brother Samuel Marra robbed the store. JJ's argues on appeal: 1) that the Administrative Law Judge ("ALJ") did not make sufficient or correct findings of fact; 2) that the ALJ erroneously applied KRS 342.680 to find Pendleton's murder work-related; and

3) that Pendleton was not acting in the course and scope of his employment at the time of his murder. For the reasons set forth below, we reverse the Court of Appeals and remand this matter for further proceedings.

The following are the facts as found by the ALJ and listed in his opinion and award:

1. [Pendleton] was an employee of J & J's [sic] Smoke Shop on July 22, 2009.
2. On July 22, 2009, Joshua Pendleton was murdered. His body was found on his work premises shortly after 10: [sic] p.m.
3. Priscilla Pendleton is the widow of [Pendleton].
4. Jayden Pendleton is the child of [Pendleton].
5. Mr. Pendleton worked on July 22, 2009. His shift ended at 8:30 p.m. He locked the doors to the premises at approximately 8:40 p.m.
6. When Mr. Pendleton left the premises, he had a key to the door and knew how to operate the alarm system.
7. Mr. Pendleton voluntarily left the premises.
8. Mr. Pendleton was later picked up by his murderers under the pretext of going to get some 'weed' or 'smoke.'
9. J & J's [sic] Smoke Shop is a business that is more subject to robbery and burglary than ordinary retail businesses.
10. Andrew Marra repeatedly lied to the investigators. I give his testimony little weight.
11. Samuel Marra may or may not have been lying to the investigators. Because of his status as a juvenile and as a felon, I give his testimony less weight. Because of his story's consistency portions of it may be reliable.

Based on these facts, the ALJ made the following conclusions: 1) that the presumption provided in KRS 342.680 applies because Pendleton was an

employee whose body was found at his work premises which was subject to a higher risk of robbery; 2) that there was insufficient evidence to indicate the death was not work-related because Pendleton had no role in robbing the store and it is “highly unlikely that he volunteered to be murdered as a part of a scheme to rob the smoke shop”; 3) that Pendleton left the course and scope of his employment when he closed the shop, but was forced back into his role as an employee when “he was either duped or forced into reopening the shop and into turning off the alarm”; and 4) that the murderers knew that Pendleton could get them into the shop and disable the alarm and therefore there is a direct relationship between Pendleton’s knowledge and capability of getting into the store and his murder. Based on these conclusions, the ALJ awarded Pendleton’s estate death benefits.

JJ’s has always contended that Pendleton was not killed as a result of a robbery, but instead because of Andrew Marra’s jealousy. Certain testimony indicated that Andrew Marra believed his girlfriend had a crush on Pendleton and that he was a jealous man with a temper. Thus, the implication is that Pendleton was killed due to personal animosity. Accordingly, JJ’s argues that Pendleton was not in the scope or course of his employment when murdered and that the robbery was intended to provide cover for the murder.

Advancing this narrative of the night’s events, JJ’s filed a petition for reconsideration asking that the ALJ make additional findings of fact. JJ’s asked the ALJ: 1) to identify the evidence in the record to support his finding that JJ’s is more subject to robbery and burglary than other businesses or

withdraw the finding; 2) to make findings of fact as to what portions of Samuel Marra's testimony he found to be consistent and reliable; 3) to make additional findings of fact as to what portions of Andrew Marra's testimony he found to be consistent and reliable; 4) to make additional findings of fact as to when Pendleton left the course and scope of his employment, and when he returned to the course and scope of his employment; and 5) to find whether the robbery of the store was an act separate and distinct from the murder. The ALJ denied the petition for reconsideration and stated the following about his reasoning:

[t]he plaintiff is entitled to the presumption under KRS 342.680 by reason of the fact that he was murdered and his body was found in his place of employment. He had access to the retail store where he worked. There is no reason to believe that he was part of the criminal actions of the Marra brothers. If the Marra brothers had wanted to kill Mr. Pendleton, they did not need to take him back to the store to do it. If they wanted to burgle the store, without setting off an alarm, it would be helpful to have access to the store. This they could get from an employee. Therefore it is likely that they used [Pendleton] as a way to have access to the store.

The Board affirmed the decision of the ALJ. In so doing, the Board went through the record to find evidence to support the ALJ's findings. Large portions of the Board's opinion consist of transcripts of taped statements made by Samuel Marra and John Blakeman, the owner of JJ's. The Court of Appeals affirmed the Board. This appeal followed.

JJ's first argues that the ALJ did not make sufficient or correct findings of fact and that the Board and Court of Appeals misstated his findings. Specifically, JJ's contends that it is entitled to know exactly what part of Andrew and Samuel Marra's testimony the ALJ found to be credible and that the ALJ should have provided evidence to support his contention that JJ's was

a business more subject to robbery than other businesses. We agree with JJ's and thus reverse the opinion of the Court of Appeals and remand this matter to the ALJ for further fact finding.

An ALJ, as the fact finder, has certain obligations in rendering an opinion. As stated in *Arnold v. Toyota Motor Manufacturing*, 375 S.W.3d 56, 61 (Ky. 2012):

KRS 342.275(2) and KRS 342.285 contemplate an opinion that summarizes the conflicting evidence concerning disputed facts; weighs that evidence to make findings of fact; and determines the legal significance of those findings. Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding does it enable the Board and reviewing courts to determine in the summary matter contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

In this matter, the opinion and award rendered by the ALJ fails to provide a sufficient factual basis for his conclusion that Pendleton was killed as part of a work-related robbery. While the ALJ concluded that the Marras knew Pendleton could provide them after-hours access to JJ's, and presumably this is why they picked him up the night of the murder, the opinion provides no factual basis to support that statement. The opinion and order is silent on any sort of relationship between Pendleton and the Marras. The opinion also fails to lay out any facts to support the conclusion that JJ's is more prone to robberies than other businesses. There is no summary or discussion of any facts in the record which might support JJ's narrative that Pendleton was killed out of jealousy, and no indication as to why the ALJ rejected that theory. Further, as pointed out by JJ's, there is nothing in the ALJ's opinion to show

which parts of Andrew and Samuel Marra's testimony he found to be credible. While the Board did an admirable job of scouring the record to find facts to support the ALJ's ultimate conclusion, that is not the function of the Board. KRS 342.285(2). We cannot be sure that the reasoning the Board used is actually the reasoning the ALJ used in reaching his decision.

Thus, for the above stated reasons, we reverse the decision of the Court of Appeals and remand this matter for proceedings consistent with this opinion.

All sitting. All concur.

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